

IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI

BEFORE SHRI N.S.SAINI, ACCOUNTANT MEMBER AND
SHRI VIKAS AWASTHY, JUDICIAL MEMBER

ITA No.1270/Mds/2011
(Assessment Year: 2006-07)

The Assistant Commissioner of
Income Tax, Company Circle-V(3)
Main Building, 4th floor,
121, N.H.Road, Nungambakkam,
Chennai-34.

(Appellant)

Smt. G.Sreevidya,
Rani Meyammai Towers,
Vs. 8A Block II, MRC Nagar,
Raja Annamalaipuram,
Chennai-600 028.
PAN: APAPS9026H

(Respondent)

Appellant by : Mr. Shaji P.Jacob, Addl. CIT
Respondent by : Dr.Anita Sumanth, Advocate

Date of Hearing : 23rd May, 2012
Date of Pronouncement : 28th June, 2012

ORDER

PER VIKAS AWASTHY, JUDICIAL MEMBER:

The present appeal has been filed by the Revenue impugning the order of the CIT(A)-V, Chennai dated 06.04.2011.

2. The facts in brief of the case are that the assessee had filed return of income relevant to the assessment year 2006-07 on 31.10.2006 declaring total income of ₹ 6,78,056/-. The case of the assessee was selected for scrutiny and notice under section 143(2) and 142(1) were issued. The assessee

is a Managing Director of M/s. Ravindra Services (P) Ltd. (hereinafter referred to as RSPL) having substantial ownership of shareholding and 10% of voting power. The assessee had taken a loan of ₹ 17,65,517/- from RSPL which was subsequently repaid by the assessee. The Assessing Officer treated the said amount as deemed divided and made addition under the head "other sources" invoking the provisions of section 2(22)(e) of the Act. Apart from the above, the Assessing Officer made addition of ₹ 2,62,035 towards the rent received from RSPL under the head 'Income from House Property'. Further, an addition of ₹1,20,718/- was made in the total income of the assessee as 'undisclosed income'. The assessee preferred an appeal against the assessment order dated 10.02.2008. The CIT(A) allowed the appeal of the assessee vide order dated 6.4.2011 deleting the additions under the provisions of section 2(22)(e) as well as additions made under other heads.

3. The present appeal has been filed by the Revenue assailing order of the CIT(A) only on the ground that CIT(A)

has erred in deleting the addition of ₹ 17,65,517/- made by the Assessing Officer as deemed dividend under section 2(22)(e) of the Act.

4. Mr. Shaji P.Jacob, DR appearing on behalf of the Revenue vehemently opposed the order of the CIT(A). He submitted that the loan was granted by RSPL to the assessee who is having substantial interest in the company having more than 10% voting power. The amount advanced by the company to the assessee falls within the ambit of definition of “deemed dividend” under section 2(22)(e) of the Act as the company was having accumulated profits to that extent when the amount was advanced to the assessee. He further submitted that the repayment of loan amount as alleged by the assessee cannot be criteria to take out the said amount from the ambit of the provisions of section 2(22)(e). He strongly contended that the CIT(A) has erred in relying on the following cases:-

- i) CIT Vs. Creative Dying & Printing P.Ltd., 318 ITR 476(Del)
- ii) CIT Vs. Ambassador Travel P.Ltd., 318 ITR 376 (Del)

iii) CIT Vs. Rajkumar, 318 ITR 462(Del)

The D.R. submitted that case of the assessee is squarely covered by the judgement of the Hon'ble Supreme Court of India in the case of Sarada P. Vs. CIT., 229 ITR 444(SC) as well as Smt. Tarulata Shyam Vs. CIT reported as 108 ITR 345(SC). He further relied on the judgement of the Hon'ble Madras High Court in the case of CIT Vs. P.K.Abubucker reported as 259 ITR 507(Mad).

5. On the other hand, Dr. Anita Sumanth, counsel appearing on behalf of the assessee submitted that the order passed by the CIT(A) is a well reasoned and detailed order. She submitted that the amount was advanced to the assessee as per her pre-condition of granting bank guarantee and a collateral security for funding of the company. The counsel submitted that the assessee had given personal guarantee and had given collateral security to facilitate availing of credit facility by the company. At the time of extending guarantee/security the assessee had sought liberty to withdraw funds from the company as and when required by

her for personal purposes. It was thus in this background, the assessee had withdrawn certain amount from the company and had also repaid the amounts withdrawn periodically. Therefore, the transaction between the assessee and the company was purely out of business consideration. The counsel further contended that if the assessee would not have given bank guarantee and collateral security, the operations of the company would have come to a standstill. The counsel submitted that the amount was advanced by the company to the assessee purely on the terms of commercial expediency. In order to support her contentions the counsel relied on the judgement of the Hon'ble Calcutta High Court in the case of Pradip Kumar Malhotra Vs. CIT reported as 338 ITR 538 (Cal) and the judgements of the Hon'ble Delhi High Court in the following cases:-

- i) CIT Vs. Creative Dying & Printing P.Ltd., 318 ITR 476(Del)
- ii) CIT Vs. Ambassador Travel P.Ltd., 318 ITR 376 (Del)
- iii) CIT Vs. Rajkumar, 318 ITR 462(Del).

6. We have heard the submissions made by the respective parties and have gone through the documents on record, orders of the lower authorities as well as the judgements referred to by the respective parties. The provisions of section 2(22)(e) are reproduced herein below:-

“2(22)(e) any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) [made after the 31st day of May, 1987, by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power, or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern)] or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits.

but "dividend" does not include—

(i) a distribution made in accordance with sub-clause (c) or sub-clause (d) in respect of any share issued for full cash consideration, where the holder of the share is not entitled in the event of liquidation to participate in the surplus assets ;

[(ia) a distribution made in accordance with sub-clause (c) or sub-clause (d) in so far as such distribution is attributable to the capitalised profits of the company representing bonus shares allotted to its equity shareholders after the 31st day of March, 1964, [and before the 1st day of April, 1965] ;]

(ii) any advance or loan made to a shareholder [or the said concern] by a company in the ordinary course of its business, where the lending of money is a substantial part of the business of the company ;

(iii) any dividend paid by a company which is set off by the company against the whole or any part of any sum previously paid by it and treated as a dividend within the meaning of sub-clause (e), to the extent to which it is so set off;

[(iv) any payment made by a company on purchase of its own shares from a shareholder in accordance with the provisions of section 77A of the Companies Act, 1956 (1 of 1956);

(v) any distribution of shares pursuant to a demerger by the resulting company to the shareholders of the demerged company (whether or not there is a reduction of capital in the demerged company).”

The definition laid down by section 2(22) is inclusive and not exhaustive. The following payments of distributions by a company to its shareholder are deemed as dividends to the

extent of accumulated profits of the company although these payments may not be dividends under the provisions of Companies Act:-

- (a) any distribution or release of company's assets;
- (b) any distribution of debentures, debenture stock, deposit certificates and bonus to preference share-holders;
- (c) distribution on liquidation of company;
- (d) distribution on reduction of capital
- (e) any payment by way of loan or advances by a closely held company to a shareholder holding substantial interest provided the loan should not have been made in the ordinary course of business and money lending should not be a substantial part of the company's business.

7. In order to attract the provisions of section 2(22)(e), the important consideration is that there should be loan/advance by a company to its shareholder. Every amount paid must make the company a creditor of the shareholder of that amount. At the same time, it is to be borne in mind that every

payment by a company to its shareholders may not be loan/advance. In the present case, the amount was withdrawn by the assessee from the company only to meet her short term cash requirements. By virtue of offering personal guarantee and collateral security for the benefit of the company, the liquidity position of the assessee had gone down. In the strict sense if it is to be construed the amount forwarded by the company to the assessee was not in the shape of advances or loans. The arrangement between the assessee and the company was merely for the sake of convenience arising out of business expediency. In the facts and circumstances of the case, it is not appropriate to hold that the amount withdrawn by the assessee partakes the character of deemed dividend under the provisions of section 2(22)(e) of the Act.

8. The case of the assessee is squarely covered by the Division Bench judgement of the Hon'ble Calcutta High Court in the case of Pradip Kumar Malhotra (supra), wherein the facts were similar to the facts of the instant case. In Pradip Kumar's case assessee had substantial holding in in a

private company. The assessee permitted his immovable property to be mortgaged to the bank for enabling the company to take the benefit of loan. The Board of Directors of the company passed a resolution to obtain interest free deposit upto ₹50 lakhs as and when required. The assessee obtained from the company a sum of ₹ 20,75,000/- by way of security deposit. Out of this amount, a sum of ₹20 lakhs was returned by the assessee to the company. The Assessing Officer added the sum of ₹20,75,000/- as deemed dividend. The Hon'ble High Court while allowing the appeal of the assessee held that for retaining the benefit of loan availed of from the bank, if decision was taken to give advance to the assessee such decision was not to give gratuitous advance to its shareholder but to protect the business interest of the company. The sum of ₹20,75,000/- could not be treated as deemed dividend. The Division Bench of the Hon'ble Calcutta High Court followed the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Creative Dyeing & Printing P.Ltd. reported as 318 ITR 476(Del). In the instant case also the assessee was allowed to withdraw funds from the

company as per requirement for personal purposes against the personal guarantee and the collateral security given by her to facilitate her availing of credit facility of the company.

9. It is a well settled law that loan or advance given to a shareholder by a company in which public is not substantially interested and which had accumulated profits, the amount advanced as loan to such shareholder is deemed to be dividend as per the provisions of section 2(22)(e) of the Act. However, the facts and circumstances of each case have to be scrutinized before applying the ratio of the cases holding above well settled law. In the facts and circumstances of the instant case, judgements relied upon by the DR in the cases of Sarada P.(supra), P.K.Abubucker (supra) and Tarulata Shyam (supra) are not applicable.

10. The Commissioner of Income Tax (Appeals) vide order dated 6.4.2011 has rightly deleted the addition made on account of “deemed dividend” by the Assessing Officer. We do not find any infirmity in the order passed by the Commissioner of Income Tax (Appeals). In view of our

aforesaid findings, the appeal of the Revenue fails and the same is dismissed being devoid of any merit.

Order pronounced in the open court on Thursday, the 28th of June, 2012 at Chennai.

Sd/-
(N.S. Saini)
Accountant Member

Sd/-
(Vikas Awasthy)
Judicial Member

Chennai,
Dated the 28th June, 2012.

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Copy to: (1) Appellant (2) Respondent (3) CIT
 (4) CIT(A) (5) D.R. (6) G.F.