

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'B' NEW DELHI**

**BEFORE SMT BEENA A PILLAI, JUDICIAL MEMBER
AND
SH. ANADI N MISHRA, ACCOUNTANT MEMBER**

**(In I.T.A.No.-528/Del/2014)
(ASSESSMENT YEAR-2006-07)**

Deepak Pahwa 20, Rajpur Road New Delhi	Vs	ACIT Circle-3(1) New Delhi.
(APPELLANT)		(RESPONDENT)
PAN-AAHPP5652J		

Assessee by	Sh. Shailender Bajaj CA
Revenue by	Sh. Anil Kumar Sharma, Sr.DR

Date of Hearing	18.01.2017
Date of Pronouncement	23.01.2017

ORDER

Per Anadi N Mishra, AM

„This is an appeal filed by assessee against order dated 06.12.2013 of learned Commissioner of Income Tax (Appeal). Grounds of appeal are as under:

- “i. That the order passed by the Ld. CIT(A) is bad in law and illegal since he failed to dispose off the ground challenging the assumption of jurisdiction under section 147 by the Ld. Assessing Officer.*
- ii. That the Ld. CIT (A) failed to pass a speaking order challenging the assumption of jurisdiction by the Ld. Assessing Officer under section 147.*
- iii. That the Ld. CIT(A) has erred both in facts and law while sustaining the addition of Rs. 7,00,000/- under section 2(22)(e) as deemed dividend.*
- iv. That the Ld. CIT(A) failed to appreciate that the advance of Rs. 7,00,000/- had been given out of contractual relationship with the employer company which is not covered under the preview of section 2(22)(e).*
- v. That the appellant craves leave to add, delete or amend any of the grounds of appeal on or before the disposal of the present appeal.”*

(B) All the grounds of appeal are related to the addition of Rs. 7,00,000 /- as deemed dividend u/s 2(22)(e) of I.T.Act . Original assessment order was passed on 04.12.2008 under Section 143(3) of I.T. Act wherein income of Rs. 27,97,620/- declared by the assessee in return of income filed on 31.07.2007 was accepted without any addition. The assessment was reopened under Section 147 r.w.s. 148 of I.T. Act vide notice dated 05.03.2009 issued under Section 148 of I.T. Act. Before initiating reassessment proceedings under 147 I.T. Act through issue of notice under Section 148 of I.T. Act, the Assessing Officer (AO) recording reasons as under:-

“The assessee filed its return of income on 31.07.2006 declaring an income of Rs. 2796620/-. Later on, the return was processed u/s 143(1) of the I.T. Act on 20.07.2007. The case was selected for scrutiny u/s 143(3) of the I.T. Act and assessed at income of Rs. 2796620/-.

During the course of assessment proceedings for the AY 2006-07 in the case of M/s Bry Air (Asia) Pvt. Ltd.; in which assessee is a director, it was noted that the company has advanced loan of Rs. 7,00,000/- to Sh. Deepak Pahwa on 04.10.2005 who is a shareholder in M/s Bry Air (Air) Pvt. Ltd. with more than 10% shareholding. Further, the company has accumulated profits of Rs. 32,21,42,323/- as on 31.03.2006. Hence, this payment is covered within the provisions of section 2(22)(e) as deemed dividend, to be taxed in the hands of Sh. Deepak Pahwa. Further, none of the exception clauses are applicable in this case.

Hence, in view of the above facts of the case and the provisions of the act in this regard, I have reasons to believe that the income to the tune of Rs. 7,00,000/- has escaped assessment and hence notice u/s 148 is hereby issued for reopening u/s 147 of the I.T. Act.”

The assessee objected to reopening of assessment stating that the material on which the assessment has been reopened already available on record at the time of original assessment. The AO rejected this objections. The assessee also submitted that the amount under consideration is loan taken by the assessee from the company against his salary. The assessing officer was of the opinion that all the

conditions laid down in Section 2(22)(e) of I.T. Act are satisfied for treating the payment by M/s Bry Air (Asia) Pvt. Ltd. to the assessee by way of advance or loan as deemed dividend are satisfied and accordingly made an addition of Rs. 7,00,000/- to the income of the Assessee, as deemed dividend under Section 2(22)(e) under of I.T. Act vide assessment order dated 26.11.2009 u/s 148/143(3) of I.T. Act. The assessee filed appeal before learned CIT(A). In the appeal before learned CIT(A) the assessee took the following grounds:-

That the proceedings initiated u/s 147 by the AO was bad in law and against the facts of case as AO has wrongly assumed jurisdiction u/s 147 since all facts were disclosed during the course of original assessment proceedings u/s 143(2).

That the AO has erred in facts and in law while treating salary advance of Rs. 7,00,000/- given to the assessee employee as deemed dividend u/s 2(22)(e) & failed to appreciate that the advance had been given out of contractual relationship with the company and the perquisite value of interest thereon had been included under the head Salaries.”

As far as the ground taken regarding initiation of proceeding under Section 147 by the Assessing Officer and jurisdiction under Section 147 of I.T. Act is concerned, the learned CIT(A) dismissed the ground of assessee holding that the assessee had not disclosed and declared all the material facts at the time of original assessment as reflected in the assessment order; that by duly recording reasons leading to the formation of belief that the income has escaped assessment, the AO had issued notice u/s 148 of the Act ; and that the reasons for reopening of the case was duly communicated to the appellant during the course of such reassessment proceedings and further, that the assessee company's objection to such reopening of assessment were also duly considered by the AO, before rejecting the same. As far as merits of the addition are concerned, the assessee pleaded before the Id. CIT(A) that the aforesaid amount of Rs. 7,00,000/- was salary advance and contended

before the Id.CIT(A), relying on Shyama Charan Gupta v/s CIT 337 ITR 511 (All.) that the assessee was not hit by s.2(22)(e) of I.T.Act. The Ld. CIT (A) rejected the plea of the assessee on the ground that facts in the case of the assessee were distinguishable from Shyama Charan Gupta v/s CIT (supra). The assessee had also pleaded that taxing the aforesaid amount of Rs. 7,00,000/- as deemed dividend has resulted in double taxation of the same amount, as the amount has also been taxed as salary income. Ld. CIT(A) has not dealt with the plea of the assessee raised against double taxation of the same amount in his impugned order dated 06.12.2013. Aggrieved, the assessee is in appeal in ITAT.

(B.1) During appellate proceedings in ITAT, the assessee filed paper book containing 41 pages. At the time of hearing before us, Ld. Counsel for assessee contended that the Assessing Officer (AO) had no valid reason to assume jurisdiction u/s 147 r.w.s. 148 of I.T.Act for reassessment, as all the relevant materials were available before the AO at the time of original assessment proceedings which resulted in original assessment order dated 4-12-2008 u/s 143(3) of I.T.Act. He drew our attention to materials filed before the AO including letter dated. 03/10/2005 requesting M/s Bry Air (Asia) Ltd. to sanction advance against salary (page 28 of paper book), statement of account of salary advance showing monthly recovery of salary advance (page 30 of paper book), individual pay record (page 31 of paper book), copy of Return of Income (pages 11-13 of paper book), letter dated 26/08/2008 submitted to AO (pages 15-18 of paper book), details of companies in which assessee has a substantially interest (page 19 of paper book) and statement of bank account (pages 20- 28 of paper book). He also relied on judicial precedents in the cases of CIT V/s Kelvinator of India Ltd.320 ITR 561 (SC) and CIT v/s Burlop Dealers Ltd. (1) SCC 462. On the merits of the addition, he strongly pleaded that the aforesaid amount of Rs. 7,00,000/- was advance salary

which was not hit by S.2(22)(e) of I.T.Act for which he relied on materials filed before the AO including letter dated. 03/10/2005 requesting M/s Bry Air (Asia) Ltd. to sanction advance against salary (page 28 of paper book), statement of account of salary advance showing monthly recovery of salary advance (page 30 of paper book), individual pay record (page 31 of paper book), copy of Return of Income (pages 11-13 of paper book), letter dated 26/08/2008 submitted to AO (pages 15-18 of paper book), details of companies in which assessee has a substantially interest (page 19 of paper book) and statement of bank account (pages 20- 28 of paper book) and on judicial precedents in the cases of Shyama Charan Gupta v/s CIT 337 ITR 511 (supra) and DCIT v/s N. Pramod (2012) 52 SOT 0038 / (2012) 32 CCH 0372 (Chen. Trib.) in ITA No. 1104/Mds/2010. The Ld. Departmental representative (DR) strongly defended the addition, and relied on the orders of the lower authorities.

(B.2) We have heard both sides patiently, and have also carefully perused all materials on record, including the paper book filed by the assessee. We find that the Id. CIT(A) dismissed the assessee's ground regarding initiation of proceeding under Section 147 by the Assessing Officer and jurisdiction under Section 147 of I.T. Act holding that the assessee had not disclosed and declared all the material facts at the time of original assessment as reflected in the assessment order, that by duly recording reasons leading to the formation of belief that the income has escaped assessment, the AO had issued notice u/s 148 of the Act ; and that the reasons for reopening of the case was duly communicated to the appellant during the course of such reassessment proceedings and that the assessee company's objection to such reopening of assessment were also duly considered by the AO, before rejecting the same. However it is not ascertainable from the order of Id. CIT(A) how he concluded that all the material facts had not been disclosed by the assessee in Return of

Income and in the course of original assessment proceedings. Moreover, Id. CIT(A) has not dealt with the plea of the assessee that addition of aforesaid amount of Rs. 7,00,000/- as deemed dividend u/s 2(22)(e) of I.T.Act leads to double addition in as much as the assessee has claimed that the same amount has also been taxed as salary income. In these facts and circumstances, we are of the opinion that the matter needs reconsideration and re-adjudication by Id. CIT(A). Accordingly, we set aside the order of Id. CIT(A) and restore the matter to the file of Id.CIT(A) for fresh order. Ld. CIT(A) is directed to pass a *de-novo* order as per law after providing reasonable opportunity to assessee and to AO. All the grounds of appeal are disposed off in accordance with these directions, and the appeal is treated as partly allowed for statistical purposes.

The order is pronounced in the open court on 23.01.2017

**Sd/-
(BEENA A PILLAI)
JUDICIAL MEMBER**

**Sd/-
(ANADI N MISHRA)
ACCOUNTANT MEMBER**

SH

Date:23.01.2017

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR,
ITAT NEW DELHI