

आयकर अपीलीय अधिकरण "E" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 40/Mum/2012

(निर्धारण वर्ष / Assessment Year : 2003-04)

A.C.I.T. Circle - 21(3), C-11 Bldg., 5 th floor, Pratyaksh Kar Bhavan, Bandra Kurla Complex, Bandra (E), Mumbai - 400 051.	बनाम/ v.	Mr. Shrikant J. Parekh, 603, Minal Complex, Off. Saki Vihar Road, Andheri (E), Mumbai - 400 072
स्थायी लेखा सं./PAN : ADBPP3870H		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Revenue by	Shri A. Ramachandran, DR
Assessee by :	Shri Kiran Mehta

सुनवाई की तारीख / **Date of Hearing** : 23-2-2016

घोषणा की तारीख / **Date of Pronouncement** : 13-05-2016

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the Revenue, being ITA No. 40/Mum/2012, is directed against the order dated 24.10.2011 passed by learned Commissioner of Income Tax (Appeals)- 32, Mumbai (hereinafter called "the CIT(A)"), for the assessment year 2003-04, , the appellate proceedings before the CIT(A) arising from the assessment order dated 27-12-2010 passed by the learned Assessing Officer (hereinafter called "the AO") u/s 143(3) read with Section 254 of the Income Tax Act, 1961 (Hereinafter called "the Act").

2. The grounds of appeal raised by the Revenue in the memo of appeal filed with the Income Tax Appellate Tribunal, Mumbai (hereinafter called "the Tribunal") reads as under:-

“1. On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in deleting the addition of Rs. 45,00,000/- made by A.O. u/s 2 (22)(e) of the Income Tax Act, 1961.

2. In doing so, the CIT(A) failed to appreciate that the assessee had shown no lease rent in the return of income thereby proving conclusively that the property was not actually leased out but the facts were circumvented to avoid tax liability u/s 2(22)(e) of the I. T. act.

3. On the facts and in the circumstances of the case and in law, the CIT(A) has failed to appreciate that the assessee incorrectly contended that the company M/s Mahendra Jewels P Ltd. was in losses, when on the contrary the company was having sufficient reserves.

4. On the facts and in the circumstances of the case and in law, the CIT(A) erred in admitting new evidence, without remanding the matter to the file of the AO for verification as per rule 46A.

5. The appellant prays that the order of Ld. CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored."

3. The brief facts of the case are that this is the second round of litigation. The return of income was filed by the assessee on 14th January, 2004 declaring total income of Rs. 28,46,920/-. The assessment was completed u/s 143(3) of the Act on 27th January, 2006 in the first round , determining the total income of the assessee at Rs. 73,46,920/- whereby the A.O. made addition on account of loan taken by the assessee from M/s C. Mahendra Jewels Pvt. Ltd. of Rs. 45 lacs as deemed dividend u/s 2(22)(e) of the Act. In the first round of litigation, the CIT(A) deleted the additions considering the same as security deposit against letting of the residential premises of the assessee on rent. The Revenue came in appeal before the Tribunal by filing second appeal in first round of litigation and the Tribunal vide orders dated

6th August, 2009 in ITA No. 5783/Mum/2006, had restored the issue of addition of Rs. 45 lacs as deemed dividend u/s 2(22)(e) of the Act back to the file of the A.O. with the directions to verify the following:-

(i) Whether M/s. C. Mahendra Jewels Pvt. Ltd. has debited the rent of Rs.10,000/- per month in the books of accounts as per the agreement paid to the assessee by the said company as monthly rental?

(ii) Whether the assessee has shown the said amount as income in the return for the AY.2004-05 (as the rent has been shown to accrue to the assessee from 01.04.2003) ?

(iii) The assessee may be asked to explain as to where he and his family were living during the period the house was let out to the company. The assessee may also explain as to why the company, viz., M/s. C. Mahendra Jewels Pvt. Ltd. have reflected the sum of Rs.40 Lakhs under the head "Loans and advances" when according to the assessee the amount was a security deposit for providing the house on rent."

In the de novo set-aside assessment proceedings, the A.O. issued fresh notices u/s 143(2) as well notices u/s. 142(1) of the Act to the assessee, asking the assessee to file the relevant details and explanations. The assessee sought adjournments from time to time but did not file the details called for before the AO in the second round of litigation. The counsel for the assessee expressed inability to file details called for , as the same was not hand over by the assessee.

The A.O. called for the information directly u/s 133(6) of the Act from M/s C. Mahendra Jewels Pvt. Ltd. vide letter dated 24th November, 2010 , which was replied by M/s C. Mahendra Jewels Pvt. Ltd. whereby leave and licence agreement dated 26th March, 2003 with the assessee along with statement of rent paid during the financial year 2002-03 containing the details of rent paid to three parties namely M/s SEEPZ rent charges, BMC taxes paid and flat rent paid to Shri. Anil Revankar with respective ledger accounts of all these

three parities was forwarded. Similarly, Ledger accounts of the assessee – Shri Shrikant J Parikh in the books of M/s C. Mahendra Jewels Private Limited as on 31st March, 2003 was also forwarded.

From the perusal of the information received from M/s C. Mahendra Jewels Pvt. Ltd.u/s 133(6) of the Act, it was observed by the A.O. that the said company has not paid any rent to the assessee. From the records also, it was also observed by the A.O. from the statement of computation of total income of the assessee for the assessment year 2004-05 , that the assessee has shown income from house property at Rs.Nil against his self occupied residential flat at Andheri , Mumbai which was the only residential flat of the assessee . It was also observed by the AO that though there is a clause of depositing of interest free deposit of Rs. 45 lakhs in the leave and license agreement dated 26th March, 2003 between the assessee and M/s. C Mahendra Jewels Private Limited but the said company has not shown this deposit payment of Rs. 45 lakhs in the list of ‘deposits’ while the same was included in the ‘loans and advances’ in the Balance Sheet of M/s C. Mahendra Jewels Private Limited. It was held by the A.O. that this is nothing but loan of Rs.45 lacs advanced by the said company to the assessee on 28-03-2003 and the same was outstanding as on 31-03-2003. There was a credit balance of Rs.5.82 crores of the assessee with the said company in the separate account which was paid to the assessee from time to time from 01-04-2002 to 31-03-2003 and the closing credit balance outstanding in the name of the assessee was reflected at Rs.29,153/- in the form of ‘unsecured loan from the Directors’ in the Balance Sheet. This loan of Rs.45 lacs was separately shown under the head ‘Loans and Advances’ in the Balance Sheet. Several opportunities have been given to the assessee but the assessee has not given any explanation as to why the said company M/s C. Mahendra Jewels Pvt. Ltd. has shown Rs. 45 lakhs under the head ‘loans and advances’ as against security deposit for providing on rent his only residential premises

to the said company. No explanation has been given by the assessee as to where he and his five family members were living during the period when the house premises were let out to the said company. The assessee having failed to give any explanation as to why the rent has not been disclosed as income for the assessment year 2004-05, when the flat was stated to have been given on rent to M/s C Mahendra Jewel Private Limited . Further, M/s C. Mahendra Jewels Pvt. Ltd. has also not claimed any rent as expenditure and has not shown any transaction with the assessee as per the audit report and the assessee has not given any reason as director of the said company, the transaction of the loan amount of Rs. 45 lacs attracted the provisions of section 2(22)(e) of the Act. The AO brought to tax as deemed dividend , the transaction of giving loan amount of Rs.45,00,000/- to the assessee by M/s C. Mahendra Jewels Pvt. Ltd in the hands of the assessee , which clearly attracted provisions of Section 2(22)(e) of the Act and accordingly the same was treated as 'deemed dividend' u/s 2(22)(e) of the Act and added to the total income of the assessee vide assessment order dated 27th December, 2010 passed by the AO u/s. 143(3) read with Section 254 of the Act. It is pertinent to mention here that in the original assessment order dated 27th January, 2006 passed by the AO u/s 143(3) of the Act, there is an undisputed finding of fact that the assessee is a Shareholder and Director of M/s C. Mahendra Jewels Private Limited and undisputedly is a person covered by the provisions of Section 2(22)(e) of the Act.

4. Aggrieved by the assessment orders dated 27.12.2010 passed by the A.O. u/s 143(3) of the Act read with Section 254 of the Act, the assessee has filed first appeal before the CIT(A).

5. Before the CIT(A) , the assessee submitted that the copies of lease agreement dated 26th March, 2003 for letting out the premises on rent to M/s C. Mahendra Jewels Pvt. Ltd. were provided to the A.O. along with all other

details by M/s C. Mahendra Jewels Pvt. Ltd. directly in an enquiry by the AO u/s 133(6) of the Act. Only some of the explanation could not be filed before the A.O. as letter of adjournment dated 28th October, 2010 requesting the AO to give a fresh date in second week of November 2010 was submitted, for which the A.O. informed that fresh notices will be issued and no particular date was given. Suddenly, on 23rd December, 2010 a telephonic call was received from the office of the A.O. by the assessee that the requisite details may be filed on the very next day. Since the details could not be collected within the short period of time, the assessee's representative attended the office of the A.O. along with the details only after two days. But by that time, it was informed to the assessee by the AO that the assessment order was already passed. The assessee submitted, without prejudice, that A.O. failed to consider the lease agreement dated 26th March, 2003 and other details directly submitted by M/s C. Mahendra Jewels Pvt. Ltd to the A.O. under an enquiry u/s 133(6) of the Act. With respect to the explanation why the said company had shown the said amount of Rs.45 lacs in their balance sheet as 'loans and advances' and not as a 'deposit' for taking the assessee's premises on leave and license basis vide the leave and license agreement dated 26/03/2003, the assessee submitted that the A.O. should have taken the explanation from the said company directly. It was submitted that accounting entries in the books of account would not be binding and conclusive and one has to look at the substance of the matter. It was further submitted that the company was in losses and the said company has taken a decision not to pay the rent to the Shareholders and Directors for the premises taken on rent. It was submitted that when the company had given interest free deposit of Rs. 45 lakhs which would translate into notional interest of Rs. 45000/- per month by taking 1% interest on such deposit. No rent was paid by the said company, hence, no such rent was received by the assessee and declared by the assessee in the return of income filed with the Revenue. The assessee submitted that it derived income from the investment

made out of said deposit of Rs. 45 lacs which is duly declared in the return of income filed for assessment year 2004-05 and due taxes paid to the Revenue. The assessee submitted that during the relevant period, the assessee was based in USA and his children were studying in USA and whenever he visited India, he used to stay with his father in Baroda. The assessee submitted the copy of passport of his own and his family members and also documents such as application for obtaining permanent status in USA, credit card statements, his children's school records to show that his family had been regularly staying in USA. With regard to the evidence that the premises was actually leased out to the company, the assessee submitted that the company used the premises for maintaining a guest house for its employees and during the period of lease, electricity bills, society charges and telephone bills were paid directly by the company, M/s C. Mahendra Jewels Private Limited and not by the assessee for which copies of company's bank account were produced. It was also submitted that the lease period was for 11 months and the deposit of Rs. 45 lacs was returned immediately after expiry of the lease on 27th February, 2004 itself which further supports the contention of the assessee that the said money was taken only as 'deposit' against the lease of property as per the agreement dated 26th March, 2003 and there was no afterthought or manipulation as suspected by the A.O. in the assessment order's dated 7th January, 2006 and 27th December, 2010.

The CIT(A) after considering the afore-stated submission of the assessee and the assessment order allowed relief by holding that the assessee sought few adjournments which were allowed by the A.O., but at last time as per the telephonic query the details were sought which could not be provided by the assessee as the assessee was in USA and the relevant details could not be submitted before the A.O. The counsel for the assessee visited the office of the A.O. after two days from the receipt of telephone call but the order has already been passed. Thus, due to insufficient time provided by the A.O., the

details of passport and other documents could not be submitted by the assessee before the AO to prove that the assessee is residing in USA and his children are studying there. The CIT(A) asked to submit the details during the appellate proceedings which were submitted by the assessee such as passport details etc. From the details, it was observed by the CIT(A) that the assessee and his family were staying in USA as they have applied for permanent resident status(green card) for residency in USA. The passport revealed that during the major period , the assessee was staying in USA and during their visit to India, they were staying with his father in Baroda. As per the explanation of the assessee , the non-payment of rent by the company as per the lease agreement is due to losses. Consequently , the assessee did not show rent income in the return of income filed with the Revenue . Immediately after the expiry of the agreement period of 11 months, the assessee refunded the deposit of Rs. 45 lacs to the company on 27th February, 2004 which is evident from the bank account of the assessee. The assessee has also filed evidence vide copy of letter dated 27.3.2003 informing the society for having leased out the property to the company with a copy submitted to the jurisdictional police station. The rental income for the lease period of 11 months was assessable only for the assessment year 2004-05 relevant to previous year 2003-04 as leave and license agreement was executed on 26-03-2003, hence, no rental income is required to be disclosed for the assessment year 2003-04. The return for the assessment year 2004-05 was filed on 1st November, 2004 which is much after the date when deposit of Rs. 45 lacs was already returned on 27th February, 2004 i.e. after the expiry of 11 months period. It was also observed by the CIT(A) that the assessment for the assessment year 2004-05 was already completed u/s 143(3) of the Act and no adverse view has been taken by the Revenue with respect to refund of Rs. 45 lacs by the assessee to M/s C. Mahendra Jewels Private Limited. It was also observed by the CIT(A) that the company M/s C. Mahendra Jewels Private Limited had paid electricity, telephone and society

charges for the period of lease when the property was let out. With respect to the non-payment of rent by the company to the assessee, the CIT(A) upheld the contentions of the assessee that due to the losses suffered, the company internally agreed not to pay the rent and that the deposit of Rs. 45 lacs would have already benefitted the assessee by Rs. 45000/- per month by considering notional interest @ 1% per month. The CIT(A) observed that it is not illegal to have internal arrangement between the company and the assessee who is major Shareholder, for not taking rent in lieu of interest free deposit which is a commercial decision. Thus, for non-payment of rent, the lease agreement cannot be said to be an afterthought while other evidences are on record. With regard to the reflection of the amount of Rs. 45 lacs under the group 'loans and advances', it was observed by the CIT(A) that the book entries are not conclusive to decide the allowability of the expenditure or nature of the transaction/income. Thus, the relief was granted by the CIT(A) with respect to the amount of Rs. 45 lacs as the 'deposit' cannot be termed as 'loans and advances' for the purposes of Section 2(22)(e) of the Act, and the addition of Rs. 45 lacs made by the A.O. as deemed dividend was found to be not tenable as per the law and the CIT(A) deleted the same. The CIT(A) also gave a direction to the A.O. to compute the ALV being income from house property in the hands of the assessee for the assessment year 2004-05, keeping in view facts and circumstances of the case and in accordance with the provisions of law. The CIT(A) deleted the impugned additions vide orders dated 24.10.2011.

6. Aggrieved by the orders dated 24.10.2011 of the CIT(A), the Revenue is in appeal before the Tribunal.

7. The ld. D.R. submitted that the assessee is a Shareholder and Director of the company M/s C. Mahendra Jewels Pvt. Ltd and undisputedly the assessee is covered by the provisions of Section 2(22)(e) of the Act. The

assessee has received an amount for Rs. 45 lacs as 'loan' from the said company M/s C. Mahendra Jewels Private Limited which is treated as 'deemed dividend' by the AO u/s 2(22)(e) of the Act. The assessee has contended that the said amount is a security deposit for giving on leave and license basis, the residential premises of the assessee which is upheld by the CIT(A) in the first round of litigation. On appeal before the Tribunal in the first round of litigation, the Tribunal restored the matter to the file of the A.O. for de novo determination of the issue with a direction to verify the genuineness of the transaction as set out in the afore-stated Tribunal's order in ITA No.5783/Mum/2006 dated 06.08.2009. No rent has been paid by the said company M/s C. Mahendra Jewels Private Limited to the assessee for the financial year 2003-04 and 2004-05 while the said leave and license agreement for letting out property was entered on 26-03-2003. No cogent reason has been given for non receipt of the rent. It was merely stated by the assessee that due to losses by the said company M/s C. Mahendra Jewels Private Limited i.e. the licensee, it has been internally decided not to pay rent to the Shareholders and Director's of the company. Section 2(22)(e) of the Act is correctly applied by the A.O. The assessee did not attend participated during the assessment proceedings before the AO in second round of litigation and submitted that the assessee was in USA at that time. The ld. D.R. submitted that additional evidences have been submitted by the assessee during second round of litigation before the CIT(A) but the same has not been referred to the A.O. by the CIT(A) for his examination and verification, by calling remand report from the AO. Rule 46-A of the Income Tax Rules, 1962 is clearly breached. Principle of natural justice has not been adhered to in this case by the CIT(A). The assessee has not brought on record cogent evidences to prove his contentions. This is the only residential property of the assessee which is stated to have been let out and it is not provided with evidence where the assessee and his family were staying during their stay in India, as the said premises which is the only residential

premises of the assessee was let out as stated by the assessee to M/s C. Mahendra Jewels Pvt. Ltd. The ld DR relied upon the orders of the AO.

8. The ld. Counsel for the assessee submitted that the assessee has received an amount of Rs. 45 lacs as security deposit on signing of leave and license agreement dated 26.03.2003 for giving on license basis, the residential premises of the assessee to M/s C. Mahendra Jewels Pvt. Ltd, against which the additions of Rs. 45 lacs were made by the AO by invoking provisions of Section 2(22)(e) of the Act. The assessee has invested the said amount and earned the income thereon which is duly declared in the return of income filed with the Revenue and due taxes paid. Notional income has been brought to tax in the hands of the assessee in assessment year 2004-05 , the order of the AO giving appeal effect to the directions of the CIT(A) is placed at paper book page 1.. The ld. Counsel submitted that the assessee was not in India at that time, hence, the assessee could not submit the details before the A.O. The ld. Counsel further relied upon the order of the CIT(A) and reiterated his submissions as were made before the authorities below.

9. We have considered the rival contentions and also perused the material available on record. We have observed that the assessee is a Shareholder & Director of the company M/s C. Mahendra Jewels Pvt. Ltd. and undisputedly the assessee is a person covered u/s 2(22)(e) of the Act with respect to the company M/s C Mahendra Jewels Private Limited. The assessee received Rs. 45 lacs from the said company M/s C. Mahendra Jewels Private Limited. The assessee is trying to justify the receipt of the said money as security deposit against the leave and licence agreement dated 26-03-2003 to let out his only residential premises situated at 603,Minal Complex Housing Society , Saki Vihar Road, Andheri(East), Mumbai to the said company M/s C. Mahendra Jewels Pvt. Ltd vide leave and license agreement dated 26th March, 2003. The Tribunal in the first round of litigation has set aside the matter to the file of

the A.O. for de-novo determination of the issue after verifying certain issues as directed by the Tribunal in its orders vide ITA no. 5783/Mum/2006 dated 06.08.2009. The assessee sought adjournments before the A.O. and did not submit information called by the AO in the second round of litigation. No rental income has been declared by the assessee in the return of income for the assessment year 2004-05 filed with the Revenue, nor the said company M/s C. Mahendra Jewels Pvt. Ltd has shown the rental expenditure for the assessment year 2004-05. The assessee has produced additional evidences before the CIT(A) in the second round of litigation to support its contentions under Rule 46A of Income Tax Rules, 1962, which were admitted and considered by the CIT(A) under Rule 46A of Income Tax Rules 1962, without forwarding the additional evidences to the A.O. for his examination and verifications as required under Rule 46A(3) of Income Tax Rules, 1962. The A.O. has not been confronted with the additional evidences submitted by the assessee for his examination and verification as is mandated under Rule 46A(3) of Income Tax Rules, 1962. Hence, there is a clear violation of Rule 46A of Income Tax Act and also principle's of natural justice has been clearly breached as the Revenue has not been afforded an opportunity to examine and verify the additional evidences so produced by the assessee before the CIT(A) for the first time in the second round of litigation. In the interest of justice and in our considered view, CIT(A) order dated 24.10.2011 is set aside and the matter under dispute is restored back to the file of the CIT(A) with a direction to forward all the additional evidences submitted by the assessee to the A.O. for his examination and verification by calling remand report from the AO. The assessee is directed to appear before the CIT(A) and submit all the relevant information/explanation's and evidences in support of his contention which shall be admitted by the CIT(A) in the interest of justice and the matter may be decided on merits in accordance with law after affording adequate opportunity of being heard to the assessee in accordance with

principles of natural justice in accordance with law, after complying with the requirements of Rule 46A of Income Tax Rules, 1962. We order accordingly.

10. In the result, the appeal filed by the Revenue in ITA No. 40/Mum/2012 for the assessment year 2003-04 is allowed for statistical purpose.

Order pronounced in the open court on 13th May , 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 13-05-2016 को की गई ।

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 13-05-2016

व.नि.स./ R.K., Ex. Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "E" Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai