IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'SMC-2', NEW DELHI

BEFORE SHRI J. SUDHAKAR REDDY, ACCOUNTANT MEMBER

ITA No. 2444/Del/2015
AY: 2007-08

Sh.Nalin Gupta H.No. 686, Sector 7B Faridabad	vs.	ACIT, Circle 1 Faridabad

PAN: ADTPG 3101 C

(Appellant) **(Respondent)**

Appellant by : Sh.Rajneesh Behari Mathur, C.A.
Respondent by : Sh. M.K.Jain, Sr.D.R.

ORDER

This is an appeal filed by the Assessee directed against the order of the Ld.Commissioner of Income Tax (Appeals), Faridabad dt. 4.3.2015 pertaining to the Assessment Year (A.Y.) 2007-08.

2. Facts in brief:- The facts leading to the addition are as follows. The assessee was holding more than 10% of the total shares of the company M/s Prescomec Auto Co.Pvt.Ltd., Faridabad. He was a Director as well as a Member Shareholder of this company. He had a running account from the company, a copy of which was placed at page 3 of the assessee's paper book. The assessee was having a credit balance of Rs.41,25,880.71 at the beginning of the F.Y. 1.4.2006. He withdrew an amount of Rs.40 lakhs on 22.5.2006 from the company. He further withdrew an amount of Rs.10 lakhs on 10.6.2006, which resulted in a debit balance of Rs.8,84,029/-. This amount was treated as deemed dividend u/s 2(22)(e) of the Act by the A.O. The contention of the assessee is that, he along with his other family members furnished personal guarantees to the bank, for enabling the assessee company to obtain a bank guarantee and the company passed a

resolution on 16.6.2005 authorising the Directors to avail temporary advances for the personal requirement to the extent of Rs.50 lakhs each, in lieu of their providing personal guarantee for the loan and credit facilities availed by the assessee company and hence S.2(22)(e) of the Act was not attracted. This was rejected by the A.O. On appeal the First Appellate Authority rejected the claim of the assessee on the ground that the assessee has not made out a case, wherein he has stated that his personal funds in the shape of investments in the shares etc. were locked with Citi Bank on account of this loan. He rejected the contention of the assessee. Aggrieved the assessee is before us.

3. After hearing rival contentions I find that the undisputed fact is that the assessee availed Rs.2.5 crores working capital limits from the Citi Bank. The Citi Bank had insisted on personal guarantees of the Directors of the Company. The Directors gave personal guarantees. In lieu of such an act of giving personal guarantees the Company Prescomec Auto Co.Pvt.Ltd. permitted the Directors to make temporary drawings of advances to the maximum extent of Rs.50 lakhs. Under these circumstances the issue before me is whether a temporary advance of Rs.8,84,029/- can be held as deemed dividends u/s 2(22)(e) of the Act.

3.1. The Hon'ble Calcutta High Court in the case of Pradeep Kumar Malhotra vs. CIT-V, (WB) (2011) 15 Taxman.com 66(Calcutta) at para 11 held as follows.

"10. After hearing the Ld.Counsel for the parties and after going through the aforesaid provisions of the Act, we are of the opinion that the phrase "by way of advance or loan" appearing in sub clause (e) must be construed to mean those advances or loans which a share holder enjoys for simply on account of 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, but if such loan or advance is given to such share holder as a consequence of any further consideration which is beneficial to the company received from such a share holder, in such case, such advance or loan cannot be said to be a deemed dividend within the meaning of the Act. Thus, for gratuitous loan or

advance given by a company to those classes of share holders would come within the purview of section 2(22) but not to the cases where the loan or advance is given in return to an advantage conferred upon the company by such share holder.

11. In the case before us, the assessee permitted his property to be mortgaged to the bank for enabling the company to take the benefit of loan and in spite of request of the assessee, the company is unable to release the property from the mortgage. In such a situation, for retaining the benefit of loan availed from Vijaya Bank if decision is taken to give advance to the assessee such decision is not to give gratuitous advance to its share holder but to protect the business interest of the company.

12. The view we propose to take finds support from the two decision,s one of the Bombay High Court and the other of the Delhi High Court relied upon by Mr.Khaitan as indicated earlier.

13. We therefore, find that the authorities below erred in law in treating the advance given by the company to the assessee by way of compensation to the assessee for keeping his property as mortgage on behalf of the company to reap the benefit of loan as deemed dividend within the meaning of S.2(22)(e) of the Act."

3.2. The Chennai A Bench of the Tribunal in the case of ACIT vs. Smt. G.Sreevidya (2012) 24 Taxmann.com 75 (Chennai) held as follows

"Held: In order to attract the provisions of S.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 assesse 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 s.2(22)(e).
The CIT(A) had rightly deleted the addition made on account of deemed dividend by the AO."

3.3. The Ld.CIT(A), in my view, has wrongly interpreted these case laws, as being applicable, only when certain property is pledged as collateral security by the guarantor. He wrongly concluded that, as the assessee has not pledged any of his assets the propositions laid down in these case laws do not apply to the facts of this case.

4. In my view such interpretation is bad in law. This is not the case where a temporary advance is given to the assessee without a reciprocal business arrangements. It was not a gratuitous act. Providing personal guarantee, by itself is an act which benefitted the company by way of grant of loan and cast a legal obligation on the assessee. Providing assets as collateral security is only an act in furtherance to personal guarantee. Thus I agree with the contentions of the assessee and delete the addition in question. In the result the appeal of the assessee is allowed.

5. In the result, the appeal by the assessee is allowed.
Order pronounced in the Open Court on 27th January, 2016.

(J.SUDHAKAR REDDY)
ACCOUNTANT MEMBER

Dated: the 27th January, 2016

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Copy of the Order forwarded to:

1. Appellant;
2. Respondent;
3. CIT;
4. CIT(A);
5. DR;
6. Guard File

By Order

Asst. Registrar