IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E, NEW DELHI

Before Sh. A. T. Varkey, JM AND Sh. O.P.Kant, AM

ITA No.4945/Del./2011
Asstt. Year : 2008-09

Naresh Sharma, 605, Sector-5, Karnal PAN:ALIS4868F	Vs.	ITO, Ward-3(2), Room No.385A, C.R. Building, I.P. Estate, New Delhi
(APPELLANT)		**(RESPONDENT)**

Appellant by : Sh.Rajeev Sachdeva, CA
Respondent by : Sh. P. Dam Kanunjna, Sr. DR

Date of Hearing : 03.09.2015		**Date of Pronouncement : 30.09.2015**

ORDER

PER O.P.KANT, A.M.

This appeal of the assessee is directed against the order dated 03.08.2011 of learned Commissioner of Income-tax (Appeals) - VI, New Delhi, raising following grounds of Appeal:-

"1. On the facts and in the circumstances of the case the AO and the CIT (A) erred in law and on the facts holding that a sum of Rs.6,36,117/- was taxable in the hands of the appellant as 'deemed dividend' within the meaning of section 2(22)(e) of the IT Act.
2. The Appellant submits that facts stated by the appellant and law as explained by the appellant was not correctly interpreted. The provisions of section 2(22)(e) have been wrongly construed and erroneously invoked.
3. On facts and circumstances of the case the AO and the CIT Appeals was not justified in enhancing Rs.80,000/- on account of

low household withdrawals during the year by treating as undisclosed source of income in the total income of the petitioner."

2. In ground Nos.1 and 2, the assessee has challenged the action of the learned Commissioner of Income-tax(Appeals)[in short 'CIT(A)'] in confirming the addition of the 'deemed dividend' of Rs.6,36,117/- under section 2(22)(e) of the Income Tax Act, 1961 (in short 'the Act') made by the learned Assessing Officer(in short 'ld. AO'). In ground No.3, the assessee has agitated confirming the addition of Rs.80,000/- against low house withdrawals.

3. The facts in brief are that the assessee is an individual and during the year under consideration shown income under heads "income from salary", "profit and gains of business", "capital gains" and "income from other sources". The assessee filed its return of income on 31.03.2009 declaring total income of Rs.1,29,570/-. The case was selected for scrutiny under Computerised Assisted Selection of Scrutiny (CASS). The assessee was director of the Company i.e. M/s. CASCO Electronics Pvt. Ltd. (in short 'company') at the beginning of the year i.e. on 1st April 2007 and was holding 1,22,500 equity shares in the company, against total paid up share capital of Rs.2,41,080/- shares , which constituted 50.81% of the total paid up share capital of the company. The ld AO noticed that the assessee was creditor of the company and closing balance of Rs.10,45,199/- was appearing as on 31.03.2008. On further detailed perusal of the ledger account of the company, the ld AO found that the assessee had given loan to the company, of which,

outstanding amount at the beginning of the year i.e. 01-04-2007, was of Rs.20,47,411/-, however, the whole of this loan was received back by the assessee in May, 2007. Thereafter, the assessee received loan/advances from the company from June, 2007 upto 24.09.2007. However, the assessee sold the shares of the company owned by him and also resigned from the post of director during the concerned previous year i.e. 2007-08. As the ld AO noticed the fact of assessee being beneficial owner of more than 10 % shares having voting power, so he was of view that the whole loan/ advance received from the company was liable for the deemed dividend in the hands of the assessee as per provisions of section 2(22)(e) of the Act. The assessee submitted that he resigned from the post of director as also sold shares during the concerned financial year i.e. 2007-08, therefore, he was not liable for deemed dividend. Alternatively ,the assessee claimed that in case he was liable for the deemed dividend , then same should be only the amount of loan/advances received from July, 2007 to September, 2007, subject to the limit of accumulated profit of the company , which according to the assessee, was Rs. 81,000/-only. However, the ld AO on verification of the ledger account of the assessee in the books of the Company, found that the assessee received total advance of Rs.9.83 lakhs from the company upto 24.09.2007, which remained up to the end of the previous year, hence, he held that same was liable for considering as deemed dividend. Further, the ld AO computed the accumulated profit of the company till 24.09.2007 to Rs.6,36,117/- and therefore , he

restricted the addition of deemed dividend to Rs.6,36,117/- u/s 2(22)(e) of the Act. Another addition of Rs.80,000/- against low household withdrawals was also made. After making additions, the income was finally assessed at Rs.8,46,480/- u/s 143(3) of the Act on 21.01.2010. Aggrieved, the assessee filed an appeal before the ld. CIT(A) and relying on the judgement of the Hon'ble Kerala High Court in the case Smt S. P. Ammal reported in 87 Taxman 370 pleaded that the loan / advance received by the assessee from the company was not liable for considering as deemed dividend. The ld. CIT(A) distinguished the facts of case cited by the assessee and confirmed the action of the ld. AO in considering the advance as deemed dividend limited to Rs.6,36,117/- and also confirmed the addition of Rs.80,000/- made by the ld. AO against the low household withdrawals. Aggrieved, the assessee is before us.

4. At the time of hearing, learned authorized representative (in short 'ld. AR') filed written submissions and paper book containing Page 1 to 86 and advanced arguments on both the grounds. In his written submissions, he has stated the facts in respect of the addition of deemed dividend and then submitted that money advanced by the company if at all to be considered as deemed dividend, then, advance outstanding as on the date, the assessee sold his share holding having voting power of more than 10 %, should only be considered as deemed dividend. Further, he relied on the judgement of the Hon'ble Kerala High Court in the case of Commissioner of Income-tax Vs. Smt S Parvathavarthini Ammal

(supra) and the decision of Income-tax Appellate Tribunal, Delhi , C Bench, in the case of Victor Aluminum Industries (P) Ltd. Vs. ACIT (2006) 9 SOT 197. As regards to the house hold withdrawals , the ld. AR submitted in his submission that wife and father of the assessee have also contributed to the family expenses and if same is taken into account, the house hold expenses of the assessee are sufficient to explain the expenses of family of the assessee. On the other hand, the learned senior department representative (in short ‘ ld. SR. DR’) relied on the order of the lower authorities.

5. We have heard the rival submission and perused the material on records. In ground Nos. 1 and 2 , the assessee has challenged addition of deemed dividend. From the provisions of section 2(22)(e) of the Act , it can be derived that in order to examine whether the advance received by the assessee from the company is liable for treating as deemed dividends in the hands of the assessee, the following three conditions must be fulfilled:

1. Whether M/s. CASCO Electronics Pvt. Ltd. (CEPL) was not a company in which public was not substantially interested?
2. Whether, the assessee was a beneficial owner of shares (other than shares entitled to fixed rate of dividend) holding not less than 10% of the voting power
3. Whether the company i.e. M/s. CASCO Electronics Pvt. Ltd. (CEPL) was having accumulated profit at the time of advance.

6. The AO has held that the assessee was holding shares more than 10% in the company during the year, the company was private limited company and the company was having accumulated profit also, therefore, according to the AO, all the three conditions for considering the advance of Rs.9.83 lakhs as deemed dividend, are fulfilled. But the AO has overlooked the fact that in this case the assessee has sold his share holding during the year, so the question arises for our consideration is whether the advance received after the sale of shares will continued to be considered as deemed dividend ?

7. To find the answer of above question, we need to look into the language of the section 2(22)(e) of the Act. The relevant part of the section is reproduced as under:

> *"2(22) dividends includes…….*
> *(a)……*
> *(b)……..*
> *(c) …….*
> *(d)……..*
>
> *(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."

8. From the plane reading of the section, we find that any payment whether it is loan or advance falls into the category of deemed dividend must fulfill the three conditions mentioned above. If any loan or advance by the company to the assessee fails to fulfill any one of conditions, it can't be held as deemed dividend. The section being a deeming provision has to be construed strictly as held in the by the Hon'ble Kerala High Court in the case of CIT Vs. PV John (1990) 181 ITR 1. The Hon'ble High Court of Allahabad in the case of CIT Vs. HK Mittal (1996) 219 ITR 420 has held that the chief ingredient is that one should be a share holder on the date the loan is advanced to the him and where such ingredient is not established, the advance could not be taken as deemed dividend under section 2(22)(e) of the Act. The ld. AR in his submission relied on judgement of the Hon'ble Kerala High Court in the case of Commissioner of Income-tax Vs. Smt S Parvathavarthini Ammal (supra) wherein it is held that:

"16. It is already settled that an application for transfer can be initiated either by the transferor or by the transferee. The question is as to what are the requirements of the provisions of the Companies Act in regard thereto. Learned counsel for the assessee referred us to the provisions of s. 108 of the Companies Act specifying that the transfer of shares is not to be registered except on production of instrument of transfer. The said statutory provision prohibits the company from registering a transfer of shares, unless a proper instrument of transfer duly stamped and executed by or on behalf of the transferor and by or on behalf of

the transferee as per the particulars stated therein. On facts again there is not even a whisper that the application form which was submitted had any defects and, therefore, it can be safely seen that the applications were submitted in accordance with the statutory provisions. Perhaps the learned counsel for the Department may be right in urging that an inference from this presumptive aspect that the applications could not be said to have been presented contrary to the provisions of s. 108 of the Companies Act should not lead us to presume that there was in fact a gift deed executed legally and properly as an a priori situation in regard thereto. Reference to s. 108 of the Act is not being made in the nature of putting the cart before the horse to lead to a conclusion that because the application was not found to be defective there must have been a proper gift deed. Reference is for the purpose of required satisfaction that the applications would have to be understood as submitted in accordance with the provisions thereof and in the process of consideration of the situation on the basis of probabilities, again in the absence of any material to show that there was any defect in the matter of applications, we will also have to proceed with the steps in the process of transfer are without any legal difficulty or impediment in regard thereto"

9. The ld. AR in his submission has also relied on the decision of the ITAT, Delhi 'C' Bench in the case of Victor Aluminum Industries (P) Ltd. Vs. ACIT (2006) 9 SOT 197 wherein it is held that

"evidence on record showing that assessee company's director 'P' held 33.33 per cent shareholding in company 'O' as on 1st April, 1997, and 4.84 per cent on 4th April, 1997, loan obtained by assessee from 'O' as on 1st April, 1997, would be deemed dividend under s. 2(22) (e) but loan obtained thereafter will not be so treated."

10. From the above judicial pronouncements, it is ample clear that, for qualifying any loan or advance as deemed dividend, it must fulfill all the

conditions of the section 2(22)(e) of the Act, on the date of such loan or advance received by that person. Therefore, in view of above, we hold that the loan/ advance obtained from the company by assessee till the date of sale of shares, when he ceased to be beneficial owner of shares not less than 10% of voting powers, was liable for the deemed dividend as per provisions of section 2(22)(e) of the Act and any loan or a advance received thereafter will not qualify as deemed dividend.

11. Once, we have held that the advance received till the date of sale of shares are liable to be considered as deemed dividend , now the issue to be decided is, as to what was the date of sale of shares in the case of the assessee. As regards to the date of sale of shares, the ld. AR has filed written submission, the relevant part of which is reproduced as under:

> *"That as the appellant has given the transfer deed on 30-07-2007 in respect of Rs.1,22,500/- equity shares in respect of sale of the said shares to Sarika Khanna which is evident from the share transfer deed as per Page No.19 of the paper book . Please note that the transfer deed dated 30/07/2007 was filed by the AR of the petitioner before the learned assessing authority during the course of assessment on 14.12.2010 by AR . (refer page no.20 to 28).*
>
> *That the petitioner was having unsecured loan from the company on 30-07-2007 was for Rs.1,12,589/- as per Page No. 17 & 18 of the paper book.*
>
> *That as the equity shares of Casco Electronics Pvt. Ltd. were sold by the appellant on 30.07.2007, the appellant was having nil shareholding as on 30-07-2007 and as such the appellant is no more shareholder of the said company. It has been held by the various courts that as and when the share transfer deed was given to the purchaser that is the date of sale……"*

12. Before us, the assessee has filed a copy of transfer deed i.e share transfer form at page no. 19 of the paper book bearing a stamp of the Registrar of Company. On perusal of the share transfer form, it is evident that the assessee has applied for transfer of share on 27.07.2007. The said share transfer form contains as under:-

> "*For the consideration stated below the "Transferor(s) named do hereby transfer to the "Transferee(s)" named the shares specified below subject to the conditions on which the said shares are now held by the Transferor(s) and Transferee(s) do hereby agree to accept and hold the said shares subject to the conditions aforesaid."*

13. The said share transfer form is filed in the office of the Registrar of Companies on 27.07.2007, so the date of transfer should be taken as 27.07.2007, however, the assessee in its submission has mentioned the date of share transfer deed as 30.07.2007, So even if we taken 30.07.2007 as date of transfer of shares, it does not make any material difference in present case. After careful consideration of all the documentary evidence submitted before us and the precedents relied upon by the ld AR, we are of the considered opinion that finding of the AO and the ld CIT(A) as regards to considering the advance of Rs. 9.83 lakhs as deemed dividend , is not based on the correct appreciation of the law as well as facts and therefore, we hold that the loans/ advances given by the company to the assessee during the year under consideration till the date of sale of shares by the assessee, should only be considered for deemed dividend. Accordingly, we remit the matter

back to the file of the AO and direct the AO to compute the loan/ advances given by the company till the date of sale of shares by the assessee as deemed dividend, subject the availability of accumulated profit of the company.

14. As regard to ground No.3 of the assessee the ld. AO in his order has held that keeping in view the economic status and size of the family of the assessee, household withdrawal of Rs.1,20,000/- shown by the assessee were not sufficient and therefore he made further addition of Rs.80,000/- to the household withdrawal already declared by the assessee. Before the ld CIT(A), the ld AR of the assessee pleaded that the assessee was having simple living and no marriage social ceremony were performed during the year and therefore withdrawals were justified. , however, the ld CIT(A) upheld the action of the AO. Before us the assessee has filed a written submission, the relevant part of which is reproduced as under:-

> *"10. That the appellant was living with his parents at Haider Quili, Chandni Chowk, Delhi during the said assessment year. The ownership of the house was of his wife. The appellant was having two children of which the details are as under:-*
>
> *A. Son aged 14 years studying in 6th class.*
>
> *B. Daughter aged 9 years studying in 2nd class.*
>
> *11. That the appellant had made cash withdrawals of Rs.1,20,000/-during the said assessment year for house hold. Apart from withdrawals made towards telephone insurance, mediclaim and car loan installment, electricity bills etc directly debited in bank statement.*
>
> *12. That the wife of the appellant, Mrs. Radhika Sharma, has made cash withdrawals of Rs.75,000/- against tuition income*

of Rs.95,000/- and the same has been shown in her return as per acknowledgement together with computation of total income enclosed. Please note that the same were filed during the course of assessment proceedings on 14.12.2010 by ar. (refer page no.24 to 25).

13. That apart from the above said withdrawals, his father Pandit Ganga Dhar Sharma has earned the income from astrology of Rs.1,68,000/- in cash and the same has been shown in his return. As per acknowledgement and computation of income enclosed."

15. The ld DR on the other hand requested that the addition of Rs.80,000/- made by the AO towards low household withdrawal may be confirmed.

16. On perusal of the written submission of the assessee it is found that the wife of the assessee as well as his father also contributed towards the household expenses, which increases the house hold withdrawal to Rs.3,63,000/-. In our opinion, looking the family size of the assessee and living standard, the house hold withdrawals are sufficient and therefore addition made by the AO is deleted. This ground of the assessee is allowed.

17. In the result, the appeal of the assessee is allowed for statistical purposes.

Order Pronounced in the Court on 30/09/2015.

-Sd/- -Sd/-

(A.T.Varkey) **(O.P.Kant)**
JUDICIAL MEMBER **ACCOUNTANT MEMBER**

Dated:30/ 09/2015
Ajay

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

ASSISTANT REGISTRAR