

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL, 'D' BENCH, CHENNAI
श्री ए. मोहन अलंकामणी, लेखा सदस्य एवं श्री धुव्वुरु आर.एल रेड्डी, न्यायिक सदस्य के समक्ष
BEFORE SHRI A.MOHAN ALANKAMONY, ACCOUNTANT MEMBER
AND SHRI DUVVURU RL REDDY, JUDICIAL MEMBER

आयकरअपीलसं./I.T.A.No.1086/Mds/2017

(निर्धारणवर्ष / Assessment Year: 2010-11)

The Deputy Commissioner of Income Tax, Central Circle 3(1), Chennai – 34.	Vs	Shri P. Srinivasa Gopal, 125, Orakkadu Village, Sholavaram Via, Chennai – 600 067.
		PAN: AAIPG7720R
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

C.O. No. 76/Mds/2017

(in I.T.A. No.1086/Mds/2017)

Shri P. Srinivasa Gopal, 125, Orakkadu Village, Sholavaram Via, Chennai – 600 067.	Vs	The Deputy Commissioner of Income Tax, Central Circle 3(1), Chennai – 34.
PAN: AAIPG7720R		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

राजस्व की ओर से /Revenue by	:	Smt. S. Vijayaprabha, JCIT
निर्धारिती की ओर से /Assessee by	:	Shri B. S. Purushottam, CA

सुनवाईकीतारीख/Date of hearing	:	14.09.2017
घोषणाकीतारीख /Date of Pronouncement	:	06.10.2017

आदेश / ORDER

Per A. Mohan Alankamony, AM:-

The appeal by the Revenue is directed against the order passed by the learned Commissioner of Income Tax (Appeals)-3,

Chennai dated 31.01.2017 in ITA No.155/2015-16/CIT(A)-3 for the assessment year 2010-11 passed U/s.250(6) r.w.s. 143(3) & 147 of the Act. The assessee has also raised cross objection towards the same order of the Ld.CIT(A) supra, which is in support of the order of the Ld.CIT(A) with respect to merits and against the order of the Ld.CIT(A) on reopening.

2. The Revenue has raised several grounds in its appeal; however the crux of the issue is that the Ld.CIT(A) has erred in deleting the addition of Rs.4,38,31,134/- made by the Ld.AO invoking the provisions of Section 2(22)(e) of the Act towards 'deemed dividend'.

3. The assessee has raised four cross objections which are being briefly summarized as follows:

- (i) The Ld.CIT(A) has erred in holding the reopening of assessment U/s.147/148 of the Act, to be valid.
- (ii) The Ld.CIT(A) has rightly held that the transaction between the assessee and M/s. Pleasant Foods Pvt. Ltd., is in the nature of trade and hence there was no justification for invoking the provisions of Section 2(22)(a) of the Act.

4. The brief facts of the case are that the assessee is an individual engaged as Director in M/s. Pleasant Foods Pvt. Ltd., filed his return of income. Thereafter the case was selected for scrutiny U/s.143(3) of the Act, wherein the Ld.A.O made addition of Rs.27,68,161/-. Subsequently, it was further revealed from the records of the company M/s. Pleasant Foods Pvt. Ltd., that the

company had received unsecured loan of Rs.26,32,00,000/- from its Director Shri P. Srinivasa Gopal during the financial year 2008-09 and the same was repaid partly during the financial year 2009-10 to the extent of Rs.19,56,31,134/-. The balance amount of Rs.6,75,68,886/- was adjusted towards sale of equity shares of Apollo Hospitals Ltd., and Apollo Sindhoori Capital Investment Ltd aggregating to Rs.11,14,00,000/-. Thus the amount of Rs.4,38,31,134/- being the difference of Rs.6,75,68,886/- and Rs.11,14,00,000/- stood in the name of the assessee as debtor in the balance sheet of the company. The Ld.AO opined that since the amount of Rs.4,38,31,134/- was payable by the assessee to the company, the provisions of Section 2(22)(a) of the Act would be attracted and therefore he reopened the case invoking the provision of Section 147 of the Act and notice U/s.148 of the Act was issued on 20.05.2014 and served on the assessee on 26.05.2014.

5. **Revenue's Appeal:**

During the course of scrutiny re-assessment proceedings, it was explained by the assessee that the debt of Rs.4,38,31,130/- arose due to the trading/purchase transaction of shares between M/s. Pleasant Foods Pvt. Ltd., and the assessee on account of commercial exigencies. It was therefore argued that in the case of the assessee provisions of Section 2(22)(a) of the Act would not be attracted. The Ld.AO rejected the contention of the assessee and held as follows:

“6. The case of the assessee squarely falls under the provisions of S 2(22)(a) which is reproduced below:

“any distribution by a company of accumulated profits, whether capitalized or not if such distribution entails the release by the company to its shareholders of all or any part of the assets of the company;”

According to the above section, the excess amount of loan repaid to the assessee has to be treated as deemed dividend. In this case, the excess amount of Rs.4.38 crores is to be construed as amount advanced by company to the assessee when there is no business exigency involved. There is no justification for the amount paid in excess by the company to the share holder (assessee) that the company has paid Capital gains tax on the sale of shares of Apollo Hospital Enterprises Ltd. Even though the company has paid capital gains tax, the assessee is also liable to be taxed under the head ‘deemed dividend’ in accordance with Section 2(22). In view of the above discussion, the amount of Rs.4.38 crores is brought to tax.

5.1. Before the Ld.CIT(A), the assessee made the following submissions:-

- (i) The assessee is a director in M/s. Pleasant Foods Pvt. Ltd., and had advanced sum of Rs.26.32 crores to the company for the purpose of investment in shares of M/s. Apollo Hospital Enterprises Ltd., during the financial year 2008-09.
- (ii) In the financial year 2009-10, relevant to the assessment year 2010-11 the loan was repaid by the company over a period of time which included transfer of 1,50,000 shares of

M/s. Apollo Hospital Enterprises Ltd., at the prevailing market rate of Rs.576 per share.

- (iii) The capital gain arising out of such transfer of share were disclosed by the company and tax paid duly.
- (iv) Thus the company had not only received substantial benefit in the form of interest free loan from the assessee as well as gained in sale of shares to the assessee.
- (v) Thus the balance amount payable by the assessee to the company on account of purchase of shares is arising out of commercial transaction and it is not loan advanced by the company to the assessee. Reliance was placed in the case Pradip Kumar Malhotra vs. CIT decided by the Hon'ble Kolkata High Court in the IT Appeal No.219 and the decision of the Delhi Bench of the Tribunal dated 29.05.2015 in the case Iswar Chand Jindal vs. ACIT, ITA No.4967/Del/2012.
- (vi) Reliance was placed in the case Pradip Kumar Malhotra supra, wherein it was held that only gratuitous loan advanced by company to shareholder can be treated as deemed dividend U/s.2(22)(e) of the Act. Further in the case Iswar Chand Jindal supra, it was held that the loans and advances given for business transactions between the parties do not fall under the ambit of "deemed dividend".
- (vii) In the case ITO vs. Gayathri Chakravarthi, ITA No.151/Kol/2013 dated 30.10.2015, the Kolkata Bench of the Tribunal held that where the company is also benefited in the transaction, the transaction will be in the nature of

commercial transaction and therefore it will fall outside the ambit of Section 2(22)(e) of the Act.

- (viii) Further the shares were acquired by the company out of the loan obtained by the company from the assessee and therefore no accumulated profit was utilized for the purpose of acquisition of the shares. Thus it would not amount to distribution of accumulated profit of the company and therefore provisions of Section 2(22)(a) of the Act cannot be attracted.

5.2 After considering the above submission of the assessee and analyzing the facts of the case, the Ld.CIT(A) directed the Ld.AO to delete the addition made on account of deemed dividend amounting to Rs.4,38,31,134/- in the hands of the assessee by observing as under”

“I have considered the submissions of the Id. AR and the findings of the AO. The undisputed facts are that appellant had advanced a loan of Rs.26,36,00,000/- to the company in which he is a Director. Secondly, the loan received by the company has been repaid during the F.Y. 2009-10, by way of cheque amounting to Rs.19,56,31,134/- . For balance loan amount of Rs.6,75,68,886/- has been repaid by kind i.e. equity shares of M/ s. Apollo Hospital Enterprises Ltd. and M/s. Apollo Sindhuri Capital Investments Ltd. I Third and also important fact is that the above equity shares were sold to the appellant for a consideration of Rs.11,14,00,000/-. Fourth point is that out of the said sale consideration, company had adjusted loan amount of Rs.6,75,68,886/- and the balance amount had been shown in

its books as debit balance. Fifth point is that the AO herself had admitted that it was a sale transaction between the appellant and the company. However, AO had I treated the debit balance shown in the books of the company against the I appellant as deemed dividend and invoked clause (a) of sub-section (22) of Sec.2.

On consideration of the above facts, it is seen that the company has sold shares of Apollo Group to the appellant at the prevailing market rate of Rs.576/- per share. After adjusting the balance loan amount, the company had taken balance consideration to the balance sheet and shown as debit balance against the appellant. The facts clearly prove that it is a pure commercial transaction between the appellant and the company and it was done at arm's length. Further, at no stretch of imagination, sale consideration receivable cannot be said to be a loan or advance. Probably, AO might have come to this conclusion and dropped the idea of invoking clause (e) of sub-section (22) of Sec.2. In fact, assessment had been re-opened to invoke this clause. However, at the end of the proceedings, AO had gone to head to tax the debit balance shown in the company's books under clause (a) of sub-section (22) of Sec.2.

Now, I turn to discuss clause (a) of sub-section (22) of Sec.2 as to whether the said clause is applicable in the given circumstances, in the hands of the appellant or not. In the assessment order, AO had reproduced clause (a) of sub-section (22) of Sec.2. On perusal of the said clause, I found that two

conditions cumulatively have to meet to apply the same. One is distribution of accumulated profits and second is entailing the release of the assets. In the appellant's case, as rightly pointed out by the ld. AR, the sale consideration receivable out of sale of shares of Apollo Group cannot be considered as distribution of accumulated profits. Secondly, shares worth of loan amount received cannot be said as entailing the release of assets.

In the appellant's case, in my considered opinion, both the conditions are absent. It appears AO had misconstrued the clause (a) of sub-section (22) of Sec.2 and wrongly applied in the appellant's case. Therefore, I found a lot of force in the arguments of the Id. AR. On the basis of the above discussions, I have no hesitation to hold that AO had wrongly considered sale transaction of shares between the appellant and his company as deemed dividend under clause (a) of sub-section (22) of Sec.2. In other words, it is a simple commercial transaction to have been done to repay loan received from the Director and capital gains tax on sale consideration of shares has been offered by the company. Further, it has been done at arm's length price and has not been disputed by the AO. In view of the above discussions, I direct the AO to delete the addition made on account of deemed dividend amounting to Rs.4,38,31,134/- and the grounds taken on this issue are allowed.”

5.3 Before us the Ld.DR argued in support of the order of the Ld.AO, while as the Ld.AR relied on the order of the Ld.CIT(A) and pleaded for sustaining the same.

5.4 We have heard the rival submissions and carefully perused the material on record. Considering the facts of the case, we are of the view that the decision of the Ld.CIT(A) has merits. The assessee is a Director in the company M/s. Pleasant Food Pvt. Ltd. Because of his close nexus with the company, he had extended enormous fund to the tune of Rs.26.32 crores as loan to the company, which was substantially repaid to the assessee, leaving a balance of Rs.6,75,68,886/-. The company had invested the loan obtained from the assessee for the purchase of shares in M/s. Apollo group of companies. Thereafter to settle the outstanding loan the company had sold shares of the Apollo groups to the assessee at the prevailing market rate for Rs.11,14,00,000/-. From this transaction the company had made substantial gain from the assessee. The interchange of ownership of shares and the related transactions are due to various business strategies adopted by the assessee and the company wherein he is a director. Thus the entire transaction is purely out of commercial exigencies. Further it is evident that the debit balance which stood in the name of the assessee, in the books of the company, was due to the gain enjoyed by the company from the transaction with the assessee and not with respect to distribution of accumulated profit of the company as rightly pointed out by the Ld.CIT(A). Therefore the view expressed by the Ld.CIT(A) that the transaction between the assessee and M/s. Pleasant Food Pvt. Ltd., falls outside the scope of the two conditions viz., distribution of accumulated profit of the company and release of assets of the company specified in Section 2(22)(e) & 2(22)(a) of the Act has merits. The reliance

placed in the decision of the case cited by the Ld.AR before the Ld.CIT(A) mentioned supra is squarely applicable in the case of the assessee. In this situation, we do not find it necessary to interfere with the order of the Ld.CIT(A) on this issue. Accordingly we hereby sustain the order of the Ld.CIT(A).

6. Assessee's Cross Objection :-

Since we have decided the issue with respect to the applicability of Section 2(22)(e) & 2(22)(a) of the Act in favour of the assessee in the Revenue's appeal and sustained the order of Ld.CIT(A), we do not find it necessary to address the ground raised by the assessee in his CO on reopening because it would be only academic. The other ground of the assessee in his CO is only in support of the Order of the Ld.CIT(A) which we have upheld, hence this ground of the assessee stands allowed.

7. In the result the appeal of the Revenue is dismissed and the cross objection of the assessee is partly allowed.

Order pronounced on the 06th October, 2017 at Chennai.

Sd/-

(धुव्वुरु आर.एल रेड्डी)

(Duvvuru RL Reddy)

न्यायिक सदस्य / Judicial Member

Sd/-

(ए. मोहन अलंकामणी)

(A. Mohan Alankamony)

लेखा सदस्य / Accountant Member

चेन्नई/Chennai,

दिनांक/Dated 06th October, 2017

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त/CIT | 5. विभागीय प्रतिनिधि/DR | 6. गार्ड फाईल/GF |