

आयकर अपीलीय अधिकरण “एक-सदस्य मामला” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH, MUMBAI

श्री शमीम याहया, लेखा सदस्य के समक्ष ।
BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 3395/Mum/2017

(निर्धारण वर्ष / Assessment Year: 2010-11)

Ankit Gupta 201/1, Raheja Tipco Height, Rani Sati marg, Malad (E), Mumbai-400 097	बनाम/ Vs.	ITO, Wd. 30(1)(1), C-13, Pratyakshkar Bhawan, BKC, Bandra (E), Mumbai-400 051
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. ANOPG 5238 R		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थी की ओर से / Appellant by	:	Shri R. C. Jain , Shri Ajay Daga & Shri Navneet Lahoti
प्रत्यर्थी की ओर से/Respondent by	:	Ms. N. Hemalatha
सुनवाई की तारीख / Date of Hearing	:	11.10.2017
घोषणा की तारीख / Date of Pronouncement	:	01.01.2018

आदेश / ORDER

Per Shamim Yahya, A. M.:

This appeal by the assessee is directed against the order of the Id. Commissioner of Income Tax (Appeals) dated 20.02.2017 and pertains to the assessment year 2010-11.

2. The grounds of appeal read as under:

1. The Id. CIT (A) erred in sustaining the addition of Rs.5 lacs out of cash deposit of Rs.1853000/-.

2. The Id. CIT (A) erred in sustaining the addition on account of deemed dividend u/s 2(22)(e) of the Act of Rs.393000/- out of Rs.1664000/- disregarding the fact that the Company which has advanced loan to the appellant did not have accumulated profit as the year under appeal was the first year of its existence.
3. The Id. CIT(A) erred in sustaining the disallowance of Rs.1 lac out of purchases and expenses of Rs.536370/- in the jowar trading business.

3. Apropos ground no. 1

On verification of AIR information, the Assessing Officer noticed that the assessee has made cash deposits of Rs.18,53,000/- on different dates with State Bank of India, Gokuldham Branch. The assessee did not explain the source of cash deposits. The Assessing Officer noted that the assessee has received total receipts from Jowar feed amounting to Rs.8,65,930/- only. The Assessing Officer also noticed from assessee's account that the cash is deposited and immediately cheque is issued to M/s. Gigal Ispat Pvt. Ltd. which is a family concern. The Assessing Officer has placed reliance on the decision in the case of *Roshan di Hatti vs. CIT* (107 ITR 938) (SC); *Kale Khan Mohammad Hanif vs. CIT* (50 ITR 1) (SC) relevant to the facts of the case.

4. Upon the assessee's appeal, the Id. Commissioner of Income Tax (Appeals) asked the Assessing Officer to file the remand report on the fresh submission of the assessee. The Id. Commissioner of Income Tax (Appeals) did not find the Assessing Officer's remand report justified. He *inter alia* accepted that the cash was generated out of business and Rs.11 lacs was drawn in cash from the same bank account and was claimed to have been re-deposited. He further accepted the assessee's contention that Rs.2.88 lacs were deposited by the Mother of the assessee. However, the Id.

Commissioner of Income Tax (Appeals) held that to meet the end of justice, he estimated that source of cash deposits to the extent of Rs.5 lacs remain unexplained. He deleted the balance addition of Rs.13,53,000/-.

5. Against this order, the assessee is in appeal before the ITAT.

6. I have heard both the counsels and perused the records. I find it very intriguing that the Id. Commissioner of Income Tax (Appeals) has accepted that Rs.11 lacs was deposited in cash in the bank account after the same was withdrawn from the same bank account at different dates. It is beyond comprehension as to how a person draws cash from his bank account and kept on re-depositing the same on different dates; *de hors* any cogent explanation, the acceptance of cash deposit in the same bank account from withdrawals from the same bank account is not acceptable. Hence, the deletion of Rs.11 lacs on this account itself remains unjustified. However, since the Id. Commissioner of Income Tax (Appeals) has sustained only Rs.5 lacs of the addition and this is not an appeal by the Revenue, the same cannot be tinkered. Accordingly, I do not find any justification in the assessee's plea seeking the deletion of Rs.5 lacs. Accordingly I sustain the same.

Apropos ground no. 2

7. The Assessing Officer noticed that M/s. Gigal Ispat Pvt. Ltd. has given advance of Rs.16,64,000/- on different dates to the assessee who is Director in aforesaid company holding 20% shareholding in the company which has profit reserves. The

assessee did not give any explanation. As per Assessing Officer, provisions of section 2(22)(e) are clearly applicable in this case. The company has given advance/loan to the assessee who is having more than 20% shareholding and the loan/advance given to the assessee is not in ordinary course of business. Hence, the Assessing Officer treated Rs.16,64,000/- as deemed dividend u/s. 2(22)(e).

8. Upon the assessee's appeal, the Id. Commissioner of Income Tax (Appeals) held as under:

5.3 I have considered the submissions of the appellant. I have also perused the findings of the A.O. in the assessment order and the remand report. There is no doubt that both debit and credit sides of the ledger account has to be considered to compute amounts covered u/s 2(22)(e). The ledger account does not reveal transaction of any commodity or service. It contain merely financial transactions and hence the same are in nature of loan/advances clearly covered by provisions of Section 2(22)(e). As pointed out by the AO in the remand report, date of actual transaction in few cases is different than shown in the ledger account. I am of the opinion that it is more authentic to consider date of clearing as date of transaction.

5.4 In view of above, benefit of first three credit entries as under has to be allowed to the appellant:

2-4-2009	By cash Mumbai	Rs. 18,000/-
30-4-2009	By Ankit Gupta (Director)	Rs. 25,000/-
31-5-2009	By Ankit Gupta (Director)	<u>Rs. 25,000/-</u>
	Total	Rs. 68,000/-

Thereafter, the company gave loan of Rs. 3,00,000/- to the appellant on 13/06/2009, Hence, net loan after deducting credit balance of the appellant i.e. Rs. 3,00,000/- minus Rs. 68,000/-=Rs.2,32,000/- is the deemed dividend u/s 2(22)(e) on 13/06/2009.

Thereafter, on 19/06/2009 and 30/06/2009, the appellant gave Rs.2,00,000/- & Rs.4,25,000/- to the company. So, credit of the appellant as on 30/06/2009 = Rs.6,25,000/- minus Rs.2,32,000/-=Rs.3,93,000/-. On 09/07/2009, the appellant received Rs.5,00,000/- from the company i.e. the excess receipt of

Rs.5,00,000/- minus Rs. 3,93,000/- =Rs.1,07,000/- is again deemed dividend u/s 2(22)(e).

So total amount of deemed dividend comes to Rs.2,32,000/-+ Rs.1,07,000/- =Rs.3,39,0007-. To conclude, the addition of deemed dividend u/s 2(22)(e) amounting to Rs.3,93,000/- is sustained and balance addition of Rs.16,64,000/- minus Rs.3,93,000/- = Rs.12,71,000/- is hereby deleted. The ground is partly allowed.

9. Against the above order, the assessee is in appeal before the ITAT.
10. The ld. Counsel of the assessee has submitted that the year under appeal being the first year of the company, there could be any accumulated profit in its hand and hence this section 2(22)(e) has no applicability. However, it has been contended that despite submission, the ld. Commissioner of Income Tax (Appeals) has not at all addressed this issue.
11. Upon careful consideration, I find considered cogency in the submissions of the assessee's ld. Counsel of the assessee. The payment as defined in section 2(22)(e) of the Act are considered deemed dividend, to the extent to which the company possess accumulated profits. The concerned section reads as under:

Definitions.

2. In this Act, unless the context otherwise requires,—

(22) "dividend"⁷ includes—

- (e) any payment⁹ 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)¹⁰[made after the 31st day of May, 1987, by way of advance or loan⁹ to a shareholder⁹, 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 profits¹¹ ;

but "dividend" does not include—

- (i) a distribution made in accordance with sub-clause (c) or sub-clause (d) in respect of any share issued for full cash consideration, where the holder of the share is not entitled in the event of liquidation to participate in the surplus assets ;
- ¹²[(ia) a distribution made in accordance with sub-clause (c) or sub-clause (d) in so far as such distribution is attributable to the capitalised profits of the company representing bonus shares allotted to its equity shareholders after the 31st day of March, 1964, ¹³[and before the 1st day of April, 1965] ;]
- (ii) any advance or loan made to a shareholder ¹⁴[or the said concern] by a company in the ordinary course of its business¹⁵, where the lending of money is a substantial part of the business of the company ;
- (iii) any dividend paid by a company which is set off by the company against the whole or any part of any sum previously paid by it and treated as a dividend within the meaning of sub-clause (e), to the extent to which it is so set off;
- ¹⁶[(iv) any payment made by a company on purchase of its own shares from a shareholder in accordance with the provisions of section 77A¹⁷ of the Companies Act, 1956 (1 of 1956);
- (v) any distribution of shares pursuant to a demerger by the resulting company to the shareholders of the demerged company (whether or not there is a reduction of capital in the demerged company).]

Explanation 1.—The expression "accumulated profits", wherever it occurs in this clause, shall not include capital gains arising before the 1st day of April, 1946, or after the 31st day of March, 1948, and before the 1st day of April, 1956.

Explanation 2.—The expression "accumulated profits" in sub-clauses (a), (b), (d) and (e), shall include all profits of the company up to the date of distribution or payment referred to in those sub-clauses, and in

sub-clause (c) shall include all profits of the company up to the date of liquidation, ¹⁸[but shall not, where the liquidation is consequent on the compulsory acquisition of its undertaking by the Government or a corporation owned or controlled by the Government under any law for the time being in force, include any profits of the company prior to three successive previous years immediately preceding the previous year in which such acquisition took place].

¹⁹[*Explanation 3.*—For the purposes of this clause,—

- (a) "concern" means a Hindu undivided family, or a firm or an association of persons or a body of individuals or a company ;
- (b) a person shall be deemed to have a substantial interest in a concern, other than a company, if he is, at any time during the previous year²⁰, beneficially entitled to not less than twenty per cent of the income of such concern ;]

12. Hence, I deem it appropriate to remit this issue to the file of the Assessing Officer to examine whether the concerned lender has accumulated profit or not and thereafter decide the issue as per law. Needless to add, the assessee should be granted adequate opportunity of being heard.

Apropos ground no. 3

13. During the course of assessment proceedings, the Assessing Officer perused the gross receipts from the business of Jowar feed in income from other source at Rs.8,65,930/- and claim of purchase expenses of Rs.5,14,900/- and other expenses of Rs.21,470/-. Accordingly, the assessee was shown caused to file details like bills, address, amount of sale, purchase and other expenses. The Assessing Officer states that the assessee did not submit any details or explanation in this regard.

Based on the above facts, in absence of production of supporting documents, the Assessing Officer treated the expenses amounting to Rs.5,36,370/- as unexplained expenses and added back to the total income of the assessee, against which the assessee appealed before the Id. Commissioner of Income Tax (Appeals).

14. Upon the assessee's appeal, the Id. Commissioner of Income Tax (Appeals) held as under:

6.3 I have considered the submissions of the appellant. I have also perused the findings of the A.O. in the assessment order and the remand report. The assessee has filed daily cash book for feed business and month wise statement of purchase, sale and stock. All the transactions of purchase and sales are found in cash. In absence of purchase bills, the expenses are not fully verifiable. Undoubtedly, the A.O. was not justified in disallowing entire purchase expenses. To cover the probable inflation of purchase expenses, disallowance of an amount of Rs.1,00,000/- on estimate is sustained and balance disallowance of Rs.4,36,370/- is hereby deleted.

15. Against the above order, the assessee is in appeal before the ITAT.

16. I have heard both the counsels and perused the records. I find that in this case the assessee has not produced purchase bills. Hence, the expenses have been held to be not fully verifiable. However, the Id. Counsel of the assessee has claimed that the gross profit shown is already very high. Hence, disallowance is on a higher side.

17. Upon careful consideration, I hold that the disallowance of Rs.50,000/- in this case would serve the end of justice. Accordingly, I modify the order of the Id. Commissioner of Income Tax (Appeals) and direct that the disallowance be limited to Rs.50,000/-.

18. In the result, this appeal by the assessee stands partly allowed for statistical purposes.

परिणामतः निर्धारिती की अपील सांख्यकीय उद्देश्य के लिए आंशिक स्वीकृत की जाती है ।

Order pronounced in the open court on 01.01.2018

Sd/-

(Shamim Yahya)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 01.01.2018

व.नि.स./Roshani, 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)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai