

आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL, 'B' (SMC) BENCH : CHENNAI

श्री अब्राहम पी. जॉर्ज, लेखा सदस्य के समक्ष।
[BEFORE SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER]

आयकर अपील सं./I.T.A. No.662/Mds/2017
निर्धारण वर्ष /Assessment year : 2009-2010.

Shri. Varusai Mohamed,
No.6, Zhackria Colony,
Choolaimedu High Road,
Chennai 600 094.

Vs. The Deputy Commissioner of
Income Tax,
Corporate Circle 5(1)
Chennai 600 034.

[PAN AADPV 3263F]
(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by : Ms. Jharna B. Harilal, FCA
प्रत्यर्थी की ओर से /Respondent by : Shri. B. Sagadevan, IRS, JCIT.

सुनवाई की तारीख/Date of Hearing : 02-01-2018
घोषणा की तारीख /Date of Pronouncement : 08-01-2018

आदेश / ORDER

This is an appeal filed by the assessee, directed against an order dated 30.11.2016 of Id. Commissioner of Income Tax (Appeals)-3, Chennai, wherein he sustained an addition of ₹14,50,116/- out of a total addition of ₹31,00,116/- made by the Id. Assessing Officer.

2. Assessee has filed this appeal with a delay of thirteen days. Condonation petition has been filed. Reason shown for the delay seem

to be justified. Ld. Departmental Representative did not raise any serious objection. Delay is condoned. Appeal is admitted.

3. Facts apropos are that assessee had filed his return of income for the impugned assessment year disclosing income of ₹3,67,400/-. During the course of assessment proceedings, it was noted by the Id. Assessing Officer that assessee had taken loans aggregating 31,00,116/- from one M/s. Rasim Exports Private limited (hereinafter as the Company) where he was a director holding shares in excess of 10%. The said Company was having accumulated profits of ₹2,90,57,875/- as on 31.03.2009. Explanation of the assessee was sought as to why Sec.2(22) (e) of the Income Tax Act, 1961 (in short 'the Act') should not be applied. His reply was that he had given immovable property valued at ₹54.55 lakhs as collateral security for loans raised by the said Company and also provided personal guarantee for such loans. As per the assessee, the Company had taken loans from banks for meeting its working capital requirement, and but for such personal guarantee and collateral security offered by his, the concerned banks would not have provided such credit facility. Further, as per the assessee, there were continuous transactions between him and the Company. Thus, the claim of the assessee was that Sec.2(22) (e) of the Act could not be applied on the amounts received by him as advance from the Company. Assessee also relied

on a decision of Co-ordinate Bench in the case of *CIT vs. G. Sreevidya, 138 ITD 427* and that of Hon'ble Calcutta High Court in the case of *Pradip Kumar Malhotra vs. CIT, 338 ITR 538*.

4. However, Id. Assessing Officer did not accept the above reply. According to him, the Company had a turnover of ₹8,57,12,270/- during the relevant previous year. As per the Id. Assessing Officer the Company though it was granted credit facilities by State Bank of Hyderabad, for which collateral security and personal guarantee were given by the assessee, it had not availed any such credit facilities. On the other hand, as per Id. Assessing Officer bill discounting credit of the Company with State Bank of Hyderabad stood reduced from ₹44,42,006/- to ₹29,44,485/-. Id. Assessing Officer noted that for other bank loans, no documents were furnished by the assessee for any guarantee given by him. As per the Id. Assessing Officer, in the case of *G. Sreevidya (supra)* decided by the Co-ordinate Bench, the concerned assessee had given collateral for a bank guarantee, on a pre-condition that the concerned Company gave loans to him. As for the judgment of Hon'ble Calcutta High Court in the case of *Pradip Kumar Malhotra (supra)* view taken by the Id. Assessing Officer was that the board of directors of the concerned Company from where Shri Pradip Kumar Malhotra had taken loans, had passed a resolution enabling them to give loans to Pradip Kumar

Malhotra. Thus according to him, both the cases relied on by the assessee were on different set of facts. He held that the sum of ₹31,00,116/- taken by the assessee as loan/advance from M/s. Rasim Exports Private limited was deemed dividend u/s.2(22)(e) of the Act. An addition was made and assessment completed accordingly.

5. Aggrieved, assessee moved in appeal before Id. Commissioner of Income. As per the assessee personal guarantee was given by him for the term loan raised by the Company from SIDBI and this was clear from the letter issued by SIDBI. Again as per the assessee, he had filed an affidavit with regard to the immovable property offered by him as collateral security for loans availed by the Company from State Bank of Hyderabad. Contention of the assessee was that there was a mutual agreement between him and the Company, by which the latter had agreed to provide financial assistance to the assessee as and when required by him.

6. However, Id. Commissioner of Income Tax (Appeals) was not impressed by the above arguments. Nevertheless he found that assessee had given a loan of ₹16,50,000/- to Company and hence only the net amount of ₹14,50,116/- could be considered for addition u/s.2(22) (e) of the Act. Thus he confirmed the addition to the extent of ₹14,50,116/-.

7. Now before me, Id. Authorised Representative strongly assailing the orders of the lower authorities submitted that intention of the legislature for inserting Sec.2(22) (e) of the Act was clear from the decision of the Kolkata Bench of the Tribunal in the case of *ITO vs. Gayatri Chakraborty (2016) 45 ITR(Trib) 197*. According to her, unless assessee had given a personal guarantee and collateral security for the loans raised by the Company, it could not have fulfilled its export commitments. As per the Id. Authorised Representative, there was a Board resolution of the Company authorizing the assessee to withdraw funds from the Company for his personal use. Contention of the Id. Authorised Representative was that transactions were quid-pro-quo and commercial in nature. As per the Id. Authorised Representative this arrangement was purely based on business expediency. Id. Authorised Representative further, submitted that there was an orally agreed pre-condition in this regard between the assessee and the Company when he provided the personal guarantee and collateral security. As per the Id. Authorised Representative this was clear from the Board resolution dated 30th June, 2008. Reliance was placed on the judgment of Hon'ble Delhi High Court in the case of *CIT vs. Creative Dyeing and Printing P. Ltd 318 ITR 476* and that of Hon'ble Bombay High Court in the case of *CIT vs. Nagindas M. Kapadia, 177 ITR 393*. She thus argued that the advance received by

the assessee from the Company stood outside the preview of Sec.2(22) (e) of the Act.

8. Per contra, Id. Departmental Representative strongly supporting the orders of the authorities below submitted that decision of Co-ordinate Bench in the case of *G. Sreevidya (supra)* had no applicability since there was no pre-condition attached to the personal guarantee and collateral security offered by the assessee. Further according to him, the Board resolution was also not on record.

9. Ad libitum reply of the Id. Authorised Representative was that the Board resolution was very much there. In any case, according to her, this was not a vital ingredient to show that there was a reciprocal arrangement. According to her, addition u/s.2(22)(e) of the Act was not justified in law.

10. I have considered the rival contentions and perused the orders of the authorities below. Id. Assessing Officer in the assessment order has clearly noted that the Company M/s. Rasim Exports Private limited had not availed any cash credit facility from State Bank of Hyderabad. He has also noted that major interest expenditure incurred by the Company was on term loans from SIDBI. Id. Assessing Officer also states that assessee was unable to furnish documents regarding collateral security given by him for bank loans

other than to State Bank of Hyderabad. Terms and conditions attached to the financial assistance provided by SIDBI to M/s. Rasim Exports Private limited placed at paper book papers 15 to 17 state as under:-

“Collateral Security

“First charge by way of mortgage in favour of SIDBI on all the immovable properties (both present and future) alongwith building and other structures comprised in SF No.S. No.127/2 & 98/5 and situate at Poonamalee High Road, Goparasanallur and Sennerkuppam Village, Poonamalle Taluk, Thiruvallur Dist, admeasuring 17397 sq.ft.

Disbursement if any, pending creating of security as above shall carry additional interest of 1% p.a. from the date of disbursement.

3. Guarantee

Personal Guarantee

The Borrower shall procure and furnish unconditional and irrevocable guarantees of Shri. R. Varusai Mohamed, Smt. V. Fasulunnisa and Smt. P. Noorjahan. The guarantee shall be joint and several and no guarantee commission shall be payable by the Borrower to the guarantors”.

What is stated in the Board resolution dated 30.06.2008 placed at paper book page 33 read as under:-

“CERTIFIED TRUE COPY OF THE RESOLUTION PASSED AT THE MEETING OF THE BOARD OF DIRECTORS OF M/s. Rasim Exports Private limited HELD ON 30.06.2008 at Annexure building, DTA unit, 2/230, Ethiraj 2nd street, Avadi road, Karaiyanchavadi, Chennai 600 056.

RESOLVED THAT the company has decided to authorize its directors, Mr. R. Varusai Mohamed and Mrs. V. Fasulunnisa to withdraw funds from the company as per requirement for personal purposes against the personal guarantee and the collateral security given by them for facilitating the enhancement of credit facility taken by the company

Specimen Signatures of Directors:-

1. *Name and Signature - Mr. R. Varusai Mohamed*
2. *Name and Signature – Mrs. V. Fasulunnisa”..*

As for the collateral offered by the assessee for loans raised by the Company from State Bank of Hyderabad, there is an affidavit of the assessee which is placed at paper book pages 21 to 25. What is stated at para 3 to 9 of this affidavit is apposite and this is reproduced hereunder:-

“3. That I am/ we are owner(s) of the property with possession and I/We have absolute rights and powers for mortgaging the property.

*4. That the property belongs to our joint family and I /We have offered the property as security to the bank the consent of all co-parceners in my/our family. {I/We have been authorised by the other co-parceners/joint owners/joint family members to create the mortgage in favour of the Bank.} ***

5. That the Bank has sanctioned various credit facilities to Shri/M/s. RASIM EXPORTS PVT LTD.,2/230 ETHLRAJ NAIDU COMPLEX, AVADI ROAD., KARAIYANCHAYADI CHENNAI - 56 on my/our confirmation to give said property as security.

6. That the property is free from all encumbrances, charges etc., and there are no dues payable to any statutory authorities or others in respect of this property. No taxes, or levies or fees are payable" to any municipal or other.

7. That the property is not the subject matter of any agreement of sale or other agreement or attachment, injunction from any court or statutory authorities.

8. That there is no litigation pending in respect of this property.

9. That no interest in favour of any third party is created in respect of the property. ”.

A question from the Bench whether the same property was offered as collateral to both SIDBI as well as State Bank of Hyderabad, did not elicit a clear answer from the Id. Authorised Representative. Resolution of the Company which has been reproduced does not specify the amount which assessee could withdraw from the Company. It is highly improbable for a prudent Company to authorize a share holder to withdraw funds from it, without setting out any limit, based only on the personal requirement of the concerned shareholder. However, if the assessee is able to demonstrate that he had suffered a detriment by offering of personal guarantee and collateral to the loans raised by the Company, there indeed can be an element of quid-pro-quo. As mentioned by the Id. Departmental Representative in the case of *Pradip Kumar Malhotra* (supra) decided by Hon'ble Calcutta High Court, there was on record, a clear Board resolution specifying the parameters within which a loan was to be given. In the case of *Srividya* (supra) decided by Co-ordinate Bench of the Tribunal, the collateral security given by the concerned assessee was attached with a pre-condition that he will be given loans by the concerned Company. I also find that Id. Assessing Officer had not examined the question whether assessee had given the same collateral security for loans

raised by the assessee from SIDBI and State Bank of Hyderabad and how far the claim was correct. Much more facts have to be brought on record before the question whether the loans taken by the assessee could be deemed as dividend can be properly addressed. Considering these circumstances, I am of the opinion that issue requires a fresh look by the Id. Assessing Officer. I set aside the orders of the lower authorities and remit the issue regarding addition u/s.2(22) (e) of the Act back to the file of the Id. Assessing Officer for consideration afresh in accordance with law.

11. In the result, appeal of the assessee is allowed for statistical purpose.

Order pronounced on Monday, the 8th day of January, 2018, at Chennai.

Sd/-

(अब्राहम पी. जॉर्ज)

(ABRAHAM P. GEORGE)

लेखा सदस्य/ACCOUNTANT MEMBER

चेन्नई/Chennai

दिनांक/Dated: 8th January, 2018

KV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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