

IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM

I.T.A. Nos.75-77/Coch/2016
Assessment Years : 2007-08, 2011-12 and 2012-13

Dr. K.M. Ashik, 10B, Skyline Palace Heights, Jawahar Nagar, Kozhikode. [PAN: ACHPA 5112DE]	Vs.	The Deputy Commissioner of Income-tax, Central Circle-2, Kozhikode
(Assessee-Appellant)		(Revenue-Respondent)

Assessee by	Shri G. Surendranath Rao, CA
Revenue by	Shri A. Dhanaraj, Sr. DR

Date of hearing	30/01/2018
Date of pronouncement	30/01/2018

ORDER

Per CHANDRA POOJARI, ACCOUNTANT MEMBER:

These appeals by the assessee are directed against the order of the CIT(A)-IV, Kochi dated 30/11/2015.

2. The assessee has raised the following ground:

"(ii) The Commissioner of Income Tax(Appeals) should have appreciated that the debit balance in the books of Moidu's Medicare Private Ltd., a company which is having more than 10% shareholding, has arisen, on account of business transaction and is not a loan or an advance. For the provisions of section 2(22)(e) to apply, the precondition is that a shareholder having substantial interest in a company in which the public

are not interested should have been paid a loan or an advance. In the instant case the debit balance did not arise out of a loan or advance but was only due to business transactions in the normal course of business. The provisions of sec. 2(22)(e) are hence not applicable to the appellant's case."

3. The brief facts of the case are that M/s. Moidu Medicare Pvt. Ltd. is a private limited company in which the public are not substantially interested. The company runs Hospital, Pharmacy, Scan etc. as well as engaged in issuing Health Certificartes to those who seek employment in Gulf countries. Dr. K. Moidu is the Managing Director and his wife, Dr. Amina Moidu and their children Dr. K.M. Mehaboob and Dr. K.M. Navas and Dr. K.M. Ashik are the Directors. All the Directors are beneficial owners of the share holding and have more than 10% of the voting power. It was submitted by the assessee that Assessing Officer made addition under section 2(22)(e) of the Act without considering the appellant's circumstances and explanation that the loans and advances are given as quid pro quo and hence it cannot be treated as deemed dividend in the hands of share holder having substantial interest. Every payment by a company to its shareholders may not be a loan/advance so as to come within the ambit of section 2 (22)(e). According to the assessee the amount was withdrawn only to meet his short term cash requirements against offering his personal assets/guarantee and collateral security for loans taken by the company which was for the benefit of the company, the liquidity position of the assessee had gone down and the amount forwarded by the company to the assessee was not in the shape of advances/loans. The arrangement between the assessee and the

company was merely for the sake of convenience arising out of business expediency. He relied on the judgment of Delhi High Court in the case of Creative Dyeing and Printing (318 ITR 476) and Calcutta High Court in the case of Pradip Kumar Malhotra (338 ITR 538).

4. At the time of hearing the Ld. AR made further submissions which is as follows:

"The addition of Rs.5,32,205/- as deemed dividend without considering that the appellant already had a credit balance of Rs.26,91,137.70 in the books against his name is unjustified. At no time during the year was any money advanced by the company to the appellant as the debits were only repayments against the existing credits and hence the addition on account of deemed dividend by invoking S. 2(22)(e) is an error and without any basis. The appellant had credits in the accounts of the company throughout the year and as on the year end date the appellant had the following credit balances :

HDFC Home loan No 310475797-	5,13,429
Loan from directors	21,77,708
Total	26,91,137

When the appellant already has a credit balance any debit against his name would only be a repayment of the amount due to him from the company and hence the assessment of Rs.5,32,205/- under Sec 2(22)(e) is totally unjustified. The fact that only net balance be considered for deemed dividend has been confirmed by this Tribunal in The Deputy Commissioner of Income Tax, Circle, Kottayam Vs Shri. N.Rajagopal (ITA No:144/Coch/2014 dated 05.09.2014).

Without prejudice to the above, it is submitted that, the learned CIT(Appeals) should have considered that the appellant being a director had regular business dealings with the company. The appellant had advanced money to the company for the requirements of the company and when money was need by the appellant, the company had repaid some of the funds to him. Hence the advance of money by the appellant and its return

can only be taken to be business transactions of the company and not loans or advances simpliciter. Such transactions are not hit by section 2(22)(e) of the Income Tax Act. Your appellant relies on the following decisions.

CIT v. Creative Dyeing & Printing (P.) Ltd. [2009] 318 ITR 476. The departmental SLP filed against this decision has been dismissed by the supreme court (328 ITR (St)10) (SC)

*CIT v. Ambassador Travels (P.) Ltd. [2009] 318 ITR 376
The matter has now been put beyond doubt by the CBDT through its circular No.19/2017 (F.NO.279/MISC/140/2015/ITJ) dated 12.06.2017 in which it has been clarified that trade advances which are in the nature of commercial transactions would not fall within the ambit of the word "advances " in S.2(22) (e) of the Act."*

5. The Ld. DR relied on the order of the authorities below.

6. We have heard the rival submissions and perused the material on record. We have gone carefully through the financial statements of M/s. Moidu Medicare Pvt. Ltd. for the above assessment years. We have gone through the assessee's account in the books of accounts of M/s. Moidu Medicare Pvt. Ltd. We are unable to trace the assessee's corresponding loan account which resulted in addition u/s. 2(22)(e) of the Act. At the time of hearing, the Ld. AR clarified that it was reflected in the cash flow statement filed by the assessee and after considering the same in the cash flow statement, the Assessing Officer made addition. Since the impugned amount which was the subject matter of addition u/s. 2(22)(e) of the Act, was not reflected in the ledger accounts of M/s. Moidu Medicare Pvt. Ltd., we are not in a position to appreciate this argument of the assessee's Counsel. If it is not reflected in the accounts of M/s. Moidu Medicare

Pvt. Ltd., the addition in the hands of the assessee should be made u/s. 68 of the Act and not u/s. 2(22)(e) of the Act. This fact needs to be verified by the Assessing Officer. Accordingly the entire issue of addition u/s. 2(22)(e) of the Act is remitted back to the file of the Assessing Officer for fresh consideration. The Assessing Officer shall decide the issue in accordance with law after affording reasonable opportunity of hearing to the assessee.

7 In the result, the appeals of the assessee are allowed for statistical purposes.

Pronounced in the open court on 30th January, 2018.

sd/-
(GEORGE GEORGE K.)
JUDICIAL MEMBER

sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Place: Kochi

Dated: 30th January, 2018

GJ

Copy to:

1. Dr. K.M. Ashik, 10B, Skyline Palace Heights, Jawahar Nagar, Kozhikode.
2. The Deputy Commissioner of Income-tax, Central Circle-2, Kozhikode.
3. The Commissioner of Income-tax(Appeals)-IV, Kochi
4. The Commissioner of Income-tax, Central, Kochi.
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin