

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम
IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्री वी. दुर्गराव, न्यायिक सदस्य एवं
श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष
BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A.No.71/Vizag/2017
(निर्धारण वर्ष / Assessment Year: 2012-13)

ITO, Ward-2(2), Guntur (अपीलार्थी / Appellant)	Yarlagadda Surendra Babu Guntur [PAN No.AAGPY3634A] (प्रत्यार्थी / Respondent)
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C.O. No.42/Vizag/2017
(Arising out of I.T.A.No.71/Vizag/2017)
(निर्धारण वर्ष / Assessment Year: 2012-13)

Yarlagadda Surendra Babu Guntur (अपीलार्थी / Appellant)	ITO, Ward-2(2), Guntur (प्रत्यार्थी / Respondent)
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अपीलार्थी की ओर से / Appellant by	: Shri G. Satyanandam, DR
प्रत्यार्थी की ओर से / Respondent by	: Shri G.V.N. Hari, AR

सुनवाई की तारीख / Date of hearing	: 06.03.2018
घोषणा की तारीख / Date of Pronouncement	: 09.03.2018

आदेश / O R D E R

PER D.S. SUNDER SINGH, Accountant Member:

This appeal filed by the revenue is directed against order of the Commissioner of Income Tax (Appeals)-1 {CIT(A)}, Guntur vide ITA No.24/2015-16/CIT(A)-1/GNT dated 26.10.2016 for the assessment year 2012-13. The cross objection filed by the assessee is in support of the order passed by the Ld. CIT(A).

2. All the ground of appeal are related to the deemed dividend assessed u/s 2(22)(e) of the Income Tax Act, 1961 (hereinafter called as 'the Act'). The assessee is an individual deriving salary income as a Director of the company. The assessee is one of the Director in M/s. Yarlagadda Exports (P) Ltd., Guntur. During the previous year relevant to the assessment year, there was an outstanding balance of ₹ 45,16,977/- out of which a sum of ₹ 17,60,219/- was borrowed during the year from M/s. Yarlagadda Exports Pvt. Ltd. in which the assessee is one of the Directors and having more than 10% shareholding in that company. Out of the outstanding amount of ₹ 45,16,977/- a sum of ₹ 17,60,219/- was borrowed during the year. Since the assessee is having substantial interest in the lending company, the A.O. has called for explanation from the assessee as to why the amount of ₹ 45,16,977/- should not be treated as deemed dividend u/s 2(22)(e) of the Act. The

assessee explained in response to the A.O's questionnaire, that the amount was borrowed from the company as a loan and making the repayment of loan along with interest at the bank rate and he did not get any extraordinary benefit out of such borrowings. Therefore, submitted that that it is a pure loan transaction and should not be treated as deemed dividend u/s 2(22)(e) of the Act. However, the A.O. was not convinced with the explanation offered by the assessee, since the assessee is holding more than 10% of share holding and there are substantial profits in the company. The A.O. treated the entire loan amount as deemed dividend u/s 2(22)(e) of the Act and brought to tax.

3. Aggrieved by the order of the A.O., the assessee went on appeal before the CIT(A). Ld.CIT(A) analysed the transaction completely and examined the borrowings and the repayment along with interest and relied on the decision of Hon'ble Delhi High Court in the case of CIT Vs. Creative Dyeing and Printing Private Limited and allowed the appeal of the assessee. For ready reference, we extract the relevant para of the order of the Ld. CIT(A), which reads as under:

"In view of the credit limits sanctioned to the Company, the Company was able to carry on its export business peacefully and satisfactorily. It was also able to honour its commitments towards the overseas buyers by exporting the Tobacco in time. Thus, the company had the opportunity to make a good business as well as a sizeable profit, by virtue of the availability of adequate liquid funds.

It may be emphatically provided the size of that business made by the company was not possible, without the sanctioned limits by State Bank

of India. For availing the credit limits I have provided all my properties along with my personal guarantee. One among such properties was the old house, located at Vikasnagar, whereas I contemplated to construct a new house. For the construction of the house at the site, I required funds. Since my financials were inadequate (with the fact that all my properties are under mortgage and my personal guarantee provided for the credit facility sanctioned to YEPL), the State Bank of India had not provided any additional credit facility to me. Hence, the Company has provided the adequate funds for the construction of my house, with a condition for the repayment of interest at the Bank Rate as well as the principal. Accordingly, I have borrowed the funds in phases and in proportion to the construction. All these facts were declared in my personal Return Income and at the time of Hearing.

In the case of CIT. Vs Creative Dyeing and Printing Private Limited, the Delhi High Court, discussed the similar issue as that a plain reading of the recommendations of the taxation enquiry commission and the speech of the then Finance Minister would show that the purpose of intention of sub-clause (e) to section 2(6A), in the 1922 Act was to bring within the tax net monies paid by closely held companies to their principal shareholders in the guise of loans and advances to avoid payment of tax.

Therefore with the said background kept in mind, it is clear that section 2(22)(e) of the Act, which is in pair material with sub-clause(e) of section 2(6A) of the 1922 Act, plainly seeks to bring within the tax net accumulated profits, which distributed by closely held Companies in the form of Loans. The purpose being that the persons who manage such closely held companies should not arrange their affairs in a manner that they assist the share holders' money in the form of in advance or loan, in avoiding the payment of taxes, by having these companies pay or distribute, what would legitimately be dividend in the hands of the shareholders.

At the same time, by granting advance, if the business purpose of the company is served, which is not the sum, which otherwise would have distributed as dividend cannot be brought within the deeming provisions of treating such advance as deemed dividend. It is to be ascertained that what is purpose of such advance and any such advance is arising out during the course of business or out of business expediency.

1. I humbly request you to pay kind attention to the following decided case laws with the same facts, wherein it was decided by the Hon'ble Legal Forums that such advancing by the Company (in the similar context and facts of my case), made during the course of business or for the expedience of the business, is not a gratuitous payment. I am enclosing here copies of the following.

- a. ACIT Vs Smt. G. Srividya, ITAT Madras Bench, Ref. ITA No.1270/MAD /2011 DT.28.06.20 12.
- b. Pradeep Kumar Malhotra vs CIT, W.Bengal- V, Calcutta High Court, ITA No.219 of 2003.
- c. CIT Vs Creative Dyeing and Printing Pvt Ltd / Delhi High Court Ref, 318 ITR 476 (DEL)
- d. Dr. Ch. Sri Padmavathi Vs. DCIT, Central Circle-31 Visakhapatnam Bench of ITAT Ref. ITA NO. 324/ VIZAG/2013, Dt. 04.07.2014.

2. In all the above cases, it was stated and decided that by virtue of offering personal guarantee and collateral security for the benefit of the Company, any such advance by the Company to the Appellant is, as a consequence of further consideration (quid pro quo), which is also beneficial to the Company. Hence, it is to be construed that the amount forwarded by the company to the Appellant shall not be in the shape of advances or loans and not as a gratuitous payment. Thus the advance is not simpliciter, but an advance made for the business expediency. The arrangement between the assessee and the company was merely for the sake of convenience arising out of business exigency. In the facts and the circumstances, it is not appropriate to hold that the amount withdrawn by the Appellant partakes character of deemed dividend under the provisions of Section 2(22)(e) of the I.T. Act.

4. Aggrieved by the order of the Ld. CIT(A), the revenue is in appeal before this Tribunal.

5. Appearing for the revenue, the Ld. D.R. argued that the assessee has taken a loan of ₹ 44,16,977/- from the assessee company and is director of the assessee company having controlling in shares i.e. more than 10% of the shares since the assessee satisfied both the conditions of having more than 10% shareholding and sufficient reserves in the lending company, the loan taken by the assessee

required to be taxed as deemed dividend u/s 2(22)(e) of the Act and argued that the A.O. has rightly invoked the provision of section 2(22)(e) and brought to tax the amount borrowed by the assessee. Hence, argued that no interference is called for and the order of the CIT(A) required to be set aside.

6. On the other hand, the Ld. Counsel for the assessee submitted that the assessee is an individual deriving salary income and for the purpose of financial requirements of the company the assessee had mortgaged his assets in the bank and given personal guarantee and hence the assets of the assessee are blocked as security to the amounts advanced to the company and there were no assets available to the assessee to make personal borrowings. The assessee was constructing a house for which the funds were required, hence, the assessee has taken a loan from the company periodically for construction of his house. The entire loan amount is repaid along with interest, therefore, the Ld. A.R. argued that this is a pure loan transaction which should not be held as a deemed dividend u/s 2(22)(e) of the Act. Since the entire amount was paid along with interest and requested uphold the order of the Ld.CIT(A).

7. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. In this case, the assessee has taken a loan from the company for construction of house. The assessee had mortgaged his properties for availing credit limits by the company and dried up his resources for getting financial assistance from the banks. Therefore, he had no option except to take the loan from the assessee company or to get released the properties mortgaged to the Bank. Since the properties cannot be released unless the credit limits are completely repaid, he has taken the advance from assessee company for construction of his house and the entire amount of advance was repaid along with interest as evidenced from the order of the Ld. CIT(A). On the similar facts and circumstances, this Tribunal in the case of DCIT Central Circle-1 Visakhapatnam Vs. Sri Hariprasad Bhararia in ITA Nos.435 to 441/Vizag/2014 dated 9.9.2016 held that the transaction between the assessee and the company are not within the meaning of loans and advances as defined u/s 2(22)(e) of the Act and accordingly, deleted the addition made towards deemed dividend under the provisions of section 2(22)(e) of the Act. For ready reference we extract the relevant part of the order of this Tribunal in para Nos.17 & 18 which reads as under:

"17. Having heard both the parties and having considered the materials available on record, we find that the A.O. has made additions towards loans and advances under the provisions of section 2(22)(e) of the Act, on the ground that transaction between the assessee and his company is coming within the definition of loans and advances. The assessee claims that transaction between himself and his company is not a gracious payment which is coming within the meaning of loans and advances as defined u/s 2(22)(e) of the Act. The CIT(A) after considering the explanation furnished by the assessee and also following the decision of Kolkata High Court, in the case of Pradip Kumar Malhotra Vs. CIT, held that the transaction between the assessee and his company are not gracious payment which is coming within the meaning of loans and advances as defined u/s 2(22)(e) of the Act. The relevant portion of the CIT(A) order is reproduced hereunder:

"7.2 However, even on merits also, alternate contention of the appellant is considered. It is noted that the appellant has mortgaged his personal property to various banks and obtained loans for the business of the company. The documents filed by the appellant of the sanction letters from various banks supports this contention and the details of the mortgage loans taken from various banks along with sanction letters and the properties provided by the appellant as collateral security to obtain loans from the said banks is tabulated below.

<i>Date of sanction</i>	<i>Name of the bank</i>	<i>Name of the borrower</i>	<i>Credit facility (Rs.)</i>	<i>Property mortgaged</i>
23.3.2004	State Bank of Hyderabad, Siripuram junction, Vizag	M/s. Sampath Vinayak Steels Pvt. Ltd.	30 lakhs	Agricultural land
10.2.2006	State Bank of Hyderabad, Siripuram junction, Vizag	M/s. Sampath Vinayak Steels Pvt. Ltd.	100 lakhs	4 storied building on 555 sq.yds situated at Rajendranagar, Vizag in the name of (a) Hari Prasad Bhararia (b) Shivalal Bhararia (brothers)
Renewal	State Bank of Hyderabad, Siripuram junction, Vizag	M/s. Sampath Vinayak Steels Pvt. Ltd.	100 lakhs	4 storied building on 555 sq.yds situated at Rajendranagar, Vizag in the name of (a) Hari Prasad Bhararia (b) Shivalal Bhararia (brothers)
7.11.2007	The Dhanalakshmi Bank, VIP Road, VizaG	M/s. Sampath Vinayak Steels Pvt. Ltd.	150 lakhs	(1) 4 storied building on 555 sq.yds. situated at Rajendranagar, Vizag in the name of (a) Hari Prasad Bhararia (b) Shivalal Bhararia (brothers) (2) VUDA Apartment admeasuring 1485 sq.ft. situated at MMTc colony, Seethammadhara, Vizag in the name of Hari Prasad Bhararia.

<i>Renewal</i>	<i>The Dhanalakshmi Bank, VIP Road, Vizag</i>	<i>M/s. Sampath Vinayak Steels Pvt. Ltd.</i>	<i>150 lakhs</i>	<i>(1) 4 storeyed building on 555 sq.yds. situated at Rajendranagar, Vizag in the name of (a) Hari Prasad Bhararia (b) Shivlal Bhararia (brothers) (2) VUDA Apartment admeasuring 1485 sq.ft. situated at MMTC Colony, Seethammadhara, Vizag in the name of Hari Prasad Bhararia.</i>
<i>13.11.2009</i>	<i>Axis Bank Ltd., Ramnagar, Vizag</i>	<i>M/s. Sampath Vinayak Steels Pvt. Ltd.</i>	<i>300 lakhs</i>	<i>(1) 4 storied building on 555 sq.yds situated at Rajendranagar, Vizag in the name of (a) Hari Prasad Bhararia (b) Shivlal Bhararia (brothers) (2) VUDA Apartment admeasuring 1485 sq.ft. situated at MMTC colony, Seethammadhara, Vizag in the name of Hari Prasad Bhararia.</i>
<i>12.11.2010</i>	<i>Axis Bank Ltd. Ramnagar, Vizag</i>	<i>M/s. Sampath Vinayak Steels Pvt. Ltd.</i>	<i>400 lakhs</i>	<i>(1) 4 storied building on 555 sq.yds. situated at Rajendranagar, Vizag in the name of (a) Hari Prasad Bhararia (b) Shivlal Bhararia (brothers) (2) VUDA Apartment admeasuring 1485 sq.ft. situated at MMTC colony, Seethammadhara, Vizag in the name of Hari Prasad Bhararia.</i>

Even till date, the Axis Bank has granted cash credit facility to the said company on the basis of the collateral security provided by the properties and also the personal guarantee of the appellant and his family members (latest sanction letter being 6.3.2013).

*7.3 It is noted that the facts in the case of **Pradip Kumar Malhotra vs CIT** (supra) are akin to the facts under reference which is given below.*

"The phrase "by way of advance or loan" appearing sub-clause(e) of section 2(22) of the Income tax Act, 1961 must be construed to mean those advances or loans which a shareholder enjoys simply on account of 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) ho/ding not less than ten per cent of the voting power; but if such loan or advance is given to such shareholder as a consequence of any further consideration which is beneficial to the company received from such a shareholder, in such case, such advance or loan cannot be said to be deemed dividend within the meaning of the Act. Thus, gratuitous loan or advance given by a company to those classes of shareholders would come within the purview of section 2(22) but not cases where the loan or advance is given in return to an advantage conferred upon the company by such shareholder.

The assessee had substantial shareholding in a private company. The assessee permitted his immovable property to be mortgaged to the bank for enabling the company to take the benefit of loan and in spite of request of the assessee, the company was unable to release the property from mortgage. Consequently, the board of directors of the company passed a resolution authorizing the assessee to obtain from the company interest free deposit up to Rs.50 lakhs as and when required. During the previous year relevant to the assessment year 1999-2000, the assessee obtained from the company a sum of Rs.20,75,000 by way of security deposit. Out of the amount, a sum of Rs.20 lakhs was subsequently returned by the assessee to the company. In the assessment made for 1999-2000 the Assessing Officer added the sum of Rs. 20,75, 000 as deemed dividend.

This was upheld by the Tribunal. On appeal to the High Court

Held, allowing the appeal, that for retaining the benefit of loan availed of from the bank, if decision was taken to give advance to the assessee such decision was not to give gratuitous advance to its shareholder but to protect the business interest of the company. The sum of Rs.20,75,000 could not be treated as deemed dividend,"

*07.4 Since in the present case also, the appellant has mortgaged his property to various banks and obtained loans for the business of the company. Even though there is a personal element of individual benefit to the appellant, the Company from which the advances were taken also benefited by using the property as collateral security to the bank. Thus, as observed by the Hon'ble Calcutta High Court that the loan or advance given in return to an advantage conferred upon the Company by a shareholder is not a gratuitous loan or advance given by the Company and does not come under the purview of section 2(22)(e). In view of the above, **the addition made on account of deemed dividend by the Assessing Officer is ordered to be deleted for AYs 2005-06 to 2011-12. Since the issue is decided in favour of the appellant, the matter relating to the appellant's remuneration does not arise."***

18. The CIT(A) has considered the issue in detail and held that the transaction between the assessee and his company are not coming within the meaning of loans and advances as defined u/s 2(22)(e) of the Act. The facts remain unchanged. The revenue has failed to brought on record any evidences to prove that the findings of the fact recorded by the CIT(A) is incorrect. Therefore, we are of the view that the CIT(A) has rightly deleted additions made towards deemed dividend under the provisions of section 2(22)(e) of the Act. We do not see any reason to interfere with the order of the CIT(A). Hence, we inclined to uphold the CIT(A) order and dismiss the appeal filed by the revenue."

8. Since the facts of the assessee's case are identical, respectfully following the view taken by the coordinate bench, we hold that the transaction is not deemed dividend within the meaning of

section 2(22)(e) of the Act and accordingly, delete the addition made by the A.O. and dismiss the appeal of the revenue.

9. The Cross objection filed by the assessee is supportive. Since the revenue's appeal is dismissed, the cross objection filed by the assessee become infructuous and dismissed.

The above order was pronounced in the open court on 9th Mar'18.

Sd/-

(वी. दुर्गराव)

(V. DURGA RAO)

न्यायिक सदस्य/JUDICIAL MEMBER लेखा सदस्य/ACCOUNTANT MEMBER

विशाखापटणम /Visakhapatnam:

दिनांक /Dated : 09.03.2018

VG/SPS

Sd/-

(डि.एस. सुन्दर सिंह)

(D.S. SUNDER SINGH)

न्यायिक सदस्य/JUDICIAL MEMBER लेखा सदस्य/ACCOUNTANT MEMBER

विशाखापटणम /Visakhapatnam:

दिनांक /Dated : 09.03.2018

VG/SPS

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. अपीलार्थी / The Appellant – The ITO, Ward-2(2), Guntur
2. प्रत्यार्थी / The Respondent – Yarlagadda Surendrababu, D.No.4-19-89, 8th Lane, Vikas Nagar, Guntur
3. आयकर आयुक्त / The CIT, Guntur
4. आयकर आयुक्त (अपील) / The CIT (A)-1, Guntur
5. विभागीय प्रतिनिधि, आय कर अपीलीय अधिकरण, विशाखापटणम / DR, ITAT, Visakhapatnam
6. गार्ड फ़ाईल / Guard file

आदेशानुसार / BY ORDER

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Sr. Private Secretary
ITAT, VISAKHAPATNAM