



IN THE INCOME TAX APPELLATE TRIBUNAL "H", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM

&

SHRI SANDEEP GOSAIN, JM

ITA No.5172/Mum/2016

(Assessment Year :2010-11)

Income Tax Officer - 9(1)(1) Mumbai	Vs.	Mr. Manoj Upadhyay C/o. Accu Dat Transcription Services Pvt. Ltd., 2 nd Floor, Linkage House, 6 Marol Co-op Industrial Estate, Marol, Andheri (E) Mumbai – 400 059
PAN/GIR No.AAUPU4335L		
Appellant)	..	Respondent)

CO No.18/Mum/2017

(Assessment Year :2010-11)

Mr. Manoj Upadhyay C/o. Accu Dat Transcription Services Pvt. Ltd., 2 nd Floor, Linkage House, 6 Marol Co-op Industrial Estate, Marol, Andheri (E) Mumbai – 400 059	Vs.	Income Tax Officer - 9(1)(1) Mumbai
PAN/GIR No.		AAUPU4335L
Appellant)	..	Respondent)

Assessee by	Shri M.C. Omi Ningshen
Revenue by	Shjri Prakash Jhunjunwala & Shri Vishnu Agarwal
Date of Hearing	19/04/2018
Date of Pronouncement	31/05/2018

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by the Revenue and Cross Objection by the assessee against the order of CIT(A) for the A.Y.2010-11 in the matter of order passed u/s.143(3) r.w.Section 147 of the IT Act.

2. Following grounds have been taken by the Revenue:-

1. *"Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the addition made u/s.2(22)(e) without appreciating the fact that the assessee held 50% of the shares in Accu Dat Transcription Services Ltd and was both a registered and a beneficial shareholder as disclosed by the assessee in the return filed before ROC and before Income tax in which the assessee disclosed that it held 50% of the shares from A.Yr. 2007-08 onwards."*

2. *"Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in appreciating the fact that the gift deed made by the assessee to transfer 4200 shares to his wife on 25.05.2007 was a sham since the gift deed was not registered and was made only to reduce the shareholding of the assessee in Accu Dat Transcription Services Ltd to less than 10% whereas on the other hand, the assessee as the Principal Officer of the company had filed returns before ROC and Income Tax disclosing the shareholding as 50%."*

3. *"Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in ignoring the fact that both the Directors of the assessee company viz. Manoj Upadhyay and Pooja Sharma have gifted their shareholding in Accu Dat Transcription Services Ltd through gift deed on stamp papers bought on 22.05.2007 which have been procured in the name of Mr.V.P. Singh, Advocate who is neither a donor nor a donee thereby leading to a conclusion that the same was an afterthought to escape payment of legitimate taxes."*

3. Rival contentions have been heard and record perused.

4. Facts in brief are that assessee is a Director in Accu Dat Transcription Services Pvt. Ltd., During the year under consideration, assessee has received a loan of Rs.38,19,274/-

from this company. The return of income was e-filed on 23.07.2010 declaring total income at Rs.4,74,160/-. The case was duly processed u/s. 143(1) of the Income Tax Act, 1961. Thereafter AO found that the assessee had received a loan of Rs. 34,15,774/- from Accu Dat Transcription Services Pvt. Ltd. in which the assessee is one of the shareholder holding 50% shareholding. Thereafter the case was reopened by issuing notice u/s. 148 of the I.T. Act, 1961 and the assessment was completed u/s. 143(3) r.w.s.147 of the IT Act, 1961 dated 30/11/2015, determining the total income of the assessee at Rs.42,93,430/- by making an addition of Rs.38,19,274/- on account of deemed dividend.

5. By the impugned order, CIT(A) deleted the addition after having the following observation:-

4. I have carefully perused the assessment order of the AO and the submissions made by the AR in support of his arguments. After taking into consideration, the AO's findings and the appellant's oral and written submissions made during the course of hearing as well as facts of the case, decision on various grounds are adjudicated as under:

4.1. Ground No. 1

4.1.1 Vide this ground the appellant has agitated against treating the deemed dividend income of Rs.38,19,274/- u/s.2(22)(e) of the Act. In para 5.1 of the assessment order the Id. A.O. mentioned that the assessee, Shri Manoj Upadhyay was the director of the said company who was also the beneficial owner having 50% share-holding in the aforesaid company. From perusal of the ledger A/c., the Id.A.O. observed that the 'appellant was in receipt of certain sums by way of loan from M/s.Accu-Dat Transcription Services Pvt. Ltd in which appellant was director and having 50% shareholding. Therefore, A.O. invoked the provision of section 2(22)(e) and made an addition of Rs.38,19,274/- as deemed dividend. Same issue had come up in appellant's own case for A.Y.2009-10 wherein my predecessor had decided the case of the appellant on the ground involved vide order No CIT (AJ-16/ITO-8(1)(1)/IT-13/2013-14 dated 20.03.2015 as under:

"I have carefully considered the facts of the case, documents produced before me and argument-advanced by Ld. AR. It is an undisputed fact that the appellant is

a registered shareholder on holding 5000 equity shares (50% shareholding) of M/s. Accu-Dat Transcription Services Pvt. Ltd. However, in order to attract the deeming provision of Sec.2(22)(e), the recipient of the money should be a registered shareholder as well as a beneficial shareholder of the lender company. Tin: Hon'ble Mumbai ITAT Special bench in the case of ACIT vs. Bhaumik Colour Pvt Ltd reported in 27 SOT 270 (Mum)(SB) had decided that "Whether expression 'shareholder' referred to in section 2(22)(e) refers to both a registered shareholder and beneficial shareholder and, thus, if a person is a registered shareholder but not beneficial shareholder then provisions of section 2(22)(e) would not apply and similarly if a person is a beneficial shareholder but not a registered share holder then also provisions of section 2(22)(e) would not apply." Also in the case of DCIT vs. Atul Engineering Udyog reported in 342 TTJ (Agra) 209 and in the case of Makhija Construction Company vs. ACIT reported in (2012) 9 SOT 27(Indore), Hon'ble ITAT's had decided that Sec.2(22)(e) shall apply only if the person is a registered shareholder and a beneficial shareholder of the lender company. Accordingly, if a person is a registered shareholder but is not the beneficial share holder of the lender company, then provision of Sec.2(22)(e) would not apply.

In impugned case, the appellant is certainly a registered share-holder of 5000 shares on holding 50% of equity shares of M/s. AccuDat Transcription Services Pvt. Ltd under company, but is a registered and beneficial share holder 8% of share-holding) since 4200 shares are beneficially held by his wife Smt. Ekta M. Upadhyay. On perusal of the gift deed dated 25/05/2007 notarised by Shri V. Shinde on same day, transfer deed and share certificates, it is observed that the appellant had gifted 4200 shares of M/s. AccuDat Transcription Services Ltd to his wife Smt Ekta M. Upadhyay. The balance-sheet of Smt Ekta M L Upadyay as on 31/03/2008 recognises the receipt of gift from the Appellant of 4200 shares of M/s. Accu-Dat Transcription Services Ltd and such 4200 shares had also been disclosed as 'Investment' in the balance sheet as on 31/03/2008 and 31/03/2009 of Smt Ekta M. Upadhyay (wife). The AO is not justified in ignoring the documentary evidences such as gift deed, transfer deed, balance sheet, etc which justifies that the appellant had gifted 4200 shares to his wife Smt Ekta M. Upadhyay. The AO had not carried any enquiry from the donee Smt Ekta M. Upadhyay and is not correct in brushing aside the documentary evidences justifying the genuineness of the gift filed on assessment record. The AO laid much emphasis on the share-holding pattern disclosed M/s. / AccuDat Transcription Services Pvt. Ltd in its I.T return and ROC return which only discloses the particulars of the registered share-holders and not of the beneficial share-holders. The appellant, in statement u/s 131, specified that the appellant is a registered shareholder on holding 50% shares of M/s, Accu-Dat Transcription Services Ltd, however, he does not specify about the particulars of the beneficial share-holders. The AO had not looked into the aspect that the appellant is not the beneficial shareholder of 4200 equity shares (42 %) M/s. Accu Dat Transcription Services Pvt. Ltd which is held by Smt Ekta Upadhyay. Accordingly, it needs to be accepted that the appellant is a registered and beneficial shareholder of only 800 shares which is 8% of the share-holding of M/s. AccuDat Transcription Services Ltd and such being lower W% of

prescribed limits, accordingly the addition u/s.2(22)(e) made in hands of the appellant cannot be sustained.

Accordingly, I hold that the appellant is not the beneficial shareholder holding more than 10% equity shares of M/s. AccuDat Transcription Services Ltd and respectfully following the judicial decisions cited supra, the addition u/s.2(22)(e) of Rs .56,65,072/- is hereby **deleted**.

3. There is also a force in alternate argument advanced by Ld. AR that the addition u/s.2(22)(e) could be made only in respect of the money of loan and/or advance received during the year. On perusal of the ledger account of the appellant in books of M/s. AccuDat Transcription Services Ltd (pg.7 of PB) and balance sheet of the said company (pg-26 of PB), it is absented that the opening balance as on 01/04/2008 u disclosed of Rs. 34,79,435/- and closing balance as on 31/03/2009 is disclosed of Rt.56,65,072/- and the payment made by the said company to the appellant during the year is of Rs.21,85,637/-. The judicial decision relied by Ld AR in the case of M/s. ITL Fabrics Pvt Ltd vs. ACIT [33 taxmann.com 385], Hon'ble Mumbai ITAT decided that "We hold that section 2(22)(e) has to be applied to only to loan/advances received during the year". Accordingly, I hold that the addition u/s.2(22)(e) could be restricted only to the extent of Rs.21,85,637/- being the amount of the loan/advance received by the appellant during the year.

3.1. Learned AR had further argued that the addition u/s.2(22)(e) could be made only extent of the "accumulated profits" of M/s. Accu-Dat Transcription s Pvt. Ltd and such accumulated profits shall exclude the current year's . In this context Ld. AR relied on Judicial decisions as under :-

- i) *ITL Fabrics Pvt Ltd vs. A CIT*
(2012) 19 ITR (Trib) 499 (Mumbai)
- ii) *Sunil P. Mantri vs. ACIT*
ITA No. 5402/M/2011 &5407/M/2011
- iii) *P. Satya Prasad vs. ITO*

31 Taxmann.com 267 (ITAT-Visakhapatnam)

- iv) *M.B. Stock Holding Pvt Ltd vs. ACIT*
84ITD-342 (ITAT-Ahd)
- v) *CIT vs. P.K. Badiani*
76ITR 369 (HC-Bom)
- vi) *CIT vs. V. Damodaran*
121 ITRR 522 (SC)

3,2 On perusal of the above stated judicial pronouncements, it is observed that it is a settled law that the accumulated profits of the company shall not include the current year's profit since the profit of the current year accrues at end of the year. On perusal of the audited balance sheet of lender company M/s. AccuDat Transcription Services Ltd, the accumulated profits is disclosed as under :-

Opening balance of? & L a/c as on 01/04/2008 : Rs.30,12,374/-

Add: Current year's profit : Rs.78,89,750/-
Closing balance as on 31/03/2009 : Rs.1,09,02,124/-

3.3 Accordingly, I also hold the aggregated addition u/s.2(22)(e) in hands of the shareholders Mr. Manoj Upadhyay (appellant) and Mrs.Pooja Sharma could be made only to the extent of the opening accumulated profits as on 1/4/2008 of Rs.30,12,374/-.

3.4 As in the preceding paragraphs, it is field that the appellant is not the registered and beneficial shareholder on holding more than 10% equity shares of M/s. AccuDat Transcription Services Ltd, the addition made in assessment u/s.2(22)(e) of Rs.56,65,072/- is hereby deleted.

Accordingly, ground no. 1 is hereby allowed. "

4.1.2 The same issue has also been decided in the case of appellant's own case for the A. Y.2012-13 in which addition of Rs. 16,29,439/- made by AO is deleted.

4.1.3. In the instant case, the facts are perimateria with A.Y.2009-10 and A.Y. 2012-13 which had been decided by my predecessor and me. Since there is no factual change, therefore, following the decision as held by my predecessor in earlier year, the addition of Rs. 38,19,274/- made by the A.O. is deleted and this ground of appeal of the appellant is **allowed**.

5. Against the above order of CIT(A), Revenue is in further appeal before us and assessee has filed Cross Objection wherein assessee has alleged that CIT(A) has failed to appreciate that genuineness of gift of shares given by the assessee to his wife during the A.Y. 2008-09 cannot be disputed in the impugned year thereby assessee is not the beneficial shareholders exceeding 10% of lender company.

6. Rival contentions have been heard and record perused. From the record, we found that alleged loan of Rs.38,19,724/- received by assessee from M/s. AccuDat Transcription Services Ltd was treated by the AO as deemed dividend u/s.2(22)(e). The provision of Sec 2(22)(e) applies only to a case where the recipient of the money is a Registered and Beneficial shareholder of lender- company. In impugned case though

the assessee is a registered shareholder of 5000 shares (50%) but is beneficial shareholder of only 800 shares (8%) and 4200 shares (42%) is beneficially owned by his wife Mrs. Ekta M. Upadhyay. As the assessee is not a beneficial shareholder of M/s Accu Dat Transcription Services Pvt Ltd of more than 10% of voting power, accordingly AO is not justified in making the addition u/s.2(22)(e) of the Act. The assessee is not a beneficial share-holder holding more than 10% of the voting power of the lender company, accordingly the provision of Sec.2(22)(e) shall not apply. From the record we found that the assessee, till 25/5/2007, was holding 5000 equity shares (50% of total share- holding) of M/s. Accu Dat Transcription Services Pvt Ltd, However, the assessee on 25/05/2007 gifted 4200 equity shares (42% of shareholding) of such company to his wife Smt Ekta M. Upadhyay as a result of which, the share- holding of the assessee was reduced to 8% of the total shareholding There is no change in share-holding pattern of the company since A.Y 2008-09 as the paid-up share capital is identical at Rs.1,00,000/-.

7. We also found that in support of the genuineness of gift of shares given by the assessee during A.Y.2008-09 to his wife, the understand documents were filed before lower authorities

- a) Gift fad (Notarised) dated 22/05/2007;*
- b) Transfer deed dated 01/12/2007 wherein the name of the transferee wife is disclosed of Smt Ekta M.Upadhyay;*
- c) Share certificates annexed with transfer deed;*
- d) Balance sheet of Mrs.Ekta M. Upadhyay as on 31.03.2008 and 31.03.2009 disclosing the share investments in M/s. Accu Dat Transcription Sewices Pvt, ltd. of Rs.42,000/- (4200 shares). Since then there is no change in her share investments;*

8. The assessee filed the copies the gift deed, transfer deed and share certificate evidencing the gift of 4,200 shares gifted by assessee to his wife Mrs. Ekta M.Upadhyay, In assessment order, .AO did not dispute the fact that assessee was only a registered shareholder and was not a beneficial shareholder of 4200 equity shares of lender company, thus addition u/s..2(22)(e) is unjustified. Since assessee is only the registered shareholder and not the beneficiary share holder of more than 10% of voting power, u/s.2(22)(e) of the Act is not applicable in view of the decision of the ITAT Special Bench in case of Bhaumik Colour Pvt Ltd reported in 27 SOT 270. The decision of the Special Bench has been confirmed by Bombay High Court in the case of CIT vs. Impact Containers Pvt. Ltd., 367 ITR 346.

9. With respect to genuineness of the gift, we found that assessee has filed all the documentary evidence before the lower authorities which clearly indicate that gifts of 4200 shares so given by the assessee to his wife are genuine. Accordingly, genuineness of gift was given doubt and as on date, the assessee was holding only 8% of the shares, therefore provisions of Section 2(22)(e) is not applicable.

10. In the result, appeal of the Revenue is dismissed wherein Cross Objection filed by the assessee is allowed.

Order pronounced in the open court on this 31/05/2018

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 31/05/2018
Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai