

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई।  
**IN THE INCOME TAX APPELLATE TRIBUNAL  
'D' BENCH: CHENNAI**

श्री जॉर्ज माथन, न्यायिक सदस्य एवं  
श्री एस जयरामन, लेखा सदस्य के समक्ष  
**BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER AND  
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA No.2146/Chny/2017  
निर्धारण वर्ष /Assessment Year: 2009-10

The Dy. Commissioner of Income Tax,  
Corporate Circle-2(1),  
Chennai-600 034.

**Vs.** M/s.GKK Exports Pvt. Ltd.,  
No.40/7, Ramakrishna Street,  
T.Nagar, Chennai-600 017.

(अपीलार्थी/**Appellant**)

**[PAN: AAACG 1568 J]**  
(प्रत्यर्थी/**Respondent**)

Revenue by

: Mrs.Sumathi Venkataraman,  
JCIT

Assessee by

: None

सुनवाई की तारीख/Date of Hearing

: 24.05.2018

घोषणा की तारीख /

Date of Pronouncement

: 25.05.2018

**आदेश / O R D E R**

**PER S. JAYARAMAN, ACCOUNTANT MEMBER:**

The Revenue filed this appeal against the order of the Commissioner of Income Tax (Appeals)-9, Chennai, in ITA No.63/CIT(A)-9/2011-12 dated 15.05.2017 for the AY 2009-10.

2. M/s.GKK Exports Pvt. Ltd., the assessee, is engaged in the business of manufacturing and trading in leather goods. While making the assessment for the AY 2009-10, the AO, inter-alia, disallowed payments made to non-residents u/s.40(a)(i) and added Rs.98,28,345/- as deemed dividend u/s.2(22)(e). Aggrieved against that order, the assessee filed an appeal before the Ld.CIT(A). On the disallowance made u/s.40(a)(i), the CIT(A) held that no TDS is required to be made u/s.195. Therefore, the provisions of Sec. 40(a)(i) is not applicable and accordingly, he deleted the addition. In respect of the addition made u/s.2(22)(e) i.e. on the deemed dividend, the CIT(A) held that the provisions of Sec.2(22)(e) can be invoked only if M/s.GKK Exports Pvt. Ltd., is a shareholder in M/s.Rapidcare Transcriptions Pvt. Ltd. If the assessee company is not shareholder in M/s.Rapidcare Transcriptions Pvt. Ltd., the addition made shall stand deleted. Since, the required facts and figures are not available before him, the CIT(A) directed the AO to obtain such details and apply the ratio of the Jurisdictional High Court's decisions.

3. Aggrieved, the Revenue filed this appeal. None appeared for the assessee. The Ld.DR submitted that the Ld.CIT(A) erred in deleting the disallowance made u/s.40(a)(i) on commission payment made to non-residents is not acceptable as per Explanation-(2) to Sec.9(1)(vii).

3.1. We heard her submissions and gone through the order of the Ld.CIT(A). The Ld.CIT(A) after applying the ratio of the Hon'ble ITAT Delhi Bench ,

supra, and the Hon'ble Supreme Court ratio, supra, to the facts and circumstances of this case has held as under in para 5.3.2 of his order:

*"In circular no.23 dated 23.07.1969, it was clarified that a foreign agent of Indian exporter operating in his own country wherein no part of his income arises in India and his commission is shown to be remitted directly to him and not received by him on his behalf in India, such an agent is not liable to income tax in India on the commission. This position is also upheld by the Supreme Court in the case of Toshoku Ltd. (1980) 125 ITR 525. However, the above said circular was withdrawn by CBDT vide circular no.7/2009 dated 22.10.2009. As stated by the appellant, the said circular will have effect only from 22.10.2009 and therefore effect of withdrawal of such circular, if any, will not have any bearing for the Assessment Year 2009-10. In view of the above, no TDS is required to be made u/s 195 of the Act and therefore the provisions of Section 40(a)(i) is also not applicable and accordingly the addition of Rs.63,24,970/- is directed to be deleted."*

Before us, the Revenue is not able to place any material to dislodge the findings recorded by the Ld.CIT(A) and hence its corresponding grounds fail.

4. With regard to the issue on the deemed dividend, the Ld.DR submitted that the Ld.CIT(A) erred in holding that the provisions of Sec.2(22)(e) can be invoked in the hands of the shareholders. The Ld.CIT(A) also erred in directing the AO to obtain the details and if the assessee company is not a shareholder of M/s.Rapidcare Transcriptions Pvt. Ltd., the addition made u/s.2(22)(e) will stand deleted. In this regard, the Ld.DR submitted that the AO has rightly invoked the provisions of Sec.2(22)(e) following the Board Circular No.493 dated 22.09.1987, two of the common shareholders of both the companies were holding more than 20% shares in the lender company and

hence, the provisions of Sec.2(22)(e) are clearly attracted. The Ld.CIT(A) erred in deleting the addition on the ground that the Sec.2(22)(e) can be invoked only in the hands of the shareholders without considering the recent decision of the Hon'ble Supreme Court in the case of Gopal and Sons (HUF) Vs. CIT, Kolkata-XI in Civil Appeal No.12274 of 2016 dated 04.01.2017 [2017] 77 taxmann.com 71 (SC).

4.1. We heard her submissions and gone through the orders. The AO found that the assessee company has received Rs.98,28,345/-, the peak of credit as on 01.07.2008, from M/s.Rapidcare Transcriptions Pvt. Ltd. The assessee submitted that the company went through cash crunch from 2008 onwards and hence made periodical borrowings from M/s.Rapidcare Transcriptions Pvt. Ltd. On enquiry, the AO found that Shri M.S.G. Kishore Babu and Shri M.S.G. Bhuvankumar are the common shareholders in both the companies. They hold 23.11% and 23.10% shares, respectively, in M/s.Rapidcare Transcriptions Pvt. Ltd and 27.65% and 27.60% shares, respectively, in the assessee company. The AO further observed that M/s.Rapidcare Transcriptions Pvt. Ltd. had accumulated profits of Rs.1,52,43,690/- which is more than the advance given, above, as on the date of transaction and accordingly, he invoked the provisions of Sec.2(22)(e) and added Rs.98,28,345/-.

4.2 On appeal, the Ld.CIT(A) found that the Hon'ble Jurisdictional High Court in the case of Principal Commissioner of Income Tax, Central-2 Vs.

M/s.Ennore Cargo Container Terminal P. Ltd., in TC(A) Nos.105 and 106 of 2017 dated 27.03.2017, after distinguishing the Hon'ble Supreme Court 's decision in the case of Gopal and Sons (HUF) Vs. CIT, Kolkata-XI in Civil Appeal No.12274 of 2016 dated 04.01.2017 [2017] 77 taxmann.com 71 (SC) and also relying on the decision of Division Bench of the Hon'ble Jurisdictional High Court decision in the case of Printwave Services Pvt. Ltd., (2015) 373 ITR 665 (Mad.) held that the advance received by the assessee company may have been for the benefit of registered shareholders, it can only be assessed in the hands of those registered shareholders and not in the hands of the assessee company. Applying these decisions, the Ld.CIT (A) held that the provisions of Sec .2(22)(e) can be invoked only if M/s.GKK Exports Pvt. Ltd., is a shareholder in M/s.Rapidcare Transcriptions Pvt. Ltd. Since, the required facts and figures are not available before him, the CIT(A) directed the AO to obtain such details and apply the ratio of the above Jurisdictional High Court decisions. Thus, it is clear that the Jurisdictional High Court, after distinguishing the Hon'ble Supreme Court's decision relied on by the Revenue, has laid the above ratio. The Ld.CIT(A) has directed the AO to obtain details and apply such ratio with which, we do not find any reason to interfere. The A O shall obtain necessary details and apply the above ratio of the Hon'ble Jurisdictional High Court after giving due opportunity to the assessee. To this extent, the Revenue's appeal grounds are treated as allowed.

5. In the result, the appeal filed by the Revenue is partly allowed.

Order pronounced on 25<sup>th</sup> May, 2018.

**Sd/-**

(जॉर्ज माथन)

**(GEORGE MATHAN)**

न्यायिक सदस्य/**JUDICIAL MEMBER**

चेन्नई/Chennai,

दिनांक/Dated: May 25, 2018.

TLN

**Sd/-**

(एस. जयरामन)

**(S. JAYARAMAN)**

लेखा सदस्य/**ACCOUNTANT MEMBER**

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

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