

आयकर अपीलिय अधीकरण, न्यायपीठ – “D” कोलकाता,
*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “D” KOLKATA*

Before **Shri S.S.Godara, Judicial Member** and
Dr. A.L. Saini, Accountant Member

ITA No.583/Kol/2017
Assessment Year :2011-12

Income Tax Officer Ward-12-(1), Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-69	V/s.	Sri Sekhanrendu Dutta BC-199, Salt Lake City, Kolkata-64 [PAN No. AFRPD 9725 M]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	S.M.Tauheed, Addl. CIT-DR
प्रत्यर्थी की ओर से/By Respondent	Shri Soumitra Chowdhury, Advocate
सुनवाई की तारीख/Date of Hearing	04-06-2018
घोषणा की तारीख/Date of Pronouncement	13-06-2018

आदेश /ORDER

PER S.S.Godara, Judicial Member:-

This Revenue's appeal for assessment year 2011-12 arises against Commissioner of Income Tax (Appeals)-4, Kolkata's order 13.01.2017 passed in case No.288/CIT(A)-4/Ward-12(1)/Kol/13-14, reversing Assessing Officer's action making deemed dividend addition u/s 2(22)(e) amounting to ₹51 lakh in assessment order dated 11.12.2014, involving proceedings u/s. 143(3) of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties.

2. The Revenue's sole substantive ground raised in instant appeal pleads that CIT(A) has erred in law as well as on facts in deleting the impugned deemed dividend addition vide following detailed discussion:-

“4.2 I have considered the submission of the AR Of the appellant in the backdrop of the assessment order. I find that the pith of the AO's contention in the matter of deemed dividend can be delineated as follows:

- a) That the assessee was a beneficial owner of shares (not less than 10% of the voting power) in M/s S.D. Construction (P) Ltd.
- b) That the assessee had received ₹1 lakhs as advance from the above said company for investing in property (supra) registered in his name as well as in the name of his minor daughter.

4.3 With the above two main criteria, the AO treated the said advance as deemed dividend in the hands of the assessee as per section 2(22)(e) of the Act. Countervailing the observation of the AO, the AR of the appellant vehemently contended that the appellant who is the MD of M/s S.D. Construction (P) Ltd was holding only 3.34% beneficial share in the company as on 31.03.2011 against the observation of the AO that the assessee was holding more than 10% of the shares of the lender company. In this regard the relevant provisions of section 2(22)(e) of Act reads as follows:

"(e) any payment by a company, not being a company in which the public a substantially interested, of any sum (whether as representing a part of the assets the company or otherwise) [made after the 31st day of May, 1987, by way of advance or loan to a shareholder, 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 participate in profits) holding not less than ten percent of the voting power"

4.4 From a plain reading of the above provisions, inter alia the two fundamental criteria for the applicability of section 2(22)(e) of the Act would be (a) that there should be an advance or loan by a private limited company to its beneficial owner shares and (b) that the recipient of the advance or loan should be holding not less than 10% of the voting power. With regard to criteria (b) I find from the list of equity shareholders of the company as on 31.03.2011, as submitted by the AR, that the appellant was holding 1,12,450 nos. of shares representing 3.34% of the total nos. of 33,64,500. On this count alone. I find that the action of the AO in resorting to the deeming provisions of section 2(22)(e) to be bereft of any merit and resultantly to be nugatory in nature. Even without prejudice to criteria (b), with regard to criteria (a) I do not find much merit in the action of the AO in as much as there was no advance or loan given by the said company to the assessee as contemplated in section 2(22)(e) of the Act for the following reasons:

1. That the said property was acquired by the company and due to compelling circumstances as narrated in the submissions of the AR (supra) supported by documentary evidences, the assessee was used as a conduit for the purposes of effecting the legal purchase as well as the payments towards such purchase. This exercise was fully approved by the Board's Resolution, placed on record, which only goes to show that the property was purchased by the assessee on behalf of the company and also for arranging for the registration of the same in his name as well as in the name of his minor daughter to mitigate the hurdles faced by the company in the deal.

2. That the cost of the property stands reflected in the audited accounts of the company as per records under the following heads:

- (i) Loans and advances for the FY 2010-11
- (ii) Capital work in progress for the FY 2011-12
- (iii) Land & Building

3. That the said property was used for the company's business affair which was acquired by the company, the cost of which was paid through the assessee only due to compelling circumstances. In this respect, the implication that there was advance or loan given by the company to the assessee does not hold much water in as much as the assessee did not derive any benefit from the said transactions.

4. That this property's address i.e. Plot No. AA-73, Salt Lake City was used as communication point by all business associates of the company including government departments and banks and had nothing to do with the affairs of the appellant. In this context, it would not be out of place to construe that the said property could not have been owned by the appellant in any manner, considering the foregoing discussions.

4.5 Having considered the entire gamut of the issue at hand based on the materials on record, I do not find much merit on the action of the AO in making the impugned addition of ₹51,00,000/- as deemed dividend u/s 2(22)(e) of the Act. In the case of Bagmane Constructions (P) Ltd. vs. CIT, the Karnataka High Court in ITA No. 473 of 2013 has held that even if payment is made out of accumulated profits but as a trade advance as a consideration for the goods received or for purchase of capital asset which indirectly would benefit the company advancing the loan such advance cannot be brought within the word advance used in section 2(22)(e) of the Act. Further in the case of Pradip Kumar Malhotra vs. CIT in ITA No. 219 of 2003, Calcutta High Court has held that it' a loan or advance is given to a 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 a deemed dividend within the meaning of the Act. In view of the foregoing, the impugned addition is hereby directed to be deleted. The AO is directed accordingly in the matter. These grounds are therefore treated as allowed on merits."

3. We have given our thoughtful consideration to rival submissions in favour and against the impugned addition. Suffice to say, it has already come on record that assessee holds 1,12,450 out of 33,64,500 shares of the concerned entity M/s S.D. Construction Pvt. Ltd. turning out to be less than the specified percentage of 10% in the statutory provision in question. Learned Departmental Representative fails to rebut this clinching finding during the course of hearing before us. We observe in this factual backdrop

the above stake does not satisfy the basic criteria of application of the impugned deeming provision enshrined u/s 2(22)(e) of the Act. We therefore conclude that a deeming fiction of income in a fiscal statute is to be strictly construed. We accordingly reject Revenue's sole substantive ground on this score alone.

4. This Revenue's above appeal is dismissed accordingly.

Order pronounced in the open court 13/06/2018

Sd/-

(लेखा सदस्य)

(Dr. A.L. Saini)

(Accountant Member)

Kolkata,

*Dkp, Sr.P.S

दिनांक:- 13/06/2018 कोलकाता ।

Sd/-

(न्यायिक सदस्य)

(S.S.Godara)

(Judicial Member)

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-ITO Ward-12(1), Aayakar Bhawan, P-7, Chowringhee Sq. Kol-69
2. प्रत्यर्थी/Respondent-Sri Sekhanrendu Dutta BC-199, Salt Lake City, Kolkata-64
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

Sr. Private Secretary, Head of
Office/DDO

आयकर अपीलीय अधिकरण,

कोलकाता ।