

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम

IN THE INCOME TAX APPELLATE TRIBUNAL,  
VISA KHAPATNAM BENCH, VISA KHAPATNAM

श्री वी. दुर्गा राव, 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.267/Viz/2018  
(निर्धारण वर्ष/ Assessment Year: 2013-14)

Nukala Lakshmana Rao  
H.No.7B-15-45  
Maruthi Nilayam  
Uppuvari Lane  
Eastern Street  
Eluru

Vs. Income Tax Officer  
Ward-2  
Eluru

[PAN : AEDPN8127]

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

अपीलार्थी की ओर से/ Appellant by : Shri I.Kama Sastry, AR  
प्रत्यर्थी की ओर से/ Respondent by : Shri D.K.Sonowal, CIT DR

सुनवाई की तारीख / Date of Hearing : 17.01.2019  
घोषणा की तारीख/Date of Pronouncement : 01.02.2019

**आदेश /ORDER**

**PER D.S. SUNDER SINGH, Accountant Member:**

This appeal is filed by the assessee against the order of the  
Pr.Commissioner of Income Tax (Pr.CIT), Rajahmundry vide

F.No.10263/Pr.CIT/RJY/2017-18 dated 28.03.2018 for the Assessment Year (A.Y.) 2013-14.

2. Brief facts of the case are that the assessee filed the return of income on 06.03.2014 declaring total income of Rs.13,25,860/-. The return was processed u/s 143(1) of the Income Tax Act, 1961 ('Act' in short) and subsequently, the case was selected for scrutiny and the assessment was completed u/s 143(3) on total income of Rs.23,28,860/- apart from the agricultural income declared by the assessee. During the assessment proceedings, the AO made the addition of Rs.10,00,000/- relating to the advances related to M/s Sri Venkata Sainath through journal entry. Subsequently, Pr.CIT, Rajahmundry has taken up the case for revision and observed that the assessee has reported the capital balance of Rs.2.38 crores and unsecured loans of Rs.3 crores in the Balance Sheet from the following persons / companies :

- |    |                                       |   |                |
|----|---------------------------------------|---|----------------|
| a. | M/s Kanaka Durga Agro Oils Pvt.Ltd.   | - | Rs.1 crore     |
| b. | M/s Nagahanuman Solvent Oils Pvt. Ltd | - | Rs.1.5 crores  |
| c. | Sri N.Ramakrishna                     | - | Rs.40.14 lakhs |
| d. | Sri N.Sainath                         | - | Rs.10 lakhs    |

In the revision proceedings, the Ld.Pr.CIT observed that out of four creditors, credit standing in the name of M/s. Naga Hanmnan Solvent Oils Pvt. Ltd is to the extent of Rs. 1.50 crores and transferred from the account copy M/s Naga Hanuman Agro Oils Pvt Ltd. The said money of Rs. 1.50 crores was sourced from M/s Naga Hanuman Agro Oils Pvt Ltd through, the account of M/s Naga Hanuman Solvent Oils Pvt. Ltd., where the assessee is the Managing Director of M/s. Naga Hanuman Agro Oils Pvt Ltd holding 75% share and the said company has got accumulated profits to the extent of 1.08 crores as on 31.03.2013. The funds of Rs.1.50 crores were flown from M/s Nagahanuman Agro Oils Pvt. Ltd. to the assessee through M/s Nagahanuman Solvent Oils Pvt Ltd to circumvent the provisions of sec. 2(22)(e). The Ld.Pr.CIT further observed from the share application account copy from the books of the assessee and found that the amounts of Rs 1.50 crores and Rs. 1 crore have been transferred from creditors of the company to M/s Nagahanuman Agro Oils Pvt. Ltd., towards share application money.

3. The Pr.CIT viewed that such loans constitute the deemed dividend u/s 2(22)(e) of the Act, and the AO failed to make enquiries and to tax the same as deemed dividend. Thus he is under the opinion that the

assessment order passed by the AO u/s 143(3) dated 26.03.2016 is erroneous and prejudicial to the interest of the revenue, accordingly issued show cause notice to the assessee calling for his explanation as to why the order u/s 143(3) of the Act dated 26.03.2016 for the A.Y. 2013-14 should not be revised and the income be recomputed. In response to the notice issued by the Pr.CIT, the assessee has filed the explanation stating that no payment was made to the assessee by Nagahanuman Agro Oils Pvt Ltd., and it has transferred its liabilities i.e. its obligation to parties to the assessee who is shareholder and director of the assessee company. Hence, submitted that the provisions of section 2(22)(e) are not applicable. The Ld.Pr.CIT not being convinced with the explanation of the assessee held that the funds were flown from Nagahanuman Agro Oils Pvt Ltd. to the assessee through the account of Nagahanuman Solvent Oils Pvt Ltd, where the assessee was 75% of the shareholder in Nagahanuman Agro Oils Pvt. Ltd. The Ld.Pr.CIT observed that a sum of Rs.1.5 crores were transferred from Naga Hanuman Agro Oils Pvt. Ltd. to the assessee through M/s Naga Hanuman Solvent Oils Pvt., Ltd. which is being conduit to circumvent the provisions of section 2(22)(e) of the Act. Therefore, held that the transaction attracts deemed dividend u/s 2(22)(e) of the Act, and the AO

did not examine this issue, hence, held that the assessment order passed by the AO was erroneous and prejudicial to the interest of the revenue in view of the Explanation-2 to section 263 inserted by the Finance Act, 2015 w.e.f. 01.06.2015. Accordingly directed the AO to redo the assessment after giving opportunity to the assessee.

4. We have heard both the parties and perused the materials placed on record. In this case, the contention of the assessee is that there was no transfer of money or the payment made by Naga Hanuman Agro Oils Pvt. Ltd or Nagahanuman Solvent Oils Pvt. Ltd. The assessee has taken over the liabilities of M/s Nagahanuman Agro Oils Pvt. Ltd. and there was no case of transfer of asset which entails the distribution of dividend or reducing the profits of the company. Even otherwise, the Ld.AR submitted during the appeal hearing that the reserves outstanding in the case of Naga Hanuman Agro Oils Pvt. Ltd. was 0.52 crores(opening balance) and even if it is presumed that accumulated profits required to be brought to tax as deemed dividend, only the opening balance required to be assessed to tax, but not the accumulated profits as at the end of the year. The Ld.AR referring to page No.10 of the paper book stated that the assessee has taken over the liability relating to NHN Agro Oils through Naga Hanuman Solvent Oils Ltd.,

for a sum of Rs.1.50 lakhs. Similarly referring to page No.11 of the paper book, the assessee submitted that the assessee has taken over the liability of Rs.1.00 crore relating to Kanaka Durga Agro Oils Products (P) Ltd., only through journal entry. Referring to page No.15 of the paper book, the assessee has shown the relevant entry passed by the Nagahanuman Agro Oils Ltd., transferring the sum to the assessee's account from Kanaka Durga Agro Oils Products (P) Ltd. for a sum of Rs. 1 crore. Similarly, in the case of Nagahanuman Solvent Oils also a sum of Rs.1.50 lakhs was transferred to the assessee. Both the accounts show that there were trade transactions relating to purchases made by Nagahanuman Agro Oils Ltd., Nagahanuman Solvent Oils Ltd and Kanaka Durga Agro Oils Products (P) Ltd., and there were no transactions other than trade transactions as appearing from the account copies placed before us by the Ld.AR in the paper book. As per the balance sheet in the case of Nagahanuman Agro Oils Ltd., the opening reserve was only Rs.50 lakhs and even it is presumed that the liabilities as loans, the addition should not be more than Rs.50 lakhs U/S 2(22)(e) of the Act. However, as submitted by the Ld.AR, the trade liabilities were transferred to the assessee through journal entry and there was no passing of money or direct payment made by the company to the assessee. As per

section 2(22)(e) of the Act any payment made by the assessee company required to be brought to tax as deemed dividend. The payment made by the company should result in distribution of assets or the reduction of the profits or accumulated profits which is available in the profit and loss account or in the balance sheet. For the sake of clarity and convenience, we extract relevant part of the provisions of section 2(22)(e) of the Act.

22) "dividend" includes—

*(e) any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of 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 to participate in profits) holding not less than ten per cent of the voting power, or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern) or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits;*

4.1. From the balance sheet, it is observed that no asset was transferred to the assessee and the reserves and surpluses available in the balance sheet was increased from 0.50 crores to 1.08 crores. Thus, we find from the submission made by the assessee that the trade liabilities, obligation to make payments resulting into purchases were transferred to the assessee to improve the balance sheet appears to be correct. The assessee is not a shareholder in the Nagahanuman Solvent Oils Ltd. and Kanaka Durga Agro

Oils Private Ltd., where from the funds were transferred. Though the liabilities were transferred from Nahahanuman Agro Oils Pvt. Ltd., through journal entries from Kanaka Durga Agro Oils Products (P) Ltd., and Nagahanuman Solvent Oils Ltd., it did not reduce any asset or reduce the accumulated profits and the assessee did not get any benefit out of the transfer of liabilities. The department has not made out any case to establish that the assessee got direct or indirect benefit by transfer of liabilities of the said companies to the assessee except increasing its obligation to make the payment to the various creditors. The Ld.DR could not controvert the submission made by the assessee. The Ld.AR relied on the decision of CIT Vs. Parle Plastics Ltd., wherein Hon'ble High Court of Bombay [332 ITR 0063], held that section 2(22)(e) of the Act, contemplates actual payment made by the company to the assessee being treated as deemed dividend in computing the income of the assessee. For the sake of clarity and convenience, we extract relevant part of the order of the Hon'ble High Court in page No.7 which reads as under :

*“This shows that during the relevant previous year (financial year 1996-97), AMPL had actually lent to the assessee only a sum of Rs. 11,68,135 in two instalments, namely Rs. 6,00,000 on 10th Sept., 1996 and Rs. 5,68,135 on 31<sup>st</sup> March, 1997. The opening balance of Rs. 1,76,39,425 was not advanced by AMPL to the assessee during the relevant previous year and could, therefore, be not treated as the amount of loan or advance received by the assessee during the relevant previous year. The said*

*amount, therefore, could not be included as the dividend (hereinafter, referred to as the deemed dividend) under cl(e) of s. 2(22) of the Act, The amount of Rs. 32,13,367 represented the provision for the interest which was to be paid by the assessee to AMPL on the old outstanding loan of Rs.1,76,39,425 and further loan of Rs.11,68,135 advanced during the relevant financial year. This was merely an entry regarding the provision. No interest was actually received by AMPL. This amount which was not paid by the AMPL to the assessee cannot be treated as loan/advance paid by the AMPL to the assessee during the relevant previous year. The opening words "any payment occurring in cl (e) of s. 2(22) of the Act contemplates actual payment made by the company to the assessee for being treated as a dividend in computing income of the assessee. Moreover, making of a provision for an interest which the assessee would ultimately be required to pay to the lender on the money lent cannot be regarded as a payment made by the company to the assessee. As such, the amount of Rs.32,13,367 which represents only the provision made for interest which the assessee was liable to pay to AMPL by way of an interest on the outstanding amount could not be regarded as the payment made by AMPL within the meaning of cl (e) of s. 2(22) of the Act. Only the amount of Rs. 11,68,135 which was actually received by the assessee as and by way of Loan or advance from AMPL would fall within inclusive cl(e) of the definition of "dividend" appealing ins. 2(22)(e) of the Act.*

4.2. In the instant case, there is no dispute that the assessee company has not made any actual payment to the assessee as the assessee has taken over the actual liability of the company on his shoulder. No asset was distributed to the assessee relating to the company and accumulated profits were not distributed in the form of loans or advances to the assessee. Actual liability of the company has been transferred to the assessee which increases his liability and there is no revenue loss to the department. Though the AO did not examine this issue, the assessment cannot be held to be prejudicial to the interest of the revenue. Accordingly, we are unable to sustain the order

of the Pr.CIT passed u/s 263 and the order of the Pr.CIT passed u/s 263 is set aside and the order of the AO is restored.

5. The appeal of the assessee is allowed.

Order pronounced in the open court on 1<sup>st</sup> February, 2019.

Sd/-

Sd/-

(वी.दुर्गा राव)

(V. DURGA RAO)

न्यायिक सदस्य/JUDICIAL MEMBER लेखा सदस्य/ACCOUNTANT MEMBER  
 विशाखापटणम /Visakhapatnam  
 दिनांक /Dated : 01.02.2019  
 L.Rama, SPS

(डि.एस. सुन्दर सिंह)

(D.S. SUNDER SINGH)

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

1. निर्धारिती/ The Assessee- Nukala Lakshmana Rao, H.No.7B-15-45, Maruthi Nilayam, Uppuvari Lane, Eastern Street, Eluru
2. राजस्व/ The Revenue – Income Tax Officer, Ward-2, Eluru
3. The Pr.Commissioner of Income Tax, Rajahmundry
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम /DR, ITAT, Visakhapatnam
- 5.गार्डफ़ाईल / Guard file

आदेशानुसार / BY ORDER

// True Copy //

Sr. Private Secretary  
 ITAT, VISAKHAPATNAM