

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद /

**IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD – BENCH 'A'**

**BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

आयकर अपील सं./ ITA No.2314/Ahd/2016

With

CO No.164/Ahd/2016

*निर्धारण वर्ष/*Asstt. Year: 2008-09

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| DCIT, Cir.2(1)(1) Ahmedabad. | Vs. | Shri Shekhar G. Patel Ganesh Corporate House 100 ft. Hebatpur-Thaltej Road Nr. Sola Bridge Off S.G. Highway Ahmedabad. |
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| <i>अपीलार्थी/</i> (Appellant) | | <i>प्रत्यर्थी/</i> (Respondent) |
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| Revenue by : | Shri S.K. Dev, Sr.DR |
| Assessee by : | Shri Nupur Shah, AR |

*सुनवाई की तारीख/*Date of Hearing : 14/02/2019

*घोषणा की तारीख/*Date of Pronouncement: 21 /02/2019

आदेश O R D E R

PER RAJPAL YADAV, JUDICIAL MEMBER:

Revenue is in appeal before the Tribunal against order of the Id.CIT(A)-2, Ahmedabad dated 22.6.2016 passed for the Asstt.Year 2008-09. On receipt of notice on Revenue's appeal, the assessee has also filed cross objection bearing no.164/Ahd/2016.

2. In the first ground of appeal, Revenue has pleaded that the Id.CIT(A) has erred in quashing re-assessment order passed under section 143(3) r.w.s. 147 of the Income Tax Act, 1961.

3. Brief facts of the case are that the assessee has filed his return of income on 27.3.2010 declaring total income at Rs.49,53,850/-. An assessment order was passed under section 143(3) on 23.12.2010. The Id.AO did not make any addition to the income declared by the assessee and accepted declared income. The assessee was a director in a company named Ganesh Housing corporation Ltd. ("GHCL" for short). Records of GHCL were subject to audit survey and examined by the Revenue department. The Revenue authorities found that GHCL has disallowed a sum of Rs.80,38,101/-. In the computation of total income, it made reference to the audit report and observed this amount relates to personal expenditure, hence, it was construed that expenditure incurred on personal needs of the Director ought to have been shown by the Director as perquisite in the return. According to the AO, the assessee failed to recognize that expenditure as his income which has escaped assessment. Therefore, he recorded reasons and reopened the assessment. The reasons recorded by the AO has been reproduced by the Id.CIT(A), which reads as under:

"Reasons for invoking provisions of section 147 of the I. T. Act

1. The assessee is one of the directors in Ganesh Housing Corporation Limited. The return of income was filed on 27/03/2010 declaring total income of Rs.49,53,850/-. The assessment of the assessee was completed u/s. 143(23) on 23/12/2010 determining total income at Rs.49,53,850/-.

During the course of verification of records of the Ganesh Housing Corporation Limited, it has been noticed that Ganesh Housing Corporation Limited has disallowed a sum of Rs.80,38,101/- in the computation of total income. In the

Annexure - 6 of the Tax Audit Report the details of expenditure of personal nature have been given which includes expenditure on telephone, electricity, motor car usage, foreign travelling and other expenses on behalf of the Directors etc. The auditor of the Ganesh Housing Corporation Limited has disallowed such expenses since it was treated expenditure of personal nature. It was also certified that such expenditures were for the benefit of directors.

As per the section 2(24) (iv) the value of any benefit of prerequisite whether convertible into money or not obtained from a company either by a director or by a person who has a substantial interest in the company or by a relative of the director or such person and any sum paid by any such company in respect of any obligation which, but for such payment would have been payable by the director or other person aforesaid.

In view of the above provision, the sum paid by the company on behalf of the Director should have been reflected as income in the hands of the Director. In the case of Shri Shekhar G. Patel, an amount of Rs.26,79,366/-being 1/3rd of amount of Rs.80,38,101/- have to be included in the income of the assessee which has been escaped from the assessment in the hands of the Director Shri Shekhar G. Patel.

2. Further Shri Shekhar G. Patel has taken interest free loans from Umnesh Complex Pvt, Ltd. and Mihika Buiidcon Pvt. Ltd. in which he is one of the directors. The non levy of interest by Unmesh Complex Pvt. Ltd. and Mihika Buiidcon Pvt. Ltd. on the sums advanced to Mr. Shekhar G. Patel is a benefit enjoyed by Shri Shekhar G, Patel by virtue of being a director. Hence, as per provisions of section 2(24)(iv), the value of such benefits is to be added in the income of the Shri Shekhar G. Patel. As per the records, average of the benefit enjoyed by Shri Shekhar G. Patel as loan comes to Rs.31849700/- on which interest @ 15% comes to Rs.4777455/-. Thus an income of Rs.4777455/- has escaped assessment in the hands of Shri Shekhar G. Patel.

3. On going through the sale deeds submitted by Shri Shekhar G. Patel, it is seen that provisions of section 50C have not been complied with. Mr. Shekhar G. Patel has sold non-agriculture land (50% share) situated at Shilaj Village for Rs. 15,00,000/-. The stamp duty paid thereon is Rs.89,500/-. By applying jantry rate @ 4.9% on stamp duty paid, the cost of the property works out to be Rs. 18,26,530/-. Therefore, there is under valuation of property to the extent of Rs.3,26,530/-. Since, Shri Shekhar G. Patel had ½ share in the property, under assessment comes to Rs. 1,63,265/- in the hands of Shri Shekhar G. Patel.

4. Similarly a property situated at Shilaj Village, Block No. 737 was sold at Rs. 15,00,000/-. Shri Shekhar G. Patel had 173rd share in the said property. The stamp duty paid thereon is Rs.87,200/-. By applying jantri rate @ 4.9% on stamp duty, the cost of property should have been Rs.17,79,590/-, so there is undervaluation of property of Rs.2,79,590/- u/s. 50C of the Act, Since Shri Shekhar G. Patel has 173rd share in the property under assessment comes to Rs.93,195/-.

In view of above, I have reason to believe that income of Rs.77,13,281 /-(Rs.26,79,366/- + Rs.47,77,455/- + Rs.1,63,265/- + Rs.93,195/-) has escaped assessment for A. Y. 2008-09 and therefore, I am of the opinion that this is a fit case for assessment by invoking the provisions of section 147 of the Income Tax Act, 1961."

4. Dissatisfied with this reopening, the assessee carried the matter in appeal before the Id.CIT(A). The Id.CIT(A) has made a detailed analysis of the reasons recorded by the AO vis-à-vis information available to him. According to the Id.CIT(A) the assessment has been reopened after expiry of four years from the end of the relevant assessment year, and therefore, proviso appended to section 147 would come in the way of AO for reopening of the assessment, unless it is established that income has escaped assessment on account of failure of the assessee to

disclose all material facts fully and truly. In the opinion of the Id.CIT(A), the AO failed to refer to any material which can be alleged that the assessee failed to disclose fully and truly, and accordingly, the Id.CIT(A) has quashed the re-assessment order.

5. Before us, while impugning the order of the Id.CIT(A), the Id.DR contended that GHCL in its audit report has itself made disallowance of Rs.80,38,101/-. If this expenditure were of personal in nature, then perquisite value of this expenditure ought to have been disclosed by the assessee. He failed to disclose this, therefore, this *proviso* will not come in the way of the AO, because the assessee failed to disclose material facts fully and truly. He further observed that the assessee has also obtained interest free loans from Umnes Complex PLtd., and Mihika Buildcon P.Ltd. If interest at the rate of 15% is being calculated on those loans, then benefit in terms of notional interest would come to Rs.47,77,455/- which has a perquisite value in the hands of the assessee, and it should have been shown as his income.

6. On the other hand, the Id.counsel for the assessee relied upon the order of the Id.CIT(A). She pointed out that AO nowhere applied his mind and made analysis of the nature of the expenditure, and whether any personal element would involve in this expenditure. There can be different reasons for the company to make a disallowance, out of its claim on expenditure. In the opinion of the management, certain expenditure were not for the purpose of business and the company wants to pay taxes on this count, that would not become automatic as perquisite in the hands of the assessee.

7. We have duly considered rival contentions and gone through the record carefully. There is no dispute that original assessment was made under section 143(3) of the Act. There is also no dispute that four years has lapsed from the end of the assessment year. The question is, whether *proviso* appended to section 147 puts an embargo in the power of the AO for reopening of an assessment order, where a scrutiny assessment has been made, and four years has expired, which would come to the rescue of the assessee or not? On the other hand, view of the Revenue is that there was no disclosure of material facts fully and truly, therefore, *proviso* will not come in way of the AO. On the other hand, the stand of the assessee is that AO failed to analysis the nature of expenditure, and therefore, there is no live-link between formation of opinion showing escapement of income vis-à-vis information available with the Ld.AO. Let us take into consideration bifurcation of those expenditure. These have been reproduced by the Id.CIT(A). They read as under:

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| a) Advertisement expenses | : | Rs.46,29,768/- |
| b) Printing & Stationary | : | Rs.18,00,000/- |
| c) Books and Magazines | : | Rs. 2,50,000/- |
| d) Being 1/5 th of Rs.67,91,665/- | : | Rs.13,58,333/- |

8. A perusal of the above would indicate that there cannot be any benefit of personal nature in advertisement expenditure. Similarly, printing and station expenses were related to the company. Out of the above expenditure, how it could be construed that element of personal nature is involved, and its perquisite value in the hands of the Director. The AO has not

analysed details of these expenditure while forming a belief that income has escaped assessment. Taking into consideration nature of expenditure, we are of the view that there was no specific expenditure which can be termed as incurred exclusively for the personal needs of the Directors. If company wants to pay taxes, that is its discretion, but for that a completed assessment of the director after four years cannot be reopened.

9. Other reason which has been assigned by the AO is availment of loans from two companies without paying interest. We find that the assessee was having share holding of 9% and 4.3% in the aforesaid two companies viz. Umnesh Complex PLtd., and Mihika Buildcon P.Ltd. He was not having substantial interest in these companies. It was brought to the notice of the Id.CIT(A) that assessee has not obtained any loan from Mihika Buildcon P.Ltd. during this year. It was opening balance. It was also contended that non-charging of interest on the debit balance in the running account of the directors would not constitute a perquisite. Judgment of Hon'ble Supreme Court in the case of V.M. Salgaocar & Bros. Pvt. Ltd. Vs. CIT, 243 ITR 383 (SC) was pressed into service. Again, though the Id.AO has to form a *prima facie* belief only, but has not analysed any of these details while forming a belief that income has escaped assessment, more particularly, when he is leveling allegations that it was escaped on account of non-disclosure of facts fully and truly. To our mind, the AO has not demonstrated this aspect in the reasons recorded by him. Therefore, we are of the view that the Id.CIT(A) has

rightly quashed the reassessment order. We do not find any merit in this ground of appeal. It is dismissed.

10. In ground no.2, Revenue has pleaded that the Id.CIT(A) has erred in deleting addition of Rs.26,79,366/-. As observed earlier, the assessee is a director in GHCL. The GHCL has disallowed a sum of Rs.80,38,101/-. According to the AO, 1/3rd of this amount i.e. of Rs.26,79,366/-has a perquisite value in the hands of the assessee, which ought to have been shown by him as income. The Id.CIT(A) has considered this aspect and noticed the break-up of this expenditure. Thereafter observed that, this is not an expenditure which can be termed as personal in nature. The finding recorded by the Id.CIT(A) reads as under:

"I have carefully considered the facts of the case, the reassessment order and the written submission of the appellant. The AO has made the addition of Rs.26,79,366/- being 1/3rd of the amount of Rs.80,38,101/- in respect of the total expenditures disallowed in the case of M/s.Ganesh Housing Corporation Ltd. in which the appellant was one of the directors. This addition has been made by the A.O. as a perquisite as per section 2(24) (iv) being the value of benefit or perquisite obtained by the appellant from the aforesaid company as income. The AO observed that in the case of M/s. Ganesh Housing Corporation in which the assessee was a director, has disallowed certain sums which were observed to be of personal in nature by the Tax Auditors and as a consequence the said amounts were to be assessed in the hands of the directors.

4.4. On the other side, the appellant has submitted that in the case of Ganesh Housing Corporation Ltd. a total of expenditure of Rs.80,38101/-was disallowed in the computation of income of which details are noted as under:-

(a) Advertisement expenses - Rs.46,29,768/-

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| (b) | Printing and Stationery - | Rs. 18,00,000/- |
| (c) | Books and Magazines - | Rs. 2,50,000/- |
| (d) | Being 1/5th of Rs.67,91,665/- | - Rs. 13,58,333/- |

(which includes motor car expenses, mobile phone expenses, electricity expenses, security service charges and director foreign travel).

4.5. The appellant submitted that irrespective of the treatment any expenditure gets in the books of accounts of the company the same cannot be taken as a base for proposing the same to be taxed in the hands of the individual only for the reason that he was a director in the said company, further stretching it on the ground that the expense was incurred to benefit the director and being personal in nature.

4.6. As per the definition of the income u/s.2(24)(iv), the value of any benefit of perquisite is to be added to the income of the director for which the original obligation to pay for the same was that of the director in his individual capacity. But in the present case paying for advertisement expenses or printing and stationery expenses or books and magazines was never been an obligation of the appellant in his individual capacity. When the obligation in the individual capacity of the appellant itself did not arise, there is no question of making any addition of the said amount to the individuals income. There was no benefit monetarily or non-monetarily that can be measured/valued in monetary terms that have arisen to the appellant from incurring such expenses.

4.7. The appellant further submitted that the advertisement expenses of Rs.46,29,768/- was incurred by the company Ganesh Housing Corporation Ltd. for advertisement in various periodicals for felicitation function of the then chairman of the company Shri Govindbhai C. Patel. Likewise the printing and stationary expenses of Rs.18 lakhs was incurred towards publication of a book namely 'Sheshthi' in the form of a biography on the life and achievement of then chairman of the company Shi Govindbhai C. Patel. Both the above expenditures were in no way related to the personal

benefits of the appellant. It was also submitted that the books and magazine expenses of Rs.2,50,000/- was incurred for printing and publishing of the book "Gujarat Goories-Power People 50" which contained a write up of the director of the company i.e. appellant which is again no way related to the personal benefits of the appellant.

4.8. The company namely M/s. Ganesh Housing Corporation Ltd. being a public limited company it has got credit recognition, increase in good will, good faith and trust of the general public at large due to publishing of the book. Further in respect of addition made on account of various expenditures from motor car, mobile phone, electricity expenses, security service charge and directors foreign travel that it was not possible to determine the expenses used for personal purposes therefore in annexure-6 to tax audit report of Ganesh Housing Corporation the auditors have made the observations in this regard. So it was a view of the tax auditor that some portion of the expenditure was for personal purpose of the directors but there was no evidence to justify the auditors view to be true. It was submitted that all these expenses were incurred for the purpose of business of the company in which the appellant was a director. Also submitted that these expenses were not incurred for personal benefit of the directors. The above expenditures were duly authorized through resolution passed in the meeting of the Board of Directors of Ganesh Housing Corporation Ltd.

4.9. Even under the head of income from profits and gains of business a proportion of various expenditures like motor car for partners/employees were disallowed assuming the same for personal use but they are not added to the income under the head of salaries and made taxable in the hands of the employees or partners of the company. By making once in the hands of the company namely Ganesh Housing Corporation Ltd. and thereafter once again in the hands of the directors is nothing but the double taxation of the same amount which is unwarranted as per the provisions of law. This was a revenue neutral exercise and all are assessed to tax in the maximum marginal rate.

4.10. Having considered the facts and the submissions, it is noticed from the copy of the bill of advertisement expenses that Ganesh Housing Corporation has incurred the expenditure of Rs.46,29,768/- towards advertisement in the Gujarat Samachar, Sandesh, Divya Bhaskar, Times of India in respect of the chairman of the said company namely Shri Govind C. Patel. This advertisement has been made in respect of Shri Govind C. Patel due to the Gujarat Gaurav and Advertorial Advertisement, and hence, the appellant did not have any connection with the aforesaid expenditure and he did not avail any personal benefit out of such advertisement. Moreover M/s. Ganesh Housing Corporation would be benefited from such advertisements therefore in no case the same can be taken as income being perquisite as per the provisions of Section 2(24) (iv) and thus no addition in the hands of the appellant is called for.

4.11. Similarly the expenditure of Rs.18 lakhs have been made in respect of the printing and stationery for the booklet in the name of 'Shreshthi' from which also the appellant did not get any personal benefits as it was also in respect of Shri Govind C. Patel. The ultimate beneficiary of this expenditure was M/s.Ganesh Housing Corporation Ltd,

4.12. Further with regard to the expenditure of Rs.2,50,000/- incurred by Ganesh Housing Corporation in respect of the book and multimedia disk in the name of Gujarat Glorius Power People 50 and also the beneficiary was M/s. Ganesh Housing Corporation Ltd. and not the appellant since no personal benefit has been obtained nor it was the obligation of the appellant to make the payment thereof which was paid by Ganesh Housing Corporation.

4.13. In view of the aforesaid discussion, the expenditures made in respect of above heads are in no way personally benefited to the appellant and therefore the same cannot be treated as perquisites as income and hence the addition made by the AO is liable for deletion."

11. With the assistance of the Id.representatives, we have gone through the record carefully. The Id.CIT(A)has made a detailed

analysis of all the expenditure, and thereafter recorded a finding that there is no personal element involved in all these expenditure. They cannot be considered as perquisite in the hands of the director. After going through well reasoned order of the Id.CIT(A), we do not find any error on this issue. It is upheld.

12. In the next ground of appeal, the grievance of the Revenue is that the Id.CIT(A) has erred in deleting the addition of Rs.47,77,455/-.

13. Brief facts of the case are that the assessee has alleged to have taken loan of Rs.3,18,49,700/- from Umnesh Complex PLtd., and Mihika Buildcon P.Ltd. According to the AO, had an interest at the rate of 15% been charged, then the assessee would be required to pay a sum of Rs.47,77,455/-. By not charging interest from the assessee, companies have extended undue benefits which is to be construed as perquisite in the hands of the assessee under section 2(24)(iv) of the Act. Accordingly, the Id.AO made addition of the above amount. Dissatisfied with the addition, the assessee carried the matter in appeal before the Id.CIT(A). The Id.CIT(A) has deleted the addition by observing as under:

"5.3. Decision:

I have carefully considered the facts of the case, the reassessment order and the written submission of the appellant. Without prejudice to the above that the reopening and reassessment is not tenable in the eyes of law since the appellant has raised the grounds on the merits of the issue however the same became academic in nature, however, on merits the same are decided as under.

5.4. The AO has made the addition of Rs.47,77,455/- as interest on the loan taken from the companies in view of the provisions of Section 2(24)(iv) of the I.T. Act. It has been noticed that the appellant has taken the interest free loans from Unmesh Complex Pvt. Ltd. and Mihika Buildcon Pvt. Ltd. on which no interest has been paid by the appellant. The appellant was one of the directors of the aforesaid company. The AO observed that it was certainly a benefit and convertible into money. If the loan has been taken from any other entity, interest would have been payable by the appellant. Therefore, the benefit enjoyed by the appellant as interest on the loans taken from the company is considered as income in the hands of the appellant.

5.5. On the other side the appellant has submitted that he was not an employee and not drawing any remuneration or salary from the aforesaid two companies from whom loans have been taken, therefore, he was not an employee of the above companies and hence perquisite value cannot be taxed in the hands of the appellant. It was also submitted that the appellant was not having any substantial interest in the aforesaid companies. The appellant had 9% and 4.37% share holding in the aforesaid companies namely Unmesh Complex Pvt. Ltd. and Mihika Buildcon Pvt. Ltd. respectively. Since the appellant had not obtained any benefit or perquisite in the capacity of the employees on the aforesaid companies therefore no income can be taxed in the hands of the appellant more so when a company has not paid any sum of money which is by way obligation payable by the appellant. It has also been submitted that no loan has been taken in the year under consideration from Mihika Buildcon Pvt. Ltd. but the same was the opening balance which remained as closing balance at the end of the year. In support of this, it has relied upon catena of judgements which have been reproduced in the preceding paras of this order.

5.6. Having considered the facts and the submissions, it is noticed that the AO has not brought on record that the appellant was an employee in the aforesaid companies from whom the loans have been taken. Even no remuneration or salary in the capacity of the director has been drawn by the

appellant from the aforesaid two companies. Being the director he cannot be held to be an employee of the companies from whom he has availed the loans. Moreover he was not having substantial interest in the aforesaid companies. The AO has also not brought anything on record to say that the aforesaid companies have paid any sum of money which is by way of obligation payable by the appellant. In the case of Mihika Buildcon Pvt. Ltd. there was no fresh loans taken during the year under consideration but those were the loans taken in the preceding years. It has also been noticed that both the companies did not have any interest expenditure in their profit and loss account therefore there was no obligation of the appellant in respect of any interest paid by these companies on behalf of the appellant.

5.7. In view of the above, respectfully following the judgements of various Hon'ble Courts relied upon by the appellant, there is no case to treat the income as perquisite in the hands of the appellant and therefore addition made by the A.O. is deleted. Thus, the related grounds of appeal raised by the appellant are allowed."

14. As observed by the Id.CIT(A) that there is no fresh loan taken by the assessee from Umnesh Complex PLtd., and Mihika Buildcon P.Ltd. It is an opening balance. No interest was charged in earlier years nor any perquisite value was assessed. Similarly, the Id.CIT(A) has observed that if the directors have running account with the company, then non-charging of interest on the debit balance would not constitute a perquisite. The Id.CIT(A) has made reference to large number of decisions while taking note of assessee's submissions at page nos.39 to 41 of the impugned order. After going through the finding of the Id.CIT(A) we do not find any error in the order of the Id.CIT(A) on this issue. This ground of appeal is rejected.

15. As far as CO of the assessee are concerned, it is merely in support of the order of the Id.CIT(A), and no specific grievance has been pleaded in the CO, hence, CO is not maintainable.

16. In the result, appeal of the Revenue and CO of the assessee, both are dismissed.

Order pronounced in the Court on 21st February, 2019.

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER