

*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "SMC" KOLKATA*

Before **Shri S.S, Godara, Judicial Member**

ITA No.2405/Kol/2017
Assessment Year:2009-10

Santosh Kumar Jaiswal 31F, Ramkrishna Samadhi Road, Kolkata-700054 [PAN No.ACSPJ 6607 N]	बनाम / V/s.	Income Tax Officer, Ward-45(4), 3, Government Place (West), Kolkata-700001
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

अपीलार्थी की ओर से/By Appellant	Shri Subash Agarwal, Advocate
प्रत्यर्थी की ओर से/By Respondent	Shri C.J. Singh, JCIT-SR-DR
सुनवाई की तारीख/Date of Hearing	05-03-2019
घोषणा की तारीख/Date of Pronouncement	15-05-2019

आदेश /O R D E R

This assessee's appeal for assessment year 2009-10 arises against the Commissioner of Income-tax (Appeals)-13, Kolkata's order dated 18.07.2017 passed in case No.118/CIT(A)-13/W-44(1)/Kol/2015-16, involving proceedings u/s. 143(3) r.w.s. 147 of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties. Case file perused.

2. The assessee's sole substantive grievance canvassed in the instant appeal challenges correctness of both the lower authorities making deemed dividend addition of ₹6,32,449/- in his hands. The CIT(A);s detailed discussion to this effect reads as under:-

“Decision:-

6. I have gone through the contention of the assessee, the order passed by the AO and the submissions made by the Appellant. The decision of this appeal is given as under:-

6.1. In this case the only issue relates to the addition of Rs.6,33,449/- as a deemed evident under section 2(22)(e) of the I.T Act.

While making addition the AO found that "during the course of assessment proceeding M/s. Benchmark Developers Pvt. Ltd for the A. Y 2009-10, it was observed that the Assessee has taken loan from M/s. Benchmark Developers Pvt. Ltd. amounting to Rs. 6,60,000/- in which he is one of the director and holds about 35% of

the total equity shares issued for the year by the company. As the assessee is holding more than 20% of shares of M/s. Benchmark Developers Pvt. Ltd. and the company Had sufficient profit during the year which Clearly attracts the provision of section 2(22)(e) of the Act.

The assessee through his AR filed a written submission in which he stated inter alia "in this connection we respectfully submit that the sum of Rs.6,60,000/- should not be added fully. Instead we hereby offer a sum of Rs.3,44,949/- being the amount of accumulated profits of the company M/s. Benchmark Developers Pvt. Ltd. as on the date of granting of the loan i.e. on 24-03-2009."

Later assessee by his letter dated 19-02-2015 revoked the power of Mr. Binod Kumar Agarwal previously appointed as AR and fresh Power of Attorney was submitted in the name of Mr. V K Jain along with that letter he also submitted an explanation regarding non applicability of section 2(22)(e) on the loan taken by him from M/s. Benchmark Developers Pvt. Ltd. a closely held company in which he is one of the director and holding share more than 20%. In his submission he stated inter alia "The submission made by the previous AR of the assessee is made on interpretation of facts. The assessee is not aware of any such submission which has been made without the knowledge and consent of the assessee. The said submission is made out of ignorance and is of judgment. Hence be ignored. We would like to file this rejoinder to explain elaborate and provide more substance to the said submission The assessee has given his personal guarantee for securing the working capital loan taken by M/s. Benchmark Developers Pvt. Ltd. from State Bank of India. The company had asked the assessee to provide his unconditional personal guarantee as security on the loans to be provided to the company by its banker. On the request of the company, the assessee agreed to act as guarantor to the secured loans of the company, which enabled it to obtain he loans from the banker. The bank has stipulated for cash collateral of Rs.20 lac in several forms or instruments/ one of which was Life Insurance policy in the name of guarantor of the said loans. The company has agreed to buy a life insurance policy in the name of the guarantor from its funds He was not benefited in any manner from such transaction. This transaction was need of the company and they met the obligation from their funds. For the purpose the assessee entered into an agreement for providing his guarantee as security to the banker of the company. The above transaction should not be brought to tax under rigorous provision of section 2(22)(e) based on above facts. "

The contention of the assessee is not acceptable on the following grounds:-

- a. The assessee taken the loan from the company on 20-03-2009.
- b. b. The policy was assigned to 581 Commercial Branch, Sale Late w.e.t 06-05-2009 i.e. in the A. Y 2010-11 and not in the A. Y 2009-10 the year under assessment.
- c. c. Letter for release of assignment of LIP in favour of the assessee was on 01-10-2011 and reassigned back in to assessee on 08-11-2011.
- d. d. The surrender value of that policy was paid in the account of the assessee on 17-04-2012 A/c No. 10016569453 as per reply received from 581 Life.
- e. e. For cash collaterals of Rs.20,00,000/- the Bank has several forms or instruments Le. in the forms of existing NSC/KVP/FD with SBI/Surrender value of Life Insurance Policies in the name of the company/promoters.

From the above it is ascertain that the Life Insurance Policy was purchased in the month or March 2009 taking Loan from the company in the name of the assessee which was assigned to SBI on 06-05-2009. The ultimate benefits of a Life Insurance Policy will goes to the policy holder or to the nominee of the policyholder. The policy was purchased

much before it was assigned to the bank as collateral security. If any untoward incidence happen in the case of assessee during that period then the benefit will go to the members of his family. Ultimately the surrender value of the policy was transferred to the account of assessee on 17-04-2012”

6.2 During the course of appellate proceeding the appellant submitted as following:-

"The Appellant is an individual engaged in the business of Consultancy and brokerage under the trade name & styled as N.s. Developers. The Appellant is also a director of Benchmark Developers Pvt: Ltd. which is engaged in the business of Real Estate. The Appellant has filed its Return of Income declaring a total income of Rs. 1,63,359/- after claiming deduction of Rs. 1,00,000/- under Chapter VIA.

The said Company in which appellant is a director has started negotiation with State Bank of India during Financial Year: 2008-09 to obtain a loan. The Appellant, being a Director was asked to provide his unconditional personal guarantee as security on the loans to be provided to the company by its bankers on the request of the Company. The appellant agreed to act as Guarantor to the secured loans of the Company which enabled it to obtain the loans from the banker.

In the Assessment order passed u/s 143(3) 01 the Act, the A.O; has formed his opinion by stating that the company had advance loan to the assessee to buy LIP in the year under Assessment i.e. A. Y. 2009-10(Para 2 of page 5 of the Assessment order}. Sir, it is absolutely incorrect The said Company has made payment of Rs.6,60,000/- by cheque no. 106426 dated 24.03.09 directly to SBI Life Insurance ultimately to be provided as collateral Security to Bank for obtaining loan by the said company. The agreement for providing personal guarantee to secured Loans was executed on 31 March, 2009 and Life Insurance Policy was assigned to State Bank of India, the lender at the time of sanction of loan. The appellant has not gained by creating the Life Insurance Policy on his life. Even he has not claimed deduction under Chapter VIA on account of payment of said LIP. The deduction of Rs.1,00,000/- claimed under chapter VIA relates to other LIP on his Life which was taken by the Appellant himself. The Appellant has also provided all the details before the A. O. in course of hearing. The A. O. is also not right to say that judgment of hon'ble High Court of Calcutta delivered in the case of Pradip Kumar Malhotra v. Commissioner of Income Tax-W.B. V is factually different from appellants matter."

In this regard the appellant further submits as under:-

"The basic structure of this provision of Section 2(22)(e) of the Act to treat the loan or advances as Dividend is a deeming provision. The deeming provision is different from the specific provisions. The intention and purpose of such deeming provision needs to be understood for charging the tax relying thereon. The purpose of this charging section is to bring in tax net the amounts given to person(s) having specified interest in the closely held company; otherwise than by distribution of dividend.

Section 2(22)(e) of the Income Tax Act /1961 plainly seeks to bring within the tax net accumulated profits which are distributed by closely held companies to its shareholders in the form of loans. The purpose being that persons who manage such closely held companies should not arrange their affairs in a manner that they assist the shareholders in avoiding the payment of taxes by having companies pay or distribute/

what would legitimately be dividend in the hands of shareholders, money in the form of advance or loan.

The facts of the case be checked to verify whether above provisions of section 2(22)(e) is applicable thereon or not

The assessee has given his personal guarantee for securing the working capital loan taken by Benchmark Developers Private Limited (herein after referred as the company) from STATE BANK OF INDIA (herein after referred as the Bank). The company had asked the assessee to provide his unconditional personal guarantee as security on the loans to be provided to the company by its banker. On the request of the company; the assessee agreed to act as Guarantor to the secured loans of the company which enabled it to obtain the loans from the banker.

The Bank has stipulated for cash collaterals of Rs20 Lac in several forms or instruments one of which was life insurance policy in the name of the guarantor of the said loan. The company has agreed to buy a life insurance policy in the name of the guarantor from its funds. The first premium of Rs.6,600/- was withdrawn by the Insurance Company from Bank account of the company opened with said working capital limit. The assessee had not met such payment and such amount was shown as advance in his account. He was not benefitted in any manner from such amount was shown as advance in his account. He was not benefitted in any manner from such transaction. This transaction was need of the company and they met the obligation from their funds.

For the purpose the assessee entered into an agreement for providing his Guarantee as security to the banker of the company. The assessee neither asked for nor received any commission or financial favour for providing this security. The above transaction should not be brought to tax under the rigorous provision of section 2(22)(e) of the Act, based on the above facts.

Our view is also supported by some latest judgments, the most relevant on the fact of this case is Pradip Kumar Malhotra v. Commissioner of income tax [2011] 338 ITR 538 (Calcutta). In that court held that for retaining the benefit of loan availed of from the bank; if decision is taken to give advance to the assessee, such decision was not to give gratuitous advance to its shareholder, but to protect the business interest of the company.

We quote the judgment of the Division Bench of the Hon' ble High Court of Calcutta (the jurisdictional high court):-

"After hearing the learned Counsel for the parties and after going through the aforesaid provisions of the Act., we are of the opinion that the phrase "**by way of advance or loan**" appearing in sub-section (e) must be construed to mean those advances or loans which a shareholder enjoys for simply on account of 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 percent of the voting power,' but if such loan or advance if given to such 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 deemed dividend within the meaning of the Act. Thus, for gratuitous loan or advance given by the company to those classes of shareholders would come within the purview of Section 2(22) but not to the cases where the loan or advance is given in return to an advantage conferred upon the company by such shareholder. In the case before us, the assessee permitted his property to be mortgaged to the bank for enabling the company to take the benefit of loan

and in spite of request of the assessee, the company is unable to release the property from the mortgage. In such a situation, for retaining the benefit of loan availed from Vijaya Bank if decision is taken to give advance to the assessee such decision is not to give gratuitous advance to its shareholder but to protect the business interest of the company.

The view we propose to take finds support from the two decisions, one of the Bombay High Court and the other of the Delhi High Court relied upon by Mr. Khaitan as indicated earlier.

We, therefore, find that the authorities below erred in law in treating the advance given by the company to the assessee by way of compensation to the assessee for keeping his property as mortgage on behalf of the company to reap the benefit of loan as deemed dividend within the meaning of Section 2(22)(e) of the Act.

We, consequently, set aside the order of the Tribunal below by directing the Assessing Officer not to treat the advance of Rs.20,75,000/- as a deemed dividend"

Also/ we beg to draw the attention on the recent judgment by Hon'ble Income Tax Tribunal Chennai in case of ACIT-CCV(3) v. Smt. G Sreevidya, we quote:-

"In order to attract the provisions of section 2(22)(e) the important consideration is that there should be loan/ advance by a company to its shareholder. Every amount paid must make the company a creditor of the shareholder of that amount At the same time/ it is to be borne in mind that every payment by a company to its shareholders may not be loan/ advance. In the present case, the amount was withdrawn by the assessee from the company only to meet her short term cash requirements. By virtue of offering personal guarantee and collateral security for the benefit of the company, the liquidity position of the assessee had gone down. In the strict sense if it is to be construed the amount forwarded by the company to the assessee was not in the shape of advances or loans. The arrangement between assessee and the company was merely for the sake of convenience arising out of business expediency. In the facts and circumstances of the case, it is not appropriate to hold that the amount withdrawn by the assessee partakes the character of deemed dividend under the provisions of section 2(22)(e) of the Act .

The case of the assessee is squarely covered by the Division Bench judgment of the Hon'ble Calcutta High Court in the case of Pradip Kumar Malhotra (supra), wherein the facts were similar to the facts of the instant case. In Pradip Kumar's case assessee had substantial holding in a private company. the assessee permitted his immovable property to be mortgaged to the bank for enabling the company to take benefit of loan. The Board of Directors of the company passed a resolution to obtain interest free deposit up to Rs. 50 lakhs as and when required. The assessee obtained from the company a sum of Rs. 20,75,000/- by way of security deposit. Out of this amount, a sum of Rs. 20 lakhs was returned by the assessee to the company. The Assessing Officer added the sum of Rs.20,75,000/- as deemed dividend. The Hon'ble High Court while allowing the appeal of the assessee held that for retaining the benefit of loan availed of from the bank, if decision was taken to give advance to the assessee such decision was not to give gratuitous advance to its shareholder but to protect the business Interest of the company. The sum 'of Rs.20,75,000/- could not be treated as deemed dividend.

The Division Bench of the Hon'ble Calcutta High Court followed the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Creative Dyeing & Printing Pvt. Ltd. reported as 318 ITR 476(Del) In the instant case also the assessee was allowed to withdraw funds from the company as per requirement for personal purposes against the personal guarantee and the collateral security given by her to facilitate her availing of credit facility of the company. It is a well settled law that loan or advance given to a shareholder by a company in which public is not substantially interested and which had accumulated pro/its. the amount advanced as loan to such shareholder is deemed to be dividend as per the provisions of section 2(22)(e) of the Act. However, the facts and circumstances of each case have to be scrutinized before applying the ratio of the cases holding above well settled law.

In the facts and circumstances of the instant case, judgments relied upon by the DR in the cases of Sarada P. (supra), P.K. Abubucker (supra) and Tarulata Shyam (supra) are not applicable.

The Commissioner of Income Tax (Appeals) vide order dated 6.4.2011 has rightly deleted the addition made on account of "**deemed dividend**" by the Assessing Officer. We do not find any infirmity in the order passed by the Commissioner of Income Tax (Appeals). In view of our aforesaid finding the appeal of the Revenue fails and the same is dismissed being devoid of any merit "

As a matter of facts, we had stated that the said temporary accommodation was also repaid. We did not rely on the premise that by repayment said transaction not to be treated as deemed dividend, it was the statement of fact only and we did not want to read much in to it Our ground of defense is that the advance itself was not gratuitous to the shareholder.

In our case of the accommodation was given to the Guarantor of loan/ on whose security the Company was enjoying the loan facilities for its business. The assessee had given the security without any honorarium in return. In such a situation/ the said advance by the company cannot be said to be a gratuitous advance for the benefit of the shareholder, hence the provision of section 2(22)(e) is not applicable. The entire arrangement was made for the business interest of the company. "

6.3 I have perused the ground of appeal and the fact of the case. The appellant has argued that the said company made payment of Rs.6,60,000/- by cheque number 106429 dated 24-03-2009 directly to 581 life insurance company in order to collateral security to the bank, for obtaining loan to the said company, in the name of Mr. Santosh Kumar Jaiswal. It is further argued that the appellant has not gained any benefit by creating life insurance also on his life even no deduction has been claimed. The appellant claimed that he has given his personal guarantee for securing the guarantee capital of the loan taken by the M/s. Benchmark Developers Pvt. Ltd. The company had asked the assessee to provide his unconditional personal guarantee as a secured loan to be provided to the company by its banker. On the request of the company, the appellant agreed to act as guarantor to the secured loans of the company, which enabled it to obtain the loans from the banker. The first premium of Rs.6,60,000/- was withdrawn by the insurance company from bank account of the company opened with said working capital limit. The appellant has not met such payment and such amount was shown as advance in his account.

Perusal of above narrated fact shows that the appellant has taken life insurance of Rs.6,60,000/- which has been shown as a loan and advances in his name in the account of the company. The company itself should/could have made guarantee by making a fixed deposit of Rs.6,60,000/- for obtaining loan. The appellant has not made any submission which can show that the appellant was bound for taking insurance in his name for loan as a guarantor for the company. There would have been many forms of deposit as far as security of the loan is concerned. The surrender value was also paid in the account of the appellant on 17-04-2012. I agree with the view that for purpose of collateral security of Rs.20,00,00/- the bank have several form of instrument in form of NSC/KVP/FD etc. The fact mentioned by the AO that the policy was taken in March 2009 which was pledged for loan to SBI on 06-05-2009 at a gap of two month and the benefit of policy was gone in the hand of policy holder. The policy was purchased much before it was assigned to the bank itself has great important in terms of deciding the deemed dividend issue. It is practically seen that even such insurance are made on the day of sanctioning of loan itself but in this case it is before two months, which shows that loan was given for FD insurance and later it was though for utilises as security. Therefore, the argument of the appellant is not tenable. The case laws cited by the appellant relates to the security which was in form of land and the holding of land always remained in the hands of the director in lieu of land no money was paid. Here in this case the company lend Rs.6,60,000/- to the appellant- which was utilised for purchase of insurance policy which is for personal use. The ultimate maturity value was also encased by the appellant and in the books of account it was shown as a loan. Perusal of above narrated facts shows that the condition laid down by section 2(22)(e) is also applicable. Hence, the addition made by the AO is upheld and the ground of appeal is dismissed.”

3. Both the Learned Representatives reiterate their respective stands against and in support of the deemed dividend addition made in the course of assessment and upheld in lower appellate proceedings. There is hardly any dispute that the impugned sum is in the nature of an insurance payment made to the SBI Life Insurance. There is further no quarrel behind parties that the assessee satisfies the first test of both registered and beneficial shareholders in the entity i.e. M/s Benchmark Developers Pvt. Ltd. who actually incurred the expenditure in issue. The assessee's sole case is that he had stood as a collateral for the said entity and it is in lieu of the corresponding agreement dated 31.03.2009 that the company agreed to pay the insurance amount treated as deemed dividend in both the lower proceedings.

4. I have perused assessee's detailed paper book comprising of his proprietary business concerned M/s N.S. Developer's, list of premium paid, copy of premium receipt, copy of re-assignment form, hiss agreement between this prop. concern and M/s Benchmark Developers Pvt. Ltd., his ledger account in the books of said entity, the said entity's ledger account in assessee's proprietary concern's books and his

acknowledgement as well as personal balance-sheet for the impugned assessment year. It emerges from the agreement particularly in clause 11 page 10 of the paper book that the said company had agreed to provide for arrange for requisite funds to life insurance policy or unit linked life insurance policy taken as cash collateral in the name of guarantor from its funds. I make it clear that there is no dispute raised *qua* genuineness of the said person guarantee agreement executed between the assessee and M/s Benchmark Developers Pvt. Ltd. for providing personal guarantee to the lenders and securing the impugned life premium receipt of the same date i.e. 31.03.2009. I therefore rely on the hon'ble jurisdictional high court's decision in **ITA No.219 of 2003 Pradip Kumar Malhotra vs. CIT** decided on 02.08.2011 holding that such a transaction involving collateral security agreement and corresponding terms and conditions incorporated therein cannot be treated as deemed dividend u/s. 2(22)(e) of the Act. I delete the same impugned addition therefore.

5. This assessee's appeal is allowed.

Order pronounced in open court on 15/05/2019

Sd/-
(S.S. Godara)
Judicial Member

Kolkata,
*Dkp/Sr.PS

दिनांक:- 15/05/2019 कोलकाता

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

1. अपीलार्थी/Appellant-Santosh Kr. Jaiswal, 31F, Ramkrishna Samadhi Road, Kol-54
2. प्रत्यर्थी/Respondent-ITO Wd-45(4), 3, Govt. Place (West), Kolkata-001
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।