

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'A(SMC)' BENCH, KOLKATA**

Before Shri P.M. Jagtap, Vice-President

**I.T.A. No. 768/KOL/2019
Assessment Year: 2012-2013**

Sri Krishna Bhagwan Giri,.....Appellant
13, B.B. Ganguly Street,
Room No. 105, Kolkata-700012
[PAN: ADVPG9028Q]

-Vs.-

Income Tax Officer,.....Respondent
Ward-1(3), Kolkata,
P-7, Chowringhee Square, Aayakar Bhawan,
Kolkata-700069

Appearances by:

Shri Manish Tiwari, FCA, for the Appellant
Shri Jayanta Khanra, JCIT, Sr. D.R., for the Respondent

Date of concluding the hearing : January 02, 2020
Date of pronouncing the order : February 05, 2020

O R D E R

This appeal filed by the assessee is directed against the order of ld. Commissioner of Income Tax (Appeals)-1, Kolkata dated 28.02.2019 and the solitary issue involved therein relates to the addition of Rs.34,64,616/- made by the Assessing Officer and confirmed by the ld. CIT(Appeals) on account of deemed dividend under section 2(22)(e) of the Income Tax Act, 1961.

2. The assessee in the present case is an individual, who filed his return of income for the year under consideration on 10.02.2013 declaring total income of Rs.4,93,820/-. The said return was initially processed by the Assessing Officer under section 143(1) of the Act. Subsequently he, however, found that the assessee had taken a loan of Rs.2,37,65,058/- from M/s. S.K. Minerals Agencies Pvt. Limited during the year under consideration, which attracted the provisions of section

2(22)(e). He, therefore, reopened the assessment and after recording the reasons, a notice under section 148 was issued by him. In response to the said notice, the return of income was filed by the assessee on 05.07.2016 declaring the same total income of Rs.4,93,820/- as declared in the return of income originally filed on 10.02.2013. During the course of assessment proceedings, the assessee was required by the Assessing Officer to offer his explanation as regards the applicability of section 2(22)(e) of the Act to the loan taken from M/s. S.K. Minerals Agencies Pvt. Limited in which the assessee was the beneficial owner of the shares holding more than 10% with voting rights. Although the assessee made a submission challenging the validity of reopening of assessment, no explanation was offered by him as regards the applicability of section 2(22)(e). The Assessing Officer accordingly invoked the provisions of section 2(22)(e) and treated the amount of loan received by the assessee from M/s. S.K. Minerals Agencies Pvt. Limited to the extent of the proportionate accumulated profits of the said Company worked out at Rs.34,65,616/- as deemed dividend chargeable to tax in the hands of the assessee. Accordingly the addition to that extent was made by him to the total income of the assessee under section 2(22)(e) on account of deemed dividend in the assessment completed under section 143(3)/147 of the Act vide an order dated 10.10.2017.

3. Against the order passed by the Assessing Officer under section 143(3)/147, an appeal was preferred by the assessee before the Id. CIT(Appeals) challenging the addition made by the Assessing Officer on account of deemed dividend under section 2(22)(e) of the Act. During the course of appellate proceedings before the Id. CIT(Appeals), the following submission was made in support of the assessee's case that the provisions of section 2(22)(e) of the Act were not applicable in his case:-

"In the matter of Pradip Kumar Malhotra -vs.- CIT Income Tax Act, 1961 No. 219/2003(2011-ITRV-HC-Kolkata-274) the Hon'ble Calcutta High Court has held that 'non-

gratuitous' advance to substantial shareholder is not deemed dividend u/s 2(22)(e), it was held:-

"The phrase 'by way of advance or loan' s. 2(22)(e) must be construed to mean those advanced or loans which a share holder enjoys on account of being a person who is the beneficial owner of shares. If such loan or advance is given to such shareholder as a consequence of any further consideration received from shareholder, then such advance or loan cannot be said to be deemed dividend u/s 2(22)(e). Thus, while gratuitous loan or advance given by a company to a substantial shareholder comes within the purview of s. 2(22)(e), a case where the loan or advance is given in return to an advantage conferred upon the company by the shareholder does not. 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 the loan and in spite of request of the assessee, the company is unable to release the said 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 given gratuitous advance to its share holder but to protect the business interest of the company".

4. The Id. CIT(Appeals), however, did not accept the submission made on behalf of the assessee as above on the ground that there was no evidence produced by the assessee to support and substantiate the same. He accordingly confirmed the addition made by the Assessing Officer to the total income of the assessee under section 2(22)(e) of the Act. Aggrieved by the order of the Id. CIT(Appeals), the assessee has preferred this appeal before the Tribunal.

5. I have heard the arguments of both the sides and also perused the relevant material available on record. The Id. Counsel for the assessee has invited my attention to the copies of documentary evidence placed in his paper book to point that the said evidence to support and substantiate

the assessee's case that the loan in question received by the assessee from M/s. S.K. Minerals Agencies Pvt. Limited was non-gratuitous loan and the said loan was given in return to an advantage conferred upon the Company by the assessee. He has contended that this evidence filed by the assessee before the Assessing Officer, however, was completely overlooked /ignored by the Id. CIT(Appeals) while confirming the impugned addition made by the Assessing Officer under section 2(22)(e) of the Act. He has urged that this matter may, therefore, be sent back to the Id. CIT(Appeals) for deciding the same afresh after taking into consideration the documentary evidence already placed on record by the assessee. Keeping in view all the facts and circumstances of the case, I am inclined to accept this contention of the Id counsel for the assessee. Even the Id. D.R. has not raised any objection for sending the matter back to the Id. CIT(Appeals) for fresh consideration. The impugned order of the Id. CIT(Appeals) on this issue is accordingly set aside and the matter is remitted back to him for deciding the same afresh on merit after taking into consideration the evidence already placed on record by the assessee and after giving the assessee proper and sufficient opportunity of being heard.

6. In the result, the appeal of the assessee is treated as allowed for statistical purposes.

Order pronounced in the open Court on February 05, 2020.

**Sd/-
(P.M. Jagtap)
Vice-President)**

Kolkata, the 5th day of February, 2020

Copies to : (1) ***Sri Krishna Bhagwan Giri,
13, B.B. Ganguly Street,
Room No. 105, Kolkata-700012***

(2) ***Income Tax Officer,
Ward-1(3), Kolkata,
P-7, Chowringhee Square, Aayakar Bhawan,
Kolkata-700069***

- (3) *Commissioner of Income Tax (Appeals)-1, Kolkata;*
- (4) *Commissioner of Income Tax- , Kolkata*
- (5) *The Departmental Representative*
- (6) *Guard File*

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.