

IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE
BEFORE SHRI. B.R BASKARAN, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No.550/Bang/2019
Assessment Year : 2013-14

M/s Perfecta Lifestyle, No.16, (Old No.12) 3 rd Floor, Kariyappa Road, Basavanagudi, Bengaluru-560 004. PAN - AANFP 6507 C	Vs.	The Income-Tax Officer, Ward -5(2)(3), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri H Guruswamy, I.T.P
Revenue by	:	Shri Pradeep Kumar, CIT-DR

Date of Hearing	:	16-02-2021
Date of Pronouncement	:	30-03-2021

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal has been filed by assessee against order dated 10/05/2018 passed by Ld.CIT(A)5, Bangalore for assessment year 2013-14 on following grounds of appeal:

1.The impugned Appellate order dated: 10-05-2018 passed by the Ld. CIT(A), Bangalore-5 is opposed to law, facts and circumstances of the case.	
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2. The Ld. CIT(A) has erred in holding that the Loan obtained by the Appellant of Rs. 81,67,625/- from the Company M/s. Fateh Agro Builders Pvt Ltd., amounts to Deemed Dividend u/s. 2(22)(e) of the Act without appreciating the fact that the Appellant Firm is not a Share Holder of the Company	37,89,293/-
3. Without prejudice to the Ground No.2, the Ld. CIT(A) ought to have appreciated the fact that the deemed dividend if any is chargeable to tax in the hands of the Shareholder and not in the hands of the Firm.	Same as above
4. The Ld. CIT(A) has erred in confirming the addition of Rs. 7,18,628/- made by the AO u/s. 40(a)(ia) of the Act without appreciating the fact that the payment so made was not based on any contractual obligation as per section 194C of the Act, but it represented day to day expenditure incidental for carrying on the business.	The relevant tax attributable to the disallowance of Rs. 7,18,628/- is subsumed in the total tax effect of Rs.37,89,293/- mentioned in GroundNo.2 above.
5. The Appellant craves leave to add, alter, amend and delete any of the grounds at the time of hearing.	
Total tax effect (see note below)	Rs. 37,89,293/-

2. At the outset, the Ld.AR submitted that there is a delay of 227 days in filing the present appeal before this *Tribunal*. Ld.AR submitted that, the case of assessee was handled by another professional before the Ld. CIT (A). The authorised representative who appeared before the Ld. CIT (A) received the impugned order, but the same was not communicated to assessee. He submitted that the previous representative has filed an affidavit dated 18/03/2019 to this effect. The authorised representative in the said affidavit has submitted, that the appellate order received

was misplaced in his office. It was only when assessee approached him in the month of March 2019 that he searched the office and obtained the order.

3. The Ld.AR thus submitted before us that, the delay in filing appeal before this (*Tribunal*) is not attributable to assessee and therefore prayed for confirmation of the delay.

4. The Ld.Sr.DR however opposed the prayer for condoning the delay on the ground that it is inordinate.

5. We have perused the submissions advanced by both sides in light of records placed before us.

6. In support of condonation of delay in filing the appeal, the Ld.AR reiterated the contents of the affidavit as above, and prayed for delay of 227 day being condoned in filing the present appeal. From the affidavit filed of the erstwhile authorised representative for assessee, it is clear that the delay cannot be attributed to assessee and in the interest of Justice and for principle that substantive right condonation should not be denied by technicalities. We therefore condone the delay in filing the present appeal before this *Tribunal*.

Brief facts of the case on merits are as under:

7. The assessee filed its return of income for year under consideration declaring total income at "nil". The case was selected for scrutiny and notice under section 143 (2) was served on assessee. In response to statutory notices, representative of assessee appeared before the Ld. AO and filed requisite details as called for.

8. The assessee is a partnership firm consisting of 2 partners namely Mr.Dinesh Bohra and M/s Rajeshwari Buildcon Pvt.Ltd., in the ratio of profit and loss at 60:40. The Ld.AO observed that, the assessee during the year had outstanding loan of Rs.71,64,625/- from M/s Fateh Agro Builders Pvt.Ltd. Ld.AO noted that assessee had total money as loan during the year corresponding to assessment year 2013-14 was Rs.81,67,625/-, as per the financial details furnished of M/s Fateh Agro Builders Pvt.Ltd. It was noted by Ld.AO that Mrs. Dinesh Bohra was 60% shareholder assessee firm and is also holding 20.58% of the shares in M/s Fateh Agro Builders Pvt.Ltd. the Ld. AO thus observed that Mr. Dinesh Bohra is substantial shareholder in M/s Fateh Agro Builders Pvt.Ltd. and partner in the assessee firm.

9. The assessee was thus called upon by Ld.AO to show cause as to why the amount received from M/s.Fateh Agro Builders Pvt.Ltd. should not be treated as deemed dividend under section 2(22)(e) of the Act.

10. In response to query raised, the Ld. AO filed his submission dated 28/03/2016 that provisions of section 2(22) (e) of the Act are not attracted in the present case. It was submitted that in the present case the transactions of loan is between a company and assessee firm. It was submitted that loan has been given by the company to the assessee. It was submitted that, provisions of deemed dividend are applicable only when the loan is given to a person having substantial interest in the lending company or to

concern where the same person is either partner or substantial shareholder. The Ld.AR invited our attention to following judgments to contend that since the assessee was not a shareholder during the relevant period of M/s. Fateh Agro, from where assessee received monies, which are in the nature of loan or advances, such transaction are not covered by the definition of the word "dividend" as contained in Section 2(22)(e) of the Act:

Decision of the Hon'ble Bombay High Court in CIT v. Universal Medicare (P.) Ltd. 190 Taxman 144, the decision of Hon'ble Delhi High Court in CIT v. MCC Marketing (P.) Ltd. [2011] 16 taxmann.com 411 and decision of Hon'ble Delhi High Court in CIT v. Ankitech (P.) Ltd. [2011]11 taxmann.com 100 (Delhi)

11. The Assessee placed reliance on the decision of *Hon'ble Karnataka High Court* in case of *CIT vs Sarva Equity Pvt.Ltd., in ITA No.324/2007 dated 08/01/2014*, wherein all the above decisions have been considered on similar facts.

The Ld.AO, however held that, M/s Fateh Agro Builders Pvt.Ltd. had accumulated profits when the loans were given to assessee and there was a common shareholder/partner being Mr. Dinesh Borha with more than 10% voting power in the lending company and more than 20% interest in the receiving concern (being assessee).

12. Aggrieved by the order of Ld. AO, assessee preferred appeal before the Ld.CIT(A). The Ld.CIT(A) after considering the submissions of the assessee, held as under:

"5. I have considered the above grounds of appeal, statement of facts and written submissions filed by the appellant and also perused the assessment order. The appellant has raised mainly two grounds of appeal and the first ground is that the Assessing Officer has considered

Rs.81,67,625/- as deemed dividend u/s.2(22)(e) of the Act, 1961 though the provisions of the said section do not apply to the issue since the closely held private limited company has advanced the said sum to the partnership concern which is not a shareholder or member of the lending company. The appellant submitted that it had borrowed unsecured loan of Rs.81 67,625/- from Fateh Agro Builders Pvt. Ltd. for the real estate development business, The appellant was not a registered shareholder in the lending company and is closely held private limited company wherein Mr. Dinesh Bohra one of the partners of the appellant hold 20,58% equity share and has substantial interest of 60% share in the appellant firm. As per decided case the amount advanced by a closely held private limited company to a partnership firm wherein the beneficial shareholder is a partner having substantial interest cannot be treated as deemed dividend as the loan recipient firm is neither a shareholder nor a member and dividend will be essentially received by a shareholder or the Assessing Officer has invoked the provisions of sec.2(22)(e) of the Act and brought to tax a sum of Rs.81,67,6251- by observing that M/s. Fateh Ag.ro Builders Pvt. Ltd. had accumulated profits when the loans were given to the appellant and there was a common shareholder/partner Shri Dinesh Bohra with above 10% voting power in the lending company and more than 20% interest in the receiving concern. Hence, loans and advances in question attract the provisions of Sec.2(22)(e) of the Act. The provisions of Sec.2(22)(e) of the Act provides that any payment by a company out of accumulated profits under the conditions mentioned to any concern should be treated as deemed dividend and the treatment given by the Assessing Officer was justified in law. As per Board's Circular No.495 dt. 22 09.1987 also, the amount is to be treated as. dividend u/s 2(22)(e) of the Act. The appellant has taken a loan Rs.81 67,625/- from Fetch Agro Builders Pvt. Ltd. wherein Mr. Dinesh Bohra one of the Partner of the appellant hold 20.58% equity share and has substantial interest of 60% share i.e the appellant firm which clearly shows that there was a common shareholder/partner in the lending company and also the receiving firm with substantial interest. Further the loans were advanced and surplus funds of the company and therefore the conditions of the provisions of Sec.2(22)(e) are clearly fulfilled and therefore I do not find any infirmity in the impounded order passed by the Assessing Officer. The grounds of appeal are not allowed.”

13. Aggrieved by the observations of Ld.CIT(A) assessee is in appeal before us now.

14. The Ld.AR submitted that assessee is not registered shareholder of M/s Fateh Agro Builders Pvt.Ltd., and therefore

the provisions of section 2(22)e) of the Act is not applicable in respect of loan received by assessee from M/s Fateh Agro Builders Pvt.Ltd. The Ld.AR submitted that Circular 495 issued by CBDT dated 22/09/1987 covers the fiction of deemed dividend only in the hands of a registered shareholder who is alone entitled to the dividend on the share capital invested in the company. He once again placed reliance on the decision of *Hon'ble Karnataka High Court* in case of *Serva Equity Pvt. Ltd. (supra)*.

15. On the contrary, the Ld.CIT.DR placed reliance on orders passed by authorities below.

16. We have perused submissions advanced by both sides in light of records placed before us.

17. We have perused the decision relied upon by the Ld.AR of *Hon'ble Karnataka High Court* in case of *M/s Serva Equity Pvt.Ltd (supra)*. The facts considered by *Hon'ble Karnataka High Court* in case of *M/s Serva Equity Pvt.Ltd (supra)* is similar with of facts before us in the present case. Admittedly, assessee is not shareholder of the company which has advanced loan to assessee. It is also fact that except for the observation by Ld.AO that Mr.Dinesh Bohra is a partner in the assessee form as well as shareholder in the company that advanced loan to assessee. This by itself cannot be significant to treat the amount advanced as deemed dividend to fall within the purview of section 2 (22) (e) of the act. *Hon'ble Karnataka High Court* in case of *M/s Serva Equity Pvt.Ltd (supra)*, has considered various decisions of

Hon'ble Bombay High Court and Hon'ble Delhi High Court(supra)
and observed as under:

"17. Section 2(22)(e) of the Act is designed to strike balance, i.e., advance or loan to a shareholder and that the word shareholder can mean only a registered shareholder. A beneficial owner of shares whose name does not appear in the Register of shareholders of the Company cannot be stated to be a shareholder. He may be beneficially entitled to the share but he is certainly not a shareholder. In other words, it is only the person whose name is entered in the Register of the shareholders of the Company as the holder of the shares who can be said to be a shareholder qua Company and not the person beneficially entitled to the shares. We are therefore, of the view that it is only where a loan is advanced by the Company to the registered shareholder and the other conditions set out in Section 2(22)(e) of the Act are satisfied, that amount of loan would be liable to be regarded as deemed dividend within the meaning of this section.

18. We do not find any reason to take a view other than the one taken by the Delhi and Bombay High~ Courts in the aforementioned judgments nor could the Senior counsel appearing for the revenue persuaded us to take differing view. In the circumstances, we find no reason to interfere with the concurrent finding of facts recorded by the two authorities below namely the Appellate Authority and the Tribunal. In the circumstances, we answer the question as formulated by us in favour of the respondent- assessee and against the revenue."

18. The Assessee has also relied on the decision of *Hon'ble Madras High Court* in case of *CIT vs M/s T.Abdul warhead & Co* in *ITA No. 512 and 513/2018* by order dated 21/09/2020 in support of the proposition that the said payment would stand attracted under the provisions of sec.2(22)(e) when it is paid by a company in which public are not substantially interested by way of advance or loan to shareholder being a person who is the beneficial owner of the shares. Thus it is abundantly clear that the payment has to be made to a shareholder being a person who is the beneficial owner of shares. In the present facts of the case payment has been made to assessee a partnership firm who was not a shareholder in the company who has advanced the loan.

19. We further note from the accounts placed in the paper book by assessee that these were termed as short-term borrowings by assessee during the year relevant to assessment year 2012-13 amounting to Rs.81,67,625/- which has been reduced to Rs.71,64,625/- during the year under consideration.

20. Based on the above discussion, we are of the opinion that the amount received by assessee from M/s Fateh Agro Builders Pvt Ltd., cannot be considered to be deemed dividend under the section 2(22)(e) of the Act.

Accordingly grounds raised by assessee stands allowed.

In the result appeal filed by assessee stands allowed.

Order pronounced in the open court on 30th March, 2021

Sd/-
(B.R BASKARAN)
Accountant Member
Bangalore,
Dated, the 30th March, 2021.
/Vms/

Sd/-
(BEENA PILLAI)
Judicial Member

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar, ITAT, Bangalore

		Date	Initial	
1.	Draft dictated on	On Dragon		Sr.PS
2.	Draft placed before author	-3-2021		Sr.PS
3.	Draft proposed & placed before the second member	-3-2021		JM/AM
4.	Draft discussed/approved by Second Member.	-3-2021		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	-3-2021		Sr.PS/PS
6.	Kept for pronouncement on	-3-2021		Sr.PS
7.	Date of uploading the order on Website	-3-2021		Sr.PS
8.	If not uploaded, furnish the reason	--		Sr.PS
9.	File sent to the Bench Clerk	-3-2021		Sr.PS
10.	Date on which file goes to the AR			
11.	Date on which file goes to the Head Clerk.			
12.	Date of dispatch of Order.			
13.	Draft dictation sheets are attached	No		Sr.PS