आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'C' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, AHMEDABAD

(***Convened through Virtual Court***)

BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMEBR
& SHRI AMARJIT SINGH, ACCOUNTANT MEMEBR

आयकर अपील सं./I.T.A. No. 2133/Ahd/2014

(**निर्धारण वर्ष /** Assessment Year : 2010-11)

M/s. Checkmate Services Pvt. Ltd. 1, Sajani Apartment, Dalal Road, Golwad, Fatehgunj, Baroda - 390002	**बनाम**/ Vs.	**Dy. Commissioner of Income Tax** Circle – 1(1), Baroda
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACC8465A		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

&

आयकर अपील सं./I.T.A. No. 399/Ahd/2015

(**निर्धारण वर्ष /** Assessment Year : 2010-11)

Smt. Sharmila Vikram Mahurkar GF 6,7,8,9 Aman Towers, Suvas Colony Fatehgunj, Vadodara - 390002	**बनाम**/ Vs.	**Dy. Commissioner of Income Tax** Circle – 1(1), Vadodara - 390007
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ABVPM1469R		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से/**Appellant by :**	Shri Tushar Hemani, Sr. Advocate with Shri Anil R. Shah, CA & Shri P. B. Parmar, Advocate
प्रत्यर्थी की ओर से / **Respondent by :**	Shri Ajay Pratap Singh, CIT. D.R. & Shri V. K. Singh, Sr. D.R.

सुनवाई की तारीख / **Date of Hearing**	17/02/2022
घोषणा की तारीख /**Date of Pronouncement**	30/03/2022

ORDER

PER MAHAVIR PRASAD, JM:

The captioned two appeals have been filed at the instance of the two different assessees against the Commissioner of Income Tax (Appeals)-I, Baroda ('CIT(A)' in short) vide Appeal No. CAB-I/036/2013-14 & CIT(A)-1, Vadodara vide Appeal No. CAB-1/113/2014-15 dated 02.05.2014 & 19.12.2014 arising in the assessment order dated 18.03.2013 & 28.02.2014 passed by the Assessing Officer (AO) under s. 143(3) of the Income Tax Act, 1961 (the Act) & under s.143(3) r.w.s. 147 of the Act; respectively, both concerning AY. 2010-11.

2. Since, facts of the case are common and related to each other, therefore, for the sake of brevity, we would like to dispose of these matters by way of common order.

3. Firstly, we would like to take up ITA No.2133/Ahd/2014 in case of M/s. Checkmate Services Pvt. Ltd., wherein assessee has taken following grounds:

> *"1. The CIT(A) has erred in confirming the addition as Investment in Property at Gurgaon on Rs.1,57,00,000/-. Since it is given as a Capital Contribution in Partnership*

Firm of M/s. Checkmate Apperals it is not liable to be added as Income.

On facts of the case and as per provisions of Law the CIT (A) ought to have deleted the addition made on Protective Basis since the same amount is already Taxed in the hands of the Smt. Sharmila Mahurkar wife of the Director of your Appellant.

2. *The CIT(A) has also erred in confirming the disallowance of Rs.5,44,46,334/-made by Assessing Officer on account of delayed payment of ESI and PF of Employees of your Appellant.*

It is submitted by your Appellant that the expenditure of Employees Contribution towards ESI & PF was incurred during the course of business and for purposes of business and that in view of Supreme Court Judgement relied by the Appellant, the CIT(A) ought to have deleted the addition of Rs.5,44,46,334/-."

4. The facts of the case are that assessee is a private company engaged in service industry dealing in providing security. During the previous year relevant to the assessment year under consideration the assessee has shown gross profit of Rs.58,27,29,357/- on the total turnover of Rs.2,95,80,95,278/- which works out the gross profit rate at 19.70%. In this case, a survey proceedings under S.133A of the Act was carried out in the case of M/s. Checkmate Services Pvt. Ltd. and its group concerns on 06.12.2010. The findings of survey action related to AY 2010-11 in relation to Checkmate Services Pvt. Ltd. that assessee company made investment in property at Gurgaon amounting to Rs. 1,57,00,000/- and same was made in property through MRS. Sharmila Mahurkar who is one of the Director in Checkmate Services Pvt. Ltd. vide MOU executed between CSPL & MRS. Sharmila Mahurkar with an intention to become major partner

in the firm. The company is engaged in in guarding business and as per the prevailing practice in the state of Haryana, no security company can directly purchase the property in the Industrial Area and accordingly the company decided to go for manufacturing unit in the name of Mrs. Sharmila Mahurkar one of the Director of the company for stitching of dress material, the requirement of which is very high in the security business and accordingly the company entered into memorandum of understanding (MOU) with Mrs. Sharmila Mahurkar for purchase of the property in her name for which a separate proprietary concern in the name and style of M/s Checkmate Apparels and all the payments for acquisition of the property shall be made by the company, based on the above agreement the company made payment of Rs. 1,57,00,000/- which was debited in the account of M/s checkmate Apparels the proprietary concern of Mrs. Sharmila Mahurkar. Though, this amount was debited in the account of Checkmate Apparels, however the amount was given to the intending seller of the property. The Director of the company further submitted that survey declaration also contains deemed dividend for AY 2010-11 of Mrs. Sharmila Mahurkar amounting to Rs. 28331391/-(which includes deemed dividend of Checkmate apparels of Rs. 223772891). While arriving at deemed dividend of M/s Checkmate Apparels the amount of Rs. 1,57,00,000/- was also considered. Learned AO mentioned that the submission of the assessee had been considered but not found acceptable. As the director of the company Shri Vikram Mahurkar was confronted with the contents of Black diary 2009 page-83 dated 29.06.2009 which

mentioned the transaction of land purchase at Gurgaon. During the survey proceedings the director vide reply to question no.3, dated 07.12.2010 had accepted that Rs.1.57 crores was paid out of books in respect to land purchased at Gurgaon and the same has been offered for taxation for A.Y.2010-11. Further, statement of shri Vikram Mahurkar was "recorded u/s 131(1A) of the Act on l7.01.2011 wherein Director of the company disclosed Rs.1.57 crore being investment in property in Gurgaon in the hands of company. The assessee has not taken the said investment in its books contending that the investment has been included into deemed dividend declared in the hands of sharmila Mahurkar, the Director of the assessee company and the same has been offered for taxation for A.Y.2010-11. Based on the aforementioned facts & discussion as above, Rs.1.57 crores is added back to the income of the assessee company.

5. It is noticed in the auditor's report that the auditors had quantified the delayed payment of P.F. and ESIC to the government account, but assessee did not disallow itself in the computation of income. The issue here is that the assessee company has deducted P.F. and ESIC contribution from its employees' but did not deposit in the Government account within the prescribed period as per respective Laws. The auditors also quantified the mistake of assessee but the same were not added back in the computation of income. Regarding contribution of employees towards PF & ESIC collected by the employer, as per the Income-tax Act, it is governed by section 2(24)(x) r.w.s. 36(1)(va). The law is very clear that

the contribution of employees' has to be deposited within the prescribed time limit as per P.F. and ESIC Act. In case of employees' contribution towards PF, the time limit is 20th day of subsequent month (inclusive of grace period of 5 days) and for employees' contribution towards ESIC, the time limit is 21st day of subsequent month for any monthly contributions received by the employer. From the table enclosed along with 3CD report, the following payments were deposited after due date. The amount of Rs.4,65,87,673/- towards P.F. and Rs.78,58,661/- towards ESIC deposited after due date. The amount was deducted from the employees but assessee company failed to deposit within the prescribed time limit. During the course of assessment proceedings, the assessee could not give any plausible explanation for delayed depositing of the above said amount and before CIT(A) as well could not give any reason for late deposit of PF & ESIC amount.

6. We have hard both the parties and perused the impugned order and material available on record. In our considered opinion, this matter is squarely covered against the assessee by the Jurisdictional High Court in the case of *CIT vs. GSRTC [2014] 366 ITR 170 (Guj.).* The Hon'ble High Court held as under:

> ***"Section 43B, read with section 36(1)(va) of the Income-tax Act, 1961 - Business disallowance - Certain deductions to be allowed on actual payment (Employees contribution) - Whether where an employer has not credited sum received by it as employees' contribution to employees' account in relevant fund on or before due date as prescribed in Explanation to section 36(1)(va),***

assessee shall not be entitled to deduction of such amount though he deposits same before due date prescribed under section 43B i. e., prior to filing of return under section 139(1) - Held, yes - Assessee State transport corporation collected a sum being provident fund contribution from its employees - However, it had deposited lesser sum in provident fund account -Assessing Officer disallowed same under section 43B - However, Commissioner (Appeals) deleted disallowance on ground that employees contribution was deposited before filing return - Whether since assessee had not deposited said contribution in respective fund account on date as prescribed in Explanation to section 36(1)(va), disallowance made by Assessing Officer was just and proper - Held, yes [Para 8] [In favour of revenue]

Therefore, respectfully following the Hon'ble Gujarat High Court order, we confirm the addition made by the lower authorities and dismiss the ground of assessee with regard to PF & ESIC.

7. Thereafter, the assessee preferred first statutory appeal before the learned CIT(A). The learned CIT(A) confirmed by holding that during survey proceedings, the Director of the company voluntarily made statement for disclosure of Rs.1,57,00,000/- that this amount was paid out of books in respect of land purchase in Gurgaon and same was offered for taxation for A.Y. 2010-11 and till the date of assessment proceedings, this statement did not reiterated by the assessee. On the other hand, learned AR for the assessee cited judgment of Hon'ble Supreme Court in case of *CIT vs. S. Khader Khan Son [2012] 25 taxmann.com 413 (SC),* wherein it was held that in survey proceedings whether Section 133A of the Act does not empower any ITO to examine any person on oath. So, statement recorded under S.133A of the Act has no

evidentiary value and any admission made during such statement cannot be made basis of addition and this matter was held in favour of the assessee.

8. Now, against the order of the CIT(A), assessee has filed an appeal before us.

9. We have gone through the relevant record and impugned order. In this case AO has accepted part of investments made in Checkmate Apparels. Out of total debits of Rs.3,08,88,748/-, AO has doubted investments of only Rs.1,57,00,000/-. The rest of the investment has been accepted by the learned AO. In support of its contention, the assessee has filed deed of partnership with Mrs. Sharmila Mahurkar. As per entering by MOU, copy of deed partnership is placed at page nos. 72 to 77 of the paper book and Checkmate Services Pvt. Ltd. secured 95% of share in the capacity of partner and the same has not been disputed by the learned AO. Learned AR of the assessee has submitted before the lower authorities that as per prevailing practice in the State of Haryana, security companies cannot start manufacturing business of stitching of dress material. Such notification or order of State of Haryana was not brought to our notice and assessee has been failed to produce such notification of State of Haryana before the lower authorities. As we have noticed that advance was given in 2009 wherein apparel business was started in 2011. The assessee has filed an MOU and partnership deed between Mrs. Sharmila Mahurkar and M/s. Checkmate Services Pvt. Ltd. was

executed on 1st April, 2011 and same is part of paper book page nos.72 to 77. A survey proceeding was carried out on the group on 06.12.2010. During the survey proceedings, Shri Vikram Mahurkar admitted that Rs.1,57,00,000/- was paid out of books. In his statement, he has not mentioned that the said amount has been paid for the business of stitching of apparel material of the security guards. In our considered opinion, it amounts to afterthought. Moreover, not any Haryana Government's notification which supports contentions of the assessee/agency has been submitted before the lower authorities as well as before us which says that if any agency is doing business of providing security, same cannot run business of stitching of uniform/dresses of the Security Guards etc. The amount was paid way back in the month of July, 2009 and assessee has produced partners deed dated 19th April, 2011 first time before the Revenue and during survey, statement made by Shri Vikram Mahurkar. No such averments were made by Shri Vikram Mahurkar. In view of the above, we do not see any infirmity in the order passed by the lower authorities and do not want to intervene in the order passed by the learned CIT(A), therefore, appeal of the assessee is dismissed.

10. In the result, both grounds of appeal raised by assessee are dismissed.

11. Now, we come to ITA No.399/Ahd/2015 (Smt. Sharmila Vikram Mahurkar).

12. The grounds of appeal raised by assessee read as under:

"I. <u>On Legality of the order:</u>

1. The Assessment Order is framed based on Statement recorded U/S.133A of a "Third Party" and not of the Appellant and therefore based on such statement assessment order is bad in Law and void.

2. Without prejudice, it is submitted that Assessing Officer has no right to take Statement on Oath (of third party) which is not valid or binding under provisions of the Act as held in the case of CIT vs. Khadar Khan Son 352 ITR P.480 (SC) and therefore it is submitted that the entire Assessment Proceedings and the Assessment Order is wholly and fully based on invalid Statement of 'Third Party' is bad in Law and Void.

II. <u>On Reopening u/s.148:</u>

1. The CIT(A) has erred both in Law and in fact the upholding Reopening of Assessment u/s.147 of the Act. It is submitted by your Appellant that no new facts have come to the knowledge of Assessing Officer and that it is a clear case of change of opinion and therefore Sec. 147 does not apply.

2. The Reasons Recorded by the Assessing Officer has no direct "Nexus" with the facts of the case and is only to make inquiring of alleged escapement of Income and therefore Asst. Order is bad in law and void.

III. <u>On Merits:</u>

1. Without prejudice to above it is submitted by your Appellant that Sec.2(22(e) does not apply to facts of the case and Rs.2,23,72,891/- is not Taxable as "Deemed Dividend" since the Loan taken by your Appellant was for purposes of Business and therefore is exempt form sec.2(22)(e).

Without prejudice it is submitted that Rs.2,23,72,891/- if it is Taxable as Income is not correctly worked out.

"2. The CIT(A) has also erred in confirming levy of Interest u/s. 234B and 234C since the order to "Charge Interest u/s.234A, 234B, 234C & 234 D as applicable" is ambiguous unclear and in view of judgement of Hon. Gujarat High Court in the case of

ACIT vs. S.K. Family Trust, reported in 251 CTR page 427 such interest is not chargeable."

13. At the time of hearing, learned AR categorically mentioned in his statement that he does not wish to press the legal ground on legality of the order and reopening under s.148 of the Act and he wishes to argue his case on merit only.

14. The facts of the case are that the assessee is a Director of M/s. Checkmate Services Pvt. Ltd. and Checkmate Facility & Electronic Solutions Pvt. Ltd. and also has a proprietorship concern in the name and style of Checkmate Apparels. The assessee is a substantial share holder in both the companies. During the year under consideration the assessee has received interest free loan/advance from M/s. Checkmate Services Pvt. Ltd. which was found during the course of survey proceedings conducted upon M/s Checkmate Services Pvt. Ltd. on 06.12.2010. Therefore, as per the provision of Section 2(22)(e) of IT Act deemed dividend provision be attracted in the hands of the assessee. The CIT(A) also decline the deemed dividend of Rs.2,23,72,891/- in the hands of Checkmate Apparels which is proprietary concern of the assessee and amounting to Rs.59,58,000/- in the hands of assessee in her personal capacity. Accordingly, Rs.2,82,31,391/- was added to the total income of the assessee.

15. Against the said order, the assessee preferred first statutory appeal before the learned CIT(A) who partly allowed the appeal of the assessee holding that assessee itself has disclosed additional income of Rs.2,23,72,891/- as deemed dividend under s.2(22)(e) of the Act as a result of survey proceedings under s.133A of the Act in her case on 06.12.2010. Assessee never reiterated from its disclosure before filing of return of income tax and notices under s.148 of the Act.

16. We have gone through the relevant records and impugned order. It is fact that Mrs. Sharmila Mahurkar was share holder of and M/s. Checkmate Services Pvt. Ltd. which is closely held company and Mrs. Sharmila Mahurkar has 10% voting power in M/s. Checkmate Services Pvt. Ltd. and Mrs. Sharmila Mahurkar was having interest 100% in her proprietary concern i.e. Checkmate Apparel. Since, the amounts were advanced by M/s. Checkmate Services Pvt. Ltd. from its accumulated profit to Mrs. Sharmila Mahurkar and therefore, she was directly beneficiary. Same amount was used for the proprietorship firm of Mrs. Sharmila Mahurkar. So far partnership deed of the Checkmate apparel is concerned same was prepared on 1st April 2011 meaning thereby after the date of survey. At the time of survey, partnership deed was not in existence meaning thereby wherein 95% share with Mrs. Sharmila Mahurkar was not with the assessee. Surprisingly, M/s. Checkmate Services Pvt. Ltd. is showing above loans and advances in the asset sides in its balance sheet and same are being shown as liability in her proprietary

concern. On the other hand, learned AR argued that same amounts were given for the business purposes and stated that this ground is squarely covered by the CBDT Circular No. 19/2017, wherein it is mentioned as under:

> *"Section 2(22) clause (e) of the Income Tax Act, 1961 (the Act) provides that "dividend" includes any payment by a company, not being a company in which the public are substantially interested, of any sum 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.*
>
> *2. The Board has observed that some Courts in the recent past have held that trade advances in the nature of commercial transactions would not fall within the ambit of the provisions of section 2(22) (e) of the Act. Such views have attained finality.*
>
> *2.1 Some illustrations/examples of trade advances/commercial transactions held to be not covered under section 2(22) (e) of the Act are as follows:*
>
> *i. Advances were made by a company to a sister concern and adjusted against the dues for job work done by the sister concern. It was held that amounts advanced for business transactions do not to fall within the definition of deemed dividend under section 2(22) (e) of the Act. (CIT(A) vs. Creative Dyeing & Printing Pvt. Ltd.1, Delhi High Court).*
>
> *ii. Advance was made by a company to its shareholder to install plant and machinery at the shareholder's premises to enable him to do job work for the company so that the company could fulfil an export order. It was held that as the assessee proved business expediency, the advance was not covered by section 2(22)(e) of the Act. (CIT vs Amrik Singh, P&H High Court)2.*
>
> *iii. A floating security deposit was given by a company to its sister concern against the use of electricity generators belonging to the sister concern. The company utilised gas available to it from GAIL to generate electricity and supplied it to the sister concern at concessional rates. It was held that the security deposit made by the company to*

its sister concern was a business transaction arising in the normal course of business between two concerns and the transaction did not attract section 2(22) (e) of the Act. (CIT, Agra vs Atul Engineering Udyog, Allahabad High Court)

3. In view of the above it is, a settled position that trade advances, which are in the nature of commercial transactions would not fall within the ambit of the word 'advance' in section 2(22)(e) of the Act. Accordingly, henceforth, appeals may not be filed on this ground by Officers of the Department and those already filed, in Courts/Tribunals may be withdrawn/not pressed upon."

17. The learned AR also cited an order of co-ordinate bench in ITA No.102/Ahd/2012 in case of ITO Vs. Mehulbhai D Zhaveri, order dated 23.12.2016, wherein Tribunal followed Hon'ble High Courts' orders are as under:

"4. It can thus be seen that the Commissioner as a matter of fact found that the payments were not in the nature of current adjustment. There was movement of fund both ways on need basis. The transactions in the nature of loans and advances are usually very few in numbers whereas in the present case, such transactions are in the form of current accommodation adjustment entries. The Commissioner therefore, held that the transactions were not in the nature of loans and advances. The Revenue carried the matter in appeal. The Tribunal concurred with the view of the CIT (Appeals) and held that the amounts were not in the nature of Inter Corporate Deposits and were therefore, not to be treated as loans or advances as contemplated in section 2(22)(e) of the Act.

5. The issue is substantially one of appreciation of facts. When the CIT(Appeals) as well as Tribunal concurrently held that looking to large number of adjustment entries in the accounts between two entities, the amounts were not in the nature of loan or deposit, but merely adjustments, application of section 2(22)(e) of the Act would not arise. Consequently, no question of law arises. Tax appeals are dismissed."

18. As we have held that on the date of survey proceedings on 06.12.2010, no firm was in existence and money was paid by the M/s. Checkmate Services Pvt. Ltd. to Mrs. Sharmila Mahurkar and at the time of survey, no partnership firm was

in existence. Hence, when it is proved that on the date of survey or in the month of July, 2009, no firm was in existence. So, in such facts and circumstances, arguments of learned AR cannot be accepted that this amount was paid for the business purposes. Therefore, in our considered opinion, CBDT Circular and ITAT order is not applicable in the case. Therefore, we do not find any merit in the appeal filed by the assessee. We do not find any infirmity in the order passed by the learned CIT(A).

19. In the result, appeal filed by the assessee is dismissed.

20. In the combined result, both appeals filed by the assessee are dismissed.

This Order pronounced in Open Court on 30/03/2022

Sd/-	Sd/-
(AMARJIT SINGH)	(MAHAVIR PRASAD)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Ahmedabad: Dated 30/03/2022

True Copy

S.K.SINHA

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

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।