

आयकर अपीलीय अधिकरण, राजकोट न्यायपीठ, राजकोट
**IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT**

(Conducted Through Virtual Court)

**BEFORE MRS.ANNAPURNA GUPTA, ACCOUNTANT MEMBER
AND
MISS SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No.165/RJT/2017
Assessment Year :2012-13**

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| Smt.Nandini Umesh Bahri Legal Heir of Late Umesh Santosh Bahri 3-Vatika Complex Limda Lane, Jamnagar. | Vs. | The Pr.CIT Jamanagar. |
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| अपीलार्थी/ (Appellant) | | प्रत्यर्थी/(Respondent) |
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| Assessee by : | Shri Sagar Shahi, AR |
| Revenue by : | Ms.Bhavna Yashroy, Ld.CIT-DR |

सुनवाई की तारीख/**Date of Hearing** : **26/07/2022**
घोषणा की तारीख /**Date of Pronouncement**: **19/10/2022**

आदेश/O R D E R

PER ANNAPURNA GUPTA, ACCOUNTANT MEMBER

Present appeal has been filed by the assessee against order passed by the ld. Pr.Commissioner of Income-Tax, Jamnagar [hereinafter referred to as "Ld.Pr.CIT"] under section 263 of the Income Tax Act, 1961 ("the Act" for short) dated 27.3.2017 pertaining to the Asst.Year 2012-13.

2. Grounds raised by the assessee are as under:

"(1)The order passed u/s. 263 of the Income-tax Act, 1961 by the Principal Commissioner of Income-tax, Jamnagar is bad in law as well as on facts.

(2) The order passed by the Principal Commissioner of Income-tax, Jamnagar by invoking the provisions of section 263 and thereby directing the Assessing officer to add Rs 53,48,045 as against the peak outstanding

amount taken by Assessing officer after proper application of mind cannot be considered as erroneous in so far as it is prejudicial to the interest of the revenue to that extent and directing the Assessing Officer to consider the addition u/s. 2(22)(e) to the extent of accumulated profits of the company at Rs. 53,48,045/-.

(3) On the basis of the facts and circumstances of the case, material placed on record the action of Principal Commissioner of Income Tax, Jamnagar ignoring the fact that infact the amount received from the company in credit does not exceed Rs 3,77,450/- during the year and thus the order passed u/s 263 of the Act is far from the truth and is required to be quashed.

(4) On the basis of the facts and circumstances of the case, the order passed by the learned Principal Commissioner of Income-tax, Jamnagar u/s. 263 cannot be upheld as the Assessing Officer has already made enquiry in respect of the addition made u/s. 2(22)(e) and when the assessment was framed after making due enquiry and on perusal of the documentary evidences invoking revisional jurisdiction u/s. 263 cannot be justified relying on the decision of Small World Industries vs. CIT 24 Mumbai in ITA NO. 2464/Mum/2013 A.Y. 2009-10. In fact even the assessing officer/has erred in making addition of Rs 3,77,450/- u/s 2(22)(e)of the Act.”

3. As transpires from order of the ld.Pr.CIT, the assessment order passed in the case of the assessee for the impugned year was found to be erroneous so as to cause prejudice to the Revenue on account of incorrect addition made by the AO on account of deemed dividend as per section 2(22)(e) of the Act which the AO had made to the extent of Rs.3,77,450/-, while as per the Ld.PCIT the same should have been to the extent of Rs.53,48,045/-

4. Briefly the facts are that M/s Tristar Security P.Ltd. (TSPL), a closely held company had made financial transactions with assessee's proprietorship concern, viz. Shree Ashapura Service. The AO had held that these transactions to be covered under section 2(22)(e) of the Act so as to be treated as deemed dividend and noting the fact that the amounts given by TSPL were returned also by the assessee during the year, he had worked out the amount withdrawn by the assessee from TSPL as amounting to Rs.3,77,450/-, by taking overdrawn balance twice during the year of Rs.2,000/- on 7.4.2011 and Rs.52,000/- on 16.4.2011 and including therein opening

negative balance of Rs.3,25,415/-. The assessee had furnished this working of outstanding credit balance which is reproduced at page no.3 and 4 of the Ld.Pr.CIT's order as under:

TRISTAR SECURITY PVT. LTD.

| Date | Dr. | Cr. | Balance | Current year position |
|------------|---------|---------|----------|-----------------------|
| 01.04.2011 | | | 325415 | |
| 07.04.2011 | 300000 | 302000 | 327415 | -2000 |
| 15.04.2011 | 1200000 | | -872585 | 1198000 |
| 16.04.2011 | 100000 | 1350000 | 377415 | -52000 |
| 06.05.2011 | 600000 | | -222585 | 548000 |
| 09.05.2011 | 350000 | | -572585 | 898000 |
| 11.05.2011 | 425000 | | -997585 | 1323000 |
| 12.05.2011 | | 425000 | -572585 | 898000 |
| 13.05.2011 | 460000 | | -1032585 | 1358000 |
| 14.05.2011 | 750000 | | -1782585 | 2108000 |
| 16.05.2011 | 190000 | 220000 | -1752585 | 2078000 |
| 17.05.2011 | | 300000 | -1452585 | 1778000 |
| 21.05.2011 | | 400000 | -1052585 | 1378000 |
| 25.05.2011 | | 800000 | -252585 | 578000 |
| 26.05.2011 | | 452150 | 199565 | 125850 |
| 27.05.2011 | 60000 | | 139565 | 185850 |
| 06.06.2011 | 150000 | | -10435 | 335850 |
| 07.06.2011 | 350000 | 150000 | -210435 | 535850 |
| 10.06.2011 | | 350000 | 139565 | 185850 |
| 15.06.2011 | 700000 | 350000 | -210435 | 535850 |
| 17.06.2011 | | 350000 | 139565 | 185850 |
| 05.07.2011 | 800000 | | -660435 | 985850 |
| 07.07.2011 | 400000 | | -1060435 | 1385850 |
| 11.07.2011 | | 800000 | -260435 | 585850 |
| 22.07.2011 | 120000 | | -380435 | 705850 |
| 25.07.2011 | | 520000 | 139565 | 185850 |
| 27.07.2011 | | 150000 | 289565 | 35850 |
| 29.07.2011 | 800000 | | -510435 | 835850 |
| 05.08.2011 | 350000 | | -860435 | 1185850 |
| 16.08.2011 | 400000 | | -1260435 | 1585850 |
| 29.08.2011 | | 1205000 | -55435 | 380850 |
| 30.08.2011 | 700000 | | -755435 | 1080850 |
| 03.09.2011 | | 800000 | 44565 | 280850 |
| 05.09.2011 | 100000 | | -55435 | 380850 |
| 06.09.2011 | 1395000 | 600000 | -850435 | 1175850 |
| 15.09.2011 | | 100000 | -750435 | 1075850 |
| 03.10.2011 | | 1025000 | 274565 | 50850 |
| 08.10.2011 | 1200000 | 700000 | -225435 | 550850 |
| 10.10.2011 | 200000 | | -425435 | 750850 |
| 11.10.2011 | 275000 | 200000 | -500435 | 825850 |
| 18.10.2011 | 1000000 | 975000 | -525435 | 850850 |

Sh. Umesh S. Bahri, AY 2012-13.

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|--------------|-----------------|-----------------|----------|---------|
| 31.10.2011 | | 450000 | -75435 | 400850 |
| 08.11.2011 | 450000 | 450000 | -75435 | 400850 |
| 09.11.2011 | 450000 | | -525435 | 850850 |
| 01.12.2011 | 950000 | 950000 | -525435 | 850850 |
| 02.12.2011 | 500000 | | -1025435 | 1350850 |
| 05.12.2011 | 650000 | 1850000 | 174565 | 150850 |
| 07.12.2011 | 200000 | | -25435 | 350850 |
| 08.12.2011 | 560000 | | -585435 | 910850 |
| 09.12.2011 | | 600000 | 14565 | 310850 |
| 13.12.2011 | 460000 | 460000 | 14565 | 310850 |
| 22.12.2011 | 300000 | 300000 | 14565 | 310850 |
| 16.01.2012 | 2100000 | 1657000 | -428435 | 753850 |
| 17.01.2012 | 650000 | | -1078435 | 1403850 |
| 18.01.2012 | 250000 | 1639000 | 310565 | 14850 |
| 10.02.2012 | 500000 | | -189435 | 514850 |
| 11.02.2012 | | 505000 | 315565 | 9850 |
| 15.03.2012 | 100000 | | 215565 | 109850 |
| 19.03.2012 | 215565 | | 0 | 325415 |
| Total | 21710565 | 21385150 | | |

5. The Id.Pr.CIT however was of the view that the negative balance of the amount overdrawn had not been correctly worked out. The Id. PCIT has stated that while calculating the overdrawn amount, the assessee has ignored the opening overdrawn amount, while according to him, the opening balance was also to be taken into consideration, and the overdrawn balance thereafter on each occasion was to be considered as a separate withdrawal and treated as deemed dividend instead of taking only the peak withdrawal. His finding at para-7 of the order reads in this regard as under:

"7. The basic contention of the assessee is that that the opening balance should be ignored to ascertain the exact amount overdrawn by the assessee from the company during the year and if this opening balance is not considered, then the company's account was overdrawn twice during the year, i.e. Rs. 2,000/- on 07/04/2011 and Rs. 52,000/- on 16-04-2011 against which the AO has already made addition of Rs.3,77,450/- on this score, which is

already excessive. The argument of the assessee appears to be misconceived. The assessee had a debit balance of Rs.3,25,415/- in the company at the beginning of the year. Therefore, whatever repayment was made by the assessee at the first instance in the financial year had to be set off against the said debit balance and if the assessee withdraws any further amount, it has to be added to the debit balance and so on. Whatever amount is deposited by the assessee has to be treated as aid against outstanding balance and not against new amount withdrawn by the assessee. As such, the assessee's contention that the outstanding debit balance at the Beginning of the year is to be ignored to ascertain the so called loan is neither tenable nor acceptable. From this point of view, the outstanding balance on a particular date would be the amount overdrawn by the assessee on that day and as such, whenever the assessee overdraws from the company, it has to be treated as deemed dividend within the meaning of the provisions of section u/s. 2(22)(e) of the Act. A perusal of the above table reveals that the assessee has overdrawn on various occasions, for example, Rs.377415/- on 16.04.2011 Rs. 199565/- on 26.05.2011, Rs. 139565/- on 10.06.2011 and so on. Since these amounts are overdrawn on fresh withdrawals by the assessee from the company, the same have to be treated as new loan within the meaning of section 2(22)(e) of the Act. It appears that the AO, while finalising the assessment treated only the peak of the outstanding amount, being Rs. 377415/-, as deemed dividend and made an addition of Rs. 377450/- only on this score. The AO, in doing so, is conceptually incorrect as the provisions of section 2(22)(e) of the Act read as under:

"2(22)(e): any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) [made after the 31st day of May, 1987 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 but "dividend" does not include—...."

6. We do not find any merit in this contention of the Id.Pr.CIT. The account of the assessee with Tristar Security Pvt. Ltd., wherein the impugned amounts have been received, is undisputedly in the nature of a current account with numerous transactions of giving and receiving amounts to the said company. This is a fact on record and is not disputed. The assessee had explained the nature of transactions between the two as relating to lending and receiving

back money from the said company by the assessee to help it tide over short term financial requirements. This explanation of the assessee is reproduced at para 5 of the Ld.PCIT's order. No infirmity has been pointed out by the Ld.PCIT in the same. His only contention is that excess receipt by the assessee on each date is to be calculated by including the opening excess receipt and every such excess receipt so arrived at is to be treated as independent receipt from the said company and thus treated as deemed dividend u/s 2(22)(e) of the Act. That peak excess receipt, considered by the AO for the purpose, is incorrect. Considering the fact that the transactions of the assessee with the said company are in the nature of current account transactions with repeated receipt and payment to the said company, the loans are repeatedly being paid back by the assessee within a few days itself and therefore it is only the peak credit which is to be considered for determining the amount advanced to the assessee qualifying as deemed dividend.

There is no error, we hold, in the order of the AO treating only the peak withdrawal as deemed dividend.

We therefore set aside the order of the Ld.Pr.CIT passed under section 263 of the Act.

7. In the result, the appeal of the assessee is allowed.

Order pronounced in the Court on 19th October, 2022 at Ahmedabad.

Sd/-
(SUCHITRA R. KAMBLE)
JUDICIAL MEMBER

Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER

Ahmedabad, dated 19/10/2022

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आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-
5. विभागीय प्रतिनिधि,आयकर अपीलीय अधिकरण ,राजकोट/DR,ITAT, Ahmedabad,
6. गार्ड फाईल /Guard file.

आदेशानुसार/ BY ORDER,

सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, ITAT, Ahmedabad