

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH : A : NEW DELHI

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER  
AND  
SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER

ITA No.3373/Del/2019  
Assessment Year: 2013-14

Ms. Bineeta Singh, Flat No. 126, Aspen Greens, Nirwana Country, Gurgaon, Haryana 122003 PAN AQEPS3259D	vs.	The ACIT Circle 5(1), New Delhi
(Appellant)		(Respondent)

For Assessee :	Shri Ajay Wadwa, Advocate Ms. Bharti Sharma, CA
Revenue For :	Shri P. Praveen Sidharth Sr. DR

Date of Hearing :	08.12.2022
Date of Pronouncement :	19.01.2023

**ORDER**

**PER CHANDRA MOHAN GARG, J.M.**

This appeal filed by the assessee is directed against the order dated 21.01.2019 of the Ld. CIT(A)-12, New Delhi, relating to Assessment Year 2013-14.

2. The grounds of appeal raised by the assessee read as under:-

*(A) That on the facts & circumstance of the case the learned A.O. and Commissioner of Income Tax(A)-12 while passing the order u/s. 147/143(3) and u/s. 250 respectively erred in:*

*i) Doing the exparte assessment which is unfair and assessee has been denied opportunity.*

*ii) Confirming and Upholding the Proceedings initiated U/s 147 of the Act.*

*iii) Not appreciating that AO has initiated the reopening proceedings on surmises and conjectures as AO was not certain, with recorded reasons, in whose hand the income has escaped assessment.*

*iv) Upholding the addition made on account of Deemed Dividend of Rs. 9400000/-.*

*v) Not appreciating that the loan was advanced to M/s. BTB Marketing (P) Ltd. for Business Purpose and interest was charged on the same, which has been allowed as a deduction.*

*vi) Passing the Assessment Order on 25.11.2016 whereas the order disposing of objections was passed on 18.11.2016 i.e. against the settled law which states that there should be a four week gap between the rejection order and Assessment Order.*

*(B) That without prejudice to the other Grounds, the reasons recorded were defective and based on surmises because the Escaped Income was not quantified at the time of recording satisfaction.*

*(C) That without Prejudice to the other grounds, the addition on account of deemed dividend cannot exceed Rs. 5276886/-*

*(further needs to restrict as per the proportionate holding of appellant) as the other amount Security Premium of Rs. 4687500/- in total Reserve and Surplus of Rs. 9964386/- as at 31.03.2013.*

*(D) That without Prejudice to the other grounds, no addition can be made for deemed dividend U/s 2(22) (e) in the current year as there is an opening balance of loan from M/s. BTB Retail (P) Ltd. to M/s. BTB Marketing (P) Ltd. of Rs. 2,02,28,592/- as on 31.03.2012 and Reserve & Surplus of Rs. 56,45,446/- as on 31.03.2012. The addition if any could only be made in AY 2012-13 to the extent of Reserve & Surplus. There is a loss of Rs. 3,61,752/- during the current Assessment Year.*

*(E) The Assessee craves leave to add, Alter or amend the grounds of appeal at or before the hearing.*

3. Learned counsel of the assessee submitted that the initially the loan was taken in BTB Marketing Pvt. Ltd., against residential property of Shri Rahul Singh, who also a Director of BTB Marketing Pvt. Ltd., for an amount of Rs. 2,06,00,000/- on 19.08.2010 and collateral security for said loan was on the property situated at Nirvana Country South City-2, Phase II, Gurgaon and guarantors were BTB Marketing Pvt. Ltd., Mr. Rahul Singh, and Mrs. Bineeta Singh. He further stated that thereafter, loan was taken BTB Retail Pvt. Ltd. against the residential property of Shri Rahul Singh of Rs.

2,99,01,000/- on 10.02.2012 with the same collateral security. The learned counsel further explain that M/s. BTB Retail Pvt. Ltd. has shown income of Rs. 30,55,309/- from BTB Marketing Pvt. Ltd., which was reflected in the books of BTB Marketing Pvt. Ltd., also and rate of interest was 13% per annum on loan taken by BTB Marketing Pvt. Ltd., at the same rate. The learned counsel further submitted that the running account between both the companies shows that the loan of Rs. 94,00,000/- was received during the year by BTB Marketing Pvt. Ltd., and Rs. 50,00,000/- were repaid during the same period. The learned counsel also further submitted that the reserve & surplus of BTB Retail Pvt. Ltd., was Rs. 52,76,885/- on 31.03.2013 at the end of the year.

4. In addition to above factual matrix the learned counsel for the assessee has challenged the addition, made by the A.O. and upheld by the Ld. CIT(A), on following grounds and precise submissions:-

*i) section 2(22)e of the Income Tax 1961, does not apply to non gratuitous advance to substantial share holder for this proposition the learned counsel has placed reliance on the judgment of Hon'ble Calcutta High Court in the case of Pradip*

*Kumar Malhotra vs. Commissioner of Income Tax reported as 338 ITR 538.*

*ii) placing reliance on the judgment of the ITAT Delhi Bench in ITA no. 1268/Del/2018 in the case of Archana Sharma vs. DCIT, Ghaziabad, it was also contended that the classes of shareholder specified therein would come within the purview of section 2(22)(e) but not in the cases where loan and advances has been given in return to an advantage conferred upon the company by such shareholder as the intention behind the provision of section 2(22)(e) of the Act is to tax dividend in the hands of shareholder.*

*(iii) the company has paid market rate of interest as sufficient compensation by the assessee*

*(iv) the amount has been routed in running account between the assessee and company therefore simple current account transaction between two entities i.e. assessee and company which are business commercial transaction cannot be regarded as deemed dividend income under section 2(22)(e) of the Act.*

*(v) drawing our attention towards CBDT circular no. 19/2017 dated 12.06.2017, it was contended by the learned counsel of the assessee that the nature of commercial transaction would not fall within the ambit of word "advance" and section 2(22)(e) of the Act.*

*(vi) the opening debth of BTB Marketing Pvt. Ltd., was of Rs. 2,02,28,592/- and opening reserves on 31.03.2012 were of Rs. 56,45,445/- and therefore no addition can be in the hands of the assessee.*

5. The learned counsel has also placed reliance on the order of ITAT 'F' Bench dated 16.03.2021 in the case DCIT vs. Ramesh Kumar Pabbi.

6. Replying to the above the learned Senior DR strongly supported the assessment as well as first appellate order and submitted that the A.O. was right invoking the provisions of section 2(22)(e) of the Act, as the day on which BTB Retail Pvt. Ltd., advance Rs. 94,00,000/- to assessee the company was having reserve & surplus more than the amount advanced, therefore the A.O. was right in holding that all the conditions stipulated u/s. 2(22)(e) of the Act are fulfilled to the impugned loan/advance given to the assessee.

7. The learned counsel of the assessee placing rejoined to the above submissions contended that as per judgment of Calcutta High court in the case of Pradip Kumar Malhotra vs. Commissioner

of Income Tax (supra) held that provisions of section 2(22)(e) would be applicable in respect of gratuitous loans and advances given by the company which were enjoyed on account of shareholding and the said section would not be applicable to cases where the loan or advance was given as a consideration for any other advantage conferred upon the company by such shareholder. The Court held that in the case under consideration, the advance was not a 'gratuitous advance' but was given to protect 'business interest of the company. Hence, the provisions of Sec 2(22)(e) were not applicable. The Court relied on Delhi HC decision in Creating Dying and Printing P Ltd (318 IT 476) and Bombay HC decision in Nagindas M Kapadia (177 ITR 393). Therefore addition made by the A.O. and confirmed by the Ld. CIT(A) is not sustainable. Therefore the same may kindly be deleted.

8. On careful consideration of rival submissions first of all we may point out that before the authorities below it was contended that as per section 2(22)(e) of the Act, any loan or advance by closely held company to a shareholder having substantial interest in the company is deemed to be a dividend income subject to the

certain condition. At this juncture we take respectfully cognizance of the judgement of Hon'ble Calcutta High Court in the case of Pradip Kumar Malhotra (supra) wherein Their Lordship held as follows:-

*9. 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-clause (e) must be construed to mean those advances or loans which a share holder enjoys for simply on account of 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; but if such loan or advance is given to such share holder as a consequence of any further consideration which is beneficial to the company received from such a share holder, in such case, such advance or loan cannot be said to a deemed dividend within the meaning of the Act. Thus, for gratuitous loan or advance given by a company to those classes of share holders 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 share holder.*

10. *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 share holder but to protect the business interest of the company.*

11. *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.*

12. *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.*

13. *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.*

14. *The appeal is, thus, allowed by answering the point No. ii in the affirmative and against the Revenue. In the facts and circumstances, there will be, however, no order as to costs.*

9. In view of above it is amply clear that the provision of section 2(22)(e) of the Act, would be applicable in respect of gratuities loans & advance given by the company which were enjoyed by the beneficiary on account of substantial shareholding. In the present case undisputedly the assessee has 46% shareholding in BTB Marketing Pvt. Ltd., as per page 7 of the assessee paper book. However Hon'ble Calcutta High Court finally held that the section would not be applicable two cases where the loan and advance was given as a consideration for any advantage conferred upon the company by such shareholder and thus the impugned advance was given to the assessee by M/s. BTB Marketing Pvt. Ltd., was given to protect business interest of the assessee company, hence provision of section 2(22)(e) of the Act were not applicable. In this judgment Hon'ble Calcutta High Court has also referred to the judgement of Hon'ble jurisdictional High Court Delhi in the case of Commissioner of Income Tax vs. Creating Dying & Printing Pvt. Ltd. reported as 318 ITR 476 (Del).

10. First of all, we may note that the assessee has repaid an amount of Rs. 50,00,000/- during the relevant financial period

leaving balance of Rs. 44,00,000/-only. In the present it is also not dispute that the company has paid market rate of interest by the assessee on the amount of advance and in the real sense the assessee did not drive any benefit from the funds of the company so as to attract rigour of the provision of section 2(22)(e) of the Act, it is clearly observed that the transaction of loan to which the assessee provided collateral security to M/s. BTB Marketing Pvt. Ltd., and BTB Retail Pvt. Ltd., to secure capital for expansion of company business, and the transaction was pure of commercial transaction under running account. These facts have not been controverted by the Authorities below or Ld. Sr. DR before us. Therefore, as per judgment of Hon'ble Calcutta High Court in the case Pradip Kumar Malhotra vs. CIT(supra) wherein it was held that the phrase "by way of advance or loan" appearing in section 2(22)(e) of the Act must constitute to mean impugned advances or loans, which is enjoyed by the shareholder for merely because on account of being a partner or a Director in the company, which the beneficiary owner of shares. However, a position differs if such loan or advances given to such shareholder as a consequence of any further consideration,

which is beneficial to the company received from such shareholder then in such advance or loan cannot be said to be deemed dividend within the ambit of section 2(22)(e) of the Act. Identical and similar situation is present in the case in hand. Therefore addition made by the A.O. and confirmed by the Ld. CIT(A) cannot be held as sustainable and thus we direct the A.O. to delete the same.

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

Order pronounced in the open court on 19.01.2023.

Sd/-  
(NARENDRA KUMAR BILLAIYA)  
ACCOUNTANT MEMBER

Sd/-  
(CHANDRA MOHAN GARG)  
JUDICIAL MEMBER

Dated: 19<sup>th</sup> January, 2023.

NV/-

Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

// By Order //

Asstt. Registrar, ITAT, New Delhi