

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH KOLKATA

**BEFORE SHRI SONJOY SHARMA, JUDICIAL MEMBER
AND SHRI RAKESH MISHRA, ACCOUNTANT MEMBER**

**ITA No. 824/KOL/2024
Assessment Year: 2018-19**

Shreekant Ray, C/o Subash Agarwal & Associates, Advocates Siddha Gibson, 1, Gibson Lane, Suite 213, 2 nd Floor, Kolkata - 700069 (PAN: AGOPR8766J)	Vs	ITO, Ward-61(3), Kolkata, Bamboo Villa, 169, A.J.C. Bose Road, Kolkata - 700014
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Nitish Bhandary, Advocate
Respondent by : Ms. Amuldeep Kaur, Additional CIT

Date of Hearing : 15.07.2024
Date of Pronouncement : 26.07.2024

ORDER

PER RAKESH MISHRA, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of the Ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi (hereinafter referred to as “the Ld. CIT(A)” passed u/s. 250 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) for AY 2018-19 dated 05.03.2024 which is passed against the assessment order u/s. 147 read with Section 144B of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) by ITO, Ward-61(3), Kolkata, dated 13.03.2023.

2. Grounds of appeal raised by the assessee are reproduced as under:

“1. For that on the facts and circumstances of the case, the Ld. CIT(A) was not justified in passing an exparte order.

2. (a) For that the Ld. CIT(A) was not justified in upholding the action of the A.O. in making the addition of Rs. 94,14,477/- on account of deemed dividend u/s 2(22)(e) of the Income Tax Act.

(b) Without prejudice to the above, Ld. CIT(A) ought to have restricted the addition u/s 2(22)(e) to Rs. 4,49,441/-, being the accumulated profit as on 31.3.2018.

3. The appellant craves leave to add further grounds of appeal or alter the grounds at the time of hearing.”

3. Brief facts of the case are that the assessee is an individual and had filed the return of income for the AY 2018-19 on 13.07.2018 showing income under various heads. The case was reopened and reassessment order under Section 147 read with Section 144B of the Act was passed by the AO at the total income of Rs. 1,05,46,917/- by making an addition of Rs. 94,14,477/- on account of deemed dividend under Section 2(22)(e) of the Act. The Ld. CIT(A) examined the finding of the AO and also observed that despite granting several opportunities as mentioned at page 8 of the appeal order, the appellant/AR refrained from attending the appellate proceedings and did not furnish any submissions. Relying upon the decision of the Hon'ble Madhya Pradesh High Court in the case of Estate of Late Tukojirao Holkar Vs CWT (223 ITR 480) and of the Hon'ble Punjab and Haryana High Court in the case of New Diwan Oil Mills Vs. CIT (2008) 296 ITR 495), who returned the reference unanswered and which relied upon the Hon'ble Supreme Court's decision in the case of CIT vs. B. Bhattachargee & Another (118 ITR 461 at page 477-478) which held that the appeal does not mean, mere filing of memo of appeal but effectively pursuing the same and since the appellant remained absent and there was no assistance from the appellant, nor the appellant had made any written submission during the appellate proceeding, he decided the appeal on merits as per the facts and details provided in Form No. 35 filed by the appellant. The Ld. CIT(A) further held that the appellant had received advance of Rs. 94,14,477/- from M/s Seth Chemical Works (P)

Ltd. which was acknowledged in his reply filed before the AO. The AO noted that the assessee is a director and shareholder in M/s Seth Chemical Works (P) Ltd. and holding voting power of 15.34% during the relevant assessment year. It was also noted in the relevant year that M/s Seth Chemical had shown accumulated profit of Rs. 4,49,441/-. Since, there was no explanation from the assessee, the AO triggered the provision of Section 2(22)(e) of the Act. The transaction fell under the category of deemed dividend as the assessee was a beneficial owner of share of shareholding not less than 10% of the voting power. In paragraph 6.1, the Ld. CIT(A) further observed that the assessee had not made any submission, however, in his adjournment petition, he made a reference that the amount of Rs. 94,14,477/- received from M/s Seth Chemical was an advance for facilitating business transaction such as supply of furniture and other general items. The Ld. CIT(A) was of the view that the assessee had made an unsubstantiated claim and created an explanation in order to escape the specific findings that the transaction was squarely in the nature of deemed dividend and did not find any infirmity in the finding of the AO and confirmed the addition of Rs. 94,14,477/- and dismissed the appeal.

4. On perusal of the assessment order, which also incorporated the reply dated 6.12.2022 of the assessee, it is observed that the assessee admitted to have received advance of Rs. 94,14,477/- from M/s Seth Chemicals Pvt. Ltd. on different dates, which was purely an advance and not salary in advance and the amount had to be repaid, the details of which are as under:

Date	Amount (Rs.)
28/04/2017	35,00,000/-
19/05/2017	10,00,000/-
07/06/2017	19,14,477/-

Total	94,14,477/-
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5. The AO examined the provision of section 2(22)(e) of the Act which are reproduced 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.”

6. On perusal of the submission of the assessee, it was found that assessee is a shareholder in M/s Seth Chemical Works (P) Ltd. and holding the voting power of 15.34% in the company during FY. 2017-18 In the relevant financial year, the company M/s Seth Chemical Works (P) Ltd. has also shown accumulated profit of Rs. 4,49,441/- as on 31.03.2018. The assessee in his submission has also accepted that he has taken advance from the M/s Seth Chemical Works (P) Ltd. wherein he is a director.

7. Since ample opportunities had been provided to the assessee to explain the Advance of Rs.94,14,477/- received from the M/s Seth Chemical Works (P) Ltd. and as the assessee is the beneficial owner of shares, holding not less than 10% of the voting power, this transaction falls under the category of deemed dividend u/s 2(22)(e) of Income Tax Act, 1961. Reply of the assessee was perused but was not found satisfactory. Thus, the amount of Rs.94,14,477/- was treated as deemed dividend u/s 2(22)(e) of the I.T. Act, 1961 by the assessing officer which has been confirmed by the Ld. CIT(A); hence the appeal.

8. We have heard the rival contentions and have also examined the record.

9. As regards, Ground No. 1 that the Ld. CIT(A) was not justified in passing the ex-parte order, it is observed that despite opportunities provided, the assessee did not file any submission before the Ld. CIT(A), who decided the appeal based upon the facts on record. Hence, Ground No. 1 of the appeal is rejected.

10. Ground No. 2 relates to the Ld. CIT(A) not being justified in upholding the action of the AO in making addition of Rs. 94,14,477/- on account of deemed dividend under Section 2(22)(e) of the Act. The assessee submitted before the Ld. CIT(A) that this advance was for facilitating business transaction such as supply of furniture and other general items, as is also reproduced by the AO in the assessment order. It was admitted that the amount of Rs. 94,14,477/- taken on different dates was purely an advance and not salary in advance and the amount had to be repaid and the date wise details were also mentioned. It has been held that in the case of Pradip Kumar Malhotra Vs. CIT (2011) 15 taxmann.com 66/203 Taxman 110 (Cal) that the phrase 'by way of advance or loan' must be construed to mean those advances or loans which a shareholder enjoys for simply on account of being a person who is beneficial owner of shareholding at least 10% of voting power, but if such loan or advance is given to such shareholder as a consequence of any further consideration which is beneficial to company received from such a shareholder, such advance or loan cannot be said to be 'deemed dividend'. Further, in the case of Walchand & Co. Ltd. Vs. CIT [1975] 100 ITR 598 (Bom) it is held that that the word 'advance' can only mean such advance which carries with it an obligation of repayment (CIT v. Raj Kumar [2008] 181 Taxman 155 (Delhi)). A temporary advance or loan by a company is capable of falling within definition of the word 'dividend' u/s 2(22)(e) in as much as the provision deals with payment on behalf of a

shareholder or payment to a shareholder by way of advance or loan irrespective of duration of such a loan or advance.

11. Therefore, the advance of Rs. 94,14,477/- received by the assessee being a beneficial owner of less than 10% of voting power shareholding was liable to be treated as deemed dividend. However, the deemed dividend was to be restricted to the extent to which the company possessed accumulated profits, which has been mentioned by the AO at Rs. 4,49,441/- as on 31.03.2018. While Ground No. 2(a) is partly rejected as the advance was to be treated as deemed dividend, however, Ground No. 2(b) is allowed as the Ld. CIT(A) ought to have restricted the addition under Section 2(22)(e) to Rs. 4,49,441/-, being the accumulated profits of M/s Seth Chemicals Pvt. Ltd. as on 31.03.2018 as is mentioned in the assessment order. Therefore, the addition is reduced to Rs. 4,49,441/- and the assessee gets consequential relief.

12. Ground No. 3 is general in nature and does not require any separate adjudication.

13. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 26th July, 2024.

Sd/-
(Sonjoy Sarma)
Judicial Member

Sd/-
(Rakesh Mishra)
Accountant Member

Dated: 26th July, 2024

AK, P.S.

Copy to:

1. The Appellant:
2. The Respondent.
3. CIT(A)
4. The CIT,
5. DR, ITAT, Kolkata Bench, Kolkata

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata