

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ 'बी', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM
&
SHRI AMARJITSINGH, JM

आयकर अपील सं./ITA No.634/Mum/2013

(निर्धारण वर्ष / Assessment Year :2006-2007)

Naresh Jagdishrai Goyal, 72, Jupiter Apartments, Anstey Road, Off. Altamount Road, Mumbai-400026	Vs.	ITO(International Taxation), Range-3(1), Scindia House, Ballard Estate, Mumbai-400038
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACPG 9641 B		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Shri Vijay Mehta

राजस्व की ओर से /Revenue by : Shri Sumit Kumar

सुनवाई की तारीख / Date of Hearing : 18/11/2015

घोषणा की तारीख/Date of Pronouncement 10/02/2016

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by the assessee against the order of CIT(A), Mumbai, for the assessment year 2006-2007, in the matter of order passed u/s.143(3) r.w.s147/148 of the I.T.Act.

2. In this appeal, the assessee is aggrieved for reopening of assessment as well as merit of the protective addition made on account of deemed dividend amounting to Rs.36,56,000/-.

3. Rival contentions have been heard and record perused. Facts in brief are that return of income declaring an income of Rs.98,663/- was filed by the assessee on 31.07.2009. The return was processed under section 143(1) accepting the returned income. Subsequently information was received from the assessing Officer of M/s. National Travel Services,

that the assessee has 35% share in profit/loss in the said firm and the said firm has received a loan of Rs.37,42,19,968/- from M/s. Jet Air Pvt. Ltd, wherein the assessee and the said firm are partners; and by invoking the provisions of sec. 2(22)(e) of the IT Act, 1961, an addition of Rs.35,56,000/- was made as "deemed dividend". The assessee's own shareholding in the said Jet Air Pvt. Ltd. was 6.02% and that of the said National Travel Services, through the assessee was 44.58%. From these facts the AO held that the assessee is a shareholder and his beneficial share holding is much more than the prescribed limit of 10% within the meaning of sec 2(22)(e) of the Act. In view of the above facts, the assessment was re-opened under sec. 147 by issuing notice under sec.148 of the Act.

4. The AO observed that the assessee is a shareholder holding beneficial ownership of shares of more than ten per cent voting right/power in the company. Assessee's holding in the firm is 35% and firm's holding in the company is 44.58% and therefore, assessee's shares held by him out of 44.58% is 15.60%. Thus, assessee's beneficial ownership is exceeding 21.62% (6.02% + 15.6%). Therefore, section 2(22)(e) can be invoked in assessee's hands. Considering the above facts the AO held that section 2(22)(e) is applicable in the assessee's case and the loan and advance is to be taxed in the hands of the assessee to protect the interest of revenue, especially in view of the decision of Hon'ble ITAT in the case of Bhoumik Colors Pvt. Ltd. In the circumstances, "protective assessment" was made in the hands of the

assessee and the loans and advances given to M/s National Travel Services to the extent of accumulated profits in the hands of the said company, M/s Jet Air Pvt. Ltd. was taxed as “deemed dividend” under section 2(22)(e) of the IT Act, 1961.

5. By the impugned order the CIT(A) confirmed the reopening as well as protective addition made on account of deemed dividend, against which the assessee is in further appeal before us.

6. We have considered rival contentions and deliberated on the judicial pronouncements cited at bar. From the record we found that return of assessee was originally processed u/s.143(1). Subsequently case was reopened u/s.147 on the information received from AO of M/s National Travel Services, a partnership firm that the assessee held 1,51,180 shares i.e. 47.99% of the aggregate paid up share capital of Jet Air Private Limited and also he was a partner having interest of 35% in National Travel Services, which had received loan of Rs.37,42,19,968/- from Jet Air Private Limited. Based on the same, the A.O was of the view that the income chargeable to tax has escaped assessment since the assessee had not declared any deemed dividend income u/s 2(22)(e) of the Act in the return of income filed in respect of the loan received by National Travel Services from Jet Air Private Limited. From the record we found that National Travel Services is a partnership firm wherein the assessee holds interest of 35%. The assessee holds 6.02% share of Jet Air Private Limited in his individual capacity and 44.58% shares as a partner for and on behalf of National Travel Services. In the case of

National Travel Services, the Hon'ble High Court has held that the loan advanced by Jet Air Private Limited to National Travel Services shall be liable to tax as deemed dividend under section 2(22)(e) of the Act in the hands of National Travel Services. As per the A.O. the assessee was the beneficial owner of more than 10% of the total voting right/power in Jet Air Private Limited, therefore, provisions of section 2(22)(e) of the Act were applicable to the assessee in respect of the loan advanced to National Travel Services. Thus, the A.O has made an addition of Rs.36,56,000/- (being accumulated profits of Jet Air Private Limited for the relevant year under consideration) under section 2(22)(e) of the Act in the hands of the assessee on a protective basis, when he has already made substantive addition in the hands of the firm. So far as reopening is concerned, as per section 147 of the Act, the A.O. can assess or reassess any income only when he has a reason to believe that such income chargeable to tax has escaped assessment for any assessment year. Hence, the A.O. ought to record reasons which lead him to believe that any income chargeable to tax has escaped assessment for any assessment year. However, as per the letter dated 29-6-2011 supplied by the AO to the assessee asking reasons for reopening, from the reasons so recorded the AO has not mentioned any reason which lead him to believe that the deemed dividend income had escaped assessment in the year under consideration. In the said letter, the A.O. has just mentioned the facts relevant to the case under consideration. Further, the A.O. has not recorded any reason as to why the said deemed dividend income should

be taxed in the hands of the assessee in spite of the fact that the said income has already been taxed in the hands of National Travel Services. Since the income has already been taxed in the hands of the firm how the AO has believed that said income has escaped assessment in the hands of the assessee. Thus, there was no reason to believe that any income chargeable to tax as escaped assessment. Thus, the protective addition made by the AO on account of deemed dividend is based on doubt and the same is not based on belief as required u/s.147 of the act.

7. In the case of Bullion Investments & financial Services (P) Ltd., 123 ITD 568, the Bangalore bench of the Tribunal held that the AO has to form a belief that income has escaped assessment in the hands of the assessee and that the reassessment cannot be made on mere suspicion.

8. Further, the ITAT also held that the assessment cannot be reopened for making protective assessment. The Mumbai bench of the Tribunal in the case of M P Ramachandran vs DCIT [129 TT] 190 (Mum)] observed that the protective assessment is based on the doubt of the A.O. and the same cannot be a reason for reopening of an assessment. The reopening of an assessment should be based on the belief and not based on a doubt.

9. In view of the above discussion, we do not find any merit for reopening of assessment for making protective addition in respect of deemed dividend which has already been added on substantive basis in the hands of the firm M/s National Travel Services.

10. Now, coming to the merit of the addition, provisions of Section 2(22)(e) prescribes that a person has to be a shareholder as well as the beneficial owner of the shares holding more than 10 percent of the voting power. Thus, the first condition is that recipient should be a shareholder of the company. So far as the condition regarding person being beneficial owner of share is concerned, the Hon'ble Bombay High Court in the case of ACIT, Circle 33 vs Bhaumik Colour (P) Ltd [(2009) 118 ITD 1 (MUM.)(SB)] has held that the expression "shareholder" in section 2(22)(e) of the Act refers to both registered shareholders and beneficial shareholder. The same view has also been held in the following decisions:-

- i) Impact Containers (P) Ltd., 367 ITR 346; and
- ii) Universal Medicare (P) Ltd. 324 ITR 263.

In the present case, the assessee is not a beneficial shareholder and hence de hors the proceedings in the case of National Travel Services where addition has been made u/s.2(22)(e), the said condition cannot be sustained in assessee's hand.

11. In view of the above decision of Hon'ble Bombay High Court, assessee cannot be considered as beneficial owners of shares in Jet Air Private Limited. Accordingly, the protective addition made in the hands of the assessee deserves to be deleted.

12. It was also contended by Id. AR that said addition is double addition since the said income has already been added and confirmed in the hands of National Travel Services. Ld. AR has relied on the decision of

Hon'ble Allahabad High Court in the case of Durgawati Singh, 234 ITR 249 in support of the proposition that CIT(A) cannot pass a protective order. It was held by the Hon'ble High Court that it is not open to the income tax appellate authorities constituted under the Act to make a protective order.

13. In view of the above, we hold that neither reopening was correct nor the addition of deemed dividend on protective basis is sustainable.

14. **In the result, appeal of the assessee is allowed.**

Order pronounced in the open court on this 10/02/2016.

Sd/-

(AMARJIT SINGH)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

(R.C.SHARMA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 10/02/2016

प्र.कु.मि/pkm, नि.स/ PS

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

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

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY
ORDER,

उप/सहायक पंजीकार
(Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai