

**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, BANGALORE**

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
and
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**

ITA No.1384/Bang/2012
(Assessment year: 2007-08)

Shri S.M.Arshad,
Flat No.604, Door No.14-2-175-40,
Light House Condominium,
Light House Hill Road,
Mangalore-575001. ... Appellant
PA No.ACZPA0799F

Vs.

Deputy Commissioner of Income-tax,
Central Circle,
Mangalore. ... Respondent

Appellant by : Shri R.Krishnan, CA.
Respondent by : Shri Sanjay Kumar, CIT(DR)

Date of hearing : 25/07/2016
Date of pronouncement : 19/08/2016

O R D E R

Per INTURI RAMA RAO, AM :

This is an appeal filed by the assessee directed against the order of the CIT(A)-VI, Bangalore, dated 16/08/2012 for the assessment year 2007-08.

2. Briefly facts of the case are as under: The assessee is an individual. He derives income under the head salary as Managing Director of M/s.Mohtisham Complexes Pvt. Ltd. Return of income

for the assessment year 2007-08 was filed on 11/04/2008 declaring income of Rs.11,87,273/-. The said return of income was processed u/s 143(1) of the Income-tax Act, 1961 [‘the Act’ for short] and the case was not taken up for scrutiny assessment.

3. Subsequently, search and seizure operations were conducted in the residential premises of the assessee u/s 132 of the Act on 13/02/2009. As a consequence of search operations, notice dated 24/09/2009 u/s 153A was issued to the assessee. In response to said notice, return of income was filed on 30/10/2009 declaring income as originally declared u/s 139(1) of the Act. During the course of assessment proceedings, the Assessing Officer [AO] noticed that the assessee is a director in M/s.Mohtisham Complexes Pvt. Ltd., in which public are not substantially interested, holding 88.26% in the said company. The AO observed that balance-sheet of the said company shown accumulated profit of Rs.4,11,29,060/- as on 31/03/2006. It was also found that the assessee had received a sum of Rs.1,26,86,722/- on various dates on account of transfer of money to one concern M/s.Mohtisham Enterprises and to M/s.Mohtisham Properties of Rs.31,41,258/-. On noticing the above transactions, the assessee was show caused as to why entire amount of Rs.1,58,27,980/- should not be assessed as deemed dividend under the provisions of sec.2(22)(e) of the Act. In response to same, assessee has submitted the following explanation:

"You have asked the assessee to show cause why a sum of Rs. 1,25,39,281/- should not be added u/s 2(22) (e), stated to be withdrawals made by the assessee from the accounts of Mohtisham Complexes (P) Ltd. As per the books of MCPL, the following position emerges as on 31-03-2007.

	(Dr)	(Cr)
Mohtisham Enterprises (HO)	1,20,27,500	
Mohtisham Enterprises Nilgiris		11,00,000
Mohtisham Properties	28,41,258	
S.M.Arshad (Loan from Directors)		23,28,219

Out of the debit balance of Rs. 1,20,27,500 in Mohtisham Enterprises, a sum of Rs. 1,20,000/- is the amount due on account of purchase of Car Park No 3 & 4 in Emporium. Therefore, there is no fund flow or cash withdrawal in respect of that amount. Further, the amount of Rs. 28,41,258/- in the name of Mohtisham properties also is on premises account and does not fall within the term advances or loans as contemplated u/s 2(22)(e) of the IT Act.

You would find that there is a debit balance on one side, of Rs.1,19,07,500 (1,20,27,500-1,20,000), against which MCPL owes Rs. 34,28,219 (11,00,000+23,28,219) to the assessee.

In this connection, the entire amount has been spent by the assessee towards putting up Nilgiris and the entertainment centre viz, Amoeba. It must be appreciated that the Empire Mall is first of its kind in Mangalore and first such venture for Mohtisham Complexes (P) Ltd.

If you trace the history of Empire Mall, The whole project took a very long time and at each stage there was considerable delay. After the mall was constructed, there was a need to have an anchor shop and it is in this process that the assessee, in his capacity as the Director of the Company approached The 'Nilgiris' for setting up their super-market in the mall. As was the policy of the 'Nilgiris' then, they were appointing

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Franchisee only and were not involved in the direct running of the super-market. However, they were not willing to offer the Franchise to Mohtisham Complexes (P) Ltd, as they were dealing in real estate development and the risk involved was high. Further, the line of business for Mohtisham Complexes (P) Ltd was entirely different and even if permitted, there was the question of technical issues like amending the objects etc. However, there was tremendous pressure from other co-owners of Empire Property and the land owners and promoters including Mohtisham Complexes (P) Ltd who were running the risk of losing heavily on account of delay. With the prospects of losing the anchor 'Nilgiris' staring hard on everyone's face, it was thought fit, as a part of business and commercial expediency to rather ask the assessee to commence the 'Nilgiris' Super-market, more particularly when he was also part owner of the land. Thus, the entire drawings were on account of business compulsion and for the purpose of the business of the company viz the object of completing Empire Mall and allowing occupation of the same, which was very much required, as far as the Company was concerned. Since for immediate implementation, the Company had to take the initiative of getting 'Nilgiris' started, it thought it fit to step into the shoes of the assessee.

It is therefore submitted that the assessee had not received any advance or loan from the Company, So as to fall within the mischief of Sec 2(22)(e) of the I.T Act.

Thus, the explanation tendered by the assessee was that the amount drawn from the company was utilized only for the purpose of putting up Nilgiris and entertainment centre i.e. Amoeba. The said explanation was rejected by the AO. However, after reducing the amount received by the company from the assessee of Rs.34,28,219/- net dividend of Rs.1,23,99,761/- was treated as deemed dividend and brought to tax.

4. Being aggrieved, an appeal was preferred before the CIT(A). It was *inter alia* contended that the amounts withdrawn from the company was utilised for the purpose of commencing super market of Nilgiris. Further, it was contended that the properties of the assessee were pledged with bank for obtaining loan for the company and placing reliance on the decision of the Hon'ble Calcutta High Court in the case of *Pradip Kr.Malhotra vs. CIT* (338 ITR 538) it cannot termed as deemed dividend. The said submissions were not accepted by the CIT(A) and he upheld the addition holding that the fact that subsequently loans were repaid has no bearing on the taxability of loans received as deemed dividend, placing reliance on the decision of the Hon'ble Apex Court in the case of *Miss P.Sarada vs. CIT* (229 ITR 444).

5. Being aggrieved, assessee is in appeal before us in the present appeal raising the following grounds of appeal:

- 1) The learned Commissioner of Income-tax (Appeals) erred in confirming the addition of Rs. 1,23,99,761/- as deemed dividend u/s 2(22)(e) of the Income tax Act.
- 2) The learned Commissioner (Appeals) erred in not appreciating the circumstances under which the amounts were paid by the company to the director, which was very much essential and complimentary to the carrying on of it's business activities.
- 3) The learned Commissioner (Appeals), though, has elaborately brought out the arguments notes of the appellant has failed to discuss as to how the explanation of the appellant is not acceptable. To that extent, the argument of the appellant has not been met with by the Commissioner of Income tax (Appeals).

- 4) The learned Commissioner (Appeals) ought to have gone into the facts of the appellant's case in detail and thereafter, decided whether the payment would fall within the clutches of s. 2(22) (e) of the Income tax Act. Having not done so, the finding of the Commissioner (Appeals) is invalid.

Your appellant prays that the addition of Rs. 1,23,99,761/- made u/s 2(22)(e) be deleted.

5. Learned Authorised Representative reiterated the same submissions as advanced before the CIT(A).

On the other hand, learned Departmental Representative relied on the orders of the lower authorities.

6. We heard rival submissions and considered the material on record. The only issue in the present appeal is whether the amount withdrawn by the two concerns M/s.Mohtisham Enterprises and M/s.Mohtisham Properties from M/s.Mohtisham Complexes Pvt. Ltd., in which the assessee has substantial interest holding shares of 88.26%, is taxable as deemed dividend in the hands of the assessee. There is no dispute about fact that the amounts were withdrawn from the company for the benefit of the concerns in which he had substantial interest. It is undisputed fact that the company is having resources and surplus of Rs.4,11,29,060/-. The provisions of sec.2(22)(e) clearly state that where amount of loan or advance is granted to a shareholder or a concern in which he has substantial interest, such amount of loan or advance is taxable in the hands of the

shareholder as deemed dividend u/s 2(22)(e) of the Act. In fact, the Hon'ble High Court of Karnataka, in the case of *Bagmane Construction (P) Ltd. vs. CIT* (2015)(277 CTR 338)(Kar) following the decision of the Hon'ble Bombay High Court in the case of *CIT v. Universal Medicare (P.) Ltd.* [2010] 324 ITR 263 held that when a payment is made to any concern falling under clause (e) of sub-section (2) of section 2, tax is leviable as deemed dividend in the hands of shareholder only and not in the hands of concern. The relevant paragraph is reproduced below:

"30. *It was also contended on behalf of the revenue that having regard to the plain words used in clause (e) 'to any concern', when the amount is paid or when any payment is made to a concern, the tax is levied on the concern and not on the shareholders. As far as this question is concerned, this Court following the judgment of the Bombay High Court in the case of CIT v. Universal Medicare (P.) Ltd.) [2010] 324 ITR 263/190 Taxman 144 has categorically held that when any payment is made by a company to any concern, which falls under clause (e), the tax is leviable on the shareholder only and not on the concern. We respectfully agree with the aforesaid judgment and we do not see any justification to take another view of this matter. Therefore, the finding recorded by the Tribunal that, these advances made by the BDPL to the sister concern as well as to its shareholder do not constitute deemed dividend under Section 2(22)(e) of the Act, is legal and valid and do not call for any interference."*

Thus even a payment is made to a concern in which the shareholder has substantial interest, amount is taxable as deemed dividend only in the hands of the shareholder.

7. As all the conditions essential for invoking the provisions of sec.2(22)(e) of the Act are present, the present case is covered

by provisions of section 2(22)(e) of the Act. The submission of the assessee that the amounts drawn from the company were utilized for the purpose of putting up Nilgiris super market in the complex, is devoid of any merit as no material was placed before us in support of the contention canvassed. Even reliance placed by the learned counsel for assessee on the decision of the Hon'ble Calcutta High Court in the case of *Pradip Kr.Malhotra* (supra) is not applicable, as the assessee had not demonstrated before us with evidence that amounts withdrawn were towards consideration of guarantee given for the purpose of obtaining loan for the purpose of business of the company from which the amounts were withdrawn. There was no material placed before us showing that properties of the assessee were pledged for the purpose of procuring bank loan for the company. Mere bald assertions without corroborative evidence cannot be accepted. Therefore, the submissions made by learned AR of the assessee are devoid of any merit.

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

Order pronounced in the open court on 19th August, 2016

sd/-
(VIJAY PAL RAO)
JUDICIAL MEMBER

sd/-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER

Place : Bangalore
D a t e d : 19/08/2016

srinivasulu, sps

Copy to :

- 1 Appellant
- 2 Respondent
- 3 CIT(A)-II Bangalore
- 4 CIT
- 5 DR, ITAT, Bangalore.
- 6 Guard file

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore