आयकरअपीलीयअधिकरण, अहमदाबादन्यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL,
'' A" BENCH, AHMEDABAD

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकरअपीलसं./**ITA No. 1009/AHD/2019**
निर्धारणवर्ष/Asstt. Year: 2013-2014

Mohan B. Agrawal, 4th Floor, Shoppers Plaza-II, Opp. B.S.N.L Telephone Exchange, Navrangpura, Ahmedabad-380009. **PAN: AAOPA4030C**	Vs.	D.C.I.T., Circle-4(2), Ahmedabad

(Applicant)		**(Respondent)**

Assessee by :	Shri Hardik Vora, A.R
Revenue by :	Shri Deelip Kumar, Sr.D.R

सुनवाईकीतारीख/**Date of Hearing : 20/01/2020**
घोषणाकीतारीख/**Date of Pronouncement: 11/03/2020**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Commissioner of Income Tax (Appeals)-4 Ahmedabad, dated 07/05/2019 (in short "Ld. CIT(A)") arising in the matter of assessment order passed under s.143 r.w.s. 147 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dated 16/10/2018 relevant to the Assessment Year 2013-2014.

The assessee has raised the following grounds of appeal.

1. *On the facts and circumstances of the case as well as law on the subject, the Learned Commissioner of Income Tax (Appeals) has erred in confirming addition by applying provisions of section 2(22)(e) for the additional amount of credit transactions from Shreem Design & Indrastructure Pvt. Ltd. amounting to Rs.2,62,31,369/-*

1.1 *On the facts and circumstances of the case as well as law on the subject, the Learned Commissioner of Income Tax (Appeals) has erred in confirming addition by applying provisions of section 2(22)(e) of the Act ignoring exemption in sub clause (ii) of S.2(22)(e).*

1.2 *On the facts and circumstances of the case as well as law on the subject, the Learned Commissioner of Income Tax (Appeals) has erred in confirming ad ition by applying provisions of section 2(22)(e) ignoring the fact that lending of money is ubstantial part of business of the company.*

1.3 *On the facts and circumstances of the case as w ll as law on the subject, the Learned Commissioner of Income Tax (Appeals) has erred in confirming addition by applying provisions of section 2(22)(e) of the Act ignoring transaction in the nature of current account.*

On the facts and circumstances of the case as well as law on the subject, the Learned Commissioner of Income Tax (A peals) has erred in confirming addition by applying provisions of section 2(22)(e) of the Act ignoring that the appellant has paid interest on excess credit amount and not had any ndividual benefit.

2. *It is therefore prayed that the above addition/disallowance made by the assessing officer may please be deleted.*

3. *Appellant c aves leave to add, alter or delete any ground(s) either before or in the course of hearing of the appeal.*

2. The only effective issue raised by the assessee is that the learned CIT (A) erred in confirming the addition made by the AO for Rs. 1,71,13,533/- under section 2(22)(e) of the Act.

3. Briefly stated fact is that the assessee is an individual and engaged in the business & profession of consulting engineer in a proprietary concern in the name and style of 'Reem Design'. The assessee during the year under consideration has accepted loan for Rs. 2,62,31,369/- from M/s Shreem Design & Infrastructure Pvt Ltd. (in short SDIPL) in which he is director and also holding 11.61% of equity share.

3.1 The AO was of the view that such advance for Rs. 2,62,31,369/- amounts to deemed dividend under the provision of section 2(22)(e) of the Act. However the AO observed that the total accumulated profit of the lender is amounting to Rs.1,71,13,533/- only. Accordingly the AO purposed the addition of Rs.1,71,13,533/- under section 2(22)(e) of the Act.

3.2 The assessee in response submitted that the lender SDIPL advance the amount during the course of normal business activity. Thus the provision of section 2(22)(e)(ii) provide exemption if the same given in course of ordinary business. The assessee further claimed that the MOA and AOA of SDIPL authorizes money lending business and the same lending business constitute more than 20% of the business of the company which is substantial part of business for the purpose of explanation 3(b) to section 2(22)(e) of the Act. Accordingly the assessee contended that there should not be any addition on account of the advances given in normal business activity under section 2(22)(e) of the Act.

3.3 However the AO disagreed with the contention of the assessee by observing that the MOA of the SDIPL contains that the reserve & surplus if any not required immediately for the business should be invested. But the same is neither part of main object and nor the part ancillary or incidental to the main object. Therefore the loan advances by the SDIPL to the assessee is not in ordinary course of business as the company is not engaged in money lending business. Accordingly the AO treated the loan amount as deemed dividend to the extent of accumulated profit of Rs. 1,71,13,533/-and added the same to the total income of the assessee.

Aggrieved assessee preferred an appeal before the learned CIT (A).

4. The assessee before learned CIT (A) Submitted that loan advances received from SDIPL is a running account and during the year he has accepted loan & advances for Rs. 2,6329,116/- and repaid for Rs. 1,93,55,108/-. The assessee also claimed to have paid interest @ 9% on outstanding balance i.e. interest of Rs.

11,26,187/- paid during the year on which he has deducted TDS u/s 194A of the Act. Accordingly the assessee claimed that advances given by SDIPL is in the course of ordinary business. The assessee further submitted that the SDIPL has given loan and advances for Rs. 9,48,46,082 during the year and accepted unsecured loan of Rs. 22,78,14,682/-. Similarly received interest income from such advances for Rs. 53,39,658/- and paid interest on unsecured loan for Rs. 2,55,22,818/- which constitute substantial portion of the business income of the SDIPL. Thus he is entitled for the relief under section 2(22) (e) (ii) of the Act.

4.1 Further the assessee contended that the provisions of section 2(22)(e) of the Act do not apply when shareholder is paying interest on such loan and advances. In this respect the assessee placed his reliance on the multiple judgment of Kolkata Tribunal.

5. However the learned CIT (A) confi med the addition made by the AO by observing a under:

> *Therefore, I decide to confirm the addition u/s. 2(22)(e) for following reasons:*
>
> *i. The appellant is substantial share holder as per provisions of IT Act 1961 in the company involved.*
>
> *ii. There is accumulated profit in the company Shreem Design Infrastructure Pvt. Ltd. of Rs.1,71,13,533/-*
>
> *iii There is loan and advances by Shreem Design Infrastructure Pvt. Ltd. to the appellant of Rs.2,62,31,369/-.*
>
> *iv. There is disallowance worked out by AO with reference to-accumulated profit as per provision of the Act.*
>
> *v. It is proved beyond doubt that the company is in the business of development of properties and in no way can be concluded to have been involved in money lending business. Even appellant's argument through Memorandum of Association fails in the case of company.*
>
> *vi. It is a case of closely held family concern wherein the appellant holds enormous power to decide about financial matters to his pecuniary benefits.*
>
> *Though, the loans and advances to the appellant are of Rs.2,62,31,369/-*

but the accumulated profits are of Rs. 1,71,13,533/- in the balance-sheet of Shreem Design Infrastructure Pvt. Ltd., the provisions of section 2(22)(e) are applicable to the amount of Rs. 1,71,13,533/-.

In view of above, the addition of Rs. 1,71,13,533/- made by AO u/s. 2(22)(e) of the Act is hereby confirmed. The concerned grounds of appeal are dismissed.

Being aggrieved by the order of the learned CIT (A), the assesse is in appeal before us.

6. The learned AR for the assesse before us filed a paper book running from pages 1 to 91 and submitted that the assessee has borrowed fund from the company on interest at prevailing rate in the market. Thus the assessee has not derived any benefit out of such loan taken from the company as discussed above. The learned AR in support of his contention further submitted that this tribunal in the own case of the assessee involving identical facts and circumstances for the assessment year 2015-16 in ITA No. 29/AHD/2019 vide order dated 12/04/2019 has decided the issue in favour of the assessee.

7. On the other hand, the learned DR vehemently supported the order of the authorities below.

8. We have heard the rival contentions of both the parties and perused the materials available on record before us. Admittedly, the assessee has paid interest on the money borrowed from the company namely SDIPL. This fact can be established from the details such as TDS certificate issued by the assessee to the company for the deduction of TDS on the payment of interest to the company which is placed on page 29 of the paper book.

8.1 There is also Ledger account of the assessee in the books of the company showing the amount of interest received from the assessee by the company which is placed on pages 30 to 38 of the paper book.

8.2 In view of the above, there remains no dispute that the assessee has incurred interest expenses on the money borrowed from the company. Accordingly, we hold that there was no benefit derived by the assessee from such company on the money borrowed by him.

8.3 We also note that the provision of the deemed dividend under section 2(22)(e) of the Act, was brought under the statute to curb the practice of diverting the fund of the company for the benefit of the shareholders. However in the case on hand there was no benefit extended by the company to the assessee. Thus, the impugned transaction is outside of the purview of the deemed dividend as envisaged under the provisions of section 2(22)(e) of the Act. We also note that this Tribunal in the own case of the assessee involving identical facts and circumstances for the assessment year 2015-16 in ITA No. 29/AHD/2019 vide order dated 12/04/2019 has decided the issue in favour of the assessee. The relevant extract of the order is reproduced as under:

> *14. We further find that th loan taken from the SDIPL and AIPL were compensated by way of interest @9% being market rate paid by the assessee on loan, therefore, the assessee in real sense did not derive any benefit of the company so as to the provisions (ii) of sec. 2(22)(2) of the Act. The learned counsel for the assessee relied in the case of ACIT vs. M/s. Zenon (India) Pvt Ltd, ITA NO 1124/Kol/2012 (Paper Book 38 to 43 and Smt. Sangita Jain vs. ITO ITA No. 1817/Kol/2009 (Paper Book 44 to 51) which supports his contentions. The learned couns l for the assessee placed reliance in the case of Shri Pradip Kumar Malhotra v. CIT [I.T.A.No. 219 of 2013 dated 02.08.2011 of Hon'ble Calcutta High Court] [PB-24-37]. Wherein it was held by the Honourable Calcutta High Court that phrase " by way of advance or loan appearing in section 2(22)(e) must be construed to mean those advances or loans, which is shareholder enjoys for simply on account of being a Partner, who is the beneficial owner of shares, but if such | loan or advance is given to such shareholder as a consequence of any further consideration, which is beneficial to the Company, received from such shareholder, in such a case, such advance or loan cannot be said to be deemed dividend within the meaning of the Act. It was held that gratuitous loan or advance given by a company to those classes of shareholders thus, would come within the purview of section 2(22)(e) but not the cases where the loan or advance is given in return to an advantage conferred upon the company by such shareholder. Since, the assessee has paid interest on loans and advances taken from SDIPL and AIPL, hence, he has compensated and no benefit has been derived. Therefore, applying the ratio of Hon'ble Calcutta High Court as quoted **above, and** Co-ordinate Bench decisions ACIT vs. M/s. Zenon (India) Pvt, Lid, ITA No. 1124/Kol/2012 (Paper Book 38 to 43 and Smt. Sangita Jain vs. ITO ITA **NOL 1817/K0V2009 (Paper** Book 44 to 51), the loans and advances taken **by the** assessee. **are not covered by** the provisions of section 2(22)(e) of the **AcL Itas.** considering the totality of facts and judicial decision as discussed **above , we hold that** the AO was not justified in making addition on account of deemed dividend of Rs. 2,50,80.923 from SDIPL*

*and Rs.76,53,711 from AIPL. Hence, same are directed to be deleted. Accordingly, grounds of appeal raised by **die assessee are** allowed.*

8.4 The facts of the case as discussed above are squarely applicable to the present facts of the case. The learned DR has not brought anything on record contrary to the arguments advanced by the learned AR for the assessee. Hence, respectfully following the ratio laid down by this tribunal in the own case of the assessee *(supra)*, we set aside the finding of the learned CIT (A) and direct the AO to delete the addition made by him. Hence the ground of appe l of the assessee is allowed.

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

Order pronounced in the Court on 11/03/2020 at Ahmedabad.

-Sd-	**-Sd-**
(RAJPAL YADAV)	**(WASEEM AHMED)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 11/03/2020

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