

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।  
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

BEFORE SHRI D. KARUNAKARA RAO, AM AND  
SHRI PARTHA SARATHI CHAUDHURY, JM

आयकर अपील सं. / ITA No. 2955/PUN/2016

निर्धारण वर्ष / Assessment Year : 2011-12

Shri Ashok M. Musale,  
Flat No.11, 1077, Sunman Apts,  
Senapati Bapat Road,  
Shivaji Nagar, Pune-411 016.  
PAN : AAUPM2922P

.....अपीलार्थी / Appellant

बनाम / V/s.

The Deputy Commissioner of Income Tax,  
Circle-8, Pune.

.....प्रत्यर्थी / Respondent

Assessee by : Shri Kishor Phadke

Revenue by : Shri Alok Malviya

सुनवाई की तारीख / Date of Hearing : 11.03.2020

घोषणा की तारीख / Date of Pronouncement : 12.03.2020

**आदेश / ORDER**

**PER PARTHA SARATHI CHAUDHURY, JM :**

This appeal preferred by the assessee emanates from the order of the  
Ld. CIT(Appeals)-6, Pune dated 01.09.2016 for the assessment year 2011-12  
as per the following grounds of appeal on record:

*“1. The learned CIT(A)-6, Pune erred in law and on facts in sustaining the addition of deemed dividend u/s.2(22)(e) of the IT Act, 1961 at Rs.19,94,417/- made by learned DCIT, Circle-8, Pune (hereinafter referred to as the learned AO).*

*2. The learned CIT(A)-6, Pune and the learned AO erred in law and on facts in holding that amount already taxed as deemed dividend of Rs.99,25,329/- in the year AY 2005-06 and AY 2006-07 shall not reduced from the opening balance of the ledger balance.*

*3. The learned CIT(A)-6, Pune and the learned AO erred in law and on facts in not appreciating the fact that on an alternative basis and without prejudice, the taxable deemed dividend ought to be compared with 50% of available reserves (since appellant is a 50% shareholder) after taking into credit of amount already taxed as deemed dividend in earlier assessment years and amount paid as interim dividend.*

*4. The appellant craves to leave, add/modify/delete/amend all/ any of the grounds of appeal.”*

2. The brief facts of the case are that the assessee is an individual and is a director in M/s. Enpack Plastics Pvt. Ltd. He holds 50% of the shares of M/s. Enpack Plastic Pvt. Ltd. A survey action u/s.133A of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) was conducted in the premises of M/s.Enpack Plastics Pvt. Ltd on 24.01.2012. During the course of survey, it was found that the director Shri Ashok M. Musale received loans/advances from the company and the same are liable to be treated as deemed dividend u/s.2(22)(e) of the Act. A statement was recorded from Shri Bushan A Musale, son of Ashok Musale in which he admitted that he and his father were unaware of the deemed dividend provisions but however, agreed to pay the tax on the deemed dividend aggregating to Rs.4,25,45,854/- for the relevant years and the same was subsequently confirmed by Shri Ashok Musale. The assessments were reopened for A.Y. 2004-05 and 2005-06 on the ground of escapement of deemed dividend income. The assessee filed revised return for assessment year 2005-06 admitting deemed dividend income of Rs.42,12,775/- and the assessment was completed determining the deemed

dividend income at Rs.62,74,691/-. Similarly for assessment year 2006-07, an amount of Rs.36,50,638/- has been brought to tax as deemed dividend income. Ultimately, an amount of Rs.99,25,328/- has been brought to tax as deemed dividend income for these two assessment years.

3. At the time of hearing, the Ld. AR of the assessee submitted that by the action of the Revenue Authorities in making additions/disallowances, the assessee has suffered double taxation. In this context, the Ld. AR of the assessee has placed reliance on the decision of the Hon'ble Bombay High Court in the case of **Commissioner of Income Tax Vs. P. K. Badiani (1970) 76 ITR 369 ( Bom.)** wherein on the issue, the Hon'ble High Court has held as follows:

*"The assessee's said account opens with a debit of Rs.67,842.95. It is, however, only a carry forward of the debit balance of the previous year and not being a payment by the company during this year, it has to be excluded. Then, there is a credit entry under date 29th June, 1957, of Rs. 7,500 being for the assessee's remuneration payable by the company for three months. There are three debit entries of Rs. 2,500 each under dates 6th April, 4th May and 6th June, 1957. The total amount of these three debit entries and the amount of this credit entry are equal and they are really contra-entries. Though the dates of the debit entries are earlier than that of the credit entry, the credit entry shows that it is merely a transfer entry and the remuneration was payable to the assessee at the respective dates of the said debit entries. These three debit entries are in payment specifically of remuneration which had already become payable by the company to the assessee and they are merely a mode of payment. These debit entries are, therefore, not loans and being part of contra-entries should really be excluded and ignored and we will proceed on that basis. Excluding this credit entry of Rs. 7,500, there are only four credit entries totalling Rs. 75,656.56 before the last credit entry of Rs. 4,00,000, under date 1st February, 1958. Before 1st February, 1958, being the date of this last credit entry of Rs. 4,00,000, and excluding the carry-forward debit of Rs. 67,842.95, there are 44 debit entries aggregating to Rs. 1,83,493.76. An examination of this account shows that not a single of these four credit entries made the assessee, as a result of the credit entry, a creditor of the company, because at the date of each credit entry, the total debit to the assessee was much larger. All these 44 debit entries were, therefore, loans to the assessee and the "accumulated profits" of the company were much larger, being Rs. 2,36,470. The aggregate of these 44 debit entries must be treated as dividend. On 1st February, 1958, there is the credit entry of Rs. 4,00,000 which wiped out the said total debit of Rs. 1,83,493.76 and wiped out*

*even the opening carry-forward debit of Rs. 67,842.95 and made the assessee a creditor of the company for the sum of Rs. 1,48,663.29. There are 12 debit entries subsequent to 1st February, 1958 aggregating to Rs. 86,079.25, but as that total is less than the said balance of Rs. 1,48,663.29 in favour of the assessee, they are mere repayments by the company towards its said liability and **none of these 12 debit entries was a loan by the company to the assessee, and, hence, no question of any of them being deemed dividends arises.** We have referred to this account of the assessee only as the best available illustration to show how the principles we have stated in this judgment are to be applied. We have referred to the various figures which we have just mentioned without having them properly checked up or worked out and the Tribunal or the revenue authorities, as the case may be, should and will be free to work out the correct position on its own, on the principles mentioned in our judgment and the answers to the questions which we give. In mentioning these figures we have not decided or taken into account any principles of law other than those covered by the subject-matter of the four questions herein. For example, Mr. Rajgopal contended that the amounts of dividends actually declared and paid by the company have been credited into this account of the assessee and that, therefore, necessary adjustments will have to be made, e. g., under section 2(6A)(e)(iii), as contended by him. The question of construing section 2(6A)(e)(iii) does not arise before us and we, therefore, express no opinion as to its application. The Tribunal and the revenue authorities, as the case may be, will act according to law and will be free to consider and give effect, when ascertaining the amount of deemed dividends, to all other provisions of law, i.e., other than those covered by the questions herein and the principles we have laid down.”*

3.1. The Ld. AR of the assessee further submitted that the decision mentioned hereinabove was not placed before the Assessing Officer. Therefore, the Ld. AR of the assessee prayed that this decision has to be considered and hence, the entire matter may be restored to the file of the Assessing Officer for adjudication after considering the decision of the Hon'ble Jurisdictional High Court mentioned aforesaid.

4. We have perused the case records and heard the rival contentions. We have also analyzed the facts and circumstances in this case and considered the judicial pronouncement placed before us. The Ld. AR of the assessee has placed strong reliance on the decision of the Hon'ble Jurisdictional High Court (supra.) and on the basis of this judgment submitted that in effect, if

additions/disallowances are sustained, the assessee will suffer double taxation. The submission of the Ld. AR also is that this decision was not placed in front of the Assessing Officer for consideration and therefore, the matter needs to be adjudicated in the light of the said decision and the Ld. AR prayed that the matter may be restored back to the file of the Assessing Officer. The Ld. DR has conceded to the prayer made by the Ld. AR of the assessee.

4.1. After hearing both the parties, we are of the considered view that this issue needs factual verification vis-a-vis the applicability of law as pronounced by the Hon'ble Jurisdictional High Court (supra.). Double taxation, in any case, is not warranted within the spirit and soul of the Income Tax Statute. Therefore, we set aside the order of the Ld. CIT(Appeals) and restore the matter back to the file of Assessing Officer directing him to consider the judgment of the Hon'ble Jurisdictional High Court (supra.) and analyze the same with the facts of the assessee's case and adjudicate the issue in compliance with the principles of natural justice.

5. In the result, **appeal of the assessee is allowed for statistical purposes.**

Order pronounced on 12<sup>th</sup> day of March, 2020.

Sd/-  
**D. KARUNAKARA RAO**  
**ACCOUNTANT MEMBER**

Sd/-  
**PARTHA SARATHI CHAUDHURY**  
**JUDICIAL MEMBER**

पुणे / Pune; दिनांक / Dated : 12<sup>th</sup> March, 2020.  
SB

**आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-6, Pune.
4. The Pr. CIT-5, Pune.
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, "ए" बेंच,  
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

// True Copy //

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.

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		Date	
1	Draft dictated on	11.03.2020	Sr.PS/PS
2	Draft placed before author	11.03.2020	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		