

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B": HYDERABAD
(THROUGH VIRTUAL CONFERENCE)**

**BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

ITA Nos. 962/HYD/2016 & 1260/Hyd/2017 Assessment Year: 2012-13 & 2011-12		
Naresh Kumar Sekhar, Hyderabad. PAN - ABAPT 0359G (Appellant)	Vs.	Income-tax Officer, Ward - 2(1), Hyderabad. (Respondent)
ITA Nos. 1261 & 957/HYD/2017 Assessment Year: 2011 12 & 2010-11		
Kiran Dwarakanath Sekhar, Hyderabad. PAN - AFVPS 5346D (Appellant)	Vs.	Income-tax Officer, Ward - 2(1), Hyderabad. (Respondent)
Assessee by:		Shri S. Rama Rao
Revenue by:		Shri Rohit Mujumdar
Date of hearing:		17/06/2021
Date of pronouncement:		13/07/2021

ORDER

PER L.P. SAHU, A.M.:

These appeals filed by the two assesseees are directed against CIT(A), Hyderabad's separate orders for AYs 2010-11 to 2012-13 involving proceedings u/s 143(3) rws 147

and 271(1)(c) of the Income Tax Act, 1961 ; in short “the Act”. As the facts and grounds are identical in these appeals, they were clubbed and heard together and therefore a common order is passed for the sake of convenience. Therefore, the decision taken in ITA No. 1260/Hyd/2017 shall mutatis-mutandis apply to other appeal in other appeals as well, except in penalty appeal u/s 271(1)(c) of the Act.

2. Briefly, the facts of the case are that the assessee herein is an individual and is a Doctor by profession. He is the Director of Kiran Infertility Centre Pvt.Ltd., Hyderabad. The income derived by the assessee includes remuneration from the company and rent from Kiran Infertility Centre Pvt., Limited. The Income-Tax authorities conducted survey u/s 133A of the I.T. Act at the premises of Kiran Infertility Centre Pvt. Ltd. According to the Assessing Officer, there was certain advance payment made by the company to the assessee. It was also found by the authorities that the appellant is having more than 20% of the share capital; that an amount of Rs.59,10,707/- was advanced by the company to the assessee and the accumulated profits of the company as on 31-03-2011 amounted to Rs. 1,45,62,949/-.

2.1 When a show cause letter was issued to the assessee, it was explained before the AO that a) the company is also engaged in money lending activity, b) that it derived

substantial income from advancing the amounts, c) that the advances are in connection with the business activity of the company; (d) that the company did not possess the accumulated profits as the company spent the entire amount for the business activity and, therefore, the assessee pleaded that the provisions u/s 2(22) (e) have no application. The Assessing Officer did not accept any of the contentions of the assessee but treated the amount of Rs.59,10,707/- paid by the company as the income of the assessee. Accordingly, the Assessing Officer determined the total income at Rs.89,33,779/-.

3. Aggrieved by the order of AO, the assessee preferred an appeal before the CIT(A) and the CIT(A) after considering the detailed written submissions made before him rejected the legal grounds raised by the assessee.

3.1 The CIT(A) while confirming the addition made by the AO u/s 2(22)(e), enhanced the addition by Rs. 15,87,722/-.

4. Aggrieved by the order of CIT(A), the assessee is in appeal before the ITAT by raising the following grounds of appeal:

"1) The order of the learned CIT (A) is erroneous both on facts and in law.

2) The learned Commissioner of Income-tax (Appeals) erred in confirming the action of the Assessing Officer in initiating proceedings u/s 147 of the I.T. Act.

3) The learned Commissioner of Income-tax (Appeals) erred in holding that the provisions of Sec.2(22)(e) of the I.T. Act are applicable to the facts of the case and further erred in confirming the addition made of Rs.59,10,707/-

4: The learned Commissioner of Income-tax (Appeals) erred in enhancing the addition made by the Assessing Officer by an amount of Rs.15,87,722/- without properly considering the explanation submitted.

5 The learned Commissioner of Income-tax (Appeals) erred in confirming the charging of interest u/s 234A, 234B and 234C of the I.T. Act.

6) Any other ground or grounds that may be urged at the time of hearing ”

5. Before us, the Id. AR of the assessee reiterated the submissions as made before the authorities below and filed a paper book containing 1 to 131 pages in support of assessee's case. He submitted that there was a commercial advantage in giving the loan/advance by the company as the assessee did not have any personal benefit from the advances taken from the company. He further submitted that the issue in dispute is squarely covered by assessee's own case for AY 2010-11 in ITA No. 364/Hyd/2017 and the hearing of these cases has already been completed.

6. The ld. DR on the other hand besides relying on the orders of revenue authorities, submitted that the said company is giving loans and advances to the Directors without complying the conditions laid down in money lending business as per the AP Money Lenders Act, Fasli, 1349. He further submitted that as on year ending 31/03/2012, there was sufficient surplus find with the company and, therefore, section 2(22)(e) is directly applicable to the case of the assessee. As the assessee is holding more than 52% shareholding in the said company, the ld. DR requested that the order of the CIT(A) be confirmed.

7. We have considered the rival submissions and perused the material on record as well as gone through the orders of revenue authorities. The issue in dispute is squarely covered by the decision of the coordinate bench of this tribunal in assessee's own case supra and order was pronounced on 25/06/2021 after hearing of these cases wherein the coordinate bench with regard to the issues of proceedings un/s 147 of the Act and addition u/s 2(22)(e), raised as ground Nos. 2 & 3 in this appeal, has observed as under:

"7. We have considered the rival submissions and perused the material on record as well as gone through the orders of revenue authorities. During the survey proceedings u/s 133A, the AO noticed that the assessee received an advance of Rs. 27,50,000/- form M/s Kiran

Infertility Centre Pvt. Ltd. and the same was treated as deemed dividend u/s 2(22)(e), which was enhanced by the CIT(A) as cited supra.

7.1. *Before us, the assessee has raised a legal ground for reopening of assessment u/s 147/148 of the Act as ground No. 3, which was also raised before the CIT(A) and CIT(A) dismissed the same as not pressed by observing as under at para 7 of his order:*

“I. Ground no. 2 is with regard to the initiation of proceedings u/s 147 of the I.T. Act, 1961. In the written submissions filed on 23.11.2015, nothing is mentioned about this ground of appeal: Even in the statement of facts nothing is mentioned about the issue of notice U / s. 148. Even during the course of hearing on 23.11.2014 no submission was made. Therefore, this ground of appeal is dismissed as not pressed.”

7.2 *We have also gone through the written submissions of the assessee placed before us at pages 142 to 156 of the paper book. There is no iota of any discussion with regard to challenging of reopening of assessment. The challenging of reopening is also not tenable because the assessing officer had tangible materials before reopening the case which was found during the course of survey operation U/s 133 (A) of the Income tax Act. 1961. In the opinion of the assessing officer there was a reason to believe that the assessee had escaped its income and, therefore, the legal ground No. 3 raised by the assessee is dismissed.*

8. *With regard to ground No. 4 regarding challenging the addition made u/s 2(22)(e) of Rs. 27,5,0,000/- of the Act, we have gone through the documents submitted by the assessee in the paper book. In the financial statement of the assessee, which is placed at page No. 58 of paper book, assessee has shown under the gross receipts – “interest” on loans to directors of Rs. 1,87,405/- and it has also shown in*

Annexure - II – Loans and Advances – under interest receivable from both the Directors, which is placed at page 62 of the paper book. Therefore, it clearly shows that the company is compensated on the loans and advances to the directors by receiving interest from the directors.

8.1 This issue is squarely covered in favour of the assessee by the decision of the coordinate bench of ITAT, Kolkata in the case of Smt. Sangita Jan Vs. ITO in ITA No. 1817/KOL/2009 for AY 2006-07 vide order dated 11th March, 2016. The relevant part of the order is reproduced below for the sake of clarity:

“5. We have heard the arguments of both the sides and also perused the relevant material available on record. One of the main contentions raised by the ld. counsel for the assessee at the time of hearing before us is that the loan in question treated as deemed dividend under section 2(22)(e) by the authorities below was taken by the assessee from M/s. Surya Business Pvt. Limited on interest and since the said Company was compensated by way of interest paid by the assessee on loan, the assessee in real sense did not derive any benefit from the funds of the Company so as to attract the provisions of section 2(22)(e). Although the ld. D.R. has vehemently opposed this contention of the ld. counsel for the assessee by submitting that the payment of interest alone cannot be considered from the benefit angle as envisaged under section 2(22)(e), it is observed that the judicial pronouncements cited by the ld. counsel for the assessee clearly support the case of the assessee.

6. In the case of Pradip Kumar Malhotra reported in 338 ITR 538 cited by the ld. counsel for the assessee, it was held by the Hon'ble Calcutta High Court that the phrase “by way of advance or loan” appearing in section 2(22)(e) must be construed

to mean those advances or loans, which a 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 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. In the case of ACIT -vs.- M/s. Zenon (India) Pvt. Limited, a loan taken by the assessee was treated by the Assessing Officer as deemed dividend under section 2(22)(e), but the Id. CIT(Appeals) did not approve the action of the Assessing Officer after having noticed that interest at the rate of 9% per annum was paid by the assessee on such loan, which, according to him, was a consideration received from her shareholders, which was beneficial to the Company and the order of the Id. CIT(Appeals) giving relief to the assessee was upheld by the Tribunal vide its order dated 29.06.2015 passed in ITA No. 1124/KOL/2012 by relying on the decision of the Hon'ble Calcutta High Court in the case of Pradip Kumar Malhotra (supra). Keeping in view the said decision of the Hon'ble Calcutta High Court which has been followed by the Coordinate Bench of this Tribunal in the case of M/s. Zenon (India) Pvt. Limited, we hold that the addition made by the Assessing Officer and sustained by the Id. CIT(Appeals) under section 2(22)(e) on account of loan received by the assessee from M/s. Surya Business Pvt. Limited on which consideration in the form of interest was paid by the assessee to the benefit of the Company is not

sustainable. We, therefore, delete the same and allow Grounds No. 1 & 2 of the assessee's appeal.

8.2 As the issue under consideration is materially identical to the issue in the said decision, respectfully following the same, we direct the AO to delete the addition of Rs. 27,50,000/- made by him u/s 2(22)(e) on account of loan received by the assessee from M/s Kiran Infertility Centre Pvt. Ltd. on which consideration in the form of interest was paid by the assessee to the benefit of the Company is not sustainable. Accordingly, ground No. 4 is allowed."

7.1 Respectfully following the said decision, ground No. 2 regarding proceedings u/s 147 of the Act is dismissed and ground No. 3 regarding addition u/s 2(22)(e), we direct the AO to delete the addition made under the said section.

8. With regard to ground No. 4 against the action of CIT(A) in enhancing the addition made by AO u/s 2(22)(e) by an amount of Rs. 15,87,722/-, the coordinate bench in AY 2010-11 cited supra held as under:

"9. As regards ground No. 5 against the action of CIT(A) in enhancing the addition made by the AO u/s 2(22)(e) by an amount of Rs. 12,67,295/-, we observe that in the impugned addition, the said company is not charging any interest on the debit balance in the hands of the director. We also observe that the accounts maintained in the name of the director is not a current account and noticed from the ledger account of the director in M/s Kiran Infertility Centre Pvt. Ltd., the rent and director's remuneration paid to the assessee has been credited at the year end, which is placed at page no. 3 to 6 of paper book. We observe that Id. CIT(A) has added the entire debit balance, but, there is

opening balance of Rs. 8,063.25/- which relates to the previous year and the same cannot be taxed in this impugned assessment year and the balance amount is satisfied to the provisions of section 2(22)(e) of the Act. The CIT(A) before enhancing the income of the assessee, issued a notice u/s 251 dated 12/08/2016, to file the objections, if any, but, the assessee did not comply to the said notice. Therefore, alleging that the CIT(A) has not provided opportunity in enhancing the income as raised in ground No. 2 is wrong. Accordingly, the assessee gets a relief of Rs. 8,063.25/- and the remaining amount of Rs. 12,59,231.75 (12,67,295/- - 8,063.25/-) is sustained. Thus, ground No. 5 is partly allowed and ground No. 2 is dismissed.”

8.1 Respectfully, following the said decision, we allow this ground to the extent of opening balance and sustain the remaining amount, if any balance left after deleting the opening balance. This ground is partly allowed.

9. Ground No. 5 is regarding charging of interest u/s 234A, 234B and 234C. Charging of interest under these sections is consequently in nature, the AO is directed accordingly.

10. Ground Nos. 1, & 6 are general in nature, hence need no adjudication.

11. In the result, appeal of the assessee is partly allowed in above terms.

12. As regards ground No. 2 regarding proceedings u/s 147 of the Act in ITA No. 962/Hyd/2016 and in ITA No. 1261/Hyd/2017, these grounds are dismissed following the decision in 1260/Hyd/2017 (supra).

13. As regards ground No. 3 regarding addition u/s 2(22)(e) in ITA No. 962/Hyd/2016 and in ITA No. 1261/Hyd/2017, these grounds are allowed following the decision in 1260/Hyd/2017 (supra).

14. As regards ground No. 4 regarding enhancement addition in ITA No. 1261/Hyd/2017, this ground is partly allowed following the decision in 1260/Hyd/2017 (supra).

15. As regards ground No. 5 in ITA No. 1261/Hyd/2017 regarding charging of interest u/s 234A, 234B and 234C, as it is a consequential in nature, the AO is directed accordingly

16. As regards the ground No. 4 regarding addition of Rs. 1,80,630/- raised in ITA No. 962/Hyd/2016, since the advance received by the assessee in the earlier ground we have directed the AO to delete the addition made u/s 2(22)(e) on account of advance received from the company M/s Kiran Infertility Centre Pvt. Ltd., following the conclusions drawn in ground No. 3, this ground is also allowed.

17. As regards the appeal in ITA No. 957/Hyd/2017, before us, The ld. AR of the assessee submitted that the Assessing Officer initiated the penalty proceedings by issue of a notice u/s 274 r.w.s. 271(1)(c) on 20.03.2014. He submitted that while issuing the said notice, the Assessing Officer did not mention whether the notice is issued for concealment of income or for furnishing of inaccurate particulars of income. Therefore, the notice is not validly issued. Consequently, the order passed u s 271(1)(c) also is not valid. For this proposition, he relied on the decision of the Hon'ble Supreme Court in the case of CIT Vs. SSA's Emerald Meadows, [2016] 73 taxmann.com 248 (SC).

18. The Learned Departmental Representative on the other hand relied on the orders of revenue authorities.

19. Considered the rival submissions and perused the material facts on record. The issue in dispute is squarely covered by the decision of the Hon'ble Supreme Court in the case of CIT Vs. SSA's Emerald Meadows, [2016] 73 Taxmann.com 248 (SC) wherein the Apex Court upheld the decision of the Hon'ble High Court, in which, the Hon'ble High Court confirmed the order of the Tribunal and dismissed the appeal of the revenue, who came in appeal against the order of the Tribunal. The Tribunal relying on a decision of Karnataka High Court in case of CIT Vs.

Manjunatha Cotton & Ginning Factory, [2013] 359 ITR 565/210 allowed the appeal of the assessee holding that notice issued by Assessing Officer u/s 274 read with section 271(1)(c) was bad in law, as it did not specify under which limb of section 271(1)(c) penalty proceedings had been initiated, i.e. whether for concealment of particulars of income or furnishing of inaccurate particulars of income.

19.1 In the case under consideration, on perusal of the show cause notices issued by the Assessing Officer u/s 274 r.w.s. 271 of the IT Act, 1961, dated 20/03/2014, which is placed on record, it is seen that the Assessing Officer did not mention whether the notice is issued for concealment of income or for furnishing of inaccurate particulars of income. Therefore, as per the ratio laid down by the Hon'ble Supreme Court in the case of SSA's Emerald Meadows, the notice issued by the Assessing Officer is not valid and consequently, the order passed u/s 271(1)(c) is also not valid. Hence, we set aside the order of the CIT(A) and quash the order passed by the Assessing Officer u/s 271(1)(c) of the Act. Accordingly, the appeal of the assessee is allowed.

20. In the result, appeal of the assessee is allowed.

21. In the result, appeals in ITA Nos. 962/H/2016 and ITA Nos. 1260 & 1261/Hyd/2017 are partly allowed and appeal in ITA No. 957/Hyd/2017 is allowed in above terms. A copy of common order be placed in the respective case files.

Pronounced in the open court on 13th July, 2021.

**Sd/-
(S.S. GODARA)
JUDICIAL MEMBER**

**Sd/-
(L. P. SAHU)
ACCOUNTANT MEMBER**

Hyderabad, Dated: 13th July 2021.

kv

copy to :

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8	<i>Guard File.</i>