IN THE INCOME TAX APPELLATE TRIBUNAL
"H" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Pavan Kumar Gadale (JM)

I.T.A. No. 5504/Mum/2016 (Assessment Year 2005-06)

Krishna Kumar Mittal HUF 2nd Floor, Off. Turner Road Bandra(W) Mumbai-400 050 PAN : AAGHK4584D	Vs.	ITO,Ward-20(1)(4) Piramal Chambers, Parel Mumbai
(Appellant)		(Respondent)

Assessee by	None
Department by	Shri Gurbinder Singh
Date of Hearing	27.07.2021
Date of Pronouncement	04.10.2021

O R D E R

Per Shamim Yahya (AM) :-

This appeal by the Assessee is directed against the order of learned CIT(A)-31 dated 30.01.2012 and pertains to Assessment Year 2005-06.

2. The grounds of appeal read as under :

1) The Income-tax Officer - 20 (1) (4), Mumbai (hereinafter referred to as "A.O.") has erred in law and on facts in passing the order dated 21st March, 2013 (hereinafter referred to as the 'Impugned order") and thereby levying penalty under section 271 (1) (c) of the Act. The impugned order is therefore liable to be set aside on this ground alone.

2) The A.O. has failed to appreciate that the Appellant has not furnished any inaccurate particulars of income to attract the levy of penalty under section 271 (1) (c) of the Act. It is submitted that the Apex Court in the case of Reliance Petro products reported in 322 ITR 1 58 (SC) has clearly held that if the assessee has not furnished inaccurate particulars of income, then penalty proceedings cannot be initiated. The impugned order has been passed without appreciating the legal position and is therefore liable to be set aside.

3) The appellant also puts its reliance in the case of Brahamputra Constructions Ltd. (Supra), wherein, the Hon'ble Court has held that the assessee had disclosed all the

facts fully and truly, no material facts had been suppressed. There was no deliberate attempt or any malafide intention on the part of the assessee to evade payment of tax. It could have been, at best, an inadvertent error which was genuine and bona fide that such loan / advance taken from the company, which was repayable, could not constitute assessee's income.

4) The assesse also like to refer to **Prakash Narain Singh,** New **Delhi** vs **Department Of Income** Tax(TN THE INCOME TAX APPELLATE TRIBUNAL DELHI BENCH "F", NEW DELHI), Wherein Plea of the assessee is that loans and advances taken by the assessee were attributable to normal business transactions and were on account of travelling and other expenses to be incurred by the assessee for the purpose of the business of the company. Tribunal found that all the facts in this connection were duly disclosed by the assessee. There was no concealment. Tribunal found that the assessee's explanation that the addition was made under the deeming provisions of section 2(22)(e) of the Act which the assessee was not well aware of has sufficient cogency. **When the** assessee **has made all the necessary disclosures and the rigors of penal provisions of section 271(l)(c) have fastened on the assessee by the deeming provisions of section** 2(22)(e) **of the Act. In tribunal considered opinion, assessee should not be visited with the rigors of penalty** u/s. 271(1)(c) **of the l.T. Act, as the** assessee's **contention that no material was suppressed and therefore, there was no ma la fide intention on the part of the** assessee **to evade the tax has sufficient cogency.**

5) **Gitanjali Ghate Vs.** DCTT (INCOME TAX APPELLATE TRIBUNAL, MUMBAI):

"while scrutinizing the balance sheet of the assessee, during the course of assessment proceedings, it was noticed by the Assessing Officer that the assessee has taken loan of Rs. 3,57,4287- from M/s. Third Eye Qualitative Researchers Pvt. Ltd. of which she is a director having substantial interest. Accordingly, the said loan of Rs. 3,57,428/- was added as deemed dividend u/s. 2(22)(e) of the I.T. Act. The AO sought explanation u/s. 271(l)(c) r.w. Explanation-1. The assessee furnished detailed reply dt. 6.3.2009. The explanation of the assessee was rejected by AO who levied minimum penalty of Rs. 1,20,310/-.

We have perused the orders of lower authorities. It is not in dispute that the fact of the loan taken by the assessee from the company came within the knowledge of AO from the balance sheet filed by the assessee which means that the assessee has disclosed the fact of borrowing in her balance sheet. **We agree with the Counsel that assessee had no m a la lid e intention to conceal the fact. So long as** assessee **has not concealed any material fact or any factual information given by her has not been found to be incorrect, she should not be liable to imposition of penalty u/s.271(1)(c)**

6) The A.O. erred in not appreciating that the Appellant had neither concealed

any particulars of income nor failed to furnish any particulars in respect thereof, to attract the levy of penalty under section 271 (1) (c) of the Act. 'The impugned order is therefore bad in law and liable to be set aside.

7) The A.O. erred in not appreciating that the issue, whether the amount of Rs. 27,12,7477- can be taxed as deemed divided under section 2(22)(e) of the Act, in the hands of the Appellant, is pending adjudication before the Hon'ble ITAT. It is submitted that when the quantum proceedings are pending before the Hon'ble ITAT, penalty cannot be levied against the Appellant. The impugned order has been passed in defiance of the settled principle of law and is therefore liable to be set aside.

3. The brief facts of the case leading to the levy of penalty are as under:-

" During the previous year i.e. 2004-05 relevant to the A.Y. 2005-06 M/s. Euro Rex Ind. Pvt Ltd and M/s. KKM International Pvt. Ltd have advanced a loan of Rs.89,25,000 and Rs.23,71,732 respectively to M/s. Mittatex Exports Pvt Ltd. The Reserves and Surplus as per Balance sheet of M/s. Euro Flex" Ind. Pvt. Ltd and M/s. KKM International Pvt Ltd were Rs.21,88,897 and Rs.5,23,850/-. The AO invoked the provisions 2(22)(e) of the Act and added Rs.27,12,7477- in the hands of M/s. Mittatex Export Pvt Ltd and treated Income from other sources being deemed dividend u/s 2(22)(e) of the Act. The Ld. CIT (A) while relying on the decision of honorable ITAT Mumbai Special Bench held that the deemed dividend u/s 2(22)(e) can only be treated in the hands of the registered and beneficial shareholder of the lender company and not in the hands of the borrowing concern in which such a shareholder is a member or partner having substantial interest. The intention behind the provision of section 2(22)(e) is to tax dividend in the hands of the shareholder.

The shareholding of M/s Krishna Kumar Mittal (HUF) in the following companies during relevant period was as follows:

Sr. No	Name of the Company	No. of Shares	Percentage of Share Holding
1.	M/s. Mittatex Exports Pvt. Ltd.	10,000	20%
2.	M/s. KKM International Pvt. Ltd.	2,000	20%
3.	M/s Euroflax Ind. Lts.	30,000	20%

The above chart establishes that the appellant is having substantial interest in the above mentioned all three companies. AO on perusal of details/information available on the records observed that the loan and advances were given by the closely held companies i.e. M/s Euroflex Ind. Pvt. Ltd and M/s. KKM International Pvt. Ltd to M/s. Mittatex Exports Pvt. Ltd and the appellant is a beneficial owner of 20% share

holding in all the three companies and also having the substantial interest in the above two companies. Therefore, as per the provision of section 2(22)(e) of the Act such loans and advances of Rs.27,12,747/- were considered as deemed dividend u/s 2(22)(e) of the Act in the hands of the appellant and was added back to the total income.

Aggrieved by this addition, the appellant filed an appeal before the CIT(A). The Ld. CIT(A) directed that proportionate deemed dividend needs to be assessed in the hands of the appellant u/s 2(22)(e) of the Act. Accordingly, the proportionate deemed dividend in the hands of the appellant amounts to Rs.5,42,549/- was added back by the AO u/s 56 of the Act.

While levying penalty AO opined that, in this case, the main person who controls the overall functioning of the company is Shri Krishna Kumar Mittal and he is also the karta of M/s Krishna Kumar Mittal HUF. That the appellant has consciously and deliberately given loans instead of distributing dividend to evade payment of Tax. That the appellant .has thus committed the default within the meaning of section 271(1)(c) of the Act. That the Appellant is under a mandatory obligation to disclose the correct and true income in the return of income and under no circumstances the appellant is allowed under the Act to file inaccurate particulars and present a totally different picture than the real one. That the burden is on the appellant to prove that there was no concealment or has not filed any inaccurate particulars of income. That in spite of show cause notice, the appellant never bothered to reply or attend personally. That this shows that the appellant has accepted the fact that it has consciously and deliberately concealed the income of Rs.5,42,549/- to evade payment of Tax. That had the revenue not selected this case for scrutiny, the appellant could have enjoyed the benefits and would have caused a great loss to the revenue. That the appellant failed to furnish a statement of true income and tax liability in the return of income. AO levied penalty.

4. Upon assessee's appeal Ld.CIT(A) proceeded to uphold the penalty by holding that assessee has not produced any evidences in support of the contention during the appellate proceedings.

5. Against this order, assessee is in appeal before us.

6. We have heard the Ld. DR and perused the record. We note that additions in this case on which penalty has been levied is due to invocation of 2(22)(e) of the Act. The assessee undisputedly is not the registered shareholder of the lender company.

7. We note that the penalty has been levied on the addition u/s. 2(22)(e) on the plank that the main person who controls the overall functioning of the company is Shri Krishna Kumar Mittal and he is also the karta of M/s. Krishna Kumar Mittal HUF. That the assessee has consciously and deliberately given loans instead of distributing dividend to evade payment of Tax. That the assesee has thus committed the default within the meaning of section 271(1)(c) of the Act. We note that the above observation which is the basis of levying penalty is absolutely wrong and legally untenable. As held by the Special Bench ITAT in case of Bhaumik Colour Pvt.Ltd. in ITA NO.5030/M/2004, dated 19.11.2008, section 2(22)(e) can only be treated in the hands of the registered shareholder. The assessee is not a registered shareholder. Hence, section 2(22)(e) itself cannot be legally invoked in such a situation. In such situation, there is no question of assessee being guilty of furnishing inaccurate particulars or concealing income in order to attract penalty u/s. 271(1)(c) as the loan has been given by the company not the assessee. The observation that assessee has consciously and deliberately given loans instead of distributing dividend is an absolutely incorrect observation liable to be set aside. In these circumstances, we have no hesitation whatsoever in setting aside the orders of the authorities below and deleting the penalty.

8. In the result, appeal by the assesee is stands allowed.

Pronounced in the open court on 04 .10.2021.

Sd/-	Sd/-
(PAVAN KUMAR GADALE)	(SHAMIM YAHYA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 04 /10/2021
Thirumalesh, Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai