

IN THE INCOME TAX APPELLATE TRIBUNAL  
AHMEDABAD "B" BENCH  
(Conducted Through Virtual Court)  
Before: Shri Mahavir Prasad, Judicial Member  
And Shri Amarjit Singh, Accountant Member

ITA No. 2190/Ahd/2016  
Assessment Year 2013-14

DCIT, Circle-1(1)(1), Ahmedabad (Appellant)	Vs	Mehul Pratap Asnani, 4, Garden Enclave, Law Garden, Ellisbridge, Ahmedabad-380006 PAN: ACMPA6996R (Respondent)
--	----	---

Revenue by: Shri R.R. Makwana, Sr. D.R.  
Assessee by: Shri Bandish Soparkar, A.R.

Date of hearing : 04-08-2021  
Date of pronouncement : 27-08-2021

**आदेश/ORDER**

**PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-**

This revenue's appeal for A.Y. 2013-14, arises from order of the CIT(A)-1, Ahmedabad dated 29-06-2016, in proceedings under section 143(3) of the Income Tax Act, 1961; in short "the Act".

2. The solitary ground of appeal of the revenue is directed against the order of Id. CIT(A)-1 Ahmedabad in deleting the addition of Rs. 2,06,53,898/- made on account of deemed dividend u/s. 2(22)(e) of the Act.

3. The fact in brief is that return of income declaring total income of Rs. 3,79,13,200/- was filed on 17<sup>th</sup> Feb, 2014. The case was subject to scrutiny assessment and notice u/s. 143(2) of the Act was issued on 8<sup>th</sup> Sep, 2014.

3.1 During the course of assessment, Assessing Officer noticed that assessee has shown in his return of income salary income in the capacity of directors of two companies namely Biotech Vision Clear Pvt. Ltd. and Biotech Ophthalmics Pvt. Ltd. as under:-

Nature of income	Amount	Name of the Company	Name of the Company
Salary-	60,00,000	Biotech Vision Care Pvt. Ltd.	
Salary	19,20,000	—	Biotech Ophthalmics Pvt. Ltd.

On perusal of the detail filed by the assessee, the Assessing Officer noticed that assessee has withdrawn a sum of Rs. 1,67,53,246/- from salary account at the end of year and the account has been squared up by a journal entry. The Assessing Officer has also noticed that in the account name “Mehul Asnani Expenses Account” a debit of Rs. 29,29,006/- was shown and the same had been squared up by a journal entry. The Assessing Officer noticed that with Biotech Vision Clear Pvt. Ltd. the assessee was having one more account in the nature of “Mehul Asnani-WIP” wherein a debit balance of Rs. 69,71,646/- was squared by a journal entry. The assessee was asked to explain the nature of the journal entries made in salary account, expenses

account as well as WIP account. The assessee has explained the same as under:-

*"1. Vide Point 1 and 2 your good seines have asked to provide explanation for entries regarding reduction in debit balance shown in "Mehul Asnani Salary A/c" and "Mehul Asnani Expense A/c" to NIL by journal entries under the narration 'PGEN-JV/1213/00930' and TGBN-JV/1213/01070'. In relation to this the assessee would like to state that during the assessment period the assessee had taken various advances in the form of salary from the beginning of the assessment period which has been accounted in respective accounts as advances. At the end of the assessment period the Remuneration of the assessee is determined on the basis of percentage of sale of the Company during the period and the same is adjusted against "Mehul Asnani Salary A/c" and "Mehul Asnani Expense A/c" respectively. The Copy of both the J.Vis attached vide An.nexu re 1. It is submitted that the assessee being director of the Company is entitled to remuneration in the form of salary. As the salary is determined at year end based on Annual performance of the Company the assessee keeps on withdrawing amount in advance while the salary is determined at the year end upon finalization of accounts of the Company. Accordingly, such amount keeps on showing as Debit balances in Company's books which gets settled upon determination of salaries at year end. It is also submitted that the Company has also deducted IDS on the salaries while adjusting against advance and the assessee has also paid tax by offering this Income in Return Of Income(ROI).*

*2. Vide Point 3 your good selves have asked the assessee to provide explanation for entries regarding reduction in debit balance shown in "Mehul Asnani WIP Account" to NIL by journal entries under the narration 'PGEN-JV/1213/00969'. In relation to this the assessee would like to state that during the year Bio-Tech Vision Care Private Limited has made payment to the assessee in relation to purchase of Building the amount paid to the assessee has at the end of the year transferred to CWIP Building A/c as the transfer could not get completed at the year end. The assessee would like to attach J. V. of the same vide Annexure 2.*

*3. Vide Point 4 your good self have asked the assessee to clarify whether any of the loan amount of Rs. 52,50,274/- shown in Balance Sheet of Biotech Ophthalmic Private Limited relates to the assessee. In relation to the same the assessee would like to state that no portion of amount relates to the assessee."*

As regards the salary account, the assessee stated that he had withdrawn various advances from salary during the year and the final amount payable by the company was adjusted against such advances taken by the assessee. The Assessing Officer was of the view that assessee had offered salary income of Rs. 60 lacs from Biotech Vision Care Pvt. Ltd. but he has

withdrawn total amount of Rs. 1,67,53,246/- and Rs. 29,29,006/- from salary account and expenses account. Therefore, extra amount withdrawn was treated as deemed dividend u/s. 2(22)(e) of the act. Similarly, the debit balance in Mehul Asnani WIP of Rs. 69,71,646/- pertained to the purchasing of building in the name of the assessee by company out of their fund, the Assessing Officer has also treated this amount of Rs. 69,71,646/- as deemed dividend u/s. 2(22)(e) of the Act. Therefore, the Assessing Officer concluded that assessee has earned deemed dividend in excess of salary income to the amount of Rs. 2,06,53,898/- Rs. 1,07,53,246/- (1,67,53,246 – 60,00,000) + 29,29,006/- + Rs. 69,71,646/- as deemed dividend and added to the total income of the assessee.

4. Aggrieved assessee has filed appeal before the Id. CIT(A). The Id. CIT(A) has deleted the addition. The relevant part of the decision of Id. CIT(A) is reproduced as under:-

*“3.3. I have carefully considered the Assessment Order and the submission filed by the Appellant. Further, on going through the assessment records, I find that similar issue had come up for adjudication in the case of Appellant in Assessment Year 2012-13 and undersigned vide order dated 26<sup>th</sup> August, 2015 has deleted the addition. The relevant portion of the Appellate Order for the A. Y. 2012-13 reads as under:*

*I have carefully considered the Assessment Order and submission filed by Appellant, the Assessing Officer has observed that Appellant is beneficial owner of more than 94.92% shares of Bio-Tech Vision Care Pvt. Limited who has reserves of Rs. 3.38 crores as on 1<sup>st</sup> April, 2011 and Rs. 3.81 crores as on 31<sup>st</sup> March, 2012. The Assessing Officer further observed that Appellant has withdrawn various amounts from said company and peak of daily balance in the above account works out to Rs. 1,47,89,965. The Assessing Officer has not accepted Appellant's contention that advances was against salary and incentive treating it as an afterthought. The Assessing Officer also observed that even though on identical facts CIT (Appeals) in A. Y. 2010-11 has decided the issue in favour of Appellant, Department is in appeal before Hon'ble I.T.A.T., addition of Rs. 1,47,89,965/- was made. On the other hand, Appellant has argued that he was having current account with the Company and such advances were adjusted against salary as well as incentive payable by said Company. It was also argued by Appellant that said Company has deducted TDS on aforesaid payment made to Appellant and this being advance against incentive/salary, same is out of the purview of Section 2(22)(e) of the Act. The Appellant has also stated that incentive and salary received from Company is already offered to tax while filing Return of Income hence advance received against such salary and considered*

while making addition under Section 2(22)(e) has resulted into double addition in the case of Appellant.

On careful consideration of entire facts, it is observed that Appellant is receiving incentive along with salary from A. Y. 2010-11 hence contention of Assessing Officer that advance was against salary and same afterthought cannot be accepted. It is pertinent to note that during year under consideration Appellant has received total salary of Rs.2.25 crores including incentive of Rs.1.65 crores from Bio Tech Vision Care Pvt. Ltd and such amount is already offered to tax. The above Company has also deducted TDS of Rs.67,95,559 on above payment, it is observed that similar issue was raised in case of Appellant in A.Y. 2010-11 wherein my predecessor CIT(Appeals) has decided the issue in favour of Appellant by holding as under

"4.3 In the assessment order, A.O. observed that the appellant was director in two opportunities namely Bio Tech Vision Care Pvt. Ltd. and Bio Tech Ophthalmic Pvt. Ltd.; he had withdrawn huge amounts on various occasions from Biotech Vision Pvt. Ltd.; he was holding and beneficial owner of more than 94.92% shares of the said company throughout the year; he had also received salary from the said company; the amounts drawn by him from the company were adjusted against the salary by passing journal entries on the last day of the financial year i.e. 31.03.2010; the company had free reserves of more than 25

Crores as on 01.04.2009 and of more than 29 Crores as on 31.03.2010; it had given advances to the appellant, who was a share holder and also beneficial owner having voting right of more than 10% in the said company; appellant himself agreed that the company had given advances, which were later adjusted against salary; in the light of the decisions in the cases of CIT Vs. Abubaker and P. Sarada Vs. C/T(229 ITR 444 (SC)) it is immaterial whether the advances were repaid or adjusted by any other mode; tax was deducted on the payment of salary on various dates during the previous year; major tax deducted of over Rs. 67 lacs was in December 2010; Form 16A was issued on 07.06.2010, which was not possible; company had filed the return of income for A.Y. 2010-11 on 15.10.2010; no accounting entries for the 70S of Rs. 67,25,5357- were made on

the last day of the financial year i.e. 31.03.2010; in view of these facts it is clear that there was no intention on the part of the company to give advances against salary / incentive; it was just an afterthought with the sole motive to overcome section 2(22)(e) and therefore the peak daily balance in the account of the appellant with the company as on 22.02.2010 of Rs. 58,12,7547- and the amount of Rs. 83.1 lacs advanced by the company totaling to Rs. 1,41,22,154/- was being added as deemed dividend u/s 2(22)(e).

4.4 The contentions of the Id. A.R. are that in lieu of services rendered by the appellant in the capacity of director to the company, it was agreed between the parties that the director shall receive certain incentive over and above salary; certain expenses of the appellant were directly paid by the company on behalf of the appellant; such payments were adjusted against incentive and salary payable to him; for this purpose a running current account of the appellant was kept by the company; ~on the salary and incentive, tax was duly deducted by the company; the running account represented interest account which was adjusted before the end of the financial year; since it was a running account, the debit balance at some point got converted into credit balance later, the amount advanced by the company was not in the nature of loan; advance in lieu of salary cannot be treated as deemed dividend in the light of the judicial pronouncements; there was no liability on the part of the appellant to repay the advances; the appellant had paid tax on the salary and incentive received by him; taxing the same amount as deemed dividend would result in double taxation; the case laws relied on by the A. & were on different set of facts and are distinguishable from the facts of the instant case; AO's observation that tax of Rs. ~67,25,5357- was deducted in December, 2010 is factually incorrect; the tax was deducted duly on 31.03.2010, but was remitted to the government along with interest in December, 2010; the tax deducted was duly accounted for in the

books of account as on 31.03.2010; the TDS was included in the current liabilities appearing on the credit side of the balance sheet; as on 31.03.2010 appellant's account in the books of the company shows credit balance of over Rs. 10 lacs, which shows that appellant was to receive such amount from the company; this proves that the adjustments of the advances against salary and incentive was bona fide and not an afterthought and therefore impugned addition made by the A.O. on assumptions was unwarranted.

4.5 Having considered the facts of the matter, I am inclined to accept the contentions of the Id. A.R., Appellant was paid salary of Rs. 5 lacs per month (as was done in the preceding year), tax was being deducted monthly on the payment of salary to the appellant. Incentive was credited on 31-03-2010 and tax was deducted on the same day. AO's observation that most of the tax was deducted in December, 2010 is found to be factually incorrect. Instead the tax deducted on the salary and incentive was remitted to the government account in the month of December, 2010. As seen from the Board resolution dated 16.04.2009 of Bio Tech Vision Care Pvt. Ltd., consent had been given for the payment of incentive to the appellant at the rate of 5.5% on the net sales achieved in the financial year 2009-10. The incentive paid was Rs. 2,17,65,484/- .In the earlier years no such incentive was paid to the appellant. However since the Board resolution is dated 16.04.2009, AO's observations (that adjustment of the advances given against the salary and incentive was an afterthought) does not stand to reason. The incentive was quantified on the last date of the previous year and was credited on the same day to the appellant's account. Tax on the payment of incentive was also deducted on the same day and was remitted in December, 2010. As seen from the Auditor's report in Form 3CD, it was stated that the tax deducted was remaining unpaid at the end of the year. The outstanding TDS was reflected in the balance sheet under 'current liabilities'. In the light of these facts, it has to be held that the advances given by the company to the appellant came to adjusted against the salary/incentive paid to him. At the end of the year appellant was to receive over Rs. 10 lacs from the company indicating thereby that the salary and incentive totaling to Rs.2.77 crores received by the appellant were such more than the amount of addition made by the AO of Rs. 1.41 crores (being the peak amount of the credit received and the payment made by the company on behalf of the appellant for the purchase of immovable property in his name). Further it is seen that incentive was paid in succeeding two years also.

4.6 In view of the above discussion, the issue for consideration is whether the provisions of Section 2(22)(e) can be invoked in a case where the advances are adjusted against salary/incentive. In view a number of decisions relied on by the Id. A.R. (as reproduced at para 4.2 above), this issue has to be answered in favour of the appellant. Further, it is seen from the return of income filed by the appellant for the year under consideration that he had admitted salary income (including the incentive) of Rs. 2,77,65,484/- from Bio Tech Vision Care Pvt. Ltd. Besides he had admitted salary income of Rs. 19,20,000/- from Bio Tech Ophthalmic Pvt. Ltd. Thus the salary admitted totaled up to Rs. 2,96,85,484/-. This fact was mentioned by the AO at para 3 of the assessment order. The contention of the Id. AR (that the taxing the salary and incentive already admitted by the appellant in the return of income once again as dividend income u/s 2(22)(e) would lead to taxing the same amount twice) is tenable.

4.7 In view of the forgoing discussion, impugned addition made by the AO u/s 2(22)(e) is not sustainable. It is deleted. This ground of appeal is allowed."

The facts of the year under consideration are similar to the facts of preceding Assessment Year hence ratio of above decision squarely applies to Appellant's case. It is pertinent to note that advance received from Company and treated as deemed dividend was adjusted against salary and incentive and on identical facts Hon'ble Ahmedabad I.T.A.T., in the case of Rakesh M. Goya/ referred in Appellant's submission has clearly stated that provisions of Section 2(22)(e) are not applicable. It is pertinent to note that in present case Assessing Officer has not disputed the fact that Appellant has not received any remuneration or incentive from Company hence amount received against such remuneration/incentive and taxed as deemed dividend has resulted into

*double addition of same income in case of Appellant. Considering the facts discussed herein above and relying upon decision of my predecessor CIT(Appeals), addition made by Assessing Officer for Rs. 1,47,89,965 is deleted. However, it is observed that Bio Tech Vision Pvt. Limited has deducted TDS on incentive only at the year end and not deducted and paid TDS on advances made to Appellant which is adjusted against such incentive. Considering these facts, Assessing Officer is directed to compute interest under Section 201(1A) in the case of Company as per provisions of law. On this background, this ground of appeal is allowed".*

*3.4 The facts of the case in the present appeal for the A.Y. 2013-14 are identical those for A.Y. 2012-13 wherein similar addition was deleted by ~TJn3ersigned. It is also observed that Appellant has received salary income of Rs.60,00,000/- and incentive income of Rs.2,98,31,964/- from Biotech Vision Care Pvt. Limited. The Assessing Officer has observed that said company has maintained three accounts of Appellant which, inter alia, include salary account, expenses account and capital WIP. The Assessing Officer has considered that debit balance in such accounts are for Rs. 1,67,53,246/- in salary account, Rs.29,29,006/- in expenses account and Rs.69,71,646/- in capital WIP account. The aggregate debit balance of such advances is for Rs.2,66,53,898/- and salary paid by said company to Appellant is Rs.60,00,000/-. Assessing Officer made net addition of Rs.2,06,53,893/-. However, the Appellant has also received incentive income of Rs.2,98,31,964/- and same is part of total income shown in Return of Income and such incentive income is also adjusted against debit balance in above three accounts. Thus, the aggregate income received by Appellant from Biotech Vision Care Pvt. Limited is in excess of advances referred by Assessing Officer and when Assessing Officer himself has allowed credit of salary payment of Rs. 60,00,000/- there is no reason for not allowing adjustment of incentive payment adjusted against above referred advances. It is also observed that Assessment Order in case of above referred company was also passed on 31<sup>st</sup> March, 2016 (as submitted by Appellant in paper book), salary as well as incentive payments made to Appellant is accepted as such in such order. Considering the above referred facts addition made by Assessing Officer for Rs. 2,06,53,838/- is deleted. **These grounds of appeal are allowed "***

5. During the course of appellate proceedings before us, the Id. Departmental Representative contended that no resolution for giving incentive to the director was passed by the companies. The Id. Departmental Representative has submitted that assessee has withdrawn the amount as advance and the entries were squared up by the journal entries of incentives. Therefore, he has contended that the amount of advances to the assessee is fallen within the scope of the deemed dividend under the provision of section 2(22)(e) of the Act. The revenue has placed reliance on the decision of Hon'ble Supreme Court in the case of Smt. Tarulati Shyam Vs. CIT (1977) 108 ITR 345 (SC) and the decision of Supreme Court in the case of Ms. P. Sarada vs. CIT (1998) 96 taxman.com 11 (SC). The decision of Hon'ble High Court of Madras in the case of CIT vs. P. K. Abubucker

(2004) 135 taxman 77 (Mad) and also the decision of Hon'ble Supreme Court in the case of L. Alagusundaram CIT (2002) 121 taxman.com (SC). On the other hand, ld. counsel has contended that assessee was a director and was holding sufficient shareholding in Biotech Vision Care Pvt. Ltd., because of promoter of the company responsibility of looking after the affair of the company was vested in him. Therefore for rendering services to the company, the assessee has received salary from the company. Because of devoting of maximum time towards the affairs of the company, the assessee was granted incentive by the company. The ld. counsel has placed reliance on the decision of Hon'ble High Court of Calcutta in the case of Pradip Kumar Malhotra vs. CIT (2011) 15 taxman.com 66 (Calcutta) and in the decision of ITAT Ahmedabad in the case of Rakesh M. Goyal Vs. ITO vide ITA No. 855/Ahd/2020 dated 26-06-2012. In support of his intention, the ld. counsel has also referred copies of documents placed in the paper book filed in support of his contention and stated that nature of debit balance as well as the amount received by the assessee was in the nature of salary and incentive only and the same cannot be brought to tax u/s. 2(22)(e) of the act.

6. Heard both the sides and perused the material on record. Without reiterating the facts as elaborated above in this order, during the course of assessment, the Assessing Officer had not accepted the contention of the assessee that advances were against salary as well as incentive payable by the Biotech Vision Case Pvt. Ltd., and held that assessee has earned deemed dividend to the tune of Rs. 2,06,53,898/-. The assessee has submitted that he was having current account with the company and such advances were adjusted against salary as well as incentive paid by the said company. The

assessee has also brought to the notice of the Assessing Officer that the said company has deducted TDS on the aforesaid payment made to the assessee. The assessee has also brought to the notice of the Assessing Officer that he has already filed the return of income and offered the amount received to tax against salary and paid the taxes thereon. It was also submitted that again adding the same amount u/s. 2(22)(e) has resulted into double addition in the case of the assessee. The assessee had paid tax on the salary and incentive received by him, taxing the same amount as deemed dividend would result in double taxation. The case laws relied upon by the revenue were of different set of facts are distinguishable from the facts of the instant case. We have also gone through the copy of income tax return filed by the assessee for the year under consideration placed in the paper book. On page no. 15 of the paper book pertaining to computation of total income it is noticed that assessee has shown the income from salary from both the companies as under:-

<u>Computation of Total Income</u>	
<i>Income from Salary (Chapter IVA)</i>	37749564/-
<i>Bio Tech Vision Care Pvt. Ltd.</i>	
<i>305, Asiatic Trade Centre,</i>	
<i>AHMEDABAD GUJARAT</i>	
<i>Salary</i>	6000000
<i>Incentive</i>	29831964
	35831964
<i>BIOTECH OPHTHALMICS PVT. LTD</i>	
<i>305, ASIATIC TRADE CENTRE,</i>	
<i>AHMEDABAD, GUJARAT</i>	
<i>Salary</i>	1920000
<i>Gross Salary</i>	1920000
	37751964
<i>Professional Tax u/s. 16(iii)</i>	2400
	-----
	37749564

It is demonstrated from the aforesaid detail in the income tax return filed by the assessee that assessee has paid taxes on the salary and incentive received by him. It is further noticed from the detail of taxes paid on the aforesaid amount was paid in the form of TDS deducted by the companies which have paid salary and incentive to the assessee. The details of payment of taxes in the form of TDS shown in the return of income are as under:-

Total Income	37913203
Round off u/s 288A	37913200
Income Exempt u/s. 10	2581271
Deduction u/s. 10AA, 80H to 80RRB(except sec. 80p) not claimed hence Amt no applicable.	
Tax Due	11203960
Education Cess	336119
	-----
	11540079
T.D.S.	12443751
	-----
	-963972
Refundable (Round off u/s. 288B)	963670
T.D.S./TCS Form	
-----	
Non-Salary(as per Annexure)	37059
Salary (as per Annexure)	12406693

It is demonstrated from the above facts that assessee has included the amount of salary and incentive received from the company in his income and categorically shown that the aforesaid amount was received from the companies after deduction of TDS. In view of the above facts and circumstances, we consider that action of Assessing Officer in taxing the impugned amount as deemed dividend has resulted into double addition on same income which has already been included by the assessee in his income.

Therefore, we do not find any infirmity in the decision of Id. CIT(A).  
Therefore, the appeal of the revenue is dismissed.

7. In the result, the appeal of the revenue is dismissed.

Order pronounced in the open court on 27-08-2021

**Sd/-**  
**(MAHAVIR PRASAD)**  
**JUDICIAL MEMBER**  
**Ahmedabad : Dated 27/08/2021**

**Sd/-**  
**(AMARJIT SINGH)**  
**ACCOUNTANT MEMBER**

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार  
आयकर अपीलीय अधिकरण,  
अहमदाबाद