

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E', NEW DELHI**

**BEFORE SH. BHAVNESH SAINI, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER**

ITA No.6553/Del/2015
Assessment Year: 2009-10

ACIT, Circle-10(2), New Delhi	Vs.	M/s. G.D. Goenka Pvt. Ltd., N-85, Connaught Place, New Delhi
PAN : AAACG0865A		
(Appellant)		(Respondent)

And

C.O. No. 79/Del/2016
(In ITA No. 6553/Del/2015)
Assessment Year: 2009-10

M/s. G.D. Goenka Pvt. Ltd., N-85, Connaught Place, New Delhi	Vs.	ACIT, Circle-10(2), New Delhi
PAN : AAACG0865A		
(Appellant)		(Respondent)

Department by	Ms. Sweta Nakara Datta, Sr.DR
Assessee by	Sh. Ram Samujh, Adv.

Date of hearing	30.08.2017
Date of pronouncement	11.10.2017

ORDER

PER O.P. KANT, A.M.:

Both the appeal of the Revenue and the ^{CROSS} objection of the assessee are directed against order dated 23/09/2015 of the

Commissioner of Income Tax (Appeals) - 4, New Delhi [in short ~~the~~ CIT-(A)] for assessment year 2009-10. Both appeal and cross objection being emanated from the impugned order, same were heard together and disposed of by way of this consolidated order.

2. The grounds raised by the Revenue in the appeal and grounds raised by the assessee in the cross objection are reproduced as under:

Grounds of appeal:

1. *On the facts and in the circumstances of the case and law, the learned CIT(A) erred in deleting an addition of Rs.1,12,05,965/- made by the AO on account of deemed dividend u/s 2(22)(3) of the Act.*
2. *The appellant craves leave, to add, alter or amend any ground of appeal raised above at the time of hearing.*

Cross Objections

1. *That learned CIT(A) erred in law as well as in facts by upholding the validity of reopening of assessment and issuance of notice u/s 148 though it was bad in law.*
2. *That Ld. CIT(A) erred in law as well as in facts by not quashing the assessment which was passed in consequence to invalid notice issue u/s 148.*
3. *The assessee craves leave to add, alter, amend, modify or delete all or any of the Grounds of appeal on or before the date of hearing of the appeal.*

3. At the outset, the Ld. counsel submitted that there was a delay of almost a week in filing the cross objection before the ITAT (in short ~~the~~ Tribunal). He referred to the petition filed for condonation of the delay alongwith affidavit by the director of the assessee company and submitted that there being a reasonable cause for delay of one week in filing the cross objection, the delay might be condoned.

3.1 The Ld. SR DR, on the other hand, did not raise any serious objections on condoning the delay in filing cross objection.

3.2 We have heard the rival submission of the parties on the issue of condonation of the delay. The learned counsel submitted that notice of filing the appeal by the Revenue was received by the assessee on 27/12/2015 and the assessee was required to file the cross objection within 30 days of receipt of the said notice i.e. on 26/01/2016, but the same was filed on 04/02/2016. The learned counsel submitted that delay of seven days in filing the cross objection was mainly due to the reason that the assessee's counsel was out of Delhi. In the petition, the assessee has also filed an affidavit from the director of the assessee company affirming above facts. In view of the facts and circumstances of the case and *bonafide* reasons for delay of 7 days, we condone the delay in filing the cross objection.

3.3 Facts in brief of the case as culled out from the orders of the lower authorities are that the assessee is engaged in providing education by running an educational institute in the name and style of GD Goenka World Institute by offering courses of study of foreign university to the students in India. The assessee filed original return of income on 22/03/2010, declaring income of Rs.81,82,765/-. The assessment was completed under section 143(3) of the Income Tax Act, 1961 (in short the Act) on 22/11/2011 after making certain disallowances. Subsequently, on receipt of information from another Assessing Officer, the Assessing Officer of the present assessee initiated reassessment proceedings by way of recording reasons to believe that income escaped assessment and issued notice under section 148 of the Act on 31/03/2013. The assessment under section 147 of the Act was passed on 31/03/2014 after making addition of Rs.1,12,05,965/- under section

2(22)(e) of the Act, with the observation that the assessee received loans and advances of Rs.1,21,25,956/- from M/s. GD Goenka Tourism Corporation Limited which was liable to be assessed as deemed dividend under section 2(22)(e) of the Act in the hands of the assessee. Aggrieved, the assessee filed appeal before the Ld. CIT-(A), challenging the validity of the reassessment under section 147 of the Act as well as merit of the addition. The Ld. CIT-(A) upheld the validity of the reassessment, however deleted the addition on merit. Aggrieved, both the Revenue and the assessee are before the Tribunal raising the respective grounds in appeal and the cross objection.

4. First we take up the cross objection of the assessee challenging the validity of reopening the assessment under section 147 of the Act.

5. The Ld. counsel of the assessee submitted a paper book containing pages 1 to 140 and challenged the reassessment proceedings before us on three counts. Firstly, according to the Ld. counsel, the assessment was reopened on the direction of the superior authority without own satisfaction of the Assessing Officer. The learned counsel submitted that case was reopened merely on the satisfaction of the other Assessing Officer i.e. Addl. CIT, Range 12, who happened to be an immediate superior authority of the Assessing Officer. Secondly, the Assessing Officer has not applied any mind while reopening the assessment. In this regard, the learned counsel submitted that Assessing Officer has mechanically reopened the assessment without carrying his own enquiry in the case. Thirdly, reopening was based on change of opinion of the Assessing Officer. In support, the ld. counsel relied on the decision of the Hon^{ble} Delhi High Court in the case of CIT vs. Kelvinator of India Limited, (2002) 256 ITR 1 (Delhi), which has been further upheld by the Hon^{ble} Supreme Court in 320 ITR 561 (SC)

6. In view of the arguments, the learned counsel submitted that reassessment proceedings were not validly initiated and, therefore, same should be held as illegal and quashed.

7. On the other hand, Ld. Sr. DR submitted that the information was sent by Addl.CIT, in the capacity of Assessing Officer of M/s. G.D. Goenka Tourism Corporation Limited and not in the capacity of a superior authority. The Ld. Sr. DR further submitted that Assessing Officer after going through the information, recorded his own prima facie satisfaction that amount in question given as loan by M/s. G.D. Goenka Tourism Corporation Limited was in the nature of deemed dividend and income escaped was exceeding Rs.1 lakh. The learned Sr. DR also submitted that there was no change of opinion in reassessment of deemed dividend as the assessee had not disclosed fully and truly all material facts in respect of deemed dividend. Accordingly, she requested for upholding the reassessment proceedings.

8. We have heard the rival submission and perused the relevant material on record. In the case of the assessee, it is relevant to reproduce the reasons recorded by the Assessing Officer, which are available on page 63 of the assessee's paper book, as under:

"The income tax assessment of M/s. G D Goenka Pvt. Ltd. for the assessment year 2009-10 was completed after scrutiny in November, 2011 determining income of Rs.1,43,24,070/-.

From the assessment order of 2010-11 of M/s G.D. Goenka Tourism Corporation Ltd, it is also observed that the following amounts are to be included in the income of M/s G D Goenka Pvt. Ltd. as deemed dividend as per the provisions of Section 2(22)(e) of the, Income Tax Act, subject to the accumulated profit:

(i)	Quantum of payments	:	Rs.	1,21,25,956/-
(ii)	Accumulated profits	:	Rs.	1,12,05,965/-
(iii)	Deemed Dividend	:	Rs.	1,12,05,965/-

On the basis of the facts as stated above, I have reasons to believe that income chargeable to tax exceeding Rs. 1 lac. has escaped assessment, as the assessee has not disclosed fully and truly all material facts necessary for his assessment for the relevant assessment year. Hence, a notice u/s 147 read with section 148 for reopening of assessment is required to be issued in this case.”

9. We find that the learned counsel has assailed the reassessment proceeding, firstly, on the ground that the assessment was reopened on the direction of the superior authority. In our opinion, the allegation of the Ld. counsel are absolutely incorrect. The Ld. counsel has nowhere brought before us that the Addl. CIT has issued any direction for reopening of the assessment. On the contrary, in the reasons recorded, the Assessing Officer has made source of the information as assessment order in the case of M/s G.D. Goenka Tourism Corporation Limited. Merely transferring an information by the Addl. CIT in the capacity of an Assessing Officer of M/s G.D. Goenka Tourism Corporation Limited, cannot be termed as direction issued by the Additional CIT to the Assessing Officer and, therefore, this contention of the Ld. counsel that Assessing Officer has recorded reasons to believe on the direction of the superior authority is rejected. Further, the Ld. counsel raised the issue that Assessing Officer has not applied his mind while reopening the assessment. We do not agree with the above contention of the Ld. counsel. On perusal of the reasons recorded, it is clear that the Assessing Officer has noted the quantum of payment as also the accumulated profits in the hands of the company and thereafter recorded satisfaction that income escaped the assessment. In our opinion, the reasons have been recorded after due application of mind. The third ground of assailing the reassessment proceeding was that the reopening was based on change of opinion. We find that in the original assessment, the Assessing Officer has not framed any opinion as to the loans in

advance from M/s. GD Goenka Tourism Corporation Limited was not in the nature of deemed dividend. The learned counsel could not point out any query raised by the Assessing Officer in original assessment proceedings which could substantiate that the Assessing Officer formed an opinion on the issue of deemed dividend under section 2(22)(e) of the Act. The Ld. counsel has also not brought to our notice whether all the requisites conditions for making the loans and advances liable for deemed dividend under section 2(22)(e) of the Act were fully disclosed to the Assessing Officer. In the circumstances, the contention of the learned counsel that reopening was based on change of opinion, cannot be accepted. In view of the above discussion, we are of the opinion that reassessment proceedings have been validly initiated and accordingly the grounds of cross objection are dismissed.

10. In the grounds of appeal raised by the Revenue, the deletion of the amount of addition of deemed dividend amounting to Rs.1,12,05,965/- has been challenged.

11. According to the Assessing Officer advances made in the course of bonafide trade transactions are covered by section 2(22)(e) of the Act. The Assessing Officer held that the payment received by the assessee from M/s. G.D. Goenka Tourism Corporation Limited fulfilled all the condition of section 2(22)(e) of the Act as under:

- i. The assessee is a registered and beneficiary shareholder of the G.D. Goenka Tourism Corporation Ltd.
- ii. The assessee company is holding 26.83% shares of the assessee company. Therefore, any payments received by the assessee company being shareholder is covered u/s 2(22)(e).
- iii. M/s. G.D. Goenka Tourism Corporation Ltd. possesses accumulated profits as on 31.03.2009.

12. The Assessing Officer further observed that only exception for not treating the payment as deemed dividend is that such payment made by the company in ordinary course of business and whether lending of money is substantial part of the business. The Assessing Officer held that money lending is not substantial part of the business of G.D. Goenka Tourism Corporation Limited. According to the Assessing Officer following two conditions are to be cumulatively satisfied to be covered under exception as occurring in section 2(22)(e) of the Act:

- a) Such payment ought to be made by the company in the ordinary course of its business.
- b) Lending of money is substantial part of the business of the company.

13. The Assessing Officer in para-4.7 of the assessment order has held that condition (b) above was not satisfied due to following reasons:

- i. Money lending is not a substantial part of the business of G.D. Goenka Tourism Corporation Limited as interest income is as low as 0.0182% of the gross receipts.
- ii. The company is in the business of air ticketing and dealing in foreign exchange.
- iii. None of the main objects of G.D. Goenka Tourism Corporation Limited refers to the money lending activity.

14. Accordingly, the Assessing Officer held the loans in advance of Rs.1,21,25,956/- received during the year under consideration from M/s. G.D. Goenka Tourism Corporation Limited as deemed dividend in the hands of the assessee.

15. The learned CIT-(A) deleted the addition in view of the decision of the Hon^{ble} Bombay High Court in the case of CIT Vs. Parley Plastic

Limited, (2011) 332 ITR 63. The relevant part of the impugned order of the learned CIT-(A) is reproduced as under:

“6. Regarding the addition of Rs.1,12,05,965/- as deemed dividend u/s 2(22)(e) I find that though the AO has given elaborate reasons for doing so, the appellant has been able to justify that why this addition should not have been made. The appellant's case is covered under Exception (ii) of Section 2(22) because both the mentioned in this Exception are fulfilled by the appellant. The first condition is that the loans and advances should have been given in the ordinary course of business which is so in the case of the appellant. Secondly, the lending of money should be forming substantial part of the business of the creditor which is also fulfilled in this case. As per the AO, the second condition has not been fulfilled. The AO has wrongly interpreted the legal provisions; the Hon'ble Bombay High Court in the case of Pyarelal Plastic Ltd. has held that substantial part does not connote the idea of being major part. In this case M/s G.D. Goenka Tourism Corporation Ltd. has been receiving interest income from year to year regularly which is the substantial amount and also the substantial part of the business. In this year, the loan amount was only Rs.99,70,000/- and not Rs.1,21,25,956/-. The AO has taken this figure as on 18.3.2009 being the peak of the debit balance which is not justifiable as the concept of peak credit applies only u/s 68 and not u/s 2(22)(e). I also agree with the argument of the appellant that term loans and advances do not include inter-corporate deposits and the Section 2(22)(e) is not applicable to the inter-corporate deposits. Hence, the addition of Rs.1,12,05,965/- is deleted.”

16. Before us, the Ld. Sr. DR relied on the order of the Assessing Officer and submitted that the assessee failed to justify that lending of money was substantial part of the business of the company.

17. On the contrary, the Ld. counsel of the assessee relied on the order of the Ld. CIT-(A).

18. We have heard the rival submissions and perused the relevant material on record. In our opinion, the Ld. CIT-(A) while adjudicating the issue in dispute has relied on the decision of the Hon'ble Bombay High

Court in the case of Parley Plastic Limited (supra), wherein the Hon'ble High Court has held that the expression '%substantial part+' does not come out an idea of being the '%major part+' or the part that constitute majority of the whole. The Hon'ble High Court held that the legislature had deliberately used the word '%substantial+' instead of using the word '%major+' and/or specifying any percentage of business or profit to be coming under the lending business of the lending the money for the purpose of clause (ii) of section 2(22) of the Act. Ld. Sr. DR did not bring before us any contrary decision of the jurisdictional High Court or the Hon'ble Supreme Court. In view of above facts and circumstances, we do not find any infirmity in the finding of the Ld. CIT-(A) on the issue in dispute and accordingly, we uphold the same. The ground of the appeal of the Revenue is rejected.

19. In the result, both the appeal of the Revenue and the cross objections of the assessee are dismissed.

The decision is pronounced in the open court on 11th Oct., 2017.

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Dated: 11th October, 2017.

RK/(D.T.D)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER

Asst. Registrar, ITAT, New Delhi