INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 3123/Del/2010 (Assessment Year: 2006-07)
ITA No. 3815/Del/2011 (Assessment Year: 2007-08)

Raas Intratech Private Ltd, 14, LSC Sector B-1, Vasant Kunj, New Delhi PAN: DELRO9855G	Vs.	ITO, Ward-15(3), New Delhi
(Appellant)		(Respondent)

ITA No. 3151/Del/2011 (Assessment Year: 2006-07)
ITA No. 2415/Del/2011 (Assessment Year: 2007-08)

ITO, Ward-15(3), New Delhi	Vs.	Raas Intratech Private Ltd, 14, LSC Sector B-1, Vasant Kunj, New Delhi PAN: DELRO9855G
(Appellant)		(Respondent)

Assessee by :	Shri Rohit Jain, Adv Shri Vibhu Gupta, CA
Revenue by:	Shri Surender Pal, Sr. DR
Date of Hearing	01/10/2018
Date of pronouncement	10/12/2018

O R D E R

PER BENCH

1. These are the four appeals filed by the assessee and the revenue against the order of the ld CIT (A)-XVIII, New Delhi dated 31.03.2010 for the Assessment Year 2006-07 and dated 09.03.2011 for the Assessment Year 2007-08.

2. The revenue has raised the following grounds of appeal in ITA No. 3151/Del/2010 for the Assessment Year 2006-07:-

   1. That on the facts and in the circumstances of the case and in law the Ld. CIT (A) erred in deleting the addition of Rs.6,25,87,356/- as deemed dividend made u/s 2(22)(e) of the Act in the hands of the Assessee Company and directing the AO to add the said amount of Rs.6,25,87,356/ as deemed dividend u/s 2(22)(e) in the hands of Shri Chetan Seth.

2. *That ld. CIT(A) failed to appreciate that as per the amended provisions of section 2(22)(e) the assessee concern is very much liable to be taxed with respect to the said amount of deemed dividend and decision of the AO to tax the same in the hands of the assessee concern finds support from the decision on the issue in the cases of M/s Skyline India Recruit.com Private Limited vs. ITO (2008) 24 SOT 420 (Mumbai) and Extempore Security and Investments Private Limited vs. DCIT 116 TTJ (Mumbai) 525.*

CIT(A) has not appreciated the impossibility of taxing the deemed dividends in the hands of shareholder instead of the concern to whom the loan/ advance is given. In a given situation it may be that the qualifying shareholders i.e. the shareholders holding not less than 10% of the voling power in the lending company and having substantial interest in the borrowing concern have different percentage of shareholding in the lending company say 17% & 27% and again a different percentage of shareholding say 21% & 28% interest in the borrowing concern. In such a situation what amount of the deemed dividend will be taxed in the hands of which of the qualifying shareholders cannot be determined. Viewed from this angle also the obvious interpretation of sec.2(22)(e) would be that the deemed dividends would be assessed in hands of the borrower which in this case is the assessee concern."

3. The assessee has raised the following grounds of appeal in ITA No. 3123/Del/2010 for the Assessment Year 2006-07:-

"1. That the Commissioner of Income-tax (Appeals) ("CIT(A)") erred on facts and in law in upholding the finding of the assessing officer that advances received by the appellant from M/s. Optic Electronic India Private Limited ("OEIPL") were liable to tax as "deemed dividend" under Section 2(22)(e) of the Income-tax Act, 1961 ("the Act").

1.1 That the CIT(A) erred on facts and in law in failing to appreciate that the provisions of Section 2(22)(e) of the Act were not attracted since the aforesaid amounts were received by the appellant as business advance towards construction and sale of property to OEIPL.

1.2 That the CIT(A) erred on facts and in law in leveling various false and baseless allegations against the appellant in sub-paras (i) to (xii) of para 9 of the impugned order , including that the submission that the advances received by the appellant were towards construction and sale of property to OEIPL as an after-thought.

1.3 That the CIT(A) erred on facts and in law in failing to appreciate the various clauses of the Memorandum of Understanding, pursuant to which the moneys were advanced by OEIPL to the appellant for construction and sale of property to OEIPL, in correct and objective perspective.

2. That the CIT(A) exceeded his jurisdiction vested in law in issuing directions to tax the aforesaid amounts in the hands of Mr Chetan Seth on the ground that Mr Chetan Seth is a common shareholder of both the appellant and OEIPL.

2.1 That the CIT(A) erred on facts and in law in issuing direction with respect to Mr Chetan Seth, is a common shareholder of both the appellant and OEIPL."

4. The assessee has raised the following grounds of appeal in ITA No. 3815/Del/2011 for the Assessment Year 2007-08:-

"1. That the Commissioner of Income-tax (Appeals) ("the CIT(A)") erred on facts and in law in upholding the finding of the assessing officer that moneys totaling to Rs.5,23,63,198 received by the appellant from Optic Electronic India Private Limited ("OEIPL") were liable to tax as "deemed dividend" under Section 2(22)(e) of the Income-tax Act, 1961 ("the Act").

2. That the CIT(A) erred on facts and in law in not appreciating that the provisions of Section 2(22)(e) of the Act were not attracted since out of the aforesaid, moneys totaling to Rs.2.40 crores were received by the appellant as business advance towards construction and sale of property to OEIPL.

3. That the CIT(A) erred on facts and in law in not appreciating that the provisions of Section 2(22)(e) of the Act were not attracted since out of the aforesaid, moneys totaling to Rs.2.94 crores were received by the appellant as share application money for allotment of share of the appellant company to OEIPL.

3.1 That the CIT(A) erred on facts and in law in alleging that the submission that the appellant had received share application money from OEIPL was an after¬thought, without appreciating that (a) the shares had actually been allotted to OEIPL on 01.10.2009, i.e. much prior to date of the assessment order, and (b) the factum of allotment stood established by contemporaneous statutory forms and other documents which constituted part of records of the Registrar of Companies.

3.2 That the CIT(A) erred on facts and in law in not considering the annual returns and statutory forms filed by the appellant with the Registrar of Companies on the mere technical ground that the appellant did not file application under Rule 46A of the Income-tax Rules, 1962 for admission of additional evidence, without appreciating that (a) the said evidences had been filed pursuant to enquiries made by the CIT(A), (b) the requirement of filing application under Rule 46A is a mere procedural requirement, (c) the CIT(A) made no adverse comments about the genuineness of the aforesaid additional evidences.

Without prejudice

4. That the CIT(A) exceeded his jurisdiction in issuing directions to tax the aforesaid amounts in the hands of M/s Ambi Finance and Investment (P) Ltd and Mr Chetan Seth on the ground that the said parties were common shareholders of both the appellant and OEIPL.

4.1 That the CIT(A) erred on facts and in law in issuing direction with respect to M/s Ambi Finance and Investment (P) Ltd and Mr Chetan Seth, who were not assessees in appeal before the CIT(A).

4.2 That the CIT(A), in any case, erred on facts and in law in directing that deemed dividend was required to be taxed in the hands of M/s Ambi

Finance and Investment (P) Ltd and Mr Chetan Seth, proportionately in the ratio of their inter se shareholding in the payer company."

5. The revenue has raised the following grounds of appeal in ITA No. 2415/Del/2011 for the Assessment Year 2007-08:-

1. That on the facts and in the circumstances of the case and in law the Ld. CIT (A) erred in deleting the addition of Rs.5,23,63,198/- as deemed dividend made u/s 2(22)(e) of the Act in the hands of the Assessee Company and directing the AO to add the said amount as deemed dividend u/s 2(22)(e) in the hands of Shri Chetan Seth.

2. That ld. CIT(A) failed to appreciate that as per the amended provisions of section 2(22)(e) the assessee concern is very much liable to be taxed with respect to the said amount of deemed dividend and decision of the AO to tax the same in the hands of the assessee concern finds support from the decision on the issue in the cases of M/s Skyline India Recruit.com Private Limited vs. ITO (2008) 24 SOT 420 (Mumbai) and Extempore Security and Investments Private Limited vs. DCIT 116 TTJ (Mumbai) 525.

3. That on the facts and circumstances of the case and in law the ld. CIT(A) has erred in observing that the deemed dividend u/s 2(22)(e) does not provide for taking the loan/ advance in the hands of the recipient company having prescribed interest/ shareholding of shareholders, unless it itself is a shareholder."

6. The only issue involved in these four appeals of the assessee for two assessment years is taxation of deemed dividend under section 2 (22) (e) of the act. The assessee is a company engaged in the business of trading and marketing of cigar, liquor and cigar accessories. The assessment for assessment year 2006 – 07 was completed under section 143 (3) of the act on 28/11/2008 Where the learned assessing officer noted that the assessee company had received certain amount from another company M/s Optic Electronics India private limited (the lender) wherein one Mr Chetan sheth is holding 28% shares and he also holds 54.2% shares in the assessee company. Consequently the learned assessing officer held that the amount of loan given by the lender to the appellant is covered under the definition of deemed dividend as per the income tax act, and accordingly, the addition for assessment year 2006 – 07 was made of INR 126098087/–. The assessee preferred appeal before the learned Commissioner of income tax Appeals who found that out of the sum of INR 126098087/– outstanding in the two accounts of the appellant company with the lender company, a sum of INR 62587356 only has been received by the appellant during the year and the balance of INR 74519249/– is the brought forward balance in the above

account since 1/4/2005. Hence opening balance is not taxable as not received during the year. It was further argued before him that that the above amount is not an unsecured loan but an advance given by the lender to the appellant for purchase, development and sale of office premises to lender. The learned CIT – A, held that this is an afterthought and therefore the evidences produced by the assessee are not acceptable. He also gave his detailed reason for holding that above advance is an unsecured loan and not a business advance. Consequently, he held that the sum of INR 62587356 received by the appellant from the lender during assessment year 2006 – 07 represents unsecured loan and therefore it is covered under the provisions of section 2 (22) (e) of the act. He further held that the addition of INR 62587356/– made by the AO in the hands of the appellant company cannot be legally sustainable as the amount can be brought to tax only in the hands of the shareholders of the lender company and not in the hands of the appellant company which is not a shareholder of the lender company. Therefore, he issued a show cause notice under explanation 3 of section 153 of the income tax act to Sri Chetan Seth , managing director of the appellant company to show cause why the said amount should not be added in his personal hands. The shareholder replied on 30/3/2010 only on the issue that it is business advance , which was rejected by the learned CIT – A, and consequently, he held that the above sum is chargeable to tax in the hands of the shareholder. He directed the ld AO accordingly. Thus, he deleted the addition in the hands of the appellant partly for the reason that sum has not been received during the year and partly for the reason that it is chargeable to tax in the hands of the shareholder. Both the parties aggrieved with the order have preferred an appeal before us.

7. The assessee is aggrieved with the order of the learned Commissioner of income tax appeals holding that the above amount is not an business advance towards construction and sale of the property to the lender and further with respect to the direction of the learned CIT A to tax the above amount in the hands of the shareholder on the ground that shareholder is a common shareholder of both the appellant and the lender. The grievance of the assessee is that CIT – A, has exceeded his jurisdiction.

8. The revenue is aggrieved that the learned Commissioner of income tax appeals has deleted the addition of INR 6 2587356/– as deemed dividend in the hands of the assessee company. According to the revenue assessee is very much liable to be taxed with respect to the above amount on account of deemed dividend.

9. The facts for assessment year 2007 – 08 are also similar but for the reason that in the present case for assessment year 2007 – 08. There are 2 shareholders, namely Mr Chetan and Ambi finance and investment private limited, where the AO made an addition of INR 52363198/– as deemed dividend in the hands of the assessee company which was deleted by the learned Commissioner of income tax appeals holding that the same should be chargeable to tax in the hands of the shareholders Sri Chetan Seth and Ambi finance and investment private limited proportionately in the ratio of the inter se shareholding in the payer company. Similarly, assessee as well as the revenue is aggrieved.

10. Let us 1st come to the appeal of the revenue, where the only grievances that the income should have been taxed in the hands of the assessee. The learned departmental representative vehemently supported the order of the learned assessing officer and stated that the above sum is required to be added in the hands of the assessee.

11. Learned authorised representative submitted that the issue is squarely covered in the favour of the assessee that deemed dividend is required to be taxed in the hands of the shareholder of the company and where the assessee is not a shareholder, it cannot be taxed in its hands. The assessee supported it with the decision of the honourable Delhi High Court in CIT vs. Ankitech private limited 340 ITR 14. Several other decisions of the honourable Delhi High Court, Karnataka High Court, Bombay High Court and Gujarat High Court were cited before us to support the above contentions. It was further stated that the honourable Supreme Court in CIT vs. Madhur Housing and development company in civil appeal number 3961 of 2012 has also held that that the honourable Bombay High Court has correctly decided the above decision on construction of the said section. He therefore submitted that the impugned amount is not chargeable to tax

in the hands of the assessee as it is not a shareholder of the lender company.

12. We have carefully considered the rival contentions and find that the issue is squarely covered in favour of the assessee so far as the contention of the learned authorised representative is that the deemed dividend cannot be taxed in the hands of the appellant company as it is not a shareholder of the lender company. Same is the finding of the learned Commissioner of income Tax A. So far as this issue is involved we do not find any infirmity in the order of the ld CIT (A), hence we uphold it to the extent that deemed dividend is chargeable to tax in the hands of the share holder only. Accordingly, we do not find any merit in the appeal of the revenue for assessment year 2006 – 07 and 2007-08.

13. Accordingly ITA number 3151/del/2010 for assessment year 2006 – 07 and ITA number 2415/del/2011 for assessment year 2007 – 08 filed by the learned assessing officer are dismissed.

14. Now we come to the appeal of the assessee for assessment year 2006 – 07 in ITA number 3123/del/2010 and ITA number 3815/del/2011 for assessment year 2007 – 08. The assessee is aggrieved with ground number 1 of the appeal and has challenged the extraneous findings of the learned Commissioner of income tax appeals holding that the amount under consideration was liable to tax as deemed dividend under section 2 (22) (e) of the act and in directing the addition to be made in the hands of Mr Chetan sheth. Assessee is also aggrieved that the above amount lent by the lender in the business advance and therefore same cannot be considered for the purpose of taxability as deemed dividend.

15. The learned authorised representative submitted that though CIT appeal has concurred with the legal submission of the assessee company that the amount received could not be taxed as deemed dividend in its hands, since the assessee was not a shareholder of the lender company, should not have returned the findings, on merit with regard to the applicability of the provisions of deemed dividend, thereby resulting in detriment and prejudice to the case of Mr Chetan who was not a party to the present appeal before the learned Commissioner of income tax appeals. It was further stated that the findings on the merit returned by the CIT (A) may either be directed to

be expunged/ deleted or it may be clarified that any findings returned by the learned Commissioner of income tax appeals on merit regarding the applicability of the provisions of deemed dividend would not in any manner prejudice the case of the shareholder. It was stated that either the finding of the learned Commissioner of income tax appeals on merit regarding the applicability of the provisions of section 2 (22) (E) of the act may be deleted/expunged and or it may be clarified that all the contentions would be open in the case of Mr Chetan , a shareholder, who is in appeal would be independently decided without in any manner being prejudiced by any adverse findings given by the learned Commissioner of income tax appeals in the present case. It was further prayed that in case ground number 1 is decided in the light of the aforesaid, the other ground raised would be rendered infructous.

16. The learned departmental representative vehemently opposed the objection of the learned authorised representative and stated that the learned Commissioner of income tax appeal has given a finding on the merits of the case holding that the impugned advance given by the lender to the appellant is not for the purposes of the business of the assessee and therefore same is correctly chargeable to tax as deemed dividend. He further submitted that the provisions of the natural justice have also not been violated as proper notice under section 153 of the act was issued to the shareholder who also filed a detailed reply on 30/3/2010, where shareholder has also contended regarding non taxability of the above amount as dividend on the ground that same was an advance for property which has already been rejected by the learned Commissioner of income tax appeals. There is no answer from the shareholder as to why the said amount should not be added in the hands of the shareholder. Therefore, the finding of the learned Commissioner of income tax – Appeals are correct as the learned authorised representative has not challenged the same even before the coordinate bench in these 2 appeals. He further stated that there is no infirmity pointed out by the learned authorised representative with respect to the finding of the learned Commissioner of income tax appeals that this is not a business advance and hence it is chargeable to tax as deemed dividend hence, now it cannot

be said by the assessee that Mr Chetan would be free to raise all the contentions.

17. We have carefully considered the rival contentions and find that the learned Commissioner of income tax appeal has given a correct finding on the issue that the amount of loan given by the lender to the appellant company is chargeable to tax in the hands of the shareholders. The proper opportunity was also given by the Commissioner of income tax appeals to the shareholder. The shareholder did not comment that this amount is not chargeable to tax in his hands, but has only stated that the above amount given by the lender to the appellant is only a business advance and therefore provisions of deemed dividend does not apply to the facts of the case. On careful analysis of the order of the learned Commissioner of income tax appeals, he has merely directed the learned assessing officer to add the said amount as deemed dividend under section 2 (22) (e) in the hands of the shareholder. No infirmity is found in the order of the learned Commissioner of income tax appeals in holding so after giving proper opportunity of hearing to the shareholder also. We also draw support from the decision of the honourable Delhi High Court dated 14/08/2018 in case of Mr Ramesh Chandra vs ACIT and Mr Sanjay Chandra vs ACIT in WPC 5684 and 5717 of 2017 where identical issue was decided and it was held that as per the express mandate of the 3rd explanation to section 153 (3) of the act unequivocally postulates that any adverse order has to be proceeded by adequate opportunity of hearing to the concerned party. In the case before us, the same opportunity has been given by the learned Commissioner of income tax appeals to the shareholder. Learned Commissioner of income tax appeals vide para number 9.2 of his order for assessment year 2006 – 07 has given the detailed finding giving 12 reasons that why the above amount is an unsecured loan but, not business advance given by the lender to the appellant company. Those reasons given by the learned CIT – A, cannot be expunged or deleted from the order in case of the appellant as no infirmity is pointed out., They are also challenged by the ground number 1.1, 1.2 and 1.3 of the appeal of the assessee for assessment year 2006 -07 and ground number 2, 3 and its sub grounds on this issue. No arguments were advanced before us. Hence, we dismiss

those grounds of appeal filed by the assessee. In view of the above facts, we cannot expunge those portions of the order of the learned Commissioner of income tax appeals which has held that the impugned loan given by the lender to the appellant company is not a business advance but unsecured loan. The shareholder we have all the rights as provided by the law to agitate any issue before the revenue authorities.

18. Accordingly, for A Y 2006 – 07 we dismiss ground number 1 and all its sub grounds holding that the advances received by the appellant from the lender is liable to tax as deemed dividend in the hands of the shareholder as it is not a business advance. We also dismiss ground number 2 of the appeal, where the learned Commissioner of income tax appeals has correctly held that the aforesaid amount is chargeable to tax in the hands of the shareholder after giving proper opportunity to the shareholder and the learned Commissioner appeals when deleting the addition in the hands of the assessee was duty-bound to say, in whose hands the deemed dividend is chargeable to tax. Accordingly, ground number 2 of the appeal is also dismissed.

19. For assessment year 2007 – 08 The ground number 1 to 4 are also dismissed for the reasons given by us. While deciding the appeal of the assessee for assessment year 2006 – 07.

20. In view of this, we dismiss the appeal of the assessee for assessment year 2006 – 07 and 2007 – 08 with above observations.

21. In the result appeal of the assessee for assessment year 2006 – 07 in ITA number 3123/del/2010 and for assessment year 2007 – 08 in ITA number 3815/del/2011 are dismissed.

Order pronounced in the open court on 10/12/2018.

-Sd/-	-Sd/-
(AMIT SHUKLA)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated:10/12/2018
A K Keot

Copy forwarded to

1. Applicant
2. Respondent

3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi