# आयकर अपीलीय अधिकरण "बी" न्यायपीठ मुंबई में।
# IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

**माननीय** श्री महावीर सिंह,न्यायिक सदस्य **एवं**
**माननीय** श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।

**BEFORE HON'BLE SHRI MAHAVIR SINGH, JM AND HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM**

आयकरअपीलसं./I.T.A. No.4075/Mum/2013
(**निर्धारणवर्ष** / Assessment Year: 2009-10)

| | | |
|---|---|---|
| **Income Tax Officer-6(1)(2)**<br>Room No.503<br>Aaykar Bhavan<br>Mumbai-400 020 | **बनाम**/<br>Vs. | **Best CFS Private Limited**<br>101/102, Prestige Chambers<br>127-B, Kalyan Street<br>Masjid Bunder(E)<br>Mumbai – 400 009 |
| स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AABCB-4832-H** | | |
| (अपीलार्थी/**Appellant**) | : | (प्रत्यर्थी / **Respondent**) |
| **Assessee by** | : | Rushabh Mehta & Jigar Mehta, Ld. ARs |
| **Revenue by** | : | Chaudhary Arun Kumar Singh, Ld. DR |

| | | |
|---|---|---|
| सुनवाई की तारीख/ **Date of Hearing** | : | 08/10/2018 |
| घोषणा की तारीख / **Date of Pronouncement** | : | 05/12/2018 |

## आदेश / O R D E R

**Per Manoj Kumar Aggarwal (Accountant Member)**

1. Aforesaid appeal by revenue for Assessment Year [AY] 2009-10 contest the order of Ld. Commissioner of Income-Tax (Appeals)-14

[CIT(A)], Mumbai, *Appeal No.CIT(A)-14/IT.116/Rg.6(1)/11-12* dated 14/02/2013 on following effective grounds of appeal:-

1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.55,58,394/- made by the Assessing Officer to the net profit without appreciating the fact that the assessee failed to explain the figures adopted for "work in progress" satisfactorily during the course of assessment proceeding."*
2. *On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of deemed dividend made u/s 2 (22) (e) of the Act to the tune of Rs.17,25,000/-, holding that deemed dividend would be attracted in the hands of the Directors being the shareholders and not in the hands of the assessee company, who is not a shareholder."*
3. *On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting deemed dividend in the hands of the assessee company which received the accumulated profits under the garb of loan. The CIT(A) failed to appreciate Explanatory Notes on the provisions of Finance Act, 1987 given in Circular No.495 dated 22-09-1987 which clarified that amendment to section 2(22)(e) has been brought to plug the loophold of the closely held company not distributing profits to "shareholders" but distributing the accumulated profit by way of advance or loan to a "concern" in which shareholder has substantial interest i.e. the assessee company in the present case. The CIT(A) erred in interpreting that assessee company not being shareholder of lender company is not covered u/s. 2(22)(e)."*
4. *On the facts and circumstances of the case and in law, the Ld. CIT(A) erred by failing to follow the "mischief rule" of interpretation and did not take into account the rationale behind introduction of amendment to section 2(22)(e) and wrongly interpreted that assessee company not being shareholder of lender company is not covered u/s 2(22)(e).*

2.1 Facts in brief are that the assessee being *resident corporate assessee* engaged as *civil contractor* was assessed in scrutiny assessment u/s 143(3) on 23/12/2011 by Ld. Income Tax Officer-6(1)(2) [AO] at Rs.101.52 Lacs after certain additions as against returned income of Rs.28.69 Lacs filed by the assessee on 30/09/2009. The following additions made by Ld. AO but deleted by first appellate authority are the subject matter of present appeal before us:-

| ***No.*** | ***Nature of Addition*** | ***Amount (Rs.)*** |
|---|---|---|
| *1.* | *Enhancement of Net Profit* | *55.58 Lacs* |
| *2.* | *Deemed Dividend u/s 2(22)(e)* | *17.25 Lacs* |

2.2 Facts *qua* the same are that during assessment proceedings, it was noted that the assessee company had carried out sub-contract for an entity namely *M/s Srishti Raj Enterprises* for construction of residential building at *Plot No. 92, Tilak Nagar, Chembur, Mumbai.* The perusal of financial statements revealed that the assessee reflected *capital work in progress* at Rs.402.34 Lacs which comprised-off of cost of Rs.365.76 Lacs and 10% profit margin of Rs.36.57 Lacs. As against this, the turnover reflected by the directors in their report was Rs.422 Lacs. The assessee submitted contract details and copies of running account bills aggregating to Rs.459.50 Lacs raised by the assessee during the year, the details of which have been extracted in the quantum assessment order.

2.3 It transpired that the aforesaid *contractee* was not making the payments for the work done and accordingly a suit was filed by the assessee in Hon'ble Bombay High Court. Subsequently, certain consent terms were agreed upon by the parties on 21/02/2009 which was duly approved by the court. As per the consent terms, the assessee was to get an amount of Rs.341 Lacs against the amount receivable from the contractee. The Ld. AO noted that the assessee, prior to 21/02/2009 had received a sum of Rs.116.95 Lacs and therefore, the gross amount receivable under the contract was 457.95 Lacs i.e. Rs.116.95 Lacs + Rs.341 Lacs. Resultantly, the differential amount of Rs.92.18 Lacs [Rs.457.95 Lacs, being turnover calculated by Ld. AO Less Rs.365.76 Lacs being capital work in progress reflected by the assessee] was treated as income of the assessee. Against the same, expenditure of Rs.17.82 Lacs as claimed by the assessee in Profit & Loss Account was

allowed and balance amount of Rs.74.37 Lacs was treated as income of the assessee. In other words, the income from the contract was worked out to Rs.74.37 Lacs as against Rs.18.78 Lacs reflected by the assessee.

2.4 The second addition stems from the fact that the assessee received unsecured loan of Rs.17.25 Lacs from an entity namely *Best Roadways Limited.* It was noted that two individuals namely *Jai Kumar Gupta & Suman Gupta* who had substantial interest i.e. shareholding of more than 20% each in the assessee company had shareholding of more than 10% each in the lender company. The aforesaid fact led the Ld. AO to invoke the provisions of Section 2(22)(e) and accordingly, the stated amount was added as *deemed dividend* in the hands of the assessee company.

3. Aggrieved, the assessee contested the same with success before Ld. CIT(A) vide impugned order dated 14/02/2013 wherein the assessee agitated the impugned additions by way of written submissions which have already been extracted in the impugned order. The assessee submitted that there was significant uncertainty in realization of dues from the contractee even after the consent terms dated 21/02/2009 since the contractee did not honor the consent terms and the assessee filed further suit in civil court for the same and therefore, the income did not accrue to the assessee and therefore, not recognized during impugned AY. In the alternative, a plea was raised to allow the non-recovered amount as business loss. The aforesaid explanation / pleas found favor with first appellate authority who deleted the additions by making following observations:-

*3.8 I have considered the submissions made by the Ld. Counsel of the appellant well as the facts of the case. The appellant has argued that the contractee disputed the workmanship of the appellant and thus rejected the bills raised upon it. This fact is neither controverted nor disputed by the Assessing Officer. Accordingly, the bills have not been recognised due to uncertainty relating to the realisation of the bills. A suit for recovery was also filed for recovery of these bills and eventually, Hon'ble Bombay High Court, on the basis of the consent terms reached between the appellant and contratees, passed an order on 21.02.2009 holding that the appellant is eligible to an amount of Rs.4,57 95,049/- (i.e. Rs. 3,41,00,000 + Rs.1,16,95,049/-) from the contractees.*

*3.9 However, since the contractees did not honour the same, the appellant also had to file a suit against the contractees for not honouring the consent terms reached between them. Further, the appellant has also pointed out that it being a contractor has to follow percentage completion method as prescribed in Accounting Standard -7 "Construction Contracts" issued by ICAI prescribed by section 145 of the Income Tax Act, 1961. The AO has not disputed this fact or the application of said method also.*

*3.10 The appellant has thus argued that the said income had not yet accrued and thus in accordance with the concept of prudence under Accounting Standard - 1 prescribed under section 145, the said income cannot be recognised. The Assessing Officer has also not rejected the books of account of the appellant, The appellant has further argued that it has been following mercantile system of accounting in the preceding year as well as in the current year and its books are audited. Thus there is no question of change in the method of accounting. It is also argued by the appellant that a mere mention in the Directors Report to the shareholders of a turnover of Rs 422 lakhs does not substantiate recognition of the said income. It is worth noting here that the AO has computed income based on the work-in-progress of Rs.4,57,95,049/- and has computed income on the said figure.*

*3.11 I am inclined to agree with the contention of the appellant that only the income, which accrues or is deemed to accrue during the year under consideration can be, included in the total income of the appellant. The appellant has, in this regard cited various decisions including the judgment of the Hon'ble Patna High Court in the case of CIT v/s. Chanchani Brothers (Contractors) Pvt. Ltd (supra). These decisions support the argument of the appellant that the additions could not be made only on the basis of the disputed bills and the income can be deemed to accrue to the appellant only when such disputed bills are paid by the contractee.*

*3.12 In the case of CIT v/s. Dhampur Sugar Mills Ltd (No. 1) (supra), Hon'ble Allahabad High Court held that since the right to receive the payment had been in dispute, it therefore does not form part of the trading receipt of the assessee. In the case of CIT v/s. U.P. Financial Corporation (supra), the Allahabad High Court held that where suit for recovery of interest-bearing loans were pending, interest does not accrue to assessee during relevant assessment years. In addition to this, the Hon'ble Bangalore Tribunal in the case of Canara Bank Vs. Joint CIT (supra) has held that* ***"So long as the income cannot be said to have accrued within the meaning of section 5 which is the charging section, sections 28 to 44D computing the income under the head "profits and gains of business" cannot be brought into operation."***

*3.13 Since the income being in dispute, cannot be said to have accrued to the appellant u/s 5 of the Act, due to prevalent situation as discussed above, same cannot be assessed in the year under consideration. The addition of Rs.55,58,394/- is hence deleted.*

*3.14 The appellant has made an alternative plea to allow the unrecoverable amount as business loss. In view of my decision above, there is no need to adjudicate the same.*

The second addition of Rs.17.25 Lacs u/s 2(22)(e) was deleted by making following observations:-

*4.5 It may be seen from the above that for a payment of an advance or loan to be deemed as dividend in the hands of the appellant, the appellant must be a shareholder and that too a beneficial owner of shares in the lending company, which is not the fact in the present case. Furthermore, in the alternative, the payment by a company could have also been deemed to be dividend in the hands of 'a person" who is a shareholder and a beneficial owner of shares in the said company making payment, it the payment was made to any concern in which such person/shareholder was a member or a partner and in which he has a substantial interest. This is also not the fact in the present case, for the payment to the appellant to be assessed as deemed dividend in the hands of the appellant because the appellant is neither a shareholder, nor beneficial owner of shares in the said company making payment (i.e. BEST Roadways Ltd). The very same interpretation of the provisions of section 2(22)(e) has been made by the ITAT Mumbai; in the case of Bhaumik Colours (P) Ltd (supra). Therefore, it is evident that the addition of Rs,17,25,000/- u/s. 2(22)(e) of the Act, in the hands of the appellant cannot be sustained. Same is hereby is deleted.*

Aggrieved by the stand of Ld. CIT(A), the revenue is in further appeal before us.

4. Rival contentions have been heard and perused. So far as the estimation of net profit is concerned, we find that it is undisputed fact that the assessee was having difficulty in realizing the dues from the aforesaid contractee which is evident from consent terms dated 21/02/2009 as approved by Hon'ble Bombay High Court and contempt petition filed by the assessee against the aforesaid entity for not honouring the terms of the consent terms by the contractee. These facts give credence to the arguments of Ld. AR that there was significant

uncertainty as to the recovery of the final amount and the income, under the circumstances, could not be recognized with reasonable certainty. No defects have been found in the books and therefore, the action of the assessee in estimating the income @10% of capital work in progress could not be said to be without strong foundation. Therefore, we find no infirmity in the order of Ld. first appellate authority in deleting the estimated additions as made by Ld. AO.

5. So far as the addition of *deemed dividend* u/s 2(22)(e) is concerned, nothing on record suggest that the assessee company was registered shareholder or beneficial shareholder of the lender company, in any manner. The fact that emerges are that both the entities i.e. lender and the assessee company has certain individuals shareholders who hold threshold shareholding in the two entities within the meaning of Section 2(22)(e). However, the assessee itself does not hold any shareholding in the lender company either as registered shareholder or as a beneficial shareholder. This being the case, the ratio of decision of Special Bench of Mumbai Tribunal rendered in *ACIT Vs Bhaumik Color (P) Ltd. [118 ITD 1]* as relied upon by first appellate authority becomes squarely applicable. Further, we find that aforesaid ratio has already attained finality in the wake of decision of Hon'ble Apex Court rendered in *CIT Vs. Madhur Housing & Development Co. [2017-TIOL-398-SC-IT]* which has upheld the view of Hon'ble Delhi High Court rendered in *CIT Vs. Ankitech P. Ltd. [11 Taxmann.com 100]* which has affirmed the aforesaid view of the special bench of the Tribunal that Section 2(22)(e) does not extend the meaning of the term '*shareholders'* and that the loan

so granted could not be taxed as dividend income in the hands of the recipient company who was not the shareholder of the lender company.

6. The decision of Hon'ble Apex Court rendered in *Gopal Sons & HUF Vs CIT [2017-TIOL-02-SC-IT]* as relied upon by revenue has duly been considered by Hon'ble Madras High Court in its decision rendered in *CIT Vs. Ennore Cargo Container Terminal Private Limited [2017-TIOL-695-SC-MAD-IT]* wherein Hon'ble Court has distinguished the same by observing as under:-

> *4.2 The Revenue seeks to assess as income the capital advance received by the assessee-company from Indev Logistics Pvt. Ltd. on the ground that it is deemed dividend received by the assessee-company for the benefit of the registered shareholder. For this purpose, the provisions of Section 2(22)(e) of the Income-tax Act, 1961 (in short 'the Act') is sought to be relied upon. The Tribunal has rejected the said contention of the Revenue, principally, on the ground that deemed dividend can only be assessed in the hands of the registered shareholder for whose benefit the money was advanced.*
>
> *4.3 As indicated above, there is no dispute that the assessee did receive capital advance from Indev Logistics Pvt. Ltd. There is also no dispute that there are common shareholders both in the assessee-company and Indev Logistics Pvt. Ltd. Therefore, quite correctly, as noted by the Tribunal, though, the advance received by the assessee company may have been for the benefit of the aforementioned registered shareholders, it could only be assessed in the hands of those registered shareholders and not in the hands of the assessee-company.*
>
> *4.4 In our view, on a plain reading of the provisions of Section 2 (22)(e) of the Act, no other conclusion can be reached. As a matter of fact, a Division Bench of this Court, in the case of Commissioner of Income Tax v. Printwave Services P. Ltd., (2015) 373 ITR 665 (Mad.), has reached a somewhat similar conclusion.*
>
> *5. Mr. Senthil Kumar, however, contends to the contrary and relies upon the judgment of the Supreme Court in Gopal and Sons (HUF) v. Commissioner of Income-tax, Kolkata-XI, (2017) 77 taxmann.com 71 (SC).*
>
> *5.1 In our view, the question of law considered by the Supreme Court in the case of Gopal and Sons (supra) was different from the issue which arises in the present matter. The question of law which the Supreme Court was called upon to consider was whether loans and advances received by a HUF could be deemed as a dividend within the meaning of Section 2(22)(e) of the Act. The assessee in that case was the HUF and the payment in question was made to the HUF. The shares were held by the Karta of the HUF. It is in this context that the Supreme Court came to the conclusion that HUF was the beneficial shareholder.*

*5.2 In the instant case, however, both the registered and beneficial shareholders are two individuals and not the assessee-company. Therefore, in our view, the judgment of the Supreme Court does not rule on the issue which has come up for consideration in the instant matter."*

Upon due consideration of factual matrix, we find that the judgment of the Hon'ble Supreme Court in the case of *Gopal and Sons (HUF)* (*supra*) is not applicable to the facts of the present case since the assessee, in that case, was a HUF entity and the issue was as to whether the loans and advances received by the *Hindu Undivided family [HUF]* could be treated as 'deemed dividend' within the meaning of Sec. 2(22)(e) of the Act. Notably, in the case before the Hon'ble Supreme Court, the payment was made by the company to the HUF and the shares in the company were held by the *karta* of the HUF. It is in this context that the Hon'ble Supreme Court upheld the addition in the hands of the HUF as factually the HUF was the beneficial shareholder. The fact-situation in the case before us stands on an entirely different footing inasmuch as the assessee-recipient of money is neither the registered nor the beneficial shareholder of the lender company. Therefore, the decision of the Hon'ble Supreme Court in the case of *Gopal and Sons (HUF)* (*supra*) is inapplicable to the facts of the present case which has also been noted by Hon’ble Madras High Court in their observations as extracted above.

7. Considering the above, the view taken by first appellate authority is in consonance with settled judicial proposition of law and therefore, requires no interference on our part.

8. Resultantly, the appeal stands dismissed.

*Order pronounced in the open court on 05th December, 2018*

| | |
|---|---|
| **Sd/-** | **Sd/-** |
| **(Mahavir Singh)** | **(Manoj Kumar Aggarwal)** |
| न्यायिक सदस्य / **Judicial Member** | लेखा सदस्य / **Accountant Member** |

मुंबई Mumbai; दिनांक Dated : 05/12/2018
*Sr.PS:-Jaisy Varghese*

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

**आदेशानुसार**/ BY ORDER,

**उप/सहायकपंजीकार** (Dy./Asstt.Registrar)
**आयकरअपीलीयअधिकरण,** मुंबई / **ITAT, Mumbai**