

**THE INCOME TAX APPELLATE TRIBUNAL IN
(DELHI BENCH "C" NEW DELHI)**

**BEFORE SHRI G.C.GUPTA, HON'BLE VICE PRESIDENT
AND
SHRI N.K.SAINI, ACCOUNTANT MEMBER**

**ITA NO. 5383 /DEL/2010
(Assessment Year: 2006-07)**

Gomti Exim Pvt. Ltd. A-1/60, FF Sector-11 Rohini New Delhi PAN : AACCG6995M (Appellant)	Vs.	ITO Ward-12(2) New Delhi (Respondent)
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Appellant by : Sh. Ved Jain, Adv., Smt. Rano Jain, CA
Respondent by : Smt. Parminder Kaur, Sr. Dr.
Date of hearing : 15/04/2015
Date of pronouncement : 12 /06/2015

ORDER

Per N.K.Saini, A. M. :

1. This is an appeal by the Assessee against the order dated 30/09/2010 of CIT(A)- XV, New Delhi.
2. Following grounds have been raised in this appeal :-

"1. On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax (Appeals) [CIT(A)] is bad both in the eye of law and on facts.

2(i) *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the addition of Rs. 10,00,000/- made by AO on account of share application money.*

(ii) *That the above said addition has been confirmed despite the assessee bringing all material and evidences on record to prove the identity of the share holder.*

(3) *That the addition on account of share capital has been confirmed ignoring the fact that appellant company was incorporated during the year and there was no source of income which could be alleged to have been introduced by way of share capital.*

4(i) *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the addition of Rs. 5,79,203/- on account of advance received against the land invoking the provision of section 2(22)(e) of the Act.*

(ii) *That the above said addition has been confirmed ignoring arbitrarily the evidence brought on record that the transaction was entered into in due course of the business of the assessee and as such does not come under the purview of section 2(22)(e) of the Act.*

(iii) *That the appellant company not being a shareholder, no addition can be made in the hands of the appellant on account of dividend.*

5. *That the appellant craves leave to add, amend or alter any of the grounds of appeal."*

3. Ground no. 1 and 5 are general in nature so do not require any comments on our part.

4. Vide ground no. 2 (i), (ii) and (iii) the grievance of the assessee relates to the confirmation of addition of Rs. 10,00,000/- made by the AO on account of share application money.

5. The facts of the case in brief are that the assessee filed e-return of Income on 28.11.2006 declaring nil income which was processed u/s 143(1) of the Income Tax Act, 1961(hereinafter referred to as the Act) and thereafter the case was selected for scrutiny. During the course of assessment proceedings, the AO noticed that the assessee had raised share capital including share premium amounting to Rs. 10,00,000/- from Shri Vinod Kumar and Rs. 6,50,000/- from Shri Jasbir Singh. The AO asked the assessee to furnish the confirmation and the sources of investment made by the above mentioned two share holders. He also asked to produce the aforesaid persons to verify the veracity of the transactions. In response the assessee produced both the persons on 5.12.2008. The AO observed that Shri Jasbir Singh was able to substantiate his sources of investment from sale proceeds of agricultural land but Shri Vinod Kumar could not do so. The AO further observed that the statement of Shri Vinod Kumar was also recorded in which he explained that he made the investment out of his past savings from agricultural activities and out of refund of cash loan given to Shri Jasbir Singh alias Pappu. Shri Vinod Kumar in his statement also stated that he owned approximately 40 bighas of land, however, papers were not available with him since those were mortgaged in

connection with a tractor loan. The AO observed that Shri Vinod Kumar could not explain the exigency under which he had to apply for bank loan specially when a sum of Rs. 10,00,000/- in cash was available with him. He further observed that copy of the Khasra Khatoni of agricultural land at Village Nathupur the names mentioned were Shri Sardare, Shri Tare and Shri Umed Singh as owner of agricultural land and the name of Shri Vinod Kumar was not amongst the co-owners of the land. The AO pointed out that the assessee produced an agreement on the blank paper which revealed that Shri Jasbir Singh of Village Nathupur had refunded and an old cash loan to Shri Vinod Kumar, however, he did not find merit in the submission of the assessee and added Rs. 10,00,000/- to its income by considering the same as unexplained credits u/s 68 of the Act. Reliance was placed on the following case laws :-

--Union of India vs. Raghubir Singh 178 ITR 548 (S.C)
--Gujarat State Co-operative Bank Ltd. vs. CIT (2001) 250 ITR 229(Guj.)
--CIT vs Steller Investment Ltd., [2001] 251 ITR 263 (SC)."

6. Being aggrieved the assessee carried the matter to the Ld. C.I.T.(A) and submitted that the assessee produced following

evidences before the AO to prove the identity and creditworthiness of Shri Vinod Kumar :-

- “(i) Copy of Share Application received from Mr. Vinod Kumar
- (ii) Copy of Shares Certificate of shares Allotted to him
- (iii) Copy of confirmation received from him
- (iv) Copy of Annual Return and Form 2 filed before the Registrar of Companies
- (v) Various documents related to assets owned by him, Identity Card.”

It was further submitted that the assessee produced the person who confirmed the amount of contribution to the assessee. It was also stated that the assessee produced various papers related to land and other assets owned by Shri Vinod Kumar which could establish his creditworthiness and to prove the genuineness of the transaction it was necessary to prove the identity and creditworthiness of the creditor. It was submitted that the AO specifically mentioned in his order that Shri Vinod Kumar appeared before him and produced details of assets owned by him. Therefore, assessee discharged the onus cast upon him. It was prayed that the addition of Rs. 10,00,000/- made by the AO may be deleted. Reliance was placed on the following case laws :-

- “1. CIT vs. M/s Lovely Exports Pvt. Ltd. 216 CTR 195
- 2. CIT vs. Steller Investment Ltd. 251 ITR 263 (SC)
- 3. CIT vs. Sophia Finance Ltd. 205 ITR 98 (Del)
- 4. CIT vs. Achal Investment Ltd. 268 ITR 211 (Del)
- 5. CIT vs. M/s Divine Leasing & Finance Ltd. (299 ITR 268)
- 6. CIT vs. Sumati Dayal 214 ITR 801 (SC)

7. CIT vs. Value Capital Services Pvt. Ltd. 307 ITR 334 (Del)”

7. The Ld. CIT(A) after considering the submissions of the assessee observed that Shri Vinod Kumar was not assessed to tax and did not have a PAN. He further observed that Shri Vinod Kumar could not produce any evidence with regard to the source of income for his creditworthiness and that the mode of payment regarding his claim of agricultural income was not furnished before the AO. The Id. C.I.T.(A) also observed that the assessee could not submit either the copy of Khasra, Khatauni or any receipt of agricultural produce and that the genuineness of the transaction was in doubt since the payment was not made through banking channel but was made in cash. The Ld. CIT(A) also mentioned that the case laws relied by the assessee were not applicable to the present case. Accordingly the addition made by the AO on account of share capital of Rs. 10 lac received from Sh. Vinod Kumar was sustained.

Now, the assessee is in appeal.

8. The Ld. Counsel for the assessee reiterated the submissions made before the authorities below and further submitted that the assessee furnished various documents including PAN Card, Share Certificate, Receipt, Khasra Khatauni etc. before the AO, for the

aforesaid contention our attention was drawn towards page no. 51 onward of the assessee's paper book. It was further submitted that the assessee produced Shri Vinod Kumar before the AO who recorded his statement wherein the source of investment was explained out of saving from agricultural activities. It was also submitted that Shri Vinod Kumar is son of Shri Umed Singh whose name was appearing in Khasra Khatauni copy which is placed at page no. 43 to 49 of the assessee's paper book and the name of the father Shri Umed Singh was there in the khatauni as a co-owner. Reference was made to page no. 43 of the assessee's paper book. It was submitted that the addition sustained by the AO was not justified.

9. In his rival submissions, the Id. DR strongly supported the order of the authorities below and further submitted that the assessee could not produce the creditworthiness of Shri Vinod Kumar and the genuineness of transaction was in doubt. Therefore, the Id. CIT(A) was fully justified in confirming the addition made by the AO u/s 68 of the Act. Reliance was placed in the following case laws :-

- C.I.T. vs. NOVA PROMOTERS AND FINLEASE (P) LTD. 342 ITR 169 (Del.)
- C.I.T. vs. FAIR FINVEST LTD. 357 ITR 146 (Del.)
- C.I.T. vs. GANGESHWARI METAL P. LTD. 361 ITR 10 (Del.)
- C.I.T. vs. LOVELY EXPORTS P. LTD. [2009] 319 ITR (St.) 5 (SC)

10. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is an admitted fact that the assessee received a sum of Rs. 10,00,000/- as share application money from Shri Vinod Kumar. The assessee furnished copy of PAN Card, Annual return, Share application form, copy of share certificate, copy of Khasra Khatauni before the AO vide letter dated 11.12.2008 copies of the above documents are placed at page nos. 17 to 49 of the assessee's paper book. In the present case, the main objection of the AO was that in khasra khatauni, the name of the assessee was not appearing as the owner of land. In this regard the explanation of assessee was that the name of his father Shri Umed Singh was appearing in khasra khatauni which is placed page no. 43 of the assessee's paper book which clearly established the ownership of land. It is also noticed that the assessee furnished copies of "J" forms in the name of Shri Vinod Kumar which clearly established that he sold the agricultural produce to M/s. Rameshwer Dayal Prem Chand Aadhti, Sonapat Mandi, copies of the same are placed at page no. 37 to 43 of the assessee's paper book. In the present case, it is noticed that the assessee received a sum of Rs. 5,00,000/- from Shri Jasbir Singh to whom the said amount

was given as an advance to purchase the land which is evident from page no. 44 of the assessee's paper book which clearly shows that the advance money given to Shri Jasbir Singh was taken back by Shri Vinod Kumar on 25.12.2005. Both the parties affixed their signature on the above said document which is witnessed by Shri Ajay Kumar son of Shri Jagdish and Shri Jagdish Son of Shri Raj Kumar.

11. From the above facts, it is clear that Shri Vinod Kumar was a man of means, his creditworthiness was proved and the identity was not in doubt since the assessee produced Shri Vinod Kumar before the AO who recorded his statement wherein the investment in the shares was admitted, copy of the share certificate, is placed at page no. 36 of the assessee's paper book which revealed that 10,000 shares having destructive nos. 16,501 to 26,500 were allotted to Shri Vinod Kumar vide certificate no. 22, therefore, the genuineness of transaction can also not be doubted. From the above facts, it is clear that the assessee proved the identity and creditworthiness of Shri Vinod Kumar as well as the genuineness of transactions amounting to Rs. 10,00,000/-, therefore, the addition made by the AO and sustained by the Id. CIT(A) was not justified, accordingly the same is deleted.

12. The next issue vide ground no. 4 (i),(ii), & (iii) relates to the confirmation of addition of Rs. 5,79,203/- made by the AO by invoking the provisions of Section 2(22)(e) of the Act. The facts related to this issue in brief are that the AO, during the course of assessment proceedings noticed that the assessee had taken an advance of Rs. 10,00,000/- from M/s. Precision Stock and Credit Pvt. Ltd. in which Shri Jasbir Singh held 22,000 out of 1,03,500 shares i.e. a beneficial holding of 21% shares with voting right. He further, observed that Shri Jasbir Singh had holding of 24.52% in assessee's company and that the balance sheet of M/s Precision Stock and Credit Pvt. Ltd. revealed that it had an accumulated profit of Rs. 579203/- in the beginning of year, thus, satisfying the conditions of applicability of Section 2(22)(e) of the Act. The AO asked the assessee to explain as to why the amount of advance received to the extent of accumulated profits of M/s Precision Stock and Credit Pvt. Ltd. may not be taxed as deemed dividend as per the provisions of Section 2(22)(e) of the Act. The Assessee submitted that the advance was received against the land which was in the nature of normal business transaction, M/s Precision Stock and Credit Pvt. Ltd. had no accumulated profits and the advance was given only out of share premium available with that

company which could not be termed as part of accumulated profit as such the provisions of section 2(22)(e) of the Act were not applicable. The AO, however, was not satisfied from the submission of the assessee by observing that the balance sheet of M/s Precision Stock and Credit Pvt. Ltd. revealed that accumulated profits of Rs. 5,79,203/- was included in reserve and surplus as per Schedule II. He also mentioned that a share premium of Rs. 66,15,000/- was added during the year beside the profit for the year of Rs. 99,213/- which gave the total reserve and surplus of Rs. 72,93,433/-. The AO accordingly made the addition of Rs. 5,79,203/- by invoking the provisions of Section 2(22)(e) of the Act. Reliance was placed in the judgment of the Hon'ble Bombay High Court in the case of Wall Chand & Co. Ltd. vs. CIT (1975), 100 ITR 598.

13. Being aggrieved the assessee carried the matter to the Ld. CIT(A) and submitted that the assessee company was incorporated during the year under consideration with the objective of dealing in real estate business and a sum of Rs. 10,00,000/- was received from one of its client M/s Precision Stock & Credit Pvt. Ltd. It was further submitted that the provisions of Section 2(22) (e) of the Act make it clear that in case some money has been advanced by any company

for some business transaction, the same cannot be considered for the purpose of Section 2(22)(e) of the Act. It was further, submitted that the money advanced by M/s Precision Stock & Credit was on account of business transaction and also the said party did not has accumulated profits to the extent of amount advanced by it to the assessee. It was emphasized that the balance sheet of M/s Precision Stock & Credit Pvt. Ltd. revealed that the said company had given the amount of Rs. 10,00,000/- to the assessee on account of advance towards purchase of some property. In support of the above contention, copy of the agreement was produced before the AO. It was submitted that the said amount was refunded back to the assessee in the next year and the balance sheet in the books of the said party had been reduced to nil, therefore, the transaction was clearly out of the purview of provisions of Section 2(22)(e) of the Act.

14. The Ld. CIT(A) after considering the submissions of the assessee observed that Shri Jasbir Singh who had holding of 24 to 25% in the assessee company was also having a beneficial holding with voting right of 21% in M/s Precision Stock & Credit Pvt. Ltd. which had an accumulated profit of Rs. 5,79,203/-. The Ld. CIT was of the view that the provisions of Section 2(22)(e) of the Act would be applicable in the

present case, since Sh. Jasbir Singh was holding more than 20% to the shares in both the assessee and M/s Precision Stock and Credit Pvt. Ltd. He also mentioned that the assessee could not prove on the basis of evidence that the transaction was in the nature of the business transaction. He, therefore, confirmed the addition made by the AO. Now, the assessee is in appeal.

15. Ld. Counsel for the assessee submitted that since the assessee company was not a share holder of M/s Precision Stock and Credit Pvt. Ltd. and just because of a common share holder the addition u/s 2(22)(e) of the Act cannot be made. Reliance was placed on the following case laws :-

1. Commissioner of Income Tax vs. Ambassador Travels P. Ltd. [2009] 318 ITR 376(Delhi)
2. Commissioner of Income Tax vs. Shri Raj Kumar [2009]318 ITR 462(Delhi)
3. Commissioner of Income Tax vs. Creative Dyeing & Printing Pvt. Ltd. [2009]318 ITR 476 (Delhi)

It was further submitted that the assessee had received advance against land from M/s Precision Stock and Credit Pvt. Ltd. which is in the nature of business transaction. A reference was made to page no. 51 of the assessee's paper book which is a copy of the agreement. It was submitted that the transaction during the normal course of business does not come within the ambit of section 2(22)(e) of the Act. The reliance was placed on the following case laws :-

1. Commissioner of Income Tax vs. Universal Medicare Private Ltd. [2010] 324 ITR 263 (Bom)
2. Commissioner of Income Tax vs. Ankitech Pvt. Ltd. & Others [2012] 340 ITR 14 (Del.)
3. Commissioner of Income Tax vs. MCC Marketing (p.) Ltd. [2012] 343 ITR 350 (Del.)
4. Assistant Commissioner of Income Tax vs. Bhaumik Colour (P) Ltd. [2009] 313 ITR 146
5. CIT vs. AR Magnetics Pvt. Ltd. (2014), 220 Taxman 209 (Delhi)(HC)
6. C.I.T. vs. Navyug Promoters (P) Ltd. (2011) 203 Taxman 618(Del.)

16. In his rival submissions, the Ld. DR strongly supported the orders of the authorities below and further submitted that since Shri Jasbir Singh was a common share holders having more than 20% share holding in the assessee company and M/s Precision Stock and Credit Pvt. Ltd. which was having an accumulated profits. Therefore, the provisions of Section 2(22)(e) were rightly invoked by the AO and the Ld. CIT(A) was justified in confirming the addition made by the AO.

17. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is noticed that the assessee entered into an agreement with M/s Precision Stocks and Credit Pvt. Ltd. on 28.3.2006 for the sale of agricultural land and received Rs. 10,00,000/- vide cheque no. 406306 of Cooperative Bank Ltd, the same is evident from page no. 51 to 53 of the assessee's paper book which is the copy of aforesaid agreement. The assessee also issued receipt for the above said amount copy of which is placed at page no. 54 of the

assessee's paper book. From the above facts, it is clear that the assessee who was engaged in the real estate business received an advance against the sale of land, therefore it was in the nature of business transaction. On a similar issue the Hon'ble Jurisdictional High Court in the case of CIT vs. Ankitech Pvt. Ltd. and Others [2012] 340 ITR 14(Supra) has held as under :-

“25. Further, it is an admitted case that under normal circumstances, such a loan or advance given to the shareholders or to a concern, would not qualify as dividend. It has been made so by legal fiction created under section 2(22)(e) of the Act. We have to keep in mind that this legal provision relates to “dividend”. Thus, by a deeming provision, it is the definition of dividend which is enlarged. Legal fiction does not extend to “shareholder”. When we keep in mind this aspect, the conclusion would be obvious, viz., loan or advance given under the conditions specified under section 2(22)(e) of the Act would also be treated as dividend. The fiction has to stop here and is not to be extended further for broadening the concept of shareholders by way of legal fiction. It is a common case that any company is supposed to distribute the profits in the form of dividend to its shareholders/members and such dividend cannot be given to non-members. The second category specified under section 2(22)(e) of the Act, viz., a concern (like the assessee herein), which is given the loan or advance is admittedly not a shareholder/member of the payer company. Therefore, under no circumstance, it could be treated as shareholder/member receiving dividend. If the intention of the Legislature was to tax such loan or advance as deemed dividend at the hands of “deeming shareholder”, then the Legislature would have inserted deeming provision in respect of shareholder as well, that has not happened. Most of the arguments of the learned counsels for the Revenue would stand answered, once we look into the matter from this perspective.

26. In a case like this, the recipient would be a shareholder by way of deeming provision. It is not correct on the part of the Revenue to argue that if this position is taken, then the income "is not taxed at the hands of the recipient". Such an argument based on the scheme of the act as projected by the learned counsel for the Revenue on the basis of sections 4,5,8,14 and 56 of the Act would be of no avail. Simple answer to this argument is that such loan or advance, in the first place, is not an income. Such a loan or advance has to be returned by the recipient to the company, which has given the loan or advance.

27. Precisely, for this very reason, the courts have held that if the amounts advanced are for business transactions between the parties, such payment would not fall within the deeming dividend under section 2(22)(e) of the Act."

18. In the present case also, the assessee company is not the shareholder in M/s Precision Stock & Credit Pvt. Ltd. and received the amount from the said company in the course of ordinary business activities. Therefore, in view of ratio laid down by the Hon'ble Jurisdictional High Court in the aforesaid referred to case, the provisions of section 2(22)(e) of the Act were not applicable. We, therefore, by considering the totality of the facts deem it appropriate to delete the impugned addition made by the AO and sustained by the Ld. CIT.

19. In the result, appeal of the assessee is allowed.

(Order pronounced in open court on 12 June, 2015.)

Sd/-
(G.C.Gupta)
Vice President

Sd/-
(N.K.Saini)
Accountant Member

Dated 12 June, 2015

Binita

Copy forwarded to

1. APPELLANT
2. RESPONDENT
3. CIT
4. CIT (A)
5. CIT (ITAT), New Delhi.

AR, ITAT

N. Delhi