

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "ई" मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE S/SHRI B.R.BASKARAN (AM) AND AMIT SHUKLA, (JM)
सर्वश्री बी.आर.बास्करन, लेखा सदस्य एवं अमित शुकला, न्यायिक सदस्य के समक्ष

आयकर अपील सं./I.T.A. No.104/Mum/2011
(निर्धारण वर्ष / Assessment Year :2007-08)

Addl Commissioner of Income Tax,24(1), C-13, Room No.503, Pratyakshakar Bhavan, Bandra-Kurla Complex, Bandra (E), Mumbai-400051.	बनाम/ Vs.	Shri Chandrakant V Gosalia, Eesha Kripa, Bhahman Sabha Lane, Maland (W), Mumbai 400064.
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. :ADDPG0778M

अपीलार्थी ओर से / Appellant by	Shri Premanand J
प्रत्यर्थी की ओर से/Rspondent by	Shri Reepal G Tralshawala

सुनवाई की तारीख / Date of Hearing : 23.4.2015

घोषणा की तारीख /Date of Pronouncement : 3.6.2015

आदेश / ORDER

PER B.R. BASKARAN (AM)

The revenue has filed this appeal challenging the order dated 27.10.2010 passed by Ld CIT(A)-34, Mumbai granting partial relief in the matter of assessment of deemed dividend under section 2(22)(e) of the Income Tax Act, 1961 (the Act) in assessment year 2007-08.

2. The facts relating to the issue are stated in brief. The assessee here is a Director and shareholder in closely held company named as M/s Gemstar Construction Pvt Ltd. The AO noticed that the assessee has

borrowed funds from the above said company and hence he proceeded to examine the applicability of the provisions of section 2(22)(e) of the Act on the amount borrowed by the assessee from the above said company. The AO has extracted the account copy of the assessee as available in the books of the company and the same is reproduced below:

Date	Particulars	Debit	Credit
1.4.2006	Opening balance	56,22,575	-
17.4.2006	Amt.paid towards premises deposit	50,000	-
19.4.2006	Payment for public issue RPL-IPO-HNIR	62,00,000	-
24.4.2006	Amt.paid towards premises deposit	1,00,000	-
26.4.2006	Amt.paid towards premises deposit	1,00,000	-
15.5.2006	Amt.paid towards premises deposit	25,000	-
16.5.2006	Amt.paid towards premises deposit	2,25,000	-
17.5.2006	Amt.paid towards premises deposit	1,50,000	-
19.5.2006	Amt. transferred from TMSB		60,95,840
13.6.2006	Amt.paid towards premises deposit	1,50,000	-
27.6.2006	Amt.paid towards premises deposit	15000	-
11.7.2006	Amt.paid towards premises deposit	2,00,000	
21.7.2006	Amt.paid towards premises deposit	20,000	-
17.8..2006	Amt.paid towards premises deposit	25,000	-
23.8.2006	Amt.paid towards premises deposit	50,000	-
15.9.2006	Amt.paid towards premises deposit	6,00,000	-
28.9..2006	Amount transferred from above a/c		6,00,000
		1,36,32,575	66,95,840
			66,36,735
	Closing balance	1,36,32,575	1,36,32,575

During the year the assessee had received a sum of Rs.80.10 lakhs from M/s Gemstar Construction Pvt Ltd, which consisted of Rs.18.10 lakhs received as security deposit in respect of a premises let out by the assessee to the above said company and Rs.62.00 lakhs received for subscribing to the Initial Public Offer of shares issued by M/s Reliance Petroleum Limited (RPL). The assessee had repaid a sum of Rs.60,95,840/- on 19.5.2006 out of the above said amount of Rs.62.00 lakhs. It was stated that the assessee applied for public issue of RPL in his name for and on behalf of the company and the same is supported by the resolution passed by the Board of Directors. However, the assessee was

allotted the shares only to the tune of Rs.1,04,160/- and the balance amount of Rs.60,95,840/- was refunded by M/s RPL. The refund amount was duly returned back by the assessee to the above said company. Accordingly, it was contended before the AO that the assessee has not borrowed any funds as contemplated under section 2(22)(e) of the Act and hence the amount of Rs.62 lakhs cannot be taxed as deemed dividend. With regard to the remaining amount of Rs.18.10 lakh, the assessee submitted that it had received a sum as lease deposits in respect of the premises let out to the above said company and hence the provisions of section 2(22)(e) are not attracted to the same. The AO was not convinced by the explanation of the assessee and accordingly assessed both the amounts aggregating to Rs.80.10 lakhs as deemed dividend.

3. In the appellate proceedings, the Id.CIT (A) deleted the assessment of lease deposit of Rs.18.10 lakhs, by following his own decision rendered in the immediately preceding year on an identical issue. With regard to the assessment of Rs.62.00 lakhs pertaining to share application money, the Id.CIT(A) accepted the contentions of the assessee. However, since the shares worth Rs.1,04,160/- allotted was retained by the assessee himself, again supported by the resolution passed by the Board of Directors, the Id.CIT(A) confirmed the assessment of deemed dividend to the extent of Rs.1,04,160/- and deleted the assessment of balance amount of Rs.60,95,840/-. Aggrieved, the Revenue has filed this appeal before us.

4. We heard the parties and perused the record. We notice that the Id CIT(A) has followed the decision rendered by the Delhi bench of ITAT in the case of Sunil Sethi Vs. DCIT (2008)(26 SOT 95), wherein it was held that if any payment is made to the assessee director for official purposes of the Company, i.e., to be utilized for and on behalf of the company and

the said funds were returned back without its utilization for any other purposes by the Director due to non-materialisation of business transaction, then the intention was not to give loan to the assessee director and that the assessee director was acting for and on behalf of the company for which proper resolution of board of directors were passed and hence the addition made as deemed dividend u/s 2(22)(e) was liable to be deleted. The main contention of the revenue is that the ratio of the decision rendered in the case of Sunil Sethi (supra) is not applicable to the facts prevailing in the instant case.

5. In the instant case, we have noticed that the assessee had received money from M/s Gemstar Construction P Ltd for the purpose of investing in the Initial Public Offer (IPO) of M/s RPL. It is not shown to the tax authorities that M/s Gemstar Construction P Ltd was engaged in the business of dealing in Shares & Securities. Hence, we agree with the contentions of the revenue that the amount of Rs.62.00 lakhs was not given to the assessee during the course of normal business for the purpose of carrying out any business transaction. We further notice that the narration given on payment of Rs.62.00 lakhs was "Payment for public issue RPL – IPO – HNI R". We were given to understand that the expression "HNI R" indicates "High Networth Individual Resident".

6. The contention of the assessee was that he had acted as an agent of M/s Gemstar Constructions P Ltd while applying shares of Initial Public offer issued by M/s RPL. In support of the same, the assessee has placed strong reliance on the resolution passed by the Board of Directors, which consisted of assessee and his son only. It is also submitted that the refund of excess application money was duly returned back to M/s Gemstar Constructions P Ltd. It was further submitted that the assessee

was allowed to retain the Shares allotted by M/s RPL, since the number of shares allotted were very small and further the decision with regard to the same was taken again by the Board of Directors of M/s Gemstar Constructions P Ltd.

7. A careful analysis of chronology of events, in our view, does not support the case of the assessee. First of all, it is not shown to us that M/s Gemstar Constructions P Ltd was not barred from applying for IPO of M/s RPL. Secondly, it was not shown that the above said company is involved in dealing in shares, i.e., it was not part of business transactions. Thirdly, the assessee was allowed to retain the shares allotted in the IPO, which militates against the explanation given by the above said company and also the resolution passed by the Board of Directors.

8. It is in the common knowledge of everyone that the allotment is done on proportionate basis in case of over subscription of public issue. When the IPO is made by reputed business houses, the IPO is usually subscribed several times and hence the allotment of shares tends to be very much lower than that applied for. Hence, the explanation of the assessee that M/s Gemstar Constructions P Ltd has decided to apply for shares of M/s RPL in his name with the expectation that more number of shares shall be allotted does not appeal to common sense. But the very fact that the shares so allotted by M/s RPL were not taken by M/s Gemstar Constructions P Ltd would only show that it did not intend to apply for the shares, though the said view is against resolution passed by the Board of Directors. But, as contended by the revenue, the resolutions so passed are within the control of the Board of directors, who again happened to be the assessee and his son. Under these set of facts, we are of the view

that one should take holistic view of the matter by duly considering surrounding circumstances.

9. In view of the foregoing discussions, we are of the considered view that the explanation of the assessee that the IPO of M/s RPL was applied by the assessee for and on behalf of M/s Germstar Constructions P Ltd is hard to believe. It is well established principle of law that mere repayment of money borrowed by the share holder will not escape him from the provisions of sec. 2(22)(e) of the Act. Hence the fact that the assessee has paid back the excess share application money refunded by M/s RPL will not be of any help to the assessee. Hence, we agree with the contentions of the revenue that the decision rendered in the case of Sunil Sethi (supra) is not applicable to the facts prevailing in the instant case. Accordingly, we are of the view that the AO was justified in assessing the amount of Rs.62.00 lakhs as deemed dividend in the hands of the assessee. Accordingly, we set aside the order of Ld CIT(A) on this issue and restore that of the AO.

10. In the result, the appeal filed by the revenue is allowed.

घोषणा खुले न्यायालय में दिनांक:3rd June, 2015 को की गई ।

Sd

(अमित शुक्ला / **AMIT SHUKLA**)

न्यायिक सदस्य / JUDICIAL MEMBER

sd

(बी.आर.बास्करन / **B.R. BASKARAN**)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai: 3rd June,2015.

व.नि.स./ SRL , Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned
4. आयकर आयुक्त / CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

True copy

आदेशानुसार/ BY ORDER,

सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai