

**IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, CHANDIGARH**

BEFORE MS. DIVA SINGH, JUDICIAL MEMBER
AND MS. ANNAPURNA GUPTA, ACCOUNTANT MEMBER

ITA No.51 /Chd/2014
(Assessment Year : 2006-07)

Sh.Roshan Lal Jindal Vs. The D.C.I.T.,
83, NAC Manimajra, Central Circle-1,
Chandigarh. Chandigarh.
PAN: AAMPJ1997R

ITA No.110 /Chd/2014
(Assessment Year : 2006-07)

The D.C.I.T., Vs. Sh.Roshan Lal Jindal
Central Circle-1, # 83, NAC Manimajra,
Chandigarh. Chandigarh.
PAN: AAMPJ1997R

And

ITA Nos.52 to 54/Chd/2014
(Assessment Years : 2007-08 to 2009-10)

Sh.Roshan Lal Jindal Vs. The D.C.I.T.,
83, NAC Manimajra, Central Circle-1,
Chandigarh. Chandigarh.
PAN: AAMPJ1997R
(Appellant) (Respondent)

Appellant by : Shri Sudhir Sehgal, Advocate
Respondent by : Shri Gulshan Raj, CIT DR
Date of hearing : 03.08.2017
Date of Pronouncement : 14.09.2017

ORDER

PER BENCH:

All the above appeals relate to the same assessee on account of assessment framed consequent to search carried out on the assessee. Therefore, all were heard together. While the appeal in ITA No.51/Chd/2014 and ITA No.110/Chd/2014 are cross appeals by the assessee and

the Revenue against the order passed by the Ld.CIT(Appeals)(Central), Gurgaon dated 27.11.2013 for assessment year 2006-07, the appeals in ITA No. 52/Chd/2014, ITA No. 53/Chd/2014 and ITA No. 54/Chd/2014 have been filed by the assessee against the order passed by the Ld.CIT(Appeals)(Central), Gurgaon dated 27.11.2013. 31.10.2013 and 31.10.2013 for assessment years 2007-08, 2008-09 and 2009-10 respectively

2. At the outset it may be stated that during the course of hearing before us the Ld. counsel for the assessee sought permission to withdraw the assessee's appeal filed in ITA Nos.52 & 54/Chd/2014. In view of the same, the said two appeals are treated as dismissed.

3. We shall now be first taking up Revenue's appeal in ITA No.110/Chd/2014

ITA No.110/Chd/2014(Revenue's appeal):

4. Ground No.(i) raised by the Revenue reads as under:

"(i) Whether on the facts and in the circumstances of the case, the CIT(A) has erred in deleting the addition of Rs.209140/- made by the Assessing Officer on account of deemed income u/s 2(22)(e) of the IT. Act, 1961?"

5. In the above ground the Revenue has challenged deletion of addition made on account of deemed dividend under section 2(22)(e) amounting to Rs.2,09,140/-.

6. Brief facts relevant to the issue are that during assessment proceedings the Assessing Officer found that

the assessee was a shareholder in a number of companies in which he had substantial interest and these companies had given loans to the assessee as well as to companies in which the assessee had substantial interest. To illustrate the position, the Assessing Officer made a chart reproduced at page 4 of the assessment order as under:

Company which is giving loan	Substantial interest of the Assessee in the said company (Minimum 10% required)	List of Substantial Interested shareholders in the company which is giving loan	Loan given to the assessee or to any concern in which assessee is substantially Interested.	Assessee's interest in said concern	Loan Amount given being treated as Deemed Dividend u/s 2(22)(e)	Proportionate Share of Deemed Dividend on the basis of shareholding among the substantially interested shareholders in the company
Himland Agro Foods India Ltd. (Accumulated Profits of 6230330)	1640/ 15800 shares = 10.38%	Gargi Jindal = 2900 shares, Urmil Jindal = 2300 shares, Ashok Jindal = 1640 Shares	Swami Devi Dayal Hi-tech Education society	Member	525000	nil
Heera Moti Healthcare Product Ltd. (Accumulated Profits of 3740308)	1200 / 5800 shares = 20.69%	Amit Jindal = 600 shares, R.I, Jindal = 1200 shares, Urmil Jindal = 1000 shares, Sunita Jindal = 600 shares	Hiramoti agro products	20%	113322	39996
	1200 / 5800 shares = 20.69%	Amit Jindal = 600 shares, Ashok Jindal = 1200 shares	Swami Devi Dayal Hi-tech Education society	Member	395000	158000

		Roshan Lal Jindal = 1200 shares				
Heeramoti Spicy Pvt. Ltd. (Accumulated Profits of 3222755)	6061/33311 shares = 18.20%	Roshan Lal Jindal = 6061 shares, Urmil Jindal = 5140 shares	Hiramoti agro products	20%	47000	47000
	6061/33311 shares = 18.20%	Roshan Lal Jindal = 6061 shares, Ashok Jindal = 4250 shares	Swami Devi Dayal Hi- tech Education society	Member	87000	51140
Total						2,96,136

7. On being confronted with the same, the assessee submitted that the sums were advanced out of commercial or business expediency and there was no intention of providing loans or advances. The assessee also submitted that the advances given to Swami Devi Dayal Hi-tech Society in the books of Heera Moti Health Care Product Ltd. & Heera Moti Spicy Pvt. Ltd. amounting in all to Rs.2,09,140/- could not be treated as deemed dividend under section 22(e) of the Act since the assessee was only the trustee in the said trust and was not entitled to 20% or more in the income of the trust. The Assessing Officer rejected the assessee's contention stating that commercial and business expediency for advancing the said loans had not been established by the assessee with necessary proof and with respect to advance made to Swami Devi Dayal Hi-tech Education Academy, the documents seized during the course of search showed that the funds had been utilized by the members of the society and their family members and, therefore, the contention of the assessee that no personal

benefit had been derived by the assessee was not correct. The Assessing Officer, therefore, treated the sum of Rs.2,96,137/- as deemed dividend and added the same to the taxable income of the assessee for the year under consideration.

8. The matter was carried in appeal before the Ld.CIT(Appeals) who deleted the addition made with respect to the amounts advanced to Swami Devi Dayal Hi-tech Education Academy of Rs.2,09,140/- holding that since it was a society/trust which had been granted registration u/s 12AA of the Income Tax Act, 1961 (in short 'the Act'), the advance was outside the scope of section 2(22)(e) of the Act. The balance addition made was upheld. It is against the aforesaid deletion of addition that the Revenue has now come up in appeal before us.

9. During the course of hearing before us the Ld. DR relied upon the order of the Assessing Officer and stated that the Assessing Officer had clearly pointed out that the documents seized during the course of search showed that the funds of the society had been utilized by the members of the society and their family members and, therefore, it was incorrect to state that no personal benefit had been derived by the assessee from the trust/society.

10. The Ld. counsel for assessee, on the other hand, relied upon the order of the Ld.CIT(Appeals) and stated that the said trust/society being a charitable society registered u/s 12AA of the Act and the assessee being merely a trustee in

the same with no defined share, it was not covered under the provisions of section 2(22)(e) of the Act as held by the Ld.CIT(Appeals). The Ld. counsel for assessee pleaded that the Ld.CIT(Appeals)'s order on this account be, therefore, upheld.

11. We have heard the contentions of both the parties. The issue in hand pertains to addition made on account of deemed dividend as per provisions of section 2(22)(e) of the Act. Being a deeming provision, bringing to tax sums which are not actually in the nature of income but are only deemed to be so, it is to be strictly interpreted. Section 2(22)(e) of the Act reads as under:

“2(22)(e) any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) ⁵ made after the 31st day of May, 1987, by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power, or to any concern, in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern)] or any payment by any such company on behalf, or for- the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits.”

12. A reading of the section in reveals that any sum advanced by a company in which a person holds voting rights of 10% or more to another concern in which such shareholder is a member or partner having substantial interest, the sum so advanced is treated as deemed dividend. Substantial interest has been defined under the said section to being beneficial entitlement to not less than

20% of the income of such concern. In the present case the fact that the assessee holds more than 10% voting rights in Herra Moti Health Care Product Ltd. & Heera Moti Spicy Pvt. Ltd., who had advanced the impugned sum, is not disputed. What is required to be seen is whether the assessee was beneficially entitled to 20% or more of the income of Swami Devi Dayal Hi-tech Education Academy. It is not disputed that Swami Devi Dayal Hi-tech Education Academy is a charitable trust registered u/s 12AA of the Act. That the assessee is a trustee in the said trust has also not been disputed and the fact that there are no interest of any member of the said society in the Trust is also not disputed. In the said circumstances, we are left with no option but to agree with the Ld.CIT(Appeals) that second limb or requirement of section 2(22)(e) of the assessee having substantial interest in the concern to which loan or advance has been given has not been established and, therefore, the said advance cannot be treated as deemed dividend in the hands of the assessee. The arguments of the Ld. DR that the documents seized during the course of search show that the funds had been utilized by the members of the society, and therefore, assessee derived personal benefit is of no consequence since the requirement of section 2(22)(e) is not whether the assessee has actually derived any personal benefit from the said concern but is that the assessee is beneficially entitled to not less than 20% of the income of the said concern. The word "entitled" means having a legal right to something.

Since such legal right is absent in the case of the present society, in the absence of such legal right of the assessee in the said society the amount advanced cannot be treated as deemed income as per section 2(22)(e) of the Act. Moreover even as per the argument of the Revenue the documents found during search only establish that the assessee has derived benefit from the said societies and not "substantial" benefit, as is the requirement of the section.

13. In view of the above, we uphold the order of the Ld.CIT(Appeals) deleting the addition made on account of deemed dividend amounting to Rs.2,09,140/- on account of loans and advances given to societies registered u/s 12A of the Act.

Ground No.1 raised by the Revenue is, therefore, dismissed.

14. Ground Nos.2 and 3 were taken together by the Ld. counsel for assessee while putting forth the contentions of the assessee against the grounds raised by the Revenue and common arguments with respect to the same were advanced. We shall, therefore, be dealing with both the grounds together. Ground Nos.2 and 3 read as under:

"(ii) Whether on the facts and in the circumstances of the case, the CIT(A) has erred in deleting the addition of Rs.3,75,000/- made by the Assessing Officer on account of credit amount in the bank account of the assessee, on the basis of additional evidence of dateless cash flow statement admitted without opportunity to the AO?"

"(iii) Whether on the facts and in the circumstances of the case, the CIT(A) has erred in deleting the addition of

Rs.30,00,000/- made by the AO on account of seized documents as pages 28-30 of A-15 seized from Swami Devi Dyal Hi Tech Education Academy, on the basis of additional evidence admitted without opportunity to the AO?"

15. Ground No.2 pertains to deletion of addition of Rs.3,75,000/- made on account of deposit in Oriental Bank of Commerce(in short 'OBC') during the year which remained unexplained. During assessment proceedings the Assessing Officer found that the cash amounting to Rs.3,75,000/- was deposited by the assessee in his bank account maintained with OBC. On being confronted with the same, the assessee submitted that the same was deposited out of withdrawals made out of other bank accounts, & incomings from brought forward cash in hand, in short meaning that the deposits could be explained out of cash flow statement. The Assessing Officer rejected assessee's contention since no cash flow statement was filed by the assessee and made addition of the said cash deposits of Rs.3,75,000/- to the income of the assessee holding the same to be unexplained.

16. During appellate proceedings before the Ld.CIT(A) the assessee furnished the cash flow statement. Relying upon the same, the Ld.CIT(A) found that the said cash deposit was made out of regular savings as per cash in hand. The Ld.CIT(A) stated that it was submitted that the cash flow was prepared from bank statement and entries in the seized books and, therefore, no adverse inference could be drawn from the same. She, therefore, deleted the addition made on account of the same.

17. In ground No.3 the Revenue has challenged deletion of addition made of Rs.30 lacs on account of seized documents which was an agreement to sell dated 19.12.2005 of land measuring 52 kanal 14 marla between Shri Roshan Lal Jindal and Smt.Shalley & Others for an agreed amount of Rs.16 lacs per acre alongwith receipt of cash advance of Rs.30 lacs. The assessee submitted that the same was on account of advance received on sale of land but since the assessee failed to give complete details of the transaction and produce documentary evidences to substantiate its contention ,the Assessing Officer made addition of the same.

18. During appellate proceedings before the Ld.CIT(A) the assessee submitted copies of the purchase deeds of the impugned land and submitted the source of the payment as being DD purchased from the regular Bank Account of the assessee and cash available with the assessee as evidenced from the cash flow statement submitted. The assessee further stated that the said deal had not matured and ultimately cash received in advance had been returned back in the same year. The assessee submitted that both the receipts and refund of the advance was incorporated in the cash flow statement. The Ld.CIT(Appeals) accepted the contentions of the assessee and deleted the addition made of Rs.30 lacs.

19. Before us the Ld. DR urged that the Ld.CIT(Appeals) had deleted both the above additions on the basis of

additional evidences without affording an opportunity to the Assessing Officer and in contravention of the provisions of Rule 46 of the Income Tax Rules. The Ld. DR urged that the issue be restored back to the Assessing Officer to examine additional evidences produced by the assessee.

20. The Ld. counsel for assessee did not object to the same.

21. Undeniably both the above additions have been deleted by the CIT(A) on the basis of the cash flow statement which was never produced before the AO and was furnished for the first time before the CIT(A). The cash flow statement clearly is an additional evidence the admittance of which is governed by Rule 46A. The Revenue has not challenged the admission of the additional evidence. However, sub clause 3 of Rule 46 clearly requires the CIT(A) to allow the AO a reasonable opportunity to examine the evidence or document before taking it into account. In view thereof, we consider it fit to restore both the issues back to the file of the Assessing Officer to examine the additional documents/evidences filed by the assessee with respect to both the grounds and thereafter adjudicate the issue in accordance with law. Needless to add that the assessee be given due opportunity in this regard.

In view of the above both the grounds 2 and 3 raised by the Revenue stand allowed for statistical purposes.

The appeal of the Revenue is partly allowed for statistical purposes.

22. We shall now take up assessee's appeal in ITA No.51/Chd/2014.

ITA No.51/Chd/2014(Assessee's appeal):

23. The grounds raised by the assessee are as under:

- “1. That the Worthy CIT (A) has also erred in dismissing the grounds of appeal pertaining to objection of assessee with regard to reference to the Special Auditor in terms of section 142 (2A).*
- 2. That the Worthy CIT (A) has erred in not considering that the conditions or reference to the special audit have not been fulfilled and since the assessee had not been maintaining any personal books of accounts, no complexity was there for the purpose of referring the case to the special audit and, as such, the assessment having been completed beyond the limitation time, the same deserves to be quashed.*
- 3. That the Worthy CIT(A) has erred in confirming the addition of deemed dividend U/s 2(22)(e) amounting to Rs.85,636/- (out of Rs.2,96,136) in respect of amount shown as alleged advance to the assessee in different Companies.*
- 4. That the Worthy CIT (A) has erred in confirming the addition of Rs. 6 lacs in respect of capital introduced by the assessee in M/s Heera Moti Agro Products as per para 9.3.3 of her order.*
- 5. That the CIT (A) has erred in confirming the addition of Rs.43,000/- on account of certain seized documents as per para 9.5.3 of her order.*
- 6. That the appellant craves leave to add or amend any grounds of appeal before the appeal is finally heard or disposed off.”*

24. Ground Nos.1, 2 and 3 raised by the assessee were not pressed before us and are, therefore, treated as dismissed. Ground No.6 being general in nature needs no adjudication.

25. Ground Nos.4 and 5 are being taken up together for adjudication since the pleading of the Ld. counsel for assessee vis-à-vis both the grounds was identical.

26. In ground No.4 the assessee has challenged the confirmation of addition of Rs.6 lacs in respect of capital introduced by the assessee in M/s Heera Moti Agro Products.

27. Brief facts relevant to the issue are that during the course of assessment proceedings it was found that the assessee had introduced Rs..6 lacs as fresh capital in the firm of M/s Heera Moti Agro Products. The assessee tried to explain the source of the same as Rs.1.5 lacs received from LIC, Rs.2.15 lacs out of withdrawals made from a firm M/s Heera Moti Agro Products and the balance Rs.2.35 lacs out of cash flow statement. The Assessing Officer not being satisfied with the submissions of the assessee made the addition of the entire amount of Rs.6 lacs holding that neither cash flow statement nor any documentary evidence was filed in support of the contention of the assessee.

28. Before the Ld.CIT(A), the assessee submitted the cash flow statement. The Ld.CIT(Appeals) found that the LIC received were not reflected in the same and the cash flow statement was without date and hence, the availability of funds and investment could not be properly comprehended therefrom. The Ld.CIT(Appeals), therefore, confirmed the addition made by the Assessing Officer.

29. In ground No.5 the assessee has contested the addition of Rs.43,000/- made on account of seized documents.

30. Brief facts relevant of the Act the same are that during the course of search pages 2, 26, 28 and 34 of Annexure A-14 Delta-1 were found and seized. The same was a note pad maintained by the assessee for day-to-day cash receipts and payments entered. As per page-34 of the said annexure cash received of Rs.43,000/- was reflected in the same. No reply explaining the nature of the same was filed by the assessee during assessment proceedings and, the Assessing Officer, therefore, added the entire amount to the income of the assessee.

31. Before the Ld.CIT(Appeals), the assessee submitted that the said sum represented regular withdrawals from the bank and which as per the assessee was duly reflected in the cash flow statement filed. The Ld.CIT(Appeals) rejected assessee's contention and upheld the addition so made.

32. Before us with respect to both the above grounds raised by the assessee, the only contention raised by the Ld. counsel for assessee was that the Ld.CIT(Appeals) had upheld the addition rejecting the cash flow statement submitted by the assessee while, on the other hand, on the basis of the very same cash flow statement it had deleted addition made which have been contested by the Revenue in its appeal in ITA No.110/Chd/2014. The Ld. counsel for assessee stated that since the Revenue has pleaded that the cash flow statement was accepted by the Ld.CIT(Appeals) without confronting it to the Assessing Officer, the same ought to be sent back to the Assessing Officer for

verification, in the interest of justice and drawing parity from the same, the issues in the present appeal also should be sent back to the Assessing Officer to decide after verifying the cash flow statement submitted by the assessee.

33. The Ld. DR did not object to the same.

34. We find merit in the contention of the Ld. counsel for assessee. Undeniably, during assessment proceedings the assessee had not been able to produce its cash flow statement to explain various transactions which were noticed by the Assessing Officer during the course of search which was undertaken at the assessee premises. The cash flow statement was subsequently submitted to the Ld.CIT(Appeals) during the course of hearing before him and on the basis of which the Ld.CIT(Appeals) upheld certain additions/disallowances and also deleted certain additions/disallowances. Further it is also a fact that the Ld.CIT(Appeals) did not confront the said cash flow statement to the Assessing Officer before passing his appellate order. Since in the Revenue's appeal in ITA No.110/Chd/2014 we have accepted the pleadings of the Ld. DR to restore the additions deleted by the Ld.CIT(Appeals) to the Assessing Officer for verification of the cash flow statement, we accept the pleadings of the Ld. counsel for assessee in the present appeal and restore the issues raised in the above two grounds also to the Assessing Officer to examine the same afresh in the

light of the additional evidences filed by the assessee and decide the same thereafter in accordance with law. Needless to add the assessee be given due opportunity of hearing in this regard. Ground Nos.4 and 5 raised by the assessee, therefore, stand allowed for statistical purposes.

35. In view of the above, the appeal of the assessee stands partly allowed for statistical purposes.

36. We shall now take up assessee's appeal in ITA No.53/Chd/2014.

ITA No.53/Chd/2014(Assessee's appeal):

37. The grounds raised by the assessee are as under:

- “1. That the Worthy CIT (A) has also erred in dismissing the grounds of appeal pertaining to objection of assessee with regard to reference to the Special Auditor in terms of section 142 (2A).*
- 2. That the Worthy CIT (A) has erred in not considering that the conditions or reference to the special audit have not been fulfilled and since the assessee had not been maintaining any personal books of accounts, no complexity was there for the purpose of referring the case to the special audit and, as such, the assessment having been completed beyond the limitation time, the same deserves to be quashed.*
- 3. That the Worthy CIT(A) has erred in confirming the addition of deemed dividend U/s 2(22)(e) amounting to Rs.1,50,401 in respect of amount shown as alleged advance to the assessee in different Companies.*
- 4. Notwithstanding the above said ground of appeal the Worthy CIT (A) has erred in not giving relief of Rs.43,150/- in respect of amount shown as advance in the books of M/s Mahaprabhu Ram Mulkh.*
- 5. That the Worthy CIT (A) has erred in confirming the addition of Rs.30,69,300/- on account of certain seized documents as per para 11.2.3 of her order.*
- 6. That the Worthy CIT (A) has erred in confirming the addition of Rs.77,78,633/- on account of certain seized documents as per para 11.3.3 of her order.*

7. *That the Worthy CIT (A) has erred in confirming the addition of Rs.5,00,000/- on account of certain seized documents as per para 11.4.3 of her order.*
8. *That the Worthy CIT (A) has erred in confirming the addition of Rs.33,11,300/- on account of certain seized documents as per para 11.5.3 of her order.*
9. *That the appellant craves leave to add or amend any grounds of appeal before the appeal is finally heard or disposed off."*

38. Ground Nos.1, 2 and 3 raised by the assessee were not pressed before us and are, therefore, treated as dismissed. Ground No.8 being general in nature requires no adjudication.

39. In Ground No.4-7 various additions as mentioned in the said grounds were made on the basis of seized documents which the assessee explained during the appellate proceedings through its cash flow statement and which was not accepted by the Ld.CIT(Appeals).

40. Before us the contention raised by the assessee was similar to that raised in its appeal in ITA No.51/Chd/2014 i.e. the CIT(A) has accepted the contents of the cash flow with regard to certain issues and rejected it on other issues while as per Rule 46A the cash flow should have been allowed to be first examined by the AO. Ld Counsel for the assessee requested restoring the matter back to the Assessing Officer for fresh adjudication after examining the cash flow statement.

41. Since the facts and circumstances in the present appeal are identical to that in ITA No.51/Chd/2014, the decision rendered therein will apply mutatis mutandis to

this appeal also following which we restore Ground No.4-7 of the present appeal to the file of the AO for fresh adjudication in accordance with law and in the light of the cash flow statement submitted by the assessee.

The appeal of the assessee is partly allowed for statistical purposes

42. In the result,

- i) The appeal of the Revenue in ITA No.110/Chd/2014 is partly allowed for statistical purposes.
- ii) The appeals of the assessee in ITA Nos.52 & 54/Chd/2014 are dismissed as withdrawn
- iii) The appeals of the assessee in ITA No.51 & 53/Chd/2014 are partly allowed for statistical purposes.

Order pronounced in the open court.

Sd/-

Sd/-

(DIVA SINGH)
JUDICIAL MEMBER

(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER

Dated : 14th September, 2017

Rati

Copy to:

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

Assistant Registrar,
ITAT, Chandigarh