

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B", HYDERABAD**

**BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER**

I.T.A. No. 2029/HYD/2017

Assessment Year: 2014-15

Nutan Malpani,
ADILABAD
[PAN: ALHPM8232G]

Vs Asst. Commissioner of
Income Tax,
Circle-1,
NIZAMABAD

(Appellant)

(Respondent)

For Assessee : Shri T.S. Ajai, AR
For Revenue : Smt. M. Narmada, DR

Date of Hearing : 24-10-2018
Date of Pronouncement : 09-11-2018

ORDER

PER S. RIFAUR RAHMAN, A.M. :

This appeal filed by the assessee is directed against the order of the Commissioner of Income Tax (Appeals)-5, Hyderabad, dated 30-10-2017, for the AY. 2014-15.

2. Brief facts of the case are that the assessee filed her return of income for the AY. 2014-15 on 30-10-2014, declaring total income of Rs. 16,65,230/-. The return was processed u/s. 143(1) of the Income Tax Act [Act]. Subsequently, the case was taken up for scrutiny under CASS and notice u/s. 143(2) of the Act was issued on 28-08-2015 and the same was

served on the assessee on 05-09-2015. The Assessing Officer noticed that the assessee has received loan/advance from M/s. Malpani Cottons Pvt. Ltd., Adilabad. The assessee is having 12.42% of the share holding in Malpani Cottons Pvt. Ltd., and the company is not a company in which public are substantially interested. Since Section 2(22)(e) of the Act will be attracted, assessee was asked to explain. In this regard, the assessee filed her objection, which is as below:

“I, Nutan Matpani, Proprietor of Sri Vinayaka Industries, Mukutban, Adilabad (hereinafter referred to as assessee) am engaged in the business of extraction and sale of cotton seed Oil. The raw material i.e. Cotton seed required for this purpose is purchased from M/s. Malpani Cottons Pvt. Ltd, Adilabad, in which company the assessee holds 12.42% of the shareholding. It is further to be noted that Malpani Cottons Pvt. Ltd, (hereinafter referred to as "Company") purchases cotton seed oil from the assessee. Therefore, both the assessee as well as the company has purchase as well sale transactions With each other. In other words, the assessee purchases cotton seed from the company, crushes the same for extracting cotton seed oil, which in turn is purchased by the company based on necessities of the trade.

Therefore, it is submitted that there is a business relationship between the assessee and the company, with regular business transactions being entered into between the parties. For this purpose, the parties maintain a running account, Wherein, all the transactions entered in the normal course of business, like purchases, sales and payments made on account thereof, are recorded. It can be seen from the copy of ledger account of the company maintained in the books of the assessee, that there are series of transactions, both purchase of cotton seed from and sale of cotton seed oil to the company and also payments made from time to time either against purchases made or as advance for purchases yet to be made from either party. The entries in the said account reflect the transactions between the parties carried on in the normal course of the business.

However, during the earlier hearings, the Assessing Officer, expressed the view that certain payments made by the company to the assessee during the course of business are in the nature of loan

or advance falling within the purview of the definition of "Deemed Dividend" per Section 2(22)(e) and therefore it was sought to bring such transactions to tax in the hands of the assessee.

In this connection, it is submitted that the parties are carrying on business with each other on a regular basis and the transactions entered into by them are nothing but pure business transactions as are generally entered into as per the established trade practices and norms: It is a well-known fact that it is a normal practice for entities dealing with each other to make payment for goods/services either before/after or on the purchase/furnishing of services based on the needs of the business and commercial expediency demanded by the circumstances and entire transactions by both the concerns inter se trading / business transactions and the same is evidenced by books of accounts and other records and the same is reflected in the returns filed before various authorities.

Section 34 of Evidence Act give a great degree of authenticity to the entries made in the regular books of accounts. This is a settled position by the Apex Court.

It is submitted that book results may not be disturbed by making additions on account of deemed dividend.

Coming to invoking the provisions of section 2(22)(e), it is submitted that the legislative intention was completely different. It was meant to counter the device to circumvent avoidance of payment of tax by advancing loan to directors and thereby decreasing the dividend. A perusal of the transaction would show that the transactions never partook the character of loan or advance between the company and its directors having specified share holding. That the transaction relates to purchase and sale is not in doubt. This is evident from the accounts of both parties as appearing in their respective books. This is the unalterable position. The transactions are straightforward, clear and shorn of any ambiguity. The same cannot be called a device more so a colorable device to invoke the deeming provisions.

It is well settled that business and commercial transactions do not fall within the ambit of section 2(22)(e). (318 ITR 476 Raj). CIT v. Nagindas M. Kapadia (1989) 177 ITR 393 (Bom). 'Loans or Advances', u/s 2(22)(e) can be applied to 'Loans' or 'Advances' simpliciter and not to those transactions carried out in course of business as such. If this purpose is kept in mind then, the word 'Advance' has to be read in conjunction with the word 'Loan'. Usually attributes of a loan are that it involves positive act of lending coupled with acceptance by the

other side of the money as loan: it generally carried an interest and there is an obligation of repayment. In the case of the assessee there is no positive act of lending. It is a business transaction reflected in books of accounts, supported by bills and vouchers. In such a situation, no presumption should be made by a strained interpretation of the section. It is also a settled rule of interpretation that Courts and authorities cannot legislate in the guise of interpretation. It is the faction of the legislature.

A deeming provision is required to be interpreted within its legitimate field. It is not permitted to create a fiction within a fiction. The provision creating an artificial income should not be given a liberal interpretation. Therefore a trading / business transaction cannot be equated with a loan or advance. It is also submitted that merely because, there is a credit or debit balance at a particular point of time in a current account, which is always bound to be there, would convert a business / trading transaction into a loan or advance.

In the present case, a perusal of the ledger account shows that the assessee made advance payments for purchase of cotton seed in certain instances and in some other instances the company made advance payments for the purchase of cotton seed oil. This in fact has led to a situation where the account of the company in the books of the assessee is not always in credit but also in considerable amount of debit during the year. It is clearly evident that the transactions in the account are running, mutual and solely for the purpose of giving effect to the business transacted between the parties. It is not the case that there are no business dealings between the parties and the assessee has simply obtained advances from the company.

The purpose of enacting Section 2(22)(e) is ensure that closely held companies do not resort to distribution of accumulated profits in the form of loans and advances with the intention of evading dividend distribution tax. If the intention of the assessee was to divert the accumulated profits in the guise of advance, the flow of funds would have been only from the company to the assessee and without any business expediency. However, this is not the situation in the present case. The flow of funds has been mutual and the sole purpose for which the funds were received and paid was to facilitate the business transactions carried on between the parties and as demanded by the business needs. The parties have never intended to siphon off the accumulated profits of the company by evading tax thereon. In such an event, the case does not attract the purpose for which section 2(22)(e) has been enacted.

Thus a running account maintained by two concerns even if they are related concerns does not fall within the purview of section 2(22)(e) of the Act as entries therein are in the normal course of the business which cannot be treated as loans/advances contemplated by Section 2(22)(e).

Reliance in this regard is also placed on the following Decisions:

1. The Honourable Delhi High Court in the case of CIT v. Raj Kumar (2009) 181 Taxmann 155 / 318 ITR 462, held that Trade advance which are in the nature of money transacted to give effect to a commercial transactions would not, in our view, fall within the ambit of the provisions of Section 2(22)(2) of the Act .

2. The Honourable Delhi High Court in the case of CIT v Ambassador Travels (P) Limited 318 ITR 376 held that It is quite clear that the assessee was a travel agency and the above two concerns that it had dealings with, that is, Mis Holiday Resort (P) Ltd. and M/s Ambassador Tours (India) (P) Ltd. were also in the tourism business. The assessee was involved in the booking of resorts for the customers of these companies and entered into normal business transactions as a part of its day-to-day business activities. The financial transactions cannot in any circumstances be treated as loans or advances received by the assessee from these two concerns.

3. The Honourable Madras High Court in the case of Commissioner of Income Tax vs. Shri Madurai Chettiyar Kartikeyan in Tax Case (Appeal) No.898 of 2013, in its decision dated 16.4.2014 while dealing with the issue of advance given by the closely held company to the assessee, held that going by the undisputed fact that the Revenue had not disputed the fact that the assessee had executed work for the company in the nature of construction of buildings and the said transaction being in the nature of a simple business transaction, we do not find any justifiable ground to bring the case of the assessee within the definition of deemed dividend under Section 2(22)(e) of the Income Tax Act, 1961.

4. In the case of Mr. Purushottam Das Mimani Vs Dy. Commissioner in ITA # IT(SS)A Nos.60-62/Kol/2011, ITAT, Kolkata in its decision dated 17.10.2014, while dealing with the issue of flow of funds between the appellant and the closely held company observed that "On perusal of the ledger account of the assessee in the books of M/s.Mima Flour Mills (P) Ltd. it is seen that on several dates there were shifting balances. On many occasions the balance was in favour of the assessee and on some other occasions the balance was

in favour of Ganesh Wheat Products (P) Ltd. It is thus evident that there were reciprocal demands between the parties and thus mutual in characteristic. The account so maintained in respect of such mutual transfer of amount by way of giving and taking financial assistance is, therefore, a current account and this current account is different from a loan account for the sole reason that, feature of mutuality is not present in a loan transaction”.

Having observed as above, the Hon. ITAT held that "It is pertinent' to note here that when dividends are declared by a company, it is solely the shareholders who benefit from the transaction. No benefits accrue to the company by way of dividend distribution. Thus, Section 2(22)(e) of the Act covers only such situations, where the shareholder alone benefits from the loan transaction, because if the company also benefits from the said transaction, it will take the character of a commercial transaction and hence will not qualify to be dividend. In the case of the assessee, by giving and taking financial assistance from each other, both the assessee and the company were benefited and such transactions between them were nothing but commercial transactions and dividend attributable to the shareholder is nothing to do with such business transaction. From the above discussions it can be said that sec, 2(22)(e) of the Act covers only those transactions which benefit the shareholder alone and results in no benefit to the company. On the other hand, if the transaction is mutual by which both sides are benefited, it is undoubtedly outside the purview of provisions of sec. 2(22)(e) of the Act"

5. In the case of DCIT Vs M/s Vippy industries Ltd in ITA# 140/Ind/2013, ITAT, Indore in its decision dated 19.6.2013 has held that Trade advances which are in the nature of money transacted to give effect to a commercial transaction; would not fall within the ambit of provision of section 2(22)(e) of the Act.

It can be seen from the above judicial pronouncements that several high courts and Income Tax Tribunals have concurred and upheld the view that trade advances made for the purpose of effecting business and commercial transactions are outside the purview of deeming provisions of Section 2(22)(e). The law laid down by the above mentioned pronouncements has been followed by several judicial authorities, from time to time, in a spate of decisions rendered on similar issues.

It Would not be out of place to mention that the Jurisdiction Hyderabad Tribunal has endorsed and upheld the same view and the same is binding on the present case.

Accordingly, the provisions of Section 2(22)(e) are not attracted in the case of the assessee.

In the light of the above, it is humbly requested that the proposal to treat the transaction under the head of deemed dividend may kindly be dropped”.

3. Assessing Officer did not accept the submissions of the assessee and observed as below:

“3.2.1. The assessee is having 12.42% of the shareholding in M/s. Malpani Cottons Pvt. Ltd., Adilabad and the company is not being a company in which the public are substantially interested. The assessee is a registered shareholder.

3.2.2. M/s. Malpani Cottons Pvt. Ltd., Adilabad has accumulated profit of Rs. 2,84,32,901/- as on 31.03.2014”.

3.1. Further he observed that the assessee is a proprietor in Sri Vinayaka Industries, Mukutban, Adilabad. Assessee sold cotton seed oil to Malpani Cottons Pvt. Ltd., and Malpani Cottons Pvt. Ltd., sold cotton seed to the assessee. The company, Malpani Cottons Pvt. Ltd., maintained two books of account separately for the above transactions. Assessing Officer felt that to determine the exact position of credit/debit balance and to ascertain whether any loan or advance is paid. Accordingly, he consolidated both the accounts. Assessing Officer further observed that the above consolidated accounts maintained by the assessee are not only for the business transaction but also for loan transactions between them. He did not agree with the contention of the assessee that the transactions with the company are of business nature and the advances received are purely business advances is not proper

and correct. Accordingly, he separated the business transaction and advances and made an addition as 'deemed dividend'.

4. Aggrieved with the above order, assessee preferred an appeal before the CIT(A) in turn, Ld.CIT(A) has confirmed the findings of the Assessing Officer. Aggrieved with the same, assessee preferred an appeal before us, raising five grounds of appeal. Out of those five grounds of appeal, only Ground No. 1 is the effective ground and all the remaining grounds are argumentative, which needs no adjudication.

"1. The learned CIT (Appeals) has erred in law and in facts and circumstances of the case in confirming the addition of RS.2,62,26,581 as deemed dividend u/s 2(22)(e) without proper appreciation of the facts and circumstances of the case and the submissions made by the appellant.

2. The learned CIT (Appeals) having noted in para 5.3 of the appellate order that, the payments for purchases made on 26.04.2013 of Rs. 35,00,000, on 29.04.2013 of Rs. 26,82,951, on 23.05.2013 of Rs. 23,02,652, on 21.12.2013 of RS. 25,74,200, on 02.01.2014 of RS. 11,87,375, on 09.01.2014 of Rs. 23,46,759, on 27.01.2014 of Rs. 12,12,162 and on 30.01.2014 of Rs. 11,86,989, aggregating to Rs. 1,69,93,088 is towards purchases on a bill to bill basis, has completely erred in treating the same as loans and including them in the computation of deemed dividend vide para no. 6.5, chart at page no. 24 of the appellate order. The learned CIT (Appeals) ought to have noted that the payments made towards specific purchase transactions, after the purchases are completed and towards specific purchase bills, as listed above, are not at all in the nature of "loans or advances" and hence the provisions of deemed dividend u/s 2(22)(e) are not at all attracted to these payments.

3. The learned CIT(Appeals) ought to have noted that the payment on 26.11.2013 of Rs. 40,00,000 and payment on 31.01.2014 of RS. 75,00,000 are not loans by the company to the assessee, on the contrary are repayment of loans earlier given by the assessee to the

company as can be seen from the chart at page no. 17 of the appellate order, and hence the provisions of deemed dividend u/s 2(22)(e) are not at all attracted to these payments.

4. The learned CIT (Appeals) has failed to take Into account the grounds of appeal filed by the appellate namely that even if the payments between the parties are treated as non-business and as loans, the advances to the extent of RS. 2,70,00,000 were made first by the appellate to the company and then returned back by the company and hence the provisions of deemed dividend u/s 2(22)(e) are not at all attracted to these payments.

5. The learned CIT (Appeals) ought to have appreciated the contention of the assessee that both the assessee and the company have continuous business transactions relating to cotton business being carried out by both of them, in the process of which various amounts are received or paid as per the business requirements, all of which are trade advances in the nature of commercial transactions which would not fall within the ambit of the word 'advance' in section 2(22)(e) of the Act and hence are not to be treated as deemed dividend as instructed by the CBDT vide Circular No. 19/2017 dated 12.06.2017, and as decided by the various cases law cited and relied by the CBDT in the above said Circular”.

4.1. The main grievance of the assessee is that the advances received by the assessee is relating to business connection with the company, Malpani Cottons Pvt. Ltd., and not a separate loan or advance transaction.

5. Ld.AR submitted that the assessee is having regular business connection in her individual capacity and buying cotton seeds from the company, Malpani Cottons Pvt. Ltd., and sells cotton seed oil to them. This aspect was also accepted by the Ld.AO and there is no dispute in the regular business of cotton seeds in which it is normal that advances are received and materials are dispatched subsequently. In this regard, he submitted a chart in the form of Paper Book which is placed at

Page No. 1 of the Paper Book. As per which he has separated the purchase and payment relating to such purchases, sales and relevant receipts of sales by the assessee. The other payments which are not relating to purchase or sales are explained in the above chart. Ld.AR brought to our notice that the payments received by the assessee are subsequent to payment of same amount by the company. He submitted that it cannot be treated as a loan or advance, simply because the assessee has paid the advance to the company and received subsequently. It will not fall in the category of loans or advances, which will attract the provisions of deemed dividend.

6. Ld.DR relied on the orders of the Assessing Officer and submitted that each entry in the books of account should be substantiated. If it is in the nature of 'loan' or 'advance', it has to be treated in the same way.

7. In the rejoinder, Ld.AR submitted that receiving of advance is normal in cotton seeds business and it is in the nature of 'trade advance'.

8. Considered the rival submissions and material on record. We noticed that there is no dispute with regard to business connection enjoyed by the assessee and the company, Malpani Cottons Pvt. Ltd. During this year, assessee has purchased and sold materials to Malpani Seeds. Further it is noticed that assessee has paid and received certain amounts which are given below:

Payments other than for purchase		Amount received other than for sale	
Date	Amount Rs.	Date	Amount Rs.
05.04.2013	10,301	06.04.2013	14,09,450
23.04.2013	1,535	25.07.2013	65,00,000
26.04.2013	4,390	14.08.2013	45,00,000
29.04.2013	38,340	29.08.2013	1,00,00,000
06.05.2013	13,484	10.09.2013	50,00,000
17.05.2013	12,825	19.09.2013	25,000
16.07.2013	1,213	26.09.2013	10,00,000
23.07.2013	750	31.01.2014	1,33,121
31.08.2013	65,00,000		
13.09.2013	25,000		
04.10.2013	13,483		
17.10.2013	16,800		
26.10.2013	20,000		
22.11.2013	60,00,000		
26.11.2013	40,00,000		
18.01.2014	30,00,000		
31.01.2014	75,00,000		

8.1. From the above chart it is noticed that the bulk amounts which were paid and received by the assessee are Rs. 65 Lakhs, Rs. 45 Lakhs, Rs. 1 Crore, Rs. 50 Lakhs and Rs. 10 Lakhs. From the above table, it clearly indicates that the assessee has paid those advances initially and received back the same subsequently. Further, we also noticed that the consolidated ledger accounts compiled by the Assessing Officer which has opening debit balance of Rs. 1,05,15,883/- and closing balance of Rs. 85,56,232/-, as noticed from the order of Ld.CIT(A) at Page No. 21. However, we noticed that when the assessee is having a regular business connection with the company and in that process, assessee receives or pays certain advances, they can be considered as 'trade advances' and not otherwise. In the given case, certain transactions which were treated by the Assessing Officer as loans and advances as highlighted by the Ld.AR, the initial payments were made by

the assessee and subsequently the company has repaid the same. To attract the deemed dividend provision, it should be otherwise around. Further, we noticed that the opening balance stood as on 01-04-2003 was Rs.1,05,15,883/- as debit balance which means assessee owes to the company and at the end of the year, closing balance stood at Rs. 85,56,232/- debit balance which means still assessee owes to the company. while comparing opening and closing balances, it is noticed that about Rs. 20 Lakhs was reduced that means assessee has repaid Rs. 20 Lakhs to the company. It clearly shows that assessee has not taken any fresh loan from the company during the current assessment year.

8.2. On the other hand, to invoke Section 2(22)(e) of the Act during this year, assessee should have received loans or advances and pays the same subsequently. In the given case, no such things were noticed. Therefore, in our considered view, assessee is having business connection and in that process, assessee may have received certain advances which can be treated as 'trade advances'. Therefore, we cannot cherry pick certain transactions and term them as 'loans and advances' in order to invoke the provisions of Section 2(22)(e) of the Act. Therefore, the ground raised by assessee is allowed.

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

Order pronounced in the open court on 9th November, 2018

Sd/-
(P. MADHAVI DEVI)
JUDICIAL MEMBER

Hyderabad, Dated 9th November, 2018

TNMM

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy to :

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- 2. The Asst. Commissioner of Income Tax, Circle-1, Nizamabad.*
- 3. CIT(Appeals)-5, Hyderabad.*
- 4. Pr.CIT-5, Hyderabad.*
- 5. D.R. ITAT, Hyderabad.*
- 6. Guard File.*