

Nulon India Ltd. Vs. Ito

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SooperKanoon Citation : sooperkanoon.com/75157

Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Aug-25-2006

Judge : N Karhail, D R Shah

Appellant : Nulon India Ltd.

Respondent : ito

Judgement :

1. This appeal by assessee arises out of the order of Learned Commissioner (Appeals)-XVI, New Delhi, dated 22-12-2006.
2. In the ground raised the assessee challenges the validity of the assessment under Section 143(3), addition of Rs. 60,22,000 being deemed dividend under Section 2(22)(e) of the Income Tax Act, disallowance of Rs. 2,000 being treated as donation and disallowance of Rs. 1,35,595 being expenses incurred through credit card.
3. In this case the appellant filed return of income on 31-10-2001. The assessing officer issued notice dated 29-10-2002 under Section 143(2).

The same was send through speed post on 30-10-2002 at 11.50 A.M. The notice was issued at the address mentioned in the return of income being Nulon House, 10th Mile Stone, Mathura Road, New Delhi. The notice was redirected at A-74, Sector-5, NOIDA. The notice was served at the redirected address on 6th November, 2002. The assessing officer as well as Learned Commissioner

(Appeals) held that the notice was issued at the address mentioned in the return and the change in address was not notified by the assessee. Thus there is valid service of notice within the time prescribed and hence assessment made pursuant to such notice is also valid.

4. The Learned Counsel for assessee Shri K.R. Manjani filed before us the copy of notice under Section 143(2) dated 29-10-2002 and also the envelope in which the same was sent through speed post. The service is affected on 6-11-2002 as per the postal authorities stamp. Since proviso to Section 143(2) requires that the notice shall be served before the expiry of 12 months from the end of the month in which the, return is furnished, service of notice on 6-11-2002 is beyond limitation period prescribed in the proviso and hence any action taken pursuant to such notice is liable to be set aside. For this proposition he relied upon the decision of Delhi High Court in CIT v. Lunar Diamonds Ltd. .

5. Learned D.R. Shri L.K.S. Dahiya submitted that the notice was sent by speed post on 30-10-2002 at the address mentioned by the assessee in the return of income. After receipt of such notice, somebody from the office of assessee has redirected the same to new address of the assessee. Thus the redirection was at the instance of the assessee. In such a circumstance the notice is served at the first instance on the assessee at the address mentioned in the return of income. Thus the notice was served on 31-10-2002 , itself which is within the limitation period. Thus the assessment is validly made. He also submitted that as per the decision of Income Tax Appellate Tribunal in ITA No.4423/Delhi/2003, dated 1-12-2004 in the case of Shri Balaji Agro Industries v. Addl. CIT. When the notice is sent through speed post which is received by the assessee the presumption is that the notice is served in the local area next day. Thus it has to be held that the notice was served within limitation period prescribed in proviso to Section 143(2).

6. We have considered the relevant fact, argument advanced and the case laws cited. When the notice is sent by speed post the postal authorities are the agent of assessing officer. Such view has been taken by Hon'ble Delhi High Court in the case of Lunar Diamonds Ltd. (supra). The proviso requires the service of notice and not merely issue of notice. Similar view has been adopted by the Special

Bench of the Tribunal in the case of *Raj Kumar Chawla v. ITO* (2005) 94 ITD 1 (Delhi). However, in the present case it is seen that the notice was issued at the address mentioned in the return of income. The notice was issued on 30-10-2002 at 11.50 A.M. The same was received at the end of assessee at the address mentioned in the return. Thereafter the notice was redirected at the instance of noticee. In such a situation, the postal authorities acted as an agent of the noticee i.e., the assessee and not the assessing officer. The Tribunal in the case of *Shri Balaji Agro Industries* (supra) held thus- That takes us to the other question as to whether there was a valid service on Shri Satish Pahwa, partner of the assessee-firm. As earlier noted, the assessee admits service of this notice, but says that it was served only on 3-11-2001, a claim which is not supported by any documentary evidence, such as the envelope containing the notice or any certificate issued by the postal authorities or any other proof. Be that as it may, the claim of the department is two fold. It is first claimed that under Section 114(e) of the Evidence Act, it is presumed that official acts have been done regularly. It is, therefore, contended that it must be presumed that the notice was served on 31-10-2001, on the partner. We are unable to appreciate how the provisions of the Evidence Act would come to the rescue of the department. Section 114(e) of the Evidence Act merely says that official acts done by Government servants are presumed to have been done regularly. This only means that in the present case there is a presumption that the notice was issued on 30-10-2001, the date on which it is claimed to have been issued and the date which it bears. The fact that the notice was sent by speed post is evidenced by the receipt issued by the postal authorities of the Head Post Office, I.P. Marg, Delhi (page 157 of the paper book). The presumption to be drawn from the receipt is that the postal authorities actually received the notice for onward transmission to the assessee and transmitted the same in the normal course of their duties. But this section of the Evidence Act does not enable a further presumption to be drawn that the notice was actually served on Shri Satish Pahwa on 31-10-2001 or earlier. The other contention is apparently based on Section 27 of the General Clauses Act, though the section was not specifically mentioned in the course of the argument. What was argued was that when the notice was handed over to the postal authorities on 30-10-2001, it must be presumed that it was significant to note that though the assessee claims

that the notice was received by post only on 3-11-2001, there is no documentary evidence to establish the same. No affidavit has also been filed to that effect, though an affidavit has been filed by the assessee denying that Shiv Kumar was authorized to receive any notice from the income-tax department. Therefore, there is no clinching proof from the assessee's side for service of notice on 3-11-2001. Since there is proof for sending the notice by speed post on 30-10-2001, the presumption that it would have been delivered to the assessee in the ordinary course of speed post on 31-10-2001 would operate and accordingly we hold that the notice must be presumed to have been served on the assessee on 31-10-2001. This part of the argument of the department succeeds. The result is that though the copy of the notice served on the Accountant on 31-10-2001 does not amount to proper service of the notice, the notice sent by speed post is presumed to have been served on Shri Satish Pahwa on 31-10-2001 under Section 282(i) read with Section 27 of the General Clauses Act. Therefore, there is no question of the assessment being struck down as null and void. The first ground is decided against the assessee." 7. In view of the discussion above and in view of the decision of this Tribunal in the case of Shri Balaji Agro Industries (supra) it can be held that the notice was served on the assessee on 31-10-2002 and thereafter it was redirected at the behest of the assessee to a new address which was served on 6-11-2002. However, since the notice originally sent was received by the assessee before it was redirected on 31-10-2002. The notice is within the limitation period and hence the assessment made pursuant to such notice is valid assessment.

8. The next ground of appeal relates to addition in respect of deemed dividend under Section 2(22)(e) of the Act. The assessee received an advance of Rs. 1,00,000 from M/s. Nulon Electronics Ltd. The assessee in earlier year received a sum of Rs. 59,22,000 as share application money. Out of the share application money received from M/s. Nulon Global Ltd., a sum of Rs. 59,12,000 was transferred as unsecured loan during the financial year relevant to the assessment year under appeal i.e., assessment year 2001-02. The assessing officer treated both the sum received as deemed dividend since the Payer Companies have sufficient accumulated profits. Learned Commissioner (Appeals) examined the list of shareholders of all the 3 Companies i.e., M/s. Nulon India Ltd. (Appellant), M/s.

Nulon Global Ltd. and Nulon Electronics Ltd. He found that one Shri S.D. Goliyan had a 37 per cent share in Nulon India Ltd., 17.68 per cent share in Nulon Global Ltd. and 10 per cent share in Nulon Electronics Ltd. Learned Commissioner (Appeals) on page 9 of his order concluded as is under:- 'I am fully in agreement with the contentions of the assessing officer reproduced above. The loan received by the assessee-company amounting to Rs. 60,22,000 has rightly been treated as deemed dividend under Section 2(22)(e). The shareholders of the company giving the loan have substantial interest in the company receiving the loan. They are related to each other and forming a close group of common interest. The amount thus received has been paid out of the accumulated profit of the two donor companies and is being used by the recipient in the normal business activity of the company. The statute has indicated exceptions to Section 2(22)(e). However, the instant case does not get covered by any of those. The fact that the amount is still payable is in no way relevant with regard to the application of Section 2(22)(e). The findings of the Hon'ble Supreme Court in case of Smt. Taru Lata Shyam v. CIT (1997) 108 ITR 345 (SC) are fully applicable in this case too. The addition on this account therefore, stands fully confirmed." 9. Learned Counsel for assessee Shri Manjani submitted that assessee is neither a shareholder in M/s. Nulon Global Ltd. nor shareholder in M/s.

Nulon Electronics Ltd. The sum of Rs. 59,12,000 was received in earlier year i.e., financial year 2000-01 towards share application money. The amount was not received as loan or advance. Though in the subsequent year the sum was treated as unsecured loan, it is by way of transfer entry and no loan is received during the financial year relevant to assessment year under appeal. The loan is not given to any other person at the behest of the assessee-company. Thus the provision of Section 2(22)(e) are not attracted. He also relied upon the decision of Madura Coats (P.) Ltd., In re (2005) 274 ITR 6091 (AAR - New Delhi). Learned D.R. on the other hand strongly relied upon appellant order. He submitted that if the amount was received in earlier year as share application money, but if the nature change is in subsequent year, to be treated as loan or advance the same has to be treated as advance during the year. Due to change of nature during the year the, advance is to be treated as made during the year. For this proposition he relied upon the decision of Supreme Court in CIT v. Karam Chand Thapar .

10. We have considered the relevant fact, argument advanced and the case was cited. The word 'dividend' is define in Section 2(22) of the Act. As per Section 2(22) dividend includes (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) (made after 31 st 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; but "dividend" does not include- (i) a distribution made in accordance with Sub-clause (c) or subclause (d) in respect of any share issued for full cash consideration, where the holder of the share is not entitled in the event of liquidation to participate in the surplus assets; (ia) a distribution made in accordance with Sub-clause (c) or Sub-clause (d) insofar as such distribution is attributable to the capitalized profits of the company representing bonus shares allotted to its equity shareholders after 31-3-1964 (and before 1st day of April, 1965;) (ii) any advance or loan made to a shareholder (or the said concern) by a company in the ordinary course of its business, where the lending of money is a substantial part of the business of the company; (iii) any dividend paid by a company which is set off by the company against the whole or any part of any sum previously paid by it and treated as a dividend within the meaning of Sub-clause (e), to the extent to which it so set off; (iv) any payment made by a company on purchase of its own shares from a shareholder in accordance with the provisions of Section 77A of the Companies Act, 1956 (1 of 1956); (v) any distribution of shares pursuant to a demerger by the resulting company to the shareholders of the dermerged company (whether or not there is a reduction of capital in the dermerged company).

1.-The expression "accumulated profits", wherever it occurs in this clause, shall not include capital gains arising before 1-4-1946, or after 31-3-1948, and before 1-4-1956.

Explanation 2.-The expression "accumulated profits" in sub-clauses (a), (b), (d) and (e), shall include all profits of the company up to the date of distribution or payment referred to in those sub-clauses, and in Sub-clause (c) shall include all profits of the company up to the date of liquidation, (but shall not, where the liquidation is consequent on the compulsory acquisition of its undertaking by the Government or a corporation owned or controlled by the Government under any law for the time being in force include any profits of the company prior to three successive previous years immediately preceding the previous year in which such acquisition took place.) (a) "concern" means a Hindu undivided family, or a firm or an association of persons or a body of individuals or a company; (b) a person shall be deemed to have a substantial interest in a concern, other than a company, if he is, at any time during the previous year, beneficially entitled to not less than twenty per cent of the income of such concern)" 11. Reading the aforesaid provision it is clear that as deemed dividend the amount can be considered if the payment is by way of advance or loan.

To a shareholder, being a person who is beneficial owner of shares holding not less than 10 per cent of voting rights.

-Or to any concern in which such shareholder is a member or a partner and in which he has substantial interest: - Or any payment by any such company on behalf, or for the individual benefit, of shareholder.

12. In the present case it is seen that the appellant is not a shareholder in any of the companies M/s. Nulon Global Ltd. or Nulon Electronics Ltd. The loan has been given to the appellant company. The loan is not given to any concern in which the assessee as a member or partner having substantial interest. The loan is not given to the appellant company for the benefit of any shareholder. The amount is received by the appellant company itself which is not a shareholder of any of the Payer Companies. The holding of Shri S.D. Goliyan in the appellant company to the extent of 37.5 per cent or is holding of 17.68 per cent and 8.13 per cent in Nulon Global Ltd. and Nulon Electronics Ltd. respectively will neither after the situation nor such factor will bring the payment by way of advance to the appellant company as deemed dividend under Section 2(22)(e). Since the appellant is not a

shareholder holding any share in the Payer Companies the provision of Section 2(22)(e) are not attracted. The payment is not given to any other concern or for the benefit of any shareholder. Thus the provision of Section 2(22)(e) are not attracted. We accordingly delete the addition of Rs. 60,22,000 made in this regard.

13. The next ground of appeal is against disallowance of Rs. 2,000 in respect of donations.. On careful consideration of appellant order we do not find any infirmity in the same.

14. The next ground of appeal is against disallowance of the sum of Rs. 1,35,595. The Learned Commissioner (Appeals) after considering the arguments as well as the assessment order concluded as under: In the remand report the assessing officer has mentioned that these expenses were made by the directors for hotel stays bills and most of the expenses appeared to be of personal nature. The appellant company vide their letter dated 9-11-2004 contended that all the directors have spacious residences in Delhi and the hotel bills were for outside clients. The expenses related to purchase of gift items have also been scrutinized and found to be totally for personal items as is clear from the "domestic transaction" details of the credit cards used. Even the hotel charges include late payment charges and other small amounts the appellant has not been able to conclusively justify this expense as being wholly for business purposes. The addition made by the assessing officer on this issue stands confirmed.

15. Learned Counsel for assessee reiterated the arguments placed before Learned Commissioner (Appeals). Alternatively it was submitted that the disallowance is on a higher side and may be reduced considerably Learned DR. on the other hand relied upon appellant order.

16. On careful consideration of relevant fact we do not find any infirmity in the order of Learned Commissioner (Appeals). Since the appellant failed to prove that the expenses are incurred wholly and exclusively for the purpose of business, the disallowance stands confirmed.