

ito Vs. Gurdip Singh

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Sep-21-2007

Judge : P Parashar, D R Shah

Appellant : ito

Respondent : Gurdip Singh

Judgement :

1. These cross appeals by revenue as well as by the assessee are directed against the order of Commissioner (Appeals), XXVI, New Delhi, dated 9-7-2004.

2. The assessee is an individual deriving income by way of salary from various companies in which he is a Director. He also receives income from house property, income from business in the form of interest from partnership firm and income from other sources. During the year the assessee has also declared long-term capital loss on sale of house property.

3. We firstly take up the appeal of the revenue. The first ground of appeal is against the deletion of addition of Rs. 60,000 on account of conveyance expenses.

3.1 The assessee declared salary from M/s. Panchsheel Properties Pvt.

Ltd. of a sum of Rs. 1,80,000. In the salary certificate issued by the company a sum of Rs. 2,40,000 was stated to be paid to the assessee as remuneration. Tax was also deducted at source on such sum of Rs. 2,40,000. When the assessee was asked to explain the discrepancy, the assessee submitted that the balance

sum of Rs. 60,000 is towards reimbursement of conveyance expenses. The sum of Rs. 60,000 is not chargeable to tax and hence not offered. The assessing officer found that the contention is not correct. In one of the letter dated 15-12-2003, the assessee has submitted that the cars are owned by various companies and all the maintenance and running expenses are borne by the company. The assessing officer concluded that when the expenses of running and maintenance of cars are borne by the company, there is no question of reimbursement of conveyance expenses. The notes on drawing do not say about incurring expenses of conveyance.

Before learned Commissioner (Appeals) it was contended and a revised certificated was issued by the company wherein Rs. 1,80,000 is shown as Director's remuneration and Rs. 60,000 as reimbursement of conveyance expenses. The claim was made under Section 37(1) of the Act. Learned Commissioner (Appeals) held that since as per certificate the sum of Rs. 60,000 is received by way of reimbursement of conveyance expenses, the addition is to be deleted.

Learned Departmental Representative, Mrs. Y.S. Kakkar submitted that as per the salary certificated issued by the company M/s. Panchsheel Properties Pvt. Ltd., the sum was treated as part of salary and accordingly included in the salary certificate also. If the amount was paid by way of reimbursement of conveyance expenses the same cannot be part of the salary certificate. The revised certificate was obtained, as the assessee himself is the Director of the company in which he holds substantial D interest. Thus, subsequent certificate has no value. If the amount was paid by way of reimbursement, tax would not have been deducted therefrom in the form of tax on salaries. If the amount was paid in the form of conveyance expenses, the same could have been claimed as exempt under Section 10(14), provided the assessee files evidence in support of such claim. Withdrawal by the assessee do not support that such expenses has been incurred. The assessee is claiming the salary income as chargeable under Section 15 of the Act.

Thus, only those amounts, which are referred in Section 16, can be allowed as deduction and Section 37(1) cannot be applied for allowing such expenses as deduction.

Learned Counsel for the assessee on the other hand sought to rely upon appellate order.

4. We have considered rival submission. The salary certificate originally filed shows that the sum of Rs. 60,000 was paid in the form of salary only and not by way of reimbursement of conveyance expenses.

If it was really so, the same will never form part of salary. As rightly contended by learned Departmental Representative the subsequent certificate is self-explanatory document and is not borne out from record that the amount of Rs. 60,000 was paid in the form of reimbursement of conveyance expenses. If the amount was paid in the form of conveyance allowance, the same will firstly form part of taxable income and only that amount which can be exempted under Section 10(14) can be allowed as deduction. However for claiming such deduction under Section 10(14), the onus lies on the assessee to prove that such expenses were incurred only in the course of employment. The patterns of withdrawal do not show that the conveyance expenses were incurred by the assessee. The amount cannot be allowed under Section 37(1), as deduction under Section 37(1) can be granted only when the income is chargeable under Section 28 of the Act. In computing income the head 'Salaries' only those deductions as narrated in Section 16 can be allowed. Thus, learned Commissioner (Appeals) was in error while allowing deduction of Rs. 60,000 under Section 37(1) of the Act. Thus, the disallowance of Rs. 60,000 is to be upheld.⁵ The next ground on appeal by the revenue is against the deletion of addition of Rs. 50,000 on account of house-tax, which was claimed as deduction on accrual basis but was actually paid by the person, who purchased the said house.

5.1 Under the head 'Income from house property' the assessee claimed payment of Rs. 3,50,000 as deduction on account of property tax against rent from property being 1/2 portion of 35-B, Pusa Road, New Delhi. The assessee declared rental income of Rs. 4,84,500. The amount of Rs. 3 lakhs was found paid by the

assessee and hence allowed as such. However, another sum of Rs. 50,000 was paid by Smt. Sunita Oberoi/Shri Sunil Oberoi who have purchased this property. These amounts were not paid by the assessee but by the aforesaid two purchasers. It was contended by the assessee that since the property was agreed to be sold by the assessee and till the date of sale the liability of property tax rest with the assessee, the amount was claimed as expenses against property income. The assessing officer held that such contention is not borne out from records. The amount is not paid by the assessee and hence not allowable under Section 23 of the Act. Learned Commissioner (Appeals) held that since property tax is payable to the seller till the date of sale and since the claim relates to the period which are agreed up to the date of sale is allowable as such.

5.2 Learned Departmental Representative submitted that the amount in question was not paid by the assessee. On the contrary the tax was paid by the new purchaser of the property. There is no material on record to suggest that the sale consideration in respect of the property also included the portion of tax. There is no material on record to suggest that the assessee has separately paid the amount of tax to the new purchasers. Deduction under Section 23 is allowable provided the property tax is actually paid during the year. Since the amount has not been paid by the assessee, the deduction is not permissible. Learned Counsel for the assessee on the other hand submitted that the assessee has obligation to reimburse the tax to the purchaser of the property, which has been paid and hence allowable under Section 23(1) of the Act.

6. We have considered rival submission. While computing annual value under Section 23 the tax levied by local authorities in respect of property is to be deducted. However, the same is deductible provided the same is paid by the owner thereof. The owner of the property has not paid the property tax. There is no material on record to suggest that the assessee has subsequently paid the amount to the buyer of the property. Accordingly the assessing officer was justified in disallowing the sum of Rs. 50,000. The Commissioner is therefore in error in deleting the disallowance of Rs. 50,000. The disallowance of Rs. 50,000 is restored.

7. The next ground of appeal is against deletion of disallowance of Rs. 94,500 on account of interest claimed under Section 24 disallowed by the assessing officer holding that the loans raised were not proved to have been utilized for acquiring/constructing the house property.

7.1 The deduction of Rs. 94,500 is claimed on account of interest on loans. The assessee submitted details of interest payable to the persons who happened to be relatives of the assessee. However, the details regarding amount of loan taken, date of loan, rate of interest, confirmation from creditors etc. was not filed. The assessee was therefore asked to furnish necessary evidence in this regard. The show-cause notice was also issued as to why the amount be not disallowed in the absence of any proof for the same and nexus regarding utilization of borrowed funds for acquisition of the property. The assessee filed income computation statement of Smt. Kamlesh Kumari and Mrs. Neeraja Ghura to whom interest have been paid.

The assessing officer held that deduction under Section 24(1)(vi) can be allowed provided, the interest is payable on the amount borrowed and which is utilized for acquiring/constructing/repairing the property, the income from which is assessable under Section 23 of the Act. Since the assessee has not produced material to suggest that the amount which was borrowed, was utilized for acquisition/constructing of property, the deduction under Section 24(1)(vi) is not allowable. Learned Commissioner (Appeals) held that most of the loans are old credits which have been accepted as genuine in earlier years and there is no additional amount borrowed during the year. Hence the basis for making the addition is not sustainable. The assessee had taken the loan in the previous years to purchase properties which is his business and hence interest is to be allowed under Section 24(1)(vi).

7.2 Learned Departmental Representative sought to rely upon assessment order, whereas learned Counsel for the assessee sought to rely upon appellate order.

8. We have considered rival submissions. Learned Counsel for the assessee failed to file before us any document, which suggest that the amount borrowed in earlier year was utilized for purchase/ acquisition of property income from which is offered

under Section 23 of the Act.

He also failed to file before us any document that such amount was allowed as deduction in earlier years. No nexus is established between borrowal of loans and utilization of same for the purpose of acquiring/constructing the house property. In the circumstances deduction under Section 24(1)(vi) is not allowable. The disallowance of Rs. 94,500 is accordingly upheld. The next ground of appeal is against deletion of addition of capital gain of Rs. 52,642 which was determined on the ground that additional cost of Rs. 1.7 lakhs claimed as deduction is not proved.

9.1 In the computation of income, the assessee declared Rs. 1,177 as long-term capital gain on sale of share in property at 35-B, Pusa Road, New Delhi. The assessee holds 1/4th share in the said property. The said property was purchased for a sum of Rs. 8,50,540 in the financial year 1991. The assessee sold his share for Rs. 19,50,000. While computing capital gain the assessee claimed to have spend a sum of Rs. 1,70,000 on construction/ renovation of the property sold. The assessee filed a bill of Rs. 1,70,000 issued by one Shri Sat Prakash Sharma. It was issued on a plain paper, which mentioned that some additions /alterations were made in the nature of civil and sanitary and parking area. In order to verify the genuineness of transaction summons were issued in the name of Shri Sat Prakash Sharma. In response Shri Nikhil Sharma son of Shri Sat Prakash contended and his statement was recorded on oath. In his statement Shri Nikhil Sharma admitted that prior to the death of his father on 12-7-2007 he used to work with him for a period of over 4 years. Shri Sat Prakash was stated to be drawing salary from M/s. Prakash Kumar and Darshan Kaur one of the sister concern of the assessee. On the genuineness of the bill Shri Nikhil Sharma submitted that the payment of Rs. 1,70,000 has not been received till date. He also admitted that the signature mentioned in the bill is not of his father. The Statement of Nikhil Sharma was put up to the assessee. The assessee was unable to prove to the contrary. The assessing officer therefore did not allow cost of property to the extent of Rs. 1,70,000 as claimed by the assessee.

9.2 Learned Commissioner (Appeals) held that since the assessee had produced the vouchers for expenditure, the assessing officer should have allowed the same.

On the basis of statement of Shri Nikhil Sharma the amount cannot be disallowed as he was not aware of the business transaction of his father. He accordingly deleted the addition made in this regard.

9.3 Learned Departmental Representative Smt. Y.S. Kakkar submitted that an expenditure is not allowable merely because the assessee say so. It is the responsibility of the assessee to substantiate the same also.

When the claim of the assessee is based on the bill issued by Shri Sat Prakash and such bill having been found be bogus based on the statement of Shri Nikhil Sharma, his son, which is not found to be incorrect, the expenditure stated in the bill cannot be allowed. When the son has denied the signature of his father and no contrary material having been placed by the assessee the genuineness of the bill is not established.

The primary responsibility rest with the assessee. The same having not been discharged the disallowance is to be upheld. Learned Counsel for the assessee on the other hand sought to rely upon finding of learned Commissioner (Appeals).

10. We have considered rival submission. As rightly contended by Id.departmental Representative the onus is on the assessee to prove that particular deduction is admissible. It is also incumbent upon him to lead evidence in this regard. The amount is stated to be spent on some civil nature and in parking area. However details of such renovation work is not filed. The bill issued by Shri Sat Prakash is found to be bogus. The signature stated therein is not of Shri Sat Prakash. The amount stated in the bill is also not paid till date. Thus there is nothing on record to suggest that the sum of Rs. 1,70,000 was paid by the assessee so as to claim the cost of improvement of property sold.Learned Commissioner (Appeals) was in error while holding that once the voucher for expenditure is produced the assessing officer should have allowed the same. The allowability of the expenditure do not depend upon mere production of voucher but such voucher should also be authentic and genuine and not merely a piece of paper. The genuineness of any claim is not proven merely on production of some paper but only when the same is to be substantiated. The creditworthiness of the claim having not been established rather the untruthfulness nature of the claim having

been proved by the assessing officer, he was justified in disallowing Rs. 1,70,000 as cost of improvement of property. One more revealing fact is that when the expenditure was incurred for whole of the property the assessee has claimed the entire expenses as its own expenses whereas the assessee is only having 1/4th share of the same.

This also proves the approach of the assessee in claiming bogus expenses and consequently reduces his tax liability. We therefore restore the disallowance of Rs. 1,70,000 which was claimed while computing capital gain on sale of property.

11. Next ground of appeal by the revenue is against deletion of addition of Rs. 11 lakhs made by the assessing officer as deemed dividend under Section 2(22)(e) of the Act. In the appeal by the assessee, the assessee also challenged the sustenance of addition of Rs. 4,55,250 as deemed dividend under Section 2(22)(e) in respect of loans received from following companies: 11.1 In the personal balance sheet of the assessee, it showed certain amount of loan taken from M/s. Taneja Builders Pvt. Ltd. and M/s. Tera Construction Pvt. Ltd. The assessee submitted that he is having substantial shareholding in these companies and is also Director in all these companies. As regards M/s. Taneja Builders Pvt. Ltd. the assessee is holding more than 50 per cent of the share capital. The reserves and surplus of TBPL as on 31-3-2000 is Rs. 9.22 lakhs. The assessee received a sum of Rs. 3 lakhs on 21-9-2000 due to which it received a loan of Rs. 75,750. This was treated as deemed dividend under Section 2(22)(e) of the Act. In respect of PPPL the reserves and surplus as on 31-3-2000 was Nil but profit during the year accounted to Rs. 1,52,979. The assessee received a loan of Rs. 19,500 on 3-2-2001. This was treated as deemed dividend under Section 2(22)(e) of the Act. As regards Tera Construction Pvt. Ltd. the assessee holds 50 per cent of the share capital. Reserves and surplus as on 31-3-2000 was Rs. 8,82,718. The profit during the year amounted to Rs. 23,68,587. The assessee is holding 52.8 per cent of its share capital. An amount of Rs. 14,16,000 was advanced by TCPL to the assessee on 8-7-2000. The assessee re-paid a sum of Rs. 6 lakhs on 15-9-2000 and Rs. 5 lakhs on 5-2-2001. The assessing officer treated the advance of Rs. 14,16,000 as deemed dividend under Section 2(22)(e) of the Act. Learned Commissioner (Appeals) confirmed the addition in respect of deemed dividend

received from TBPL and PPPL. As regards TCPL, learned Commissioner (Appeals) sustained the addition of Rs. 3,60,000 only as in his opinion closing debit balance is to be treated as deemed dividend under Section 2(22)(e). The assessee as well as the revenue are in appeal before us.

11.2 Learned Departmental Representative Smt. Y.S. Kakkar submitted that the fact which is not in dispute that the assessee is a substantial shareholder in all the three companies. The amount was received by way of loans and advances from these companies. The company in all the three cases are possessing accumulated profits as on the date of payment and hence as per Section 2(22)(e) read with Explanation 2 thereto the addition was rightly made by the assessing officer.

Learned Departmental Representative further submitted that subsequent repayment of such loans and advances cannot be considered so as to reduce the amount of deemed dividend at the time when the original advance was granted. The sections do not say so. Thus, learned Commissioner (Appeals) was in error when he directed to adopt only the closing balance in the account of assessee as deemed dividend as against the original amount advanced of Rs. 14,60,000.

11.3 Learned Counsel for the assessee submitted that while computing 'accumulated balances' in the hands of three companies the assessing officer took into consideration the balances at the 'end of the accounting year', i.e., as on 31-3-2001 (after adding current profit etc.). The opening balances, as on 1-4-2000 are, however, much less.

Before the learned Commissioner (Appeals), the assessee contended that he had made temporary withdrawal, now and then, for the purposes of incurring expenditure on behalf of the companies only and no part of it was used for his personal benefit at any stage. It was claimed that the amounts are neither 'Loan' nor 'advance' but are in the nature of 'imprest' only. It was also claimed that the companies had no 'accumulated balances' capable of being distributed as all their funds were invested in real estate. The learned Commissioner (Appeals) still held that provision of Section 2(22)(e) are applicable and confirmed the additions on the basis of closing debit balances. Amount taken from firm is not 'loan' or 'advance'. It is 'imprest money' which is not liable to deeming provisions of Section 2(22)(e). It is

not for individual benefit of shareholder. Reliance placed on the following judgments: Dy. CIT v. Lakra Bros.

No amounts were available which were capable of being distributed as "dividend" as the amounts were invested in real estate. Reference was invited to following judgments: P.K Badiani v. CIT court held 'Accumulated profits' means balance on the last date of the previous accounting year and cannot include current profits of the year in which an advance is made to a shareholder. Other cases referred to are: (i) CIT v. V. Damodaran (1980) 121 ITR 5722 (SC) affirming CIT v. V. Damodaran .

12. We have carefully considered relevant facts, argument advanced and the case law cited. When the assessing officer originally required the assessee to show cause as to why the advances should not be treated as deemed dividend under Section 2(22)(e), no explanation was offered all the completion of assessment proceedings. Thus the assessing officer was justified in drawing adverse inference. For the first time before learned Commissioner (Appeals) it was contended that the transaction is not in the nature of loans or advances. It was contended that the assessee is also director in these three companies and to achieve the objectives of the company he had to supervise the transaction of sale and purchase of properties and had to made handy payments in substantial sums for acquiring, maintaining, refunding and selling the properties. He was therefore required to keep sufficient amount in his saving bank account to meet the urgent needs. If the amount remained unutilized for one or two months they were deposited back in the companies account through cheque. However on perusal of accounts of the assessee in the books of said company it nowhere reveals that the amount was advanced for the purpose of business of the company. The assessee was not been able to substantiate such claim. The assessing officer had no occasion to comment upon such contention of the assessee. Learned Commissioner of Income-tax (Appeals) has given a finding that the reply of the assessee does not hold any good looking to the account of the appellant in the books of account maintained by the assessee. Thus factual finding given by Commissioner (Appeals) has not been challenged by the assessee by producing necessary material before us. An assertion that the amount advanced by the

company was for the purpose of its business, therefore, cannot be accepted in the absence of any corroborative material. The primary onus for such assertion rests on the assessee in the absence of any material it is not possible for us to give a finding that the amount advanced by the company was for the purpose of its business and not amounting to loans or advances. Thus the amount was rightly treated as loans and advances within the meaning of Section 2(22)(e). It is also not in dispute that the assessee is holding substantial shares in the said companies. Thus the amount of loans and advances to such shareholder to the extent the company is possessing accumulated profits can be assessed as income by way of deemed dividend as per Section 2(22)(e) of the Act. For the sake of proper understanding, provision of Section 2(22)(e) and Explanation 2 thereto are extracted herein: Section 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) (made after 31-5-1987, 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 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; 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).

12.1 Having found that the payment by these three companies by way of advance or loan to the assessee is to be treated as deemed dividend under Section

2(22)(e), we are left with the issue as to what is the amount assessable as such. The amount assessable cannot exceed the accumulated profits possessed by these companies. As per Explanation 2 the expression "accumulated profits" in Clause (e) of Section 2(22) shall include all profits of the company upto the date of distribution or payment referred in these clauses. Hon'ble Supreme Court in the case of P.K.Badiani (supra) held that the expression "accumulated profits" shall mean profits in the commercial sense and not an assessable or taxable profits liable to tax as income computed under the 1922 Act.

But in the present case the assessing officer has merely taken the accumulated profits as appearing under the head 'Reserves and surplus' as per the accounts of those companies only and not the taxable profits. There is no provision that only the cash balance available to the company on the date of payment is to be treated as deemed dividend.

Thus the contention of the assessee that the amounts were invested in real estates and hence to be reduced from the accumulated profits is misplaced. Further contention raised by the assessee is that accumulated profits means the balance on the last date of the previous accounting year and cannot include current profits in which advance is made is also ill founded. Though reliance is placed on the decision of Hon'ble Supreme Court in the case of V. Damodaran (supra), that case was with reference to Section 2(6A)(e) of Indian Income Tax Act, 1922.

However the clause 'accumulated profit' was not defined under the 1922 Act as is now defined in Explanation 2 below Section 2(22). Hon'ble Supreme court also noted the amendment in 1961 Act by insertion of Explanation 2 thereto Hon'ble Supreme Court observed as under: An attractive submission was raised on behalf of the revenue that in the Twelfth Report of the Law Commission of India (p. 324, item 17), the authors of the report consider that the intention of the Legislature was to include current profits in the expression 'accumulated profits' in Section 2(6A) and that the present definition of 'accumulated profits' by Explanation 2 to Section 2(22) of the Income Tax Act, 1961, only clarifies what the true intent was all along. In the view which has found favour p with us, we are not persuaded by that

submission.

12.2 Having inserted Explanation 2 in Section 2(22) the accumulated profits shall always included all profits of the company to the date of payment of such dividend and cannot merely be taken as the accumulated profits on the last date of the previous accounting year. The business profits earned by the company accrues from day to day and not only at the end of the year when the accounts are finalized. The companies are also entitled to declare interim dividend without the finalization of annual accounts which fortifies the view that profits accrue from day to day and not only when annual accounts are prepared and signed. Thus the assessing officer was justified in apportioning profits of the year till the date of payment of deemed dividend.

12.3 Learned Commissioner (Appeals) has held that only the closing balance in the loans and advances are to be treated as deemed dividend and the repayments received from the loans and advances will reduce the quantum to deemed dividend. There is no such provision in Section 2(22)(e), which suggest that only the outstanding balance at the end of the year is to be treated as deemed dividend. Once the amount is advanced to the extent of which the company possesses accumulated profits, on the date of advance itself it becomes income in the form of deemed dividend under Section 2(22)(e). Hon'ble Supreme Court in the case of Smt. Tarulata Shyam v. CIT held that: The Legislature has deliberately not made the subsistence of the loan or advance, or its being outstanding on the last date of the previous year relevant to the assessment year, a prerequisite for raising the statutory fiction. In other words, even if the loan or advance ceased to be outstanding at the end of the previous year, it can still be deemed as a 'dividend' if the other four conditions factually exist to the extent of the accumulated profits possessed by the company.

In view of the above, the entire amount of Rs. 14,60,000 being advances by Tera Construction Pvt. Ltd. are to be treated as deemed dividend.

Thus in effect the addition made of Rs. 15,55,250 by the assessing officer is to be sustained.

13. In the appeal by the assessee, the assessee has raised ground No. 2 relating to disallowance of Rs. 8,880 on account of property tax and in ground 3 regarding addition of Rs. 15,000 on account of maintenance of property. These grounds were not pressed at the time of hearing. For want of prosecution these grounds are dismissed.

14. In the result, the appeal of the revenue is allowed and that of the assessee is dismissed.

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