

**IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH 'J' MUMBAI**

**ITA No.03/Mum/2011
Assessment Year: 2007-08**

**MRS AMISHA B KORADIA
C-402 GOKUL DIVINE IRLA
SV ROAD, VILE PARLE (W)
MUMBAI-56
PAN NO:AABPL6364L**

Vs

**INCOME TAX OFFICER
WARD-9(2)(2), MUMBAI**

Vijay Pal Rao, JM and N K Billaiya, AM

Dated: April 19, 2013

ORDER

Per: Vijay Pal Rao:

This appeal by the assessee is directed against the order dated 29.10.2010 of the CIT(A) for the AY 2007-08.

2. The assessee has raised the following grounds in this appeal:

1. The CIT(A) has erred in fact and in law in confirming the partial addition of Rs. 65,99,604/- as deemed dividend u/s 2(22)(e) of the IT Act 1961.

2. The CIT(A) has erred in fact and in law in confirming disallowance of Rs. 65,429/- u/s 57(ii) of the IT Act being the interest paid on overdrawn capital with partnership firm Vs M/s Sagar Construction."

3. Ground no. 1 is regarding deemed dividend u/s 2(22)(e).

3.1 The assessee is a beneficial shareholder in M/s Koradia Construction Pvt Ltd., and having 50% of shares holding. The Assessing Officer noted that the assessee has taken loan of Rs. 78,10,000/- various dates from this company which has accumulated profit of Rs. 8,00,97,861/-. In the absence of explanation, the Assessing Officer treated the loan as deemed dividend u/s 2(22)(e) of the Act and added Rs. 78,00,000/- to the income of the assessee.

3.2 Aggrieved from the action of the Assessing Officer, the assessee contended before the CIT(A) that the impugned sum includes remuneration of Rs. 2 lacs which has already been offered as income from salaries. Further, the Assessing Officer had ignored the opening debit balance of Rs.5,32,396/- and another debit balance of Rs. 4,75,000/- while making the

impugned addition. Thus, the assessee contended before the CIT(A) that a total sum of Rs. 12,10,396/-, which was ignored by the Assessing Officer should be excluded from the amount and further out of the balance outstanding, a sum of Rs. 58 lacs represents advance received from the company towards purchase of flat which ultimately could not go through and the amount was later on refunded. The assessee submitted that this is not a loan or dividend covered u/s 2(22)(e) and the same also should be held to be excluded from the addition made by the Assessing Officer.

3.3 The CIT(A) accepted the explanation of the assessee to the extent of Rs. 12,10,396/- comprising of Rs. 2 lacs as salary income and Rs. 10,10,396/- as opening debit balance.

3.4 As regards the contention of the assessee that Rs.58 lacs was received for purchase of property, which was later on refunded, the CIT(A) did not accept the same. Accordingly, the CIT(A) has confirmed the addition to the extent of Rs. 65,99,604/- after giving a relief to the extent of Rs. 12 lacs.

4. Before us the Id AR of the assessee has submitted that the CIT(A) has failed to appreciate the fact that the advance of Rs. 58 lacs was given to the assessee by the company for the purchase of flat. In support of his contention, he has referred the statement of account with M/s Korodia Construction P Ltd as well as Schedule to the balance Sheet and the P&L account of M/s Korodia construction P Ltd. The Id AR has pointed out that Schedule E to the Balance Sheet for current asset, loans and advances indicates the advances given by the company to the assessee as advance for the purchase of flat. The accounts of M/s Korodia construction P Ltd are already available on the website of Registrar of Companies. He has further submitted that return of income for the company was filed electronically on 31.10.2007 and the copy of which was filed with the ITO, Ward 9(2)(2). Thus, the Id AR has submitted that this material clearly indicates that the advance was given to the assessee for the purchase of flat and in the ordinary course of the business of M/s Korodia construction P Ltd. The Id AR has referred the statement of the accounts with M/s Korodia Construction P Ltd and submitted that Rs. 8 lacs was received by the assessee on 28.12.2006 whereas Rs 50 lacs was received on 15.2.2007. This amount was refunded by the assessee subsequently when the purchase of flat could not materialize due to the objections of the Society. The Id AR has filed a copy of the agreement for the purchase and sale of flat and submitted that the said amount was advanced to the assessee in pursuant to the said agreement/MoU for purchase of flat. Therefore, the amount of Rs. 58 lacs was given to the assessee by the company in the ordinary course of business of purchase of the property and the same does not fall under the definition of deemed dividend in terms of sec. 2(22)(e) of the Act.

4.1 He has further contended that a transaction of advance was business transaction and cannot be treated as loan or advance as per sec 2(22)(e) of the Act. He has submitted that section 2(22)(e) creates legal friction and artificial liability which should be given a strict interpretation. In support of his contention, he has relied upon the decision of the Hon'ble Kerala High Court in the case of *P V John reported in 181 ITR 1*. The Id AR has then relied upon the decision of the Hon'ble Delhi High Court in the case of *CIT vs Raj Kumar reported in 318 ITR 462 = (2009-TIOL-247-HC-DEL-IT)* and submitted that the Hon'ble High Court has held that if payments are made by such a company to even its shareholders having substantial interest but are the result of business transactions between the parties, then such payments cannot be treated as loan or advance and the money so received cannot be treated as deemed dividend within the meaning of sec. 2(22)(e) of the Act. He has also relied upon the decision of the Hon'ble Delhi High Court in the case of *CIT vs Arvind Kumar Jain reported in 205 Taxman 44*

= **(2011-TIOL-790-HC-DEL-IT)** and submitted that if the advance which have been granted to give the effect to a commercial transaction, the same would not fall under the ambit of sec. 2(22)(e) of the act. He has relied upon the following decisions:

i) *CIT vs Nagindas Kapadia* (177 ITR 393)

ii) *CIT vs Creative Dyeing & Printing P Ltd* (229 CTR 250) = **(2009-TIOL-532-HC-DEL-IT)**

4.2 The Id AR has also referred the memorandum of understanding dated 30th Nov 2006 between the assessee and her husband and M/s Koradia Construction P Ltd regarding the purchase and sale of flat no. C-402 and C-403, 4th Floor, Gokul Divine, Irla, Vile Parle (W) Mumbai . He has pointed out that the total consideration as per the said agreement was to be paid to the assessee at Rs. 60 lacs; therefore, the payment of Rs. 58 lacs towards purchase of the said flat.

4.3 On the other hand, the Id DR has submitted that the Memorandum of understanding cannot be considered at this stage when the assessee has not filed the same before the authorities below. The assessee has not produced the evidence to show as how the transaction of purchase and sale of flat could not materialize due to refusal of permission by the Society. The MoU is between the closely related parties; therefore, it is a self serving document and cannot be relied upon. He has relied upon the order of the authorities below and submitted that the CIT(A) has relied upon the decision of the Hon'ble jurisdictional High Court in the case of *CIT vs 76 ITR 361* as well as the decision of the Supreme Court *290 ITR 433* = **(2007-TIOL-57-SC-IT)**. Therefore, once the payment of advance to the assessee and accumulated the profits are not disputed, then the CIT(A) is justified in confirming the addition to the extent of Rs. 65,99,604/-.

5. We have considered the rival submissions as well as the relevant material on record. The dispute before us is regarding the advance of Rs. 58 lacs stated to have been given to the assessee by the company for purchase of flat. The assessee has filed a copy of the resolution of M/s Koradia Construction P Ltd dt 9.9.2006 wherein the company had decided to purchase the flat Nos C-402 and C-403 situated at Gokul Divine, Irla, S V Road, Vile Parte (W)Mumbai 400056 from the assessee and her husband. From the books of accounts and audit report of M/s Koradia Construction P Ltd, it is evident that the company has shown this amount of Rs. 58 lacs as advance for the purchase of property. As per the Schedule E to the balance Sheet of M/s Koradia construction P Ltd, the amount of Rs. 58 lacs has been clearly shown as towards purchase of premises. Therefore, in view of the fact that the company is engaged in the business of construction and dealing in properties and the purpose of advancing money to the assessee, as per the record of the company is for purchase of property; therefore, falls under the business/commercial transaction between the company and the assessee.

5.1 It is to be noted that the return of the company has been filed with the same Assessing Officer who has jurisdiction over the assessee. Therefore, when the amount of advance of Rs. 58 lacs given to the assessee by the company for the purchase of property as recorded in the books of account of the company, then it cannot be presumed that the said amount falls under the ambit of loan and advances in the provisions of sec. 2(22)(e) of the Act.

5.2 Moreover, it is pertinent to note that Rs.50 lacs was given to the assessee on 15.2.2007 and therefore, this amount remains only for 1 ½ months during the year under consideration. Further, the amount of Rs. 8 lacs was given to the assessee on 28th Dec 2006 and the said amount remains with the assessee only for 3 months in view of the short span of period of 1 ½

months in respect of Rs. 50 lacs and 3 months in respect of 8 lacs . It is otherwise not permissible to make full addition of the said amount for the year under consideration. Once the assessee has established that the said amount was given to the assessee for the purchase of flat which is in the nature of commercial transaction between the parties, then in the absence of proving contrary by the department, the addition to the extent of Rs. 58 lacs is not justified. This view is fortified by series of decisions as relied upon by the assessee. Hence, in view of the above discussion and in the facts and circumstances of the case, the addition to the extent of Rs. 58 lacs u/s 2(22)(e) is deleted and consequently, the addition of balance amount of Rs. 7,99,604/- is confirmed.

6. Ground no. 2 is regarding disallowance of Rs. 65,429/- on account of interest.

6.1 The assessee is a partner in two partnership firms i.e M/s Aditya Developers and M/s Sagar Constructions. She earned interest income of Rs. 1,08,333/- on capital with Aditya Developers . The interest income was adjusted against interest payment of Rs. 65,429/- to M/s Sagar Construction. The Assessing Officer disallowed the claim of the assessee on the ground that the payment of interest is in the case has no nexus with interest earned and thus the same is not admissible deduction u/s 57(iii) of the Act. Accordingly, the Assessing Officer assessed the interest income of Rs. 1,08,333/- as income from other sources.

6.2 On appeal, the CIT(A) has confined the addition made by the Assessing Officer.

7. We have heard the Id AR as well as the Id DR and considered the relevant material on record. The assessee has introduced Rs.50 lacs as capital in Aditya Developers and withdrawal of Rs.56 lacs with Sagar Construction. Thus, the assessee has earned interest income from partnership firms M/s Aditya Developers, at the same time; the assessee had interest expenditure of Rs.65,429/- on debit balance with the other partnership firm.

8. At the outset, we note that the Assessing Officer has assessed interest income received from the firm as income from other sources which itself contrary to the provisions of sec. 28(v). Charging of payment of interest is provided under the partnership deed and therefore, the amount of interest received from the partnership firm has to be assessed as busies income in terms of sec. 28(v) which provides as under:

Sec. 28.....
.....
.....

[(v) any interest, salary, bonus, commission or remuneration, by whatever name called, due to, or received by, a partner of a firm from such firm :

Provided that where any interest, salary, bonus, commission or remuneration, by whatever name called, or any part thereof has not been allowed to be deducted under clause (b) of section 40, the income under this clause shall be adjusted to the extent of the amount not so allowed to be deducted ;]'

8.1 There is no dispute about the fact that the assessee has overdrawn from the partnership firm M/s Sagar Construction; therefore, the interest paid to the Sagar Construction for debit balance in the capital account is an allowable expenditure against the business income of the assessee and particularly against the interest/remuneration received from the partnership firm.

9. In view of the above discussion, we allow the claim of the assessee and the addition made by the Assessing Officer on this account is deleted.

10. In the result, the appeal is partly allowed.