

Orissa High Court

M/S. Mahimananda Mishra vs Assistant Commissioner Of Income on 10 January, 2023

IN THE HIGH COURT OF ORISSA AT CUTTACK

ITA No.18 of 2018

M/s. Mahimananda Mishra	Appellant
	Mr. Saswat Kumar Acharya, Advocate	
	-versus-	
Assistant Commissioner of Income	Respondent
Tax, Circle-1(1), Cuttack		
Mr. Radheshyam Chimanka, Senior Standing Counsel for the		
	Revenue Department	

CORAM:
THE CHIEF JUSTICE
JUSTICE M.S. RAMAN

ORDER

10.01.2023 Order No.

05. 1. The present appeal by the Assessee is directed against an order dated 10th October, 2017 passed by the Income Tax Appellate Tribunal, Cuttack Bench, Cuttack (ITAT) in ITA No.52/CTK/2016 for the Assessment Year (AY) 2011-12.

2. While admitting the present appeal on 27th July 2022, the following question was framed for consideration:

"Whether the deemed dividend paid by the Orissa Stevedores Ltd. should be taxed in the hands of Mr. Mahimananda Mishra, the Individual Director who holds shares therein or in the hands of the appellant firm of which he is a partner?"

3. This Court has heard the submissions of Mr. Saswat Kumar Acharya, learned counsel for the Appellant and Mr. Radheshyam Chimanka, learned Senior Standing Counsel for the Revenue Department.

4. The facts relevant for the present appeal as set out in the assessment order is that the Assessee is a Firm engaged in the business of labour contract under the name and style M/s. Mahimananda Mishra. Admittedly, the said Firm has four partners one of whom is Mr. Mahimananda Mishra having contributed 20% of the shares of the Firm. There are three other partners as well.

5. Mr. Mishra also happens to be the Director of M/s. Orissa Stevedores Ltd. (OSL) and in OSL, he holds 36.95% shares.

6. During the AY in question, OSL gave a unsecured loan of Rs.3,75,78,685/- to the Firm i.e. M/s. Mahimananda Mishra. Of this, Rs.1,74,04,185/- was received as cash. The Assessing Officer (AO)

proceeded to treat the above unsecured loan as a deemed dividend in the hands of the Firm and added it to the income of the Firm invoking Section 2(22)(e) of the Income Tax Act, 1961 (Act).

7. When the Assessee took the matter in appeal to the Commissioner of Income Tax (Appeals), Cuttack [CIT(A)], it was noted by the CIT(A) in the order dated 16th November, 2015 allowing the appeal that in terms of Section 2(22)(e) of the Act, the amount could be treated as deemed dividend only in the hands of shareholder since he is the beneficial owner of the shares in OSL.

8. Section 2(22)(e) of the Act reads as under:

"2. (22). xxx

(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 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;"

9. A plain reading of the above provision indicates that the taxing of the deemed dividend has to be in the hands of the shareholder of OSL. In the present case, admittedly it is Mr. Mishra in his individual capacity who holds 36.95% of the paid-up share capital of the OSL. On the other hand, M/s. Mahimananda Mishra, the Firm, does not hold any shares in OSL. Consequently, this Court finds that the CIT (A) was right in his conclusion in para 6, which reads as under:

"6. Thus, the amount should be treated as deemed dividend u/s.2(22)(e) of the Act in the hands of Shri Mahimananda Mishra as discussed above. The AO is directed to take remedial measures accordingly."

10. The ITAT in the impugned order has, in the considered view of this Court, needlessly remanded the matter to the CIT (A) on the ground that it was not clear whether deemed dividend should be taxed in the hands of Assessee's partner or in the hands of the Assessee. Since the plain reading of Section 2(22)(e) of the Act makes it clear that the deemed dividend is to be taxed in the hands of individual shareholder and not an entity which does not hold shares in OSL, the question of remanding the matter to the CIT(A) did not arise.

11. For the aforementioned reasons, the question framed by this Court is answered in favour of the Assessee and against the Department by holding that the deemed dividend should be taxed in the hands of Mr. Mahimananda Mishra, the individual Director of OSL and not in the hands of the

Appellant-Assessee, the Firm.

12. The Court re-affirms the conclusion reached in para 6 of the order of the CIT(A). The impugned order of the ITAT is set aside.

13. The appeal is accordingly disposed of.

(Dr. S. Muralidhar) Chief Justice (M.S. Raman) Judge M. Panda