India Casting Company, Agra vs Department Of Income Tax on 19 July, 2012

IN THE INCOME TAX APPELLATE TRIBUNAL
AGRA BENCH, AGRA

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER AND
SHRI A.L. GEHLOT, ACCOUNTANT MEMBER

ITA No.55/Agr/2012
Assessment Year : 2008-09

Asstt. Commissioner of Income Tax, Circle 4(1), Agra.	M/s. India Casting Company, D-42, Foundry Nagar, Agra. (PAN: AAAFI 3215 P)
(Appellant)	(Respondent)

Appellant by	:	Shri Waseem Arshad, Sr. D.R.
Respondent by	:	Shri K.K. Jain, Advocate

Date of Hearing	:	19.07.2012
Date of Pronouncement of order	:	09.08.2012

ORDER

PER A.L. GEHLOT, ACCOUNTANT MEMBER:

This is an appeal filed by the Revenue against the order dated 03.11.2011 passed by the Ld. CIT(A)-II, Agra for the Assessment Year 2008-09 on the following grounds :-

"1. The ld. CIT(A) has erred in law and on facts in deleting the addition of Rs.3,85,39,213/- made by the AO by invoking the provisions of section 2(22)(e) of the IT Act without properly appreciating the facts of the case and the position of law that the aforesaid addition is squarely covered u/s 2(22)(e) of the IT Act.

2. The ld CIT(A) has erred in law and on facts in deleting the addition of Rs.2,00,000/- made by the AO by invoking the provisions A.Y. 2008-09.

of section 2(22)(e) of the IT Act without properly appreciating the facts of the case and the position of law that the aforesaid addition is squarely covered u/s 2(22)(e) of the IT Act.

3. The ld. CIT(A) has erred in law and on facts in deleting the above addition of deemed dividend made for the payments by way of advance or loan by M/s New Era Exports (P) Ltd. and M/s Gee Key Real Estate (P) Ltd. for the individual benefit of the Assessee Co., ignoring the facts that Shri Ajay Agarwal and Shri Girraj Kishor

Agarwal respectively were the beneficial share holders in both the above companies and also having substantial interest in the assessee concern M/s Indian Casting Co. and thus the case was squarely covered under the second limb of provision of section 2(22)(e) of the IT Act.

4. The ld. CIT(A) has erred in law and on facts in deleting the above addition placing reliance on some judicial decisions & following the decision of Jurisdictional Hon'ble ITAT in the case of M/s Nirmala Realtors (P) Ltd. in ITA No.69, 70 & 71/Agra/2011 wherein Hon'ble ITAT has observed that the provisions relating to section 2(22)(e) are ambiguous and has held that intention of the legislature is to tax dividend only in the hands of the share holders (Regd. Share holder) of the lender Co. and not in the hands of concern in which share holder has substantial interest, without appreciating the facts and the position of law that the word "Concern" has been inserted in the statute in section 2(22)(e) with effect from 01.04.1998.

5. The order of the ld. CIT(A) being erroneous in law and on facts deserve to be quashed and that the order of AO to be restored.

6. The appellant craves leave to add or alter any or more ground or grounds of appeal as may be deemed fit at the time of hearing of appeal."

2. The brief facts of the case are that the assessee is a partnership firm. During the assessment proceedings, the Assessing Officer (A.O.) noticed that the assessee A.Y. 2008-09.

firm had made number of transactions with its sister concern M/s. New Era Exports Pvt. Ltd. The details of such transactions have been given by the A.O. in his order at page nos.1 to 3. The A.O. further noticed that the assessee was not having any business relation with its sister concern M/s. New Era Exports Pvt. Ltd.

After considering assessee's submission, the A.O. invoked provisions of section 2(22)(e) of the Income Tax Act, 1961 ('the Act' hereinafter) on the ground that Shri Ajay Kumar Agarwal, partner of assessee firm was share holder of 10% in M/s. New Era Exports Pvt. Ltd. and 33% in assessee firm. The A.O. was of the view that under the facts and circumstances of the case, section 2(22)(e) of the Act is clearly applicable. The A.O. made addition of Rs.3,85,39,213/-. Similarly, addition was made on account of Rs.2,00,000/- received by the assessee from M/s. Gee Kay Real Estate Pvt. Ltd Where in GK Agarwal holding 51.81% and 34% in assessee firm. The CIT(A) deleted the addition as under :- (page nos.16&

17) "4. I have gone through the assessment order and the submissions made by the Id. AR and in this regard, I would like to refer to the case of M/s. Nirmala Realtors Pvt. Ltd. vs. DCIT, decided by the ITAT, Agra Bench, Agra in ITA No.69, 70 & 71/AGR/2011. Ina this case, the appellant had filed an appeal against the order passed by the undersigned wherein on similar facts, I had confirmed the addition made by the AO u/s.2(22)(e) of the Act. However, Hon'ble Jurisdictional ITAT by referring to the judgements of Hon'ble Rajasthan High Court in the case of CIT vs. Hotel Hilltop 313 ITR 116

and in the case of ACIT vs. Bhomik Colour Lab Pvt. Ltd. 313 ITR 146 held that the provisions of section 2(22)(e) for making addition can be invoked only in the case of a registered shareholder. Vide A.Y. 2008-09.

para no.31 & 32 of the judgement (cited supra), the Hon'ble ITAT observed as under :-

> "31. Another important issue that arises for consideration is, whether this payment can be assessed in the hands of the assessee as deemed dividend being the payment to a concern where shareholder holds substantial interest, in whose hands the income would be brought to tax whether in the hands of the "concern" or the "shareholder"? The assessing Officer added it in the hands of the concern i.e. the assessee and CIT(A) has also confirmed the same. Even though CBDT Circular No.495 dated September 22, 1987, 168 ITR (St.) 87 states that the deemed dividend would be taxed in the hands of a concern (non-shareholder) if the conditions mentioned in the section are satisfied. However, our view is different in view of the decisions taken by the various courts.
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> 32. The similar issue came up for consideration before Mumbai ITAT (Special Bench) in case of ACIT vs. Bhaumik Colour P. Ltd. 313 ITR 146 (AT). The Special Bench held that the provisions of section 2(22)(e) do not spell out as to whether the income has to be taxed in the hands of the shareholder or the concern (non-shareholder). It further observed that since the provisions are ambiguous, it is, therefore, necessary to examine the intention behind enacting the provisions of section 2(22)(e) of the Act. In furtherance, it was stated that the intention behind the provisions of section 2(22)(e) is to tax dividend in the hands of the shareholder. The deeming provisions as it applies to the case of loans or advances by a company to a concern in which its shareholder has substantial interest, is based on the presumption that the loan or advances would ultimately be made available to the shareholders of the company giving the loan or advance. The intention of the Legislature is, therefore, to tax dividend only in the hands of the shareholder and not in the hands of the concern and accordingly it held that deemed dividend under section 2(22)(e) of the Act can be assessed only in the hands of the shareholder of the lender company and not in the hands of any other person."

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As the facts of the appellant's case are similar, therefore, following the decision of jurisdictional ITAT, I delete the additions made by the AO."

3. The ld. Departmental Representative relied upon the order of the A.O. and submitted that even assessee firm is not a registered share holder, section 2(22)(e) of the Act is applicable as partner of the assessee firm is having substantial interest in those companies. The ld. Departmental Representative in support of his contention relied upon the judgement of Hon'ble Delhi High Court in the case of CIT vs. National Travel Services, 202 Taxman 327 (Delhi). Ld. Departmental

Representative further submitted that the Hon'ble Delhi High Court after considering the order of I.T.A.T., Special Bench, Mumbai in the case of Asst. CIT vs. Bhaumik Colour P. Ltd., 118 ITD 1 (Mum) (Special Bench) and other judgements of Hon'ble High Courts held that section 2(22)(e) is applicable in case of the assessee, a partnership firm, which is to be treated as share holder and it is not necessary that it has to be a registered share holder.

4. Ld. Authorised Representative, on the other hand, relied upon the order of CIT(A) and submitted that the assessee firm is not the share holder of M/s. New Era Exports Pvt. Ltd. and M/s. Gee Kay Real Estates Pvt. Ltd. The A.O. has wrongly considered the advance/loan taken by the assessee firm from the above two companies as deemed dividend in the hands of the assessee. The action of the A.Y. 2008-09.

A.O. is arbitrary, illegal and highly unjustified. Ld. Authorised Representative submitted that section 2(22)(e) of the Act is applicable in respect of payment which was made only to share holder and not in any other case. Ld. Authorised Representative relied upon the following decisions:-

S.No.	Citation	Name of parties
1	83 ITR 170 (SC)	CIT vs. C.P. Sarathy Mudaliar
2	122 ITR 1 (SC)	Rameshwar Ds Sanwar Mal vs. CIT
3	259 ITR 9 (All)	Raj Kumar Singh & Co vs. DCIT
4	313 ITR 116 (Raj)	CIT vs Hotel Hilltop
5	199 Taxmann 341 (Del)	CIT vs Ankitech (P) Ltd.
6	218 ITR 239 (SC)	ITO vs. Atchaiah
7	41 ITR 275 (SC)	Kantilal Manilal vs CIT
8	74 ITR 849 (SC)	CIT vs Nalin Behari Lal
9	59 ITR 574 (SC)	CIT vs Moon Mills Ltd.
10	277 ITR 128 (Cal)	Mukundray K. Shah vs. CIT
11	313 ITR (AT) 146 (Mum) (SB)	ACIT vs Bhaumik Colour Pvt. Ltd.
12	324 ITR 263 (Bom)	CIT vs. Universal Medicare Pvt. Ltd.
13	204 Taxmann 82 (P&H)	CIT vs. Sharman Woolen Mills Ltd.
14	204 Taxmann 56 (Del) (Mag)	CIT vs. MCC Marketing Pvt. Ltd
15	206 Taxmann 32 (Del) (Mag)	CIT vs. Standipack Pvt. Ltd.
16	57 DTR 433 (Agra)	DCIT vs. Atul Engg. Udyog
17	ITA No.69, 70 & 71/Agra/2011	Nirmala Realtors Pvt. Ltd. vs. DCIT
18	263 ITR 255 (SC)	CIT vs. G.M. Stainless Steel (P) Ltd.

5. In respect of M/s. New Era Exports Pvt. Ltd., the Ld. Authorised Representative submitted that the assessee firm is neither a registered share holder of the said company nor beneficial owner of the shares. Ld. Authorised A.Y. 2008-09.

Representative submitted that substantial part of the business of M/s. New Era Exports Pvt. Ltd. is money lending in ordinary course and as per exception (ii) given as per the direction of section

2(22)(e), dividend does not include an advance or loan made to a 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.

The said company was the merchant exporter of the assessee firm and had trade transactions in the past. It is also submission of the Authorised Representative that no individual benefit is derived by the partners of the assessee firm directly or indirectly from the advances received from the said company. The partners have not overdrawn their capital from the accounts of the assessee firm. Advance received were utilized for payment to the creditors from whom purchases were made, repayment of loan and other liabilities which is proved by a chart showing the sources of funds with M/s. New Era Exports Pvt. Ltd. before advancing the money to the assessee firm. Ld. Authorised Representative submitted that at no point of time money was advanced out of reserve and surplus.

6. We have heard the ld. Representatives of the parties and records perused.

The admitted facts of the case under consideration are that the assessee is a partnership firm. The partnership firm is not a registered share holder of both the private limited companies, however, partners of assessee firm were share holders of the companies. From a reading of the provision of section 2(22)(e) of the Act, it A.Y. 2008-09.

is clear that it comprehends manifold requirements, the first being the payment should be made by way of loan or advance to the concern. Of course, on this aspect, the conclusion has been recorded by the Revenue authorities in favour of the Revenue which is not in dispute. The more important aspect, being the requirement of section 2(22)(e) is that "the payment may be made to any concern, in which such shareholder is a member or partner and in which he has substantial interest or any payment by any such company on behalf or for the individual benefit of any such shareholder . . . " Thus, the substance of the requirement is that the payment should be made on behalf of or for the individual benefit of any such shareholder, obviously, the provision is intended to attract the liability of tax on the person, on whose behalf or for whose individual benefit the amount is paid by the company whether to the shareholder or to the concerned firm. In which event, it would fall within the expression "deemed dividend". Obviously, income from dividend is taxable as income from other source under section 56 of the Act and in the very nature of things the income has to be of the person earning the income.

The assessee partnership in the present case is not shown to be one of the persons being shareholder. Of course, the two individuals being Shri Ajay Kumar Agarwal, and Shri G.K. Agarwal persons holding more than requisite amount of shareholding and having requisite interest in the firm but then thereby the deemed dividend would not be deemed dividend in the hands of the firm rather it would obviously be deemed dividend in the hands of the individuals on whose behalf or A.Y. 2008-09.

on whose individual benefit being such shareholder the amount is paid by the company to the concern. Thus, the significant requirement of section 2(22)(e) is not shown to exist. The liability of tax as deemed dividend could be attracted in the hands of the individuals being the shareholders

and not in the hands of the firm.

This view is fortified by the order of I.T.A.T., Special Bench, Mumbai in the case of Asstt. CIT vs. Bhaumik Colour P. Ltd, 313 ITR (AT) 146 (Mum) (SB) wherein it was held that provisions of section 2(22)(e) for making addition can be invoked in the case of registered share holders. The order of I.T.A.T., Special Bench, Mumbai in the case of Asstt. CIT vs. Bhaumik Colour Pvt. Ltd. has been confirmed by the Hon'ble Bombay High Court in the case of CIT vs. Universal Medicare Pvt. Ltd., 190 Taxman 144 (Bombay). The relevant question before the Hon'ble Bombay High Court and their finding are as under :-

> "1. Whether, on the facts and in the circumstances of the case, the ITAT, in law, was right in deleting the addition of Rs.35 lakhs treated as deemed dividend under section 2(22)(e) of the Income-tax Act, 1961, by stating that since the transactions are not reflected in the books of account, it cannot be treated as deemed dividend ?
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> 2. Whether, on the facts and in the circumstances of the case, the Tribunal in law, was right in holding that the Assessing Officer has not established that the money was advanced for the benefit of any shareholder and the same has to be taxed in the hands of such shareholder who obtained the benefit and not in the hands of the assessee- company, following the ratio of decision in the case of ACIT v. Bhaumik Colour (P.) Ltd. 27 SOT 270 (SB) ?
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> 3. Whether on the facts and in the circumstances of the case, the ITAT in law was right in directing the Assessing Officer to allow the amount of provision for leave encashment without appreciating the fact that the disallowance was made as there was no proof of payment furnished to the effect that the same was paid before the due date of filing the return under section 139(1) of the Incomes-tax Act ?"

2. For convenience of reference, it would be appropriate to take up the third question initially. The Tribunal has relied upon the judgment of the Calcutta High Court in the case of Exide Industries Ltd. v. Union of India [2007] 292 ITR 4701, in which the provisions of section 43B(f) have been struck down. The Tribunal directed the Assessing Officer to allow the amount as claimed towards leave encashment. The issue as regards the correctness of the judgment of the Calcutta High Court in Exide Industries Ltd.'s case (supra) is pending in appeal before the Supreme Court and interim orders have been passed. The appeal, insofar as the issue of leave encashment is concerned is admitted on the following question of law :

> "Whether the Tribunal was justified in directing the Assessing Officer to allow the amount claimed by way of provision for leave encashment in view of the provisions of section 43B(f) of the Income-tax Act, 1961 ?"

3. The first and second questions are now taken up. Briefly stated, the admitted facts are that an amount of Rs. 32,00,000 was transferred from the bank account of a company by the name of Capsulation Services Private Limited (CSPL) to the account of the assessee maintained in the Chembur Branch of the State Bank of India. Mr. Vikram Tannan was a Director of CSPL. He held over 10 per cent of the equity capital of CSPL and over 20 per cent of the equity capital of the assessee. The Assessing Officer, in the course of the order of assessment, relied on the provisions of section 2(22)(e) and treated the amount of Rs. 35,00,000 as deemed dividend in the hands of the assessee and directed that the amount be added back to its total income. The assessee contended that one Mr. Teredesai, Vice President (Finance) had misappropriated large sums of money by opening bank accounts and the transaction by which an amount of Rs.

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32,00,000 was transferred from CSPL was part of the misappropriation. According to the assessee, the amount was not reflected in the books of the assessee since it had been misappropriated by the Vice President (Finance). The fact that the amount has been defalcated could not, according to the assessee, be disputed in view of the fact it has been allowed by the Assessing Officer as a business loss during the assessment year 2006-07. Hence, the contention of the assessee was two-fold. First, according to the assessee, for section 2(22)(e) to apply the amount ought to have been received as an advance or loan from a company to a concern in which the shareholder had substantial interest. This condition, according to the assessee, was not met since the amount was neither an advance nor a loan to the assessee but represented misappropriation of funds by the Vice President (Finance). Consequently, even if the amount is treated as deemed dividend within the meaning of section 2(22)(e) it is taxable in the hands of the shareholder and not in the hands of the assessee. Secondly, even on the assumption that this was an amount advanced to the assessee by the CSPL, for the purposes of taxation a deemed dividend would be taxable in the hands of the shareholder and not the assessee to whom the payment was advanced.

4. The Assessing Officer came to the conclusion that the provisions of section 2(22)(e) are attracted the moment a loan or advance is made and the subsequent defalcation of funds was immaterial. The Assessing Officer held that the loan was received from the bank account of CSPL; the money was deposited in the bank account of the assessee and the subsequent defalcation of the funds after the receipt of moneys by the assessee was an extraneous circumstance which made no difference to the application of section 2(22)(e). The Assessing Officer found that Mr. Vikram Tannan who was a Director of the assessee held more than 20 per cent of the equity capital of CSPL. The Assessing Officer came to the conclusion that all the conditions for the application of section 2(22)(e) were fulfilled and the loan of Rs.35,00,000 from CSPL would have to be treated as deemed dividend in the hands of the assessee.

5. In appeal, the Commissioner of Income-tax (Appeals) affirmed the order of the Assessing Officer, save and except with a modification that the actual amount which has been received by the assessee was held to be Rs.32,00,000 and not Rs.35,00,000 as determined by the Assessing Officer.

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6. The Tribunal in appeal has reversed the findings of the Commissioner of Income-tax (Appeals) on two counts. Firstly, the Tribunal held that the provisions of section 2(22)(e) would be attracted if a loan was taken by the shareholder from any closely held company. In the present case, the Tribunal noted that the amount was part of a fraud committed on the assessee and the transaction was not reflected in its books of account. In the circumstances, section 2(22)(e) was held not to apply. Secondly, the Tribunal held that even otherwise, the amount would have to be taxed in the hands of the shareholder who obtained the benefit and not in the hands of the assessee.

7. Under section 56, income of every kind which is not to be excluded from the total income under the Act is chargeable to income- tax under the head 'Income from other sources', if it is not chargeable to income-tax under any of the heads specified in items (a) to (e) of section 14. Under clause (1) of sub-section (2), income by way of dividend is chargeable to income-tax under the head 'Income from other sources'. Section 2(22) provides an inclusive definition of the expression 'dividend' for the purposes of the Act.

Section 2(22)(e) is as follows :-

> "(22) 'dividend' includes--
>
> (a) to (d) ** ** **
>
> (e) any payment by a company, not being a company in which the public are substantially interested, or 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;"

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8. Clause (e) of section 2(22) is not artistically worded. For facility of exposition, the contents can be broken down for analysis :

> (i) Clause (e) applies to any payment by a company not being a company in which the public is substantially interested of any sum, whether as representing a part of the assets of the company or otherwise made after the 31 May, 1987; (ii) Clause (e) covers a payment made by way of a loan or advance to (a) a shareholder, being a 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 (b) any concern in which such shareholder is a member or a partner and in which he has a substantial interest; (iii) Clause (e) also includes in its purview any payment made by a company on behalf of or for the individual benefit, of any such shareholder; (iv) Clause (e) will apply to the extent to which the company, in either case, possesses accumulated profits. The remaining part of the provision is not material for the purposes of this appeal. By providing an inclusive definition of the expression 'dividend', section 2(22) brings within its purview items which may not ordinarily constitute the payment of dividend. Parliament has expanded the ambit of the expression 'dividend' by providing an inclusive definition.

9. In order that the first part of clause (e) of section 2(22) is attracted, the payment by a company has to be by way of an advance or loan. The advance or loan has to be made, as the case may be, either to a shareholder, being a beneficial owner holding not less than ten per cent of the voting power or to any concern to which such a shareholder is a member or a partner and in which he has a substantial interest. The Tribunal in the present case has found that as a matter of fact no loan or advance was granted to the assessee, since the amount in question had actually been defalcated and was not reflected in the books of account of the assessee. The fact that there was a defalcation seems to have been accepted since this amount was allowed as a business loss during the course of assessment year 2006-

07. Consequently, according to the Tribunal the first requirement of there being an advance or loan was not fulfilled. In our view, the finding that there was no advance or loan is a pure finding of fact which does not give rise to any substantial question of law. However, even on the second aspect which has weighed with the Tribunal, we are of the view that the construction which has been placed on the provisions of section 2(22)(e) is correct. Section 2(22)(e) defines the A.Y. 2008-09.

ambit of the expression 'dividend'. All payments by way of dividend have to be taxed in the hands of the recipient of the dividend namely the shareholder. The effect of section 2(22) is to provide an inclusive definition of the expression 'dividend'. Clause (e) expands the nature of payments which can be classified as a dividend. Clause (e) of section 2(22) includes a payment made by the company in which the public is not substantially interested by way of an advance or loan to a shareholder or to any concern to which such shareholder is a member or partner, subject to the fulfillment of the requirements which are spelt out in the provision. Similarly, a payment made by a company on behalf, of for the individual benefit, of any such shareholder is treated by clause (e) to be included in the expression 'dividend'. Consequently, the effect of clause (e) of section 2(22) is to broaden the ambit of the expression 'dividend' by including certain payments which the company has made by way of a loan or advance or payments made on behalf of or for the individual benefit of a shareholder. The definition does not alter the legal position that dividend has to be taxed in the hands of the shareholder. Consequently in the present case the payment, even assuming that it was a dividend, would have to be taxed not in the hands of the assessee but in the hands of the shareholder. The Tribunal was, in the circumstances, justified in coming to the conclusion that, in any event, the payment could not be taxed in the hands of the assessee. We may in concluding note that the basis on which the assessee is sought to be taxed in the present case in respect of the amount of Rs.32,00,000 is that there was a dividend under section 2(22)(e) and no other basis has

been suggested in the order of the Assessing Officer.

10. For the aforesaid reasons, the first and second questions will not give rise to any substantial questions of law."

7. Further, On identical set of facts, the Hon'ble Rajasthan High Court in the case of CIT vs. Hotel Hilltop, 313 ITR 116 (Raj) has held as under :- (Page nos.117 to 120) "This appeal by the Revenue against the judgment of the Tribunal dated September 16, 2004, was admitted, vide order dated A.Y. 2008-09.

March 29, 2005, by framing the following substantial questions of law:-

> "1. Whether on the facts and in the circumstances of the case and in law, the learned Tribunal was justified in upholding the order of learned Commissioner of Income-tax (Appeals) deleting the addition of Rs.10 lakhs as deemed dividend under section 2(22)(e) of the Income-tax Act ?
>
> 2. Whether the assessee-firm whose partners hold 100% share in M/s. Hilltop Palace Hotels (P.) Ltd., had received the payment of Rs.10 lakhs by way of security and not as an advance is perverse?"

The necessary facts are that a return was filed by the assessee (firm) M/s. Hotel Hilltop, 5, Ambavgarh, Udaipur, declaring income of Rs.72,000/- on January 3, 1992. The case was taken under scrutiny and notices were issued. It appeared that the assessee had shown liability of Rs.12,46,058/- under the head "other liabilities" out of which a liability to the extent of Rs.10,87,747/- pertained to M/s. Hilltop Palace Hotels (P.) Ltd. It also transpired to the Assessing Officer that this liability consisted of Rs.10 lakhs received as an advance against the security from the company to the firm under the agreement to hand over the management of the firm's hotel to the company and the balance amount of Rs.87,747/- are of trade credits.

The assessee, vide order-sheet dated August 13, 1993, was asked to explain why the security of Rs.10 lakhs be not treated as dividend under section 2(22)(e) of the Income-tax Act and added to the income of the firm. It is not in dispute that the amount of Rs.10 lakhs proceeded from the company to the firm. It is also not in dispute that the shareholding pattern of the company is as under :

> "Shareholding pattern of M/s. Hilltop Palace Hotels (P.) Ltd.
>
> (1) Shri Roop Kumar Khurana 23.33% (2) Smt. Saroj Khurana 4.67% (3) Vikas Khurana 22% (4) Deshbandhu Khurana 25% (5) Shri Rajiv Khurana 25%"

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Likewise, it is also not in dispute that at the relevant time constitution of the firm was as under :-

"Constitution of M/s Hotel Hilltop :

1. Shri Roop Kumar Khurana 45%

2. Shri Deshbandhu Khurana 55%"

The Assessing Officer, in these circumstances, found the amount to be deemed dividend under section 2(22)(e) and assessed it in the hands of the firm. This order was challenged in appeal and the learned Commissioner (Appeals) found that since the firm is not a shareholder of the company the amount of Rs.10 lakhs cannot be assessed to tax under section 2(22)(e) and thus it was deleted.

Against this order of the Commissioner of Income-tax (Appeals), the Revenue filed an appeal before the learned Tribunal and the Tribunal found that the provisions under section 2(22)(e) are deeming provisions and are aimed at including the obvious or what is uncertain or to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. Then the definition, as given in section 2(22)(e) was also considered and found that since the firm is not a shareholder of the company the amount of Rs.10 lakhs could not be assessed to tax under section 2(22)(e). It was also found that this amount cannot be stated to be an advance or loan as the agreement specifically mentions it as security. It was also considered that as on April 1, 1990, the company has accumulated profits of Rs.44,825/- only. Thus, the ingredients of the deeming clause are not satisfied. It was reiterated that unless the firm is a registered shareholder of the company any amount of advance to the partner cannot be taxed in the hands of the firm as such. Thus, the appeal was dismissed.

We have heard learned counsel on the questions framed. Long drawn arguments were made on either side. However, before proceeding further, we may gainfully quote the provisions of section 2(22)(e), which read as under :-

> "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 A.Y. 2008-09.
>
> otherwise) made after the 31st day of May, 1987, by way of advance or loan to a share holder, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or with out 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;"

From a reading of the above provision, it is clear that it comprehends manifold requirements, the first being the payment should be made by way of loan or advance to the concern. Of course on this aspect, the conclusion has been recorded by the Tribunal against the Revenue but then on a bare

reading of the agreement and considering the totality of circumstances including the very nature of the term "security" and the fact that substantial portion of this Rs.10 lakhs of amount, say more than Rs.9 lakhs, have been advanced only during January 7, 1991, to March 22, 1991, it is difficult to accept it as a security in the sense of the term as comprehended in the agreement rather it clearly appears to be simply a nomenclature used to borrow the words of the Assessing Officer "transparent cover". Be that as it may.

The more important aspect, being the requirement of section 2(22)(e) is that "the payment may be made to any concern, in which such shareholder is a member or partner and in which he has substantial interest or any payment by any such company on behalf or for the individual benefit of any such shareholder . . . " Thus, the substance of the requirement is that the payment should be made on behalf of or for the individual benefit of any such shareholder, obviously, the provision is intended to attract the liability of tax on the person, on whose behalf or for whose individual benefit the amount is paid by the company whether to the shareholder or to the concerned firm. In which event, it would fall within the expression "deemed dividend". Obviously, income from dividend is taxable as income from other source under section 56 of the Act and in the very nature of things the income has to be of the person earning the income. The assessee in the present case is not shown to be one of the A.Y. 2008-09.

persons being shareholder. Of course, the two individuals being Roop Kumar and Devendra Kumar are the common persons holding more than requisite amount of shareholding and having requisite interest in the firm but then thereby the deemed dividend would not be deemed dividend in the hands of the firm rather it would obviously be deemed dividend in the hands of the individuals on whose behalf or on whose individual benefit being such shareholder the amount is paid by the company to the concern.

Thus, the significant requirement of section 2(22)(e) is not shown to exist. The liability of tax as deemed dividend could be attracted in the hands of the individuals being the shareholders and not in the hands of the firm.

Thus, the result of the aforesaid discussion is that question No. 2, as framed, is answered in favour of the Revenue, and against the assessee, while question No. 1 is answered against the Revenue and in favour of the assessee though for different reasons.

The net result of the answer to the above questions is, that the appeal fails and is dismissed."

8. As regards the judgement of Hon'ble Delhi High Court in the case of CIT vs. National Travel Services, 202 Taxman 327 (Delhi) cited by the ld.

Departmental Representative, we noticed that in another judgement in the case of CIT vs. Ankitech (P) Ltd., 199 Taxman 341 (Del), the Hon'ble Delhi High Court decided the issue in favour of the assessee considering the judgment of Hon'ble Bombay High Court in the case of CIT vs. Universal Medicare Pvt. Ltd., 190 Taxman 144 (Mum) and judgment of Rajasthan High Court in the case of CIT vs. Hotel Hilltop (supra). In the case of CIT vs. Ankitech (P) Ltd. (supra), the Hon'ble Delhi

High Court has affirmed the order of I.T.A.T., Special Bench, Mumbai in the A.Y. 2008-09.

case of Baumik Colour (Supra). However, the Hon'ble Delhi High Court has taken a different view in the case of CIT vs. National Travel Services (supra) wherein it has been held that for the purpose of section 2(22)(e) of the Act the partnership firm is to be treated as the share holder and it is not necessary that it is to be "registered share holder". The Hon'ble Delhi High Court has decided the issue in favor of the Revenue.

9. From the above discussion, we have noticed that there are two possible views and interpretation on the issue is under consideration. Hon'ble Bombay High Court in the case of CIT vs. Universal Medicare Pvt. Ltd. (supra), Hon'ble Rajasthan High Court in the case of CIT vs. Hotel Hilltop (supra) and Hon'ble Delhi High Court in the case of CIT vs. Ankitech (P) Ltd. (supra) decided the issue in favour of the assessee but in subsequent judgement Hon'ble Delhi High Court in the case of CIT vs. National Travel Services (supra) has decided the issue against the assessee and in favour of the Revenue. Under such circumstances, the Hon'ble Supreme Court in the case of CIT vs. Vegetable Products Limited, 88 ITR 192 (SC) has held as under:-

> "There is no doubt that the acceptance of one or the other interpretation sought to be placed on section 271(1) (a)(i) by the parties willful lead to some inconvenient result, but the duty of the court is to read the section, understand its language and give effect to the same. If the language is plain, the fact that the consequence of giving effect to it may lead to some absurd result is not a factor to be A.Y. 2008-09.
>
> taken into account in interpreting a provision. It is for the legislature to step in and remove the absurdity. On the other hand, if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted. This is a well-accepted rule of construction recognised by this court in several of its decisions. Hence, all that we have to see is, what is the true effect of the language employed in section 271(1)(a)(i). If we find that language to be ambiguous or capable of more meanings than one, then we have to adopt that interpretation which favours the assessee, more particularly so because the provision relates to imposition of penalty."

10. The Hon'ble Patna High Court in the case of Tata Iron & Steel C. Ltd. vs. Union of India, 75 ITR 676 (Patna) has held that in a case of reasonable doubt, the construction must be beneficial to the tax payer is to be adopted.

11. In addition to above, the proposition of law relating to the issue as to which view, in case there are two possible views, should be followed, the decision in the following cases have been dealt with this proposition of law and have held that in case of provision of law is liable to interpretation, then interpretation in favour of the assessee should be adopted.

(1) Mysore Minerals Ltd. vs. CIT, 239 ITR 775 (SC)
(2) Orissa State Warehousing Corporation vs. CIT, 237 ITR589 (SC)

(3) CIT vs. Podar Cement Pvt. Ltd. & Others, 226 ITR 625 (SC)
(4) CIT vs. Gwalior Rayon Silk Mfg. Co. Ltd., 196 ITR 149 (SC)
(5) CIT vs. Sahazada Nand, 60 ITR 392 (SC)
(6) CIT vs. Kulu Valley Transport Co. Ltd., 77 ITR 518, 530 (SC)
(7) CIT vs. Vegetable Products Ltd., 88 ITR 192 (SC)

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(8) CIT vs. Naga Hills Tea Co. Ltd., 89 ITR 236, 240 (SC) (9) Contr. ED vs. Kanakasabai, 89 ITR 251, 257(SC) (10) CIT vs. Madho Jatia, 105 ITR 179, 184 (SC)

12. In the light of above discussions, we find that the CIT(A) followed the one possible view in favour of the assessee following the judgement of the Hon'ble Rajasthan High Court in the case of CIT vs. Hotel Hilltop and the order of I.T.A.T. Special Bench, Bombay in the case of Asstt. CIT vs. Baumik Colour Pvt. Ltd. In the facts and circumstances and in view of the above discussions, we confirm the order of the CIT(A).

13. In the result, appeal of the Revenue is dismissed.

(Order pronounced in the open Court)

Sd/-
(BHAVNESH SAINI)
Judicial Member

Sd/-
(A.L. GEHLOT)
Accountant Member

PBN/*
Copy of the order forwarded to:
1. Appellant
2. Respondent
3. CIT (Appeals) concerned
4. CIT concerned
5. D.R., ITAT, Agra Bench, Agra
6. Guard File.

By Order

Sr. Private Secretary
Income-tax Appellate Tribunal, Agra
True Copy