A.F.R.

Court No. - 35

Case :- INCOME TAX APPEAL No. - 532 of 2011

Appellant :- The Commissioner Of Income Tax Bareilly And Another
Respondent :- M/S Associated Metals Co. Ltd. Bareilly
Counsel for Appellant :- S.S.C. I.T.
Counsel for Respondent :- R.R.Agrawal,Suyash Agrawal

Hon'ble Bharati Sapru,J.
Hon'ble Saumitra Dayal Singh,J.

This appeal has been filed by the revenue under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the Act), against the order of the Income Tax Appellate Tribunal, Lucknow Bench dated 30.11.2005 for the Assessment Year 1995-96 on the following questions of law:-

"(1) Whether the Provisions of Section 2(22)(e) of the Act applies to the facts and circumstances of the case?

(2) Whether on the facts and in the circumstances of the case, the amount of Rs. 3,80,00,000/- could be treated as a deemed dividend within the meaning of Section 2(22)(e) of the Act?

(3) Whether on the facts and in the circumstances of the case, the Tribunal is justified in law in deleting the addition of Rs. 3,80,00,000/- made by the A.O. as deemed dividend u/s 2(22)(e) of the Act?"

At the very outset, learned counsel for the revenue states that the question no.2 covers the entire controversy raised by the revenue.

For the previous year relevant to the Assessment Year 1995-96 the assessee disclosed a credit balance of Rs. 3,75,26,099/- standing in the name of a sister concern of the assessee, Goel Investments ltd. (hereinafter referred to as the GIL). During the assessment proceedings, the

Assessing Officer proposed to tax the said amount treating the same to be deemed dividend under Section 2(22)(e) of the Act.

The assessee objected to the said proposal and it submitted that it had shown credit balance of Rs. 3,76,26,009/- of GIL on account of a cheque having been issued by GIL to Vasulinga Sugar & General Mill Ltd. That cheque had not been accepted by the said Vasulinga Sugar & General Mill Ltd. and returned back to GIL. However, the reversal/rectification entries were made in the next financial year and, therefore, the entries did not represent any real transaction of payment of money. It was only an accounting entry.

However, the Assessing Officer had rejected the explanation furnished by the assessee and treated the aforesaid amount as deemed dividend under Section 2(22)(e) of the Act.

Upon the appeal, the CIT (Appeals) allowed the assessee appeal on the reasoning that the aforesaid entries do not represent payment of any money by the GIL to the assessee. Upon further appeal by the revenue, the Tribunal has held as below:-

"There is no dispute to the fact that the assessee has shown the credit balance in its books of account in the name of GIL as on 31st March, 1995. However, the assessee has stated that a cheque of Rs. 3,80,00,000/- was issued by GIL to Vasulinga Sugar and General Mills Limited being cheque no. 129000 dated 28th March, 1995, on Bank of India. There is no dispute to the fact that the said cheque was cancelled and was never presented for payment as is evidence from page no.4 of the paper book filed by the ld. D.R. Now the question comes as to whether entries made by the assessee in its books of account showing the balance in the name of GIL could be deemed that a loan or advance has been made to the assesse by GIL on the basis of the above cheque. We are of the considered view that the mere issue of cheque does not create any legal right nor any

legal obligation and as such no relationship of lender or borrower, debtor or creditor, comes into existence unless and until the cheque is presented to the bank and is honoured. Therefore, the transaction of the payment by way of loan or advance is completed only the borrower.

In the case before us, there is no dispute to the fact that there was no actual out flow of money as the cheque was not presented for payment. Since in the case before us, there is no out flow of fund from the lender to the borrower, the question of repayment of the loan or advance before the end of the accounting year or at any future date does not arise and the mere entry made in the books of account by the assesse showing as credit on the basis of the cheque issued, which was not encashed and was subsequently cancelled, does not being it within the ambit of the provisions of Section 2(22)(e) of the Act."

Sri Shubham Agarwal, learned counsel for the revenue submits that the cheque having admittedly been issued by GIL to the assessee, the transaction was covered under Section 2(22)(e) of the Act and it represented deemed dividend that had been rightly subjected to tax.

Opposing the aforesaid argument, Sri R.R. Agarwal, learned senior counsel assisted by Sri Ankur Agarwal, learned counsel for the assessee submits that the provision of Section 2(22)(e) of the Act is a deeming provision. It can apply only upon fulfilment of statutory conditions mentioned therein. No amount can be treated as deemed dividend unless there is actual payment.

Having considered the argument so advanced, we note Section 2(22)(e) of the Act reads as below:-

*"**2.** In this Act, unless the context otherwise requires,-*

(22) dividend includes:-

(a).....

(b).....

(c).....

(d).....

(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 (hereinafter 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;"

(emphasis supplied)

From the plain reading of Section 2(22)(e) it transpires the legislature seeks to tax certain payments made by specified persons as deemed dividend by treating such payments to be dividend payment on notional basis. Mere issuance of a cheque that was subsequently cancelled and returned without ever being ever presented for encashment and without any money having been paid against the same to the assessee it could never constitute payment of any sum. The assessee never came gained receipt of any amount of money against the aforesaid cheque from GIL. No money passed through from GIL to the assessee.

Notwithstanding the fact the cheque was subsequently cancelled and returned, the provision of Section 2(22)(e) never got attracted to the facts of the case for a simple reason that no amount of money was ever received by the assessee. To apply a notional provision of the statute the revenue should have shown to exist

actual fact of payment and it could not have inferred notional or deemed dividend on a notional payment in absence of express intention to that effect expressed by the legislature.

In this regard, we further find that the Madras High Court in the case of **Commissioner of Income Tax Vs. Smt. Savithiri Sam** reported in **(1998) 114 CTR (Mad) 17,** construed 'payment' used in Section 2(22)(e) to be physical/actual payment. It further held as below:-

"5. *That apart, the provisions of law namely s. 2(22)(e) which we have already extracted above, says that by a fiction dividend is made to include any payment by a company etc. Therefore, it is difficult for us to introduce another fiction in respect of the words "payment. In other words, when s. 2(22)(e) itself introduces a fiction, it is improper for us to introduce another fiction and construe a payment as equivalent to a constructive payment. In this view of the matter, we are not inclined to accept the arguments advanced on behalf of the Revenue and following the decision in G.R. Govindarajulu Naidu vs. CIT (supra), we answer the reference in the affirmative and against the revenue."*

Also, the Bombay High Court in the case of **Commissioner of Income Tax-22 Vs. Pravin Bhimshi Chheda** reported in **(2014) 48 Taxmann.com 151 (Bombay)**, has held as below:-

"*The Tribunal, then, analyses this transaction and holds that there is no flow of fund or any benefit from M/s Swati Energy and Projects Pvt. Ltd. to M/s Sujyoti Enterprises or to its partner Mr. Pravin B. Chheda. Mr. Pravin Bhimshi Chheda is the respondent-assessee before us. It is in these circumstances, that the Tribunal concluded that this is not a loan or advance so as to attract section 2(22)(e). We are not required to go into any further controversy or larger question.*"

Thus in absence of satisfaction of statutory precondition of "payment" of "any sum", to the assessee the provision of Section 2(22)(e) was

never attracted. The questions raised in this appeal are answered in the negative i.e. against the revenue and in favour of the assessee.

The appeal lacks merit and is **dismissed**. No order as costs.

Order Date :- 1.12.2017
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