

IN THE HIGH COURT AT CALCUTTA  
Special Jurisdiction (Income Tax)  
Original Side

Present :  
The Hon'ble Justice Girish Chandra Gupta  
And  
The Hon'ble Justice Arindam Sinha  
8<sup>th</sup> April, 2015

ITA 48 of 2007

**C.I.T Kolkata-XII**  
**Vs.**  
**Mahesh Chandra Mantri**

Mr. P.K. Bhowmick, Advocate for the appellant

Mr. R. Murarka, Advocate with  
Ms. Sutapa Roy Chowdhury, Advocate for the  
respondent

The Court :- The question for consideration formulated at the time of admission of the appeal pertaining to the Assessment Year 2001-02 reads as follows :-

*“Whether on the facts and in the circumstances of the case Income Tax Appellate Tribunal was justified in law in deleting the addition made by the Assessing Officer under Section 2(22)(e) of the Income Tax Act, 1961?”*

The provisions contained in Section 2(22)(e) of the Income Tax Act provides as follows :-

*“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 31<sup>st</sup> 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 shareholders 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”.*

It is apparent from the language of the clause quoted above that before any payment can take the character of dividend within the meaning of the aforesaid provision it has to be shown that there were accumulated profits lying with the company which made the payment. In the case before us it was never the contention of the revenue that any accumulated profit was lying with the company. Their case is that the company was having a reserve created from out of the share premium. How is the money received by a company, on account of the share premium, is to be accounted for and how can that money be spent has elaborately been provided for in Section 78 of the Companies Act, 1956.

Mr. Bhowmick, learned Advocate appearing for the appellant did not dispute that there were no accumulated profits lying with the company. His contention is that there was a reserve created from out of the share premium. Therefore, according to him Section 2(22)(e) should be applied to any advance or loan made by the company. In support of his contention he relied upon a judgment of the Apex Court in the case of Bharat Fire And General Insurance Ltd. v. C.I.T, New Delhi reported in (1964) Vol.LIII 108. The facts and circumstances in that case were altogether different. What had happened in that case was the assessee received a sum of Rs. 50,787/- by way of dividend from Rohtas Industries Ltd.. Rohtas Industries Ltd. in the year 1945 had created a Capital Reserve from out of the moneys received on account of share premium. The aforesaid reserve was applied for declaring the dividend. The Companies Act of 1913 did not contain any prohibition as regards application of share premium money in declaring dividend. But the 1956 Act does not permit declaration of dividend from out of the money collected on account of share premium.

Therefore, the judgment in the case of Bharat Fire And General Insurance (supra) has no manner of application to the facts and circumstances of the case. In the case before us the provisions contained in Section 78 of the Companies Act, 1956 are applicable. It is interesting to note that it was not also the case of the revenue that from out of the moneys received on account of share premium dividend was declared as was done in the case of Bharat Fire And General Insurance (supra).

For the aforesaid reasons the question formulated at the time of admission of the appeal is answered in the affirmative and against the revenue.

The appeal is, therefore, dismissed.

(Girish Chandra Gupta, J.)

(Arindam Sinha, J.)

ANC.