Chief Justice's Court **AFR**

Case :- INCOME TAX APPEAL No. - 252 of 2014

Appellant :- Shashi Pal Agarwal
Respondent :- Commissioner Of Income Tax Kanpur
Counsel for Appellant :- Shubham Agarwal
Counsel for Respondent :- C.S.C. It

Hon'ble Dr. Dhananjaya Yeshwant Chandrachud,Chief Justice
Hon'ble Pradeep Kumar Singh Baghel,J.

This appeal under Section 260A of the Income Tax Act, 1961[1] by the assessee has arisen from a judgment of the Income Tax Appellate Tribunal[2] dated 25 July 2014.

The assessment year to which the appeal relates is AY 2007-08.

The Assessing Officer made an assessment under Section 143 (3) of the Act on 24 December 2009. The Assessing Officer made an addition of Rs.12,50,455.00 to the total income of the assessee treating it to be a deemed dividend within the meaning of Section 2 (22) (e) of the Act. In appeal, the Commissioner (Appeals), by an order dated 29 March 2011, deleted the addition. An appeal was filed by the Revenue before the Tribunal. The Tribunal allowed the appeal by its judgment dated 29 November 2013. The assessee thereafter moved this Court under Section 260A of the Act. By a judgment dated 17 April 2014 in **Kishori Lal Agrawal v Commissioner of Income Tax**[3], a Division Bench of this Court restored the proceedings back to the Tribunal with the following observations:

> "...The first ingredient of exclusionary clause (ii) of section 2 (22) (e) is that the advance or loan must be made to the shareholder by

1 Act
2 Tribunal
3 (2014) 364 ITR 158 (All)

> a company in the ordinary course of its business. The first ingredient does not require that the company must be engaged in money lending business. Moreover, where the advance or loan was made in the ordinary course of the business of the company, the fact that the lending of surplus funds is not part of the main object but is at the same time permissible as an ancillary object, would not detract from the loan or advance being made in the ordinary course of its business. The second ingredient, undoubtedly, requires that the lending of money should be a substantial part of the business of the company. What is a substantial part of the business of the company has to be determined as a matter of fact."

On remand, the Tribunal has rendered its impugned decision on 25 July 2014 holding that the Assessing Officer had correctly treated the advance or loan given to the assessee by two private limited companies as deemed dividend. The order passed by the CIT (A) was set aside and the order of the Assessing Officer was restored.

The following question of law, of the questions formulated in the appeal, has been pressed at the hearing:

> "Whether the Tribunal was not justified in drawing an adverse conclusion against the appellant by overlooking the specific finding of the CIT (Appeals) that both the lending companies have advanced 69% and 38% of their total capital/assets to the appellant as interest bearing loan, which forms substantial part of the business of the lending company and hence leading to the conclusion that the case is covered

under exception clause (ii) to Section 2 (22) (e) of the Act."

The assessee, in the present case, held more than 10% of the shareholding of two private limited companies, namely Kukki Color Photos Pvt. Ltd. and Kukki Color Prints Pvt. Ltd. The assessee had received loans and advances from the aforesaid two companies during the assessment year in question. The issue was, whether the exclusionary provision contained in Section 2 (22) (e) of the Act was attracted.

Section 2 (22) (e) of the Act, insofar as is material, defines the expression 'dividend' as follows:

> "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 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;
>
> but 'dividend' does not include--
>
> ...

> (ii) any advance or loan made to a shareholder or the said 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 expression 'dividend' is defined in Section 2 (22) (e) of the Act to comprise of the following ingredients:

(i) There must be a payment by a company in which the public is not substantially interested by way of advance or loan to a shareholder;

(ii) The payment must be to a person, who is the beneficial owner of shares, not being shares entitled to a fixed rate of dividend, 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 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. However, the exclusionary clause (ii), operates to exclude any advance or loan made to a shareholder or to the said concern by a company in certain cases. Within the purview of the exclusionary provision, the advance or loan must be, firstly, to a shareholder; secondly, the payment must be in the ordinary course of business; and thirdly, the lending of money must constitute a substantial part of the business of the company.

What constitutes a substantial part of business is a question of fact.

The legislature has not used the expression 'major part of the business' but has designedly used the expression 'substantial part of the business of the company'. The expression 'business' contemplates an organized course of activity which is actually continued or contemplated to be continued with a profit motive and not for a sport or pleasure. In each case, the true test is whether the lending of money constituted a substantial part of the business of the company. Therefore, two requirements must be attracted. Firstly, the business of the Company must consist of the lending of money in the ordinary course of its business during which an advance or loan was made to a shareholder. Secondly, the lending of money must constitute a substantial part of the business of the Company.

In the present case, the admitted facts, which were brought on the record and which are not disputed even during the course of the hearing of appeal, are that the assessee held more than 10% of the equity capital of the two private limited companies. Neither of the companies, admittedly, lent any money to any entity, save and except to the assessee. The lending of money was not a part of the business of the Company, nor for that matter, could it constitute a substantial part of the business. There was no organized course of activity involving dealings with any one else, save and except for the assessee. The assessee was, therefore, unable to establish that the exclusion was attracted.

In that view of the matter, we see no reason to entertain the appeal,

which does not give rise to any substantial question of law. The appeal is, accordingly, dismissed. There shall be no order as to costs.

Order Date :- 9.12.2014
RKK/-

(P.K.S. Baghel, J) (Dr. D.Y. Chandrachud, CJ)