

**HON'BLE SRI JUSTICE L. NARASIMHA REDDY
AND
HON'BLE SRI JUSTICE CHALLA KODANDA RAM**

I.T.T.A No. 238 OF 2003

15-10-2014

BETWEEN

Commissioner of Income Tax, Rajahmundry

...Appellant

And

The India Fruits Limited, Kadiyam

.....Respondent

**HON'BLE SRI JUSTICE L. NARASIMHA REDDY
AND
HON'BLE SRI JUSTICE CHALLA KODANDA RAM**

I.T.T.A No. 238 OF 2003

-

JUDGMENT: (per the Hon'ble Sri Justice Challa Kodanda Ram)

This appeal is filed by the Revenue, under Section 260A of the Income Tax Act, 1961 (for short, 'the Act') raising the following two substantial questions of law, said to be arising from the orders of the Income Tax Appellate Tribunal, Visakhapatnam (for short, 'the Tribunal') dated 09-10-2002 in ITA No.414/H/1994:

“1. Whether on the facts and in the circumstances of the case, the Appellate Tribunal is justified in holding that the amount advanced to the shareholder cannot be

considered as deemed dividend within the purview of Section 2(22)(e) of the I.T. Act, 1961?

2. Whether the finding of the Income Tax Appellate Tribunal that lending of the amount to the shareholder is in the ordinary course of its business and that the activity of lending of money constitutes substantial part of the business of the company are based on material on record?"

2. The facts are that the assessee is a company which is holding 100% stake in another company under the name "M/s. Anam Machinery Fabricators Limited". During the financial year 1992-94 corresponding to the assessment year 1993-94, the assessee was assessed to a sum of Rs.27,59,932/- towards deemed dividend received from the subsidiary company. The said amount represents the undistributed dividend of the subsidiary company. In view of the fact that the assessee company borrowed certain amounts from the subsidiary company, the said amount was sought to be taxed in the hands of the assessee by applying the provisions of Section 2(22)(e) of the Act. The appeal filed by the assessee with the first appellate authority ended up in dismissal and thereafter, it filed further appeal to the Tribunal. The Tribunal, after analysing the facts on record, gave a categorical finding that there were mutual transactions between the parties in the normal course of business and the subsidiary company had also one of its objects, as lending money, and for the monies lent to the assessee company, the subsidiary company had charged interest at the rate of 13% per annum. Taking all these aspects into consideration, the Tribunal has set aside the order of the assessing officer. The department is in appeal raising the substantial questions of law said to be arising from the orders of

the Tribunal referred to in para (1) above.

3. Sri S.R. Ashok, learned Senior Counsel for the department by making a reference to the orders of the Tribunal submits that there was only one single transaction in the whole year and further it was not the business of the subsidiary company to lend monies and there was no other transaction of lending money to any other entity. He would also submit that the contention of the department that this being the loan transaction, the resolution of the Board of the Directors of the subsidiary company was brought up for the purpose of assessment, was not adverted to and believed by the Tribunal. He has relied upon the judgment of the Bombay High Court in ***Walchand & Co. Ltd., v. C.I.T.***^[1].

4. On the other hand, Ms.K. Neeraja, learned counsel for the respondent – assessee supports the order of the Tribunal and has specifically drawn the attention of this Court to the findings of fact recorded by the Tribunal. She has placed reliance upon the judgment of the Supreme Court in ***M. Janardhan Rao v. Joint Commissioner of Income Tax***^[2].

5. We feel it necessary to notice the observations made by the Tribunal at para 9 of its order which read as under:

“On an over all analysis of the facts and circumstances of the case along with the papers and documents placed before us and the relevant provisions of different statutes, we observe as follows:

Although the Assessment order and the order of the

CIT (A) appear to have been made on a sound footing, but on a critical analysis of the provisions of the statute and on a perusal of the written submission filed by the learned AR of the assessee, after hearing the vociferous argument made by the Senior Counsel Mr.K.K. Viswanathan in this regard, we are unable to ignore the technicalities of law clinching in favour of the assessee. Firstly, because as discussed above, Clauses 9 and 10 of the Object clauses of the Memorandum of Association of M/s. Anam Machinery Fabricators Ltd., authorise that company to accumulate funds, to lend, invest or otherwise employ monies belonging to or entrusted to the company in securities and shares and other investments; to lend and advance money or give credit to such person, firms or companies and on such terms as may seem expedient and to give guarantees or become sureties for any such person, firms or companies, the income of such concern. Although, it was never raised by both the sides, analysing further in Clause to Explanation III of Sect.2(22)(e), we found that “concern” means a Hindu undivided family, or a firm or an association of persons or a body of individuals or a company. Hence, the technicalities of all these provisions fully favour the stand of the assessee which simply cannot be brushed aside just with a purpose to make addition on the ground of “deemed dividend”.

In addition to all this, the logical argument of the Senior Counsel on behalf of the appellant-company further substantiate his stand on the ground that the appellant-company changed their accounting system from cash to mercantile with effect from 1.6.1988 in consonance with the provisions of Sec.209 of the Companies Act and offered to tax on mercantile basis thereafter. We also agree with his point that the term “substantial interest” and “substantial business” not having been defined in the Act has to be considered only on the basis of 20% of the income as per clause (b) of Expl.III of Sec.2(22)(e) of the Act.

On an over all consideration of the facts and circumstances of the case read with statutory provisions of the Income Tax Act as well as Companies Act and the documents relied by the Appellant, we do not find any

alternative than to delete this addition in favour of the assessee because of the technicalities adumbrated in the respective statutes which were strictly complied with by the assessee-company.”

6. In the light of the findings recorded by the Tribunal and in view of the fact that there is no challenge to the findings recorded by the Tribunal, by raising a plea that such findings of fact are perverse, the findings of fact as recorded by the Tribunal are required to be accepted as final and binding on the Court under Section 260A of the Act.

7. When we analyse the facts on record, it is evident that the assessee-company owed certain sum during the assessment year and it had a sum of Rs.1,12,24,745 to the credit of the subsidiary company which is much in excess of the amount of Rs.27,59,932/- sought to be brought to tax under deemed dividend. Further, in the assessment order, the assessing officer recorded a finding that the parties were maintaining a running account and as on 31-03-1990, a sum of Rs.1,12,24,745/- was lying to the credit of the subsidiary company. It is also clear from the record that the subsidiary company was advancing money to the assessee company for the purpose of purchase of raw material and to make payments to M/s.Hindalco Limited to meet their business/trading liabilities. Taking all these aspects into consideration, the Tribunal recorded a finding that there is no element of deemed dividend and the amount of undistributed dividend of the subsidiary company cannot be said to be deemed dividend of the assessee company.

8. The judgment of the Bombay High Court in **Walchand's** case (1 supra) is not applicable to the case on hand since in the said case it was not established that giving of loan or advance was in the ordinary course of business of the first company or that lending of money was a substantial part of its business. Further, in the said case a finding was recorded that there were only a few isolated transactions and at the end of the year, the accounts were completely squared off, whereas in the present case, as noticed supra, there was a running account between the parties and interest was charged. Apart from that, a sum of Rs.1,12,24,745/- was standing to the credit of the subsidiary company.

9. For the aforesaid reasons, we see no reason to interfere with the orders of the Tribunal and accordingly, we answer the questions of law raised in the appeal, against the Revenue and in favour of the assessee.

10. The appeal is accordingly dismissed. There shall be no order as to costs.

L. NARASIMHA REDDY, J

CHALLA KODANDA RAM, J

15-10-2014

ks

Note:

LR copy to be marked.

B/O

ks

[\[1\]](#) 100 ITR 598

[\[2\]](#) 273 ITR 50