

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 10TH DAY OF FEBRUARY 2021

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR. JUSTICE NATARAJ RANGASWAMY

I.T.A. NO.43 OF 2013

BETWEEN:

SMT. JAMUNA VERNEKAR
#107, 2ND MAIN
KORAMANGALA, I BLOCK
BANGALORE-560034.

.... APPELLANT

(BY MR. V. CHANDRASEKHAR, ADV., FOR
MR. M. LAVA, ADV.,)

AND:

THE DEPUTY COMMISSIONER
OF INCOME TAX
CIRCLE-12(5), R.P. BHAVAN
NRUPATHIJINGA ROAD
BANGALORE-560001.

... RESPONDENT

(BY MR. E.I. SANMATHI, ADV.,)

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THIS I.T.A. IS FILED UNDER SEC. 260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 31.08.2012 PASSED IN ITA NO.494/BANG/2011 FOR THE ASSESSMENT YEAR 2007-08, PRAYING TO:

(i) FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN.

(ii) ALLOW THE APPEAL AND SET ASIDE THE FINDINGS TO THE EXTENT AGAINST THE APPELLANT IN THE ORDER PASSED BY THE TRIBUNAL IN ITA NO.494/BANG/2011 DATED 31.08.2012.

THIS I.T.A. COMING ON FOR HEARING, THIS DAY, **ALOK ARADHE J.**, DELIVERED THE FOLLOWING:

JUDGMENT

This appeal under Section 260-A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act', for short) has been filed by the revenue against the judgment dated 31.08.2012 passed by the Tribunal (hereinafter referred to as 'the Tribunal' for short). The subject matter of the appeal pertains to the Assessment Year 2007-08. The appeal was admitted by a Bench of this Court vide order dated 10.07.2013 on the following substantial question of law:

"Whether the Tribunal was justified in law in holding that the amount of Rs.59,37,455/- received in lieu of Security Deposit and Lease Rentals were loans or advances within the meaning of Section 2(22)(e) of the Act on the facts and circumstances of the case?"

2. Facts leading to filing of this appeal briefly stated are that the assessee is an individual and is a

Director in a company viz., M/s. Vernaker Associates Pvt. Ltd., where she holds more than 10% of shares. The assessee was the owner of plot situated at No.8, 1st A Main, Stag Extension, S.T.Bed, Koramangala Block, Bengaluru which was purchased on 20.01.2004. The company agreed to take the building on rent if the building was constructed on the aforesaid plot of land. For the purposes of construction of building, the company agreed to pay certain amounts depending upon the availability of the funds. It was further agreed between the parties that the amount advanced by the company for the purposes of construction shall be adjusted towards security deposit and the balance towards rent payable by the company to the assessee. The payments were directly made by the company to the suppliers or the contractors and construction of the building was completed in November 2007 and thereafter, the assessee executed a lease deed on 15.12.2007 on certain terms and conditions. The

assessee filed return of income for the Assessment Year 2007-08 on 30.07.2007 in which taxable income was disclosed as Rs.13,40,060/-. The return of income was processed under Section 143(1) of the Act on 01.03.2009. The case of the assessee was selected for scrutiny and notice under Section 143(2) of the Act was issued to the assessee on 19.09.2008. The Assessing Officer, by an order dated 14.12.2009, completed the assessment and determined the total income of the assessee at Rs.72,77,415/- by making an addition of Rs.59,37,455/- as deemed dividend under Section 2(22)(e) of the Act.

3. The assessee thereupon filed an appeal before the Commissioner of Income Tax (Appeals), who by an order dated 30.12.2020, *inter alia*, held that the amounts paid by the company did not amount to deemed dividend within the meaning of Section 2(22)(e) of the Act. It was further held that the provisions of

Section 2(22)(e) of the Act can be applied only to loans and advances and cannot be applied to deposits. With regard to balance amount of Rs.19,37,355/-, the Commissioner held that the appellant has recovered the rent dues subsequently which are nothing but trade debt arising during the course of the business. It was further held that the entire building measuring 8,500 square feet had been leased out at a nominal rent of Rs.2,00,000/- per month which works out to Rs.23.50/- per square feet as against the prevailing market value of Rs.35/- per square feet. Therefore, it was held that the recovery of amounts to trade advances were from rentals in the normal course of business and are not liable to be taxed as envisaged under Section 2(22)(e) of the Act. Thus, the appeal preferred by the assessee was allowed. Being aggrieved by the aforesaid order of the Commissioner of Income Tax (Appeals), the revenue filed an appeal before the Tribunal. The Tribunal, by an order dated 31.08.2012, allowed the appeal preferred

the revenue. In the aforesaid factual background, the appeal has been filed by the assessee.

4. Learned counsel for the assessee submitted that the Tribunal ought to have appreciated that the payment made by the company to the assessee was for business purpose and not a gratuitous payment. It is further submitted that the security deposit does not par take the character of loans or advances and the payment received is by way of security deposit. It is also urged that disallowance, if any, has to be restricted to the accumulated profits and accumulated profits represent the profits as at the beginning of the year and does not include the current profits. However, the Tribunal has failed to appreciate the aforesaid aspect of the matter. In support of aforesaid submission, reliance has been placed on the decisions in **'COMMISSIONER OF INCOME-TAX Vs. CREATIVE DYEING AND PRINTING P. LTD.'** (2009) 318 ITR 476 (DELHI), **'COMMISSIONER OF INCOME-TAX Vs.**

AMBASSADOR TRAVELS P. LTD.' (2009) 318 ITR 376 (DELHI), **'COMMISSIONER OF INCOME-TAX Vs. RAJ KUMAR'** (2009) 318 ITR 462 (DELHI), **'PRADIP KUMAR MALHOTRA Vs. COMMISSIONER OF INCOME-TAX'** (2011) 338 ITR 538 (CAL), **'PRINCIPAL COMMISSIONER OF INCOME-TAX Vs. VIKAS OBEROI'** (2020) 115 TAXMANN.COM 261 (SC), **'BAGMANE CONSTRUCTIONS (P) LTD. Vs. COMMISSIONER OF INCOME-TAX, BANGALORE'** (2015) 57 TAXMANN.COM 120 (KAR), **'COMMISSIONER OF INCOME-TAX Vs. C.R.DASS'** (2012) 17 TAXMANN.COM 76 (DELHI), **'COMMISSIONER OF INCOME-TAX, KOLKATA-1 Vs. GAYATRI CHAKRABORTY'** (2018) 94 TAXMANN.COM 244 (CALCUTTA), **'COMMISSIONER OF INCOME-TAX, MUMBAI Vs. VIR VIKRAM VAID'** (2015) 55 TAXMANN.COM 431 (BOMBAY), **'COMMISSIONER OF INCOME-TAX, AGRA Vs. ATUL ENGINEERING UDYOG'** (2014) 51 TAXMANN.COM

569 (ALLAHABAD), 'COMMISSIONER OF INCOME-TAX Vs. M.B.STOCKHOLDING (P) LTD.' (2015) 64 **TAXMANN.COM 138 (GUJARAT), 'COMMISSIONER OF INCOME-TAX Vs. V.DAMODARAN'** (1979) 2 **TAXMAN 397 (SC), GVK INDUSTRIES LTD. Vs. INCOME-TAX OFFICER'** (2011) 197 **TAXMAN 337 (SC) AND 'COMMISSIONER OF INCOME-TAX Vs. B.C.SRINIVASA SETTY'** (1981) 5 **TAXMAN 1 (SC).**

5. On the other hand, learned counsel for the revenue submitted that the findings recorded by the Tribunal with regard to deemed dividend are the findings based on appreciation of evidence on record and the Tribunal, while recording the aforesaid finding, has not ignored any materials. It is further submitted that the assessee has neither pleaded nor has raised substantial question of law on perversity, in the memorandum of appeal. Therefore, no substantial question of law arises for consideration in this appeal and the findings recorded by the Tribunal are findings of fact which cannot be said

to be perverse. It is further submitted that the withdrawals were made by the assessee from the company which amounted to grant of loan advance by the company to the share holder and therefore, the legal fiction under Section 2(22)(e) of the Act was rightly applied by the Tribunal. It is further submitted that nexus between the amount withdrawn and utilization towards the alleged business purpose, has not been proved by the assessee. It is further submitted that the assessee has not argued before the Commissioner of Income Tax (Appeals) regarding the accumulated profits. In support of aforesaid submission, reliance has been placed on the decision in **'VIJAY KUMAR TALWAR Vs. COMMISSIONER OF INCOME-TAX' 330 ITR 1 AND 'COMMISSIONER OF INCOME TAX Vs. MUKUNDRAY K SHAH' (2007) 290 ITR 433.**

6. We have considered the submissions made on both sides and have perused the record. The only issue, which arises for consideration in this appeal is whether

loan or advance given to a shareholder can be treated as deemed dividend under Section 2(22)(e) of the Act, which reads as under:

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;

7. Thus, from perusal of the aforesaid provision, it is evident that it is only where a loan is advanced by a company to the registered shareholder and in case other conditions as set out in Section 2(22)(e) of the Act are satisfied, the amount of loan would be liable to be treated as deemed dividend within the meaning of Section 2(22)(e) of the Act. The purpose of insertion of sub clause (e) of sub Section 22 of Section 2 of the Act was to bring within the tax net accumulated profits which are distributed by closely held companies to its shareholders in the form of loans to avoid payment of dividend distribution tax under Section 115-O of the Act. Loan or advance given to shareholders or to a concern would not normally qualify as dividend and only in case, where such loan or advance is given to a shareholder as a consequence of any further consideration which is beneficial to the company received from such a shareholder, in such a case, such advance or loan cannot be said to be deemed dividend within the

meaning of the provision. The word 'loan' means anything lent specially money on interest whereas, deposit means a sum of money paid to secure an article at service etc. Therefore deposit is not covered by the decision of Section 2(22)(e) of the Act. In the instant case, the assessee received certain sum from the company which was subsequently adjusted with the security deposit. The company did not give loan to the assessee to construct a building but kept a deposit as any other commercial transaction. The sum so paid has been adjusted towards security deposit which is evident from the books of the company and therefore, the aforesaid deposit is outside the purview of Section 2(22)(e) of the Act. A sum of Rs.19,37,355/- amounts to trade advances which was recovered from rentals during the usual course of business. The trade advances arising during usual course of business and not for individual benefit of the assessee and the same amounts to advance payment of the rents adjusted monthly with

the ledgers of the assessee. The Commissioner of Income Tax (Appeals) has also held that under the commercial transactions, the assessee had given prime property and after construction to the company and the company was benefited as the building after construction was let out to the company at much lower rate than the market price and therefore, the transaction in question is commercial transaction and is outside the purview of Section 2(22)(e) of the Act. However, the aforesaid aspect of the matter has not been appreciated by the tribunal. Therefore, the finding recorded by the tribunal cannot but be termed as perverse.

In view of preceding analysis, the substantial question of law is answered in the negative and in favour of the assessee and against the revenue. In the result, the impugned order of the tribunal dated 30.08.2012 insofar as it contains the finding against the appellant is hereby quashed.

In the result, the appeal is allowed.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

RV/SS