

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON
&
THE HONOURABLE MRS. JUSTICE SHIRCY V.

WEDNESDAY, THE 3RD DAY OF JANUARY 2018 / 13TH POUSHA, 1939

ITA.No. 167 of 2008

(AGAINST THE ORDER IN ITA 349/1999 of I.T.A.TRIBUNAL,COCHIN BENCH DATED
30-05-2008)

APPELLANT/APPELLANT

THE COMMISSIONER OF INCOME TAX,
KOTTAYAM.

BY ADV.SRI.JOSE JOSEPH, SC, FOR INCOME TAX

RESPONDENT/RESPONDENT:

M/S. MALAYALA MANORAMA CO.LTD. ,KOTTAYAM.

BY ADV. MR. P. GOPINATH
BY ADV. SRI. ANIL D. NAIR
BY ADV. SRI.P. BENNY THOMAS
BY ADV. SRI.K .JOHN MATHAI
BY ADV. SRI.E.K. NANDAKUMAR

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 02.11.2017 ALONG WITH IT.APPEAL
NOS. 1686 AND 1693 OF 2009, THE COURT ON 03.01.2018 DELIVERED THE FOLLOWING:

**P.R. RAMACHANDRA MENON
&
SHIRCY V, JJ.**

.....
**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**
.....

Dated this the 3rd January , 2018

JUDGMENT

P.R. Ramachandra Menon, J.

These appeals have been preferred at the instance of the Revenue, in respect of the different assessment years, i.e, 1995-96, 1996-97 and 1997-98. In the first two appeals, two common questions are involved; viz, sustainability of deduction under Section 80Q of the Incometax Act and as to the assessment of the 'deemed dividend' under Section 2(22)(e) of the Incometax Act. In the third appeal, the first issue regarding deduction under Section 80Q is the same, but the second point therein is with regard to the eligibility for deduction under Section 80-IA of the Act. In respect of the said question as to the eligibility for deduction under Section 80-IA, the order passed by the Commissioner of Income Tax (Appeals) has already been set aside and remanded by the Income Tax Appellate Tribunal and the challenge raised by the appellant Revenue is only in respect of the first issue. As such, once the above two issues as involved

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

2

in the first two appeals are considered and answered, that will decide the fate of all the three appeals and hence they were taken up and heard together.

2. The respondent Assessee is the same in all the cases, who is engaged in printing and publishing of the **Malayala Manorama daily, Manorama Weekly**, the publication by name **"THE WEEK"** and also the **Manorama Year Book**. The Assessee Company has 100% shares in a Subsidiary Company, viz., **Commercial Broadcasts Ltd.** (**CBL** in short), who is engaged in distributing the Assessee's publications in the Gulf region. An agreement has been executed between the Assessee Company and the Subsidiary Company in this regard and the printing and publication of the materials as aforesaid by the Assessee Company and distribution of the same in the Gulf Region by the Subsidiary Company is being carried out in terms of the said agreement.

3. Incidentally, it is to be noted that the Head Office of the Subsidiary Company was at Mumbai and since sufficient number of direct flights were not available from Kerala to the Gulf Region, the publications were being sent by the Assessee Company to the

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

3

Subsidiary Company at Mumbai, from where it was being taken to the Gulf Region and distributed there, resulting in delay by one day. By the passage of time, sufficient number of direct flights came to be operated from Kerala, upon which the Subsidiary Company made arrangements with the Assessee Company to send the publications directly from Kerala to the Gulf on account of the Subsidiary Company and so as to facilitate such exercise, interest free deposit of a sum of Rs.60 lakhs was effected to the Assessee Company. Necessary payment was being effected/ set off and accounts were being maintained accordingly, ensuring the deposit of Rs.60 lakhs to be intact for meeting the eventuality, if any.

4. The pleadings and proceedings are referred to as given in ITA.No.167 of 2008, except where reference is made separately depending upon the context.

5. Sect.80Q of the Income Tax Act provides for deduction of 20% of the Income from printing and publishing of books. The Assessee filed return for the year 1995-96, claiming deduction of Rs.12,69,957/-, with regard to the printing and publishing of books under Section 80Q. Similarly, as on 31.03.1995, the Books

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

4

of accounts of the Subsidiary Company (CBL) showed that a sum of Rs.34,23,600/- was due from the Assessee Company to the Subsidiary Company as loan, besides showing a sum of Rs.60 lakhs due from the Assessee Company by way of deposits effected. Corresponding entries were there in the Books of accounts of the Assessee Company as well. The Assessing Officer was of the view that the accounting effected was not correct and that there was instance of evasion of tax at the hands of the Assessee, by virtue of the wrong procedure/description of accounting. It was accordingly, that notice was sent with reference to the proposal sought to be made, which was objected to by the Assessee. After completing the procedural formalities, the Assessing Officer passed 'Annexure A' assessment order, whereby it was noted that the profit worked out in respect of the printing of the Year Book revealed more than 50% of the sales; whereas the profit in respect of the division dealing with printing and publication of the "Daily" was only to the tune of **2.91%**. It was accordingly observed that, showing of such a higher rate of profit in respect of the printing and publication of books was abnormally high and that for arriving at the actual profit, one had

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

5

to consider the over-head expenses, depreciation etc., which was not reckoned by fixing the profit in respect of the printing of books. Such a course of showing higher profit in respect of the printing of books was stated as shown by the Assessee to claim maximum deduction under Section 80Q and accordingly, the Assessing Officer was of the opinion, in view of the inconsistencies and incongruities in arriving at the profits in the new Units, that a reasonable method had to be adopted, to allocate the profits on the basis of the total receipts in the respective units. It was accordingly, that the entire Turnover in respect of the 'Daily' published from different divisions were taken together, also reckoning the turn over in respect of the Year Book published in different languages and the total profit was worked out fixing the same as **2.91%.**

6. Coming to the second issue as to the deemed dividend under Section 2(22)(e) of the Act, it was contended by the Assessee that the disputed figures were the balances in the accounts, resulted in the course of ordinary commercial transactions and hence they would not come within the purview of loan or advance as to be categorised under section 2(22)(e) of

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

6

the Act. The said contention was repelled by the Assessing Authority, placing reliance on the decision rendered by the Bombay High Court in **Sadhana Textiles Mills P. Ltd vs. CIT** [188 ITR 318(Bom.)], where the Court upheld the addition under Section 2(22)(e) in respect of the credit balance, which arose due to day-to-day transactions of purchase, sales and the like. The explanation put forth by the Assessee with regard to the amounts deposited by the Subsidiary Company was also not accepted and it was accordingly, that both the issues were answered in favour of the Revenue and against the Assessee; thus passing 'Annexure A' order mulcting the liability showing the total demand including interest (after giving credit to the TDS and advance tax paid) as Rs.92,29,851/-.

7. On being aggrieved of the Assessment order, the Assessee took up the matter by way of appeal before the Commissioner of Income Tax (Appeals). After hearing both the sides, the Commissioner of Income Tax (Appeals) observed that there was no justification in adopting a ratio as worked out by the Assessing Officer for finding out the income of the Unit publishing 'Daily' by computing the income from publication of the Year

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

7

Book in the same proportion. The Appellate Authority also found that the Assessee had maintained proper Books of Accounts for the Department of publication of Malayala Manorama Year Book and all the expenditure relating to that particular Department was debited in the accounts relating to the publication of the Year Book. It was further observed by the Appellate Authority that there was no basis for the Assessing Officer to conclude that overhead expenses were not considered while arriving at the income of the particular Department of the Assessee and that it was only during the spare time that the Year Book was printed in the Press owned by the Company. The depreciation relating to the entire printing machinery was claimed in the Kottayam Unit of the Malayala Manorama and therefore, there was no justification for the Assessing Officer to hold that depreciation had also to be considered from the income of publishing the Year Book and hence that there was no justification in re-computing the deduction allowable under Section 80Q. The Appellate Authority further observed that the above aspect was already considered by the Income Tax Appellate Tribunal, Cochin Bench in ITA 1053/(Coch.)/76-77 dated 13.07.1978 and ITA

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

8

No.640/(Coch.)/1983 dated 20.01.1988 holding that all overhead expenses connected with the publication had already been debited in the Books of Accounts. It was held that the Assessee's computation of Income under Section 80Q should have been accepted by the Assessing Officer and that there was no justification for re-computing the deduction allowable. It was accordingly that appropriate directions were given to the Assessing Officer in this regard.

8. With regard to the contention of the Assessee that the Assessing Officer was not correct in treating the Trade Discount amounting to Rs.3423600/- and the Agents' Deposit of Rs.60 lakhs as "deemed dividend" under Section 2(22)(e) of the Income Tax Act, it was observed that, under the said provision, 'loans and advances' given to a share holder will be treated as "deemed dividend"; what was received by the Assessee was not coming within the purview of "loans and advances" and hence the Assessing Officer was not correct in treating the said amount as "deemed dividend". During the accounting period, it was observed that, the Assessee had not accepted any loan or advance from the Assessee's Subsidiary Company (CBL,

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

9

Bombay). The specific nature of operation among the Assessee, the Subsidiary Company (CBL) and the Distributor have been adverted to in paragraph 16, which is reproduced below for convenience of reference: (page 34)

“ ” 16. xx xxBy an agreement dated 29.04.1993 among the Assessee,, Commercial Broadcasts Ltd., Bombay and M/s.Al Nisar Distribution, PB-No.6519, Dubai, CBL is authorised to export the publications of Malayala Manorama and M/s. Al Nisar Distribution was appointed as a distributor in the Gulf countries. The Assessee used to sell its publications to CBL and CBL, in turn, export the publications to the distributor in Dubai against which the exporting agent, CBI,, receives freight charges and consideration towards the sale of publications. Prior to 1993, CBL was exporting Newspapers etc., from Bombay, but subsequently when direct flights were introduced from Trivandrum to Gulf countries, it was found that the Daily News Paper can be supplied to the Gulf countries on the same day itself instead of supplying in the subsequent day through Bombay and hence CBL appointed M/s. Air Freight Ltd., Trivandrum as their Clearing & Forwarding Agents. Since, CBL, was located in Bombay, it in turn requested the Assessee Company to pay the air freight charges to M/s. Air Freight Ltd., Trivandrum, which will be reimbursed by CBL when remittances were received from gulf distributor. In pursuance of a request dated 18.07.1993, Malayala

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

10

Manorama started making payments to Air Freight Ltd. and in turn were receiving reimbursements from CBL. The sum of Rs.34,23,600/- treated as loan by the Assessing Officer was only the balance as on 31-3-1995 of this transaction towards Airfreight charges besides product cost. The ledger account produced before the Assessing Officer reveals this fact. Even though the Assessing Officer treats this transaction as a commercial transaction still he concluded it as Loan or Advance and brought under the mischief of Section 2(22)(e)".

9. The case projected before the Commissioner, with reference to the deposit of Rs.60 lakhs made, is dealt with in paragraph 17, which is also reproduced below:

"17. In respect of deposit of Rs.60 lakhs treated as deemed dividend under 2(22)(e), it is submitted that by the same agreement dated 29th day of April, 1993, the Exporter CBL was required to make a deposit of such amount as may from time to time be agreed to cover the price of publications to be supplied. Such deposits shall be returned without interest to CBL upon expiry or termination of agreement. In pursuance of the agreement, the Assessee Company has received a deposit of Rs.60 lakhs towards the purchase cost of News Paper and magazines supplied. This is not the sole instant of taking deposits from agents. , but, the Assessee was uniformly collecting deposits from all the agents. The total of such deposits received as on 31.03.1995 was Rs.11,11,58,000/-

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

11

Therefore, deposit towards cost of publication will not come under "Loan or Advance" as given u/s.2(22)(e) and hence the Assessing Officer is not correct in treating this sum as deemed dividend."

10. The necessity to draw a distinction between "loan and deposit" was highlighted; also seeking to draw a distinction with regard to the law laid down by the Mumbai High Court in **188 ITR 318**. In fact, the Assessing Officer had included a sum of Rs.8356287 as "deemed dividend" under Section 2(22)(e) of the Income Tax Act, to the income of the Assessee, which included the alleged loan of Rs.2356287/- and the deposit of Rs.6000000/-. The sum of Rs.2356287/- was worked out after deducting the opening balance of Rs.1067313/- from the closing balance as on 31.03.1995 amounting to Rs.3423600/-. This figure was the closing balance as on 31.03.1995 towards Airfreight charges etc paid and received from the CBL. The other amount was the agents' deposit obtained by the Assessee from the CBL, who is the exporter of the publication of the Assessee to the Gulf countries. The Appellate Authority found that the Assessing Officer was influenced by the nomenclature

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

12

given to the above item as 'loan and advance' in the Balance Sheet of the CBL and even after admitting that the above are commercial transactions by the Assessing Officer, he still held it as "loans and advances", holding that under Section 2(22)(e), dividend includes any payment by a Company, not being a Company in which public are substantially interested.

11. The Appellate Authority observed that, to find out whether the payments received by the Assessee would come within the purview of Section 2(22)(e) of the Act, it was necessary to consider what was a 'loan' and what was an 'advance'?. Observing that a loan is something quite different from a debt, it was noted that for a loan, there must be a lender, a borrower, a thing loaned for use, as well as a contract between the parties for the return of the thing given on loan. A loan contract would create a debt, but there may be a debt without contracting a loan and hence that every sale of goods on credit would not amount to a transaction of loan. In the instant case, it was held that there was no lending or borrowing with or without interest; nor was there an intention to repay. The Assessee was maintaining two accounts for its transactions with its Subsidiary;

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

13

one for the purpose of payment of airfreight charges and the second one for product cost. The change in circumstances as to the situation prevailed prior to 1993 when the publications were exported from Bombay by the purchaser/CBL and the position thereafter, whereby it came to be exported from Trivandrum when direct flights were introduced from Trivandrum to the Gulf countries was also taken note of .

12. It was the Subsidiary Company/CBL, who appointed M/s Airfreight Ltd., Trivandrum as their Clearing and Forwarding Agent; simultaneously requesting the Assessee Company to pay the airfreight charges as and when demanded by the Clearing and Forwarding Agent, to be reimbursed by the CBL as and when remittances were received from its Gulf Distributor. It was in view of this understanding that the Assessee Company started making payments to the Clearing and Forwarding Agent in a separate ledger account. It was accordingly that the Assessee Company used to pay the Clearing and Forwarding Agent M/s. Airfreight Ltd and in turn, the Assessee used to get payment periodically from the Subsidiary Company/CBL. This clearly revealed the instances of day-to-day commercial transactions and

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

14

there was clear credit and credit balance in the accounts, by virtue of which, the Appellate Authority held that the Assessing Officer was not correct in concluding that the closing credit balance was a 'loan' to the Assessee from a Company in which it was having substantial holdings. It was reiterated by the Appellate Authority, that it was only a commercial transaction and there was no lending or advancing within the meaning of section 2 (22)(e). It was also observed that the other account, relating to the 'product cost' related to sale of newspaper and other publications, revealing the debit balance throughout the year, except on one or two occasions. .

13. The observations made by the Appellate Authority in paragraph 20, while allowing the appeal, are relevant, which is extracted below:

“20. By an agreement dated 29th April, 1993 between the Malayala Manorama, M/s. Commercial Broadcasts Ltd., Bombay and M/s. Al-Nisar Distribution, Dubai, CBL shall keep with Manorama, a deposit of such amount as may from time to time be agreed by them to cover the price of publications to be supplied thereunder. Such deposit shall be returned without interest to CBL upon expiry or termination of this agreement. A sum of

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

15

Rs.60 lakhs received by the Assessee Company from CBL was pursuant to the above agreement and as agreed upon by the parties. Therefore, this deposit of Rs.60 lakhs obtained from CBL doesn't partake the character of loan or advance to be treated as deemed dividend. A distinction has to be drawn between a loan and a deposit. In the case of a loan, it is ordinarily the duty of the debtor to seek out the creditor and to repay the money according to the agreement and in the case of deposit, it is generally the duty of the depositor to go to the depositee and make a demand for it. A deposit is to be kept by the depositee for the depositor and the loan is to be kept by the borrower for himself. So, deposit does not cover a transaction of the nature of a loan. A deposit doesn't come under the purview of section 2(22)(e). The Assessee Company was insisting agency deposit from all the agents of its publications and the total of such agency deposit received till 31.3.1995 was a sum of Rs.11,11,58,004/-. Therefore, it is not only from CBL, but even from other agents, the Assessee Company was insisting for making deposits based on certain norms relating to the purchase of publications. These deposits are also refundable without interest when the agency is discontinued. Therefore, the deposit received from CBL cannot be taken in isolation and to treat it as a loan and bring it under Section 2(22)(e). In view of the above findings, I hold that the Assessing Officer is not correct in bringing to tax a sum of Rs.83,56,287/- as deemed dividend and adding to the income. The same is deleted.”

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

16

14. On challenging Annexure B order passed by the Appellate Authority by the Revenue, the Tribunal considered the entire matter and passed Annexure C verdict repelling the contentions taken by the Revenue and upholding the verdict passed by the Appellate Authority. The question regarding deduction under section 80Q of the Act has been discussed in paragraph 7 ; which is reproduced below:

“ We have heard rival submissions and considered the facts and materials on record including the contents of the paper book submitted by the learned representative of the Assessee and the case laws cited by the parties. We find that the question of deduction under Section 80Q was subject matter of appeal before this Tribunal and the Tribunal in its order dated 13.07.1978 in ITA No.1053/Coch/76-77 for the assessment year 1975-76 whereby the Assessee's computation was accepted. Further the learned representative of the Assessee placed on record copies of the computation of taxable income and Annexures thereto for the assessment year 1992-93, 1993-94 and 1994-95 and submitted that similar claim of the Assessee for these years was accepted by the department. We find that the Assessee has been consistently following this method of computation and it was being allowed except for certain years and in respect of such years claims were allowed in appeal and the

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

17

revenue had not taken in further appeal. To a query from the Bench the learned representative of the Assessee submitted that the Assessee had not out sourcing the work of printing of Year-book for the assessment years 1992-93, 1993-94 and 1994-95 and the same method adopted by the Assessee was accepted by the Revenue. We find force in the contention of the learned representative of the Assessee that the computation suggested by the Assessing Officer was not in accordance with law. Further we find that on direction by the first appellate authority for the assessment year 1983-84, the Assessing Officer examined the claim of the Assessee and allowed the claim as claimed by the Assessee. Interpretation which favours the Assessee and which has been acted upon and accepted by the Revenue for a long period should not be disturbed except for compelling reasons. This is the view of the Hon'ble Apex Court in the case of Birla Cement Works vs. CBDT reported in 166 CTR 291. Further Hon'ble jurisdictional High Court in the case of Travancore Titanium Products Ltd. has held that earlier decision is to be followed. Since there was no appeal against the earlier years, the Revenue cannot deny the claim of the Assessee. In this view of the matter, we find force in the contention of the learned representative of the Assessee that for all the earlier years prior to assessment year 1995-96, similar method was followed by the Assessee and which had been accepted by the Assessing Officer himself or on direction by the first appellate authority and hence Revenue could not have

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

18

changed its method of allowing deduction under Section 80Q of the Act for the assessment year 1995-96, in view of the decisions cited supra. Hence, finding force in the contention of the learned representative of the Assessee in the facts and circumstances of the case, we are rejecting this ground of appeal of the Revenue, i.e.regarding deduction under Section 80Q of the Act.

15. In relation to the deposit of Rs.60 lakhs treated as 'deemed dividend' under section 2(22)(e) of the Act, the Tribunal observed in paragraph 10.1, that it was not the sole instance of taking deposits from agents and that the Assessee was uniformly collecting deposits from all agents, the total of which as on 31.3.1995 was Rs. 11,11,58,000/-. It was held therefore that the deposit towards the cost of publication will not come under "Loan or Advance" as given under section 2(22)(e) of the Act and hence the Assessing Officer was not correct in treating this sum as "deemed dividend".

16. There is a case for the Revenue that the observation made by the Tribunal and the basis for drawing inference in favour of the Assessee [that in respect of the earlier assessment years, the proceedings finalised in favour of the Assessee were

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

19

not subjected to challenge by the Revenue], it is stated that no principle of 'res judicata' will be applicable in respect of Income Tax matters. The said contention is sought to be answered by the learned counsel appearing for the Assessee by placing reliance on the decision rendered by the Apex Court in **M/s. Radhasoami Satsang, Saomi Bagh, Agra vs. Commissioner of Income Tax** [(1992)1 SCC 659], whereby it has been held that, though the principles of 'res judicata' strictly do not apply to Income Tax proceedings, each assessment year being a Unit and the decision rendered in respect of one year may not apply in respect of the next year, where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and the parties have allowed that position to be sustained by not challenging the order, it would not be appropriate to allow the position to be changed in a subsequent year. It was accordingly held, in the said case, that in the absence of any change in circumstances, the Revenue should have felt bound by the previous decisions and no attempt should have been made to reopen the question. It is stated that the law declared as above is squarely applicable to the case in hand

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

20

as well, in so far as the change involved has not been pleaded or proved by the Revenue, to take a different stand.

17. In **Birla Cement Works vs. Central Board of Direct Taxes and others**[(2001)166 CTR Reports 291] cited from the part of the Assessee, it was held by the Apex Court in paragraph 10, that if two interpretations are reasonably possible on the question and one of the two possible interpretations of the taxing statute, which favours the Assessee and which has been acted upon and accepted by the Revenue for quite long, should not be disturbed except for compelling reasons. No such compelling reason is made out in the instant case and as such, the course which was being followed by the Assessee and accepted by the Revenue right from 1976-77 onwards ought not to have been interdicted on a fine morning.

18. The learned counsel for the Assessee sought to place reliance on the dictum rendered by a three Member Bench of the Apex Court in **C.K.Gangadharan and another vs. Commissioner of Income Tax**[(2008)218 CTR Reports 1= **(2008)8 SCC 739**] as well. In paragraph 4 of the said verdict, paragraph 20 of the decision rendered by the Apex Court in

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

21

Bharat Sanchar Nigam Ltd. And another vs. Union of India

[(2006)3 SCC 1 = AIR 2006 SC 1383] has been extracted. It will be worthwhile to reproduce the same here to hold that unless a new ground is urged or a material change in the factual situation is established, no authority, whether quasi-judicial or judicial, can generally be permitted to take a different view. It reads as follows:

“ 20. The decisions cited have uniformly held that res judicata does not apply in matters pertaining to tax for different assessment years because res judicata applies to debar Courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct. The Courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason why Courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasi judicial or judicial can generally be permitted to take a different view. This mandate is subject only to the usual gateways of distinguishing the earlier decision or where the earlier decision is per incuriam.

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

22

However, these are fetters only on a coordinate bench which, failing the possibility of availing of either of these gateways, may yet differ with the view expressed and refer the matter to a bench of superior strength or in some cases to a bench of superior jurisdiction.

In the above circumstance, the submission made by the learned Government Pleader for the Revenue, placing reliance on the above decision (paragraphs 12 and 13) to the effect that non-filing of appeal in respect of other assessment years is fatal to the course now sought to be pursued, is not correct or sustainable.

19. The learned Govt. Pleader for the Revenue submits that, merely because the Revenue has not preferred appeals in some cases, it does not operate as a bar for the Revenue to prefer an appeal in another case, where there is just cause for doing so, or it is in the public interest to do so or that there is a pronouncement by the higher courts in the wake of divergent views expressed by the Tribunals or the High Courts. If the Assessee contends that such differential treatment is the result of an instance of malafides, the Assessee has to plead it specifically and establish the same. There may be certain cases

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

23

where no appeal is filed, because the tax element is too small or the effect of the outcome may not vary the situation to the requisite extent. The Apex Court has discussed such circumstances, as discernible from paragraphs 12 and 13 of the decision in **C.K. Gangadharan's** case (cited supra), which are extracted below:

“12. If the Assessee takes the stand that the revenue acted mala fide in not preferring appeal in one case and filing the appeal in other case, it has to establish mala fides. As a matter of fact, as rightly contended by the learned counsel for the revenue, there may be certain cases where because of the small amount of revenue involved, no appeal is filed. Policy decisions have been taken not to prefer appeal where the revenue involved is below a certain amount. Similarly, where the effect of decision is revenue neutral there may not be any need for preferring the appeal. All these certainly provide the foundation for making a departure.

13. In answering the reference, we hold that merely because in some cases the revenue has not preferred appeal that does not operate as a bar for the revenue to prefer an appeal in another case where there is just cause for doing so or it is in public interest to do so or for a pronouncement by the higher court when divergent views are expressed by the Tribunals or the High Courts.”

20. With regard to the question as to when a transaction

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

24

amounts to a 'loan' so as to come within the purview of "dividend" eligible for deduction under Section 2(22)(e) of the Act, reference is made to the judgment rendered by a Division Bench of the Delhi High Court in **Commissioner of Income - Tax vs. Raj Kumar** [(2009) 318 ITR 462 Delhi]. The Delhi High Court held that, to attract Section 2(22)(e) of the Income Tax Act, thereby making a payment to have the attributes of a 'dividend' within the meaning of the provision, it has to satisfy:

- (i) The Company making the payment is one in which public are not substantially interested.*
- (ii) Money should be paid by the Company to a shareholder holding not less than ten percent (10%) of the voting power of the said Company. It would make no difference if the payment was out of the assets of the Company or otherwise.*
- (iii) The money should be paid either by way of an advance or loan or it may be "any payment" which the Company may make on behalf of or for the individual benefit of any shareholder or also to any concern in which such shareholder is a member or a partner and in which he is substantially interested.*
- (iv) And lastly, the limiting factor being that these payments must be, to the extent of accumulated profits, possessed by such a Company.*

It was held by the Bench that the word 'advance' which appears

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

25

in the Company of the word 'loan' could only mean such advance which carries with it an obligation of repayment and that the trade advances which are in the nature of money transacted to give effect to a commercial transaction would not fall within the ambit of the provision under Section 2(22) (e) of the Act.

21. Section 2(22)(e) reads as follows:

(22) " "dividend" includes-

- (a) any distribution by a Company of accumulated profits, whether capitalised or not, if such distribution entails the release by the Company to its shareholders of all or any part of the assets of the Company;*
- (b) any distribution to its shareholders by a Company of debentures, debenture-stock, or deposit certificates in any form, whether with or without interest, and any distribution to its preference shareholders of shares by way of bonus, to the extent to which the Company possesses accumulated profits, whether capitalised or not;*
- (c) any distribution made to the shareholders of a Company on its liquidation, to the extent to which the distribution is attributable to the accumulated profits of the Company immediately before its liquidation, whether capitalised or not;*
- (d) any distribution to its shareholders by a Company on the reduction of its capital, to the extent to which the Company possesses accumulated profits which arose*

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

26

after the end of the previous year ending next before the 1st day of April, 1933, whether such accumulated profits have been capitalised or not;

(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 share holder, 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-

(i) a distribution made in accordance with sub-clause(c) or sub-clause (d) in respect of any share issued for full cash consideration, where the holder of the share is not entitled in the event of liquidation to participate in the surplus assets:

(ia) a distribution made in accordance with sub-clause © or sub-clause (d) in so far as such distribution is attributable to the capitalised profits of the Company representing bonus shares allotted to its equity shareholders after the 31st day of March, 1964, and

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

27

before the 1st day of April, 1965;

(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;

(iii) any dividend paid by a Company which is set off by the Company against the whole or any part of any sum previously paid by it and treated as a dividend within the meaning of sub-clause(e) to the extent to which it is so set off.

(iv) any payment made by a Company on purchase of its own shares from a shareholder in accordance with the provisions of section 77A of the Companies Act, 1956 (1 of 1956)

(v) any distribution of shares pursuant to a demerger by the resulting Company to the shareholders of the demerged Company (whether or not there is a reduction of capital in the demerged Company)".

22. A payment would acquire the attributes of 'dividend' within the meaning of the above provision, only subject to satisfaction of the conditions, as extracted above. The word "advance" has to be read in conjunction with the word "loan"; the latter usually involving a conscious act of lending coupled with acceptance by the borrower of the money as 'loan', which also

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

28

generally carries interest, with an obligation to effect the repayment. In the above circumstance, the term 'advance' appearing in the Company of the word 'loan' as mentioned in the provision could only mean such advance which carries with it an obligation of repayment and this being the position, the 'trade advances' which are in the nature of money transacted to give effect to commercial transactions, would not fall within the ambit of the provisions under Section 2(22)(e) of the Act. We fully agree with the view expressed by the Delhi Bench in this regard.

23. **Commissioner of Income Tax vs. Ambassador Travels (P)Ltd [2009] 318 ITR 376(Delhi)** was a case where the Assessee was engaged in the business of running a Travel Agency. In respect of the previous year relevant to the assessment year 1998-99, the Assessee had business transactions with two Companies. According to the Assessing Officer, the aforesaid financial transactions would fall in the category of "deemed dividend" defined under Section 2(22)(e) of the Act. Though the said view was upheld by the Commissioner of Income Tax (Appeals), it was reversed by the Tribunal (on challenge at the instance of the Revenue), holding that there was

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

29

nothing on record to show that the amounts considered by the Assessing Officer were in any manner 'advances or loans' in the account of the Assessee. It was also noted that, being a Travel Agency, the Assessee had regular business dealings with the above two concerns, dealing with all their Holiday Resorts and the Tourism industry. It was accordingly held that, since the transactions were normal business transactions which were carried out during the course of relevant/previous year, they could not be described as 'advances or loans', and the appeals were allowed. The Delhi High Court observed that the view taken by the Tribunal did not suffer from any error of law. Since the Assessee was involved in the booking Resorts for the customers of the two Companies (mentioned therein) with whom they had regular/normal business transactions as a part of its day-to-day business activities, such financial transactions could not be in any circumstances be treated as 'loans' or 'advances' received by the Assessee from the two Companies, to be brought within the purview of Section 2(22)(e) of the Act. It was accordingly, that interference was declined, dismissing the Revision Petitions, holding that there was no substantial question of law.

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

30

24. In **Commissioner of Income Tax vs. Excel Industries Limited [(2014) 13 SCC 459]**, the Apex Court considered the scope of deviation from previous assessments and as to when it was impermissible. It was a case where Section 28(iv)-**Export income** was involved under the Income Tax Act, 1961. It was held by the Bench, that the income tax cannot be levied on hypothetical income. According to the Apex Court, if income does not result at all, there cannot be a tax, eventhough in book-keeping, an entry is made about a 'hypothetical income', which does not materialise. The 'three tests' laid down by various decisions of the Apex Court were referred to, which are as given below:

- “(i) whether the income accrued to the Assessee is real or hypothetical;
- (ii) whether there is a corresponding liability of the other party to pass on the benefits of duty-free import to the Assessee even without any imports having been made; and
- (iii) the probability or improbability of realisation of the benefits by the Assessee considered from a realistic and practical point of view (the Assessee may not have made imports).”

1.

It was applying the above three tests, that the Apex Court arrived at a finding in the said case, that 'no real income' had

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

31

accrued, but for hypothetical income and hence Section 28(iv) of the Act would be inapplicable to the facts and circumstances of the case, alerting that the Assessing Officer was required to take a pragmatic view and not a pedantic one. The Apex Court further held that, it was borne out by records that in several assessment years, the Revenue had accepted the order passed by the Tribunal in favour of the Assessee and did not pursue the matter any further, but in respect of some assessment years, the matter was taken up in appeal before the Bombay High Court, but without any success. That being the position, it was held that the Revenue could not be allowed to flip-flop on the issue and it ought to have let the matter rest, rather than spending the taxpayers' money in pursuit of the litigation, just for the sake of litigation. (Paragraph 27).

25. From the above discussion, it is quite evident that the amounts under the disputed heads were being received by the Assessee from its Subsidiary Company only as part of regular business transactions, which was being accounted properly. The change in circumstance, as to the distribution of dailies/publications in the Gulf, causing the same to be

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

32

transported through the Agent directly from Trivandrum to the Gulf, [instead of forwarding the same to Bombay, where the registered office of the Subsidiary Company is situated and then to have it transported from Mumbai to the Gulf, for distribution in the Gulf] was resulted because of the starting of direct flights from Trivandrum to Gulf, as pointed out by the Assessee. It was in this regard, that advance deposits were also effected by the Subsidiary Company and payments were being effected directly by the Assessee to the clearing and forwarding agent of the Subsidiary Company at Trivandrum, as per their instructions, which were being properly accounted. The payments effected by the Subsidiary Company and received by the Assessee, were as part of the regular business transactions and applying the law laid down in the judicial precedents cited above, it could not have been treated as 'loan' or 'advances', so as to make the disputed amounts as "deemed dividend", as defined under Section 2(22)(e) of the Act. We are of the view that there is absolutely no basis for the challenge raised by the Revenue, with reference to the deduction under Section 80Q of the Act and the assessment, taking it as a "deemed dividend" under Section

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

33

2(22)(e) of the Act. The common question involved in the above cases is answered accordingly.

26. In **ITA.1686 of 2009 (cited supra)**, there is no challenge with reference to Section 80Q of the Act, but for the common contention with reference to Section 2(22)(e) of the Act, which stands already answered. But here, there is another issue, as to whether 'interest' received from the Bank could be treated as business income, for calculating deduction under Section 80IA of the Act. Considering the said issue, the Commissioner of Income Tax (Appeals), following the decision of this High Court reported in **178 CTR 498, [Malayala Manorama Co.Ltd. vs. Commissioner of Income Tax]**, directed the Assessing Officer to re-compute the deduction under Section 80IA by computing the deduction from the profits of the eligible units of the Assessee Company. It was against the said finding, that the Revenue had filed an appeal before the Tribunal, which came to be dismissed as per Annexure C, in turn leading to ITA.1686 of 2009, preferred by the Revenue (challenging the finding in respect of the decision rendered as to the deduction of the 'deemed dividend' under Section 2(22)(e) of the Act). Since the issue with reference

**IT APPEAL Nos.167 OF 2008
& 1686 AND 1693 OF 2009**

34

to Section 80IA has been remanded by the Commissioner , which view has been upheld by the Tribunal and since we find that no tenable ground has been raised to interfere with the same, we do not find any merit in this appeal as well.

In the above facts and circumstances, we hold that the Revenue has failed to substantiate the existence of any 'substantial questions of law'. All the appeals are dismissed accordingly.

**P.R. RAMACHANDRA MENON,
JUDGE**

**SHIRCY V,
JUDGE**

lk