

ITAT No.160 of 2016
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME-TAX)
ORIGINAL SIDE

COMMISSIONER OF INCOME TAX, KOLKATA-1, KOLKATA
Versus
GAYATRI CHAKRABORTY

BEFORE:

The Hon'ble JUSTICE ANIRUDDHA BOSE
The Hon'ble JUSTICE AMITABHA CHATTERJEE
Date : 3rd May, 2018.

Mr. P.K.Bhowmick, Advocate for appellant
Mr.J.P.Khaitan,Sr.Advocate, Mr.Siddharth Das, Mr.G.S.Gupta,
Advocates for respondent

The Court :-The assessee in this case was aggrieved by an assessment order in which a sum of Rs.3,10,83,635/- had been directed to be added to her income, treating the said sum as deemed dividend under Section 2(22)(e) of the Income Tax Act, 1961. The assessment year involved is 2009-10. It transpires from the materials on record that for the previous year the assessee had obtained a sum of Rs.15,76,77,411/- from Bright Advertising (P.) Ltd. in which she had 25.24% equity stake. In the balance sheet for the said assessment year, this company had disclosed Rs.1,92,85,832/- as general reserve and

Rs.1,17,97,802/- as surplus profit. These sums were added to the total income of the assessee for taxing purpose under the provisions of the aforesaid section. The assessee was successful in having this part of the assessment order upturned by the C.I.T. (Appeals). Stand of the assessee is that the said sum did not represent any loan or advance so as to attract the provisions pertaining to deemed dividend. It is the assessee's case that the same formed part of transactions in mutual or current account. Further appeal of the Revenue before the Income Tax Appellate Tribunal was also dismissed.

The underlying reason for the decisions of the two statutory appellate fora in favour of the assessee was that the sum received by the assessee was part of transactions recorded in mutual running current account. Both the C.I.T. (Appeals) and Tribunal found that the said sum received by the assessee could not constitute loan attracting the deeming provision contained in Section 2(22)(e) of the 1961 Act. These two appellate authorities thus accepted the stand of the assessee.

This Court had admitted the appeal of the Revenue on the following point :-

*Whether the Tribunal in the decision under appeal, had rightly come to the conclusion that the transactions between the Assessee and the company in which she had 25.24% equity stake were part of a mutual running or current account and could not constitute deemed dividend in terms of Section 2(22) (e) of the Income Tax Act, 1961 for the assessment year involved in this appeal, having regard to the decision of the Supreme Court in the case of **Commissioner of Income-Tax Vs. Mukundray K. Shah** reported in [2007] 290 ITR 433 (SC) ?*

Mr. Bhowmick, learned Counsel for the Revenue has argued that the inflow of funds from the company to the assessee by itself attracted the

deeming provision. His submission is that in the subject-case, it was only distribution of profits to the assessee camouflaged as advance or other form of payment. He relied on two authorities of the Hon'ble Supreme Court in the cases of **Miss P. Sarada Vs. Commissioner of Income-Tax** (229) ITR 444 and **Commissioner of Income-Tax Vs. Mukundray K. Shah** [2007] 290 ITR 433(SC) in support of his contention. His main submission is that even if there is repayment of sum received by a shareholder having the requisite percentage of shares in a private company, that fact by itself cannot lead to the conclusion that such repayment forms part of regular financial transaction between the company and the shareholders. Such payment out of profit in given facts could still be treated as "deemed dividend" in the hands of the recipient assessee. After drawing our attention to the factual aspects in the case of **Miss P. Sarada** (supra), he relied on the following passage from that judgement :-

"From the facts as stated hereinabove, it appears that the withdrawals made by the appellant from the company amounted to grant of loan or advance by the company to the shareholder. The legal fiction came into play as soon as the monies were paid by the company to the appellant. The assessee must be deemed to have received dividends on the dates on which she withdrew the aforesaid amounts of money from the company. The loan or advance taken from the company may have been ultimately repaid or adjusted, but that will not alter the fact that the assessee, in the eye of law, had received dividend from the company during the relevant accounting period."

He also cited the following passage from the judgement of

Mukundray K. Shah (supra) :-

"16. The above two judgments indicate that the question as to whether payment made by the company is for the benefit of the assessee is a question of fact. In this case, the Tribunal has concluded that the payment routed through MKF and MKI

was for the benefit of the assessee. This was a finding of fact. It was not perverse. Therefore, the High Court should not have interfered with the said finding. Further, the above two judgments lay down that the concept of deemed dividend under [Section 2\(22\)\(e\)](#) of the Act postulates two factors, namely, whether payment is a loan and whether on the date of payment there existed "accumulated profits". These two factors have to be correlated. This correlation has been done by the Tribunal coupled with the fact that all withdrawals were debited in the capital account of the firm leading to the debit balance of Rs.8.18 crores. The High Court has erred in disturbing the findings of fact."

The two judgements referred to in this authority are a decision of this Court in the case of **Nandalal Kanoria -Vs.- C.I.T.** ([1980] 122 I.T.R. (405) and **C.I.T. -Vs.- P. K. Badiani** ([1970] 76 I.T.R. 369), the latter being a decision of the Bomany High Court.

Mr. Bhowmick wants us to invalidate the decision of the Tribunal as well as that of the Commissioner of Income-tax and restore the order of the assessing officer by which the said sum of Rs.3,10,83,635/- was added to the income-tax of the assessee for the purpose of taxing.

Submission of Mr. Khaitan, learned Senior Counsel, appearing for the assessee is that the transactions between the assessee and the company bore the character of mutual running or current account. He points out that there was a concurrent finding on this count by the two statutory appellate fora upon appreciation of evidence and in exercise of our jurisdiction under Section 260A of the Act, we ought not to enter into fresh exercise of appreciation of evidence. He has drawn our attention to that part of the decision of the Tribunal in which analysis has been made of ledger of the assessee in the books of the company. We shall revert to the finding of the Tribunal on this count later in this judgment.

Law on this point is clear. In the event transactions between a shareholder and a company in which the public are not substantially interested and the former has substantial stake, create mutual benefits and obligations, then the provision of treating any sum received by the shareholder out of accumulated profits as deemed dividend would not apply. The company in the instant case fits the description conceived in the aforesaid provision to come within the ambit of Section 2(22)(e) of the Act. The controversy which falls for determination is whether the sum received by the assessee formed part of running current account giving rise to mutual obligations or the payment formed one-way traffic, assuming the character of loan or advance out of accumulated profit. A Co-ordinate Bench of this Court in the case of **Pradip Kumar Malhotra Vs. Commissioner of Income-Tax** [2011] 338 ITR 538(Cal) has laid down the factors for testing the transactions between a company and its shareholder in the light of the aforesaid provision :-

“we are of the opinion that the phrase "by way of advance or loan" appearing in sub-cl. (e) must be construed to mean those advances or loans which a shareholder enjoys for simply on account of 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; but if such loan or advance is given to such shareholder as a consequence of any further consideration which is beneficial to the company received from such a shareholder, in such case, such advance or loan cannot be said to a deemed dividend within the meaning of the Act. Thus, for gratuitous loan or advance given by a company to those classes of shareholders would come within the purview of s. 2(22) but not to the cases where the loan or advance is given in return to an advantage conferred upon the company by such shareholder. ”

The C.I.T. (Appeals) found the transaction between the assessee and the company to be of the genre dealt with in the case of

Pradip Kumar Malhotra (supra) which would not come within the purview of the aforesaid provision. It was held by the C.I. T. (Appeals).

“8. I have gone through the submission of the A.R. and the judicial decisions referred to by him. It appears to me that the sum of Rs.15,76,77,411/- paid by the company to the appellant cannot be considered as distribution of dividend in the form of loans which was the intention of the Legislature behind enacting Sec.2(22)(e) of the I.T.Act. Secondly, it is now well established that the deeming provision should be construed strictly and the meaning of the words “loans or advances” used in Sec.2(22)(e) cannot be extended to other transactions like ICD or mutual and current transactions. In the above circumstances, the sum of Rs.15,76,77,411/- received by the appellant from the company cannot be treated as loan or advance and therefore assessed in her hand as deemed dividend in terms of Sec.2(22)(e) of the I.T. Act. The addition of Rs.3,10,83,635/- as made by the A.O. is, therefore, deleted. Since the addition made by the A.O. in the hand of the appellant has been deleted by me, the dispute relating to correct computation of accumulated profit of the company as raised by the appellant in her ground No.3 has become infructuous.”

In Revenue’s appeal, the Tribunal analysed the ledger account of the company so far as the payment made to and received from the assessee is concerned and found:-

“11. We have given a very careful consideration to the rival submissions. A copy of the ledger of the Assessee in the books of BAPL is placed at pages 41 to 46 of the Assessee’s paper book. A copy of the statement showing the balance after every transaction in the Assessee’s ledger in the books of BAPL is placed at page 47 to 52 of the Assessee’s paper book. The same is given as annexure to this order for better appreciation of facts.

12. A perusal of the statement of balances of transactions between the Assessee and BAPL shows that as on 2.4.2008 BAPL owed Assessee a sum of 1,95,000. BAPL paid the Assessee a sum of Rs.2.4.2008 a sum of Rs.21,05,000 and the Assessee owed BAPL a sum of Rs.19,10,000. The amounts given in the bracket in the last column of the enclosed balances in the running current account is the amount which BAPL owed the Assessee. Mutual transactions go on in this fashion throughout the previous year and as on the last date of the previous year the account is squared i.e., neither the Assessee owes BAPL nor BAPL owes Assessee any sum.

The Assessee was beneficiary of the sums given by BAPL at some point of time during the previous year and BAPL was the beneficiary of the sums given by the Assessee at another point of time during the previous year. It was therefore a case of mutual running or current account which created independent obligations on the other and not merely transactions which created obligations on the other side, those on the other being merely complete or partial discharge of such obligations. There were reciprocal demands between the parties and the account was mutual. ” [quoted verbatim]

In the case of **Miss P. Sarada** (supra), it has been recorded in the judgement that because of various withdrawals made by the assessee, her credit balance in the company's books had been entirely wiped out and her account with the company showed excess withdrawal. In that perspective, the Hon'ble Supreme Court observed and held :-

“In the instant case, excess withdrawals were made by the assessee on various dates between 3.7.1972 to 22.3.1973 when the account of Mahesh has not been debited. The assessee's account was consequently overdrawn. On the very last day of accounting year some adjustment was made but that will not alter the position that the assessee had drawn a total amount of Rs.93,027 between 3.7.1972 to 22.3.1973 from the company when her account with the company did not have any credit balance at all. That means these advances made by the company to the assessee will have to be treated as deemed dividends paid on the dates when the withdrawals were allowed to be mad. Subsequent adjustment of the account made on the very last day of the accounting year will not alter the position that the assessee had received notional dividends on the various dates when she withdrew the aforesaid amounts from the company.”

In the case of **Mukundray K. Shah** (supra), Tribunal made a finding of fact which was referred to in the decision of the Hon'ble Supreme Court that payments were made for the benefits of the assessee to enable the assessee to buy certain financial instruments. There was no finding

that the transactions between the assessee and the company in that case had yielded any mutual benefit to the assessee and the company. This was a case where the Tribunal's finding was that the payments involved in that proceeding was for the benefit of the assessee, and such payment was routed through two firms, of which the assessee was a partner. It was this decision, applying the ratio of which, the appeal was admitted.

In this proceeding, however, there is a clear finding of fact by the two statutory appellate fora that the assessee was beneficiary of the sums given by the company at some point of time and the company was beneficiary of the sums given by the assessee at another point of time. This finding given by the two statutory appellate fora distinguishes the present case from the factual basis of the decision in the case of **Mukundray K. Shah** (supra). The ratio of that decision thus does not apply in the facts of the case giving rise to this appeal.

In this factual and legal perspective, in our opinion payment of the aforesaid sums to the assessee cannot be treated as dividend out of profit. No perversity has been pointed out on behalf of the Revenue so far as such a concurrent finding of fact is concerned by the two statutory appellate fora. We are not inclined to disturb such finding of fact, which the Tribunal has backed with detailed analysis. We have reproduced earlier in this judgement the Tribunal's observations on this point. If we embark on a fresh factual enquiry into the accounts of the assessee or that of the company involved, such exercise would entail reappraisal of evidence. Such enquiry is impermissible at this stage. The Tribunal's

decision thus stands confirmed by us and the question formulated by us is answered accordingly, in favour of the assessee.

The appeal stands dismissed.

There shall be no order as to costs.

(ANIRUDDHA BOSE, J.)

sb/nm

(AMITABHA CHATTERJEE, J.)