

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 890 of 2011

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE M.R. SHAH

sd/-

and

HONOURABLE MR.JUSTICE B.N. KARIA

sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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COMMISSIONER OF INCOME TAX-II....Appellant(s)

Versus

MAHAVIR INDUCTOMELT PVT LTD....Opponent(s)

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Appearance:

MRS MAUNA M BHATT, ADVOCATE for the Appellant(s) No. 1

MR TUSHAR P HEMANI, ADVOCATE for the Opponent(s) No. 1

MS VAIBHAVI K PARIKH, ADVOCATE for the Opponent(s) No. 1

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CORAM: HONOURABLE MR.JUSTICE M.R. SHAH

and

HONOURABLE MR.JUSTICE B.N. KARIA

Date : 13/01/2017

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE M.R. SHAH)

1.0. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the learned Income Tax Appellate Tribunal, Ahmedabad dated 10.12.2010 passed in ITA No.2349/AHD/2008 for AY 2005-06, the Revenue has preferred present Tax Appeal to consider the following substantial question of law.

“A. Whether the Appellate Tribunal is right in law and on facts in deleting the addition of Rs.16,79,850/- made on account of excess claim of premium paid on plot ?

B. Whether the Appellate Tribunal is right in law and on facts in deleting the addition of Rs. 1,94,54,869/- made u/s 2(22)(e) of the Act?”

2.0. That the assessee filed the return of Income for AY 2005-06 declaring total income of Rs. 25,62,660/-. The return of income was processed under Section 143(1) of the Income Tax Act. That thereafter, the case was reopened under Section 148 of the Act. That the assessee claimed a sum of Rs. 18,66,450/- as premium paid on plot allotted by Gujarat Maritime Board and the assessee claimed the same in its business of ship breaking as it has obtained that plot on lease from GMB. The assessee paid this amount as premium on leasehold property. According to the Assessing Officer, the assessee has acquired this plot from GMB under lease and lease agreement was for 10 years and accordingly this is a capital asset and payment made for acquiring capital asset is capital expenditure. Accordingly, AO allowed deduction only of 1/10th expenditure and disallowed the balance amount of Rs.16,79,850/-. The AO also made addition of Rs.1,94,54,869/- as deemed dividend under Section 2(22)(e) of the Act on the loan and advance received by the assessee from one M/s. Mahavir Rolling Mills Ltd. The AO observed that M/s. Mahavir Rolling Mills Ltd is a company in which public are not substantially interested and one of the Directors, Shri K K Bansal holds more than 20% of shares in both M/s. Mahavir Rolling Mills Ltd and M/s. Mahavir Inductomelt Pvt Ltd (assessee).

2.1. Feeling aggrieved and dissatisfied with the order passed by the Assessing Officer disallowing the balance amount of Rs. 16,79,850/- claimed by the assessee as premium paid on plot allotted by Gujarat

Maritime Board and making addition of Rs. 1,94,54,869/- as deemed dividend under Section 2(22)(e) of the Act, the assessee preferred appeal before the learned CIT(A). The learned CIT(A) deleted the addition of Rs.16,79,850/- made on account of excess claim of premium plot. The learned CIT(A) also deleted the addition of Rs. 1,94,54,869/- made under Section 2(22)(e) of the Act.

2.2. Feeling aggrieved and dissatisfied with the order passed by the learned CIT(A), the Revenue preferred appeal before the learned Tribunal and by impugned judgment and order, the learned Tribunal has dismissed the said appeal and confirmed the order passed by the learned CIT(A) in deleting the addition of Rs. 16,79,850/- made on account excess claim of premium plot as well as deleting the addition of Rs. 1,94,54,869/- made under Section 2(22)(e) of the Act.

2.3. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the learned Tribunal, Revenue is before this Court by way of present appeal with the following question of law.

“A. Whether the Appellate Tribunal is right in law and on facts in deleting the addition of Rs.16,79,850/- made on account of excess claim of premium paid on plot ?

B. Whether the Appellate Tribunal is right in law and on facts in deleting the addition of Rs. 1,94,54,869/- made u/s 2(22)(e) of the Act?”

3.0. Shri Manish Bhatt, learned counsel for the revenue has vehemently submitted that in the facts and circumstances of the case the learned Tribunal has materially erred in deleting the addition of Rs.16,79,850/- made on account of excess claim of premium paid on plot.

3.1. It is submitted by Shri Manish Bhatt, learned counsel for the revenue that while deleting the aforesaid addition, the learned Tribunal has not properly appreciated fact that the lease agreement was for 10 years and therefore, the Assessing Officer was justified in allowing 1/10th of the amount and disallowed the remaining amount. It is further submitted by Shri Manish Bhatt, learned counsel for the revenue that the learned Tribunal has materially erred in confirming the decision of the learned CIT(A) that since no permanent asset had come into assessee possession, the amounts were deductible as revenue expenses. It is further submitted that learned Tribunal has not properly appreciated the fact that plots were taken on long term lease. It is further submitted that as such the learned AO rightly allowed only amount pertaining to one year as eligible deduction.

3.2. It is further submitted by Shri Manish Bhatt, learned counsel for the revenue that the learned Tribunal has materially erred in deleting the addition of Rs. 1,94,54,869/- made under Section 2(22)(e) of the Act.

3.3. It is further submitted by Shri Manish Bhatt, learned counsel for the revenue that while deleting the addition of Rs. 1,94,54,869/- made under Section 2(22)(e) of the Act, the learned Tribunal has not properly appreciated the provision of Section 2(22)(e) of the Act. It is submitted that as Shri KK Bansal was having 20% share in the assessee company as well as M/s. Mahavir Rolling Mills Ltd and therefore, considering Section 2(22)(e) of the Act, the learned Tribunal ought to have confirmed the addition of Rs. 1,94,54,869/- made under Section 2(22)(e) of the Act.

Making above submissions, it is requested to allow present appeal.

4.0. Shri Tushar Hemani, learned counsel for the assessee has opposed present appeal.

4.1. It is submitted by Shri Hemani, learned counsel for the assessee that in the facts and circumstances of the case the learned Tribunal has not committed any error in deleting addition of Rs. 16,79,850/- made on account of excess claim of the premium paid on plot. It is submitted that the said issue is as such covered in favour of assessee in light of the decision of the Division Bench of this Court in the case of Deputy Commissioner of Income Tax vs. Sun Pharmaceutical India Limited reported in (2010) 329 ITR 479 (Guj).

4.2. It is further submitted that so far as question no.2 i.e. with respect to addition of Rs. 1,94,54,869/- made under Section 2(22)(e) of the Act is concerned, the same is also required to be answered against the revenue in light of the decision of the Division Bench of this Court in the case of Principal Commissioner of Income Tax vs. Ram Shipping Industries Pvt Ltd rendered in Tax Appeal No.253 of 2015 .

Making above submissions and relying upon the above decisions, it is requested dismiss the present appeal.

5.0. Heard the learned advocates for the respective parties at length. No so far as question no.1 i.e. whether learned Appellate Tribunal is right in law and on facts in deleting the addition of Rs.16,79,850/- made on account of excess claim of premium paid on plot is concerned, it is required to be noted that amount paid by the assessee with respect to plot allotted by GMB is held allowable as revenue expenditure. The AO deleted the same and treated as capital expenditure and spread over in 10 years in view of fact that lease was for 10 years. However, the same is held to be revenue expenditure by the learned

CIT(A) confirmed by the learned Tribunal. The said issue covered against the revenue in view of the decision of the Division Bench of this Court in the case of Sun Pharmaceutical India Limited (supra). In the case before the Division Bench, the Division Bench has held that where assessee took a land on lease for 99 years at a nominal rent of Rs.40 per year and paid a sum of above Rs. 48 lakhs as advance rent, as land was not acquired by assessee, advance rent was allowable as revenue expenditure and could not be treated as capital expenditure. Similar is the position in the present case. Under the circumstances, no error has been considered by the learned Tribunal in deleting the addition of Rs. 16,79,850/- made on account excess claim of premium paid on plot. Question no.1 is answered against the revenue and in favour of assessee.

6.0. Now, so far as question no.2 i.e. whether the Appellate Tribunal is right in law and on facts in deleting the addition of Rs. 1,94,54,869/- made under Section 2(22)(e) of the Act is concerned, it is required to be noted that it is not the case on behalf of the Revenue M/s. Mahavir Rolling Mills Ltd was shareholder of assessee company nor even the assessee company is a shareholder in the M/s. Mahavir Rolling Mills Ltd. Merely on the ground that one Shri K.K. Bansal one of the Directors holding more than 20% of share was director both in M/s. Mahavir Rolling Mills Ltd and assessee company, the AO has treated the loans and advance made by M/s. Mahavir Rolling Mills Ltd to the assessee company as deemed dividend in the hands of the assessee company.

7.0. Identical question came to be considered by the Division Bench of this Court and considering the decision Delhi High Court in the case of CIT vs. Ankitech Pvt Ltd reported in 340 ITR 14 (Del), the Division Bench has confirmed the deletion made by the learned Tribunal

by holding that from whom loan and advance was taken by the assessee must be shareholder in the assessee company. In para para 3 & 4, the Division Bench has observed and held as under:

[3.0] We have heard Shri Manish Bhatt, learned Counsel appearing on behalf of the revenue at length. We have also considered and gone through the impugned judgment and order passed by the learned Tribunal; the assessment order as well as the order passed by the learned CIT(A) making the addition of Rs.4,14,71,946/- made by the Assessing Officer invoking Section 2(22)(e) of the Act. In paras 24 to 27, the Delhi High Court in the case of **Ankitech Pvt. Ltd.(Supra)** has held and observed as under;

24. The intention behind enacting the provisions of Section 2(22)(e) is that closely-held companies (i.e. companies in which public are not substantially interested), which are controlled by a group of members, even though the company has accumulated profits would not distribute such profit as dividend because if so distributed the dividend income would become taxable in the hands of the shareholders. Instead of distributing accumulated profits as dividend, companies distribute them as loan or advances to shareholders or to concern in which such shareholders have substantial interest or make any payment on behalf of or for the individual benefit of such shareholder. In such an event, by the deeming provisions, such payment by the Company is treated as dividend. The intention behind the provisions of Section 2(22)(e) of the Act is to tax dividend in the hands of shareholders. The deeming provisions as it applies to the case of loans or advances by a Company to a concern in which its shareholder has substantial interest, is based on the presumption that the loans or advances would ultimately be made available to the shareholders of the Company giving the loan or advance.

25. Further, it is an admitted case that under the normal circumstances, such a loan or advance given to the shareholders or to a concern, would not qualify as dividend. It has been made so by a legal fiction created under Section 2(22)(e) of the Act. We have to keep in mind that this legal provision relates to dividend. Thus, by a deeming provision, it is the definition of dividend which is enlarged. Legal fiction does not extend to shareholder. When we keep in mind this aspect, the conclusion would be obvious, viz, loan or advance given under the conditions

specified under Section 2(22)(e) of the Act would also be treated as dividend. The fiction has to stop here and is not to be extended further for broadening the concept of shareholders by way of legal fiction. It is a common case that any company is supposed to distribute the profits in the form of dividend to its shareholders/members and such dividend cannot be given to non-members. The second category specified under Section 2(22)(e) of the Act, viz, a concern (like the assessee herein), which is given the loan or advance is admittedly not a shareholder/member of the payer company. Therefore, under no circumstance, it could be treated as shareholder/member receiving dividend. If the intention of the Legislature was to tax such loan or advance as deemed dividend at the hands of deeming shareholder, then the Legislature would have inserted a deeming provision in respect of shareholder as well, that has not happened. Most of the arguments of the learned Counsel for the revenue would stand answered, once we look into the matter from this perspective.

26. In a case like this, the recipient would be a shareholder by way of deeming provision. It is not correct on the part of the Revenue to argue that if this position is taken, then the income is not taxed at the hands of the recipient. Such an argument based on the scheme of the Act as projected by the learned Counsel for the revenue on the basis of Sections 4, 5, 8, 14 and 56 of the Act would be of no avail. Simple answer to this argument is that such loan or advance, in the first place, is not an income. Such a loan or advance has to be returned by the recipient to the Company, which has given the loan or advance.

27. Precisely, for this very reason, the Courts have held if the amounts advanced are for business transactions between the parties, such payment would not fall within the deeming dividend under Section 2(22)(e) of the Act.”

Considering the provisions of Section 2(22)(e) of the Act, we are in complete agreement with the view taken by the Delhi High Court.

[4.0] Shri Bhatt, learned Counsel appearing on behalf of the revenue has as such tried to justify the decision of the Delhi Court in the case of Ankitech Pvt. Ltd. (Supra) and has vehemently submitted that the Delhi High Court has not considered the third category i.e. shareholder in the assessee-Company holding not less than 10% of the voting power in the Company from whom the loan or advance is taken. However, on considering Section 2(22)

(e) of the Act, we are not at all impressed with the aforesaid. If the contention on behalf of the revenue is accepted, in that case, it will be creating the third category / class, which is not permissible. What is provided under Section 2(22)(e) of the Act seems to be that the assessee-Company must be a shareholder in the Company from whom the loan or advance has been taken and should be holding not less than 10% of the voting power. It does not provide that any shareholder in the assessee-Company who had taken any loan or advance from another Company in which such shareholder is also a shareholder having substantial interest, Section 2(22)(e) of the act may be applicable.

7.1. Similar is the position in the present case. Under the circumstances, no error has been committed by the learned Tribunal in deleting addition of Rs. 1,94,54,869/- made under Section 2(22)(e) of the Act. Under the circumstance, question no.2 is also held against the revenue and in favour of the assessee.

8.0. In view of the above and for the reasons stated above, present appeal deserves to be dismissed and is accordingly dismissed.

(M.R. SHAH, J.)

(B.N. KARIA, J.)

Kaushik