

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "A", KOLKATA
[Before Shri N.V.Vasudevan, JM & Shri M.Balaganesh, AM]

ITA No.151/Kol/2013
Assessment Year : **2009-10**

I.T.O., Ward-2(2),
Kolkata

-versus-

Smt. Gayatri Chakraborty
Kolkata
(PAN:ACPPC 8419G)

(APPELLANT)

(RESPONDENT)

For the Appellant : Shri Debasish Roy, JCIT, Sr.DR
For the Respondent : Shri Ravi Tulsian, FCA

Date of Hearing : 15.10.2015.
Date of Pronouncement : 30.10.2015.

ORDER

Per Shri N.V.Vasudevan, JM

This is an appeal by the Revenue against the order dated 12.10.2012 of CIT(A)-I, Kolkata, relating to AY 2009-10.

2. The Assessee is an individual. She is a director in a company by name M/S.Bright Advertising Pvt. Ltd., (BAPL). She holds 25.24% shares in BAPL. There were transactions between the Assessee and BAPL of giving money by the Assessee to BAPL as well by BAPL to the Assessee. The AO from the ledger Account of BAPL in the books of the Assessee, took note only of the transaction whereby BAPL gave money to the Assessee and was of the view that the same was "Loan or Advance" within the meaning of Sec.2(22)(e) of the Act by a company (BAPL) to a person who holds substantial interest in the company (BAPL) and had to be brought to tax as deemed dividend to the extent the company possesses accumulated profits.

The provisions of Sec.2(22)(e) of the Act, reads as follows:

Sec.2(22) "dividend" includes—

“(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 31-5-1987, by way of advance or

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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.”

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 (c) 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 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).*

Explanation 1.—The expression "accumulated profits", wherever it occurs in this clause, shall not include capital gains arising before the 1st day of April, 1946, or after the 31st day of March, 1948, and before the 1st day of April, 1956.

Explanation 2.—The expression "accumulated profits" in sub-clauses (a), (b), (d) and (e), shall include all profits of the company up to the date of distribution or payment referred to in those sub-clauses, and in sub-clause (c) shall include all profits of the company up to the date of liquidation, but shall not, where the liquidation is consequent on the compulsory acquisition of its undertaking by the Government or a corporation owned or controlled by the Government under any law for the time being in force, include any profits of the company prior to three successive previous years immediately preceding the previous year in which such acquisition took place.

Explanation 3.—For the purposes of this clause,—

- (a) "concern" means a Hindu undivided family, or a firm or an association of persons or a body of individuals or a company ;*
- (b) a person shall be deemed to have a substantial interest in a concern, other than a company, if he is, at any time during the previous year, beneficially entitled to not less than twenty per cent of the income of such concern ;*

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Section 2(32) defines the expression “person who has a substantial interest in the company”, in relation to a company, means 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, carrying not less than twenty percent of the voting power.

3. The provisions of Sec.2(22)(e) treats “loan or advance” given by a company in which public are not substantially interest as distribution of dividend by the company to its shareholders and chargeable to tax. It is being done to bring within the tax net monies paid by the closely held companies to their shareholders who have substantial interest in the company, payment by way of loan or advance presuming that the accumulated profits which the company has are being given as loan or advance instead of dividend to avoid tax if such sums are given as Dividend. The purpose being that persons who manage such closely held companies should not arrange their affairs in a manner that they assist the shareholder in avoiding the payment of taxes by having these companies pay or distribute, what would legitimately be dividend in the hands of the shareholder, money in the form of an advance or loan.. Nomenclature of this section which is “Deemed Dividend”, connotes that this section has been brought on statue as “Deeming Fiction”. It means that the income termed as dividend is actually not dividend distributed by a closely held company but the amount paid is still treated as dividend and hence the term “Deemed Dividend”.

4. The AO applying the provisions of Sec.2(22)(e) of the Act treated the total of transactions by which monies were given by BAPL to the Assessee which was quantified by the AO at Rs.15,76,77,411/- as in the nature of “Loan or Advance” within the meaning of Sec.2(22)(e) of the Act. The AO however treated only a sum of Rs.3,10,83,635/- as deemed dividend and brought the said sum to tax in the hands of the Assessee. This is because the accumulated profits of BAPL were quantified by the AO at Rs.3,19,0,83,635/- by the AO and the addition was restricted to that sum by the AO.

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5. Aggrieved by the order of the AO, the Assessee preferred appeal before CIT(A). Before CIT(A), the Assessee contended that the transactions between the Assessee and BAPL in which the Assessee was a Director represented not a loan account but a current and mutual account. It was submitted that a current or mutual account is different from a loan account in the sense that it has the feature of mutuality which is not present in a loan account. An account is mutual when transactions on one side are independent of the transactions on the other side. When an account has a shifting balance that is favourable to one party at times and favourable to the other party at other times, the account is current and mutual. By way of an example, the Assessee explained that when A pays Rs.1,000/- to B and on a subsequent date B repays Rs.1,000/- to A, it is a loan account but if instead of repaying Rs.1,000/- B pays Rs.1,200/- to A, such an account cannot be said to be a loan account but it is a mutual or current account as the payments by A or B are independent and not dependent or linked with the payments made by the other. The Assessee drew attention of the CIT(A) to the decision of the Hon'ble Supreme Court in the case of Kesari Chand Jaisukh Lal vs Shillong Banking Corporation Ltd. in which it has been held that "to be mutual there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharge of such obligations..... There were shifting balances, on many occasions the balance was in favour of the appellant and on many other occasions, the balance was in favour of the respondent. There were reciprocal demands between the parties and the account was mutual".

6. The Assessee filed before CIT(A) a copy of the Ledger Account of the Assessee as appearing in the Books of Accounts of BAPL. The balance as on 31.03.2009 was nil. It was pointed out that in almost every month of the Fin. Year 2008-09, there were about 5 to 10 transactions involving payments by both the Assessee and BAPL to each other. Referring to the transactions in the Ledger Account, the Assessee pleaded that during the first few months of the Fin. Year 2008-09, the outstanding balances were in favour of BAPL and it was, therefore, advantageous to BAPL. However in subsequent months the position reversed and the balances after each transaction were in favour of

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the Assessee. It was argued that in any case whether the outstanding balances at the end of each transaction were in favour of Assessee or BAPL, it cannot be held that it was a loan account.

7. The Assessee submitted that the transactions between the Assessee and BAPL were in the nature of a current or mutual account and not a loan account. In this connection, the Assessee also relied on the observations of the Hon'ble Calcutta High Court in the case of Daga & Co. (P) Ltd. vs CIT reported in 227-ITR-480 wherein it has been held that "to constitute a current account or an account in the course of business of the company, there must be each side creating an independent obligation on the other. Mere credit entries with adjustment entries like payment of interest and deduction of tax at source cannot make an account, a current account or an account in the course of business transaction". The A.R. has also referred to another decision of the Hon'ble Calcutta High Court in the case of Pradip Kumar Malhotra (338-ITR-538) wherein it has been held that gratuitous loan or advance given by a Company to those classes of shareholders would come within the purview of Sec.2(22) but not cases where the loan or advance is given in return to an advantage conferred upon the company by such a shareholder. It was thus submitted that the transactions between the Assessee and BAPL cannot be treated as a loan account and consequently the A.O. was not justified in treating the sum of Rs.15,76,77,411/- as deemed dividend in the hand of the Assessee in terms of Sec.2(22)(e) of the I.T. Act."

8. The CIT(A) agreed with the contentions on behalf of the Assessee and deleted the addition made by the AO, observing as follows:

"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 LT. Act. The addition of Rs.3,10,83,635/- as made by the A.O. is, therefore, deleted. Since the addition made by

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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.”

9. Aggrieved by the order of the CIT(A), the Revenue is in appeal before the Tribunal raising the following grounds:

*“1. That the facts and circumstances of the case CIT(A) erred both in law and facts in deleting addition of Rs.3,10,83,635/- made by the A.O. u/s 2(22)(e) of the I.T.Act, 1961.
2. that the Appellant craves leave to add, amend, modify & alter any grounds of appeal during course of hearing of the case.”*

10. The learned DR relied on the order of the AO. The learned counsel for the Assessee reiterated submissions made before the CIT(A) and relied on the decision of the Hon’ble Calcutta High Court in the case of Pradip Kumar Malhotra Vs. CIT 338 ITR 538(Cal). Further reliance was also placed on the decision of the ITAT Kolkata Bench in the case of Mr.Purushottam Das Mimani Vs. DCIT IT(SS) A Nos. 60 to 62/Kol/2011 for AY 2006-07 to 2008-09 order dated 17.10.2014 wherein the Kolkata Bench on identical facts following the decision of the Hon’ble Calcutta High Court in the case of Daga & Co. (P) Ltd., (supra) was pleased to hold that provisions of Sec.2(22)(e) of the Act were not applicable.

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

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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.

13. This tribunal in the case of Mr.Purushottam Das Mimani (supra) on identical facts came to the conclusion that the account between the Assessee and a public limited company was a running mutual current account and thereafter following the decision of the Hon'ble Calcutta High Court in the case of Pradip Kumar Malhotra (supra) held as follows:

“4. We have heard rival submissions and gone through facts and circumstances of the case. We have gone through the facts of the case and found from the perusal of ledger account of assessee in the books of account of Ganesh Wheat Products (P) Ltd., the lender company, it is seen that as on the first day of the relevant accounting year 2005- 06 (A.Y. 2006-07) opening balance is at Rs.28,07,584/-. Thereafter, on several dates during the entire financial year there were several transactions through cheques and some in cash by either parties, i.e. the assessee and the loan giving company, resulting in shifting balances. On many occasions the balance was in favour of the assessee and on some other occasions the balance was in favour of Ganesh Wheat Products (P) Ltd. The ledger of the assessee further reveals that no payment by loan creditor is followed by a repayment by the loan debtor and, in fact, the payments by the assessee and Ganesh Wheat Products (P) Ltd. are independent of one another. No interest was charged by either side for advancing money on mutuality inasmuch as the loan account was a current account in nature. It is thus evident that there were reciprocal demands between the parties and thus mutual in characteristic. At the close of accounting year as on 31-03-2006, debit balance stood at a sum of Rs.18,87,522/- which was duly reflected in the balance sheet under the head Loans & Advances. Similarly, in respect of Mima Flour Mills opening balance was Nil and there were several shifting of balance and the resultant debit balance was Rs.5,00,833/-. For A.Y. 2007-08, in respect of Mima Flour Mills, opening balance was Rs.5,00,833/- and after shifting balance, the debit balance came to nil. In respect of Ganesh Wheat Products, opening balance was Rs.18,87,522/- and after shifting balance the credit balance came to Rs.9 lakhs. On perusal of the ledger account of the assessee in the books of M/s. Mima Flour Mills (P) Ltd. it is seen that on several dates there were shifting balances. On many occasions the balance was in favour of the

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assessee and on some other occasions the balance was in favour of Ganesh Wheat Products (P) Ltd. It is thus evident that there were reciprocal demands between the parties and thus mutual in characteristic. The account so maintained in respect of such mutual transfer of amount by way of giving and taking financial assistance is, therefore, a current account and this current account is different from a loan account for the sole reason that feature of mutuality is not present in a loan transaction.

5. Here in the present case, from the facts narrated above, it is clear that both the parties are beneficiary of the transaction being current account of the above transactions i.e. shifting balances. This issue has been answered by Hon'ble Calcutta High Court in the case of Pradip Kumar Malhotra v. CIT 338 ITR 538 (Cal) wherein Hon'ble High Court held as under:

“The phrase “by way of advance or loan” appearing in sub-clause (e) of section 2(22) of the Income-tax Act, 1961, must be construed to mean those advances or loans which a shareholder enjoys 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 be deemed dividend within the meaning of the Act. Thus, gratuitous loan or advance given by a company to those classes of shareholders would come within the purview of section 2(22) but not cases where the loan or advance is given in return to an advantage conferred upon the company by such shareholder.”

From the above facts and legal proposition decided by Hon'ble jurisdictional High Court, it is clear that section 2(22)(e) of the Act was inserted to bring within the purview of taxation those amounts which are actually a distribution of profits but are disbursed as a loan so that tax thereon can be avoided. It is pertinent to note here that when dividends are declared by a company, it is solely the shareholders who benefit from the transaction. No benefits accrue to the company by way of dividend distribution. Thus, section 2(22)(e) of the Act covers only such situations, where the shareholder alone benefits from the loan transaction, because if the company also benefits from the said transaction, it will take the character of a commercial transaction and hence will not qualify to be dividend. In the case of the assessee, by giving and taking financial assistance from each other, both the assessee and the company were benefited and such transactions between them were nothing but commercial IT(SS)A No.60-62 & 73-76/Kol/2011 A.Ys.06-07 to 08-09 and 02-03 to 05-06Mr. Purushottam Das Mimani. v. DCIT, CC-V, Kol Page 5 transactions and dividend attributable to the shareholder is nothing to do with such business transaction. From the above discussions it can be said that sec. 2(22)(e) of the Act covers only those transactions which benefit the shareholder alone and results in no benefit to the company. On the other hand, if the transaction is mutual by which both sides are benefited, it is undoubtedly outside the purview of provisions of sec. 2(22)(e) of the Act. From the above, it is clear that the loan account differs from current account and the provisions of section 2(22)(e) of the Act, being a deeming section, cannot be applied to current account. In such circumstances, we delete the addition and this common issue of assessee's appeals is allowed.”

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14. We are of the view that in the present case also the transactions in question does not benefit the shareholder i.e., the Assessee alone and the results in no benefit to the Company BAPL. The loan account is different from a current account with a shareholder and the transactions between the Assessee and BAPL are in the nature of current account and provisions of Sec.2(22)(e) of the Act will not be applicable to the case of the Assessee. We therefore concur with the decision of the CIT(A) and dismiss the appeal of the Revenue.

15. In the result, appeal by the Revenue is dismissed.

Order pronounced in the open court on 30.10.2015.

Sd/-
[M.Balaganesh]
Accountant Member

Sd/-
[N.V.Vasudevan]
Judicial Member

Date: 30.10.2015.
R.G.(.P.S.)

Copy of the order forwarded to:

1. Smt. Gayatri Chakraborty, C/o M/s. Bright Advertising (P)Ltd., 310, Kamalalay Centre, 3rd Floor, Kolkata-700013.
- 2 The I.T.O., Ward-2(2), Kolkata.
3. The CIT-I, Kolkata, 4. The CIT(A)-I, Kolkata.
5. DR, Kolkata Benches, Kolkata

True Copy,

By order,

Deputy /Asst. Registrar, ITAT, Kolkata Benches