

आयकर अपीलीय अधिकरण] पुणे न्यायपीठ "बी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

BEFORE MS. SUSHMA CHOWLA, JM AND
SHRI ANIL CHATURVEDI, AM

आयकर अपील स / ITA No.245/PUN/2017
निर्धारण वर्ष / Assessment Year : 2013-14

The Asst. Commissioner of Income Tax, Appellant
Circle Dhule, Dhule.

बनाम v/s

M/s. Bhaawani Shankar Ginning Factory, Respondent
Plot No.56, Krishna Siddhi, G.B. Nagar,
Malegaon Road, Dhule.

PAN : AAGFB0483J.

प्रत्याक्षेप स / CO No.04/PUN/2019
(Arising out of ITA No.245/PUN/2017
निर्धारण वर्ष / Assessment Year : 2013-14

M/s. Bhaawani Shankar Ginning
Factory, Cross-Objector.
Plot No.56, Krishna Siddhi, G.B. Nagar,
Malegaon Road, Dhule.

PAN : AAGFB0483J.

बनाम v/s

The Asst. Commissioner of Income Tax, Appellant in the
Circle Dhule, Dhule. appeal.

Assessee by : Shri Rahul K. Hakani.

Revenue by : Shri Sudhendu Das.

सुनवाई की तारीख / Date of Hearing : 03.07.2019	घोषणा की तारीख / Date of Pronouncement: 01.08.2019
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आदेश / ORDER

PER ANIL CHATURVEDI, AM :

1. The present appeal filed by the Revenue and the C.O. filed by
the assessee are directed against the order of Commissioner of

Income Tax (Appeals) – 1, Nashik dated 21.11.2016 for the assessment year 2013-14.

2. The relevant facts as culled out from the material on record are as under:-

Assessee is a partnership firm stated to be engaged in the business of cotton ginning, pressing and manufacturing. Assessee electronically filed its return of income for A.Y. 2013-14 on 06.09.2013 declaring total income of Rs.17,16,595/-. The case was selected for scrutiny and thereafter assessment was framed u/s 143(3) of the Act vide order dt.02.02.16 and the total income was determined at Rs.2,37,76,474/-. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who vide order dt.21.11.2016 (in appeal No.Nsk/CIT(A)-1/729/2015-16) has allowed the appeal of the assessee. Aggrieved by the order of Ld.CIT(A), Revenue is now in appeal before us and has raised the following grounds :

“1. Whether on the facts and in the circumstances of the case, the Ld.CIT(A)-1, Nashik was justified in allowing unexplained money of Rs.2,20,44,732/- u/s 2(22)(e) of the Income Tax Act, 1961.

2. Whether on the facts and in the circumstances of the case, the Ld.CIT(A)-1, Nashik was justified in allowing deemed dividend of Rs.2,20,44,732/- u/s 2(22)(e) of the Income Tax Act, 1961 when the CBDT Circular No.495 of 1987 explains the provisions made by the Finance Act, 1987 that the deemed dividend salary tax in the hands of concern.

3. The order of the CIT(A) may be vacated and that of the Assessing Officer may be restored.”

3. On the other hand, assessee has filed C.O. and the grounds raised by the assessee reads as under :

“1. The learned CIT(A) failed to appreciate that Ld AO erred in making addition of Rs 2,20,44,7321- u/s 2(22)(e) of the Act being loan received from Mahesh Ginning Pvt Ltd without computing accumulated profits and without recording any finding that payment of loan was from accumulated profits or assessee possessed accumulated profits and hence the addition ought to be deleted.

2. The learned CIT(A) failed to appreciate that the learned AO erred in making addition of Rs 2,20,44,7321- u/s 2(22)(e) of the Act being loan received from Mahesh Ginning Pvt Ltd without deducting share premium account, income tax payable and depreciation as per income tax act while computing accumulated profits u/s 2(22)(e).

3. The learned CIT(A) failed to appreciate that the learned AO erred in making addition of Rs 2,20,44,732/- u/s 2(22)(e) of the Act being loan received from Mahesh Ginning Pvt Ltd without appreciating that the loan was given on the grounds of commercial expediency and the entire loan was returned during the year and there was no evasion of tax and hence the addition ought to be deleted.”

4. Before us, Ld.A.R. at the outset, submitted that there is delay of 29 days in filing the C.O. He also placed the sworn affidavit of Mr. Gopal Hajarimal Tayal, Partner of the firm stating the reasons for the delay and in view of the reasons stated in the affidavit he prayed that the delay in filing the C.O be condoned. Ld.D.R. did not seriously object to the prayer of condonation.

5. On the issue of condonation of delay of C.O., we have gone through the affidavit filed by the partner of assessee’s firm and heard the Ld.D.R. After considering the reasons stated in the affidavit, we are of the view that the delay in filing the C.O., has been satisfactorily explained. In view of these facts, we condone the delay and admit the C.O. for hearing.

6. We first proceed with Revenue’s appeal in ITA No.245/PUN/2017 for A.Y. 2013-14.

6.1. All the grounds being inter-connected are considered together.

7. During the course of assessment proceedings, AO noticed that assessee had received loan from Mahesh Ginning Pvt. Ltd., in which both the partners of the firm i.e., Goverdhandash H. Tayal and Gopal Hazarimal Tayal held 18.19% share each. He also noticed that assessee firm had only two partners holding 50% share each. AO was therefore of the view that the transaction of receipt of loan by the assessee qualified as dividend u/s 2(22)(e) of the Act. The assessee was asked to explain as to why the transaction not be treated as deemed dividend u/s 2(22)(e) of the Act. To the said aforesaid query of AO, assessee inter-alia submitted that assessee firm is not a share-holder and therefore the provisions of Sec.2(22)(e) of the Act are not applicable. The submissions of the assessee were not found acceptable to the AO. AO noted that Mahesh Ginning Pvt. Ltd., had accumulated reserves of Rs.2.20 crores (rounded off). He therefore, by applying the provisions of Sec.2(22)(e) of the Act, made addition of Rs.2,20,44,732/-. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who after considering the submissions of the assessee and after following the decision of Hon'ble Bombay High Court in the case of CIT Vs. Universal Medicare Private Limited reported in (2010) 324 ITR 263 deleted the addition made by the AO by observing as under :

"4.4. I have carefully considered the facts of the case, the submission of the appellant and the order of the Assessing Officer. The appellant is a firm. It is a settled law that the partnership firm is

not a legal person. Hence the partnership firm holds share in the name of its partners. If a company advances money to the firm in which partners hold shares of that company would the provision of section 2(22)(e) be triggered.

4.5. The present issue is, therefore, a question of fact, which involves a legal fiction. The courts have explained and laid down certain tests which needs to be applied keeping in view the facts of each case. There is no dispute with regard to the tests in the present appeal. As stated above, Sec. 2(22)(e) is a deeming provision which creates a legal fiction. It is judicially settled that a legal fiction cannot be interpreted to work injustice and a statutory fiction cannot be extended beyond its purpose. There is no dispute that the subject matter of payment contemplated under 2(22)(e) includes an advance, a loan, any payment on behalf of a shareholder and any payment for the benefit of a shareholder. The basic principles therefore, governing the section have been carefully examined. The chief ingredient in that section is that one should be a shareholder on the date the advance was made. In the present case, even though the advances were made out of profits of the lending company, but, the chief ingredient i.e., the registered shareholder and beneficial interest is not existing in the appellant's case. It is primarily on two counts. The appellant firm is not a registered shareholder of the lending company. The ITAT Spl. Bench in the case of ACIT Vs. Bhaumik Color (P) Ltd. (2009) 27 SOT (MUM) (SB) and the case of Commissioner of Income Tax-9 Vs. Impact Containers Pvt. Ltd., has dealt with the similar issue and has held that "the deemed dividend can only be taxed in the hands of a person who is not only a beneficial shareholder, but also a registered shareholder. The said decision of the Special Bench of the ITAT has been followed by the jurisdictional ITAT Pune Bench in ITA No. 728/PN/2008 A. Y. 2005-06 vide an order dated 31/03/2009 in the case of M/s. Shivananda Electronics Vs. JCIT. The ratio of the two decisions squarely apply to the identical facts of the case of the appellant. Further, the above proposition of law is also supported by the decision of Hon'ble Bombay High Court in the case of CIT Vs. Universal Medicare Private Limited (2010) 324 ITR 263. The decision of Impact Containers has also been upheld by Bombay High Court. Therefore, in absence of above ingredients, the advance made by Mahesh Ginning Pvt. Ltd. to M/s Bhawani Shankar Ginning Factory to carry out its business cannot be treated as deemed dividend in the hands of the appellant u/s 2(22)(e). Therefore, it is held that no payment as contemplated u/s 2(22)(e) has been made by the closely held company to the appellant firm. There is contrary decision of Delhi High Court in National Travel Services wherein it has been held that for purpose of deemed dividend u/s 2(22)(e) firm is shareholder though shares are held in name of partners. However, following the binding judicial precedents the decision of jurisdictional i.e. Bombay High Court is followed. Consequently, it is held that the Assessing Officer was not justified in invoking section 2(22)(e) and making the impugned addition of Rs.2,20,44,732/- and, therefore, the same is deleted.

However, the AO is directed to take appropriate action as per the relevant provisions of the Act to tax deemed dividend in the hands of partner Govardandas H. Tayal and Gopal Hazarimal Tayal holding shares of 18.9% each in Mahesh Ginning Pvt. Ltd."

Aggrieved by the order of Ld.CIT(A), Revenue is now before us.

8. Before us, Ld. D.R. supported the order of AO. Ld.A.R. on the other hand, reiterated the submissions made before lower authorities and further submitted that the assessee firm is not a share-holder and therefore the provisions of Sec.2(22)(e) of the Act are not applicable and for the aforesaid proposition, he relied on the decision of Bombay High Court in the case of CIT Vs. Skyline Great Hills reported in (2016) 238 Taxmann.com 675. He also placed on record the copy of the aforesaid decision. He thus supported the order of Ld.CIT(A). He thereafter submitted that if the grounds of Revenue are dismissed then the C.O. of the assessee would become academic and would therefore require no adjudication.

9. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to addition u/s 2(22)(e) of the Act. It is an undisputed fact that assessee had received loan from Mahesh Ginning Pvt. Ltd., in which both the partners of the assessee also held 18.19% shares each. We find that Ld.CIT(A) while deciding the issue in favour of the assessee has given a finding that the chief ingredient of Sec.2(22)(e) of the Act is that one should be a shareholder on the date on which the advance was made. Though the advances were made out of the profits of the lending company but the assessee was not the registered shareholder and beneficial interest was not existing. She

therefore, following the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Universal Medicare Private Limited (supra) and other decisions cited in the order, has held that the receipt of loan cannot be contemplated as deemed dividend u/s 2(22)(e) of the Act. Before us, Revenue has not pointed out any contrary binding decision in its support. We therefore find no reason to interfere with the order of Ld.CIT(A). **Thus, the grounds of the Revenue are dismissed.**

10. Now, we take up the Cross-Objection filed by the assessee in C.O. No.4/PUN/2019 for A.Y. 2013-14.

11. Before us, Ld. AR submitted that if the appeal of the Revenue is dismissed, the grounds raised by the assessee in Cross Objection will become academic. While deciding the appeal of Revenue hereinabove, we for the reasons stated hereinabove have dismissed the grounds of the Revenue. Therefore, in view of the Ld AR's submission, the **grounds raised by the assessee in the present C.O are dismissed.**

12. **In the result, both the appeal of Revenue and C.O. of assessee are dismissed.**

Order pronounced on 1st day of August, 2019.

Sd/-

(SUSHMA CHOWLA)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

(ANIL CHATURVEDI)

लेखा सदस्य / ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 1st August, 2019.

Yamini

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. CIT(A) -1, Nashik.
4. Pr.CIT-1, Nashik.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" / DR,
ITAT, "B" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune.