

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'B' BENCH, KOLKATA**

**Before Shri Waseem Ahmed, Accountant Member and
Shri K. Narasimha Chary, Judicial Member**

**I.T.A. No. 2873 /KOL/ 2013
Assessment Year: 2007-2008**

Mr. Manish Mimani.....Appellant
Flat No.11, 4th Floor,
32, Rowland Row,
Kolkata-700 020
[PAN: ABTPM 1173 K]

-Vs.-

Joint Commissioner of Income Tax (OSD),.....Respondent
Central Circle-V, Kolkata

Appearances by:

Shri Ravi Tulsiyan, FCA, for the assessee

Shri Debashis Banerjee, JCIT, Sr. D.R., for the Department

Date of concluding the hearing : August 22, 2016

Date of pronouncing the order : August 26, 2016

O R D E R

Per Shri K. Narasimha Chary, J.M.:

This appeal by the assessee is challenging the order dated 29.11.2013 passed by the Id. Commissioner of Income Tax (Appeals), Central-1, Kolkata (hereinafter called as "the CIT(A)" in short) in Appeal No.302/CC-V/CIT(A)/C-1/11-12 in respect of the assessment year 2007-08.

2. Brief facts of the case are that the assessee is an individual. He belongs to Mimani Group. He has income from Salary, house property and other sources. On 30.1.2009 he filed his return of income. On 4.10.2007, there was a search and seizure operation in Mimani Group. During the course of search operation no incriminating materials were found relevant to assessment year under appeal. Learned AO however initiated proceedings u/s 153A of the assessee and the assessee in response to the said notice requested the learned AO to treat the original returned filed earlier as return in response to notice u/s 153A of the Act. In the said assessment , the learned AO added

back an amount of Rs.15,36,337/- representing advances received by the assessee from M/s. Ganesh Wheat Product Pvt. Ltd as deemed dividend u/s 2(22)(e) of the Act. However, learned CIT initiated proceedings u/s 263 of the Act for enhancement of the additional amount towards deemed dividend by Rs.27,68,646/- and passed an order u/s 263 of the Act treating the original order passed u/s 153A of the Act by the learned AO as erroneous and prejudicial to the interest of the revenue. Pursuant to the orders of the learned CIT, u/s 263 of the Act, learned AO by order dated 29.11.2011 added Rs.27,68,646/- also to the income of assessee thus reaching the gross total income of the assessee at Rs.53,54,040/-

3. Challenging these orders, the assessee preferred an appeal before the learned CIT in appeal No 301/CC-V/CIT(A) C-I/11-12. However, observing that the assessee has no interest in pursuing the appeal, because of non representation on the dates of hearing, the learned CIT by way of impugned order dismissed the appeal, confirming the additions made by the learned AO.

4. Aggrieved by the learned CIT(A), assessee preferred this appeal on the following grounds:

(1) The order passed by the ld. CIT(A) dated 29.11.2013 is arbitrary, void, without proper reasons, invalid and bad in law.

(2) The ld. CIT(A) erred in holding that the appellant assessee was not interested in pursuing the appeal lying before him and in that view, in dismissing the appellate grounds raised before him in limine, without considering the individual grounds of appeal raised before him.

(3) The ld. CIT(A) failed to appreciate that the Assessing officer had erred in adding back the amount of Rs.27,68,646/- u/s. 2(22)(e) of the Income Tax Act, 1961, simply by following the direction of the CIT given in his order u/s 263 of the Act, dated 22.11.2011, without applying his own mind.

(4) In specific, on the facts and in the circumstances of the case, the ld. CIT(A) failed to appreciate that the Assessing Officer had erred in failing to see through that the appellant had regular business dealings with M/s Ganesh Wheat Products (P) Ltd., which do not come under the purview of section 2(22)(e) of the Income Tax Act, 1961.

(5) Further, on the facts and in the circumstances of the case, the ld. CIT(A) failed to appreciate that the Assessing Officer had erred in considering that the appellant assessee had received Rs.27,68,646/- during the period from 01.11.2006 to 05.03.2007 from M/s. Ganesh Wheat Products Pvt. Ltd. an in that view, in adding back the said amount of Rs.27,68,646/- as 'Deemed

Dividend' received by the appellant assessee in terms of section 2(22)(e) of the Act.

(6) The appellant craves leave to amend, alter, substitute, modify, abridge, add to and/or rescind any or all of the above grounds.

5. Ld. AR argues that the drawing and deposits made by the assessee with Ganesh Wheat Products Pvt. Ltd are in the nature of current account and do not amount to deemed dividend under Section 2(22)(e) of the Act. He further submits that such by way order dated 04.05.2016. On this ground he submits that the additions made on the bases of such quashed order will not survive. He further submitted that in respect of the addition of Rs. 15,36,337/-, on a very similar question of law as to the applicability of Section 2(22)(e) of the Act to the deposits and withdrawals, another coordinate Bench of this Tribunal in IT(SS)A Nos 57 and 58/Kol/2011 held that they are not hit by Section 2(22)(e) of the Act and the additions have to be deleted. He filed the copies of the above orders to substantiate his contention. On the other side, learned DR vehemently relied upon the orders of the authorities below.

6. Basing the on the above rival contention, the issue that arises for our consideration is whether the additions made by the learned AO treating the transactions of assessee with Ganesh Wheat Products (P) Ltd as deemed dividend within the meaning of section 2(22)(e) of the Act?

7. We have carefully gone through the orders produced by the learned AR. In the order dated 22.11.2011 in ITA 301/Kol/2012 while quashing the orders of the learned CIT passed under section 263 of the Act a Coordinate Bench of this Tribunal observed as follows:

"4. The learned AR argued that this tribunal had already disposed off the original appeal emanating out of original section 153A proceedings in IT(SS)A.57& 58/Kol/2011 for A.Yrs. 2006-07 & 2007-08 respectively dated 17.10.2014 wherein the addition made towards deemed dividend was deleted by this Tribunal. He argued that accordingly this issue stands decided by the tribunal in favour of the assessee and hence prayed for following the same

order in respect of enhancement proposed in section 263 order of the Id.CIT. In response to this the learned DR vehemently supported the order of the Id.CIT.

5. We have heard the rival submissions and perused the materials available on record. It is not in dispute that the assessee is holding more than 10% of the voting power in M/s. Ganesh Wheat Product (P)Ltd. It is not in dispute that the said company is having accumulated profits of Rs.81,57,815/-. We find that the assessee had frequently drawn moneys from the said company and has also repaid moneys to the said company on several dates. Both the transactions are interest free and we also find that on several occasions that the balance outstanding is in favour of the assessee and also in favour of the said company. Hence it is in the nature of running account or current account. We find that this tribunal in the case of the assessee in IT(SS)A.No.57&58/Kol/2011 dated 17.10.2014 had held as under :-

"4. We have heard rival submissions and gone through facts and circumstances of the case. We find from the facts narrated above as well as argued by both the sides, that the facts are exactly identical to the case of Mr. Purushottam Das Mimani in IT(SS)A No. 60 to 62/Ko112011, which we have now adjudicated (which is a group case). The issue being exactly identical and we have considered the issue in para 4 and 5 of our order of even date in the case of Mr. Purushottam Das Mimani, which reads as under:

"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, 5841-. 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 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 Malhatra 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 share-holder, 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 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. "

6. Respectfully following the said decision of the Tribunal and also the Jurisdictional High Court in the case of Pradip Kumar Malhotra vs CIT reported in 338 ITR 538(Cal) we find that the transactions in the form of current account should not be construed as loan or advances within the meaning of section 2(22)(e) of the Act. Accordingly grounds raised by the assessee are allowed and order of the Id.CIT u/s 263 of the Act is quashed."

8. As a matter of fact, IT(SS)A.No.57&58/Kol/2011 dated 17.10.2014 referred to in the order dated 22.11.2011 in ITA 301/Kol/2012 is assessee's own case where such a finding that the transactions of assessee with Ganesh Wheat Products (P) Ltd, where the assessee alone does not stand to benefit from such loan transaction, but the company also derives benefit there from, as such transactions assumes the character of a commercial transaction and will not qualify to be dividend to come within the purview of Section 2(22)(e) of the Act.

9. Respectfully following the above decisions of the coordinate Benches of this Tribunal, inasmuch as the proceedings under section 263 of the Act, giving raise to the addition of Rs. 27,68,646/- we hold that the transactions of the assessee with Ganesh Wheat Products (P) Ltd cannot be treated to be dividend to come within the purview of Section 2(22)(e) of the Act, and any additions made on that premise will not survive. We accordingly reach a conclusion that the additions made by the AO and confirmed by the learned CIT cannot be sustained. We answer the issue accordingly.

10. In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on August 26, 2016.

Sd/-

Sd/-

(Waseem Ahmed)
Accountant Member

(K. Narasimha Chary)
Judicial Member

Kolkata, the 26th day of August, 2016

Copies to : (1) ***Mr. Manish Mimani,***
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(2) ***Joint Commissioner of Income Tax,***
Central Circle-V, Kolkata,

(3) ***CIT(Appeals), Central-1, Kolkata***

(4) ***Commissioner of Income Tax, Kolkata;***

(5) ***The Departmental Representative***

(6) ***Guard File***

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.