

आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL 'B' (SMC) BENCH : CHENNAI

श्री अब्राहम पी. जॉर्ज, लेखा सदस्य के समक्ष।

[BEFORE SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER]

आयकर अपील सं./I.T.A. No.874/Mds/2017

निर्धारण वर्ष /Assessment year : 2008-2009.

The Deputy Commissioner of Income Tax,
Corporate Circle 2(1)
Chennai 600 034.

Vs. M/s. Grandeur Wear Private
Limited,
No.3, Perumal Koil Street,
Nerkuntram,
Chennai 600 107.

[PAN AACCG 6731H]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by : Shri. Sahadevan, IRS, JCIT.

प्रत्यर्थी की ओर से /Respondent by : None

सुनवाई की तारीख/Date of Hearing : 28-06-2017

घोषणा की तारीख /Date of Pronouncement : 30-06-2017

आदेश / ORDER

In this appeal filed by the Revenue, it is aggrieved that Id. Commissioner of Income Tax (Appeals) deleted an addition made by the Id. Assessing Officer under section 2(22)(e) of the Income Tax Act, 1961 (in short "the Act").

2. Facts apropos are that assessee a garment exporter had filed its return for the impugned assessment year declaring income of ₹74,21,710/-. During the course of assessment proceedings, it was noted that assessee had received advances aggregating to ₹1,19,30,943/- from one of its sister concern called "M/s. United Electrotex Private Limited" (in short "the UTAL") Shareholding in assessee company and UTAL were as under:-

S. No.	Name of the Shareholder	M/s. Grandeur Wear Pvt. Holding		M/s. United Electrotex Pvt Limited.	
		(Rs)	(% of age holding)	(Rs)	(% of age holding)
1	Mr B.S. Peter	10,00,000	24%		28%
2	Mr. M.S.N. Peter	5,00,000	12%		---
3	Mrs. Catherine D. Sheela	14,50,000	35%		72%
4	Mrs. K. Akilandam	2,50,000	6%		---
5	Mrs. Lakshmi Prasad.	10,00,000	24%		---

As per the Id. Assessing Officer, M/s. UTAL had accumulated profit of ₹1,94,16,756/-. Hence, in his opinion the sum of ₹1,19,30,943/- received by the assessee from it was deemed dividend under section 2(22)(e) of the Act. When put on notice, reply of the assessee was as under:-

"United Electortex Pvt Ltd and the assessee company are engaged in the same business of Garments manufacturing and Exports. UTAL is established in 1991 and operating in Bangalore. The production capacity of UTAL has reached to its maximum level. For further expansion of Production Capacity to meet out the increased Foreign customers' seasonal orders, instead of increasing the production capacity, it is alternatively decided to start anew company, the assessee company, in Chennai with the main reason to enjoy the comparatively low 'cost of production in the areas of Wages & Salary and other aspects prevailing in Chennai. Instead of opening a Branch the assessee company is formed as a separate Group company during the year 2006 for better administration with some more Directors.

The assessment year 2008-09 is the first year operation since from the company is formed. it could not avail the necessary bank loan. The proposed investments from shareholders are also delayed To meet out financial crises it has availed funding assistance from UTAL. UTA provides advance only after availing fresh bank loans for which its financial statements and past performance is useful to easily avail the Bank Loan with a view to utilise the production facilities of the assessee company during the time of executing peak seasonal orders.

Trade Advance

Since the Export business of garments is purely seasonal and Significant portion of the orders are received only in the month of November and December, it is very difficult to execute bulk orders within a short schedule of time. Hence, UTAL made arrangements with the assessee company to utilise its production facilities to meet out the seasonal orders end made advances for the above said purpose only. Hence. the advance payment is made only to give effect to a commercial transaction between the companies and it is purely Trade Advance only~

Unfortunately during the assessment year; due to the worldwide economic slackness the expected orders could not be materialised and the job assignment could not be made by the UTAL to the assessee company, However; business transaction has been effected in the subsequent years. We are enclosing herewith the copy of the invoices made during the subsequent years by the assessee company to UTAL for your kind reference.

Even after availing the funding assistance from UTAL, Director himself has given additional Loan. Hence, there are no other

motive of getting indirect fund transfer benefit from the company as contemplated by the section 2(22)(e) of the Income Tax Act. It is only availed for survival of the assessee company from the financial crisis in anticipation of making business transaction with the UTAL in future.

The Id. Assessing Officer examined the ledger account of M/s. UEPL in the books of the assessee and held that the amounts given by it were neither trade advance nor share application money. Further, according to him, nothing was produced by the assessee to show that there was any trading between the two entities, even in the subsequent year. Thus, according to him what was received by the assessee was only temporary loans, squarely coming within the purview of Section 2(22) (e) of the Act. Relying on the judgment of Hon'ble Jurisdictional High Court in the case of *K.M.S. Lakshmana Aiyar vs. Addl. ITO (1960) 40 ITR 469*, that of Hon'ble Calcutta High Court in the case of *Tarulata Shyam and others vs. CIT (1971) 82 ITR 485*, and that of Hon'ble Bombay High Court in the case of *Sadhana Textiles Mills Pvt Ltd vs. CIT 188 ITR 318*, he held that Section 2(22) (e) of the Act took within its fold not only an individual but also a corporate entity. He made an addition of ₹1,19,30,943/-.

3. Aggrieved, assessee moved in appeal before the Id. Commissioner of Income Tax (Appeals). Grounds taken by the

assessee before the Id. Commissioner of Income Tax (Appeals) were as under:-

"1. The learned assessing officer is not correct in law and facts of the case to determine the sum of Rs.1,19,30,943/- u/s 2(22)(e) of the Income Tax Act as deemed dividend Income at the hands of the appellant for the Assessment year 2008-09.

2. The learned Officer failed to appreciate the fact from the copies of Account that the sum of Rs.39,37,516/- was paid in the Assessment year 2007-08 and Rs.79,93,427/- was paid in the Assessment year 2008-09 by United Electrotex Pvt. Limited and the amount related to the respective year shall alone be considered as income without prejudice to the appellant's claim that the amount paid by United Electrotex Pvt. Limited cannot be treated as income u/s 2 (22)(e).

3. The Appellant further submits that M/ s. United Electrotex Pvt. Limited while advancing monies from time to time the appellant's company, the Board of Directors of M/ s United Electrotex Pvt. Ltd., had laid down conditions that they reserved their right to convert their monies paid to the appellant company at the appropriate time within period of five years into shares of the Appellant company and utilize the funds for executing the orders placed by UEPL and therefore the monies paid by the UEPL cannot be treated as deemed dividend at the hands of the appellant company u/s2(22)(e).

4. The Appellant venture to submit that the persons 'who are holding 42% of shares in the appellant company are not share holders of the M/ s United Electrotex (P) Ltd and have no right of claim to participate in the surplus held by the United Electrotex (P) Ltd and therefore the entire amounts of Rs.1,19,30,943/- as deemed income u/s2(22)(e) at the hands of the appellant company is not legally and factually correct.

5. The Appellant venture to submits that it had

furnished the audited Balance Sheet of M/ s United Electrotex Pvt. Ltd., and the said company had shown the same under the head. Current Assets and Loans & advances) in view of the fact that the monies paid by them were liable for conversion into shares of the appellant company and accordingly the said company had clubbed it as staff and "other advances".

6. The Appellant respectfully submits that it had inadvertently had shown the same as unsecured Loan instead of treating as Current Liabilities more particularly as "Other Liabilities" for the fact that the monies paid by the UEPL were entitled to be utilized for conversion of shares of the appellant company and as well as trade for the' limited period up to date of conversion into shares at their option.

7. The Appellant further submits that the learned officer citing various case laws for treating the amounts paid by M/ s United Electrotex (P) Lid, to the appellants company as deemed income without considering the conditions as stipulated by them and accordingly it cannot be treated or termed as Loan or Advance instead of share application money and in any event the same cannot be treated as deemed dividend income u./ s2(22)(e) at the hands of the appellant.

8. The Appellant further submits that the learned officer had not properly appreciated for the reasons which were beyond the control of the appellant in executing the job work and for supply of goods .to M/ s UEPL and had actually commenced execution in the subsequent years. particularly in view of the fact that M/ s UEPL had the right to convert' the amount into shares of the appellant company at appropriate time suited to them for the monies paid by them and the appellant company had to protect the interest of other share holders who are holding 42% in the appellant company and had no stake in M/ s. UEPL.

9. The Appellant therefore prays for these reasons and those to be adduced at the time of hearing the determination of deemed income u/ s 2(22)(e) as made by the learned assessing Officer be deleted/ modified in accordance with law and from the facts of the case".

Ld. Commissioner of Income Tax (Appeals) relying on the judgment of Hon'ble Jurisdictional High Court in the case of *CIT vs. Printwave Services P. Ltd (2015) 373 ITR 665* held that assessee not being a registered or beneficial shareholder in UTPL, the sum received could not be treated as deemed dividend under section 2(22) (e) of the Act. On other aspects of the addition, raised by the assessee through its grounds, Id. Commissioner of Income Tax (Appeals) did not give any finding.

4. Now before me, Id. Departmental Representative relying on a judgment of Hon'ble Apex Court in the case of *Gopal and Sons (HUF) vs. CIT (Civil Appeal No.12274 of 2016, dated 04.01.2017)* submitted that by virtue of Explanation 3 to Sec. 2(22) (e), where there was more than 20% share holding by common shareholders in the recipient and paying companies, then Sec. 2(22) (e) can be applied on the recipient company if other conditions were satisfied. According to him, Id. Assessing Officer had given a clear finding that the amounts received by the assessee were not trade advances. Thus, as per Id. Departmental Representative the Id. Commissioner of Income Tax (Appeals) fell in error when he deleted the addition.

5. Nobody appeared for the assessee despite notice for hearing fixed on 28.06.2017 being acknowledged, when the appeal was taken up.

6. I have carefully gone through the orders of the lower authorities and heard the Id. Departmental Representative. Id. Commissioner of Income Tax (Appeals) had deleted the addition made by the Id. Assessing Officer under section 2(22) (e) of the Act for the sole reason that assessee was not a registered shareholder of M/s. UTPL. Reliance was placed by the Id. Commissioner of Income Tax (Appeals) on the judgment of Hon'ble Jurisdictional High Court in the case of *Printwave Services P. Ltd (supra)*. However, after this judgment of Hon'ble Jurisdictional High Court, Hon'ble Apex Court in the case of *Gopal and Sons (HUF) (supra)* had considered the issue of deemed dividend in the hands of an HUF, where HUF was not a share holder of the creditor company, but only its Karta was the shareholder. What Hon'ble Apex Court held at 13 to 17 of its judgment is reproduced hereunder:-

'13) A reading of clause (e) of Section 2(22) of the Act makes it clear that three types of payments can be brought to tax as dividends in the hands of the share holders. These are as follows:

(a) any payment of any sum (whether as representing a part of the assets of the

company or otherwise) by way of advance or loan to a shareholder.

(b) any payment on behalf of a shareholder, and

(c) any payment for the individual benefit of a shareholder. [See: Alagusundaran Vs. CIT; 252 ITR 893 (SC)]

14) Certain conditions need to be fulfilled in order to attract tax under this clause. It is not necessary to stipulate other conditions. For our purposes, following conditions need to be fulfilled:

(a) Payment is to be made by way of advance or loan to any concern in which such shareholder is a member or a partner.

(b) In the said concern, such shareholder has a substantial interest.

(c) Such advance or loan should have been made after the 31st day of May, 1987.

15) Explanation 3(a) defines "concern" to mean HUF or a firm or an association of persons or a body of individuals or a company. As per Explanation 3(b), a person shall be deemed to have a substantial interest in a HUF if he is, at any time during the previous year, beneficially entitled to not less than 20% of the income of such HUF.

16) In the instant case, the payment in question is made to the assessee which is a HUF. Shares are held by Shri. Gopal Kumar Sanei, who is Karta of this HUF. The said Karta is, undoubtedly, the member of HUF. He also has substantial interest in the assessee/HUF, being its Karta. It was not disputed that he was entitled to not less than 20% of the income of HUF. In view of the aforesaid position, provisions of Section 2(22)(e) of the Act get attracted and it is not even necessary to determine as to whether HUF can, in law, be beneficial shareholder or registered shareholder in a Company.

17) It is also found as a fact, from the audited annual return of the Company filed with ROC that the money towards share holding in the Company was given by the assessee/HUF. Though, the share certificates were issued in the name of the Karta, Shri Gopal Kumar Sanei, but in

the annual returns, it is the HUF which was shown as registered and beneficial shareholder. In any case, it cannot be doubted that it is the beneficial shareholder. Even if we presume that it is not a registered shareholder, as per the provisions of Section 2(22)(e) of the Act, once the payment is received by the HUF and shareholder (Mr. Sanei, karta, in this case) is a member of the said HUF and he has substantial interest in the HUF, the payment made to the HUF shall constitute deemed dividend within the meaning of clause (e) of Section 2(22) of the Act. This is the effect of Explanation 3 to the said Section, as noticed above. Therefore, it is no gainsaying that since HUF itself is not the registered shareholder, the provisions of deemed dividend are not attracted. For this reason, judgment in C.P. Sarathy Mudaliar, relied upon by the learned counsel for the appellant, will have no application. That was a judgment rendered in the context of Section 2(6-A)(e) of the Income Tax Act, 1922 wherein there was no provision like Explanation 3”.

Their lordship has observed at para 17 of the judgment that even if recipient was not a registered shareholder, but a member of the recipient was having substantial interest, Section 2(22) (e) of the Act was attracted. Considering the judgment of Hon'ble Apex Court reproduced above and also the fact that other grounds raised by the assessee before the Id. CIT(A) was not adjudicated by him. I am of the opinion that the issue requires a revisit by the Id. CIT(A). I therefore, set aside the order of Id. Commissioner of Income Tax (Appeals) and remit the matter back to him for consideration afresh in accordance with law. Needless to say, assessee shall be given adequate opportunity to explain its stance.

7. In the result, appeal filed by the Revenue is allowed for statistical purposes.

Order pronounced on Friday, the 30th day of June , 2017, at Chennai.

Sd/-
(अब्राहम पी. जॉर्ज)
(ABRAHAM P. GEORGE)
लेखा सदस्य/ACCOUNTANT MEMBER

चेन्नई/Chennai

दिनांक/Dated:30th June, 2017

KV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|--------------------------|------------------------------|-------------------------|
| 1. अपीलार्थी/Appellant | 3. आयकर आयुक्त (अपील)/CIT(A) | 5. विभागीय प्रतिनिधि/DR |
| 2. प्रत्यर्थी/Respondent | 4. आयकर आयुक्त/CIT | 6. गार्ड फाईल/GF |