

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD “D” BENCH AHMEDABAD

BEFORE, SHRI PRAMOD KUMAR, ACCOUNTANT MEMBER
AND SHRI S. S. GODARA, JUDICIAL MEMBER

ITA No. 3478/Ahd/2014
(Assessment Year: 2005-06)

DCIT, Circle – 1(1)(1),
'A' Wing, Room No.309, 3rd Floor,
Pratyaksha Kar Bhavan, Ambawadi,
Ahmedabad - 380015

Appellant

Vs.

M/s. Biotech Ophthalmics Pvt. Ltd.,
Sarhik-II, Opp. Rajpath Club,
S.G. Highway, Ahmedabad – 380 051

Respondent

PAN: AAACB0328F

राजस्व की ओर से/By Revenue : Shri V. K. Singh, Sr. D.R

आवेदक की ओर से/By Assessee : None

सुनवाई की तारीख/Date of Hearing : 20.12.2017

घोषणा की तारीख/Date of
Pronouncement : 29.12.2017

ORDER

PER S. S. GODARA, JUDICIAL MEMBER

This Revenue's appeal for assessment year 2005-06 arises against the CIT(A)-III, Ahmedabad's order dated 16.10.2014 in case no. CIT(A)-III/375/DCIT.Cir.1/13-14, reversing Assessing Officer's action making Section 2(22)(e) deemed dividend addition of Rs.41,25,289/-, in proceedings u/s.143(3) r.w.s. 147 of the Income Tax Act, 1961; in short "the Act".

2. We advert to the relevant facts. The assessee company manufactures and trades in ophthalmic solutions. The Assessing Officer noticed it to have availed loans of Rs.41,25,289/- including interest amount of Rs.6,77,439/- from M/s. Biotech Vision Care Pvt. Ltd. in the relevant previous year. He further found one Shri Mehul P. S. Asnani holding 90% of its stake and 95% in the latter entity having accumulated profits of Rs.7,00,40,586/- as on 31.03.2005 including current year's profits of Rs.3,18,36,440/-. The Assessing Officer therefore invoked deeming fiction u/s.2(22)(e) of the Act the amount in question of Rs.41,25,289/- in the impugned re-assessment framed on 25.10.2011.

3. The CIT(A) deletes the impugned addition as under:

"9. Grounds No. 3 to 5 relate to assessment of impugned deemed dividend of Rs.41,25,289/- u/s. 2(22)(e) of the I.T. Act in the hands of the appellant.

9.1 I have considered the facts of the case, assessment order, appellant's submission and the CIT(A)'s order on the same issue in the case of appellant in A.Y. 2006-07 and in the case of Menul P. Asnani in A.Y 2005-06.

9.2 This issue of deemed dividend has already been decided in the above mentioned cases by the CIT(A)-VI Ahmedabad. In case of Mehul P. Asnani in AY 2005-06 it was held as under-

"from the above it is clear that the loan transaction between Biotech vision care Ltd and Biotech ophthalmic Ltd was held to be deemed dividend within the meaning of section 2(22) (e) of the IJ Act. In view of the reason mentioned therein the loan transaction is to be treated as deemed dividend but the addition has to be made in the hands of shareholder as per the provision of Bombay special bench and Bombay High Court. Accordingly the addition of deemed dividend is to be made in the hands of the appellant who held more than 90% share of lending company. Assessing officer discuss the judicial decision relied upon by the appellant and distinguish the same on facts, I agree with the assessing officer or this considering the facts of the case and relevant judicial decision including Bombay ITAT and high courts, the transaction of loan are treated as deemed dividend."

9.3 In the AY 2006-07, the CIT(A)-VI deleted the addition of deemed dividend in the hands of the appellant company after observing as under-

"The undisputed facts are that appellant took loan from Biotech vision care private Ltd. Shri Mehul P Asnani was having 90% shareholding in the lending concern and 40% shareholding the appellant company therefore the shareholder Shri Mehul P Asnani was having substantial interest in both the companies and accordingly the loan advanced by Biotech vision care to the appellant company is taxable as deemed dividend under section 2(22) (e) of the I.T Act. The appellant said that it was business advance for commercial consideration but the said advance cannot be treated as given in normal course

of business since the lender company is not in money lending business, in view there of the provisions of section 2(22) is clearly applicable and loan amount has to be treated as deemed dividend. Considering the facts of the case, the transaction of loan is treated as deemed dividend.

Appellant is not a shareholder in the lender company however assessing officer treated the same as deemed dividend in hands of appellant company. Appellant's main objection was that in view of the various decisions including special bench of ITAT Mumbai and Bombay High Court referred in appellant's submission, the addition of deemed dividend can be made only in the hands of shareholder. If the recipient of the loan is not a shareholder and transaction is covered by this provision, the addition is to be made in hands of shareholder. Considering the decision of ITAT special bench and Bombay High Court, I agree with the appellant's contention that addition for deemed dividend has to be made in hands of shareholder only. Accordingly, assessing officer is directed to delete the addition in respect of deemed dividend in the hands of appellant and make the said addition in hands of shareholder Shri Mehul P Asnan in view of the decisions of Hon'ble ITAT Special Bench and Hon'ble High Court of Bombay."

9.4 *The facts in the appeal under consideration are exactly same as discussed above therefore respectfully following the decision in the case of appellant in A.Y. 2006-07 and in the case of Shri Mehul P Asnani in A.Y 2005-06, the AO is directed to delete the addition in respect of deemed dividend in the hands of appellant in A.Y. 2005-06.*

4. We have heard rival contentions. The Revenue vehemently contends that the CIT(A) has erred in law as well as on facts deleting the above deemed dividend addition in question. It is evident that the CIT(A) has followed his order in assessee's case itself for the succeeding ay qua the very entity. The Revenue is fair enough in not drawing any factual or legal distinction so far as the relevant issue in both these assessment years are concerned. We notice in this backdrop that the very issue stands adjudicated in assessee's case itself against the Revenue in its appeal ITA No.443/Ahd/2011 for succeeding assessment year 2006-07 decided on 31.08.2015 as follows:

"6. We find that there is no controversy or dispute about the fundamental legal position that unless the assessee is a shareholder in the company from which the amounts are received, such amounts cannot be taxed in his hands as deemed dividend under section 2(22)(e) of the Act. In the case of CIT Vs Daisy Packers Pvt Ltd (judgment dated 18th July 2012 in Tax Appeal No. 212 of 2010), Hon'ble jurisdictional High Court has, inter alia, noted that it is not necessary to go into other legal issues once it is an undisputed position that the assessee was not shareholder in Amigo Brushes Pvt Ltd, and that "if the assessee company does not hold a share in other company from which it had received deposit, it cannot be treated to be a deemed dividend under section 2(22)(e) of the Act". The same was the position in the case of ACIT vs Bhaumik Colours Pvt Ltd [(2009) 118 ITD 1 SB (Mum)] wherein a special bench of this Tribunal concluded that, "Deemed dividend can be assessed only in the hands of a person who is a shareholder of the lender company and not in the hands of a person other than a shareholder" and

that "The expression 'shareholder' referred to in s. 2(22)(e) refers to both a registered shareholder and beneficial shareholder. If a person is a registered shareholder but not the beneficial shareholder then the provisions of s. 2(22)(e) will not apply. Similarly, if a person is a beneficial shareholder but not a registered shareholder then also the provisions of s. 2(22)(e) will not apply".

7. *It is thus clear that being a registered shareholder is a condition precedent for invoking Section 2(22)(e) of the Act, and that condition is admittedly not satisfied. For this short reason alone, the impugned additions should have been deleted by the CIT(A). We approve the conclusions arrived at by the CIT(A) in this respect and decline to interfere in the matter so far as the relief given by the CIT(A) is concerned.*

8. *In the result, the appeal is dismissed."*

We accordingly adopt judicial consistency herein as well to affirm CIT(A)'s findings deleting the impugned deemed dividend addition in question. The Revenue's sole substantive ground is therefore rejected.

5. This Revenue's appeal is dismissed.

[Pronounced in the open Court on this the 29th day of December, 2017.]

Sd/-
(PRAMOD KUMAR)
ACCOUNTANT MEMBER
Ahmedabad: Dated 29/12/2017

Sd/-
(S. S. GODARA)
JUDICIAL MEMBER

True Copy

S.K.SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।