

**IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH 'A', CHANDIGARH**

BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA No.194/Chd/2017
Assessment Year: 2010-11

The ITO
Ward-5(4)
Chandigarh

Vs.

J.N. Goyal Hospital Pvt. Ltd.
Flat No. 1265, Sector 50-C
Chandigarh

PAN No. AACCCJ1834A

(Appellant)

(Respondent)

Assessee By : Shri. Sudhanshu Bansal
Revenue By : Shri. Saurav Dubey
Smt. Chandrakanta

Date of hearing : 14/03/2018

Date of Pronouncement : 22/05/2018

ORDER

PER DR. B.R.R. KUMAR:

The present appeal has been filed by the Revenue against the order of the Ld. CIT(A)-2, Chandigarh dt. 07/11/2016.

2. In the appeal Revenue has raised the following grounds:

i) *On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in partly allowing appeal of the assessee without appreciating the facts of the case.*

ii) *On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 84,29,936/- made u/s 2(22)(e) of the Act ignoring the fact that provisions of Section 2(22)(e) were squarely applicable to the case.*

iii) *On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in observing that the appellant company i.e. M/s J.N. Hospital Pvt. Ltd. is not the share holder of the lender company i.e. M/s Deepak Gasses Pvt. Ltd. and vice-versa, whereas the share holders of M/s Deepak Gas Pvt. Ltd. have substantial interest in the recipient company i.e. M/s J.N. Hospital Pvt. Ltd and therefore provisions of section 2(22)(e) are squarely applicable in this case.*

iv) *On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in allowing the appeal of the assessee and placing reliance upon the order of Hon Tale High Court of Punjab and Haryana in the case of CIT Ludhaina Vs. Sharman Woolen Mills Ltd. (2012) and ignoring the fact*

that while passing the order u/s 143(3), reliance was placed on the judgement of Hon'ble Supreme Court in the case of CIT Vs. M.K. Shah 290 ITR 433 which is squarely applicable to the facts of the case of the assessee.

3. The effective ground is ground no. 2 pertaining to addition under section 2(22)(e) of the Income Tax Act, 1961.

4. Brief facts of the case and the rationale given by the Ld. CIT(A) can be gauged from the order of the Ld. CIT(A) below:

5.1 Brief fact on the issue are that the appellant company received loans from M/s Deepak Gases Pvt. Ltd. and the outstanding balance as on 31.03.2012 was Rs. 84,29,636/-. AO further noted that Mr. Jai Narayan and Mrs. Hema Goyal are the common Directors in M/s Deepak Gases Pvt. Ltd. and the appellant company and are substantial share holders. M/s Deepak Gases Pvt. Ltd. has accumulated reserve and surplus. Assessing officer held that M/s Deepak Gases Pvt. Ltd. is a sister concern of the appellant company and all the conditions u/s 2(22)(e) are satisfied and therefore the amount of loans and share application money amounting to Rs. 84,26,636/- was treated as deemed dividend in the hands of the appellant.

5.2 Appellant made submission that M/s Deepak Gases Pvt. Ltd. and M/s JN Goyal Hospital Pvt. Ltd. i.e. appellant company does not have any share holding in each other and therefore the provisions of Sec. 2(22)(e) are not applicable. Sh. Jai Narayan and Mrs. Hema Goyal are common directors in these companies. The appellant has placed reliance on various judgments including the judgment of Hon'ble P&H Court in M/s Sharman Woolen Mills Ltd. (supra).

5.3 The submission of the appellant and the relevant material on record have been considered. Similar issue has been considered and decided by Hon'ble ITAT, Chandigarh Bench vide order dated 18.01.2016 in the case of M/s Olympus Personnel Allied Services Pvt. Ltd. in ITA No. ITA/57/Chd/2015. The facts and circumstances in the case of the appellant assessee are similar to the case decided by Hon'ble ITAT. The relevant part of the judgment is reproduced as under:

"we have heard the Ld. representatives of both the parties at length and have also perused the materials available on record. Sh. Tej Mohan Singh Ld. Counsel for the assessee submitted that assessee is a private limited company engaged in manpower supply. The company supplied skilled and unskilled workers. Sh. Tej Mohan Singh, Ld. Counsel for the assessee submitted that AO asked the assessee to explain as to why the amount of Rs. 68,35,028/- being the amount of reserves and surpluses should not be treated as deemed dividend u/s 2(22)(e) of the Act, on account of loans having been received from another company namely M/s Competent Personnel and Allied Services (P) Ltd. in which the same directors were there. The maximum advance during the year was to the tune of Rs. 2,29,52,487/- Sh. Tej Mohan Singh, Ld. Counsel for the assessee vehemently argued that the provisions of section 2(22)(e) are not applicable to the facts of the present case. According to him, the company from whom the loans have been received is not a registered share holders of the assessee company. The provisions of section 2(22)(e) are only applicable where loan is taken by the shares holders and not by the company. In support of the above contention, Sh. Tej Mohan Singh, Ld. Counsel for the assessee relied on the following decisions:-

1. CIT v Sharman Woolen Mills Ltd [2012] 204 Taxman 82(P&H)
2. CIT v Navyug Promoters (P) Ltd 203ITR 618 (Delhi)

3. ACIT v M/s Color Crafts Pvt. Ltd. Ludhiana in ITA No. 1248/Chd/2011 of ITAT Chandigarh.
4. ACIT v M/s India Casting Company in ITA No. 55/Agr/2012 of ITAT, Agra.

In our considered view, the decisions relied on by Sh. Tej Mohan Singh, Ld. Counsel for the assessee are squarely applicable to the facts of the present case. In the case of CIT v Sharman Woolen Mills Ltd (supra), the Jurisdictional High Court held that in terms of section 2(22)(e) of the Act the dividend income is assessable only in the hands of share holder of the lending company. The Hon'ble High Court also observed that M/s Sharman Woods Ltd. was not a share holder of M/s Ankur Agro Pvt. Ltd who has advanced unsecured loans to M/s Sharman Woolen Mills Ltd, a separate registered company under the Companies Act, 1956. The AO made an addition of Rs. 99,10,000/- in the income of Sharman Woolen Mills Ltd as a dividend u/s 2(22)(e) of the Act. The Jurisdictional High Court has categorically held that in terms of section 2(22)(e) of the Act, the dividend income is assessable in the hand of share holders of the lending company. Since M/s Sharman Woolen Mills Ltd was not share holder of M/s Ankur Agro Pvt. Ltd. and therefore, the said amount was not assessable in the hands of the Sharman Woolen Mills Ltd in terms of section 2(22)(e) of the Act. In the instant case also, M/s Olympus Personnel Allied Services (P) Ltd. (assessee) had received loans/advances from M/s Competent Personnel and Allied Services (P) Ltd and the assessee is not a share holder of the said company. The provisions of section 2(22)(e) are not applicable where the loans are taken by the share holder and not by the company, who is not a share holder.

In the case of Navyug Promoters (P) Ltd. (supra) the Hon'ble Delhi High Court has categorically held that an assessee who is not a share holder of the company, from which he received a loan or an advance, cannot be treated as being covered by definition of word 'dividend as provided in section 2(22)(e) of the Act, The relevant observations of the Hon'ble High Court are as under:-

"4. The revenue is in appeal raising the questions extracted above. The controversy is now concluded by the judgment of a division bench of this court in the case of CIT v Ankitech Pvt. Ltd (ITA No. 462/2009) and connected appeals on 11th May 2011. A copy of the judgment has been filed before us. We have carefully gone through the same. After an elaborate discussion of the issue, and the case-law on the subject, the Divisions Bench has held that an assessee who is not a shareholder of the company, from which he received a loan or an advance cannot be treated as being covered by the definition of the word "dividend" as provided in section 2(22)(e) of the Act. It has been held:-

"24. The intention behind enacting provisions of section 2(22)(e) is that closely held companies (i.e companies in which public are not substantially interested), which are controlled by a group of members, even though the company has accumulated profits would not distribute such profit as dividend because if so distributed the dividend income would become taxable in the hands of the shareholders. Instead of distributing accumulated profits as dividend, companies distribute them as loan or advances to shareholders or to concern in which such shareholders have substantial interest or make any payment on IT A 497/2011 Page 4 of 5 behalf of or for the individual benefit of such shareholders. In such an event, by the deeming provisions, such payment by the company is treated as dividend. The intention behind the provisions of Section 2(22)(e) of the Act is to tax dividend in the hands of shareholders. The deeming provisions as it applies to the case of loans or advances by a company to a concern in which its shareholders has substantial interest, is based on the presumption that the loans or advances would ultimately be made available to the shareholders of the company giving the loan or advance.

25. Further, it is an admitted case that under normal circumstances, such a loan advance given to the shareholders or to a concern, would not qualify as dividend. It has been made so by legal fiction created u/s 2(22)(e) of the Act. We

have to keep in mind that this legal provisions relates to "dividend". Thus, by a deeming provision, it is the definition of dividend which is enlarged. Legal fiction does not extend to "shareholder". When we keep in mind this aspect, the conclusion would be obvious, viz., loan or advance given under the conditions specified u/s 2(22)(e) of the Act would also be treated as dividend. The fiction has to stop here and is not be extended further for broadening the concept of shareholders by way of legal fiction. It is a common case that any company is supposed to distribute the profits in the form of dividend to its shareholders/ members and such dividend cannot be given to non-members. The second category specified u/s 2(22)(e) of the Act, viz., a concern (like the assessee herein), which is given the loan or advance is admittedly not a shareholder/member of the payer company. Therefore, under no circumstance, it could be treated as shareholder/member receiving dividend. If the intention of the Legislature was to tax such loan or advance as deemed dividend at the hands of "deeming shareholder", then the Legislature would have inserted deeming provisions in respect of shareholder as well, ITA 497/2011 Page 5 of 5 that has not happened. Most if the arguments of the Ld. Counsels for the Revenue would stand answered, once we look into the matter from this perspective."

5. In the present case, it is an admitted fact that the assessee company is not a shareholder holding the required percentage of shares in any of the two companies. Therefore, the judgment of this court in *Ankitech Pvt. Ltd*(supra) fully applies to the present case. We accordingly hold, following the said judgment that no substantial question of law arises from the order of the Tribunal.

7. In the case of *CIT Vs. Universal Medicare Private Ltd.* 324 ITR 263 (Bom.), the Hon'ble Bombay High Court has held that deemed dividend is assessable in the hands of the share holders. Admittedly, in this case the assessee company is not a share holder of *M/s Competent Personnel and Allied Services (P) Ltd* and the amount in question cannot be added in the hands of the assessee company.

8. Keeping in view the decisions of the Hon'ble Jurisdictional High Court in the of *Sharman Woolen Mills Ltd* (supra) and also those of Hon'ble Delhi High Court and Bombay High Court, referred to above, we hold that there was no justification in making the addition under the provisions of section 2(22)(e) of the Act. Accordingly, we delete the addition of Rs. 68,35,028/- made on account of deemed dividend."

5. Before us the Ld. DR argued that a plain and straight reading of the Act makes the monies received are taxable in the hands of the recipient. The Ld. AR supported the order of the Ld. CIT(A).

6. We have gone through the facts of the case.

7. Since decision of the Ld. CIT(A) is rightly based on the judgments in the case of of *M/s Olympus Personnel Allied Services Pvt. Ltd.* in ITA No. ITA/57/Chd/2015 dt. 18.01.2016, *CIT v Ankitech Pvt. Ltd* (ITA No. 462/2009), *CIT Vs. Universal Medicare Private Ltd.* 324 ITR 263 (Bom.), *CIT v Sharman Woolen Mills Ltd* [2012] 204 Taxman 82(P&H) wherein it was held that the deemed dividend is assessable in the hands of the share holder only and keeping in view the fact that the assessee company is not the shareholder of the lender company i.e *M/s Deepak Gases Pvt. Ltd.* and vice versa. Therefore section 2(22)(e) is not

applicable in the case of the assessee and hence the addition made on account of deemed dividend under section 2(22)(e) is liable to be deleted.

8. As a result, appeal of the Revenue is dismissed.

Order pronounced in the open Court.

Sd/-
(DIVA SINGH)
JUDICIAL MEMBER
Dated : 22/05/2018

Sd/-
(DR. B.R.R. KUMAR)
ACCOUNTANT MEMBER

AG

Copy to: 1.The Appellant, 2. The Respondent, 3. The CIT(A), 4. The CIT, 5. The DR