

आयकर अपीलिय अधीकरण, न्यायपीठ – “A” कोलकाता,  
**IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA**  
 (समक्ष) Before श्री ए. टी. वर्की, न्यायीक सदस्य एवं/and श्री एम. बालागणेश, लेखा सदस्य  
 [Before Shri A. T. Varkey, JM & Shri M. Balaganesh, AM]

**I.T.A. No. 3431/Mum/2013**  
**Assessment Year: 2009-10**

Income-tax Officer, Wd-7(2)(1), Mumbai	Vs.	M/s. Rainbow Investment Ltd. Mumbai. (PAN: AAACR3915Q)
Appellant		Respondent

&

**I.T.A. No. 3068/Mum/2013**  
**Assessment Year: 2009-10**

M/s. Rainbow Investment Ltd. Mumbai.	Vs.	Income-tax Officer, Wd-7(2)(1), Mumbai
Appellant		Respondent

Date of Hearing	12.07.2018
Date of Pronouncement	26.09.2018
For the Revenue	Shri Sallong Yaden, Addl. CIT, Sr. DR
For the Assessee	Shri D. S. Damle, FCA

**ORDER**

**Per Shri A.T.Varkey, JM**

These are cross appeals preferred by the revenue and assessee respectively against the order of the Ld. CIT(A)-13, Mumbai dated 22.02.2013 for AY 2009-10.

2. The issue involved in both the appeals relate to common question as to whether the income tax authority was justified in assessing the amount the assessee took as loan from M/s. Offshore India Ltd. could be treated as dividend income under the deeming provisions of sec. 2(22)(e) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”).

3. Brief facts of the case are that while scrutinizing the records of the assessee company, the AO noted that on 30.06.2008 the assessee company had received interest free loan of Rs.5,16,00,000/- from M/s. Offshore India Ltd. (hereinafter referred to as “M/s. OSIL”) a company in which public was not substantially interested. Since the assessee company held 32.75% of the issued equity capital of M/s. OSIL and according to AO, since both the conditions prescribed in sec. 2(22)(e) of the Act were apparently satisfied by M/s. Rainbow Investments Ltd. [i.e. the assessee herein], therefore, the AO invoked sec. 2(22)(e) of the Act and added Rs. 5.16 cr. as income of the assessee. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A), who did not agree with the contention of the assessee that it falls within the exception prescribed by clause (ii) of sec. 2(22)(e) of the Act. However, he gave partial relief to the assessee by restricting the quantum of the addition to the extent of free reserve and surplus with the lender company up to the date of lending at Rs.1,03,62,690/-. Aggrieved by the Ld. CIT(A)’s order giving partial relief both the assessee and the revenue are in appeal before us.

4. We note that in assessee’s appeal the assessee has challenged the very applicability of charging provision of sec. 2(22)(e) of the Act and if assessee’s objection for invocation of sec. 2(22)(e) of the Act is upheld by the Tribunal in the light of exemption as per clause (ii) of sec. 2(22) and holds that the loan received from M/s. OSIL did not come within the mischief of the statutory provision and thereby doesn’t constitute dividend u/s. 2(22)(e) of the Act, then the issue relating to quantification of dividend income as raised in the departmental appeal will become academic. Therefore, we are inclined to adjudicate the appeal of the assessee first in ITA No. 3068/Kol/2013.

5. We have heard rival submissions and gone through the facts and circumstances of the case. The sheet anchor on which the assessee has raised the appeal is that the loan received by the assessee from M/s. OSIL did not come within the mischief of deeming provisions of sec. 2(22)(e) of the Act because of the ‘*exception*’ provided by clause (ii) of sec. 2(22) of the Act. Therefore, let us examine the provision and is reproduced herein below for easy reference. Clause (ii) of sec. 2(22) provides as follows:

*“Dividend does not include any advance or loan made to a shareholder by a company in the ordinary course of its business where the lending of money is a substantial part of the business of the company.”*

So, a bare reading of the aforesaid exception provision means that if any advance or loan is made by the lender company to a shareholder (like assessee) in the ordinary course of its business, where the lending of money is a substantial part of the business of the lender company then, the advance or loan thus given by such company to its shareholder will not be treated as dividend. So, now we have to examine as to whether the business of lending carried out by the lender company (M/s. OSIL) can be said constitute its substantial business. For answering this question we require to see the facts relating to this issue. We note that the paid up capital of M/s. OSIL as on 31.03.2009 was Rs.32,13,90,080/-. The same was opening equity capital as on 01.04.2008. As per M/s. OSIL's Balance Sheet as at 31.03.2009, “Reserves” were Rs.37,92,23,313/-. The corresponding figure of the “Reserves” as on 31.03.2008 was Rs.35,24,91,854/-. The individual head wise break-up of the amount shown under the head “Reserves” was as follows:

		31.03.2009 Rs.	31.03.2008 Rs.
i)	Capital Reserve (on account of amalgamation)	34,62,14,529	34,62,14,529
ii)	Statutory Reserve (created in terms of Sec. 45IC of RBI Act)	66,10,000	12,60,000
iii)	Surplus of P/L A/c.	2,63,98,784	50,17,325
		37,13,90,313	35,24,91,854

6. From a perusal of the aforesaid chart it is evident that surplus in the P&L Account till 31.03.2009 was only Rs.2,63,98,784/-. As on 31.03.2009, the net owned funds (NOF) of M/s. OSIL by way of share capital and Reserves aggregated Rs.70,06,13,393/-. As on 31.03.2009, the amounts advanced by M/s. OSIL by way of loans and advances were Rs.53,29,41,480/-. In percentage terms the loans and advances granted to third parties constituted 76.05% of the NOF and exceeded more than 100% of the issued share capital of M/s. OSIL as on 31.03.2009. We note that since more than 50% of the investible funds of M/s. OSIL were deployed in granting loans and advances, Reserve Bank of India had granted registration to M/s. OSIL as a “Non Banking Financial Company”(NBFC). Copy of the NBFC Registration Certificate is found placed at page 36 of the paper book. We note that being a registered NBFC, granting of loans was an ordinary business of M/s. OSIL and

since 76% of NOF were utilized by M/s. OSIL for granting loans and advances it was the assessee's contention that granting of loans constituted "substantial" business of M/s. OSIL.

7. We note as per clause (ii) of sec. 2(22) of the Act the expression is "*substantial part of the business*" so, the word used is "substantial" in contra distinction with the word "principal" or "main business". The use of the word "substantial" connotes that granting of loans should not be "peripheral" or "insignificant part" of the business but it should be materially significant business where at least 20% of the investible funds are deployed. So, as per the facts noted above, we take note that share capital of the loan granting company was Rs. 32.14 crs. Whereas loans and advances granted were to the tune of Rs.53.29 cr. which far exceeded the share capital of M/s. OSIL. We note that the NOF of M/s. OSIL as on 31.03.2009 was at Rs.70.06 cr. and, therefore, funds utilized in granting of loans constituted to 76.05% of NOF. These facts and figures, therefore, goes on to show that granting of loans was in fact a "substantial part of business" of M/s. OSIL, the lender company.

8. We note from the perusal of the orders of the Ld. CIT(A) and the AO that they both rejected the assessee's plea for upholding applicability of clause (ii) of sec. 22 of the Act on the ground that the loans granted by M/s. OSIL did not carry any interest (i.e. M/s. OSIL gave loan to the assessee company Rs.5.16 cr. as interest free loan). Even though the Ld. CIT(A) in principle accepted the proposition that granting of loans was substantial part of M/s. OSIL business, yet he concluded that the loan in question was not granted in the ordinary course of the loan granting business by M/s. OSIL. Therefore, the Ld. CIT(A) held that granting of interest free loan was not in the "ordinary course" of M/s. OSIL's business.

9. Assailing the aforesaid view of the Ld. CIT(A)/AO that since M/s. OSIL gave interest free loan to assessee company M/s. OSIL's granting interest free loan was not ordinary course of M/s. OSIL's business is erroneous, the Ld. AR submitted that it is well settled that deeming provisions of law has to be strictly construed and no violation can be made with the provisions of the law. According to him, if the view of the Ld. CIT(A) and AO has to be accepted, then the exception given under clause (ii) of sec. 2(22) of the Act should be read as "any advance or loan made to a share holder by a company in the ordinary

course of its business where interest bearing lending of money is a substantial part of the business of the company” The Ld. AR emphasized on the fact that the aforesaid underlined portion i.e. ‘*interest bearing lending*’ is not found in the enacted law which is the exception clause (ii) of sec. 2(22) of the Act, so if the view of Ld. CIT(A)/AO has to be upheld then the words ‘interest bearing lending’ has to be inserted in the aforesaid manner which is not what the Parliament has enacted. We find considerable force in the contention of the Ld. AR that ‘Casus Omissus’ cannot be applied by judicial interpretations. ‘Casus Omissus’, a Latin word, means “the case omitted”. Casus Omissus can in no case be applied by a Court of Law, for that it would amount to making of the law by court as held by the Hon’ble Supreme Court in MoulabiHussain Haj Vs. State of Gujarat (2004) 6 SCC 672. The Hon’ble Supreme Court in D.R. Venkatchalam v Dy. Transport Commissioner (1977 (2) SCC 273) observed that courts must avoid the danger of a priori determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. The Hon’ble Apex Court has held that the Courts are not entitled to usurp legislative duty. The Hon’ble Supreme Court has held while interpreting a provision, the court only interprets law and cannot legislate. If the provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deem necessary. In Popular Trading Co. (2000) 5SCC 515 it was held that legislative ‘Casus Omissus’ cannot be applied by judicial interpretation. The rule is that the particular case, thus left un-provided for must be disposed of according to law as it existed in the statute. Useful reference may also be made to the decision of this Tribunal in the case of Coal India Ltd VsJt.CIT (88 ITD 514) where this Tribunal following the principles of ‘casus omissus’ as set out in the foregoing, held as follows:

*“10. We may mention that it is not for this Tribunal to supply the casus omissus, even if any, in the statute. A casus omissus, which broadly refers to a matter which has not been provided in the statute but should have been there to make the statute workable, cannot be supplied by us, as, to do so will be clearly beyond the call and scope of our duty which is only to interpret the law as it exists. Hon’ble Supreme Court, in the case of Smt. TarulataShyam v. CIT [1977] 108 ITR 345 at page 356 has observed :*

*"We have given anxious thought to the persuasive arguments.... (which) if accepted, will certainly soften the rigour of this extremely drastic provision and bring it more in conformity with logic and equity. But the language of sections...is clear and unambiguous. There is no scope for importing into the statute the words which are not there. Such interpretation would be, not to construe, but to amend the statute. Even if there be a casus omissus, the defect can be remedied only by legislation and not by judicial interpretation....To us, there appears no justification to depart from normal rule of construction according to which the intention of legislature is primarily to be gathered from the words used in the statute. It will be well to recall the words of Rowlatt J. in Cape Brandy Syndicate v. Inland Revenue Commissioners [1921] 1 KB 64 (KB) at page 71, that : '.....in a taxing Act one has to look at merely what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be, implied. One can only look fairly at the language used.' Once it is shown that the case of the assessee comes within the letter of law, he must be taxed, however great the hardship may appear to the judicial mind to be."*

10. Thus, we note that Sec. 2(22)(e) of the Act is a deeming provision of the Act and it is a settled legal proposition that any deeming provisions of the taxing statute must be strictly construed and, therefore, save and except the words and phrase expressly used or employed by the legislature, nothing more can be taken into account while interpreting the deeming provision. The court or judicial authority is not permitted to read into deeming provision any additional words or expression which have not been used or employed by legislature. Casus Omissus is not permitted. At the same time it has to be kept in mind that the judicial/quasi judicial authorities are also not permitted to ignore or overlook the expression or words expressly used. There is no scope for intendment while interpreting a deeming provision of a taxing provision particularly when the words employed are of precise meaning.

11. In order to attract the exception clause (ii) of Sec 2(22) of the Act all that loan granting company is required to prove is that granting of loans, constitutes substantial part of its business and the loan is granted in the ordinary course of such business. Save and except these 2 conditions it is not necessary of the loan granting company to further show that the loan granted carried interest as well. Charging of interest is not an additional

condition attached to granting of loans for the purpose of deciding the applicability of clause (ii) to Sec 2(22) of the Act. In the circumstances we are of the opinion that the lower authorities erred in bringing in an additional condition of charging interest for deciding applicability of clause (ii) of Sec 2(22) of the Act which is not permissible in law. All that the lower authorities ought to have examined was whether granting of loans constituted significant or substantial part of OSIL's business and whether such loan was granted in the course of its money lending business. Once the two conditions specifically mentioned in clause (ii) were fulfilled then it was wholly immaterial whether loan granted, carried any interest or not. Nowhere clause (ii) of Sec 2(22) of the Act mandated for the AO to verify whether granting of interest bearing loans constituted substantial part of assessee's business.

12. We note that the very question of applicability of clause (ii) of Sec 2(22) to an assessee who similarly received interest free loan from another NBFC was considered by the Co-Ordinate Bench of this Tribunal in ITA No.1815/Mum/2012 in the case of M/s. Blue Niles Holdings Ltd for AY the 2006-07. The relevant order is at pages 108-113 of the paper book. In the said case during previous year relevant to AY 2006-07 the assessee received interest free loan of Rs.17,50,000 /- from M/s. RPG Cellular Investments & Holdings Pvt. Ltd (RPG) which was assessed u/s 2(22)(e) of the Act. M/s. RPG was registered with RBI as an NBFC. Granting of loans was however not the "principal" or "main business" of RPG though it constituted significant part of its business. The addition u/s. 2(22)(e) was deleted by CIT(A) against which the Revenue had filed second appeal. In the said decision, the Tribunal found that the NOF of RPG was Rs. 170.91 crs out of which Rs.72.48 crs were invested in loans and advances which in percentage terms worked out to 42.40%. The Tribunal accordingly upheld Ld. CIT(A)'s order wherein he had held that granting of loans and advances formed substantial part of RPG's business. It was specifically brought to the attention of the Tribunal that only because interest was not charged by RPG on the loan granted to assessee, the AO had treated the loan of Rs.17.50 lacs as deemed dividend. On this fact the Tribunal in Para 6 of its appellate order held that merely because RPG did not charge interest could not change the colour or the transaction and thereby took it outside the purview of clause (ii) of Sec 2 (22)(e) of the Act. The Tribunal accordingly dismissed the appeal filed by the revenue.

13. We note that the facts of Blue Niles Holdings Ltd in ITA No.1815/Mum/2012 were parimateria with the appellant's case. In that case also the assessee received interest free loans from an NBFC whose principal business was not granting of loans but it was substantial part of the business. In that case also the interest free loan received from RPG was assessed as deemed dividend u/s 2(22)(e) principally on the ground that granting of interest free loan could not be said to be part of ordinary course of money lending business of RPG. Interpretation of Sec 2(22)(e) read with clause (ii) thereof as made by the AO was not upheld both by the CIT(A) and ITAT. In appeal both the appellate authorities i.e. CIT(A) as well as ITAT did not agree with the Revenue's contention that in order to attract clause (ii) of Sec 2(22) it is necessary for the loan granting company to charge interest. Therefore, according to us, the Ld.CIT(A) was unjustified in rejecting the assessee's plea that in terms of clause (ii) of Sec 2(22) interest free loan received on 30.06.2008 was not chargeable as deemed dividend for AY 2009-10. In that view of the matter the appeal of the assessee deserves to succeed, and we allow the appeal of the assessee.

14. Therefore, in the light of the aforesaid discussion, the appeal of the assessee is allowed and since the loan received by the assessee from M/s. OSIL cannot be treated as dividend, the issue of quantification of dividend income does not arise. So, Revenue appeal is infructuous and so dismissed.

15. In the result, appeal of assessee is allowed and that of the revenue is dismissed.

Order is pronounced in the open court on 26/09/2018

Sd/-  
(M. Balaganesh)  
Accountant Member

Sd/-  
(A. T. Varkey)  
Judicial Member

Dated: 26th September, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

- 1 Appellant – M/s. Rainbow Investments Ltd., Duncan House, 4<sup>th</sup> floor, 31, Netaji Subhas Road, Kolkata-700 001.
- 2 Respondent – ITO, Ward-7(2)(1), Mumbai.
- 3 CIT(A)-13, Mumbai. (sent through e-mail)
- 4 CIT , Mumbai
- 5 DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy,

By order,

Sr. Pvt. Secretary