

आयकर अपीलीय अधिकरण , 'ए' न्यायपीठ, चेन्नई  
**IN THE INCOME TAX APPELLATE TRIBUNAL  
"A" BENCH, CHENNAI**

श्री एन.आर.एस .गणेशन, न्यायिक सदस्य एवं  
श्री एस जयरामन, लेखा सदस्य के समक्ष

**BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND  
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER**

**आयकर अपील सं./I.T.A. No. 429/Chny/2018**

**निर्धारण वर्ष/Assessment Year : 2013-14**

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

M/s. Checkpoint Apparel Labelling  
Vs. Solutions India Pvt. Ltd.,  
No. AID / AIE, Industrial Complex,  
Anna Salai, Maraimalai Nagar,  
Chengalpet – 603 209.

**[PAN: AAGCS 9485A]**

**(अपीलार्थी/Appellant)**

**(प्रत्यर्थी/Respondent)**

Revenue by : Ms. D. Rohini, JCIT  
Assessee by : Shri. Vishal Kalra, Advocate

सुनवाईकीतारीख/Date of Hearing : 03.10.2018  
घोषणाकीतारीख/Date of Pronouncement : 30.11.2018

**आदेश/ O R D E R**

**PER S. JAYARAMAN, ACCOUNTANT MEMBER:**

The Revenue filed this appeal against the order of Commissioner of Income Tax (Appeals)-1, Chennai in ITA No. 52/CIT(A)-1/16-17 dated 29.11.2017 for assessment year 2013-14.

2. M/s. Checkpoint Apparel Labelling Solutions India Pvt. Ltd., the assessee, is engaged in the business of Manufacture of Garment Accessories like Labels, Hangtags, Stickers, etc. While making the assessment under section 143(3) for assessment year 2013-14, the A O found , inter alia, that during the year the assessee company had received a loan from M/s. OAT System Software India Private Limited to the extent of Rs.4.25 Crores. It had also paid interest on the said loan. The Assessing Officer noted that the ultimate parent company of the assessee, Checkpoint Systems Inc., was also the ultimate parent company of M/s. OAT System Software India Private Limited. As Checkpoint Systems Inc. held the entire share capital of the assessee as well as the lending company, the Assessing Officer concluded that the loan received by the assessee from M/s. OAT System Software India Private Limited was in the nature of a deemed dividend u/s. 2(22)(e). The Assessing Officer concluded that all the conditions required u/s. 2(22)(e) were fulfilled in this case and hence made additions on account of deemed dividend. Aggrieved, the assessee filed an appeal before the CIT(A), who allowed the appeal.

3. Aggrieved against the order of the Ld CIT(A), the Revenue filed this appeal with following grounds :

*"1. The order of the learned CIT(A) is contrary to law and facts and circumstances of the case.*

*2. The learned CIT(A) erred in deleting the addition made of Rs.4.25 crores by treating loan as deemed dividend u/s.2(22)(e) of the Act*

*2.1 The Learned CIT(A) erred in holding that the provisions of section 2(22)(e) of the Act are not applicable to the loan transaction entered between the assessee company and its related concern, without appreciating the fact that the advances can only be treated as deemed dividend.*

*2.2 The learned CIT(A) failed to appreciate that the Apex Court decision in the case of Madhur Housing & Development Company (Civil Appeal No. 3961 of 2013 dated 05.10.2017) which upheld the decision of the Delhi HC in the case of Ankitech Pvt Ltd 11 Taxmann.com 100 (2011) wherein it was held that provisions of Sec.2(22)(e) could be invoked only if the recipient of the loan was both a beneficial and registered shareholder in the lender company, relied upon in the instant case has been subsequently held by the Apex Court as incorrect and requiring reconsideration vide its decision in the case of M/s. National Travel Services (Civil Appeal No.2068-2071 of 2012) dated 18.01.2018.*

*2.3 The disallowance made by the AC invoking provisions of Sec.2(22)(e) of the Act in respect of the impugned loan transaction was required to be upheld in view of the Apex Court decision in the case of MIs. National Travel Services cited supra.*

*3. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the learned CIT(A) may be set aside and that of the Assessing Officer restored."*

4. The Ld DR presented the case on the above lines and pleaded that the order of the Ld AO be restored. Per Contra, the Ld AR submitted written submissions and took us through it, of which the relevant portion is extracted as under :

*"2.1 The only issue raised in the present appeal by the Revenue is that the loan amounting to Rs. 42,500,000 should be assessed as deemed dividend in the hands of assessee.*

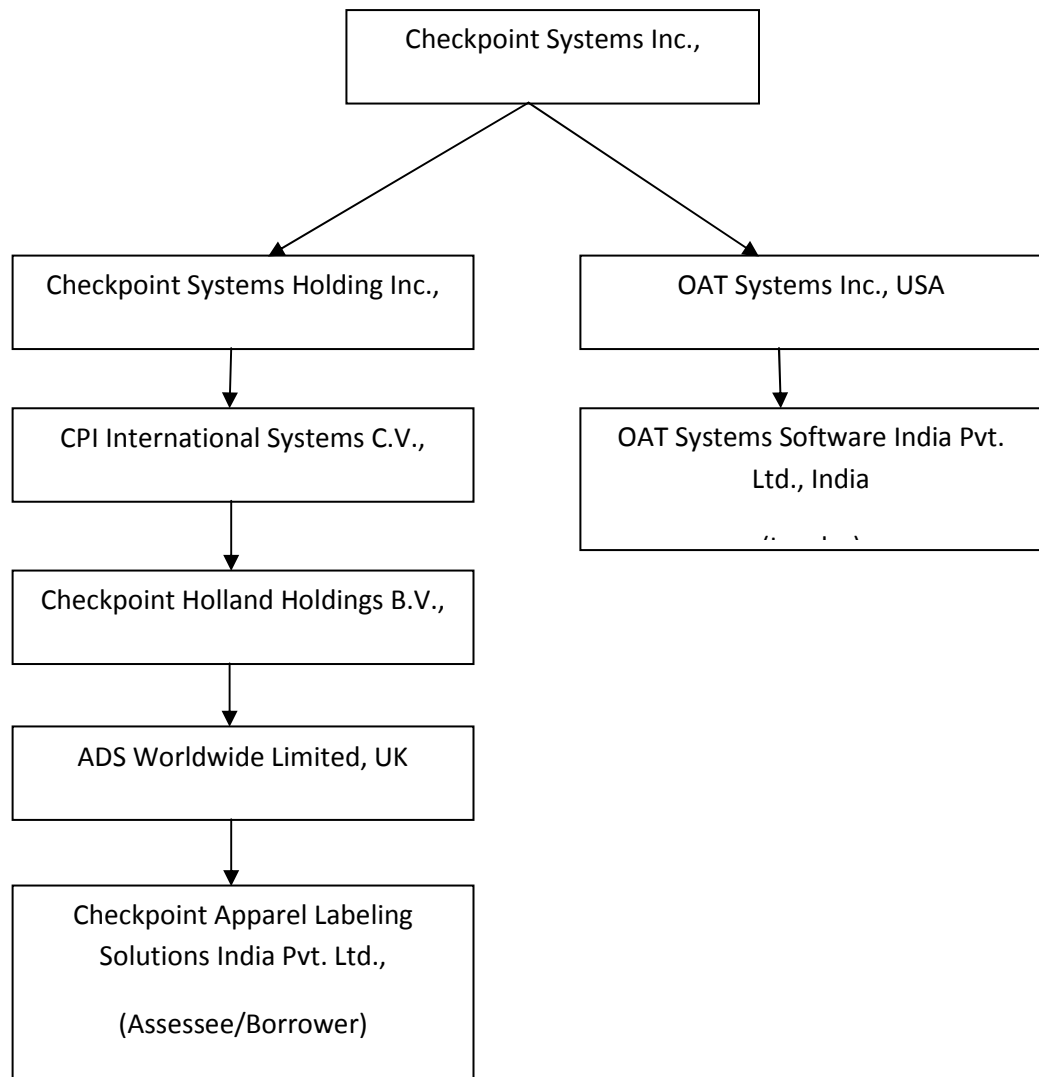
*2.2 It is submitted that as per the provisions of section 2(22)(e) of the Act, any loan or advance given by a closely held company (i.e. a company in*

which public are not substantially interested) can be deemed as dividend if any of the following conditions are satisfied:

- i. Loan or advance is given to a shareholder of the company being a beneficial owner of at least 10% of the voting rights; or
- ii. Loan or advance is given to any concern in which such shareholder is a member or a partner and holds substantial interest; or
- iii. Any payment is made by the company on behalf of or for the benefit of such shareholder of the company.

It is evident from the above that in order to hold any payment of loan or advance to be taxable as deemed dividend, the payment should be made to a shareholder or to a concern in which 'such' shareholder is member or for the benefit of 'such' shareholder.

2.3 In the facts of the instant case, the shareholder of Oat Systems India (the lender) is Oat Systems Inc., USA and shareholder of the Assessee is ADS Worldwide Limited, United Kingdom. The shareholding structure of the Assessee and the lender is presented below for reference:



2.4 It will be appreciated that the Assessee is:

- neither a shareholder of Oat Systems India nor does any shareholder of Oat Systems India hold any shares in the Assessee Company.
- Assessee has not received any payment from Oat Systems India on behalf of or for the benefit of its shareholder (i.e. for ADS Worldwide Limited).

Thus, none of the above conditions specified in section 2(22)(e) of the Act are satisfied in the Assessee's case.

2.5 The AO, however, while framing the assessment has made following observations on page 4, to allege that the amount received by the Assessee is exigible to tax as deemed dividend:

'The shares of both the company are directly held by common parent Check Point Systems Inc, USA through two subsidiaries namely MIS ADS Worldwide Limited and MIS OAT System Inc.'

2.6 It is submitted that the AO has misconstrued the provisions of section 2(22)(e) of the Act and also just because the ultimate parent company is common, it cannot be held that:

- (a) the Assessee is a shareholder in OAT System India and
- (b) that the loan was advanced to Assessee on or behalf of its shareholder.

2.7 The entire share capital of the Assessee was held by ADS Worldwide Ltd, which in turn was held by a Netherland Company and after two more intermediate holding companies, Checkpoint Systems Inc. is the ultimate holding company of the appellant. Similarly, OAT System Software India Private Limited was also not a direct subsidiary of Checkpoint Systems Inc as shown in the chart.

2.8 Applying the above principles to the present case, none of the conditions stipulated in section 2(22)(e) of the Act are satisfied since:

- Appellant is not a shareholder of the lender company;
- Appellant is not a concern in which a shareholder (i.e. OAT Systems Inc., USA) of the lender company holds substantial interest;
- The loan has not been received for the benefit of shareholder (i.e. OAT Systems Inc., USA) of the lender company.

2.9 Reliance in this regard can be placed on the judgement of Cargill India (P.) Ltd. vs ACIT bearing ITA No.5733/DeI/2011, wherein the Hon'ble ITAT under similar facts has held that as the assessee is not a direct shareholder in the lender company, hence, the loan received by the assessee cannot be treated as deemed dividend.

*The relevant observations are reproduced below —*

*'28. After considering the submissions it is noticed that an identical issue having similar facts was a subject matter of the assessee's appeal in ITA No. 4095/Del/2010 for the assessment year 2006-07 wherein vide order dated 28.11.2013, the issue has been decided in favour of the assessee and the relevant findings have been given in para 35 which read as under: 35. Ground No. 2.2 to 2.4. deals with the issue of deemed dividend u/s 2(22)(e) of the Act. The assessee received a loan of Rs. 21.74 crores from M/s Cargill Global Trading India Pvt. Ltd. (CGTIPL) which is a group company of the assessee company. In fact both the assessee company as well as lender company are subsidiaries of Cargill Inc. USA through its separate subsidiary companies Cargill Asia Pacific Ltd. (CAPL) and Cargill International Trading me Ltd. Singapore and the group structure of the companies can be explained as under:*

*It was contended that CGTIPL i.e. lender company was a subsidiary of Cargill Int. Trading Pte Ltd. Singapore with 99% shareholding and none of the shares of lender company were held by assessee company and therefore provisions of section 2(22)(e) were not applicable. For the sake of convenience, we analyse the provisions of section 2(22)(e).*

*Section 2(22)(e) applies to a shareholder being a person who is the beneficial owner of share holdings not less than 10% of the voting power of that company. Thus in order to attract the provisions of section 2(22)(e) the person should be a*

*(a) shareholder;*

*(b) should be a beneficial owner of shares;*

*(c) It must hold at least 10% of voting power in the lender company*

*The aforesaid requirements of law are cumulative. Further it is settled position that the term shareholder as used in provision of section 2(22)(e) refers to shareholder who is a registered share holder i.e. whose name appears in the share register of the company. The Assessing Officer has held the amount of loan as deemed dividend because as per his opinion Cargill Inc. USA i.e. ultimate holding company of both assessee company and lender company was the beneficial owner of shares and therefore he held that assessee was indirectly holder of shares in the lender company. We find that the Assessing Officer has arrived at this conclusion on the basis of surmises*

*and conjectures only as he himself at page 10 of his assessment order recorded the following findings:—*

*Thus though the assessee company is not holding shares in CGIPTL directly, indirectly the assessee company is holding substantial interest in CGIPTL through the Cargill Inc. the holding company.*

*In view of the above, we find that Assessing Officer himself arrived at the conclusion that assessee was not a direct registered shareholder in the lender company, therefore, relying upon various judgments as relied upon by Ld AR the loan received by assessee cannot be treated as deemed dividend u/s 2(22)(e) of the Act. Therefore, ground No.2.2. to 2.4 are allowed.”*

*(Emphasis supplied)*

*2.10 The above ratio has also been upheld by the Hon'ble Supreme Court vide judgment dated October 5, 2018 in the case of CIT vs Madhur Housing and Development Company (2017) (Civil Appeal No. 3961 of 2013), The Hon'ble Supreme Court affirmed the decision of the Honble Delhi High Court in the case of CIT vs Ankitech (P.) Ltd. [2012] 340 ITR 14 (Delhi HC) and observed that the High Court has laid down the correct construction of deemed dividend under the Act.*

*2.11 Further, it is pertinent to note that the order of the Hon'ble Supreme Court in the case of CIT vs National Travel Services [2018] 401 ITR 154 (SC), has merely referred only one aspect of Ankitech (supra) judgement, ie, whether the shareholder in the hands of whom the deemed dividend could be taxed should be both registered and the beneficial shareholder, to a larger Bench, as was amended by Finance Act, 1987, wef 1.4.1988. The observations made therein are reasons that their lordships have stated for making such reference. This does not ipso facto mean that the judgment of the Hon'ble Supreme Court in Madhur Housing and Development Company (supra) stands reversed. The judgment of the Supreme Court in the case of Madhur Housing (supra) upholding Delhi High Court in Ankitech (P) Ltd (supra) is still the correct legal position.*

*2.12 Even for the sake of argument if it is considered that the legal position as enunciated by Supreme Court in Madhur Housing (supra) has been diluted by National Travel Services (supra), it is only one of the two aspects of taxability of deemed dividend has been discussed and referred for larger Bench. The position that the deemed dividend can be taxed only in the hands of shareholder, has not been diluted as held by Madhur Housing (supra) and*

*Cargill India (supra). It is reiterated that the reference to larger Bench only seeks to dilute, the controversy regarding, whether shareholder should be both registered and beneficial shareholder and not the settled position that dividend ultimately can be taxed only in the hands of shareholder, be it registered or beneficial not otherwise. Thus, to that extent the judgement in the case of Ankitech (supra) still holds ground.*

*2.13 It is submitted that the AC had also disallowed the interest paid by the Assessee to CAT systems for the impugned loan at 13.5%. The CIT(A) has held the same to be as an allowable expenditure. The Department has not challenged such allowance of interest expenditure. Under the circumstances when one leg of the transaction has been accepted to be loan and interest paid thereof has been allowed / accepted as a business expenditure then the loan taken cannot be re-characterized as deemed dividend.*

*2.14 In view of the above the order of the CIT(A) deserves to be upheld.”*

5. We heard the rival submissions and gone through the relevant material. The assessee submitted that crucial condition required u/s. 2(22)(e) was not satisfied as the assessee was not a registered shareholder of the lending company M/s. OAT System Software India Private Limited. The diagrammatic representation of the shareholding pattern of the assessee and M/s. OAT System Software India Private Limited, as extracted supra, shows that the assessee is not a shareholder of M/s. OAT System Software India Private Limited. Hence, deemed dividend cannot be assessed in the hands of the assessee. Respectfully following the order in the case of Cargill India (P.) Ltd. vs ACIT bearing ITA No.5733/Del/2011, wherein, the Hon'ble ITAT under similar facts has held that as the assessee is not a direct shareholder in the lender company, hence, the loan received by the assessee cannot be treated

as deemed dividend. We are in agreement with the following submissions of the Ld AR

*" The above ratio has also been upheld by the Hon'ble Supreme Court vide judgment dated October 5, 2018 in the case of CIT vs Madhur Housing and Development Company (2017) (Civil Appeal No. 3961 of 2013), The Hon'ble Supreme Court affirmed the decision of the Honble Delhi High Court in the case of CIT vs Ankitech (P.) Ltd. [2012] 340 ITR 14 (Delhi HC) and observed that the High Court has laid down the correct construction of deemed dividend under the Act.*

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*2.14 In view of the above, the order of the CIT(A) deserves to be upheld”*

and hence , the Revenue's appeal is dismissed .

6. In the result, the Revenue's appeal is dismissed.

Order pronounced on Friday, the 30<sup>th</sup> day of November, 2018 at Chennai.

**Sd/-**

(एन.आर.एस .गणेशन)

**(N.R.S. GANESAN)**

**न्यायिकसदस्य/Judicial Member**

**Sd/-**

(एसजयरामन)

**(S. JAYARAMAN)**

**लेखासदस्य/Accountant Member**

चेन्नई/Chennai,

दिनांक/Dated: 30<sup>th</sup> November, 2018

**JPV**

आदेशकीप्रतिलिपिअग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त) अपील(/CIT(A)
4. आयकरआयुक्त/CIT
5. विभागीयप्रतिनिधि/DR
6. गार्डफाईल/GF