

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'A' BENCH, KOLKATA**

**Before Shri P.M. Jagtap, Vice-President (KZ)
and Shri S.S. Viswanethra Ravi, Judicial Member**

**I.T.A. Nos. 549, 550, 551, 552 & 553/KOL/2018
Assessment Years: 2009-2010, 2011-12, 2012-13, 2013-14 & 2014-2015**

***M/s. Manipur Tea Co. Pvt. Limited,.....Appellant
Continental Chambers, 4th floor,
15A, Hemanta Basu Sarani,
Kolkata-700 001
[PAN: AAAC 9636 L]***

-Vs.-

***Principal Commissioner of Income Tax,.....Respondent
Central, Kolkata-2,
Aayakar Bhawan Poorva, 5th Floor, Room No. 501,
110, Shanti Pally, Kolkata-700 107***

Appearances by:

*Shri Miraj D. Shah, FCA, for the Appellant
Shri A.K. Nayak, CIT, D.R., for the Respondent*

Date of concluding the hearing : March 19, 2019
Date of pronouncing the order : May 03, 2019

O R D E R

Per Bench:-

These five appeals filed by the assessee are directed against five separate orders, all dated 31.01.2018 of the ld. Principal Commissioner of Income Tax, Central, Kolkata-2 passed under section 263 of the Income Tax Act, 1961 for A.Ys. 2009-10, 2011-12, 2012-13, 2013-14 & 2014-15.

2. The assessee in the present case is a Company, which is engaged in the business of Growing/Manufacturing of Tea. In the assessments completed under section 153A/143(3) of the Act for all the five years under consideration vide orders dated 30.03.2016, the total income of the assessee was determined by the Assessing Officer at a loss of

Rs.41,80,720/- and Rs.37,21,120/- for A.Ys. 2009-10 and 2011-12 respectively, while the total income of the assessee for the remaining three assessment years i.e. 2012-13, 2013-14 & 2014-15 was determined at 'NIL'. The record of the said assessments came to be examined by the ld. Principal CIT. On such examination, he found that the assessee-company had received unsecured loans of Rs.25,00,000/-, Rs.67,00,000/-, Rs.54,00,000/-, Rs.1,15,00,000/- and Rs.1,61,00,000/- from another Group Company namely M/s. Govind Promoters Pvt. Limited in the previous year relevant to A.Y. 2009-10, 2011-12, 2012-13, 2013-14 & 2014-15 respectively. He also found that Shri Devendra Kumar Mantri and Smt. Tanuja Mantri were common shareholders in the assessee-company as well as in M/s. Govind Promoters Pvt. Limited having substantial shareholding. He further found that M/s. Govind Promoters Pvt. Limited was having substantial accumulated profit during the years under consideration. According to the ld. Principal CIT, the loan amounts received by the assessee-company during the years under consideration thus were liable to be assessed in the hands of the assessee-company as deemed dividend under section 2(22)(e) of the Act and there was an error in the orders of the Assessing Officer passed under section 153A/143(3) in not making any enquiries/verification in respect of the said loans so as to consider the applicability of section 2(22)(e). He accordingly issued notices under section 263 requiring the assessee to show-cause as to why remedial action should not be taken by exercising the powers under section 263 to revise the orders passed by the Assessing Officer under section 153A/143(3) for all the five years under consideration.

3. In reply to the show-cause notices issued by the ld. Principal CIT under section 263, a written submission was filed by the assessee vide letter dated 24.11.2017 stating, inter alia, as under:-

"With respect to your query regarding implication of section 2(22)(e) of the Income Tax Act, 1961 with respect to loan

transactions entered into with M/s Govind Promoters Pvt. Ltd. we would like to state that M/s Govind Promoters Pvt. Ltd. being Non-Banking Financial Company is out of the purview of the above mentioned section since the company advances loan in its ordinary course of business and lending of money is substantial part of its business. A copy of NBFC Certificate in case of Govind Promoters Pvt. Ltd has been enclosed herewith. Sir, we are reproducing an extract of section 2(22)(e) below for your kind perusal-

"(e) any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) made after the 31st day of May, 1987, by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power, or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern)) or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits; but "dividend" does not include-

(i) distribution made in accordance with sub-clause (c) or sub-clause (d) in respect of any share issued for full cash consideration, where the holder of the share is not entitled in the event of liquidation to participate in the surplus assets;

(ia) a distribution made in accordance with sub-clause (c) or sub-clause (d) in so far as such distribution is attributable to the capitalised profits of the company representing bonus shares allotted to its equity shareholders after the 31st day of March, 1964, and before the 1st day of April, 1965;

(ii) any advance or loan made to a shareholder for the said concern 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;"

From the section 2(22) (e), it transpires that a company which is carrying on business of granting of loans and advance is out of purview of section 2(22)(e). Since, M/s Govind Promoters Pvt. Ltd. is an NBFC and its principal business is of granting of loans and advances, section 2(22)(e) is not applicable in this case. Copy of audited financial statements of Govind Promoters Pvt. Ltd. for the A.Y. 2011-12 is enclosed herewith for your kind perusal. In support of our contention we would like to place reliance on a recent case of DCIT vs. Sindhu Holdings Ltd. ITA No.2766 (Delhi) of 2012) (A.Y. 2008-09) (29.01.2016) where it has been held by the Hon'ble Delhi ITAT that -

"moreover, the fender companies are NBFC which are also excluded from the said deeming provision, therefore, we do not find any merit in this ground of appeal and we uphold the ld. CIT (A)'s order and dismiss this ground."

We would like to further submit that the said company had duly charged interest on the loan given and thus such transaction should be treated as being entered during the normal course of business. Copy of loan confirmation is enclosed herewith for your kind perusal. Hence, the said loan transaction should not be considered as deemed dividend and chargeable in the hands of the assessee company. In support of our contention we would like to submit that the Hon'ble Kolkata High Court in the case of Pradip Kumar Malhotra v CIT (2011) 338 ITR 538 held that for gratuitous loan or advances given by a company to those classes of shareholders would come within the purview of section 2(22) (e) but not to the clauses where loan or advances is given in return to an advantage conferred upon the company by such shareholders. In our case also the interest paid by the assessee company was a return on loan given by M/s Govind Promoters Pvt. Ltd. The amount being non-gratuitous is not covered u/s 2(22)(e)".

The submissions made by the assessee were not found acceptable by the ld. Principal CIT. Having regard to the facts of the case and keeping in view certain judicial pronouncements discussed by him in his impugned order, he held that the assessments made by the Assessing Officer under section 153A/143(3) for all the five years under consideration were passed without making any enquiry or verification regarding the applicability of section 2(22)(e) to the loans in question received by the assessee-company from the other Group Companies, which were necessary in the facts and circumstances of the case and such lack of enquiry or verification made the said orders erroneous insofar as prejudicial to the interest of revenue. He accordingly set aside the orders passed by the Assessing Officer under section 153A/143(3) for all the five years under consideration vide orders passed under section 263 with a direction to the Assessing Officer to make the assessments afresh after making proper enquiry and verification on the issue and after affording reasonable opportunity of being heard to the assessee. Aggrieved by the orders of the ld. Principal CIT passed under section 263 for all the five

years under consideration, the assessee has preferred these appeals before the Tribunal.

4. The Id. Counsel for the assessee submitted that the Id. Principal CIT vide his impugned orders passed under section 263 has set aside the orders passed by the Assessing Officer under section 153A/143(3) of the Act for all the five years under consideration on the ground that the necessary enquiry or verification regarding applicability of the provision of section 2(22)(e) to the loans in question taken by the assessee-company from other group companies was not made by the Assessing Officer. In this regard, he invited our attention to the copies of notices issued by the Assessing Officer under section 142(1) placed in his paper book to point out that the details of all the loans and advances were called for by the Assessing Officer during the course of assessment proceedings and the same were duly furnished by the assessee. He also invited our attention to the relevant Annexure of the Tax Audit Report submitted by the assessee alongwith its returns of income for all the five years under consideration to point out that the loan amounts in question taken by the assessee from other Group concerns during the years under consideration and squared off during the said years itself were duly reflected therein. He also pointed out that the full particulars of persons who were beneficial owners of equity shares of the assessee-Company holding more than 10% shares were called for by the Assessing Officer during the course of assessment proceedings and the same were duly furnished by the assessee. He submitted that the assessee-company during the years under consideration had paid interest on the loans in question taken from the other Group Companies and the same was duly shown in the relevant Annexure of the Tax Audit report showing payments to related persons specified in section 40A(2)(b) of the Act. He contended that all the relevant details thus were furnished by the assessee in the Tax Audit Reports filed alongwith the returns of income as well as during the course of assessment proceedings as per the

requirements of the Assessing Officer. He contended that since the assessee-company had paid interest on the loan amounts in question taken from other Group Companies, the provisions of section 2(22)(e) were not applicable as held by the Hon'ble Calcutta High Court in the case of Pradip Kumar Malhotra (338 ITR 538). He also contended that the assessee-company was not the shareholder in such Group Companies and, therefore, the loan amounts received from the said companies could not be treated as deemed dividend in the hands of the assessee under section 2(22)(e) of the Act. He contended that proper enquiry and verification thus was made by the Assessing Officer during the course of assessment proceedings as regards the applicability of section 2(22)(e) to the loan amounts in question received by the assessee-company from the other Group Companies and after having considered all the facts of the case as well as the legal position, a conscious decision was taken by him that the provisions of section 2(22)(e) were not applicable. He contended that there was thus no error in the orders of the Assessing Officer passed under section 153A/143(3) for all the five years under consideration as alleged by the Id. Principal CIT and the Id. Principal CIT was not justified in revising the same by exercising the powers conferred upon him under section 263. He urged that the impugned orders passed by the Id. Principal CIT under section 263 may, therefore, be set aside and that of the Assessing Officer passed under section 153A/143(3) be restored back.

5. The Id. D.R., on the other hand, strongly supported the impugned orders passed by the Id. Principal CIT under section 263. He contended that even though the relevant details were available on record, the Assessing Officer ought to have made the necessary enquiry to ascertain the applicability of section 2(22)(e) to the loan amounts in question received by the assessee-company from the other group companies. He submitted that the query raised by the Assessing Officer and details furnished by the assessee as highlighted by the Id. Counsel for the

assessee were general in nature and there was no specific enquiry or verification made by the Assessing Officer regarding the applicability of section 2(22)(e) to the loan amounts in question taken by the assessee from the other Group Companies. As regards the legal position pointed out by the Id. Counsel for the assessee by relying, inter alia, on the decision of the Hon'ble Calcutta High Court in the case of Pradip Kumar Malhotra (supra), the Id. D.R. contended that there is nothing to show that the Assessing Officer has taken into consideration this legal position while passing the order under section 153A/143(3). He contended that the enquiry or verification on the issue of applicability of section 2(22)(e) as required in the facts and circumstances of the case thus was not made by the Assessing Officer while passing the orders under section 153A/143(3) and such lack of enquiry or verification made the said orders erroneous as well as prejudicial to the interest of revenue warranting revision under section 263 as rightly done by the Id. Principal CIT.

6. We have considered the rival submissions and also perused the relevant material available on record. As demonstrated by the Id. Counsel for the assessee on the basis of relevant documentary evidence placed in the paper book, the details of unsecured loans taken during the years under consideration by the assessee-company from the other Group Companies were called for by the Assessing Officer during the course of assessment proceedings and the same were duly furnished by the assessee. Even the details of shareholders holding more than 10% shares in the assessee-company were called for by the Assessing Officer and the same were duly furnished by the assessee. In the Tax Audit Reports filed by the assessee-company along with its returns of income, the unsecured loans received by the assessee-company during the years under consideration from the other Group Companies and squared off in the same years were duly reflected and even interest paid thereon was duly

shown in the said Tax Audit Reports in the details of payments made to related persons as specified in section 40A(2)(b). As rightly contended by the Id. Counsel for the assessee, all the relevant details to ascertain the applicability of section 2(22)(e) to the loan amounts in question taken by the assessee-company during the years under consideration from the other Group Companies thus were either available on the record before the Assessing Officer or the same were called for by him during the course of assessment proceedings by raising specific queries and after applying his mind to the said details, a conscious decision was taken by him as regards the non-applicability of section 2(22)(e) to the loan amounts in question while completing the assessment under section 153A/143(3) of the Act. In our opinion, it, therefore, cannot be said that there was an error in the orders of the Assessing Officer in not making any enquiry or verification on the issue of applicability of section 2(22)(e) to the loan amounts in question as alleged by the Id. Principal CIT and the revision under section 263 by the Id. Principal was not called for.

7. It is also observed that interest was paid by the assessee on the loan amounts in question taken from the other Group Companies and as held by the Hon'ble Calcutta High Court in the case of Pradip Kumar Malhotra (supra), the said loans given to the assessee-company by the other Group Companies as a consequence of further consideration, which were beneficial to the said companies, cannot be treated as deemed dividend under section 2(22)(e). It is also relevant to note here that the assessee-company was not the shareholder in the other Group Companies during the years under consideration and the amounts of loan in question thus could not be treated as deemed dividend under section 2(22)(e) even on this ground as rightly contended by the Id. Counsel for the assessee. At the time of hearing before the Tribunal, the Id. D.R. has not disputed this legal position cited by the Id. Counsel for the assessee in support of the assessee's case that section 2(22)(e) was not applicable to

the loan amounts in question received by the assessee-company from the other Group Companies. He, however, has contended that there is nothing on record to show that this legal position was specifically considered by the Assessing Officer while completing the assessments under section 153A/143(3) of the Act. We are unable to accept this contention of the Id. D.R. In our opinion, the Assessing Officer is not only expected to be aware of such legal position but is also duty-bound to apply the same while completing the assessments, especially when it is propounded by the Hon'ble Jurisdictional High Court. In the present case, the Assessing Officer thus had not only made the enquiry or verification as required in the facts of the case to ascertain the applicability of section 2(22)(e) to the loan amounts received by the assessee from the other group companies, but a conscious decision was also taken by him keeping in view the legal position that section 2(22)(e) was not applicable to the loan amounts in question received by the assessee during the years under consideration from the other Group Companies. In our opinion, there was thus no error in the orders of the Assessing Officer for the years under consideration passed under section 153A/143(3) of the Act as alleged by the Id. Principal CIT and the revision of the same under section 263 by the Id. Principal CIT was not called for. In that view of the matter, we set aside the impugned orders passed by the Id. Principal CIT under section 263 and restore that of the Assessing Officer passed under section 153A/143(3) of the Act.

8. In the result, all the appeals of the assessee are allowed.

Order pronounced in the open Court on May 03, 2019.

Sd/-
(S.S. Viswanethra Ravi)
Judicial Member

Sd/-
(P.M. Jagtap)
Vice-President (KZ)

Kolkata, the 3rd day of May, 2019

*Copies to : (1) M/s. Manipur Tea Co. Pvt. Limited,
Continental Chambers, 4th floor,
15A, Hemanta Basu Sarani, Kolkata-700 001*

**(2) Principal Commissioner of Income Tax,
Central, Kolkata-2,
Aayakar Bhawan Poorva, 5th Floor, Room No. 501,
110, Shanti Pally, Kolkata-700 107**

**(3) Commissioner of Income Tax- ,
(4) The Departmental Representative
(5) Guard File**

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.