

आयकर अपीलिय अधिकरण, 'बी' न्यायपीठ, चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH: CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मंजुनाथ. जी, लेखा सदस्य के समक्ष
BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
SHRI MANJUNATHA. G, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.784/Chny/2020
निर्धारण वर्ष /Assessment Year: 2014-15

M/s. Susee Automotive (P.) Ltd.,
No.25, Tamilsangam Road,
Madurai – 625 001.
[PAN: AAOCS-8509-H]

(अपीलार्थी/**Appellant**)

The Dy. Commissioner of
Income Tax,
Corporate Circle-2,
Madurai.

(प्रत्यर्थी/**Respondent**)

आयकर अपील सं./ITA No.832/Chny/2020
निर्धारण वर्ष /Assessment Year: 2014-15

The Dy. Commissioner of
Income Tax,
Corporate Circle-2,
Madurai.

(अपीलार्थी/**Appellant**)

M/s. Susee Automotive (P.) Ltd.,
No.25, Tamilsangam Road,
Madurai – 625 001.
[PAN: AAOCS-8509-H]

(प्रत्यर्थी/**Respondent**)

अपीलार्थी की ओर से/ Appellant by
प्रत्यर्थी की ओर से /Respondent by

: Shri T. Vasudevan, Advocate
: Shri S.R. Karuppusamy, CIT

सुनवाई की तारीख/Date of Hearing

: 31.05.2023

घोषणा की तारीख /Date of Pronouncement

: 31.07.2023

आदेश / ORDER

Per Mahavir Singh, Vice President :

These cross appeals, by the assessee and the Revenue, are
arising out of the orders of Commissioner of Income Tax (Appeals)-1,

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Madurai [hereinafter [hereinafter "CIT(A)"] in ITA No.190/2016-17 dated 03-03-2020. The Assessments were framed by Income Tax Officer, Non Corporate Ward-3, Chennai for the relevant A.Y. 2014-15 vide order dated 22.12.2016 u/s. 143(3) of the Income Tax Act, 1961 (hereinafter 'the Act').

2. At the outset, it is noticed from the orders passed by CIT(A)-1, Madurai that both the appeals, one filed by the assessee and one filed by the Revenue, are delayed by 139 days and 87 days, respectively. The order of CIT(A), in these cross appeals, is dated 03.03.2020 and this delay in both the appeals is covered by the exemption provided by Hon'ble Supreme Court in Miscellaneous Application No.665 of 2021 vide order dated 23.03.2020 has given directions that the delay are to be condoned during this period 15.03.2020 to 14.03.2021 and they have condoned the delay up to 28.02.2022 in Miscellaneous Application No.21 of 2022 vide order dated 10.01.2022. Since the Hon'ble Supreme Court has condoned the delay during the said period, respectfully following the same we condone the delay and admit the appeals.

3. First we will deal with the Revenue's appeal in ITA No.832/Chny/2020. The only issue in this appeal of Revenue is as

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regards to the order of CIT(A) in deleting the addition made by A.O holding that the loan received by the assessee-company from the seven parties are treated as deemed dividend within the provisions of Section 2(22)(e) of the Act. For this, the Revenue has raised the following Grounds No.2, 3 & 4:

“2. The CIT(A) erred in allowing the appeal of assessee by holding that deemed dividend has to be taxed in the hands of registered shareholders only. In this case, the assessee company is not a registered shareholder of the lending companies.

3. The CIT(A) erred in allowing the appeal of the assessee held that the two shareholders of the assessee company viz. Shi J. Rajiv Subramanian and Shri S. Jeyabalan having 70% and 30% of shares respectively are registered shareholders of the lending companies and hence deemed dividend should be taxed in the hands of shareholders in the ratio of their shareholding.

4. The CIT(A) erred in allowing the appeal of the assessee claiming deemed dividend u/s.2(22) (e), ignoring the fact that two common share holders were having substantial interests in both the lending as well as receiving companies. The decision of the CIT(A) is not in conformity with the Section 2(22) (e) of the Income Tax Act, 1961.

4. The brief facts of the case are that the A.O during the course of assessment proceedings noticed from the balance sheet and schedules thereto that the assessee has availed unsecured loans from its sister concern with having common directors holding more than 10% of voting powers in the payer company. The A.O registered the following seven parties and the amount availed as under:

<i>Sl. No.</i>	<i>Payer company from whom loan was availed by assessee</i>	<i>Amount of loan Rs.</i>
<i>1.</i>	<i>Susee Automobiles P Ltd., Kappalur</i>	<i>84,51,536</i>
<i>2.</i>	<i>Susee Premium Automobiles P. Ltd., Trichy</i>	<i>6,43,94,918</i>
<i>3.</i>	<i>Suse Auto Sales & Services P. Ltd., Madurai</i>	<i>2,00,44,569</i>

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4.	<i>Susee Finance & Leasing P Ltd.</i>	76,78,082
5.	<i>Susee Traders P. Ltd.</i>	2.34.206
6.	<i>Susee Information Systems P Ltd.</i>	11,87,250
7.	<i>Susee Auto Plaza P Ltd.</i>	1,04,600

5. The A.O noted the shareholding pattern of the payer companies of the directors as under:

Shareholder	Shareholding in assessee company	Share holding in payer companies			
		<i>Susee Automobiles P Ltd. Kappalur</i>	<i>Susee Premium Automobiles P Ltd. Trichy</i>	<i>Susee Auto Sales & Services P Ltd., Madurai</i>	<i>Susee Finance & Leasing P Ltd.</i>
<i>S. Jeyabalan</i>	20%	30%	20.70%	57.99%	30%
<i>J.Rajiv Subramanian</i>	80%	70%	79.27%	42%	70%

6. Subsequently, the A.O listed out the amount of loan to be treated as deemed dividend in respect of first four companies as under:

Sl. No.	<i>company from whom loan was availed by assessee</i>	<i>Amount of loan Rs.</i>
1.	<i>Susee Automobiles P Ltd., Kappalur</i>	84,51,536
2.	<i>Susee Premium Automobiles P. Ltd., Trichy</i>	3,07,42,950
3.	<i>Susee Auto Sales & Services P. Ltd., Madurai</i>	2,00,44,569
4.	<i>Susee Finance & Leasing P Ltd.</i>	76,78,082
	<i>Total dividend</i>	6,69,17,137

7. And subsequently, he also gone through the shareholding pattern and accumulated profits of the three companies which is as under:

Sl. No.	<i>Company from whom loan was availed by assessee</i>	<i>Amount of loan Rs.</i>
1.	<i>Susee Traders P. Ltd.</i>	2.34.206
2.	<i>Susee Information Systems P Ltd.</i>	11,87,250
3.	<i>Susee Auto Plaza P Ltd.</i>	1,04,600
	<i>Total dividend</i>	15,26,056

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8. According to A.O, the assessee is covered by the provisions of Section 2(22)(e) of the Act and added deemed dividend u/s. 2(22)(e) of the Act at Rs. 6,84,43,193/-. Aggrieved, the assessee preferred an appeal before CIT(A).

9. The CIT(A) following the decision of Hon'ble Madras High Court in the case of *PCIT vs. M/s. Ennore Cargo Container Terminal P. Ltd. in T.C(A) Nos.105 and 106 of 2017 dated 27.03.2017 (Mad.)*, held that the assessee-company neither a registered shareholder nor the beneficial shareholder and therefore, the deemed dividend cannot be taxed in the hands of the assessee-company. However, the CIT(A) directed the A.O to reopen the case in the hands of Shri J. Rajiv Subramanian and Shri S. Jeyabalan, Directors of the company. For this, the CIT(A) observed in para 5.7 to 6 as under:

"5.7. It has also been argued by the appellant that the appellant company is neither a registered shareholder nor the beneficial shareholder and therefore, deemed dividend cannot be taxed in the hands of the appellant company. The issue has been analysed in the context of the case of the appellant. The appellant has relied on the decision of Madras High Court in case of Principal CIT Vs Ennore Cargo Container Terminal Pvt Ltd delivered on 27.03.2017, wherein at para No.4.2 to 6 which is reproduced below:-

"4.2. Revenue seeks to assess as income the capital received by the assessee-company from Indev Logistics Ltd. on the ground that it is deemed dividend received by the assessee company for the benefit of' the registered For this purpose, the provisions of Section 2 (22) (e) of the Income-tax Act, 1961 (in short 'the Act') is sought to be relied upon. The Tribunal has rejected the said contention of the Revenue, principally, on the ground that deemed dividend can only be assessed in the hands of the registered shareholder for whose benefit the money was advanced.

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4.3. As indicated above, there is no dispute that the assessee did receive capital advance from Indev Logistics Pvt. Ltd. There is also no dispute that there are common shareholders both in the assessee-company and Indev Logistics Pvt. Ltd. Therefore, quite correctly, as noted by the Tribunal, though, the advance received by the assessee company may have been for the benefit of the aforementioned registered shareholders, it could only be assessed in the hands of those registered shareholders and not in the hands of the assessee-company.

4.4. In our view, on a plain reading of the provisions of Section 2(22)(e) of the Act, no other conclusion can be reached. As a matter of fact, a Division Bench of this Court, in the case of Commissioner of Income Tax vs. Printwave Services (2015) 373 ITR 665 (Mad.), has reached a somewhat similar conclusion.

5. Mr.Senthil Kumar, however, contends to the contrary and relies upon the judgment of the Supreme Court in Gopal and Sons (HUF) vs. Commissioner of Income-tax, Kolkata-XI, (2017) 77 taxmann.com 71 (SC).

5.1. In our view, the question of law considered by the Supreme Court in the case of Gopal and Sons (supra) was different from the issue which arises in the present matter. The question of law which the Supreme Court was called upon to consider was whether loans and advances received by a HUF could be deemed as a dividend Within the meaning of Section 2 (22) (e) of the Act. The assessee in that case was the HUF and the payment in Question was made to HUF. The shares were held by the Karta of the HUF. It is in this context that the Supreme Court came to the conclusion that HUF was the beneficial shareholder.

5.2. In the instant case, however, both the registered and beneficial shareholders are two individuals and not the assessee-company. Therefore, in our view, the judgment of the Supreme Court does not rule on the issue Which has come up for consideration in the instant matter.

6. Accordingly, in so far as Questions Nos.3 and 4 are concerned, we find that no interference is called for With the view taken by the Tribunal via the impugned order. In these circumstances, the Revenue's appeal, i.e. T.C(A) No.105 of 2017, pertaining to AY 2007-08, with regard to the said questions, is dismissed."

5.8. In another decision which is relevant in the context is *Shahir Sami Khatib Vs ITO* (2018) 98 Taxmann.com 453 (Mum)/(2018) 259 Taxman 160 (Mum). It was found that the appellant was holding more than 10% of the equity shares of the lending company and was also having substantial interest in the borrowing company, It was held that the amount of loan given by lender company to the borrower company was rightly added as deemed dividend u/s 2(22)(e) of the Act in the hands of the appellant being the registered shareholder.

5.9. In view of the above two decisions, the point agitated by the appellant in this case that if the deemed dividend under the facts and circumstances of the case has to be brought to tax, it can be

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*brought to tax in the hands of the registered share holder only in respect of whom the shareholding criteria is satisfied under the second limb of section 2(22)(e) of the Act. It is observed in this case that the criteria of shareholding is satisfied in case of both the shareholders viz. Shri J. Rajiv Subramanian and Shri S. Jeyabalan. In view of the above stated decisions of Hon'ble Madras High Court and Bombay High Court, the deemed dividend has to be taxed in the hands of Shri J. Rajiv Subramanian and Shri S. Jeyabalan. As it is applicable in case of both the shareholders, the deemed dividend should be taxed in the ratio of their shareholding in the appellant company. As the shareholding of Shri J. Rajiv Subramanian is 70%, the 70% of the deemed dividend will be taxed in the case of Shri J. Rajiv Subramanian and as the shareholding of Shri S. Jeyabalan is 30%, the 30% of the deemed dividend will be taxed in the hands of Shri S. Jeyabalan. The Assessing Officer has added the quantum of the deemed dividend in the hands of the appellant company which is contrary to the ratio decided by the jurisdictional Madras High Court in the case of Ennore Cargo Container Terminal P Ltd (supra). **The addition in the hands of the appellant company is therefore, deleted.***

6. Under the facts and circumstances of the case, the deemed dividend in the ratio of the shareholding in the appellant company should have been brought to tax in the hands of the directors Shri J. Rajiv Subramanian and Shri S. Jeyabalan. In view of the provisions contained u/s 150(1), I direct the Assessing Officers of Shri J. Rajiv Subramanian and Shri S. Jeyabalan to reopen the assessment in the respective cases u/s 147 and bring the quantum of deemed dividend to tax in their respective hands. It is further stated that the assessment in this case was completed on 22.12.2016. The time was clearly available to reopen the assessment for assessment year 2014-15 and therefore, in terms of provisions contained u/s 150(2), there is no legal impediment to reopen the cases of the above mentioned two shareholders.”

Aggrieved, the Revenue is in appeal before us.

10. The facts are admitted and the assessee-company is neither registered shareholder nor beneficial owner and hence, deemed dividend cannot be assessed in the hands of the assessee. This view is also affirmed by Hon'ble Calcutta High Court in the case of *Pradip*

Kumar Malhotra vs. CIT [2011] 338 ITR 538 (Cal.), wherein it is held

as under:

"4. We have heard rival submissions and gone through facts and circumstances of the case. We have gone through the facts of the case and found from the perusal of ledger account of assessee in the books of account of Ganesh Wheat Products (P) Ltd., the lender Company, it is seen that as on the first day of the relevant accounting year 2005- 06 (A.Y. 2006-07) opening balance is at Rs.28,07,584/-. Thereafter, on several dates during the entire financial year there were several transactions through cheques and some in cash by either parties, i.e. the assessee and the loan giving resulting in shifting balances, On many occasions the balance was in favour of the assessee and on some other occasions the balance was in favour of Ganesh Wheat Products (P) Ltd. The ledger of the assessee further reveals that no payment by loan creditor is followed by a repayment by the loan debtor and, in fact, the payments by the assessee and Ganesh Wheat Products (P) Ltd. are independent of one another. No interest was charged by either side for advancing money on mutuality inasmuch as the loan account was a current account in nature. It is thus evident that there were reciprocal demands between the parties and thus mutual in characteristic. At the close of accounting year as on 31-03-2006, debit balance stood at a sum of Rs. 18,87, 522/- which was duly reflected in the balance sheet under the head Loans & Advances. Similarly, in respect of Mima Flour Mills opening balance was Nil and there were several shifting of balance and the resultant debit balance was Rs.5.00.833/-. For A. Y. 2007-08, in respect of Mima Flour Mills, opening balance was Rs.5., 00,833/- and after shifting balance, the debit balance came to nil. In respect of Ganesh Wheat Products, opening balance was Rs. 18,87,522/- and after shifting balance the credit balance came to Rs.9 lakhs. On perusal of the ledger account of the assessee in the books of M/s. Mima Flour Mills (P) Lia. it is seen that on several dates there were shifting balances. On many occasions the balance was in favour of the assessee and on some other occasions the balance was in favour of Ganesh Wheat Products (P) Ltd. It is thus evident that there were reciprocal demands between the parties and thus mutual in characteristic. The account so maintained in respect of such mutual transfer of amount by way of giving and taking financial assistance is, therefore, a current account and this current account is different from a loan account for the sole reason that feature of mutuality is not present in a loan transaction.

5. Here in the present case, from the facts narrated above, it is clear that both the parties are beneficiary of the transaction being current account of the above transactions i.e. shifting balances.

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This issue has been answered by Hon'ble Calcutta High Court in the case of Pradip Kumar Malhotra v. CIT 338 ITR 538 (Cal) wherein Hon'ble High Court held as under:

"The phrase "by way of advance or loan" appearing in sub-clause (e) of section 2(22) of the Income-tax Act, 1961, must be construed to mean those advances or loans which a shareholder enjoys simply on account of 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; but if such loan or advance is given to such shareholder as a consequence of any further consideration which is beneficial to the company received from such a shareholder, in such case, such advance or loan cannot be said to be deemed dividend within the meaning of the Act. Thus, gratuitous loan or advance given by a company to those classes of shareholders would come within the purview of section 2(22) but not cases where the loan or advance is given in return to an advantage conferred upon the company by such shareholder."

From the above facts and legal proposition decided by Hon'ble jurisdictional High Court, it is clear that section 2(22) (e) of the Act was inserted to bring within the purview of taxation those amounts which are actually a distribution of profits but are disbursed as a loan so that tax thereon can be avoided. It is pertinent to note here that when dividends are declared by a company, it is solely the shareholders who benefit from the transaction. No benefits accrue to the company by way of dividend distribution. Thus, section 2(22)(e) of the Act covers only such situations, where the shareholder alone benefits from the loan transaction, because if the company also benefits from the said transaction, it will take the character of a commercial transaction and hence will not qualify to be dividend. In the case of the assessee, by giving and taking financial assistance from each other, both the assessee and the company were benefited and such transactions between them were nothing but commercial IT(SS)A No.60-62 & 73-76/Kol/2011 A.Ys.06-07 to 08-09 and 02-03 to 05-06 Mr. Purushottam Das Mimani: v. DCIT, CC-V, Kol Page 5 transactions and dividend attributable to the shareholder is nothing to do with such business transaction. From the above discussions it can be said that sec. 2(22)(e) of the Act covers only those transactions which benefit the shareholder alone and results in no benefit to the company. On the other hand, if the transaction is mutual by which both sides are benefited, it is undoubtedly outside the purview of provisions of sec. 2(22)(e) of the Act. From the above, it is clear that the loan account differs from current account and, the provisions of section

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2(22)(e) of the Act, being a deeming section, cannot be applied to current account. In such circumstances, we delete the addition and this common issue of assessee's appeals is allowed."

11. We noted that the issue is fully covered in favour of the assessee as the assessee-company neither registered shareholder nor beneficial shareholder in its group concerns, wherein the unsecured loans or deposits was availed by assessee. This being factual position and the issue is being covered by Hon'ble Madras High Court in the case of *M/s. Ennore Cargo Container Terminal P. Ltd.*, supra, and Hon'ble Calcutta High Court in the case of *Pradip Kumar Malhotra*, supra. Hence, we find no infirmity in the order of CIT(A) and hence, the same is affirmed.

12. Coming to assessee's appeal, we noted that the appeal of the assessee in supportive of the order of CIT(A), but only on the point that the CIT(A) cannot give direction to the A.O for reopening of assessment u/s. 251 of the Act. We find that this can be examined by the A.O at the time of taking a decision whether to reopen the assessment or not u/s. 251 of the Act. Hence, both the appeals, that of the assessee and of the Revenue, are dismissed.

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13. In the result, both the appeals filed by the assessee and the Revenue are dismissed.

Order pronounced on 31st July, 2023.

Sd/-
(मंजुनाथ. जी)
(Manjunatha. G)

लेखा सदस्य /Accountant Member

चेन्नई/Chennai, दिनांक/Dated: 31.07.2023.

EDN/-

Sd/-
(महावीर सिंह)
(Mahavir Singh)
उपाध्यक्ष / Vice President

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त/CIT
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF