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IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad 'B' Bench, Hyderabad

BEFORE SHRI LALIET KUMAR, JUDICIAL MEMBER AND
SHRI MADHUSUDAN SAWDIA, ACCOUNTANT MEMBER

आ.अपी.सं / **ITA No.1110/Hyd/2018**
(निर्धारण वर्ष / Assessment Year: 2013-14)

M/s. Agarwal Sponge & Energy Private Limited, Hyderabad. PAN: AAECA8680P	Vs.	Dy. Commissioner of Income Tax, Circle-1(1), Hyderabad.
(Appellant)		(Respondent)
निर्धारिती द्वारा / Assessee by:	Shri Sunil Kumar Jain, C.A.	
राजस्व द्वारा / Revenue by:	Shri Pranav Kumar, CIT-DR	
सुनवाई की तारीख / Date of hearing:	12/08/2024	
घोषणा की तारीख / Pronouncement:	28/08/2024	

आदेश/ORDER

PER MADHUSUDAN SAWDIA, A.M:

This appeal is filed by M/s. Agarwal Sponge & Energy Private Limited, Hyderabad ("the assessee"), feeling aggrieved by the order passed by the Learned Commissioner of Income Tax (Appeals)-I, Hyderabad ("Ld. CIT(A)"), dated 09.01.2018 for the A.Y. 2013-14.

2. The facts of the case in brief are that the assessee was a company engaged in the business of manufacturing of sponge iron lump, filed its return of income for A.Y. 2013-14 on 01.10.2013 declaring loss of Rs.14,61,37,875/- under the normal provisions of the Income Tax Act, 1961 ("the Act"). Further the assessee filed revised return of income on

31.10.2013 declaring loss of Rs.14,95,06,268/- under the normal provisions of the Act. The case of the assessee was selected for scrutiny under CASS and notices u/s. 143(2) and 142(1) of the Act were issued to the assessee. After considering the submissions of the assessee, the Learned Assessing Officer (“Ld. AO”) completed the assessment u/s.143(3) of the Act on 31/03/2016 making addition of Rs.16,68,33,979/- on account of deemed dividend u/s.2(22)(e) of the Act and determining the total income at Rs.1,73,27,711/-. The addition was made by Ld. AO as per his observations under para no.2.1 of his order, which is reproduced as under :

“ 2.1 After careful consideration of the assessee submission, the argument of the assessee is not tenable, on this issue different judicial authorities have expressed diverse views, the jurisdictional HC in the case of M/s Siddeswari Power Generation Pvt Ltd in ITTA No.705,400 & 541 opined that deemed dividend provisions can be applied to the share holder only. The department has contested before the Supreme Court against the case of Siddeswari Power Generation Pvt Ltd. The SLP filed by the department is admitted in the Apex Court vide case No.2805 of 2015.

It is to mention that as per section 2(22)(e), dividend includes any payment by a company, not being a company in which the public are substantially interested, of any sum by way of advance or loan to any concern in which such share holder is a member or a partner and in which he has a substantial interest or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which company in either case possesses accumulated profits.

A plain reading of the section, it is clear that any payment by a company by way of advance or loan to any concern attract the provisions of deemed dividend. In the case of the assessee company, it obtained a loan of Rs. 46,29,18,427/-from M/s Agarwal Industries Pvt Ltd in which M/s Agarwal Agri & Steel Pvt Ltd is the common share holder and is having more than 10% share holding. Apart from this M/s Agarwal Industries Pvt Ltd has accumulated profits of Rs.16,68,33,979/-during the financial year 2012-13. Considering the facts of the case and also the provisions of section 2(22)(e), an amount of Rs.

16,68,33,979/- is treated as deemed dividend to the extent of accumulated profits of M/s Agarwal Industries Pvt Ltd in the hands of the assessee company and added to the income returned. In view of the above additions made, the assessee has concealed the particulars of income or furnished the inaccurate particulars of income, hence penalty proceedings u/s 271(1)(c) are separately initiated.”

3. Aggrieved by the order of Ld. AO the assessee filed appeal before the Ld. CIT(A), who dismissed the appeal of the assessee as per his observation under para no.6.3 of his order, which is reproduced as under :

“ 6.3 The submissions of the appellant and the assessment order have been carefully considered. The appellant has taken interest free loan from its related company where it is substantially related in shareholding. The Assessing Officer has raised the issue of deemed dividend in this case. The Assessing Officer found that appellant received Rs.46,29,18,427/- from M/s. Agarwal Industries Pvt Ltd which should have been termed as Dividend. However, the Assessing Officer is correctly invoked the provisions of Section 2(2)(e) where the appellant is not paying interest and has majority shares.

It is pertinent point out, the judicial judgment in the case of M/s.Bhaumik Colour Pvt ltd and M/s. Ankitech Private Limited. The issue whether deemed dividend is taxable in the hands of the concern in which the shareholders of the lender company has substantial interest or in the hands of such common shareholder has been a matter of debate before the courts. The Special Bench of the Mumbai Tribunal in the case of M/s. Bhaumik Colour (P) Ltd held that in the absence of indication in Section 2(22)(e) of the Act to extend the legal fiction to a case of loan or advance to a non-fiction to a case of loan or advance to a non-shareholder, loan or advance cannot be taxed as deemed dividend in the hands of such non- shareholder. The decision of the Special Bench has been affirmed by the Bombay High Court in the case of Universal Medicare (P) Ltd and the Delhi High Court in the case of M/s. Ankitech Private limited. However, the Supreme Court put at rest this controversy in the case of M/s. Ankitech Private Limited and held that deemed dividend is not taxable in the hands of a loan recipient concern, if such concern is not a shareholder of the lender company. It is taxable in the hands of common shareholders having substantial interest in both the entries. The Supreme Court decision has provided clarity on the issue.

In this present case, the M/s. Agarwal Industries Pvt Ltd and M/s.Agarwal Agri & Steel Pvt ltd are two shareholders in appellant M/s.Agarwal sponge & Energy Private Limited. The loan has been taken by the M/s. Agarwal Industries Pvt ltd. Hence, deemed dividend has to be worked out in case of the appellant as there are common shareholders. In the appellant company (M/s. Agarwal Sponge & Energy Pvt ltd), loan receipt has been from M/s. Agarwal Industries Ltd, in which it owns 18.29% of shares, also another major

shareholder in the appellant company (M/s. Agarwal Sponge & Energy Pvt Ltd) is M/s. Agarwal Agri & Steel Pvt Ltd, who owns 37.5% of shareholding in the appellant company. It is pertinent to also add, that the M/s. Agarwal Agri & Steel Pvt Ltd is as 20.68% of shareholding in M/s. Agarwal Industries Pvt Ltd. All the companies are group companies and having common shareholdings. Hence, I feel the Assessing Officer is correct in invoking Section 2(22)(e).

*In light of the above, the addition made by the Assessing Officer is upheld.
-Ground Dismissed.”*

4. Aggrieved by the order of Ld. CIT(A) the assessee is in appeal before us. The solitary ground raised by the Ld. AR is related to addition of Rs.16,68,33,979/- on account of deemed dividend u/s.2(22)(e) of the Act. The Ld. AR submitted that the assessee had taken a loan of Rs.46,29,18,427/- from M/s. Agarwal Industries Private Limited (“Lendor”). He further submitted that the assessee is not a shareholder of the lender. However, the revenue authorities have made an addition of Rs.16,68,33,979/- on account of deemed dividend u/s.2(22)(e) of the Act in the hands of the assessee. The Ld. AR also submitted that since the assessee is not a shareholder of the lender, the provisions of section 2(22)(e) is not applicable to the assessee with regard to loans taken from the lender. In support of their argument, the Ld. AR relied on the decision of Hon’ble Delhi High Court in ITA No.462 of 2009 & Others in the case of CIT Vs. Ankitech Pvt. Ltd. & others and Hon’ble Bombay High Court in the case of CIT Vs. Universal Medicare Pvt. Ltd. Dt.22.03.2010, in which it has been held that addition on account of deemed dividend u/s.2(22)(e) of the Act can be made in the hands of shareholder only.

5. Per contra, the Ld. DR relied on the decision of lower authorities and requested the bench to sustain the addition made by the revenue

authorities. The Ld. DR further submitted that M/s. Agarwal Agri & Steel Private Limited is holding 20.69% of shares of lender and 37.57% shares of assessee. Since M/s. Agarwal Agri & Steel Private Limited was holding more than 10% of shares of both lender and assessee, the lender and assessee got automatically related and therefore the loan taken by the assessee from the lender is covered u/s. 2(22)(e) of the Act.

6. We have heard the rival contentions and also gone through the records in the light of submissions made by either side. As per the submission of the Ld. AR the assessee had taken a loan of Rs.46,29,18,427/- from lender in which the assessee is not a shareholder. However, the revenue authorities have made an addition of Rs.16,68,33,979/- on account of deemed dividend u/s.2(22)(e) of the Act in the hands of the assessee. As per the submission of the Ld. DR M/s. Agarwal Agri & Steel Private Limited is holding 20.69% of shares of lender and 37.57% shares of assessee. Since M/s. Agarwal Agri & Steel Private Limited was holding more than 10% of shares of both lender and assessee, the lender and assessee got automatically related and therefore the loan taken by the assessee from the lender is covered u/s. 2(22)(e) of the Act.

7. We have gone through the decisions of Hon'ble Delhi High Court in the case of CIT Vs. Ankitech Pvt. Ltd. & others (Supra) and Hon'ble Bombay High Court in the case of CIT Vs. Universal Medicare Pvt. Ltd.(Supra). To have a better understanding of the issue, it is also relevant to go through section 2(22)(e) of the Act, the same is reproduced as under :

“(22) "dividend" includes—

(a)

(b)

(c)

(d)

(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 ;”*

8. From the perusal of section 2(22)(e) and the decisions of Hon’ble Delhi High Court in the case of CIT Vs. Ankitech Pvt. Ltd. & others (Supra) and Hon’ble Bombay High Court in the case of CIT Vs. Universal Medicare Pvt. Ltd.(Supra), it is abundantly clear that the deemed dividend u/s. 2(22)(e) of the Act will be liable to be taxed in the hands of the shareholder only. The contention of the Ld. DR that since M/s. Agarwal Agri & Steel Private Limited was holding more than 10% of shares of both lender and assessee, the lender and assessee got automatically related and therefore the loan taken by the assessee from the lender is covered u/s. 2(22)(e) of the Act, is not correct. Therefore, we are of the considered opinion that the addition of Rs.16,68,33,979/- made by the Ld. AO on account of deemed dividend u/s.2(22)(e) of the Act in the hands of the assessee is required to be deleted. Therefore, we direct the Ld. AO to delete the addition of Rs.16,68,33,979/- made on account of deemed dividend u/s.2(22)(e) of the Act. Accordingly, we allow the appeal of the assessee.

9. In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 28th Aug., 2024.

Sd/-

(LALIET KUMAR)
JUDICIAL MEMBER

Sd/-

(MADHUSUDAN SAWDIA)
ACCOUNTANT MEMBER

Hyderabad.

Dated: 28.08.2024.

** Reddy gp*

Copy of the Order forwarded to :

1. M/s. Agarwal Sponge & Energy Pvt. Ltd., 15-1-52/1, Jagdish Nivas, Old Feelkhana, Hyderabad.
2. DCIT, Circle 1(1), Hyderabad.
3. Pr.CIT-1, Hyderabad.
4. DR, ITAT, Hyderabad.
5. Guard file.

BY ORDER,