

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

Before Shri Waseem Ahmed, Accountant Member and
Shri Soundararajan K., Judicial Member

ITA No. 139/Coch/2023
(Assessment Year: 2012-13)

Life Span Infrastructure (India) Pvt. Ltd. TC-4/2554(3), Indraprastham Pattom P.O. Kowdiar Road Trivandrum 695004 [PAN: AABCL7856M]	vs.	The Income Tax Officer Ward - 2(5), Trivandrum
(Appellant)		(Respondent)

Appellant by:	Shri R. Krishnan, CA
Respondent by:	Smt. Girly Albert, Sr. D.R.

Date of Hearing:	23.09.2024
Date of Pronouncement:	26.09.2024

ORDER

Per Bench

This appeal filed by the assessee is directed against the order of the National Faceless Appeal Centre, Delhi [CIT(A)] dated 17.12.2022 for Assessment Year (AY)2012-13.

2. The only issue raised by the assessee is that the learned CIT(A) erred in confirming the addition of Rs. 9,50,000/- as deemed dividend u/s 2(22)(e) of the Income Tax Act, 1961 (the Act).

3. Briefly stated facts are that the assessee in the instant case is a private limited company which has taken a loan from a company, namely M/s Nikunjam

Constructions Pvt. Ltd. amounting to Rs. 9,50,000/- only. According to the Revenue the Directors of the assessee company also have substantial interest in the company, Nikunjam Constructions Pvt. Ltd. Thus, accordingly the Revenue treated the amount of loan received by the assessee from Nikunjam Constructions Pvt. Ltd. as deemed dividend u/s 2(22)(e) of the Act and added to the total income of the assessee.

4. Aggrieved assessee preferred an appeal to the learned CIT(A) who has confirmed the order of the Assessing Officer (AO) by observing as under: -

“5.3 I have carefully considered the facts of the case. The amount received by the appellant from M/s Nikunjam Constructions Pvt Ltd was not in connection with any business transaction. M/s Nikunjam Constructions Pvt Ltd had accumulated profit. As per the definition given in the section 2(22)(e) of the Act, it is not necessary that the appellant is the shareholder of M/s Nikunjam Constructions. As per the definition, even the receipt of advance by the appellant company would attract deeming provision, due to the common managing director as he was beneficial owner of shares in M/s Nikunjam Constructions, and he had substantial interest in the appellant company. Thus, even though the appellant was not a shareholder of M/s Nikunjam Constructions Pvt Ltd and had not received any dividend, the advance received from M/s Nikunjam Constructions out of the accumulated profits, is hit by the deeming provision under section 2(22)(e) of the Act. As per judicial decisions, exceptions to this rule may be available to cases where there are business transactions between two entities. However, in the appellant's case, as there was no business transaction involved, the same did not fall under the exception. The grounds raised are rejected”

5. Being aggrieved by the order of the learned CIT(A) the assessee is in appeal before us.

6. The learned A.R. before us contended that the assessee was not a registered shareholder of the company, namely Nikunjam Constructions Pvt. Ltd. According to the learned A.R. this fact was also accepted by the learned CIT(A) in his order. Accordingly, the learned A.R. contended that the provision of deemed dividend u/s 2(22)(e) cannot be applied in view of the fact that the assessee is not a registered shareholder.

7. On the other hand, the learned Sr. DR vehemently supported the order of the authorities below.

8. We have heard the rival contentions of both the parties and perused the materials available on record. It is the admitted position as arising from the order of the learned CIT(A) that the assessee is not a registered shareholder in the company named Nikunjam Constructions Pvt. Ltd. This fact could also be verified from the findings of the learned CIT(A) reproduced in the preceding paragraph. Thus, the assessee is not a shareholder and therefore the provisions of section 2(22)(e) of the Act cannot be applied. In holding so, we draw support and guidance from the order of the Ahmadabad Tribunal in the case of Amit Intertrade Pvt. Ltd. vs. DCIT in ITA No. 2259/Ahd/2016 vide order dated 28.02.2022. The relevant facts are reproduced as under: -

“8. We have heard the rival contentions of both the parties and perused the materials available on record. Admittedly, the shareholders of the assessee company namely Shri Jateen Gupta and Shri Amit Gupta are holding 50% shares in Assessee Company and also holding more than 20% shares in M/S JP Iscon Ltd. Likewise, the assessee has shown unsecured from impugned party in balance sheet for the year ITA no.2259/AHD/2016 With C.O.No.162/Ahd/2016 Asstt. Year 2007-08 5 under consideration. Accordingly the AO in the case on hand has treated the amount of Rs. 8,94,41,125.00 as deemed dividend in the hands of the assessee on the reasoning that the transactions of advancing loan as discussed above falls within the purview of the provisions of section (2)(22)(e) of the Act. However, the learned CIT (A) was pleased to delete the addition made by the AO for the reasons as discussed in the aforesaid paragraphs.

8.1 The 1st question before us arises whether it is sine qua non that the assessee company, which is not a registered shareholder, obtains any loan from companies in which its shareholder also holding substantial share may brought under the scanner of deemed dividend. In this regard we find pertinent to refer the provisions of section 2(22)(e) of the Act which reads as under:

(22) "dividend" includes—

(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 ;

8.2 On perusal of above provision what inferred is that the provision of section 2(22)(e) of the Act can only be invoked in case of shareholder who is holding substantial interest. The provision of section 2(22)(e) of the Act nowhere talks about taxing an entity/company who is not a shareholder holder in lender company but shareholder of such company holding substantial share in lender company. In this regard we find support and guidance from the judgment of Hon'ble Jurisdictional High court in Tax appeal no. 891 of 2016 in case of PCIT vs. Mahavir Inductomelt Pvt Ltd where in similar facts the Hon'ble court held as under:

"50. Identical question came to be considered by the Division Bench of this Court in Tax Appeal No. 253 of 2015. After considering the decision of the Bombay High Court in the case of CIT vs. Impact Containers Private Limited &ors rendered in I TA No. 114 of 2012 and the decision of the Delhi High Court in the case of CIT vs. Ankitech Pvt Ltd reported in 340 ITR 14 (Del) and on interpreting Section 2(22)(e), in para 4 has observed and held as under:

ITA no.2259/AHD/2016 With C.O.No.162/Ahd/2016 Asstt. Year 2007-08 6 "4.Shri Bhatt, learned Counsel appearing on behalf of the revenue has as such tried to justify the decision of the Delhi Court in the case of AnkitechPvt. Ltd. (Supra) and has vehemently submitted that the Delhi High Court has not considered the third category i.e. shareholder in the assessee Company holding not less than 10% of the voting power in the Company from whom the loan or advance is taken. However, on considering Section 2(22)(e) of the Act, we are not at all impressed with the aforesaid. If the contention on behalf of the revenue is accepted, in that case, it will be creating the third category / class, which is not permissible.

What is provided under Section 2(22)(e) of the Act seems to be that the assessee company must be a shareholder in the Company from whom the loan or advance has been taken and should be holding not less than 10% of the voting power. It does not provide that any shareholder in the assessee- Company who had taken any loan or advance from another Company in which such shareholder is also a shareholder having substantial interest, Section 2(22)(e) of the act may be applicable.

5.1. Considering the aforesaid decision of the Division Bench of this Court and the facts narrated herein above, more particularly, considering the fact that the assessee was not shareholder of Mahavir Rolling Mills Pvt Ltd to whom loan was given, it cannot be said that the learned Tribunal has committed any err or in deleting the addition made by the Assessing Officer on deemed dividend."

8.3 Coming to the case on hand, admittedly the assessee company is not holding any shares or rights of M/s. JP Iscon Ltd. Thus considering the above discussion and judgment of Hon'ble jurisdictional court in case of Mahavir Inductomelt (Supra), the AO was not justified in invoking the provision of section 2(22)(e) of the Act in its case. The learned CIT(A) rightly deleted the addition made by the AO.

8.4 At this juncture, it is also important to deal with the contention raised by the learned DR at the time of hearing as discussed above after referring to the judgment of Hon'ble Supreme Court in the case of Gopal and Sons (HUF) Vs. CIT reported in 77 Taxmann.com 71. In Gopal And Sons (HUF) v. CIT [2017] 391 ITR 1/77 taxmann.com 71/245 Taxman 48 (SC) the assessee a HUF received a loan from a company in which it had 37.12% of the total shareholdings. The shares were issued in the name of Karta and in the return filed to the ROC it was stated by the company that the registered ownership was in the name of Karta and the HUF was the beneficial shareholder. The apex court held that the payment was made to the HUF which was covered by the term 'concern' given in Explanation 3 to section 2(22). The karta was a member of the HUF and he had not less than 20% of the income of the HUF as his entitlement. The apex court, accordingly, held that the amount of loan given by the company to the HUF was taxable as deemed dividend.

ITA no.2259/AHD/2016 With C.O.No.162/Ahd/2016 Asstt. Year 2007-08 7 8.5 However, we note that in the case which arose before the Madras High Court in CIT v. T. Abdul Wahid & Co. [2020] 119 taxmann.com 497/275 Taxman 101/428 ITR 456 the facts were that the assessee, a partnership firm, received unsecured loan from a company and the Assessing Officer opined that one of partners of assessee-firm, being also a shareholder in the said company, holding 26.25 per cent shares had substantial interest in the firm and, consequently, concept of deemed dividend under section 2(22)(e) of the Act would apply. The High Court, on appeal by the Revenue, held that since payment had been made to the assessee, a partnership firm and assessee was not a shareholder in company, it was neither a loan nor an advance, but a deferred liability and, thus, section 2(22) (e) of the Act would not apply.

8.6 The decision of the Supreme Court in the case of Gopal and Sons (HUF) v. CIT [2017] 77 taxmann.com 71/245 Taxman 48/391 ITR 1 was distinguished by the Madras High Court after observing that "as in the case before the Supreme Court the assessee was the beneficial shareholder, whereas on facts, it was not so, in the assessee's case. Admittedly, the assessee in the case on hand was neither the beneficial owner of the shares nor registered owners of the shares. Accordingly, in our humble understanding, the principles laid down by the Hon'ble Supreme Court in the case of Gopal and Sons (HUF) Vs. CIT reported in 77 Taxmann.com 71 are not applicable in the given facts and circumstances. Thus the ground of appeal raised by the Revenue is hereby dismissed.

8.7 In the result appeal of the Revenue is dismissed.”

9. In view of the above we hold that the provisions of section 2(22)(e) cannot be applied in the given set of facts as the assessee on hand is not a registered shareholder of the company, namely, Nikunjam Constructions Pvt. Ltd. Hence, the ground of appeal of the assessee is hereby allowed.

10. In the result, the appeal filed by the assessee is allowed.

Order pronounced on 26th September, 2024 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963.

Sd/-
(Soundararajan K)
Judicial Member

Sd/-
(Waseem Ahmed)
Accountant Member

Cochin, Dated: 26th September, 2024

n.p.

Copy to:

1. The Appellant
2. The Respondent
3. The Pr. CIT concerned
4. The Sr. DR, ITAT, Cochin
5. Guard File

By Order

Assistant Registrar
ITAT, Cochin