

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'G' : NEW DELHI)**

**BEFORE SHRI J.S. REDDY, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.2365/Del./2013
(ASSESSMENT YEAR : 2009-10)**

DCIT, Circle 8 (1), vs. M/s. Seaview Developers Pvt. Ltd.,
New Delhi. Basement, 6 Community Centre,
Saket,
New Delhi – 110 017.

(PAN : AAJCS4143C)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Ravi Sharma, Advocate
REVENUE BY : Smt. Paramita M. Bishwash, CIT DR

Date of Hearing : 30.05.2016

Date of Order : 31.05.2016

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, DCIT, Circle 8 (1), New Delhi (hereinafter referred to as 'the revenue'), by filing the present appeal sought to set aside the impugned order dated 03.01.2013 passed by the Commissioner of Income-tax (Appeals)-XI, New Delhi qua the Assessment Year 2009-10 on the grounds inter alia that :-

“1. The Id. CIT (A) has erred in law and on facts in deleting the addition of Rs.42,56,18,705/- u/s 2(22)(e) of the Income Tax Act, 1961.

2. The appellant craves leave to add, amend, alter, forego or delete any ground of appeal at or before the time of hearing.”

2. Briefly stated the facts of this case are : during the scrutiny proceedings, notice under section 143(2) and 142(1) of the Income-tax Act, 1961 (for short ‘the Act’) along with questionnaire were issued to the assessee and in response thereto, Shri Manoj Sarangi, CA/AR put in appearance from time to time, filed requisite details and necessary evidence. Assessee is into the business of real estate development and has received advance from the companies viz. (i) Shantiniketan Properties Ltd. – Rs.5,55,00,000/-; (ii) Unitech Infracon Ltd. – Rs.7,59,70,870/-; (iii) Unitech Developers and Projects Ltd. – Rs.23,29,05,028/-; (iv) Unitech Realty Projects Ltd. – Rs.3,01,00,000/-; and (v) Unitech Hi-Tech Structures Ltd. – Rs.7,23,00,000/-. From the balance-sheet ending 31.03.2010, it is noticed by AO that some related party disclosures had been made qua which assessee was called upon to furnish necessary information. Assessee filed detail of group structure showing aforesaid five companies along with assessee company itself, 60% shares were held by six different companies.

3. AO noticed that 60% in all the aforesaid five companies from whom advances were received by the assessee company,

belongs to Candor Investments Ltd. / Unitech Corporate Parks Plc. Similarly, in case of assessee, 60% stake is held by M/s. Deterrel Estates Limited which is 100% subsidiary of Candor Investments Ltd. which is in turn 100% subsidiary of M/s. Unitech Corporate Parks Plc.

4. Assessee was called upon to explain as to why the intermediate layers be not ignored and in view of the actual holding and effective control by a single entity from whom advances have been received and the amount received by assessee company as advance be not treated as deemed dividend u/s 2(22)(e) of the Act. Assessee filed detailed reply.

5. Finding the explanation filed by the assessee not tenable, AO treated the amount received by the assessee company as advance as deemed dividend in its hand to the extent accumulated profit available with the company giving advance and computed the deemed dividend to the tune of Rs.42,56,18,705/- and made the addition thereof to the total income of the assessee.

6. Assessee carried the matter before the Id. CIT (A) who has deleted the addition by allowing the appeal. Feeling aggrieved, the revenue came up in appeal before the Tribunal by way of filing the present appeal.

7. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

8. Ld. DR for the revenue to challenge the impugned order relied upon the order passed by AO. However, on the other hand, Id. AR for the assessee contended that the issue involved in this case is duly covered by the cases cited as **Commission of Income-tax vs. Ankitech (P.) Ltd. 199 Taxman 341 (Delhi) and ACIT vs. Bhaumik Colour (P.) Ltd. (SB) 120 TTJ 865 (Mumbai).**

9. AO treated the amount received by the assessee company as advance from five companies as deemed dividend to the extent accumulated profit is available with the company giving advance by invoking the provisions contained u/s 2(22)(e) of the Act primarily on the grounds inter alia that 60% of the actual and beneficial shares in all the five companies in question who have given advances to the assessee company constitute a single entity i.e. M/s. Unitech Corporate Parks Plc.; that advances were given to the aforesaid five companies to a company in which the company actually and beneficially holding 60% of its share; that the five companies that gave the advances to the assessee company did not have accumulated benefits as per their balance sheet.

10. However, Id. CIT (A) overturned the findings returned by the AO by holding that the loan and money advanced from the fellow subsidiaries does not fall within the purview of section 2(22)(e) of the Act as the assessee is not a shareholder in any of the aforesaid five companies.

11. Now, the sole question arises for determination in this case is, **“as to whether the loans and advances/money advanced by five fellow subsidiaries to the assessee company is to be treated as deemed dividend and as such taxable in the hands of the assessee company?”**

12. Identical issue has come up before the Special Bench / Third Member order passed in ITAT, Mumbai Bench ‘E’ in **ACIT vs. Bhaumik Colour (P.) Ltd. (SB)** (supra) which has decided the issue in favour of the assessee by holding that the intention of the legislature is to tax dividend only in hands of the shareholder and not in the hands of the concern.

13. For facility of reference, provisions contained u/s 2(22)(e) of the Act are reproduced as under :-

“2

(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”

14. Operative part of the decision in **ACIT vs. Bhaumik Colour**

(P.) Ltd. (SB) (supra) is reproduced as under :-

“Section 2(22) of the Income-tax Act, 1961 - Deemed dividend - Assessment year 1997-98 - Whether deemed dividend can be assessed only in hands of a person who is a shareholder of lender company and not in hands of a person other than a shareholder - Held, yes - Whether expression 'shareholder ' referred to in section 2(22)(e) refers to both a registered shareholder and beneficial shareholder and, thus, if a person is a registered shareholder but not beneficial shareholder then provisions of section 2(22)(e) would not apply and similarly if a person is a beneficial shareholder but not a registered shareholder then also provisions of section 2(22)(e) would not apply - Held, yes - Whether deeming provision of section 2(22)(e) as it applies to case of loans or advances by a company to a concern in which its shareholder has substantial interest, is based on presumption that loan or advances would ultimately be made available to shareholders of company giving loan or advance, and, therefore, intention of Legislature is to tax dividend only in hands of shareholder and not in hands of concern - Held, yes

15. Undisputedly, assessee company has received advances from the aforesaid five fellow subsidiaries in the previous year 2008-09 duly detailed in preceding para no.2. It is also not in dispute that to invoke the provisions contained u/s 2(22)(e), two conditions precedent are required to be fulfilled; one : the shareholder should be a registered share holder; and two : the shareholder should also been beneficial owner of the shares. In other words, the intention of the legislature in enacting provisions contained u/s 2(22)(e) of the Act is to tax dividend in the hands of shareholders.

16. Identical issue has come up before Hon'ble Bombay High Court in case cited as **Commission of Income-tax vs. Universal Medicare (P.) Ltd. 190 Taxman 144 (Bombay)** in which Hon'ble High Court examined the scope and applicability of section 2(22)(e) of the Act by holding as under :-

“8. Clause (e) of section 2(22) is not artistically worded. For facility of exposition, the contents can be broken down for analysis: (i) Clause (e) applies to any payment by a company not being a company in which the public is substantially interested of any sum, whether as representing a part of the assets of the company or otherwise made after the 31 May, 1987; (ii) Clause (e) covers a payment made by way of a loan or advance to (a) a shareholder, being a 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 (b) any concern in which such shareholder is a member or a partner and in which he has a substantial interest;

(iii) Clause (e) also includes in its purview any payment made by a company on behalf of or for the individual benefit, of any such shareholder; (iv) Clause (e) will apply to the extent to which the company, in either case, possesses accumulated profits. The remaining part of the provision is not material for the purposes of this appeal.

By providing an inclusive definition of the expression 'dividend', section 2(22) brings within its purview items which may not ordinarily constitute the payment of dividend. Parliament has expanded the ambit of the expression 'dividend' by providing an inclusive definition.”

17. Now, advertent to the case at hand in the light of the provisions contained u/s 2(22)(e) and the ratio of the judgments **Commission of Income-tax vs. Ankitech (P.) Ltd., ACIT vs. Bhaumik Colour (P.) Ltd. and Commission of Income-tax vs. Universal Medicare (P.) Ltd.** (supra), we are of the considered view that loans and advances made by five fellow subsidiaries cannot be treated as deemed dividend taxable in the hands of the assessee company for the followings reason :-

- (i) that no doubt, the payment / advance has been made by the aforesaid five companies to the assessee company but undisputedly the assessee company is not a shareholder in any of the aforesaid five companies;

- (ii) that advance from the fellow subsidiaries cannot be treated as deemed dividend in the hands of the assessee company which is neither a shareholder of fellow subsidiaries nor the aforesaid fellow subsidiaries / five companies have advanced any money to any concern in which assessee company has any substantial interest;
- (iii) that provisions contained u/s 2(22)(e) can only be invoked when the payment is made to a shareholder, but in the instant case undisputedly assessee company is not a shareholder in any of the fellow subsidiaries;
- (iv) that none of the aforesaid five companies which have made the advances to the assessee company is a company in which public is substantially interested; that in the instant case, payment has not been made to a person who is a shareholder;
- (v) that ITAT, Mumbai Special Bench in **ACIT vs. Bhaumik Colour (P.) Ltd. (SB)** (supra) held that the requirement to invoke provisions u/s 2(22)(e) is not merely holding a beneficial interest in the shares but it should be registered shareholder, in other words,

shareholder should be both registered as well as beneficial shareholder;

- (vi) that in the instant case, money has flown/advanced to holding company by the subsidiary companies and not vice-versa whereas provisions u/s 2(22)(e) can be invoked when money has been flown/advanced by holding company to the subsidiary company;
- (vii) that conditions specified in the provisions contained u/s 2(22)(e) for treating the loans and advances as deemed dividend are established but this deemed dividend can be taxed in the hands of shareholder only and not the assessee company itself.

18. So in view of what has been discussed above, we find no ground to interfere into the findings returned by Id. CIT (A) nor Id. DR has brought on record any decision of Hon'ble Supreme Court and Hon'ble High Court taking divergent view, hence, we hereby dismiss the present appeal filed by the revenue.

Order pronounced in open court on this 31st day of May, 2016.

**Sd/-
(J.S. REDDY)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 31st day of May, 2016
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT-XI, New Delhi.
- 5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.