

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

**BEFORE SHRI G.D. AGRAWAL, VICE PRESIDENT
and
SHRI A.T. VARKEY, JUDICIAL MEMBER**

**ITA No.2766/Del./2012
(ASSESSMENT YEAR : 2008-09)**

DCIT, Circle 8 (1),
New Delhi.

vs.

M/s. Sindhu Holdings Ltd,
17, Vasant Enclave,
Rao Tula Ram Marg,
New Delhi – 110 057.

(PAN : AAACS2545P)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : S/Shri Salil Kapoor & Sanat Kapoor, Advocates
REVENUE BY : Shri B.R.R. Kumar, Senior DR

ORDER

PER A.T. VARKEY, JUDICIAL MEMBER :

This appeal, at the instance of the revenue, is filed against the order of the CIT (Appeals)-XI, New Delhi dated 14.03.2012 for the assessment year 2008-09.

2. The solitary ground taken by the revenue is against the deletion of addition of Rs.2,70,00,000/- made by the AO under section 2(22)(e) of the Income-tax Act, 1961 (hereinafter 'the Act').

3. The assessee is engaged in the business of media operation (publication of newspapers and maintenance and retrieval of trolleys at airport along with

advertisement rights thereof), transportation, finance operations, rental income and petrol pump. During the year under consideration, the return of income declaring total income of Rs.1,27,80,733/- was filed on 29.09.2008. Thereafter, the assessee revised its return on 29.03.2010 declaring total income of Rs.1,27,69,310/-. The case was processed u/s 143 (1) of the Act and subsequently, the same was selected for scrutiny. During the course of hearing, the AO noticed certain facts and based on that, a show cause notice dated 09.12.2010 was issued. The assessee filed the reply to the said notice. After considering the reply of the assessee, the AO found certain claims of the assessee not tenable.

3.1 Out of the those certain claims, one of the issues was against the addition of Rs.2,70,00,000/- under section 2(22)(e) of the Act, which is the dispute in the present appeal. The facts relating to this issue are as follows.

3.2 The AO vide show cause notice dated 09.12.2010 asked the assessee to explain as to why loan of Rs.1.50 crores taken from M/s. Sindhu Trade Links Ltd. (hereinafter 'STLL') and loan of Rs.1.20 crores taken from M/s. Parnami Habitat Developers Ltd. (hereinafter 'PHDL') be not treated as deemed dividend in view of the facts that directors of the assessee company are substantially interested in the said companies and also some of the shareholders are common in both the companies. The AO observed that out of five directors, Sindhu and his family members itself controls nearly 59%

shareholdings of the STLL and in this situation, it could not be accepted that the STLL was a public company where public was substantially interested. He further observed that the percentage of shares of other directors and their family members would again go on to prove that it was not a company in which public are substantially interested, rather it was a company which was closely held by the promoter Mr. Sindhu and his family members and therefore the saving clause (ii) of section 2(22) of the Act would not be applicable and come to the rescue of the Assessee Company insofar as invoking section 2(22) (e) was concerned. Likewise, in the case of PHDL also, the AO found that as per shareholdings patterns of PHDL as on 31.03.2008, more than 50% shares were held by Mr. Sindhu and their family members/associates. According to the AO, the onus was on the assessee to prove that STLL was a widely held public limited company in which the public were substantially interested and the onus was also on the assessee company that the shares of the STLL were widely traded and its shares were available in the open market for purchase and sale by any common man/person; and held that the assessee failed to discharge its onus and the AO countered the submission of the assessee that the STLL was an NBFC and therefore the deeming provision of section 2(22)(e) would not be applicable, by giving following reasons:-

“The Income Tax Act provides certain exceptions with the respect to the provision of deemed dividend. This has been laid down in saving clause (ii) section 2(22) of the IT Act, which be reproduced herewith -

"but "dividend" does not include-

(ii) any advance or loan made to a shareholder [or 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.”

But so far as this assessee is concerned, it has failed to substantiate that the transactions by the STLL in the form of advances or loans were “in the ordinary course of its business”. The onus was cast on the assessee company to substantiate that the loans and advances received by it from the group company or associates company (STLL), in which common directors are beneficial share holders, were in the ordinary course of business i.e. advancing of loans & advances on Interest of the payer company.

Same is the case of PHDL. The assessee has failed to prove that the advances were given in the normal course of business.

In view of discussions and reasons given above, the two fold submissions of the AR stands negated and controverted and the two saving clause will not be of any help to the assessee as the same is not applicable in this case. Further why the provisions of deemed dividend will be applicable, in the present case, is being discussed further on merit of the case and Transactions."

Accordingly, relying on various authorities and factual matrix, the AO held that the advances/loans received by the assessee were liable to be taxed in the hands of the assessee as deemed dividend as per section 2(22)(e) r.w.s. 56 and section 115O of the Act and Rs.2.70 crores was added back to the total income of the assessee.

3.4 Aggrieved, the assessee went in appeal before the Id. CIT (A) who deleted the addition by observing as under :-

“Ground No.4, 5, 6 & 7 : Addition of Rs.2.70 crores u/s 2(22)(e) of the Income Tax Act, 1961 being loans received from associated companies.

a. The AO made the above addition on account of loans received from two companies, holding them to be associated companies as well as companies in which public are not substantially interested. The AO has held that even though the companies were listed companies they were not ones in which the public were substantially since the shares were not traded on the stock exchange and/or the number of shareholders are limited. The AO seeks to lift the 'corporate veil' to uncover the mechanics of this transaction. The major part of the assessment order deals with this addition, however after a careful perusal, reproducing the same was not found called for since the material issue is whether section 2(22)(e) of the Act is applicable in this case.

b. The appellant has submitted extensive arguments on this issue. Again, the crucial issue is found to be whether the lender companies are ones in which the public are substantially interested.

Section 2(22)(e): Not applicable to widely held Companies:

Section 2(22)(e) uses the words: any payment by a company "not being a company in which the public are substantially interested" meaning thereby that Section is applicable only to companies which are commonly known as closely held companies.

Section 2(18) of the Act reads as under:

"(18) "company in which the public are substantially interested"-a company is said to be a company in which the public are substantially interested-

(b) if it is a company which is not a private company as defined in the Companies Act, 1956 (1 of 1956), and the conditions specified either in item (A) or in item (B) are fulfilled, namely:-

shares in the company (not being shares entitled to a fixed rate of dividend whether with or without a further right to participate in profits) were, as on the last day of the relevant previous year, listed in a recognized stock exchange in India in accordance with the Securities Contracts (Regulation) Act, 1956 (42 of 1956), and any rules made there under;"

It was vehemently argued that these conditions are fulfilled by the lender companies and hence they are companies in which the public are substantially interested, and hence the deeming provisions of section 2(22)(e) of the Act cannot apply to the loans in question.

c. The issue has been carefully perused, and the AO's action in not considering the lender companies as those in which the public are substantially interested is found incorrect. In fact what is relevant to this issue is quoted in the assessment order itself as, "it will be well to recall

the words of Rowlatt J in *Cape Brandy Syndicate v. Inland Revenue Commissioners* [1921] 1 KB 64 (KB) at page 71, that: *".....in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used"*. Even while quoting this in the assessment order the AO seeks to go beyond the intention of the Act. Especially in deeming provisions. the interpretation cannot be stretched to the disadvantage of assesseees. In this case the AO was not required to go beyond the definition in section 2(18) of the Act. Even the plethora of case laws quoted by the AO are found wanting on relevance to the present issue. The addition of Rs.2.70 crores on account of deemed dividend is therefore deleted. This ground is ruled in favour of the appellant."

4. The revenue, being aggrieved, is in appeal before us on the aforesaid issue.

5. Ld. DR relied on the order of the Assessing Officer and submitted that loan of Rs.1.50 crores taken from M/s. Sindhu Trade Links Ltd. (STLL) and loan of Rs.1.20 crores taken from M/s. Parnami Habitat Developers Ltd. (PHDL) was rightly treated as deemed dividend in view of the facts that directors of the assessee company are substantially interested in the said company and also some of the shareholders are common in both the companies. He further submitted that out of five directors, Sindhu and his family members itself controls nearly 59% shareholdings of the STLL and in this scenario, it could not be accepted that the STLL was a public company where public was substantially interested. He further submitted that the percentage of shares of other directors and their family members would again go on to prove that it was not a company in which public are substantially interested, rather it was a company which was closely held by the promoter

Mr. Sindhu and his family members and therefore the saving clause (ii) of section 2(22) of the Act would not be applicable and come to the rescue of the Assessee Company insofar as invoking section 2(22) (e) was concerned. The Id. DR submitted that likewise, in the case of PHDL also, a perusal of the shareholdings patterns of this company as on 31.03.2008 will reveal that more than 50% shares were held by Mr. Sindhu and their family members/associates and according to him, the assessee failed to prove the onus that STLL was a widely held public limited company in which the public were substantially interested, and that the shares of the STLL were widely traded and its shares were available in the open market for purchase and sale by any common man/person. He also submitted that the assessee has failed to prove that the STLL was an NBFC, therefore, the deeming provision of section 2(22)(e) would be applicable. He, therefore, submitted that the loans are nothing but deemed dividend and is liable to be taxed in the hands of the assessee and in this regard, he made reference to the various judicial pronouncements relied upon by the AO, which are reproduced below :-

- (i) Kantilal Manilal vs. CIT – (1961) 41 ITR 275 (SC);
- (ii) Sadhana Textiles Mills (P.) Ltd. vs. CIT – (1991) 188 ITR 318 (Bom.);
- (iii) Smt. Tarulata Shyam vs. CIT – (1977) 108 ITR 345 (SC);
- (iv) CIT vs. Mukundray K. Shah – 160 Taxman 276 (SC)
- (v) Miss P. Sarada vs. CIT – 96 Taxman 11 (SC)
- (vi) Kantilal Manilal vs. CIT – 41 ITR 275 (SC)

- (vii) CIT vs. P.K. Abubucker – 135 Taxman 77 (Mad.)
- (viii) Mr. Ravindra D. Amin vs. CIT – 208 ITR 815 (Guj.)
- (ix) L. Alagusundaram Chettiar – 109 ITR 508 (Mad.)
- (x) Walchand & Co. Ltd. – 100 ITR 598 (Bom.)
- (xi)

In view of these submissions, ld. DR pleaded that the orders of the CIT(A) be set aside on this issue and the appeal of the department be allowed.

6. Ld. AR for the assessee reiterated the submissions made before the ld.

CIT (A) and for the sake of clarity, the same are reproduced hereunder :-

"It was submitted vide letter dated 15.12.2010 (Copy enclosed) that both STLL and PHDL are NBFC certificate holding companies and also stock exchange listed companies. Proof of being NBFC and Listed companies were submitted during the course of assessment proceedings.

It was also pleaded while submitting the shareholding charts of STLL and PHDL that Assessee Company is not holding shares exceeding 10% of their (M/s Sindhu Trade Links and M/s Parnami Habitat Developers) total shareholding. Also none of the shareholder holding more than 10% in those companies is holding 20% shares in the Assessee Company. Hence provisions of Section 2(22)(e) of the Income Tax Act, 1961 are not applicable.

However the Ld. AO chose to treat the ICDs received as Deemed dividend in the hands of Assessee Company.

Kindly note that the addition made should not have been made in view of the following:

Section 2(22)(e) of the Income Tax Act, 1961 was not applicable:

At the outset, we wish to draw your kind attention to Section 2(22)(e) of the Income Tax 1961 which is 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;

But "dividend" does not include -

(ii) any advance or loan made to a shareholder [or 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 reading of above Section, following interpretations can be drawn. The interpretation of the Section has been dealt point wise vis a vis observation of the Ld. AO and submission against those observations:

1. **Section 2(22)(e): Shareholding conditions not applicable**

Section 2(22)(e) of the Income Tax Act, 1961 is attracted when a shareholder having shares not less than 10% receive any advance or loan from such company or any concern receive any advance or loan from such company in which a shareholder holding more than 10%, also holds substantial interest i.e. 20% shareholding in the concern who received the loan.

From the Balance sheet as on 31.03.2008 - Investment schedule of the Assessee Company (Copy enclosed) and Shareholding charts of STLL and PHDL, it is clear that the Assessee Company is not holding any shares In these companies and hence in no way the amounts can be taxed in the hands of Assessee Company.

Further note from Shareholding charts of STLL and PHDL that there is no shareholder holding 10% in these companies, who is further holding 20% in the Assessee Company.

Hence Section 2(22)(e) of the Income Tax Act, 1961 is not applicable since shareholding condition, mandatory for applicability of Section 2(22)(e) of the Income Tax Act, 1961 are not satisfied.

2. **Section 2(22)(e) applicable in the hands of shareholder:**

Section 2(22)(e) of the Income Tax Act, 1961 is applicable in the hands of shareholder only. Neither the Assessee Company is shareholder in these companies nor there is a shareholder holding 10% in these companies, is holding 20% in the Assessee company. Hence addition made in the hands of Assessee Company, should not have been made.

3. **Section 2(22)(e): Not applicable to widely held Companies:**

Section 2(22)(e) uses the words : any payment by a company "not being a company in which the public are substantially interested" meaning thereby that Section is applicable only to companies which are commonly known as closely held companies.

Section 2(18) of the Act reads as under:

"(18) "company in which the public are substantially interested"-a company is said to be a company in which the public are substantially interested-

(b) if it is a company which is not a private company as defined in the Companies Act, 1956 (1 of 1956), and the conditions specified either in item (A) or in item (B) are fulfilled, namely:-

(A) shares in the company (not being shares entitled to a fixed rate of dividend whether with or without a further right to participate in profits) were, as on the last day of the relevant previous year, listed in a recognized stock exchange in India in accordance with the Securities Contracts (Regulation) Act, 1956 (42 of 1956), and any rules made thereunder;

It was submitted before the Ld. AO that STLL and PHDL are Public Limited Company through following evidences which have been discussed by Ld. AO at page no. 11 to 15 in the Assessment order:

(a) Listing evidences of being listed on Delhi Stock Exchange and Jaipur Stock Exchange.

(b) Shareholding pattern as on 31.03.008 of the Assessee Company

Submission before your good self against Ld. AO observation:

The observations made by the Ld. AO are dealt herewith point wise:

a. Trading of shares and acceptance of public deposit are no parameters to check whether a company is a widely held Company or not. It is the section 2(18) definition which should prevails while assessing whether a Company is a company, in which Public is substantially interested or not.

b. The allegation of the Ld. AO that the Assessee Company has failed to evidence that STLL and PHDL continues to be listed at stock exchanges and has not been suspended or de-listed, is not correct.

As an evidence of being listed on Jaipur and Delhi Stock Exchanges, the Assessee Company submitted the Annual Listing fee bills raised by the respective stock exchanges on the STLL and PHDL. Proof of payment of listing fee for both the stock exchanges were submitted during the course of assessment proceedings vide letter date 15.12.2010. Had the STLL or PHDL were been suspended or delisted, stock exchanges would not have raised the annual listing fee bills.

Further as per information available in public domain on Delhi Stock Exchange website at <http://www.dseindia.org.in/sitepages/list-companies.php> it can be seen that STLL and PHDL are listed company on Delhi Stock Exchange. Since the list involve 2830 companies, we are producing herewith relevant extract showing evidence in regard to STLL and PHDL only.

Also note that PHDL is also listed on Ahmadabad Stock Exchange which can be verified from as per information available In public domain on Ahemdabad Stock Exchange website at <http://www.aselindia.org/companies/listed-companies.html> it can be seen that PHDL is listed company on Ahemdabad Stock Exchange. Since the list involve 226 companies, we are producing herewith relevant extract showing evidence in regard to PHDL only.

Also note that there was no adverse material on record or brought on record by the Ld. AO to support her contentions regarding STLL and PHDL. Hence the allegations made by the Ld. AO is baseless, arbitrary and made in a reckless manner.

c. Controlling~% shareholding in a company by promoter group does not mean that the company is a closely held company. If it is so then almost 95% of the NSE or SSE listed companies would be treated as closely held companies. For your ready reference, we are enclosing herewith shareholding pattern of NSE/SSE listed reputed companies for DLF Ltd., TATA Consultancy Services Limited, Reliance Limited as on 31.03.2008. The same is available in public domain on the websites of NSE and BSE.

From the shareholding pattern of these companies, you will see that Promoter shareholding for these companies is much more that what is for the Assessee Company. Somewhere it is hovering around 88%. Still they are regarded as listed and widely held companies. So the same parameter shall be used for Assessee Company also .

Further as per Securities Contract (Regulation) Rules, 1957, Rule 19(2)(b) provides following with respect to public shareholding for a listed company:

"Requirements with respect to the listing of securities on a recognized stock exchange.

19. (2) Apart from complying with such other terms and conditions as may be laid down by a recognized stock exchange, an applicant company shall satisfy the stock exchange that:

[(b) At least 10 per cent of each class or kind of securities issued by a company was offered to the public for subscription through advertisement in newspapers for a period not less than two days and that applications received in pursuance of such offer were allotted subject to the following conditions:

(a) minimum 20 lakh securities (excluding reservations, firm allotment and promoters contribution) was offered to the public;

(b) the size of the offer to the public, i.e., the offer price multiplied by the number of securities offered to the public was minimum Rs. 100 crores; and

(c) the issue was made only through book building method with allocation of 60 per cent of the issue size to the qualified institutional buyers as specified by the Securities and Exchange Board of India:

Provided that if a company does not fulfil the conditions, it shall offer at least 25 per cent of each class or kind of securities to the public for subscription through advertisement in newspapers for a period not less than two days and that applications received in pursuance of such offer were allotted"

Since the Assessee Company is in compliance of this rule, allegation that controlling 59% of the shareholding in the Assessee Company would take away the benefit of listing, is purely baseless.

4. **Section 2(22)(e): Not applicable on Inter Corporate Deposits**

Provisions of Section 2(22)(e) of the Income Tax Act, 1961 are not applicable to Inter Corporate Deposits. They are applicable to payments by way of advance or loans only. Reliance in this regard has been placed on Bombay Oil Industries Ltd. vs DCIT (2009) 28 SOT 383 (ITAT Mum) (Copy enclosed) wherein the Hon'ble ITAT Mumbai has held that since there is a clear distinction between the words advance or loan and Inter Corporate Deposits and hence deeming provisions of Section 2(22)(e) of the Income Tax Act, 1961 cannot be applied to Inter Corporate Deposits.

5. **Section 2(22)(e): Not applicable to loan or advance by Non Banking Finance Companies**

Section 2(22) of the Income Tax Act, 1961 has an exclusion clause that dividend does not include where advance or loan has been given to shareholder 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.

As submitted earlier also that the Assessee Com an is not a shareholder in the STLL and PHDL, further note that the STLL and PHDL are Non Banking Finance Company and Registered with Reserve Bank of India since 1998 in Category of Loan Investment Company and engaged in activities of shares sale, financial activities, loan syndication activities and hypothecation activities. Proof of being FC companies was submitted during the course of assessment proceedings vide letter dated 15.12.2010.

Further the Profit and Loss Account of the STLL and PHDL as on 31.03.2008 (Copies of Balance sheet and Profit and Loss are enclosed herewith) shows that STLL has earned following income out of NBFC activities:

Particulars	Sindhu Trade Lins Ltd.	Parnami Habitat Developers Limited
Interest Income	32,532,082.00	62,64,244.00
Loan Syndication Charges	7,129,302.23	-
Hypothecation Charges	1,562,631.81	-
Bad Debts recovered	1,613,303.00	-
Misc. receipts in nature of Processing fee etc.	1,647,815.06	-
Total	44,485,134.10	62,64,244.00

The above details shows that STLL and PHDL are pursuing NBFC activities and Inter Corporate Deposit has also been advanced in the ordinary course of activities.”

In the light of the above submission, the Id AR does not want us to interfere in the order of Id CIT(A)

7. We have heard both the sides and perused the material on record. The only dispute is whether the lender companies which has made deposits (Inter-Corporate Deposits (ICD)) will fall under the deeming provision under section 2(22)(e) of the Act or not. We find that section 2(22)(e) excludes public company “not being a company in which the public are substantially interested”. Section 2(22)(18) of the Act defines companies in which the

public are substantially interested. As per the said definition, a company is said to be a company in which the public are substantially interested, if it is a company which is not a private company as defined in the Companies Act, 1956 (1 of 1956) and the conditions specified either in Item A or in Item (B) are fulfilled, namely :-

“(A) shares in the company (not being shares entitled to a fixed rate of dividend whether with or without a further right to participate in profits) were, as on the last day of the relevant previous year, listed in a recognized stock exchange in India in accordance with the Securities Contracts (Regulation) Act, 1956 (42 of 1956), and any rules made thereunder.”

We find that the assessee before the AO and the ld. CIT (A) has submitted that both these companies are public limited companies and they have produced evidences to substantiate that the STLL and PHDL are listed companies at Delhi Stock Exchange and PHDL is also listed on Ahmedabad Stock Exchange and also the shareholding pattern as on 31.03.2008. And that Section 2(22)(e) is not applicable to loans or advances by Non Banking Finance Companies (NBFC). In order to substantiate that STLL and PHDL are NBFC, it was submitted that they are registered with Reserve Bank of India since 1998 in Category of Loan Investment Company and engaged into the activities of shares sale, financing activities, loan syndication activities and hypothecation activities. It is a well settled principle of law that deeming provision has to be interpreted strictly and it cannot be stretched to more than that for which the deeming provision can be literally interpreted. Nothing can

be added or implied while interpreting a deeming provision. One can only look at the language used. Therefore, we concur with the Id. CIT (A) that the lender company i.e. M/s. STLL and M/s. PHDL are public limited companies and so the loan/advance/ICD given to the assessee does not fall in the ken of section 2(22)(e) and moreover, the lender 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 Id. CIT (A)'s order and dismiss this ground.

8. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in open court on this 29th day of January, 2016.

**Sd/-
(G.D. AGRAWAL)
VICE PRESIDENT**

**sd/-
(A.T. VARKEY)
JUDICIAL MEMBER**

**Dated the 29th day of January, 2016
TS**

Copy forwarded to:

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

**AR, ITAT
NEW DELHI.**