INCOME TAX : Where assessee was not a shareholder in company from which it had received loan, such loan amount could not be treated as deemed dividend under section 2(22)(e) in hands of assessee

[2020] 120 taxmann.com 125 (Madras)

HIGH COURT OF MADRAS

Commissioner of Income Tax, Chennai

v.

Checkpoint Apparel Labelling Solutions (India) Ltd.*

T.S. SIVAGNANAM AND MRS. V. BHAVANI SUBBAROYAN, JJ.
TC APPEAL NO.307 OF 2019†
SEPTEMBER 29, 2020

Section 2(22) of the Income-tax Act, 1961 - Deemed dividend (Loans or advances to shareholder) - Assessment year 2013-14 - Assessing Officer treated loan received by assessee company from another company as deemed dividend under section 2(22)(e) - Whether, in view of decision in case of CIT v. T. Abdul Wahid & Co., since assessee was not a shareholder in said company from which it received loan, such loan amount could not be treated as deemed dividend under section 2(22)(e) in hands of assessee - Held, yes [Paras 5 and 11] [In favour of assessee]

CASE REVIEW

CIT v. *T. Abdul Wahid & Co.* [TC Appeal Nos. 512 & 513 of 2018, dated 21-9-2020] (para 11) *followed*.

CASES REFERRED TO

CIT v. *National Travel Services* [2011] 14 taxmann.com 14/202 Taxman 327/[2012] 347 ITR 305 (Delhi) (para 7), *CIT* v. *T. Abdul Wahid & Co*. [TC Appeal Nos. 512 & 513 of 2018, dated 21-9-2020] (para 8), *Gopal & Sons (HUF)* v. *CIT* [2017] 77 taxmann.com 71/245 Taxman 48/391 ITR 1 (SC) (para 9), *Miss P. Sarada* v. *CIT* [1998] 96 Taxman 11/229 ITR 444 (SC) (para 9), *CIT* v. *National Travel Services* [2011] 14 taxmann.com 14/202 Taxman 327/[2012] 347 ITR 305 (Delhi) (para 9), *National Travel Services* v. *CIT* [2018] 89 taxmann.com 332/253 Taxman 243/401 ITR 154 (SC) (para 9) and *CIT* v. *Ankitech (P.) Ltd.* [2011] 11 taxmann.com 100/199 Taxman 341/[2012] 340 ITR 14 (Delhi) (para 9).

Mrs. R. Hemalatha, SSC *for the Appellant.*

JUDGMENT

T.S. Sivagnanam, J. - This appeal, filed by the Revenue under section 260A of the Income-tax Act, 1961 ('the Act' for brevity), is directed against the order dated 30-11-2018 passed by the Income-tax Appellate Tribunal, Bench 'A' Chennai (for short, the Tribunal) in I.T.A.No.429/Chny/2018 for the assessment year 2013-14.

2. The above appeal has been admitted on 10-6-2019 on the following substantial questions of law:

"(*i*) Whether the reasoning and finding of the Tribunal is proper by applying the decision of the Apex Court in the case of Madhur Housing and Development Company which had upheld the decision of the Delhi High court in the case of *Anikitech (P.) Ltd.* dealt with an issue relating to the first condition that the person should be a shareholder under sec. 2(22)(*e*) of the Act, but in the present case the issue relates to usage relating to beneficial owner of the shares which is the 2nd condition enunciated in Sec.2(22)(*e*) for its applicability? And

(*ii*) Whether the Tribunal was right in applying the decision of the *Anikitech (P.) Ltd*. of the Delhi High Court especially when the Hon'ble Apex Court in the case of National Travel Services reported in 401 ITR page 154 had held that the view taken in *Anikitech (P.) Ltd*., requires reconsideration and that too without going into the other question whether the 2 nd limb of the amended clause of section 2(22)(*e*) of the Income-tax Act would apply or not?"

3. We have heard Mrs. R. Hemalatha, learned Senior Standing Counsel appearing for the appellant - Revenue. Though notice was served on the respondent and their name printed in the cause list, none appears for the respondent.

4. The assessee is a limited company filed its return of income for the assessment year under consideration namely AY 2013-14 on 29-11-2013 declaring a loss of Rs. 8,19,048/-. The case was selected for scrutiny and a notice under section 143(2) dated 2-9-2014 was issued. Thereafter, a notice under section 142(1) of the Act along with a questionnaire was issued on 13-7-2014. The assessee, through their authorized representative, cooperated with the assessment proceedings. Ultimately, the assessment was completed by order dated 25-2-2016.

5. The major assessment being that the loan was held to be deemed dividend under section 2(22)(*e*) of the Act and a disallowance of Rs. 4,25,00,000/- was made. Aggrieved by such an order and other subsidiary issues, the assessee filed an appeal before the Commissioner of Income-tax (Appeals)-1, Chennai-34, who, by order dated 29-11-2017, allowed the appeal. Aggrieved by that, the Revenue filed an appeal before the Tribunal, which dismissed the appeal by the impugned order. Thus, the Revenue is before us.

6. The question, which would fall for consideration is as to whether the Assessing Officer was right in holding that the only exclusion provided by the Statute under section 2(22)(*e*) of the Act was in the case of money lending business and the payments that are made in the ordinary course of business, as, for doing money lending business, a person is required to obtain a licence from the Reserve Bank of India or whether it is a non banking financial company.

7. The Assessing Officer held that the assessee was not one such company falling under anyone of the categories. Accordingly, the contention of the assessee was rejected and in doing so, the Assessing Officer relied upon the decision of the Delhi High Court in the case of *CIT* v. *National Travel Services* [2011] 14 taxmann.com 14/202 Taxman 327/[2012] 347 ITR 305]. Further, the Assessing Officer took note of the payment made by the assessee to the tune of Rs. 43,29,603/- as interest to one M/s.OTA Systems Software India Private Limited against the loan received amounting to Rs. 42,50,00,000/-. This was considered as deemed dividend in the hands of the assessee and the interest paid was disallowed as an expenditure on the ground that there was no provision under the Act to allow interest charged on deemed dividend.

8. We had an occasion to consider an identical substantial question of law in the case of *CIT* v. *T. Abdul Wahid & Co*. [TCA.Nos.512 & 513 of 2018 dated 21-9-2020]. As contended before us in this appeal, an argument was made by Mr. T. Ravikumar, learned Senior Standing Counsel in the said decision that

loans or advances had to be treated as dividend to the extent of accumulated profits and loan or advances may be given directly to the shareholder or it may be given for the benefit of the shareholder or on behalf of the shareholder. Therefore, it was contended that the Assessing Officer was right in treating the loan as deemed dividend under section 2(22)(*e*) of the Act.

9. In the said decision, in support of his contentions, the learned Senior Standing Counsel referred to the decisions in the cases of

(*i*) *Gopal & Sons (HUF)* v. *CIT* [2017] 77 taxmann.com 71/245 Taxman 48/391 ITR 1 (SC);

(*ii*) *Miss. P. Sarada* v. *CIT* [1998] 96 Taxman 11/229 ITR 444 (SC);

(*iii*) *CIT* v. *National Travel Services* [2011] 14 taxmann.com 14/202 Taxman 327/[2012] 347 ITR 305 (Delhi); and

(*iv*) *National Travel Services* v. *CIT* [2018] 89 taxmann.com 332/253 Taxman 243/401 ITR 154 (SC), in which, the Hon'ble Supreme Court doubted the correctness of the decision in the case of *CIT* v. *Ankitech (P.) Ltd.* [2011] 11 taxmann.com 100/199 Taxman 341/[2012] 340 ITR 14 (Delhi).

10. In the said decision, after considering the rival submissions, we dismissed the appeals filed by the Revenue by returning the following findings :

> "11. Section 2(22)(*e*) of the Act, which defines dividend, an inclusive definition, includes any payment by a company, not being a company in which the public are substantially interested, of any summade after the 31-5-1987, by way of advance or loan, to a share holder, being a person, who is the beneficial owner of shares holding not less than 10% of the voting power, or 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 share holder, to the extent to which the company in either case possesses accumulated profits.
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> 12. The said provision would stand attracted when a payment is made by a company, in which public are not substantial interested by way of advance or loan to a share holder, being a person who is the beneficial owner of the shares. On facts, it is clear that the payment has been made to the assessee, a partnership firm. The partnership firm is not a share holder in the company. If such is the factual position, the decision in the case of National Travel Services relied on by the revenue cannot be applied, nor the case of *Gopal and Sons*, as they are factually distinguishable. The records placed before the assessing officer clearly shows the nature of transaction between the firm and the company and it is neither a loan nor an advance, but a deferred liability. These facts have been noted by the assessing officer. In such circumstances, this Court is of the view that the Tribunal rightly reversed the order passed by the CIT(A) affirming the order of the assessing officer."

11. The above decision would fully approve the stand taken by the Tribunal in the impugned order. Therefore, necessarily we have to reject the appeal filed by the Revenue.

12. Accordingly, the above tax case appeal is dismissed, the impugned order is confirmed and the substantial questions of law are answered against the Revenue.

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*In favour of assessee.

†Arising out of order passed by ITAT in IT Appeal No. 429/Chny/2018, dated 30-11-2018.