IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH: KOLKATA
[Before Shri M. Balaganesh, AM & Shri Partha Sarathi Chaudhury, JM]

I.T.A No.421/Kol/2014
Assessment Year: 2006-07

Deputy Commissioner of Income-tax, Circle-1, Kolkata.	**Vs.** **M/s. The Hooghly Mills Co. Ltd. (PAN: AAACT9780F)**
(Appellant)	(Respondent)

Date of hearing: 01.03.2017
Date of pronouncement: 01.03.2017

For the Appellant: N o n e
For the Respondent: Shri Siddharth Jhajharia, FCA

ORDER

Per Shri M. Balaganesh, AM:

This appeal by revenue is arising out of order of CIT(A), Central-1, Kolkata vide appeal No. 104/CC-VII/CIT(A)C-I/11-12 dated 12.12.2003. Assessment was framed by DCIT, Central Circle-VII, Kolkata u/s. 263/251/143(3) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") for Assessment Year 2006-07 vide his order dated 30.08.2011.

2. The revenue has raised the following grounds:

"I. That, on the facts and in the circumstances of the case, the CIT(A) has erred in deleting the addition of Rs.5,58,93 000/-, made by the A.O. u/s. 2(22)(e).

2. That, on the facts and in the circumstances of the case, the CIT(A) has erred in deleting the addition made by the A.O. u/s. 36(i)(va) read with Section 2(24)(x) in respect of employee's Contribution to PF/ESI for an amount of Rs. 64,96,988/-.

3. That, on the facts and in the circumstances of the case, the CIT(A) has erred in deleting the addition of Rs. 4,19,97,464/-, made on account of gratuity liability.

4. That, on the facts and in the circumstances of the case, the CIT(A) is not justified in deleting the addition of Rs. 81,30,428/- made by the A.O. u/s. 14A and rule 8D.

5. The appellant craves leave to amend, modify and alter any grounds of appeal during the course of hearing of this case."

3. The brief facts of this appeal is that the return of income was filed electronically for the AY 2006-07 on 27.11.2006 showing total loss of Rs.1,64,32,570/- and book profit u/s.

115JB of the Act of Rs.7,47,440/-. The assessment was completed u/s. 143(3) of the Act on 31.12.2008 determining total loss of Rs.1,19,71,435/-. Subsequently, this assessment was subject to revision u/s. 263 by the Ld. CIT, Central-1, Kolkata vide his order dated 01.03.2011 setting aside the assessment framed by the AO as erroneous and prejudicial to the interest of the revenue. Pursuant to the said order u/s. 263 of the Act, the AO proceeded to frame the fresh assessment and in the said fresh assessment he made the following additions vide his order u/s. 263/251/143(3) of the Act dated 30.08.2011:

Addition towards deemed dividend u/s. 2(22)(e)	-	Rs. 5,58,93,000/-
Disallowance u/s. 36(1)(va)	-	Rs. 64,96,988/-
Disallowance of gratuity	-	Rs. 4,19,97,467/-
Disallowance u/s. 14A	-	Rs. 81,30,428/-

The AO after making the aforesaid four additions determined the total income at Rs.9,35,45,050/-. These additions were deleted by the Ld. CIT(A) in first appeal. Aggrieved, the revenue is in appeal before us.

4. None appeared on behalf of the revenue. We find that the Ld. CIT, DR was sick and had applied for adjournment for eight cases listed for hearing. But since the Ld. AR informed that the subject mentioned appeal of the revenue becomes infructuous in view of this Tribunal quashing the order passed u/s. 263 of the Act by the Ld. CIT, we proceed to hear the Ld. AR and dispose of the appeal accordingly.

5. We have heard the submission of Ld. AR and have carefully perused the material available on record. We find that as rightly pointed out by the Ld. AR that this Tribunal had quashed the revision order u/s. 263 of the Act in ITA No.547/Kol/2011 dated 15.07.2016 wherein each of these additions contemplated were discussed in detail. The operative portion of each of these additions discussed in the said Tribunal order are reproduced hereunder:

Addition towards deemed dividend:

"8. We have heard rival contentions and perused materials available on record. From the foregoing discussion we find that all the disclosures regarding the sales and purchases of jute materials were available before the AO at the time of assessment. The transaction has been duly reported by the assessee in the tax audit report as required u/s 40A(2)(b) of the Act. There was no adverse remark in the tax audit report. After considering the material information placed before us, we are of the considered view that AO was in possession of sufficient information about the aforesaid transaction. Accordingly he formed the opinion

that the transaction is in the nature of current account and out of the purview of the provisions of section 2(22)(e) of the Act. In this connection, we are putting our reliance in case Pradip Kumar Malhotra vs. CIT where by the Hon'ble HIGH COURT OF CALCUTTA (2012) 246 CTR 0493 : (2011) 64 DTR 0378 : (2011) 338 ITR 0538 : (2011) 203 TAXMAN 0110 Held :

> *"The phrase "by way of advance or loan" appearing in sub-cl. (e) of cl. (2) of s. 2 must be construed to mean those advances or loans which a share holder enjoys for simply on account of being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or ITA No.547/Kol/2011 A.Y.2006-07 M/s The Hooghly Mills Co.Ltd. v. DCIT, CC-VII, Kol. Page 9 without a right to participate in profits) holding not less than ten per cent of the voting power; but if such loan or advance is given to such shareholder as a consequence of any further consideration which is beneficial to the company received from such a shareholder, in such case, such advance or loan cannot be said to a deemed dividend within the meaning of the Act. Thus, gratuitous loan or advance given by a company to those classes of shareholders would come within the purview of s. 2(22) but not the cases where the loan or advance is given in return to an advantage conferred upon the company by such shareholder. In the present case the assessee permitted his property to be mortgaged to the bank for enabling the company to take the benefit of loan and in spite of request of the assessee, the company is unable to release the property from the mortgage. In such a situation, for retaining the benefit of loan availed from the bank if decision is taken to give advance to the assessee such decision is not to give gratuitous advance to its shareholder but to protect the business interest of the company. Authorities below erred in law in treating the advance given by the company to the assessee by way of compensation to the assessee for keeping his property as mortgage on behalf of the company to reap the benefit of loan as deemed dividend within the meaning of s. 2(22)(e).—CIT vs. Creative Dyeing & Printing (P) Ltd. (2010) 229 CTR (Del) 250 : (2009) 30 DTR (Del) 143 : (2009) 318 ITR 476 (Del) and CIT vs. Nagindas M. Kapadia (1989) 75 CTR (Bom) 161 : (1989) 177 ITR 393 (Bom) relied on.*
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> *Loan advanced by company to shareholder in compensation of shareholder mortgaging his immovable property for enabling company to secure bank loan cannot be treated as deemed dividend under s. 2(22)(e)."*

COMMISSIONER OF INCOME TAX vs. CREATIVE DYEING & PRINTING (P) LTD. whereby the Hon'ble HIGH COURT OF DELHI (2010) 229 CTR 0250 : (2009) 30 DTR 0143 : (2009) 318 ITR 0476 : (2009) 184 TAXMAN 0483 has Held :

> *"The finding of facts, arrived at by the Tribunal is that the transaction in question was a business transaction and which transaction would have benefited both the assessee company and PE Ltd. In fact, the counsel for the appellant has conceded that the amount is in fact not a loan but only an advance because the amount paid to the assessee company would be adjusted against the entitlement of moneys of the assessee company payable by PE Ltd. in the subsequent years. The contention that since PE Ltd. is not into the business of lending of money, the payments made by it to the assessee company would be covered by s. 2(22)(e)(ii) and consequently payments even for business transactions would be a deemed dividend is not acceptable. The provision of s. 2(22)(e)(ii) is basically in the nature of an Explanation. That cannot however, have bearing on interpretation of the main provision of s. 2(22)(e) and once it is held that the business transactions do not fall within s. 2(22)(e), one need not to go further to s. 2(22)(e)(ii). The provision of s. 2(22)(e)(ii) gives an example only of one of the situations where the loan/advance*

will not be treated as a deemed dividend, but that's all. The same cannot be expanded further to take away the basic meaning, intent and purport of the main part of s. 2(22)(e). This interpretation is in accordance with the legislative intention of introducing s. 2(22)(e). Therefore, the Tribunal was correct in holding that the amounts advanced for business transaction between the parties, namely, the assessee company and PE Ltd. was not such to fall within the definition of deemed dividend under s. 2(22)(e).—CIT ITA No.547/Kol/2011 A.Y.2006-07 M/s The Hooghly Mills Co.Ltd. v. DCIT, CC-VII, Kol. Page 10 vs. Raj Kumar (2009) 23 DTR (Del) 304 : (2009) 181 Taxman 155 (Del) followed.

Amount advanced to the assessee company by another company having common directors not being a loan but an advance f or business transaction which is to be adjusted against the moneys payable by the latter to the assessee company in the subsequent years, same did not fall within the definition of deemed dividend under s. 2(22)(e)."

Here in the present case, from the facts narrated above, it is clear that both the parties are beneficiary of the transaction being current account of the above transactions. So as per the legal proposition decided by Hon'ble jurisdictional High Court, it is clear that section 2(22)(e) of the Act was inserted to bring within the purview of taxation those amounts which are actually a distribution of profits but are disbursed as a loan so that tax thereon can be avoided. It is pertinent to note here that when dividends are declared by a company, it is solely the shareholders who benefit from the transaction. No benefits accrue to the company by way of dividend distribution. Thus, section 2(22)(e) of the Act covers only such situations, where the shareholder alone benefits from the loan. In the instant case the company benefits from the said transaction, it will take the character of a commercial transaction and hence will not qualify to be dividend. Now it can be said that sec. 2(22)(e) of the Act covers only those transactions which benefit the shareholder alone and results in no benefit to the company. On the other hand, if the transaction is mutual by which both sides are benefited, it is undoubtedly outside the purview of provisions of sec. 2(22)(e) of the Act. From the above, it is clear that the loan account differs from current account and the provisions of section 2(22)(e) of the Act, being a deeming section, cannot be applied to current account. In such circumstances, the order of the ld. CIT under section 263 of the Act is not sustainable in law."

DISALLOWANCE U/S. 36(1)(va)

"10. At the outset we find that the issue with regard to employees contribution is already covered by the judgment of Hon'ble High Court of Rajasthan in favour of assessee in the case of COMMISSIONER OF INCOME TAX vs. UDAIPUR DUGDH UTPADAK SAHAKARI SANGH LTD. (2014) 265 CTR 0059 (Raj) : (2014) 98 DTR (Raj) 0109 : (2014) 366 ITR 163 (Raj)

The head notes reads as under

"Business Income–Disallowance–Validity of Deletion–Assessee, engaged in business of dairy product, processing and marketing of milk and milk product and cattle feed etc, filed its return of income–AO noticed that, assessee had deposited payment of Rs. 14,60,412 in PF fund and Rs.973 in ESI fund with delay, and therefore, added said amount to income of assessee as per provisions of s 36(1)(va) read with s 2(24)(x)–CIT(A), vide its appellate order after noticing certain judgments concluded that, where payments on account of contribution to PF, ESI etc. are made within due date of filing return, such deductions are allowable–CIT(A) accordingly deleted disallowance made by AO–ITAT upheld order passed by

CIT(A)–Held, Supreme Court in CIT v. Vinay Cement Ltd. had observed in a similar matter that assessee is entitled to claim the benefit u/s 43B where he had contributed to provident fund before filing of return and that in the instant case they were concerned with the law as it stood prior to the amendment of s 43B–In view of settled legal position, appeal preferred by Revenue is dismissed."

It was held as under

"Supreme Court in CIT v. Vinay Cement Ltd. [2009] 313 ITR (St.) 1 had observed that in such circumstances, assessee was entitled to claim the benefit in section 43B for that period particularly in view of fact that he had contributed to provident fund before filing of return. Following observations of Hon'ble Supreme Court in Vinay Cement (supra), the Delhi High Court in CIT v. Aimil Ltd. has also held that, in so far as the Income-tax Act is concerned, assessee can get benefit, if actual payment is made before return is filed, as per principle laid down by Supreme Court in Vinay Cement (2009) 313 ITR (St.) 1. In view of settled legal position, appeal preferred by Revenue has no substance and same is, therefore, dismissed."

In view of above the order of AO cannot be held erroneous and prejudicial to the interest of revenue. Hence the impugned order passed by the ld. CIT under section 263 of the Act is not sustainable in law and therefore we set aside."

Disallowance of Gratuity:

"9. Now coming to second issue which is regarding the payment of gratuity, from the foregoing discussion, we find that Ld. CIT held that order of AO is erroneous and prejudicial to the interest of revenue on account of deduction allowed by AO with regard the claim made by assessee for gratuity. From the ITA No.547/Kol/2011 A.Y.2006-07 M/s The Hooghly Mills Co.Ltd. v. DCIT, CC-VII, Kol. Page 11 facts of the case, we find that AO has given a very clear finding that claim of gratuity was not made in assessee's books of account but it was claimed separately in the computation of income which was not allowed by AO while framing original assessment order. So in the instant case, we find that the question for the deduction on account of gratuity in the computation of total income does not arise. Besides this, we also find lot of force in the argument advanced by Ld. AR before us that the order of AO has been merged with the appellate order of Ld. CIT(A) appeal no. 430/CC-VII/CIT(A), C-1/08-09 AY 2006-07 which is placed on record at pages 127 to 135 of the 2nd paper book. In this connection we rely in the judgment of Hon'ble HIGH COURT OF BOMBAY in the case of RITZ LTD. & ANR. vs. UNION OF INDIA & ORS. (1990) 83 CTR 0177 : (1990) 184 ITR 0599 : (1990) 51 TAXMAN 0320 where it was held that

"Once an order of assessment is subject matter of appeal, the whole of it merges in that of the appellate order. Thus, the only question that requires consideration is whether the retrospective amendment of s. 263 overrides or nullifies the effect of those judgments.—CIT vs. P. Muncherji & Co. (1987) 63 CTR (Bom) 338 : (1987) 167 ITR 671 (Bom) : TC57R.432#1 and CIT vs. Smt. A.S. Narendrakumari Basaheba of Rajkot (1988) 74 CTR (Bom) 56 : (1989) 176 ITR 515 (Bom) : TC57R.436 followed

As a first impression Expln. (c), as it stands without anything more, appears to support the Revenue's submission that Expln. (c) was applicable in the present case also. On carefully examining the provisions of the Expln. (c), however, the position is otherwise. Before its amendment by the Finance Act, 1989, Expln. (c) inserted by the Finance Act, 1988, was then evidently prospective w.e.f 1st June, 1988. In the present case the appeals having been not only filed but also disposed of before that

date, this Explanation would have no effect whatsoever. Coming then to the amendment of the Explanation in 1989 with retrospective effect from 1st June, 1988, it is seen that on the face of it there is some contradiction. The insertion of words "filed on or before or after the 1st June, 1988" and "and shall be deemed always to have extended" at two places in the Explanation may support the Department's contention on the face of it that after the amendment in 1989 Expln. (c) means that to the extent matters have not been considered and decided in appeal the CIT will always have jurisdiction to revise the order of assessment under s. 263 subject to other conditions. The question, however, is if that was so why did the legislature not stop at that and went further to say that insertion of these words though factually in 1989 was with retrospective effect from 1st June, 1988, the date on and from which Expln. (c) itself was inserted by the Finance Act, 1988. Expln. (c) requires to be constructed harmoniously. The ITA No.547/Kol/2011 A.Y.2006-07 M/s The Hooghly Mills Co.Ltd. v. DCIT, CC-VII, Kol. Page 12 insertion of words at two places as well as the fact that insertion is made retrospective from the date on which the Explanation itself was inserted can all be given proper meaning if it is held that these words are to be read in the Explanation right from the date the Explanation itself was inserted. Thus, only in cases where action under s. 263 is taken after 1st June, 1988, the merger of assessment order will be treated as confined to issues actually considered and decided in appeal in terms of the Expln. (c). The construction placed herein is based on sound logic, namely, irrespective of the language in which the amending provisions are couched, the amendment cannot be retrospective with effect from a date earlier to the date on which the provision sought to be amended itself was brought on the statute book.

Only in cases where action under s. 263 is taken after 1st June, 1988, the merger of assessment order will be treated as confined to issues actually considered and decided in appeal in terms of the Expln. (c).”

In view of the above after relying on the above judgment we find that order of AO cannot be held to erroneous and prejudicial to the interest of revenue. Hence the impugned order passed by the ld. CIT under section 263 of the Act is not sustainable in law and therefore we set aside.”

Disallowance u/s. 14A

“11. Now coming to the last issue of disallowance under section 14A of the Act for Rs. 25,000/-, we find that the issue has been duly discussed and considered by AO while framing original assessment order. The assessee during the year has earned interest income only for an amount of ₹5,78,384/-. The AO after considering the submission of assessee has disallowed a sum of ₹25,000/- only. We further find that the issue has been already covered by the Hon'ble Allahabad High Court in the case of Principal Commissioner of Income Tax vs. M/s Ashok Handloom Factory Pvt. Ltd. in ITA No. 19 of 2016 dated 01.02.2016 wherein the Hon’ble High Court has held that it is settled law that the commissioner of income tax can exercise his jurisdiction u/s 263 of the Act only in cases where no enquiry is made by the Assessing Officer. In the instant case, it is admitted by the Income Tax Department that the Assessing Officer had made some enquiries though according to them it was not a proper enquiry. In our view of the fat that some enquiry was made is sufficient to debar the authorities from exercising the powers u/s 263 of the Act. The Tribunal was accordingly justified in setting aside the order passed u/s 263 of the Act. We do not find any substantial question of law arising for consideration the appeal is accordingly dismissed. In the case on hand, the ITA No.547/Kol/2011 A.Y.2006-07 M/s The Hooghly Mills Co.Ltd. v. DCIT, CC-VII, Kol. Page 14 AO has made an addition by invoking the provision of section 14A of the Act after making the necessary enquiry. The instant case is duly covered with the decision of

Hon'ble Allahabad High Court M/s Ashok Handloom Factory Pvt. Ltd. (supra) as discussed above, therefore relying on the same, we reverse the order of Ld. CIT for u/s 263 of the Act. In view of above, we uphold that order passed by AO is neither erroneous nor prejudicial to the interest of revenue. Hence, we quash the order passed by Ld. CIT(A) and ground raised by assessee is allowed."

In view of the aforesaid order of this Tribunal quashing the revision order passed u/s. 263 of the Act by the Ld. CIT, the subsequent assessment proceedings and appellate proceedings initiated pursuant to the 263 order becomes infructuous. Accordingly, we dismiss the grounds raised by the revenue before us.

6. In the result, the appeal of revenue is dismissed.

Order is pronounced in the open court on 01.03.2017

Sd/-	Sd/-
(Partha Sarathi Chaudhury)	(M. Balaganesh)
Judicial Member	Accountant Member

Dated : 1st March, 2017

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. APPELLANT – DCIT, Circle-1, Kolkata.
2. Respondent –The Hooghly Mills Co. Ltd., 10, Clive Row, Kolkata-700 001.
3. The CIT(A), Kolkata
4. CIT, Kolkata.
5. DR, Kolkata Benches, Kolkata

/True Copy, By order,

Asstt. Registrar.