आयकर अपीलीय अधीकरण, न्यायपीठ – "B" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH: KOLKATA

(समक्ष)Before **श्री एन. एस. सैनी,** लेखा सदस्य एवं/and श्री महावीर सिंह, न्यायीक सदस्य)

[Before Shri N. S. Saini, AM & Shri Mahavir Singh, JM]

आयकर अपील संख्या / I.T.A Nos. 821 to 823/Kol/2011

निर्धारण वर्ष/Assessment Years: 2001-02 to 2003-04

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आयकर अपील संख्या / I.T.A Nos. 824 & 825/Kol/2011

निर्धारण वर्ष/Assessment Years: 2005-06 & 2006-07

Shri Subrata Banik, Executor to the Estate of Late Bithika Banik. (PAN:AEFPB9099F)	-Vs-	Commissioner of Income-tax, Central-III, Kolkata.
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

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आयकर अपील संख्या / I.T.A Nos. 826 to 828/Kol/2011

निर्धारण वर्ष/Assessment Years: 2001-02 to 2003-04

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आयकर अपील संख्या / I.T.A Nos. 829 & 830/Kol/2011

निर्धारण वर्ष/Assessment Years: 2005-06 & 2006-07

Shri Subrata Banik, (PAN:AECPB8509B)	-Vs-	Commissioner of Income-tax, Central-III, Kolkata.
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

Date of hearing: 13.06.2013
Date of pronouncement: 11.07.2013

For the Appellant: S/Shri S. Jhajharia, FCA & Sujoy Sen, Advocate
For the Respondent: Shri Tapas Kr. Dutta, CIT(DR)

आदेश/ORDER

Per Bench:

All these appeals by assessee are arising out of separate orders of CIT, Kolkata passed u/s. 263 of the Income-tax Act, 1961 (hereinafter referred to as "the Act") in Memo Nos. CIT,C-III/Kol/263/Subrata Banik./2010-11/4862,4865, 4870, 4875, 4872, 4847, 4851, 4854, 4858 & 4861 all dated 28.03.2011 respectively. Assessments were framed separately by ACIT, CC-II, Kolkata u/s. 153A/144 for Assessment Years 2001-02 to 2003-04 in ITA Nos. 821 to 823/K/2011 & Assessment Years 2005-06 & 2006-07 in ITA No. 824&825/K/2011 vide his orders all dated 31.12.2008 respectively and assessments were framed by ACIT, CC-II, Kolkata u/s. 153A/143(3) for AY 2001-02 to 2003-04 in ITA Nos. 826 to 828/K/2011 & for AY 2005-06 & 2006-07 in ITA Nos. 829&830/K/2011 vide his orders all dated 30.12.2008 respectively.

2. The only issue in these appeals of assessee is as regards to revision orders passed u/s. 263 of the Act by CIT, Central-III, Kolkata for revising the assessment orders passed u/s. 143(3) r.w.s. 153A of the Act for invoking the provisions of section 2(22)(e) of the Act treating loan amounts as deemed dividend. The assessee has raised common ground in all these ten appeals. Facts and circumstances are exactly identical in all these appeals and the lead appeal being AY 2001-02 in ITA No. 826/K/2011will be taken up first and the issue will be decided. The grounds raised in ITA No. 826/K/2011 read as under:

> *"1. For that in view of the facts and circumstances of the case the Hon'ble CIT was wholly wrong and unjustified in initiating the proceeding u/s 263 of the I. T. Act on 07.03.2011 and subsequently passing an order of u/s 263 on 28.03.2011 directing revision of the order of search & seizure assessment u/s l43(3)/153A dt. 30.12.2008 without proper application of mind and without appreciation of the facts.*
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> *The notice as well as the order u/s 263. being not valid in the eye ol law, are liable to be quashed/cancelled, as none of the conditions precedent for assumption of jurisdiction u/s 263 were fulfilled in the case.*
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> *2. For that in view of the facts and circumstances of the case the Hon'ble CIT was wholly wrong and unjustified in issuing the show cause notice u/s 263 on 07.03.2011 which was barred by limitation since the cause of action, if any, on the same set of facts had arisen in course of the origìnal assessment long before the completion of the S & S assessment u/s 143(3)/153A on 30.12.2008. The notice as well as the order u/s 263, being illegal and barred by limitation are liable to be quashed/cancelled.*
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> *3. For that in view of the facts and circumstances of the case the Hon'ble CIT was wholly wrong and unjustified in passing the said order u/s 263 on 28.03.2011 for revision of the order u/s 143(3)/153A before taking up such course of action u/s 263 against the earlier assessment. The action of the Hon'ble CIT was wholly arbitrary, unjusified, uncalled for, bad in law and barred by limitation.*
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> *4. For that in view of the facts and circumstances of the case the Hon'ble CIT was wholly wrong and unjustified in initiating the proceeding u/s 263 of the Act on a mere change of opinion and subsequently passing the said order u/s 263 without considering the facts that the order u/s 143(3)/153A were completed by the A.O after the due process of scrutiny and examination of the records.*
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> *5. Without prejudice to the Ground Nos. 1 to 4 above and even otherwise, the Hon'ble CIT was wholly wrong and unjustified in passing the said order u/s 263 directing the A.O to revise the order of assessment u/s 143(3)/153A, which was subsequently revised u/s.154 on 20.09.2010, and enhance the assessed total income by addition of a sum of Rs. 11,73,913/- as deemed dividend income u/s 2(22)(e) of the Act without considering the fact that section 2(22)(e) was not at all applicable in the case. The action of the Hon'ble CIT, was wholly arbitrary. unjustified, uncalled for and bad in law."*

3. Briefly stated facts are that a search and seizure operation u/s. 132 of the Act was conducted on business and residential premises of the assessee and his group companies on 06.11.2006. The assessee is assessed with DCIT, Central Circle-III, Kolkata. Original assessment was completed u/s. 143(1) of the Act for this AY 2001-02 on 15.01.2003 whereas

assessee filed return of income on 02.10.2001. Pursuant to search notice u/s. 153A of the Act was issued and served on the assessee on 24.08.2007 and assessee filed his return of income on 21.01.2008. Assessment u/s. 153A/143(3) of the Act was framed by ACIT, Central Circle-II, Kolkata vide order dated 30.12.2008. Subsequently, CIT Central-III, Kolkata issued show cause notice dated 07.03.2011 as under:

> *"i) On scrutiny of assessment records it is seen that M/s. Makson Developers Pvt. Ltd and M/s Ajanta Footcare (India) Ltd have received loans from its group company M/s. Ajanta Rubber India Pvt. Ltd. during the F.Yr. 2000-01 relevant to Assessment Year 2001-02 amounting to Rs. 5,00,000/- and Rs.25,00,000/- respectively.*
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> *ii) It is also found that out of 2300 shares issued by M/s. Ajanta Rubber India Pvt. Ltd.; you held 900 shares. In the companies namely, M/s Ajanta Foot Care (India) Ltd and M/s. Makson Developers Pvt. Ltd you held more than 20% of the share holding of the companies. Thus you are the person having substantial interest in the companies as defined u/s. 2(32) of the I.T Act 1961.*
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> *iii) Section 2(22) of the Income tax Act, l96l defines "dividend". As per the clause (e) of sub section (22) of Sec. 2 "dividend" includes -*
>
> > *(e) any payment by a company, not being a company in which the public are substantially ìnterested, of any sum (whether as representíng 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;*
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> *iv) It is seen from the records that the I.T.O., Ward-7 (1), Kolkata has informed that M/s. Ajanta Rubber India Pvt. Ltd. has accumulated profit for different assessment years as under:*
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> | *Asstt. Year* | *Accummulated profits as per Balance Sheets* |
> |---|---|
> | *2001—02* | *Rs. 82,76,749/-* |
> | *2002—03* | *Rs. 82,35,260/-* |
> | *2003—04* | *Rs. 81,89,729/-* |
> | *2004—05* | *Rs. 81,91,953/-* |
> | *2005—06* | *Rs. 92,48,568/-* |
> | *2006—07* | *Rs. 92,25,735/-* |
>
> *In view of above facts Rs.5,00,000/- and Rs.25,00,000/- given by M/s. Ajanta Rubber India Pvt. Ltd. to M/s. Makson Developers Pvt. Ltd. and M/s. Ajanta Footcare (India) Ltd. during the Assessment Year 2001-02 is required to be treated as deemed dividend u/s. 2(22)(e) of the Income-tax Act, 1961 in your hands in the proportion of your shareholding in those companies."*

4. The assessee replied the show cause notice by filing a letter dated 11.03.2011. The CIT in his revision order discussed the facts that during financial year relevant to assessment year

2001-02, which is under consideration, the assessee and Late Bithika Banik had shareholding in the following companies in the ratio given hereunder:

Name of the company	Total shares	Held by Assessee	Held by Lt. Bithika Banik
M/s. Ajanta Rubber India Pvt. Ltd. M/s. Makson Developers Pvt. Ltd. M/s. Ajanta Footcare (India) Pvt. Ltd.	2300 Of Rs.9,32,000 1500	900 Of Rs.4,93,925 500	1400 Of Rs.4,38,075 1000

In view of the above, the CIT noted that during the financial year relevant to Assessment Year 2001-02, Ajanta Rubber India Pvt. Ltd. advanced a sum of Rs.25 lakh to Makson Developers Pvt. Ltd. and Rs.5 lakh to Ajanta Footcare (India) Pvt. Ltd. According to him, the assessee has substantial interest as defined u/s. 2(32) of the Act in all the companies as mentioned above because he carries more than 20% of the voting power. The assessee is a registered as well as beneficial owner of shares in the companies mentioned above. According to him, loan given by Ajanta Rubber India Pvt. Ltd. to Makson Developers Pvt. Ltd. and also Ajanta Footcare (India) Pvt. Ltd. is to be treated as deemed dividend in terms of section 2(22)(e) of the Act. He noted, since there is one more shareholder and both of them have substantial interest as defined u/s. 2(32) of the Act in all the companies as mentioned above, the dividend in their hands has to be considered on the basis of their proportionate share holding in the lender company. The assessee before CIT during the original proceedings referred to clause 3 of section 2(22)(e) of the Act but CIT relying on the decision of ITAT Mumbai Bench decision in the case of ACIT Vs. Bhowmick Colour Pvt. Ltd. (2009) 118 ITD 1 (Mum.)(SB) treated the loan given by Ajanta Rubber India Pvt. Ltd. to Makson Developers Pvt. Ltd. and Ajanta Footcare (India) Pvt. Ltd. as deemed dividend in the hands of the assessee by observing in para 26 & 27 as under:

> *"26. I have gone through the details of loans given by M/s. Ajanta Rubber India Pvt Ltd to M/s Makson Developers and to M/s Ajanta Footare (India) Pvt. Ltd. I have also gone through the details of shareholding of the assessee in the companies. On the basis of the Financial Statements filed by M/s. Ajanta Rubber India Pvt. Ltd working of accumulated profits has also been done. After considering all these details and workings, computation of dividend as per the provisions of section 2(22)(e) of the I.T. Act, 1961 has also been done. All these details and workings are made a part of this order as Annexure-1, Annexure-2 and Annexure-3. As per the workings, the amount of dividend that has to be added in the hands of the assessee in the Assessment Year 2001-02 comes to Rs.11,73,913/-.*
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> *27. From the above discussion it is amply clear that the impugned assessment is completed without requisite verification on the issue as discussed .above. Therefore, the*

assessment order is erroneous in so far as it is prejudicial to the interest of revenue. The invoking of provisions of Section 263 of the I.T. Act has correctly been taken in tis case. Accordingly, in the exercise of revisionary powers u/s. 263 of Income Tax Act, 1961, the assessment of assessment year 2001-02 completed u/s. 153A/143(3) on 30.12.2008 which has subsequently been revised u/s. 154 of the I. T. Act, 1961 on 20.09.2010 is enhanced by Rs.11,73,913/-. The Assessing Officer is directed to revise the assessment to this extent after affording reasonable opportunity of being heard to the assessee."

5. We have heard rival submissions and gone through facts and circumstances of the case. We find that these appeals relate to Assessment Years 2001-02, 2002-03, 2003-04, 2005-06 and 2006-07 against the revision order passed by CIT u/s. 263 of the Act in which loan was advanced by Ajanta Rubber India Pvt. Ltd. to Makson Developers Pvt. Ltd. and Ajanta Footcare (India) Pvt. Ltd., wherein assessee held more than 10% share in lender company and more than 20% in the borrower company. Such loan advanced to these concerns have been treated as deemed dividend income u/s. 2(22)(e) of the Act by revisionary order passed by CIT u/s. 263 of the Act. It is to be mentioned that none of the loans treated as deemed dividend u/s. 2(22)(e) of the Act has been received by the assessee. The Ld. counsel for the assessee has relied on Board Circular No.495 dated 22.09.1987, which reads as under:

"10.1 Secs. 104 to 109 relate to levy of additional tax on certain closely-held companies (other than those in which the public are substantially interested) ìf they fail to distribute a specified percentage of their distributable profits as dividends. These provisions had lost much of their relevance with the reduction of the maximum marginal rate of personal tax to 50 per cent which is lower than the rate for corporation tax on closely-held companies. Secs. 104 to 109 have, therefore, been omitted by the Finance Act, 1987.

10.2 With the deletìon of ss. 104 to 109 there was a likehood of closely-held companies not distributing their profits to shareholders by way of dividends but by way of loans or advances so that these are not taxed in the hands of the shareholders. To forestall his mainpulation, sub-cl. (e) of cl. (22) of s. 2 has been suitably amended. Under the existing provisions, payments by way of loans or advances to shareholders having substantial interest in a company to the extent to which the company possesses accumulated profits is treated as dividend. The shareholders having substantial interest are those who have a shareholding carrying not less than 20 per cent voting power as per the provisions of cl. (32) of s. 2. The amendment of the definition extends its application to payments made (i) to a shareholders holding not less than 10 per cent of the voting power, or (ii) to a concern in which the shareholder has substantial interest. "Concern" as per the newly inserted Explanation 3(a) to s. 2 (22) means an HUF or a firm or an association of persons or a body of indíviduals or a company. A shareholders having a substantial interest in a concern as per part (b) of Explanation 3 is deemed to be one who is beneficially entitled to not less than 20 per cent of the íncome of such concern.

10.3 The new provision would therefore, be applicable in a case where a shareholder has 10 per cent or more of the equity capital. Further, deemed dividend would be taxed in the hands of a concern where all the following conditions are satisfied:

(i) where the company makes the payment by way of loans or advances to a concern;

(ii) where a member or a partner of the concern holds 10 per cent of the voting power in the company; and

(iii) where the member or partner of the concern is also beneficially entitled to 20 per cent of the ìncome of such concern.

Wíth a view to avoid the hardship in cases where advances or loans have already been given, the new provisions have been made applicable only in cases where loans or advances are given after 3lst May, 1987.

These amendments will apply ín relation to asst. yr. 1988-89 and subsequent years."

From the above circular issued by CBDT in terms of section 119 of the Act makes it abundantly clear that the circumstances mentioned in the above circular that such loan will be treated as deemed dividend income u/s. 2(22)(e) of the Act in the hands of borrower company or concerns in which the shareholder is having beneficial interest of 10% in lending company and more than 20% in the borrower company. But, by this financial circular revenue wanted to remove the rigors of section 2(22)(e) of the Act so that the shareholder has not taxed who has not borrowed the loan at all. In view of the above circular issued by CBDT, according to assessee, the AO while framing assessments in these years u/s. 143(1) or 143(3) in some of the years or even after search assessments framed u/s. 153A of the Act, could not have treated the loan received by the borrower company from another lender company wherein assessee had held beneficial interest of 10% of lender company and 20% in the case of borrower company as deemed dividend income u/s. 2(22)(e) of the Act in the hands of the assessee as shareholder even though it may be treated as deemed dividend income in the hands of recipient company. It was the contention of the assessee before us that, from the above CBDT Circular the position is clear that the AO could not have treated such loan as deemed dividend u/s. 2(22)(e) of the Act in the hands of the assessee, the question of order of AO passed u/s. 153A r.w.s. 143(3) of the Act being erroneous inasmuch as prejudicial to the interest of revenue on this issue does not arise. Now we have to examine whether the AO has

formed an opinion while framing assessments u/s. 143(3) or 143(1) of the Act or 153A of the Act, when a detailed questionnaire was issued to the assessee on both the occassions i.e. regular assessment as well as search assessment and assessee replied to the same. The assessee has given the details of assessments framed as under:

Assessment Year	Date of filing of return	Abatement u/s. 143(3)	Assessment u/s. 143(1)/143(3) made on
2001-02	02.10.01	31.03.04	15.01.03 u/s. 143(1)
2002-03	25.10.02	31.03.05	29.03.05 u/s. 143(3)
2003-04	31.10.03	31.03.06	08.06.04 u/s. 143(1)
2005-06	29.10.05	Search on 06.11.06 barred on 31.12.08	153A/143(3)

According to the ld. counsel for the assessee, the original assessments u/s. 143(3) or 143(1) of the Act were completed much before the date of search and seizure and these assessments have never been abated. Complete details i.e. Balance Sheet, P&L Account and audited accounts were available in those assessments. The Ld. counsel for the assessee pointed out that assessments framed u/s. 153A of the Act stand abated only in respect of assessment years for which no assessment has been completed u/s. 143(3) or 143(1) of the Act. In respect to this issue no incriminating paper regarding deemed dividend u/s. 2(22)(e) of the Act having been found during the search, the question of treating the amount as deemed dividend u/s. 2(22)(e) of the Act for the above assessment years during revision proceedings u/s. 263 of the Act does not arise.

6. From the above facts and circumstances and the fact that revenue has not objected that these details were not before the AO during the course of original assessment proceedings either u/s. 143(3) or 143(1), as the case may be, or during search assessment u/s. 153A of the Act. The details of loans advanced were available before the AO and he has examined these details during those assessments. No doubt the AO has not expressed the acceptance of these loan details in so many words in the assessment order or search assessment order, that does not make any difference that the AO has not gone into the details of these loans. In such circumstances, the CIT now, in the revision order passed u/s. 263 of the Act wants to change the opinion and this is not permissible in law as the dictum of Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. Vs. CIT (2000) 243 ITR 83 (SC). Hon'ble Supreme Court in this case has stated that (from Head

notes), "*An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind. The phrase ''prejudicial to the interests of the Revenue'' is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to an erroneous order of the Income-tax Officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the Revenue. The phrase ''prejudicial to the interests of the Revenue'' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer, cannot be treated as prejudicial to the interests of the Revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income-tax Officer is unsustainable in law.*"

In such facts and circumstances, we quash the revision orders in these ten appeals passed by CIT u/s. 263 of the Act and allow appeals of the assessee.

7. In the result, appeals of assessee are allowed.

8. Order is pronounced in the open court on 11.07.2013

Sd/- Sd/-

एन. एस. सैनी, लेखा सदस्य **महावीर सिंह**, न्यायीक सदस्य
(N. S. Saini) (Mahavir Singh)
Accountant Member Judicial Member

(तारीख) Dated : 11th July, 2013 Pronounced by

वरिष्ठ निजि सचिव Jd.(Sr.P.S.) Sd/- (Pramod Kumar) Sd/- (Mahavir Singh)
A.M. J.M.

आदेश की प्रतिलिपि अग्रेषितः- Copy of the order forwarded to:

1. अपीलार्थी/APPELLANT – Shri Subrata Banik, Executor to the estate of Late Bithika Banik & Shri Subrata Banik , C/o Salarpuria, Jajodia & Co,7, C.R. Avenue, Kolkata-700 072
2 प्रत्यर्थी/ Respondent – CIT, Central-III, Kolkata
3. आयकर कमिशनर (अपील)/ The ACIT,CC-II, Kolkata.
4. विभागिय प्रतिनीधी / DR, Kolkata Benches, Kolkata

सत्यापित प्रति/True Copy, आदेशानुसार/ By order,

सहायक पंजीकार/Asstt. Registrar.