*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided On: 17.03.2015

\+ **ITA No.398/2010**

COMMISSIONER OF INCOME TAX ..... Appellant

Through: Mr. Rohit Madan & Mr. Ruchir Bhatia, Advocates.

Versus

SUBRATA ROY ..... Respondent

Through: Mr. Percy J. Pardiwala, Sr. Adv. With Mr. Satyen Sethi & Mr. Arta Trana Panda, Advocates.

AND

\+ **WP(C) 1162/2012**

THE COMMISSIONER OF INCOME TAX (CENTRAL-1)
..... Appellant

Through: Mr. Rohit Madan & Mr. Ruchir Bhatia, Advocates.

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SUBRATA ROY ..... Respondent

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CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K. GAUBA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)
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1. The question of law urged by the revenue in this appeal (and the writ petition) is:

> "Whether the amount of Rs.1,84,19,305 was deemed dividend in the hands of the assessee under the provisions of Section 2 (22) (e) of the Income Tax Act, 1961?"

2. The assesse was managing director of Sahara India Savings and Investment Corporation Ltd. (hereafter "SISICOL") during assessment year (AY) 1992-93; he was also a partner of M/s. Sahara India (hereafter referred to as "the firm"). In terms of an agreement dated August 17, 1987, the firm was to act as an agent to promote, conduct, introduce and secure business under SISICOL's schemes. The firm -in tune with its contractual obligations, had to remit ₹26,24,12,222/- on 31-03-1992, which it had collected and was payable to SISICOL. Between 01-04-1991, and 31-03-1992, the firm advanced ₹1,88,96,202/- to the assessee. The Assessing Officer (AO) held that the amount was a loan from SISICOL to the assessee through the use of the company's agent, the firm, which was a "conduit" and a device adopted to bypass application of Section 2(22)(e) of the Income-tax Act, 1961 (hereinafter, referred to as "the Act"). The amount of ₹1,88,96,202/- being a loan out of SISICOL's accumulated profits to the assessee-shareholder was treated as *"deemed dividend"* under

section 2(22)(e) of the Income-tax Act ("the Act") and added to the assessee's income.

3. On appeal, the learned Commissioner of Income-tax (Appeals) – hereafter "CIT (A)" held that SISICOL had advanced sums to a concern (the firm) in which the assessee had a substantial interest. Taking note that Section 2(22)(e) as applicable after its amendment w.e.f. from 31-05-1987, for AY year 1988-89, included concerns in which shareholder is a member or partner, the CIT (A) upheld the addition made.

4. The assessee carried the matter in appeal to the ITAT. There was a divergence of views of the two members who originally heard the appeal; the Judicial Member held that Section 2(22)(e) was inapplicable; the Administrative Member held to the contrary and that the provision was attracted to the circumstances of the case.

5. The Judicial member noted that the assessee was managing director of SISICOL, which had many deposit schemes and 290 units or branches to aid its operations. He was also a partner of the firm, which entered into an understanding with SISICOL on 17.8.1987, to conduct, promote, introduce and secure business through various schemes for the company. The firm also collected amounts through several schemes of SISICOL. Referring to the schemes, and the terms of the 1987 agreement, it was noted that there was no time limit stipulated for remittance of amounts collected by the firm on behalf of SISICOL to it. The amounts were to be collected in the ordinary

course of business. The affidavit of Shri O. P. Srivastava dated 06.07.1996 was also relied on; it stated that such sums collected and retained before remission by firm to the company, SISICOL, constitute neither "loan" nor "advance".

6. The Judicial Member then considered the question whether credit balances lying with the firm could be treated as loan or advance from the company. It was held that, in facts and circumstances of the case, the amount required to be remitted by the firm could be branded as a trade debt and not as loan or advance. Reference was made to the Chamber's Dictionary meaning of the term "loan". The observations of the Supreme Court in *Bombay Steam Navigation Co. (1953) P. Ltd. v. CIT* [1965] 56 ITR 52 were relied upon to say that a loan of money undoubtedly results in a debt but every debt does not involve a loan. The distinction between a loan and a debt and the pre-requisite for a loan – being the existence of a lender, a borrower, a thing loaned for use and a contract between the parties for return of the thing loaned was also noticed. It was held that the dictionary meaning of term "advance" was premised on an outgoing or flow of money from the company to the shareholder; consequently, notional payments by way of book entries would not be included. It was held that to invoke the provisions of Section 2(22)(e), the revenue had to prove that a sum was directed by the company to the firm to pay to the assessee. In such a case, could the firm be said to debit the company's account and not that of individual partner. It was therefore held that the firm was indebted to the company (in respect of what it collected and which

was payable to SISICOL), but by no stretch of imagination could it be said such amounts in the hands of the firm were given as loan or advance by SISICOL. The amounts payable in the large running account was unremitted collection, and the relationship was that of a debtor and a creditor in respect of the trade debt but not one of a borrower and a lender. Reference was made to Schedule IX appended to the profit and loss account of SISICOL for the relevant period. He noted that the sums shown as due from the firm to the company was reflected in Schedule VII to the balance-sheet with the heading "*Cash, bank and other balances"*. Thus, the description for the amount due from the firm was entirely different from normal loan and advance appearing in the relevant accounts.

7. The Judicial Member found that in the facts and circumstances of the case, the ₹1.88 crores loan to the assessee by the firm was not an advance out of the amounts payable by the firm to SISICOL. The firm had sufficient funds from other sources - a fact also noted by the CIT (A) in paragraph 4 of his order. The total funds available with the firm at the relevant time was ₹60,61,54,638/-, including ₹26.24 crores payable to SISICOL. The detail of ₹60,61,54,638/-, the amount payable is noted at page 25 of the order. Therefore, on facts, it could not be said that ₹1.88 crores loan given by the firm to the assessee was part of credit balances of the SISICOL with the firm. The CIT (A) held that 44 % of availability of funds with the firm could be said to belong to SISICOL. The Judicial Member stated that such inference could not be drawn without providing specific link or direct nexus

between the two figures. The revenue was unable to connect loan advanced to the assessee with the amount due to SISICOL. Consequently, the judicial member concluded that that there was no payment of any amount by way of loan or advance, either directly to the assessee shareholder or on his behalf or for his benefit. The trade debt payable by the firm in the normal course of business could not be treated to form the genesis of loan of ₹1.88 crores to the assessee. The Judicial Member further observed that the firm had been advancing interest free amounts to its partners, evident from the materials on record and that the details of repayment of loan by the assessee in the immediately succeeding year were made. He further noted that the assessee had taken loan from the firm right from 01.04. 1990, but the provision of Section 2(22)(e) was never invoked before by the Department.

8. It was concluded that the assessee was not liable even in terms of the amendment, to a "concern" as referred to in Explanation 3 to section 2(22)(e) of the Act and held that the arrangement could not be treated as a device or conduit to benefit the assessee. The Judicial member held that the corporate veil could not be lifted in the facts of the case. It was observed that the credit balance of ₹26.24 crores was retained by the firm in the usual course of business and represented collection for the previous two months. The collection exceeded on an average ₹10 crores per month. Consequently, it could not be inferred that amount retained by the firm was for the assessee's benefit. The credit balance of about ₹26 crores was natural and unavoidable in the

circumstances of the case and had no nexus whatsoever with loan advanced by the firm to the assessee. The Judicial Member accordingly held that there was no receipt of *"deemed dividend"* in the hands of the assessee.

9. The Accountant Member, on the other hand, noticed that as managing director of SISICOL, the assesses controlled the activities of all companies and firms of the Sahara group and was also the main person behind the activities of all concerns. He held that a "payment" is not the same thing as payment in fact and relied on *G. R. Govindarajulu Naidu v. CIT* [1973] 90 ITR 13 (Mad). He also observed that the transaction in question could not be treated as being carried out at arm's length. He observed that there was no dispute that the firm had advanced amounts to the assessee. The Accountant Member held that two transactions, one from company, SISICOL, to the firm, and from the firm to the assessee should be treated as a combined one, amounting to payment of loan from SISICOL, to the assessee. He held that the firm was only a conduit for the loan and that the firm's loan to the assessee had its roots in the credit balance of SISICOL. Reliance was placed in this regard upon *T. Sundaram Chettiar v. CIT* [1963] 49 ITR 287 (Mad) and *M. D. Jindal v. CIT* [1987] 164 ITR 28 (Cal). It was held that the firm did not have adequate resources and its advance to the assessee was not an independent transaction. Reference was made to the balance-sheet of the firm as on March 31, 1992, which showed that the partner's capital was only ₹40,000/-. The learned Accountant Member concluded that

the provision of section 2(22)(e) were applicable in this case. It was noticed that SISICOL had share capital of ₹2,95,87,800/- and further reserves and surplus of ₹1,84,19,305/- as on 31.3.1992. These facts and figures supported the conclusion that the roots of the loan from the firm, to the assessee lay in the credit balance of the company, SISICOL, with the firm.

10. Dealing with the question whether the credit balance of SISICOL with the firm, was a trade debt or not, the Accountant Member noted the exception to the definition of dividend in clause (ii) of sub-section 2(22)(e) and observed that it operated only if there was an advance or loan to a shareholder by SISICOL and that the assessee had to show that his case fell within the exception clause and that no material had been placed before the ITAT to establish it. The Accountant Member noticed that of a total credit balance of several concerns aggregating to ₹60,61,54,638/-, only ₹26,24,12,223/- stood in the name of SISICOL and also addressed the issue of whether any nexus could be established between credit balance in the name of SISICOL and loan advanced by the firm to the assessee.

11. The third member to whom the matter was referred, after hearing the submissions of the parties concurred with the opinion of the Judicial Member. Consequently, the assessee's appeal was allowed.

12. The revenue argues that the majority opinion of the ITAT is erroneous, given the text of Section 2 (22) (e) and the object behind its

enactment. Heavy reliance was placed on the order of the Accountant Member and of the Revenue authorities. Counsel argued that the assessee, as managing director (of SISICOL) was controlling it and the firm as well and, as a result, could use the firms as a conduit or a device to funnel and utilize the said company's funds for his personal benefit. It was loan or advance by SISICOL to its shareholder, i.e., the assessee, who *de facto* was Sahara. It was argued that the assessee was also a shareholder of SISICOL; the firm became a convenient device to funnel SISICOL's amounts, advanced to it. Counsel said that once it was proved that a substantial amount i.e., ₹26,24,12,223/- stood to the credit of SISICOL, that some amounts were paid by the firm to the assessee reinforced the inference that they were out of that company's funds. Counsel submitted that Section 2 (22) (e) enacts a deeming fiction and that in such cases, it is open to the revenue to follow that fiction and not allow the mind to boggle at some intervening facts. Consequently, in reality, the firm being a device or mechanism to avoid the provision, should be ignored and the fact that the amounts were flowing from SISICOL to the assessee, should be given due weight.

13. Learned counsel relied on the judgment of the Supreme Court in *Commissioner of Income Tax v. Mukundray K. Shah* [2007] 290 ITR 433 where it was held that:

> *"11... The companies having accumulated profits and the companies in which substantial voting power lies in the hands of the person other than the public (controlled companies) are*

required to distribute accumulated profits as dividends to the shareholders. In such companies, the controlling group can do what it likes with the management of the company, its affairs and its profits. It is for this group to decide whether the profits should be distributed as dividends or not. The declaration of dividend is entirely within the discretion of this group. Therefore, the Legislature realised that though funds were available with the company in the form of profits, the controlling group refused to distribute accumulated profits as dividends to the shareholders but adopted the device of advancing the said profits by way of loan to one of its shareholders so as to avoid payment of tax on accumulated profits. This was the main reason for enacting section 2(22)(e) of the Act.

12. In the case of CIT v. L. Alagusundaram Chettiar [1977] 109 ITR 508, the Madras High Court held that the word " payment" in the said section means the act of paying and, therefore, in that case it was held that payment by the company to Karuppiah Chettiar was for the benefit of the assessee, the managing director of the company, L. Alagusundaram Chettiar, and was therefore assessable as dividend in the hands of the assessee. In the said judgment it has been held that the basic test to be applied in such cases is not whether the loan given is a benefit but whether payment by the company to Karuppiah Chettiar was for the benefit of the assessee who was the managing director of the paying company. Applying the above test to the facts of the present case, we are of the view that the Tribunal was right in holding, on examination of the cash flow statement, that MKSEPL had made payments to MKF and MKI for the benefit of the assessee which enabled the assessee to buy 9 per cent. RBI Relief Bonds in the financial year 1999-2000. It is in this sense that the Tribunal was right in holding that the two firms were used as conduits by the assessee. It is not in dispute that the assessee had more than 10 per cent. of voting power in MKSEPL during the block period. It is not in dispute that the assessee had substantial interest of about 16 per cent. in MKF.

> *It is not in dispute that the three companies were controlled companies. There is one more point which needs to be mentioned. The timing of the so-called repayments by the company to MKF and MKI and the immediate withdrawal of the funds by the assessee-cum-director-cum-shareholder-cum-partner and the timing of investment in purchase of Bonds were around the same time. Moreover, in MKSEPL the assessee is not only a shareholder having more than 10 per cent. of total voting power, he is also a director of that company. The said company is also a partner in MKF and MKI which explains why the amount of Rs. 5.99 crores was routed by splitting the said amount into two parts of Rs. 2.79 crores and Rs. 3.20 crores. In the present case, the most important aspect, which has not been considered by the High Court, was that withdrawal of money by the assessee from his capital account, in the books of MKI, during the financial year 1999-2000 led to a debit balance of Rs.8.18 crores as on March 31, 2000. To this extent, the finding given by the Assessing Officer and by the Tribunal remains unchallenged…. The five payments had direct co-relation with Rs. 5.99 crores paid by MKSEPL to MKF and MKI and payments by the said two firms to the assessee who used the said money to buy 9 per cent. RBI Relief Bonds. Therefore, the said payment by the company through the two firms was for the benefit of the assessee. Therefore, the said funds were not repayment of loans, they were for purchase of 9 per cent. RBI Relief Bonds by the respondent."*

The revenue's counsel also relied on *Commissioner of Income Tax v National Travel Services* [2012] 347 ITR 305 and urged that in similar circumstances, partners of a firm were held to have received advances and subjected to tax under Section 2 (22) (e).

14. Counsel for the assessee urged this court to uphold the ITAT's majority view. He submitted that once there was a factual finding with respect to absence of nexus between the amounts payable to SISICOL

and the balance of firm's moneys (which was in excess of ₹33 crores) there was no question of applicability of Section 2 (22) (e). Counsel submitted that although the provision creates a fiction, before proceeding to the "logical conclusion" the strict terms of the statute are to be construed and applied.

15. Section 2 (22) (e) of the Act reads as follows:

"(22) " dividend " includes--

(a) any distribution by a company of accumulated profits, whether capitalised or not, if such distribution entails the release by the company to its shareholders of all or any part of the assets of the company;

(b) any distribution to its shareholders by a company of debentures, debenture-stock, or deposit certificates in any form, whether with or without interest, and any distribution to its preference shareholders of shares by way of bonus, to the extent to which the company possesses accumulated profits, whether capitalised or not;

(c) any distribution made to the shareholders of a company on its liquidation, to the extent to which the distribution is attributable to the accumulated profits of the company immediately before its liquidation, whether capitalised or not;

(d) any distribution to its shareholders by a company on the reduction of its capital, to the extent to which the company possesses accumulated profits which arose after the end of the previous year ending next before the 1st day of April, 1933, whether such accumulated profits have been capitalised or not;

(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) by way of advance or loan to a shareholder, being a person who

has a substantial interest in the company, 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--

(i) a distribution made in accordance with sub-clause (c) or sub-clause (d) in respect of any share issued for full cash consideration, where the holder of the share is not entitled in the event of liquidation to participate in the surplus assets;

(ii) any advance or loan made to a 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;

(iii) any dividend paid by a company which is set off by the company against the whole or any part of any sum previously paid by it and treated as a dividend within the meaning of sub-clause (3), to the extent to which it is so set off.

Explanation 1.—The expression 'accumulated profits', wherever it occurs in this clause, shall not include capital gains arising before the 1st day of April, 1946, or after the 31st day of March, 1948, and before the 1st day of April, 1956.

Explanation 2.—The expression 'accumulated profits' in sub-clauses (a), (b), (d) and (e), shall include all profits of the company up to the date of distribution or payment referred to in those sub- clauses, and in sub clause (c) shall include all profits of the company up to the date of liquidation, but shall not, where the liquidation is

consequent on the compulsory acquisition of its undertaking by the Government or a corporation owned or controlled by the Government under any law for the time being in force, include any profits of the company prior to three successive previous years immediately preceding the previous year in which such acquisition took place.

Explanation 3.—For the purposes of this clause,—

(a) 'concern' means a Hindu undivided family, or a firm or an association of persons or a body of individuals or a company ;

(b) a person shall be deemed to have a substantial interest in a concern, other than a company, if he is, at any time during the previous year, beneficially entitled to not less than twenty per cent of the income of such concern ;"

16. The term "dividend" takes in any disbursal, by a company, of accumulated profits, distribution to its shareholders- by a company- of debenture stock, or deposit certificates in any form, (with or without interest), any sharing with its shareholders- by the company, on its liquidation, any distribution made to the shareholder by a company on the reduction of its capital. All these are spelt out by clauses (a) to (d) of section 2(22) of the Act. Section 2 (22) (e) enacts that payment by a company and 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 31.05.1987, but by way of advance or loan to a shareholder: being a person who is the beneficial owner of the 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 10% voting power is deemed to be dividend. The second class of payment is by way of advance or loan to any *concern* in which such shareholder is a member or partner and in which he has substantial interest. The third class is payment by any such company for individual benefit of any such shareholders to the extent of which the company in either case possesses accumulated profits.

17. The later part of Section 2 (22) (e) spells out exclusions from the term "dividend". Parliament pointedly clarified that any loan given or advance made, to a shareholder, or concern (in which the shareholder is a member or partner and in which he has substantial interest), by the company in the ordinary course of his business where the lending of money is a substantial part of the business of the company or any dividend paid by a company which is set off by the company against the whole or any part of sum previously paid by it and treated as a dividend under Section 2 (22) (e) to the extent of set off, is not "dividend" and therefore excluded.

18. In *Commissioner of Income Tax v. C. P. Sarathy Mudaliar* 1972 (83) ITR 170 (SC), Section 2(6A)(e) of the Income Tax Act, 1922, (which was identical to Section 2(22)(e)) was considered. There, members of a Hindu undivided family (HUF) acquired shares in a company with family's funds. Loans were given to the HUF and the question was whether those loans could be treated as the family's dividend income in terms of Section 2(6A)(e). The Supreme Court held that only loans advanced to shareholders could be deemed to be dividends under Section 2(6A)(e) of the Act, and that the HUF could not be considered to be a *" shareholder"* . Therefore, amounts loaned to the HUF were not loans of the company to its shareholders and could not, therefore, be deemed to be its income. The Court further held that when the Act speaks of shareholder it refers to the registered shareholder. *C. P. Sarathy Mudaliar* was followed by the Supreme Court in *Rameshwarlal Sanwarmal v. Commissioner of Income Tax*

1980 [122] ITR 1. In that case, the company advanced the loans to the assessee-HUF who was the beneficial owners of the shares (in the company), though shares were registered in the name of the individual *karta*, who held them for and on behalf of the family. The Supreme Court held that the Hindu undivided family being only the beneficial shareholder and not a registered shareholder would not fall within the purview of section 2(6A)(e) of the 1922 Act. The Court held as follows:

> *"What section 2(6A)(e) is designed to strike at is advance or loan to a `shareholder` and the word `shareholder` can mean only a registered shareholder. It is difficult to see how a beneficial owner of shares whose name does not appear in the register of shareholders of the company can be said to be a `shareholder` . He may be beneficially entitled to the share but he is certainly not a `shareholder` . It is only the person whose name is entered in the register of the shareholders of the company as the holder of the shares who can be said to be a shareholder qua the company and not the person beneficially entitled to the shares. It is the former who is a `shareholder` within the matrix and scheme of the company law and not the latter. We are, therefore, of the view that it is only where a loan is advanced by the company to a registered shareholder and the other conditions set out in section 2(6A)(e) are satisfied that the amount of the loan would be liable to be regarded as `deemed dividend` within the meaning of section 2(6A)(e)."*

19. It is thus clear that the first limb of the provisions of Section 2(22)(e) has to be followed, i.e., the payment must be to a person who is a registered holder of shares. Here, the assessee is no doubt a shareholder of SISICOL. However, was the payment made by the company? The elaborate exercise of the revenue asking the ITAT and

this Court to lift the "corporate veil" and see the reality, piercing the dissimulative position of the assessee is to be understood as its compulsion to deal with the text of Section 2 (22) (e), which enacts that a payment *"by a company… of any sum (whether as representing a part of the assets of the company- or otherwise) by way of advance or loan to a shareholder…"* and such shareholder being one who has a substantial interest in the company. It is undisputed that the payments were not made to the assessee "by the company" (SISICOL); nor in his capacity as its "shareholder". They were paid by the firm (of which he is undoubtedly a partner).

20. The AO and the CIT (A) were of the opinion that the firm – which gave the amounts as loan to the assessee – a partner, was a ruse a facade and a smokescreen to shield the real payment by SISICOL to him. Whilst there is no gainsaying that the assessee is managing director of SISICOL – equally he is partner of the firm, which advanced the amount to him. However, the question of payment to the concern (in this case, the firm) is a matter that requires to be established. Here the factual findings are important. A sum may be a debt but not loan from company to firm or to the assessee. The assessee had relied on *Bombay Steam Navigation Co. (1953) P. Ltd.* (supra) and other decisions to say that there had to be outflow of funds. The third member who agreed with the Judicial member (and therefore spoke for the majority view), correctly surmised that decision of such issues could not be based on entries in books of account. It was, in our opinion correctly stated that the totality of facts

and circumstances required consideration. Here, the court notices that the Accountant Member (of ITAT) held that two transactions of loan by the firm to the assessee and the other, from SISICOL to the firm- were really one transaction. Indisputably, the assessee obtained the loan from the firm. Consequently, if it is held that the two transactions were in fact one, i.e., loan represented funds of SISICOL, then the case of loan and advance stood established and Section 2(22)(e) applied. Unquestionably, the firm worked for the company as its agent. If an agent had given a loan or advance to the assessee for and on behalf of the company, then there was no need for anything else to be established to attract Section 2 (22) (e). The concomitant issue (with whether the transaction was one whole or separate) was also the question if the assessee had used a smokescreen to evade tax and camouflage the transaction of loan/advance from SISICOL to himself by employing the firm as a conduit. The revenue argued that a device was used and that in such case, the assessee would hardly be expected to show the transaction as a loan from SISICOL to him. It cannot be seriously doubted that as managing director and shareholder of SISICOL, the assessee has sufficient control over its affairs; so is the case with the firm. The firm did advance amounts to him. These facts, however, facially cannot result in an inference that the two transactions are one and that the assessee had adopted a stratagem of securing loan and advance from SISICOL through a conduit, viz. the firm. Apart from the surmise that the transaction was one and the same, the revenue had to probe further and establish from the material before it that the payments were part of a tax evasion ruse. Section

2(22)(e) pulls in notional or artificial income for assessment by a fiction. The primary burden to bring to tax amounts, on the ground that the transaction is a deemed dividend (when it is not so otherwise) is upon it. To discharge that burden, the Revenue cannot rest content on surmises and assumptions; it should premise them, rather on facts and materials on the record. The ITAT held that there is no material on record to show that funds of the company were utilized by the firm to advance loan to the assessee. The firm had advanced ₹1,88,96,202/- out of total available funds of more than ₹60 crores: which belonged to different parties though available with it i.e., the firm. This factual finding does not disclose any error or infirmity.

21. So far as the contention that the two transactions -one from SISICOL to the firm and the second from the firm to the assessee should be treated as one, is not based on any valid justification. The firm has a legal existence separate and independent of SISICOL. It carried on significant commercial activity and collected substantial amounts (crores of rupees). Therefore, the finding that the two transactions, i.e., one of advancing loan (by the firm to the assessee) and the other of the use of funds of SISICOL by the firm being in reality one transaction is without basis. The presumption was drawn without any material to support the case of the Revenue that funds of the company were utilized to advance the loan. Speaking about this, the third member, who spoke for the majority view of the ITAT since he concurred with the Judicial Member, said:

"There is no nexus between funds of the company with the firm and advancement of loan to the assessee. In fact evidence, as pointed out by the learned Judicial Member, is to the contrary. He has pointed out that on April 25, 1991, Rs. 20 lakhs were advanced by the firm to the assessee. This amount could not have come out of credit balance of Rs 26.41 crores which represented money collections in February and March, 1992. There is no contravention of the above factual finding at any stage of proceedings including the Third Member hearing before me. The main and the solid finding that Rs. 26.24 crores shown as credit balance payable to the company by the firm represented collections made by the assessee in the course of business for the months of February, March and partly for January, 1992, has also not been challenged or refuted with reference to any material on record. It is also not in dispute that the firm was making on an average a collection of more than Rs. 10 crores per month through 290 centers spread throughout the length and breadth of the country and that time was taken in making accounts, reconciliation, trial balances and in providing other details of collection and in remittance of money to SISICOL. Having regard to the huge turnover, two months cannot be said to be unreasonable. This is what the learned Judicial Member has recorded and my attention has not been drawn to any material, which would show that such a finding on facts of the case, could not be recorded. The factual finding has also not been shown to be erroneous. A device cannot be presumed, it has to be established by bringing on record facts and circumstances from which a reasonable inference of device could be drawn. No such attempt appears to have been made here."

22. This Court relies on the decision in *Commissioner of Income Tax v Ankitech Pvt. Ltd.* [2012] 340 ITR 14. In *Ankitech*, during the assessment proceedings, the AO noticed that the assessee, a company received an advance of ₹6,32,72,265/- by way of book entry from one JGPL. The shareholders who had substantial interest in the assessee

also had 10 % voting power in JGPL. The AO specifically took note of the shareholding pattern in the assessee-company as well as in JGPL. It was held that two individuals were members holding substantial interests in JGPL which had provided loans and advances to the assessee and the same individuals had substantial interest in the assessee as well, for the purpose of section 2(22)(e). The amount received by the assessee from JGPL, therefore, was held to constitute "advances and loans" and treated as deemed dividend under Section 2(22)(e) of the Act, and added that amount to the assessee's income despite their plea to the contrary. Highlighting the limits to which a fiction can be carried, this Court ruled that:

> *"25. ....under the normal circumstances, such a loan or advance given to the shareholders or to a concern, would not qualify as dividend. It has been made so by a legal fiction created under section 2(22)(e) of the Act. We have to keep in mind that this legal provision relates to "dividend". Thus, by a deeming provision, it is the definition of dividend which is enlarged. Legal fiction does not extend to "shareholder". When we keep in mind this aspect, the conclusion would be obvious, viz., loan or advance given under the conditions specified under section 2(22)(e) of the Act would also be treated as dividend. The fiction has to stop here and is not to be extended further for broadening the concept of shareholders by way of legal fiction. It is a common case that any company is supposed to distribute the profits in the form of dividend to its shareholders/members and such dividend cannot be given to non members. The second category specified under section 2(22)(e) of the Act, viz., a concern (like the assessee herein), which is given the loan or advance is admittedly not a shareholder/member of the payer company. Therefore, under no circumstance, it could be treated as shareholder/member receiving dividend. If the intention of the Legislature was to tax such loan or advance as deemed*

> *dividend at the hands of "deeming shareholder", then the Legislature would have inserted a deeming provision in respect of shareholder as well, that has not happened. Most of the arguments of the learned counsel for the Revenue would stand answered, once we look into the matter from this perspective."*

23. The revenue had relied on *Commissioner of Income Tax v National Travel Services* [2012] 347 ITR 305 to say that in similar circumstances, partners of a firm were held to have received advances and subjected to tax under Section 2 (22) (e). This Court notices that in that case, the assessee-firm consisted of three partners, N, S and JE having profit sharing ratio of 35 %; 15% and 50 % respectively. It had taken a loan of ₹28,52,41,516/- from JP in which the assessee/firm had invested. The assessee had subscribed to the equity shares which constituted 48.18 % of the share capital. The shares were purchased in the names of two partners, N and S but the assessee-firm was the beneficial owner. The AO assessed the loan as deemed dividend under Section 2(22)(e) but the Tribunal set aside the order. On appeal, this court ruled in favour of the revenue, on the basis of a cumulative reading of Section 2 (22) (e) especially the explanation regarding "concern" as extending to a firm and the entitlement of shares on the basis of "beneficial entitlement". The court observed pertinently that:

> *"If the contention of the assessee is accepted, in no case a partnership firm can come within the mischief of section 2(22)(e) of the Act because of the reason that shares would be purchased by the firm in the name of its partners as the firm is not having any separate entity of its own. With the name of the partner entering into the register of members of the company as shareholder, the said partner shall be the "shareholder" in the records of the company but not the beneficial owner as*

"beneficial owner" is the partnership firm. This would mean that the loan or advance given by the company would never be treated as deemed dividend either in the hands of the partners or in the hands of partnership firm. In this way the very purpose for which this provision was enacted would get defeated…

..22. No doubt, when section 2(22)(e) of the Act enacts a deeming provision, it has to be strictly construed. At the same time, it is also trite that such a deeming provision has to be taken to its logical conclusion. If the partnership firm which has purchased the shares is not treated as shareholder merely because the shares were purchased in the name of the partners, that too because of the legal compulsion that shares could not be allotted to the said partnership firm which is a non-legal entity, it would be impossible for such a condition to be fulfilled. That is not the purpose of law. The partnership firm is synonym of the partners. As per the Circular issued by the SEBI dated March 31, 1975, interpreting section 187C of the Companies Act, relied on by the learned counsel for the assessee himself, a partnership firm is not a person capable of being a "member" within the meaning of section 47 of the Companies Act. It is further explained that since a partnership firm is not a legal entity by itself but only a compendious way of describing the partners constituting the firm, it is necessary that the names of all the members of the partnership firm should be entered in the register of members. Obviously then, with the purchase of shares by the firm in the name of its partners, it is the firm which is to be treated as shareholder for the purposes of section 2(22)(e) of the Act."

24. This court is of the opinion that the above decision does not advance the revenue's cause in this appeal. Granted, the assessee is a shareholder of SISICOL; he is also a partner of the firm. However, neither did SISICOL give him the money nor did it advance the amount to the firm. The firm has an independent existence and it had over ₹60 crores in its account. That a significant part of it, i.e., 44% or

over ₹26 crores was payable to SISICOL could not have blinded the revenue to the fact that the other amount was available and given as a loan to the assessee. In these circumstances at least, it could not have been said that the loan to the assessee and the loan (in the form of credits in favour of SISICOL) were really one transaction. It is also a matter of record that the firm had over 290 branches or units and collection by it exceeded- on an average ₹10 crores per month. Therefore, it could not be legitimately held that amount retained by the firm was for the assessee's benefit.

25. For the foregoing reasons, it is held that the question of law framed has to be answered and is so answered in favour of the assessee and against the revenue. The appeal is consequently dismissed.

WP No. 1162/2012

26. In this petition, the correctness of an order 11.04.2008 by which the revenue's application for rectification of the majority opinion, in view of the third member not noticing or wrongly appreciating important features has been challenged.

27. The revenue alleged that Judicial Member's order, especially para 45 was not correctly read by the Third Member, who ruled that the Circular of CBDT dated 22.09.1987 did not go against the spirit of the law. The Third Member held that the circular was inapplicable. The third member noted that the expanded provision in Section 2(22)(e), seeks to cover a "concern" and this is what was explained in

the Circular. The judicial Member held that it was not a case of benefit to "concern" as in that situation 'deemed dividend' under Section 2(22)(e) had to be added in the hands of the concerns and not of the assessee. The Revenue objected to the observations in the ultimate para of the third Member that the source of funds utilized for advancing loan to the assessee was not examined and no material was on record to prove that SISICOL's funds were used to advance loan to the assessee. Therefore, conditions of Section 2(22)(e) were not satisfied. Dealing with these submissions, the ITAT held that:

> *"8. It is contended in the application that Third Member was expected to evaluate himself the factual position and material which had been brought by both the parties. He should have called for detailed information before deciding the issue in favour of the assessee as I.T.A.T is a final fact finding body .*
>
> *9. The contention advanced is without any substance. Evidence on record has been evaluated and finding of fact recorded by the Third Member as noted above. Further the Third Member has a very limited jurisdiction to agree with one of the differing Members of the Bench. As a matter of fact, the Third member found that Revenue failed to establish that amount of the SISICOL with Sahara India was utilized for giving loan to the assessee. Observation about no material and no attempt to connect to establish nexus between funds of SISICOL and advancement of loan to the assessee was, in consonance with the observations and findings already recorded by the learned Judicial member. The Third Member could not ask for further enquiries or investigation and permit a fresh - inning to the Revenue as suggested in the Misc. application. The contention raised is devoid of substance.*
>
> *10. At any rate, I do not find any mistake, which can be treated as a "mistake apparent from record", permitted to be rectified u/s 254(2) of the Income-tax Act, in order dated 17.7.2007.*

Revenue authorities are merely seeking review of the order, which is not permissible. The misc. application is devoid of any substance and is dismissed."

28. We are of the opinion that the impugned order does not suffer from any infirmity calling for interference. As to whether there was a mistake apparent from the face of the record, in the context of this case, the ITAT felt that the revenue could not establish its case, since the basic contention about applicability of Section 2 (22) (e) was not accepted.

29. The writ petition, i.e., W.P.(C)No. 1162/2012 has to fail. Therefore, both the matters, i.e., WP No. 1162/2012 and ITA 398/2010 are accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

R.K. GAUBA
(JUDGE)

MARCH 17, 2015