

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH: KOLKATA
[Before Shri S. V. Mehrotra, AM & Shri Mahavir Singh, JM]

I.T.A No.215/Kol/2013
Assessment Year: 2006-07

Income-tax Officer, Wd-29(4), Kolkata Vs. Shri Piyush Jalan
(Appellant) (PAN: ACUPJ6325K)
(Respondent)

Date of hearing: 10.08.2015
Date of pronouncement: 07.09.2015

For the Appellant: Shri S. M. Sarfarazut Tauheed, Sr. DR
For the Respondent: Shri M. Satnaliwala, FCA

ORDER

Per Shri Mahavir Singh, JM:

This appeal by revenue is arising out of order of CIT(A)-XVI, Kolkata in Appeal No.63/CIT(A)-XVI/Wd-29(4)/11-12 dated 20.11.2012. Assessment was framed by ITO, Ward-29(4), Kolkata u/s. 143(3)/147 of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') for AY 2006-07 vide its order dated 31.10.2011.

2. The sole issue in this appeal of revenue is against the order of CIT(A) deleting the addition of deemed dividend u/s. 2(22)(e) of the Act for an amount of Rs.22,00,000/- being loan transaction. For this, revenue has raised following three grounds:

"1. That on the facts and in the circumstances of the case, the Ld. CIT(A) erred in law as well as on facts by deleting the addition of Rs.22,00,000/- as deemed dividend u/s2(22)(e) of the I.T.Act,1961 made by the AO. after due diligence.

2. That on the facts and in the circumstances of the case, the Ld. CIT(A) erred in law as well as on facts by holding that the loan transaction made by the assessee with the company falls with the exceptional clause, clause-ii of section 2(22)(e) of the Income Tax Act, 1961.

3. That on the facts and in the circumstances of the case, the Ld. CIT(A) erred in law as well as on facts by holding that the company was having money lending as substantial part of its business and not engaged in any manufacturing business when primary records shows otherwise."

3. Briefly stated facts are that the assessee has taken a loan of Rs.22,00,000/- from Jeekay Rolling Mills Pvt. Ltd. on 07.12.2005. In this Private Limited Company the assessee was holding more than 10% equity shares. The AO required the assessee to explain as to why this amount of loan of Rs.22,00,000/- be not treated as deemed dividend under the provision of section 2(22)(e) of the act. The assessee claimed before

the AO that it has taken loan in the ordinary course of money lending business by the company and consequently earned interest of Rs.8,15,774/- on this loan of short term capital gain of Rs.2352/- in the FY 2004-05 relevant to Ay 2005-06. According to assessee, there is no other business during the relevant AY 2006-07 relevant to FY 2005-06 except earning of interest income and income from short term capital gains. But the AO has not considered the explanation of the assessee and noted that the assessee company was engaged in the business of rolling mill and company did not changed this objective in the memorandum before ROC. According to him, the assets in the Balance Sheet i.e. audited accounts also substantiated that this loan was not related to NBFC. According to him, the main objective of the company was manufacturing irrespective of the fact of production and not of money lending. Accordingly, he made addition. Aggrieved, assessee preferred appeal before CIT(A).

4. The CIT(A) considering the explanation of the assessee of clause (2) of section 2(22)(e) of the Act and noted that this loan was in the ordinary course of money lending, which is substantial part of business income of the assessee company and accordingly, the provisions of section 2(22)(e) of the Act will not apply to the case of the assessee. Aggrieved, revenue came in appeal before Tribunal.

5. We have heard rival submissions and gone through facts and circumstances of the case. We find from the facts that the assessee had taken loan of Rs.22,00,000/- from Jeekay Rolling Mills Pvt. Ltd. on 07.12.2005 and as per Provision of Section 2(22)(e) of the Act, the AO had treated the same as deemed dividend income. But as per Provision of section 2(22)(e) of the Act, any advance or loan made to a shareholder by a company in the ordinary course of business where the lending of money is substantial part of the business of the company, loan amount cannot be treated as deemed dividend. Substantial part of the business is lending of money is to be ascertained from the income of the lending company and also from the amount of loan given by the lending company Jeekay Rolling Mills (P) Ltd. had only income of Rs. 8,18,126/- during the financial year 2004-05, out of which the sum of Rs.8,15,774/- was from interest income & Rs.2352/- was the short term capital gain. There was no business income. The said company had advanced loan of Rs. 96,14,003.07 as on 31. 03.2005 out of total capital & reserve of Rs.1,35,33,573/- . So, the substantial part of the business of the company was

lending of money. The loan was advanced on 07/12/2005, so the activities of the company for the year ended 31.03.2005 is to be considered because profit & loss account & Balance sheet cannot be prepared on the date of transaction. Moreover, nature of income & investment of the lending company did not change in the financial year 2005-06. In the financial year 2005-06, the company had income of Rs. 6,87,190/- from interest and the balance was only short term capital gain which was earned after the date of advancing loan. Short term capital gain was earned on 18/01/2006 i. e. after the date of loan advanced. The details of short term gain are also filed in the paper book of assessee. There was no business income. The entire amount of the company except fixed assets was invested on loan. So the substantial business of the company was lending of money. As such loan amount cannot be treated as deemed dividend income u/s. 2(22)(e) of the Act.

6. We have considered the above submissions and in order to appreciate the same we have to ascertain as to whether the case of the assessee was covered by the exception provided in sub-clause (ii) of clause (e) of section 2(22), it would be worthwhile to refer to the said provisions which are "*Any advance or loan made to a shareholder or the said concern by a company in the ordinary course of its business where the lending of money is a substantial part of the business of the company.*" As is evident from the aforesaid provisions, where the lending of money is substantial part of the business of the concerned company and any advance or loan is made by it to a shareholder in the ordinary course of its business, the amount so advanced cannot be treated as deemed dividend under clause (e) of section 2(22). There is no dispute about the fact that the expression "substantial part of the business" used in sub-clause (ii) has not been defined in the statute. In this regard, the learned counsel for the assessee has pointed out that a similar expression "substantial interest" is used in clause (e) of section 2(22) and the same has been defined in Explanation 3(b) below section 2(22)(e) as follows :-

"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 20 per cent of the income of such concern."

Although the term "substantial interest" as defined in Explanation 3(b) above is different than the expression "a substantial part of the business" used in sub-clause (ii), one thing that is clearly evident from the said definition is that the factual position as it stands during the relevant previous year only is supposed to be taken into consideration

to decide the issue about the substantial interest in the context of deemed dividend under section 2(22)(e). This aspect which is clearly evident from the definition of "substantial interest in a concern" given in Explanation 3(b) to section 2(22)(e) itself means that the money in question having been advanced in the year under consideration, the facts and figures of the said year alone need to be taken into account to find out as to whether the lending of money is a substantial part of the business of the said company but in the present case in both the years the facts are clear that the substantial part of the business of the assessee company is of money lending. We, therefore, are inclined to agree with the stand of the assessee that the facts and figures of the year under consideration as well as in the immediate preceding assessment years are to be taken into consideration for deciding the issue of substantial interest in a concern. Actually and factually during AY 2005-06 the assessee had income from interest and even during AY 2006-07 interest income from loans and investment. There is no manufacturing activity or trading activity except the business of money lending. Therefore, the assessee's case falls under exception to sec. 73 of the Act and the CIT(A) has rightly deleted the addition of deemed dividend made by AO. Therefore, we confirm the order of CIT(A).

7. In the result, all the appeals of revenue are dismissed.

8. Order is pronounced in the open court on 07.09.2015

Sd/-
(S. V. Mehrotra)
Accountant Member

Sd/-
(Mahavir Singh)
Judicial Member

Dated : 7th September, 2015

Pronounced by
Sd/- (M.B) Sd/-(M.S)
AM JM

Jd. Sr. P.S

Copy of the order forwarded to:

1. APPELLANT óITO, Ward-29(4), Kolkata.
2. Respondent ó Shri Piyush Jalan, 2/1A, Burdwan Road, Alipore, Kolkata-27.
3. The CIT(A), Kolkata
4. CIT Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy,

By order,

Asstt. Registrar.