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IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D': NEW DELHI

BEFORE SHRI B.P. JAIN, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No. 5893/Del /2014
Assessment Year: 2010-11

Mr. Tushar Kothari, J-202, Saket, New Delhi-110017 (PAN: AAIPK0221H)	vs	DCIT, Circle-2(1), New Delhi.
(Appellant)		(Respondent)

Appellant by : Shri Sanjay Sood, CA
Respondent by : Shri Amit Jain, Sr. DR

Date of Hearing: 22.01.2018
Date of Pronouncement: 25.01.2018

ORDER

PER SUDHANSHU SRIVASTAVA, J.M.

This appeal has been preferred by the assessee against the order dated 26.08.2014 passed by the Ld. CIT(A)-V, New Delhi for assessment year 2010-11 wherein vide the impugned order, the Ld. Commissioner of Income Tax(A) has upheld the addition of Rs. 10 lakh as deemed dividend u/s 2(22)(e) of the Income Tax Act, 1961 (hereinafter called 'the Act')

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2. Brief facts of the case are that the return of income was filed declaring income of Rs.1,41,66,720/- on 30.07.2010. Subsequently, information was received by the Assessing Officer wherein it was informed that during the course of assessment proceedings in the case of M/s Beehive Systems Private Limited for assessment year 2010-11, it was noticed that this company had advanced Rs.10 lakh to its Director Shri Tushar Kothari (assessee) who was holding 46% of the shares in the said company. Based on this information, notice u/s 148 of the Act was issued after duly recording the reasons. During the course of re-assessment proceedings, the assessee submitted that he was not covered by the provisions of section 2(22)(e) of the Act. The Assessing Officer proceeded to add back the amount of Rs. 10 lakh u/s 2(22)(e) of the Act and the same was confirmed by the Ld. Commissioner of Income Tax(A). Now, the assessee has approached the ITAT and has challenged the said confirmation of addition by raising the following grounds of appeal:-

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"1) THAT on the facts and circumstances of the case and in law, the order passed by the Ld. Assessing Officer under section 147 r.w. section 143(3) of the Act is bad in law.

2) THAT on the facts and circumstances of the case and in law, the Learned Assessing Officer erred on facts and in law in making the impugned reassessment just on the basis of information received internally.

3) THAT on the facts and circumstances of the case and in law, the Ld. AO has grossly erred in making addition by Rs. 1,000,000/- as deemed dividend in the hands of appellant.

4) The Ld. AO has grossly erred in considering the payment received from Beehive Technologies Private Limited as deemed dividend in the hands of appellant wherein the appellant is not a shareholder of the company.

5) THAT in the facts and circumstances of the case, the Learned CIT(A) erred in not considering that provisions of Section 2(22)(e) are not attracted in the present matter; and the addition of Rs. 10,00,000/- as deemed dividend made by the A.O being bad in law needs to be deleted.

6) *THAT in the facts and circumstances of the case, the Learned CIT(A) erred in confirming the order of the A.O., where the A.O. erred in treating the amount of Rs. 10,00,000/- given to assessee by M/s. Beehieve Technologies (P) Ltd. as deemed dividend in the hand of assessee ignoring the fact that assessee was not the shareholder of M/s. Beehieve Technologies (P) Ltd.*

7) *THAT in the facts and circumstances of the case, the Learned CIT(A) had erred in ignoring the fact that no payment was made by M/s. Beehive Systems (P) Ltd. Company in which assessee is a Shareholder, to assessee; the payment was made only by M/s. Beehieve Technologies (P) Ltd. to assessee.*

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8) *THAT the appellant craves leave to add, alter, amend or drop any of the above grounds at the time of hearing."*

3. The Ld. AR submitted that the impugned amount has been treated as income u/s 2(22)(e) of the Act in the hands of the assessee on the presumption that the advance/loan of Rs. 10 lakh was given by M/s Beehive Private Limited to its shareholder i.e. the assessee. However, the fact of the matter is that the assessee had received Rs. 10 lakh from M/s Beehive Technologies Private Limited and not from M/s Beehive Systems Private Limited. The ld. AR further submitted that the assessee is not a shareholder of M/s Beehive Technologies Private Limited from whom the impugned amount was received as advance. It was also submitted that the assessee was a shareholder of M/s Beehive Systems Private Limited. Reliance was placed on the judgment of Delhi High Court in the case of CIT vs Bikaner Cuisine (P) Ltd. reported in 223 Taxman 106(Delhi)(MAG) and also on another judgment of the Hon'ble Delhi High Court in the case of CIT vs. Ankitech (P) Ltd. reported in 340 ITR 14 (Del) for the proposition

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that the provisions of section 2(22)(e) could not be attracted in cases where the assessee was not a shareholder in the payer company.

4. In response, the Ld. Sr. DR placed reliance on the orders of the authorities below and submitted that the transaction was routed through M/s Beehive Technologies Private Limited only to circumvent the provisions of section 2(22)(e) and, therefore, the Assessing Officer had rightly made the addition.

5. We have heard the rival submissions and perused the material available on record. The fact that the amount had been advanced as loan from M/s Beehive Technologies Private Limited is undisputed. It is also undisputed that the assessee is not a shareholder in M/s Beehive Technologies Private Limited. The Assessing Officer has also noted that on perusal of bank statement, it was found that Shri Tushar Kothari i.e. the assessee had received payment of Rs. 10 lakh in his HDFC account from M/s Beehive Technologies Private Limited. Thus, it is very much evident that the impugned amount has not been given by M/s Beehive Systems Private Limited in

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which the assessee is a shareholder. Hon'ble Delhi High Court in the case of Commissioner of Income Tax(A) vs Ankitech (P) Ltd. (supra) has held in Para 24 to 30 as under:-

> *"24. The intention behind enacting provisions of Section 2(22)(e) is that closely held companies (i.e. companies in which public are not substantially interested), which are controlled by a group of members, even though the company has accumulated profits would not distribute such profit as dividend because if so distributed the dividend income would become taxable in the hands of the shareholders. Instead of distributing accumulated profits as dividend, companies distribute them as loan or advances to shareholders or to concern in which such shareholders have substantial interest or make any payment on behalf of or for the individual benefit of such shareholder. In such an event, by the deeming provisions, such payment by the company is treated as dividend. The intention behind the provisions of Section 2(22)(e) of the Act is to tax dividend in the hands of shareholders. The deeming provisions as it applies to the case of loans or advances by a company to a concern in which its shareholder has substantial interest, is based on the presumption that the loans or advances would ultimately be made available to the shareholders of the company giving the loan or advance.*
>
> *25. Further, it is an admitted case that under 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 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*

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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 deeming provision in respect of shareholder as well, that has not happened. Most of the arguments of the learned counsels for the Revenue would stand answered, once we look into the matter from this perspective.

26. In a case like this, the recipient would be a shareholder by way of deeming provision. It is not correct on the part of the Revenue to argue that if this position is taken, then the income "is not taxed at the hands of the recipient". Such an argument based on the scheme of the Act as projected by the learned counsels for the Revenue on the basis of Sections 4, 5, 8, 14and 56 of the Act would be of no avail. Simple answer to this argument is that such loan or advance, in the first place, is not an income. Such a loan or advance has to be

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returned by the recipient to the company, which has given the loan or advance.

27. Precisely, for this very reason, the Courts have held that if the amounts advanced are for business transactions between the parties, such payment would not fall within the deeming dividend under Section 2(22)(e) of the Act.

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30. Before we part with, some comments are to be necessarily made by us. As pointed out above, it is not in dispute that the conditions stipulated in Section 2(22)(e) of the Act treating the loan and advance as deemed dividend are established in these cases. Therefore, it would always be open to the Revenue to take corrective measure by treating this dividend income at the hands of the shareholders and tax them accordingly. As otherwise, it would amount to escapement of income at the hands of those shareholders.

4. The appeal has no merit and is accordingly dismissed."

6. Thus, guided by the ratio of decision of Hon'ble Delhi High Court in the case of Commissioner of Income Tax vs Ankitech (P) Ltd (supra)., we find that the addition has no feet to stand and we set aside the order of the Ld. Commissioner of Income Tax(A) and direct the Assessing Officer to delete the addition.

7. In the result, the appeal of the assessee stands allowed.

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The order is pronounced in the open court on 25th January, 2018.

Sd/-	Sd/-
(B.P. JAIN) **ACCOUNTANT MEMBER**	**(SUDHANSHU SRIVASTAVA)** **JUDICIAL MEMBER**

Dated: 25th JANUARY, 2018

'GS'

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

TRUE COPY

By Order

ASSISTANT REGISTRAR