

IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Chandra Pooraji, AM & Shri George George K, JM

MP No.1/Coch/2015 : Asst.Year 2007-2008
(Arising out of ITA No.352/Coch/2013)

MP No.2/Coch/2015 : Asst.Year 2008-2009
(Arising out of ITA No.353/Coch/2013)

M/s.Kerala Transport Co. Kozhikode PAN :AADFK0173H.	Vs.	The Asst.Commissioner of Income-tax Circle – 1(1) Kozhikkode.
(Applicant)		(Respondent)

Appellant by : Sri. T.M.Sreedharan
Respondent by : Sri. A.Dhanaraj, Sr.DR

Date of Hearing : 19.01.2018	Date of Pronouncement : 19.01.2018
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ORDER

Per George George K., JM

These two Miscellaneous Applications at the instance of the assessee arise out of the consolidated order of the Tribunal dated 30.08.2013 in ITA Nos.352 & 353/Coch/2013. The relevant assessment years are 2007-2008 and 2008-2009.

2. Brief facts of the case are as follows:-

2.1 ITA Nos.352/Coch/2013 and 353/Coch/2013 were filed by the Department before the Tribunal. The only ground that was raised by the Department before the Tribunal in both the

appeals was regarding deletion of addition u/s 2(22)(e) of the Income-tax Act, 1961. The CIT(A) deleted the addition made u/s 2(22)(e) of the I.T.Act as deemed dividend by following the order of the Tribunal in assessee's own case for assessment year 2005-2006 in ITA No.382/Coch/2011 (order dated 11.01.2013). The CIT(A) held that since the firm is not a shareholder of the lender company, deemed dividend cannot be assessed in the hands of the assessee-firm.

2.2 In ITA Nos.352/Coch/2013 and 353/Coch/2013, the Revenue had admitted that no further appeal has been filed by the Department in assessee's case for assessment year 2005-2006, due to low tax effect. The Tribunal disposed off ITA Nos.352/Coch/2013 and 353/Coch/2013 by order dated 30.08.2013. The Tribunal dismissed the appeal filed by the Revenue. The Tribunal held that the beneficial shareholders of the lender company are partners of the assessee-firm and therefore the deemed dividend u/s 2(22)(e) has to be assessed only in the hands of the partners and not in the hands of the assessee-firm.

3. Aggrieved by the order of the Tribunal, the assessee has filed the present Miscellaneous Petitions. The learned AR has filed a brief written submission. The relevant portion of the same is reproduced below:-

"8. The grievance of the assessee, which is raised in the above two M.Ps. is as regards the observation

that the deemed dividend u/s.2(22)(e) has to be assessed only in the hands of the respective partners and not in the hands of the firm. According to the assessee, the above finding, as regards the assessability of deemed dividend in the hands of the partners, was made without examining the facts of the case in relation to the partners of the firm. Section 2(22)(e) can be invoked only upon fulfillment of conditions and subject to various statutory requirements. Adverse observations against the partners were made without hearing them and without affording reasonable opportunity. Applicability of section 2(22)(e) is to be founded on facts and evidence as regards giving of loan or deposit by the Company to the share holder concerned. None of these requirements were gone into before making the above observation. The basic condition is that the Company should pay any sum by way of advance or loan to a share holder. The share holder should be a person who holds not less than 10% of the voting power, or to a concern in which such shareholder is a member or a partner or in which he has substantial interest or any payment by any such Company should be on behalf of or for the individual benefit of such a share holder and the Company in either case must possess accumulated profits.

9. Without examining the existence of these facts, the observation made as above would not be sustainable.

10. Great hardship and prejudice has been caused to the partners as a result of the above observation because attempts have been made to re-open the assessment of the partners in order to include the amounts (credited in the books of the firm) even without examining the facts. The amounts are being straight away added as income of the partners by assuming that this Hon'ble Tribunal has given a

finding or direction in that behalf.

11. Whether the transaction is by way of loan or deposit is a matter to be established by evidence. Decisions of the Hon'ble Apex Court and various High Courts are also in favour of the assessee in this regard."

3.1 The learned Counsel for the had also filed a compilation of case laws. The details of the case laws relied on by the learned AR are as follow:-

- (i) Hukumchand Mills Ltd. v. CIT [(1967) 63 ITR 232 (SC)]
- (ii) CIT v. Manik Sons [(1969) 74 ITR 1 (SC)]
- (iii) Pathikonda Balasubba Setty (Deceased) v. CIT [(1967) 65 ITR 252 (Bom.)]
- (iv) J.K.Bankers v. CIT [(1974) 94 ITR 107 (All.)]
- (v) Apex Bank Ltd. v. CIT [(1978) 112 ITR 257 (Gau.)]
- (vi) Natwarlal & Co. v. CIT [(1963) 50 ITR 783 (Guj.)]
- (vii) Marubeni India (P) Ltd. v. CIT [(2010) 328 ITR 306 (Del.).]

3.2 The learned Departmental Representative was duly heard.

4. We have heard the rival submission and perused the material on record. The only issue raised is whether the Tribunal had exceeded its jurisdiction while holding deemed dividend cannot be assessed in the hands of the assessee-firm

and but only in the hands of the partners of the assessee-firm, who are the beneficial shareholders of the lender company, viz., M/s.KTC Automobiles Private Limited. The relevant finding of the Tribunal in its order dated 30.08.2013, while dismissing the appeal of the Revenue in ITA No.352 & 353/Coch/2013, reads as follow:-

"4. It is not in dispute that the beneficial shareholders of KTC Automobiles Pvt. Ltd. are partners in the assessee firm. Therefore, when the money was received by the firm on behalf of the partners, the deemed dividend has to be assessed only in the hands of the partners and not in the hands of the firm. This is for the simple reason that the firm is not a shareholder in the lending company. Since the partners are shareholders and funds were given to the partnership firm for the benefit of the partners, this Tribunal is of the considered opinion that the deemed dividend u/s 2(22)(e) has to be assessed only in the hands of the respective partners and not in the hands of the firm. Therefore, this Tribunal is of the considered opinion that the CIT(A) has rightly deleted the addition in the hands of the firm by following the order of this Tribunal. This Tribunal do not find any infirmity in the order of the CIT(A). Accordingly, the order of the CIT(A) is confirmed."

4.1 The above finding of the Tribunal in ITA Nos.352 & 353/Coch/2013 did not exceed its jurisdiction and has limited its finding only on the subject matter of litigation before it. The finding of the Tribunal is confined to the deletion of addition u/s 2(22)(e) of the I.T.Act in the hands of the assessee-firm. The Tribunal held that beneficial shareholders of the lender

company are the partners of firm and not assessee firm and therefore no deemed dividend can be assessed in the hands of the assessee-firm. The case laws relied on by the learned Counsel, are distinguishable on facts. All the case laws mentioned above are explaining the powers of the Tribunal and interpretation of the word "thereon" u/s 254(1) of the Income-tax Act. None of the judicial pronouncements mentioned above arise out of an order passed by the ITAT u/.s 254(2) of the I.T.Act. In this context the above judicial pronouncement are distinguishable from the facts of the instant case. If the partners of the firm are aggrieved by the reopening of the assessment in their hands, it is for the partner to challenge the same in appropriate forum. In the instant case, there is no apparent mistake in the order of the ITAT dated 30.08.2013, warranting our interference u/s 254(2) of the I.T.Act. Therefore, we see no reason to interfere with the order of the Tribunal dated 30.08.2013 in ITA Nos.352 & 353/Coch/ 2013 for assessment years 2007-2008 and 2008-2009.

5. In the result, the Miscellaneous Petitions filed by the assessee are dismissed.

Order pronounced on this 19th day of January, 2018.

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Sd/-
(George George K.)
JUDICIAL MEMBER

Cochin ; Dated : 19th January, 2018.
Devdas*

Copy of the Order forwarded to :

1. The Applicant.
2. The Respondent.
3. The Chief CIT, Kochi.
4. The CIT(A), Kozhikode.
5. DR, ITAT, Cochin
6. Guard file.

By Order

(Asstt. Registrar)
ITAT, Cochin