

आयकरअपीलीयअधिकरण, 'सी'न्यायपीठ, चेन्नई
**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, CHENNAI**

श्रीमहावीर सिंह, उपाध्यक्ष एवंश्री मनोज कुमार अग्रवाल, लेखा सदस्यके समक्ष
**BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A No.:700/CHNY/2020
निर्धारण वर्ष/ Assessment Year 2011 – 2012

M/s. Pallava Resorts Private Limited,
No.7, 9th Floor, Rain Tree Place,
McNichols Road, Chetput,
Chennai – 600 031.

PAN : AADCP 7095C

(अपीलार्थी/**Appellant**)

Vs. The Income Tax Officer,
Corporate Ward – 5(1)
4th Floor, Aayakar Bhawan,
Main Building, 121, M.G. Road,
Nungambakkam, Chennai – 600 034.

(प्रत्यर्थी/**Respondent**)

अपीलार्थीकीओरसे/Appellant by : Mr. S. Sundraraman, CA
प्रत्यर्थीकीओरसे/Respondent by : Mr. P. Sajit Kumar, JCIT

सुनवाई की तारीख/Date of Hearing : 18.07.2022
घोषणा की तारीख/Date of Pronouncement : 22.07.2022

आदेश /ORDER

PER MAHAVIR SINGH, VP:

This appeal by the Assessee is arising out of the order of the Commissioner of Income Tax (Appeals)-3, Chennai in ITA No.103/CIT(A)-3/2018-19, order dated 27.02.2020. The re-assessment was framed by the Income Tax Officer, Corporate Ward – 5(1), Chennai for the Assessment Year 2011 – 2012 u/s.143(3) r.w.s.147 of the Income Tax Act, 1961 (hereinafter “the Act”) dated 30.12.2018.

2. At the outset, it is noted that this appeal of the Assessee is barred by limitation by 96 days and the learned Counsel for the Assessee drew our attention to Form No.36 and stated that the order of the Commissioner of Income Tax (Appeals) was received on 04.03.2020 and during the outbreak of 'Covid-19' pandemic. The Hon'ble Bench took into cognizance the Order of the Hon'ble Supreme Court the "Suo Moto WP 03/2020 dated 20.03.2020 while considering the condonation of delay. It is a fact that 'Covid-19' pandemic was prevalent during the period and in term of the directions issued by the Hon'ble Supreme Court in Miscellaneous Application No.21/2022 in Suo Motu Writ Petition No.3 of 2020, we condone the delay of 96 days and admit the appeal for adjudication on merits.

3. The Assessee has raised two issues, i.e. (i) challenging the reopening of the assessment u/s.147 r.w.s.148 of the Act vide Ground Nos.2 to 6, as under:

"2) He erred in re-opening the assessment of the Appellant u/s.147 of the Act, beyond a period of four years as the Appellant had truly and fully disclosed all material facts necessary for completion of the original assessment (completed u/s.143(3) of the Act) and, hence the first proviso to Sub-Section (1) to Section 147 of the Act would apply.

3) The CIT(A) erred in law in re-opening the assessment as the reasons recorded for re-

assessment does not state that there is a failure on the part of the Appellant to disclose fully and truly all primary material or relevant facts which were necessary for completion of the original assessment.

4) The CIT(A) failed to appreciate that the details of loans obtained by the Appellant from QNEI were available in the financial statements which was on records, while completing the assessment of the Appellant under the Act.

5) The CIT(A) failed to appreciate that between the date of the order of assessment sought to be re-opened and the date of forming of present opinion by the Assessing Officer, while re-opening the assessment, nothing new has happened, there is no change of law, no new material has come on record, no information has been received.

6) The CIT(A) erred not to note that an assessment completed u/s.143(3) of the Act cannot be re-opened on account of change of opinion on the same set of facts available with him during the original assessment."

4. The Assessee has raised Ground Nos.1 and 7 to 10 as regards to the addition made by the Assessing Officer and confirmed by the Commissioner of Income Tax (Appeals) on 'deemed dividend'. Firstly, we will decide the issue on merits, i.e., the deemed dividend u/s.2(22)(e) of the Act assessed by the Assessing Officer and confirmed by the CIT(A). The Ground Nos.1 and 7 to 10 raised by the Assessee are as under:

"1) The CIT(A) erred both in law and on the facts of the case in treating an inter-Corporate Deposit received by the Appellant amounting to Rs.1,40,67,365/- from its Holding Company, viz.

M/s. Questnet Enterprises Private Limited [QNEI] as deemed dividend u/s.2(22)(e) of the Act.

7) The CIT(A) erred in not appreciating that from a factual perspective, the Appellant was never a shareholder of QNEI and hence the provisions of Section 2(22)(e) of the Act would not apply to loans obtained by it from QNEI.

8) The CIT(A) erred in not appreciating the legal position that the provision of Section 2(22)(e) of the Act can be applied only in the hands of a person who is a recipient of a loan and the shareholder of the Payer Company. Since, the Appellant was never a shareholder of QNEI, the provisions of Section 2(22)(e) of the Act would not apply to the Appellant.

9) The CIT(A) erred in not following the jurisdictional High Court decision in the case of PCIT Vs. Ennore Cargo Terminal Private Limited [406 ITR 477] (Madras High Court).

10) The Appellant, therefore prays that the re-assessment be annulled and the addition made u/s.2(22)(e) of the Act amounting to Rs.1,40,67,365/- be deleted."

5. The brief facts of the case are that the Assessee is a Private Limited company namely, Pallava Resorts Private Limited and it has filed its return of income on 01.10.2012. The original assessment was completed u/s.143(3) of the Act and subsequently the assessment was reopened u/s.147 of the Act dated 30.12.2018. The Assessing Officer during the course of reassessment proceedings noted on perusal of the financials that the Assessee company has received a loan to the tune of

Rs.1,40,67,365/- from Questnet Enterprises Private Limited [QNEI] during the Financial Year 2010 – 2011 relevant to the Assessment Year 2011 – 2012. It was observed from the financials of QNEI that it has accumulated profit as on 31.03.2011 at Rs. 12,21,49,133/-. The Assessing Officer has brought out the shareholder pattern of both the companies, as under:

Sl. No.	Name of the Shareholder	Percentage of share in	
		Pallava Resorts Pvt. Ltd.	Questnet Enterprises Pvt. Ltd.
[1]	Ms. Pushpam Appalanaidu	24.94%	75%
[2]	Mr. Joseph Augustine	2.77%	25%
[3]	Questnet Enterprises India Private Limited	72.29%	

5.1 According to the Assessing Officer, the loan received by the Assessee from QNEI is to be treated as 'deemed dividend' and is to be assessed to tax u/s.2(22)(e) of the Act. The Assessing Officer issued a show-cause notice accordingly for which the Assessee had replied that the deemed dividend is assessable only in the hands of the shareholder and that there could not be any incidence of taxation to it on account of the monies received from QNEI. The Assessee submitted vide letter dated 13.12.2018 that the provisions of Section 2(22)(e) of the Act cannot be invoked in case of the amount is advanced by one

company to another, who is not a shareholder of the company and the shareholding of the common Directors cannot be taken into consideration for the purpose of attracting provisions of Section 2(22)(e) of the Act relating to the deemed dividend. The Assessee further submits that even if the monies advanced were to be treated as an inter-corporate deposits, the provisions of deemed dividend would not apply in the light of the fact that interest on inter-corporate deposit is not an interest on the loan or advance under the Interest Tax Act, 1974. Therefore, the inter-corporate deposits cannot be treated as a loan falling within the purview of Section 2(22)(e) of the Act. He further pointed out that this proposition has been upheld by the Kolkata Tribunal in the case of "IFB Agro Industries Limited Vs. Joint Commissioner of Income Tax in I.T.A. No.1721/Kol/2012 [TS-5376-ITAT-2013(Kolkata)-0].

5.2 The Assessing Officer noted that the Jurisdictional High Court's decision in the case of Commissioner of Income Tax Vs. Ennore Cargo Terminal Private Limited reported in [2018] 406 ITR 477 (Mad) (HC) is pending before the Hon'ble Supreme Court in SLP filed by the Revenue and hence the claim of the Assessee is not acceptable. Therefore, by invoking the

provisions of Section 2(22)(e) of the Act, the Assessing Officer made the addition of deemed dividend amounting to Rs.1,40,67,365/-. Aggrieved, the Assessee preferred an appeal before the Commissioner of Income Tax (Appeals).

6. The CIT(A) confirmed the addition by going through the provisions of Section 2(22)(e) of the Act and noted in paragraph nos.5.3.5 to 5.3.9, as under:

“5.3.5 On reading of the above Section, it is clear that even if the loan or advance is provided to a concern in which there are common shareholders holding substantial interest, the provisions of Section 2(22)(e) of the Act will trigger.

5.3.6 In the case of the Appellant, a shareholder Ms. Pushpam Appalanaidu holds 24.99% shares of the Appellant and 75% shares of QNEI. Hence, it satisfies the condition of holding substantial interest.

5.3.7 The Appellant has further highlighted various case laws which state that the provisions of Section 2(22)(e) of the Act trigger only if it is received by a shareholder. The list of such case laws is provide below for ease of reference.

- Commissioner of Income Tax Vs. Jignesh P Shah [ITA No.197/2013] (Mumbai HC).
- Commissioner of Income Tax Vs. Ankitech Private Limited [2011-ITRV-HC-Del-109](Delhi HC)
- Principal Commissioner of Income Tax Vs. Ennore Cargo Terminal Private Limited [406 ITR 477] (Madras HC)

5.3.8 It is pertinent to note that a similar finding in favour of the Appellant was also upheld by the Hon'ble Karnataka High Court in the case of Commissioner of Income Tax Vs. Namdhari Seeds [2017] 246 Taxmann 0061. The Income Tax Department had filed an SLP against the said decision and it has been duly accepted by the Hon'ble Supreme Court in the case of the Commissioner of Income Tax Vs. Namdhari Seeds [2017] 79 Taxmann.com 124. Further, the SLP application is also pending before the Hon'ble Supreme Court against the Hon'ble Madras High Court in the case of the Principal Commissioner of Income Tax Vs. Ennore Cargo Terminal Private Limited."

Aggrieved, the Assessee is now in Appeal before the Tribunal.

7. We have heard the rival contentions and had gone through the facts and circumstances of the case. We note that the Assessee does not hold any shares in QNEI and that it is QNEI that holds 72.29% shares in the Assessee Company. The fact remains that under the Companies Act, 1956, as a subsidiary company of QNEI, it is illegal to have shares in its holding company. From the Balance Sheet filed by the Assessee, it is noticed that the Assessee does not have any investments and therefore it is clear that the Assessee does not hold share in QNEI. However, it is noticed from the submissions of the learned Counsel for the Assessee that the holding company had regularly paid for the expenses of the Assessee

and the Assessing Officer had considered these payments as loans and had brought to tax as deemed dividend.

7.1 From the above, it is clear that the transactions between the Assessee along with its holding company were in the nature of current account and not in the nature of loans and hence does not fall under the scope of the deemed dividend u/s.2(22)(e) of the Act. It is pertinent to point out that ITAT, Chennai Tribunal has taken the same view in the case of Fairmacs Shipstores Private Limited Vs. The Deputy Commissioner of Income Tax in ITA No.761/Mds/2014. We noted that identically in this case also the payment should have been made by way of advance of loan to a shareholder of QNEI. The loan given by QNEI to the Assessee does not fall within the aforesaid provision. Also, in the decision of the Jurisdictional High Court in the case of PCIT Vs. Ennore Cargo Container Terminal Private Limited (supra) it is held that, even if common shareholders are there in both the companies, the deemed dividend can be taxed only in the hands of the registered shareholder of the company and not in the hands of the company which has received the loan.

7.2 However, the Bench took into cognizance the judicial precedents relied upon by the learned Counsel for the Assessee in support of his contentions. (a) The decision of the Hon'ble Delhi High Court in the case of the Commissioner of Income Tax Vs. Ankitech Private Limited reported in [2012] 340 ITR 14 (Del.) wherein the Hon'ble Delhi High Court has held that the provisions of Section 2(22)(e) of the Act is not attracted if the recipient is not a shareholder. (b) The decision of the Jurisdictional High Court in the case of Commissioner of Income Tax Vs. Checkpoint Apparel Labelling Solutions India Limited reported in [2021] 276 Taxmann 312 (Mad.) wherein it has held that since the recipient of the loan was not a shareholder in a company from which loan was received, hence loan cannot be assessed as deemed dividend. (c) The decision of the Mumbai High Court in the case of Commissioner of Income Tax Vs. Jignesh P. Shah [2015] 372 ITR 392 (Bom.) wherein it has held that the provision of Section 2(22)(e) of the Act cannot be invoked unless the Assessee itself is a shareholder of the company who was lending money to him. (d) The decision of the Co-ordinate Bench of this Tribunal, Mumbai Benches in the case of The Bombay Oil Industries Limited Vs. Deputy Commissioner of Income Tax in [2009] 28 SOT 383 (Mum.)

wherein it is held that "Section 2(22)(e) of the Act enacts a deeming fiction whereby the scope and ambit of the word dividend has been enlarged to bring within its sweep certain payments made by a company as per the situations enumerated in the Section. Such a deeming fiction would not be given a wider meaning than what it purports to do. The provisions would necessarily be accorded strict interpretation and the ambit of the fiction would not be pressed beyond its true limits. The requisite condition for invoking Section 2(22)(e) of the Act is that payment must be by way of loan or advances. Since there is a clear distinction between the inter-corporate deposits, viz. loans / advances, according to us the authorities below were not right in treating the same as deemed dividend u/s.2(22)(e) of the Act."

7.3 Since, the Assessee is not a shareholder of QNEI, the amount received from QNEI will not be taxable in the hands of the Assessee as deemed dividend u/s.2(22)(e) of the Act and common shareholding in two companies would not attract the provisions of Section 2(22)(e) of the Act. In the light of the above, we are of the opinion that the reassessment made by the Assessing Officer stands null and void and the addition of

Rs.1,40,67,364/- made u/s.2(22)(e) of the Act be deleted.
Thus, the ground raised by the Assessee is allowed.

8. The second issue raised by the Assessee is as regards to challenge to the reopening of the assessment u/s.147 r.w.s.148 of the Act. As we have decided the issue of deemed dividend u/s.2(22)(e) of the Act in favour of the Assessee, we refrain ourselves from adjudicating the issue of reopening and hence the same has become academic.

9. In the result, the appeal of the Assessee in I.T.A No.:700/CHNY/2020 is allowed partly.

Order pronounced in the court on 22nd July, 2022 at Chennai.

Sd/-

(मनोज कुमार अग्रवाल)
(MANOJ KUMAR AGGARWAL)
लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(महावीर सिंह)
(MAHAVIR SINGH)
उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,
दिनांक/Dated, the 22nd July, 2022

IA, Sr. PS

आदेशकीप्रतिलिपिअग्रेषित/**Copy to:** 1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त (अपील)/CIT(A)
4. आयकरआयुक्त/CIT
5. विभागीयप्रतिनिधि/DR
6. गार्डफाईल/GF