(2013) 10 BOM CK 0015

In the Bombay High Court

Case No : Tax Appeal No. 8 of 2013

Assistant Commissioner of Income Tax — APPELLANT

Vs

Britto Amusement (P) Ltd. — RESPONDENT

Date of Decision : 08-10-2013

Acts Referred:

Citation : (2013) 263 CTR 578 : (2014) 360 ITR 544

Hon'ble Judges : Naresh H. Patil, J;F.M. Reis, J

Bench : Division Bench

Advocate : Asha Dessai, for the Appellant; S.R. Rivonkar, for the Respondent

Judgement

F.M. Reis, J.—Heard Ms. Asha Dessai, learned counsel appearing for the appellant and Shri Rivonkar, learned counsel appearing for the respondent. The above appeal filed under s. 260A of the IT Act, 1961, seeks to challenge the order dt. 14th Sept., 2012, passed by the Tribunal, Panaji, whereby the appeal preferred by the appellants came to be dismissed.

2. Briefly, the facts of the case are that the assessee, the respondent herein, filed the return of income declaring a total income of Rs. 9,88,598, which was made under s. 143(1) of the IT Act, 1961. During the course of the search at the office of M/s. Goa Golf Club (P) Ltd., from the ledger extract, it was found that M/s. Goa Golf Club (P) Ltd., advanced loan to M/s. Brito Amusement (P) Ltd. It was further noted that Dr. William Britto and Mrs. Muriel Britto, are the shareholders of M/s. Goa Golf Club (P) Ltd., holding 75 per cent and 25 per cent shareholding therein. It was further found that the said Dr. William Britto and Mrs. Muriel Britto and M/s. Goa Golf Club (P) Ltd., were also holding shares in the assessee company in the ratio of 26 : 26 : 48 thus Dr. William Britto and his wife were having more than 10 per cent voting rights in M/s. Goa Golf Club (P) Ltd. It was further found that they had substantial interest in assessee company M/s. Britto Amusement (P) Ltd., where the said M/s. Goa Golf Club (P) Ltd., was running a casino. The assessee received operating fees from M/s. Goa Golf Club (P) Ltd., and the AO was of the view that in addition to the operating fees, the assessee

received loans or advances which, in his opinion, constituted deemed dividend as per s. 2(22)(e) of the IT Act. The AO also computed the accumulated profit of M/s. Goa Golf Club (P) Ltd., which were in excess of Rs. 33,55,076. As such, the AO by applying the provisions of s. 2(22)(e) of the IT Act, treated the amount of Rs. 33,55,076 to be deemed dividend under s. 2(22)(e) of the IT Act. The respondent preferred an appeal before the CIT(A), who confirmed the addition by holding that the assessee has confirmed in its submission dt. 24th Feb., 2010 before the Dy. Director of IT (Inv.), Panaji, that it had borrowed funds from M/s. Goa Golf Club (P) Ltd., and that the assessee failed to provide any explanation substantiating the claim that the money was received as a normal business transaction. Being aggrieved by the said order passed by the CIT(A), the respondents filed an appeal before the Tribunal, Panaji, which was disposed of by order dt. 1st Oct., 2012. The Tribunal allowed the appeal of the respondents by coming to the conclusion that in the order passed under s. 253 for the asst. yr. 2003-04 in the case of M/s. Goa Golf Club (P) Ltd., the amount paid to the assessee company of Rs. 2,23,94,763, is treated as revenue expenditure. However, the ledger account in respect of payment received from M/s. Goa Golf Club (P) Ltd., it is clear that the payments made to the assessee company include the payment against expenditure and also the loan and advances which have been admitted in the audited balance sheet. It is further the contention of the appellant that the order of the Tribunal is not acceptable as the assessee in the submission made before Dy. Director of IT (Inv.) on 24th April, 2010, admitted that it had borrowed funds from M/s. Goa Golf Club (P) Ltd. Being aggrieved by the said order of the Tribunal, the appellants submit that the substantial question of law arises as to whether the Tribunal was justified in law in holding that the amount of Rs. 33,55,076 is not a loan or advance as provided under s. 2(22)(e) of the IT Act and further whether the Tribunal was justified in law in not recording a finding that the said amount is assessable in the case of the shareholders, namely, Dr. William Britto and Mrs. Muriel Britto.

3. Ms. Asha Dessai, learned counsel appearing for the appellants, has taken us through the provisions of s. 2(22)(e) of the IT Act, 1961, and pointed out that dividends include any payments by a company not being a company in which the public are substantially interested of any sum by way of advance or loan to a shareholder being a person who has a substantial interest in the company. The learned counsel as such points out that as there were accumulated profits in the said company and as Mr. William Britto was a beneficial shareholder with more than 10 per cent voting rights in M/s. Goa Golf Club (P) Ltd., and has a substantial interest therein, the amount of advance is to be construed to be deemed dividend in his hands. Learned counsel further pointed out that as the material on record establishes that Dr. Britto has a substantial interest in the said company the advance is to be continued to be deemed dividend. Learned counsel has taken us through the judgment of the Tribunal and pointed out that the Tribunal has erroneously come to the conclusion that advances cannot be considered as deemed dividends in terms of s. 2(22)(e) of the IT Act of 1961.

4. On the other hand, Shri Rivonkar, learned counsel appearing for the respondents, has supported the order of the Tribunal. The learned counsel has pointed out that the assessee does not hold any shares in M/s. Goa Golf Club (P) Ltd., and that Mr. William Britto and his wife Mrs. Muriel Britto, are the shareholders of M/s. Goa Golf Club (P) Ltd., having 75 per cent and 25 per cent shareholding while Dr. William Britto and M/s. Goa Golf Club (P) Ltd., are the shareholders of the assessee company having 26 per cent, 26 per cent and 48 per cent shareholding respectively. The learned counsel further pointed out that in such circumstances, advances can be considered deemed dividends only in the hands of the shareholders of the company. The learned counsel further points out that these advances can be at the most considered as deemed dividends in the hands of Mr. and Mrs. William Britto and not in the hands of non-shareholders. Learned counsel further pointed out that the deemed dividends cannot be assessed in the hands of the assessee as it is not a shareholder of M/s. Goa Golf Club (P) Ltd. Learned counsel as such submits that no substantial question of law arises in the present appeal.

5. We have considered the submissions of the learned counsel and we have also gone through the impugned judgment. The amount in dispute is a sum of Rs. 33,55,076 which is sought to be made assessable as deemed dividend under s. 2(22)(e) of the IT Act of 1961 in the hands of the respondent. The Tribunal has noted that it is undisputed fact that the AO applied the provisions of s. 2(22)(e) in respect of the payments made by M/s. Goa Golf Club (P) Ltd. to M/s. Britto Amusement (P) Ltd. The Tribunal so noted that it is an undisputed fact that M/s. Britto Amusement (P) Ltd., is not a shareholder of M/s. Goa Golf Club (P) Ltd. In order to consider whether such amount can be held to be deemed dividend in the hands of a person other than a shareholder, it would be appropriate to examine the provisions of s. 2(22)(e) of the IT Act of 1961, as amended w.e.f. 1st April, 1988 which reads as under:

(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) made after the 31st day of May, 1987, by way of advance or loan to a shareholder, being a person who is the beneficial owner of 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 ten percent of the voting power, or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern) 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.

6. Upon comparing the provisions of the said Act as they stood prior to the amendment, the Tribunal noted that in the 1961 Act, an additional condition was introduced that the payment should be to a shareholder being a person who is the beneficial holder of shares and who has a substantial interest in the company

i.e. a shareholding which carries not less than 20 per cent of the voting power. By the 1987 amendment, the power of the voting rights were reduced to 10 per cent. The learned Tribunal further noted that in the present case, the shareholder who is a registered and beneficial holder of shares, 10 per cent voting powers are Mr. William Britto and Mrs. Muriel Britto as each of them is holding more than 20 per cent shareholding in the assessee capital. It is further noted that the respondent-assessee is neither a registered nor a beneficial holder of the shares. The learned Tribunal has also taken note of the judgment of this Court and noted that the provisions of s. 2(22)(e) of the said IT Act of 1961 cannot be applied in the case of the assessee. The learned Tribunal also considered the judgment of the Special Bench and found that it had taken the same view that deemed dividend cannot be assessed in the hands of a person who is not a shareholder of the company. The learned Tribunal, as such, set aside the order of the CIT(A) and deleted the additions made by the AO as deemed dividend in the hands of the assessee who is not the shareholder of M/s. Goa Golf Club (P) Ltd.

7. The findings arrived at by the Tribunal that the respondent is not assessee (sic-shareholder) of M/s. Goa Golf Club (P) Ltd., has not been disputed by the appellants. In this context, it would be appropriate to note the observations of the Division Bench of this Court in the case of The Commissioner of Income Tax Vs. Universal Medicare Private Limited, , wherein it has been observed at para 10 thus:

10. In order that the first part of cl. (e) of s. 2(22) is attracted, the payment by a company has to be by way of an advance or loan. The advance or loan has to be made, as the case may be, either to a shareholder, being a beneficial owner holding not less than ten per cent of the voting power or to any concern to which such a shareholder is a member or a partner and in which he has a substantial interest. The Tribunal in the present case has found that as a matter of fact no loan or advance was granted to the assessee, since the amount in question had actually been defalcated and was not reflected in the books of account of the assessee. The fact that there was a defalcation seems to have been accepted since this amount was allowed as a business loss during the course of asst. yr. 2006-07. Consequently, according to the Tribunal the first requirement of there being an advance or loan was not fulfilled. In our view, the finding that there was no advance or loan is a pure finding of fact which does not give rise to any substantial question of law. However, even on the second aspect which has weighed with the Tribunal, we are of the view that the construction which has been placed on the provisions of s. 2(22)(e) is correct. Sec. 2(22)(e) defines the ambit of the expression ''dividend''. All payments by way of dividend have to be taxed in the hands of the recipient of the dividend namely the shareholder. The effect of s. 2(22) is to provide an inclusive definition of the expression dividend. Clause (e) expands the nature of payments which can be classified as a dividend. Clause (e) of s. 2(22) includes a payment made by the company in which the public is not substantially interested by way of an advance or loan to a shareholder or to any concern to which such shareholder is a member or partner,

subject to the fulfilment of the requirements which are spelt out in the provision. Similarly, a payment made by a company on behalf, of for the individual benefit, of any such shareholder is treated by cl. (e) to be included in the expression ''dividend''. Consequently; the effect of cl. (e) of s. 2(22) is to broaden the ambit of the expression ''dividend'' by including certain payments which the company has made by way of a loan or advance or payments made on behalf of or for the individual benefit of a shareholder. The definition does not alter the legal position that dividend has to be taxed in the hands of the shareholder. Consequently in the present case the payment, even assuming that it was a dividend, would have to be taxed not in the hands of the assessee but in the hands of the shareholder. The Tribunal was, in the circumstances, justified in coming to the conclusion that, in any event, the payment could not be taxed in the hands of the assessee. We may in concluding note that the basis on which the assessee is sought to be taxed in the present case in respect of the amount of Rs. 32,00,000 is that there was a dividend under s. 2(22)(e) and no other basis has been suggested in the order of the AO.

Hence, considering the above observation, the Tribunal has rightly found that the respondent is not a shareholder of a company known as M/s. Goa Golf Club (P) Ltd., and as such the question of including the disputed amount as deemed dividend in terms of s. 2(22)(e) of the IT Act does not arise at all. Considering the said judgment of this Court and in view of the undisputed facts of the case referred to in the impugned judgment of the Tribunal, we find that no substantial question of law arises in the present appeal. Hence, the appeal stands rejected.

