(2011) 11 DEL CK 0220

In the Delhi High Court

Case No : ITA No. 599 of 2011

CIT APPELLANT

Vs

MCC Marketing Pvt Ltd. RESPONDENT

Date of Decision : 21-11-2011

Acts Referred:
Income Tax Act, 1961 — Section 143(3), 2(22), 260A

Citation : (2012) 343 ITR 350 : (2012) 204 TAXMAN 56

Hon'ble Judges : Sanjiv Khanna, J;R.V. Easwar, J

Bench : Division Bench

Advocate : Sanjeev Sabharwal, for the Appellant;

Judgement

R.V. Easwar, J.—The Revenue has sought to raise the following questions as substantial questions of law in this appeal filed u/S. 260A of

the Income Tax Act, 1961 (""Act"" for short) against the order of the Income Tax Appellate Tribunal (""Tribunal"") dated 13th August 2010 in ITA

No.1430/Del/2010:

2.1 Whether provisions of Section 2(22)(e) were correctly invoked by the Assessing officer when the director of the company is holding more than

20% share in both the donor & donee companies?

2.2 Whether learned ITAT erred in deleting the addition of Rs.37,66,432/- made by the Assessing officer u/s 2(22)(e) of Act, being deemed

dividend?

2. The assessee-respondent is a private limited company and the assessment year involved is 2006-07. In the assessment made u/S. 143(3) of the

Act, the Assessing Officer had made an addition of Rs.37,66,432/- by invoking Sec. 2(22)(e) of the Act for the following reason, that the above sum was received by the assessee as unsecured loan from another sister-concern by the name MCC Imaging Pvt. Ltd. (""MIPL"") and that one

Ajay Mehta was the major common shareholder in both MIPL and the assessee company. He was found to be holding 90% shares and 50%

shares respectively in the assessee and MIPL. On these facts he invoked the aforesaid statutory provision and brought the amount to tax in the

assessee - company''s hands.

3. On appeal, the CIT(A) held that since the assessee-company did not hold any shares in MIPL, the provisions of Sec. 2(22)(e) are not

attracted, following the order of the Special Bench of the Tribunal, Mumbai in the case of ACIT v. Bhaumik Colours Pvt. Ltd (2009) (27 SOT

270) wherein it was held that an addition for deemed dividend u/S. 2(22)(e) can be made only in the hands of the shareholder of the company

from whom he had received a loan or advance and, where the recipient of the loan or advance is not a shareholder in the company, no addition

can be made in his hands by invoking the said section.

4. The Revenue filed an appeal before the Tribunal which, following the order of the Special Bench (supra), held that the view taken the CIT(A)

was correct. The appeal of the revenue was thus dismissed.

5. We find that the matter is now concluded by the judgment of a Division Bench of this Court delivered on 11th May, 2011 in the case of CIT v.

Ankitech Pvt Ltd (ITA No.462/2009) and the connected appeals. A copy of the judgment has been filed before us. We have carefully gone

through the same. After an elaborate discussion of the issue, and the case-law on the subject, the Division Bench has held that an assessee who

was not a shareholder of the company from which he received a loan or an advance cannot be treated as covered by the definition of the word

dividend"" as contained in Sec. 2(22)(e) of the Act. It has been held :-

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 u/s 2(22)(e) of the Act. We have to keep in mind that this legal provision relates to

dividend"". Thus, by a 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 u/s 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 u/s 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.

6. In the present case, it is an admitted fact that the assessee-company is not a shareholder in MIPL. Therefore, the judgment of this Court in

Ankitech Pvt Ltd (supra) fully applies to the present case. We accordingly hold, following the said judgment, that no substantial question of law

arises from the order of the Tribunal.

7. The appeal is accordingly dismissed with no order as to costs.

