
(1984) 03 MAD CK 0017
In the Madras High Court
Case No : Tax Case No. 1258 of 1979

Commissioner of Income Tax

APPELLANT

Vs

P. Sarada

RESPONDENT

Date of Decision : 03-03-1984

Acts Referred:

Income Tax Act, 1961 — Section 2(22), 2(6A)

Citation : (1985) 154 ITR 387

Hon'ble Judges : V. Ratnam, J;G. Ramanujam, J

Bench : Division Bench

Advocate : Nalini Chidambaram and C.V. Rajan, for the Appellant; T.V. Balakrishnan, for the Respondent

Judgement

Ramanujam, J.—The following question has been referred to this court for its opinion by the Income Tax Appellate Tribunal at the instant of the Revenue.

Whether, on the facts and in the circumstance of the case, the Appellate Tribunal is correct in law in holding that the withdrawals made by the

assessee from M/s. Universal Radiators Private Limited totalling Rs. 93,027 cannot be assessed in the hands of the assessee u/s 2(22)(e) of the

Income Tax Act, 1961, for the year 1973-74 ?

2. The assessee, Miss P. Sarada, is a substantial shareholder in M/s. Universal Radiators P. Ltd. While completing the assessment for the years

1973-74, the ITO found that the assessee had withdrawn a sum of Rs. 93,027 from the above concern during the relevant accounting years over

and above the credit she had with the said concern. This excess withdrawal was treated by the ITO as dividends under s. 2(22)(e) of the I.T. Act

on two grounds.

1. The assessee had no credit balance in her accounts with the said concern; and
2. That there were sufficient accumulated profits of the said concern at the time when the excess withdrawals was made by the assessee.
3. The ITO, therefore, added Rs. 93,027 to the total income of the assessee treating it as a dividend under s. 2(22)(e) of the Act.

4. The assessee took the matter in appeal to the AAC, who agreed with the ITO and held that the excess withdrawals made by the assessee should be assessed as dividends within the meaning of s. 2(22)(e) of the Act. The assessee preferred a further appeal to the Tribunal and the

Tribunal allowed the assessee's appeal and held that the withdrawals had to be taken as made out of the money lying to the credit of Sri A. C.

Mahesh in view of the letter dated April 3, 1972, addressed by Sri A. P. Madhavan, the father of the minor son, Sri A. C. Mahesh, in which he

had directed the company to make available to the assessee Rs. 1 lakh from out of his account. The Tribunal found that as A. C. Mahesh owed

some money to the assessee and as Mahesh had directed repayments to the amount due to Miss Sarada from out of his credit balance available

with the concern, the withdrawals made by the assessee should be taken to the withdrawals from the account of Mahesh and not from and out of the

of accumulated profit of the concern, so as to attract s. 2(22)(e) of the Act. In this view, the Tribunal deleted the addition of the sum of Rs. 93,027

from the income of the assessee. Aggrieved by the said decision of the Tribunal, the Revenue has come up before this court by way of this

reference.

5. There is no doubt that the assessee is a substantial shareholder in M/s. Universal Radiators P. Ltd. It is also not in dispute that the assessee was

having a running account with the said company and the credit balance in her account as on April 1, 1972, was Rs. 38,168.86. There were

periodical withdrawals from the company by the assessee till March 22, 1973, aggregating to Rs. 93,027 after wiping out the credit balance of Rs.

38,168.86 and the excess withdrawals were as follows :

Date of Excess	Date of Excess
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withdrawals	withdrawals	withdrawals	withdrawals
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Rs.	Rs.
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3-7-1972 1,831.14 18-12-1972 8,522

3-8-1972 5,000 2-1-1973 5,000

2-9-1972 5,000 3-2-1973 5,000

12-9-1972 7,998 5-3-1973 5,000

3-10-1972 5,000 9-3-1973 7,999

3-11-1972 5,000 17-3-1973 10,000

1-12-1972 5,000 22-5-1973 3,930

11-12-1972 7,990 -----

18-12-1972 4,749 93,027

6. It is also not in dispute that the company had accumulated profits. On the various dates when the excess withdrawals were made by the

assessee, there were admittedly accumulated profits and so the withdrawals will fall within the mischief of s. 2(22)(e) of the Act. It is only after

realising this position that at the time of withdrawals of the amounts from her account, there was no credit, but there were accumulated profits of

the company and that was sufficient to attract s. 2(22)(e) of the Act, the assessee came forward with a claim that the withdrawals are not from the

accumulated profits but from the credits available to one Mahesh who had made available to the assessee a sum of Rs. 1,00,000 from and out of

his credit account. The ITO, however, did not accept this claim of the assessee on the ground that in the books of account of the company, the

withdrawals by the assessee is only from her account, that the account of Mahesh was debited and the account of the assessee was credited with

the said sum of Rs. 1,00,000 only on March 31, 1973, and that so long as the withdrawals by the assessee are shown in the accounts as

withdrawals from the company, it is to be taken to be withdrawals from and out of the accumulated profits of the company and, therefore, it will

clearly come within the mischief of s. 2(22)(e) of the Act. However, according to the Tribunal, though the withdrawals had been made from the

assessee's account, it should be taken to be a withdrawal made from and out of the credit of Mahesh and the fact that the credit and debit entries

have been made in accordance with the letter dated April 3, 1972, given by A. P. Madhavan, the father of Mahesh, only on March 31, 1973, will

not affect the tenability of the assessee's claim. Thus the main controversy

between the parties is, whether the withdrawals made by the assessee from the company was from and out of the accumulated profits as contended by the Revenue or whether it was a withdrawal from and out of the amounts due by the company to Mahesh. If really the amount withdrawn came from the credit of Mahesh, then it cannot be taken to be an advance or loan to a shareholder from the accumulated profits so as to attract s. 2(22)(e) of the Act. The entries in the books of account of the company, however, would go to show that the excess withdrawal is from the company's funds. It is only on March 31, 1973, the entries had been made debiting Rs. 1,00,000 in the account of Mahesh and crediting the same in the assessee's account. However, the Tribunal relying on a letter dated April 3, 1972, said to have been written by Madhavan directing repayment of the amounts due to Miss Sarada from and out of the credit available of Mahesh with the company, has also found that a sum Rs. 70,000 was in fact due by Mahesh to Sarada, and it is only to discharge that liability the direction has been given to the company on behalf of Mahesh to repay that amounts due to the assessee. Based on the said letter, the Tribunal has held that the company has committed an error in not giving effect to the letter by making debit entry as against him and credit entry in favour of the assessee in the books of account of the company and that the mere fact that the company had not made the entries then and there on April 3, 1972, itself but the had made the entries later, would not in any way later the nature of the transaction, and, therefore, the assessee should be taken to have made withdrawals only from and out of the credit available to Mahesh and not out of the accumulated profits.

7. On a due consideration of the matter, we are not in a position to agree with the view taken by the Tribunal in this case. Even, according to the Tribunal, the amount due by Mahesh to the assessee was only a sum of Rs. 70,000 as the accounts of Mahesh with the company as on March 31, 1972, indicate that the had to pay the assessee a sum of Rs. 70,000. In the accounts of the assessee with the company as on April 1, 1972, there is a reference to a loan of Rs. 1,00,000 less Rs. 30,000, i.e., Rs. 70,000, owing by Mahesh to the assessee during the relevant year. So the entries in the accounts of Mahesh and the assessee clearly made out that on April 1, 1972, Mahesh owed a sum of Rs. 70,000 to the assessee. Even

assuming that Mahesh had to pay the sum of Rs. 70,000 to the assessee as on April 1, 1972, it could be said to have been repaid only if his account is debited and the assessee's account is credited to that extent. But the such an event took place only on March 31, 1973, on the last day of the accounting year. Even assuming that the letter dated April 3, 1972, is genuine, as has been held by the Tribunal, in view of the fact that the assessing authority did not doubt its genuineness, sum of Rs. 70,000 only can be withdrawn by the from her accounts. The letter dated April 3, 1972, does, however, authorise the assessee to withdraw from the account of Mahesh a sum of Rs. 1,00,000. But, the excess withdrawal was to the extent of Rs. 93,027 and the same is not limited to Rs. 70,000. From this it appears that the excess withdrawals by the assessee on various dates were without reference to the quantum of the amount due by Mahesh. Even with regard to Rs. 70,000 said to be due by Mahesh to the assessee, till the assessee takes advantage of that letter and gets a credit for the amount mentioned in that letter in her accounts, her withdrawals cannot be said to relate to the amounts which came to be credited in the assessee's account long afterwards. It has been held by the Supreme Court in *Shrimati Tarulata Shyam and Others Vs. Commissioner of Income Tax, West Bengal*, that the statutory fiction under s. 2(6A)(e) of the Act would come into operation at the time of the payment of the advance or loan to a shareholder by a company in which the public are not substantially interested and tax is attracted to the loan or advance to the extent to which the company possesses accumulated profits moment the loan or advance is received and that even if the loan or advance ceases to be outstanding at the end of the previous year in which the loan or advance was taken, it can still be deemed to be "dividend" if the conditions of s. 2(6A)(e) are satisfied. At the time when the excess withdrawals were made by the assessee, the amounts said to be due to Mahesh to the assess had not been credited in her account and it came to be credited only on March 31, 1973, at the end of the previous year. Even assuming the letter to be genuine as held by the Tribunal, so long as the letter has not been given effect to by making debit entries in the accounts of Mahesh, the amount referred to in that letter had remained to the credit of Mahesh. As already stated the entries in the books of account maintained by the company till March 31, 1973, show that the assessee has

overdrawn from the company's fund and that the company had sufficient accumulated profits. It is only on March 31, 1973, the account of Mahesh was debited and credit was given to the assessee for the amounts directed to the transferred. The assessee should, therefore, be taken to have got credit for the amount due by Mahesh only on March 31, 1973, and this means that she has adjusted the excess withdrawals by a credit on March 31, 1973. As pointed out by the Supreme Court, the mere fact that the loan or advance made by the shareholder has been repaid before the close of the accounting year will not indicate the on the date of the withdrawal, it was not a loan or advance by the company. In any event, even according to the Tribunal, the direction given in the letter dated April 3, 1972, is only for repayment of the sum of Rs. 70,000 due by Mahesh to the assessee and there is no explanation as to why Mahesh should provide the facility for the assessee to withdraw more than the said sum of Rs. 70,000. We are, therefore, of the view that the letter dated April 3, 1972, even if it is taken to be genuine, will not enable the assessee to claim that her excess withdrawals were from and out of the credit available to Mahesh. The finding to the contrary will in this case appear to be not only unreasonable but also perverse. Even if Mahesh has authorised the company to pay Rs. 1,00,000 to the assessee out of the amount standing to his credit with the company, so long as the amount is not transferred to the credit of the assessee and such a credit having been given only on March 31, 1973, the said amount of Rs. 1,00,000 cannot be said to have been made available to the assessee on the various dates when the excess withdrawals were made by her. As already pointed out, the relevant date is the date of the loan or advance and in this case on the date of the excess withdrawals, there was no amount to the credit of the assessee and no amount had also been transferred to her credit from Mahesh's account. The fact that the company had credited the amount in the assessee's account only on March 31, 1973, leads to the inference that the latter by Madhavan on behalf of the minor Mahesh authorising a debit of his account and credit to the assessee's account would have been given only on March 31, 1973, and not before.

8. In this connection, Mr. T. V. Balakrishnan for the assessee contends that it is not open to this court to go against the finding of fact given by the

Tribunal that the letter dated April 3, 1972, is genuine. It is not doubt true, the Tribunal proceeds on the basis that the letter dated April 3, 1972, is genuine. But it is seen that the Tribunal proceeds to hold the letter to be genuine only because the ITO has not chosen to challenge the genuineness of the same. Whether the ITO has challenged it or not, in the circumstances of the case, we have to find out whether the letter would have been in existence on the dates when the excess withdrawals were made. If the letter has been there, the assessee would have referred to that letter and sought credit for the amounts mentioned in the letter when she withdrew the amounts from her accounts, in which case, the amounts withdrawn would not have been shown as excess withdrawal. If really, the letter from the father of Mahesh came into existence on April 3, 1972, there is no reason for the company not to give effect to that letter but to go on showing the withdrawals by the assessee as excess withdrawals. Thus, the excess withdrawals can only be taken to be a loan or advance made by the company. We hold that on the date of the excess withdrawals, the credit facility referred to in the letter dated April 3, 1972, was not available and the excess withdrawals can only be treated as a loan or advance by the company. The learned counsel for the assessee vehemently contends that it is not open to this court to ignore the letter dated April 3, 1972, which has been found to be genuine by the Tribunal and to hold that the excess withdrawals did not relate to the credit facility referred to therein. It is no doubt true that a finding of fact arrived at by the Tribunal cannot normally be interfered with by this court. But if the Tribunal failed to take into account the relevant material, or has acted on inadmissible material or has based its conclusion on conjectures and surmises, this court can ignore such finding of the Tribunal and re-examine the issue arising for decision on the basis of materials on record. It has been pointed out by the Supreme Court in *The Commissioner of Income Tax, Bihar and Orissa, Patna Vs. S.P. Jain*, that the High Court and the Supreme Court have always the jurisdiction to interfere with the findings of the Appellate Tribunal if it appears that either the Tribunal has misunderstood the statutory language, because the proper construction of the statutory language is a matter of law, or it has arrived at finding based on evidence or where the finding is inconsistent with the evidence or contradictory to it, or it has acted on material partly relevant and partly

irrelevant or where the Tribunal draws upon its own imagination and import facts and circumstances not apparent from the record or bases its conclusions on mere conjectures and surmises or where on person judicially acting and properly instructed as the relevant law could have come to the determination reached and that in all such cases, the findings arrived at are vitiated. As already stated, in this case, the books of the company who that the assessee had overdrawn from the accounts which means that she has taken an advance from the company which had admittedly accumulated profits. If really the letter has been given by Madhavan on behalf of Mahesh to the company transfer any particular amount the to assessee's account, the company would not show in the accounts to the amounts drawn by the assessee as over-payments. There is no reason given by the assessee why the letter dated April 3, 1972, has not been given effect to by debiting Mahesh's account and crediting the assessee's account. Admittedly, a large amount would stand to her credit if the letter had been given on April 3, 1972, as alleged by the assessee. It is only when the assessee found that she had overdrawn and, therefore, she will come within the mischief of s. 2(22)(e) of the Act, a letter appears to have been got from Madhavan, father of Mahesh, who had admittedly a credit in his account. If the letter dated April 3, 1972, has in fact been given on behalf of Mahesh, even if the company has not given effect to it by making a debit entry as against Mahesh and credit entry in favour of the assessee, the assessee can call upon the company to make that credit available for her when she withdraws the amounts. The fact that she had not called upon the company to debit the amount in Mahesh's account and credit the same in her account shows that the letter must have into come existence only later. However, we are not being our consolations merely on the improbability of the letter having been produced on April 3, 1972, as pointed out by the assessee. We are proceeding on the basis that even if the letter is genuine, so long as the letter has not been given effect to, the assessee cannot be said to have overdrawn from the credit facility, referred to in the letter which has not been given effect to by the company. In this view of the matter, we are not inclined to agree with the Tribunal and, therefore, we are answering the question referred to us in the negative and against the assessee. The assessee will pay the costs of the Revenue. Counsel's fee Rs. 500.