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IN THE INCOME TAX APPELLATE TRIBUNAL

"C" BENCH, AHMEDABAD

BEFORE SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER

AND

SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER

ITA No.2219/Ahd/2015

Assessment Year :2009-10

ACIT, Cir.1 Bhavnagar.	Vs.	Kiran Ship Breaking Company 3/4 Kartikey Complex Kalanala Bhavnagar 364 001 PAN : AADFK 4409 Q

Assessee by	:	Shri Umaid Singh Bhati, AR and Shri Abhimanyu Singh Bhati
Revenue by	:	Shri Ashok Kumar Suthar, Sr.DR

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PER ANNAPURNA GUPTA, ACCOUNTANT MEMBER

The present appeal has been filed by the Revenue against the order passed by the Commissioner of Income Tax (Appeals)-6, Ahmedabad (in short referred to as CIT(A)), dated 12.5.2015passed under section 250(6) of the Income Tax Act, 1961 ("the Act" for short) pertaining to Assessment Year 2009-10.

2. The grounds raised are as under:

> "1. The Ld. CIT(A) has erred in deleting the addition of Rs. 2,28,53,926/- on account of deemed dividend u/s. 2(22)(e) of the IT Act and disallowance of an interest expenses amounting to Rs.86.829/- by not considering the contents of the deeming provision which clearly states that "any payment 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 is the beneficial owner of shares 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 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 posses accumulated profits".
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> 2. The Ld. CIT(A) has erred in not appreciating the fact that the assessee is a firm and the partner is a shareholder of the company and has substantial interest in the firm.

3. Solitary issue in the present appeal relates to the addition made of deemed dividend in the hands of the assessee in terms of section 2(22)(e) of the Act, which was deleted by the ld.CIT(A).

4. The AO had noted that the assessee had received various sums during the year from one Shree Electromelts Ltd. ("SEL" for short) both from its steel and coke division; that one of the directors of SEL, Shri Ram Krishan Jain, held more than 10% share in the company and 50% partnership in the assessee-firm. He, therefore held that the firm had substantial interest in the company and amount of advance outstanding at the end of the year from two divisions, amounting to Rs.1,89,08,942/- from coke division and Rs.39,44,984/- from steel division, were treated as deemed dividend in terms of section 2(22)(e) of the Act, liable to be taxed in the hands of the assessee firm. The AO relied on the decision of Hon'ble Delhi High Court in the case of CIT Vs. National Travel Services, 202 taxman 327 (Del) in this regard.

The ld.CIT(A) however deleted the addition noting that Shri R.K.Jain had invested in the company SEL in his individual capacity out of his funds and not as and on behalf of thepartnershipfirm. He noted from the balance sheet of Shri R.K. Jain that he had

sufficient funds to make the investment and from the balance sheet of the assessee-firm, he noted that there was no investment recorded in the books of the firm pertaining to that made in the shares of SEL.

He, therefore, concluded that the investment in shares by Shri R.K.

Jain in SEL was his own individual account and not on behalf of the firm. From the same, he deduced that the firm was neither registered shareholder nor in any way beneficial owner of the shares in SEL, and therefore, he held that the provisions of section 2(22)(e) of the Act were not attracted in the hands of the assessee-firm. He distinguished the decisions relied upon by the AO in the case of National Travel Services (supra) pointing out that in the said case, the investment by partners in the company was found to be on behalf of the firm, and therefore, the Court had held that it was the firm which was the beneficial owner of the shares, and accordingly provisions of section 2(22)(e) were attracted in the hands of the assessee. The finding the ld.CIT(A) at para 4.5 of his order are as under:

> 4.5 I have given my careful consideration to the observations of the A.O and the contentions of ld. AR. During the year under consideration appellant firm received various sums from Shree Electromelts Limited partly by way of advances for sale and partly in cash. Appellant sold scrap against the advances received from the Steel division of SEL. As against the cash received from the Coke division of SEL, appellant made repayments in cash.

A perusal of the ledger accounts of both these divisions of SEL in appellant's books shows that these accounts were running accounts. A.O. made addition u/s 2(22)(e) of the balances outstanding as on 31.03.2009 to the Coke division of Rs.1,89,08,942/- and to the Steel division of Rs.39,44,984/- totaling to Rs.2,28,53,926/- (instead of making the addition of the amounts received by the appellant in toto, which was a much higher figure).The partner of the appellant firm Shri. R.K Jain owns shares exceeding 10% of the share capital of Shree Electromelts Ltd.(SEL). Judicial opinion is unanimous in holding that the deemed dividend u/s 2(22)(e) is assessable only when a share holder is a registered and a beneficial shareholder. In the case laws relied on by the AR and cited at 118 ITD 1(Mum) (SB),324 ITR 263(Bom), 313 ITR 116(Raj), 340 ITR 14(Del),36 CCH 241 Chennai, 4 ITR (Trib) 186(Mumbai), 71 DTR (Del) 358, 39 SOT 465 (Hyd) and 295 ITR 9 (AII),the ratio laid down was that the provisions of section 2 (22)(e) are attracted only in the case of registered and beneficial shareholder. In the instant case appellant is a firm. In accordance with the Companies Act, 1956 (read with the circular issued by the SEBI dated 13.03.1975 interpreting Section 187(c) of the Companies Act and stating that a partnership firm is not a person capable of being a member within the meaning of Section 47 of the Companies Act), a firm is incapable of becoming a shareholder in a company. In the case relied on by the A.O. namely CIT V/s National Travel Services (202 Taxman 327), Delhi High court held that if a firm invests its money in the shares of a company in the names of its partners, deemed dividend u/s 2 (22)(e) is assessable in the hands of the firm. In the instant case there is nothing on record to suggest that the appellant firm's money was invested. As seen from the affidavit of Sh. R.K Jain (partner of the appellant firm) dated 27.06.2014, he acquired

1,98,031/- shares(around 4 % of the share capital of the SEL)in the financial year 1992-93.Further he purchased 2,99,301/- shares in the financial year 2003-04.As seen from the balance sheet of Sh. R.K Jain as on 31.03.2004 he was having sufficient opening capital at the beginning of the F.Y 2003-04 to cover the investment in shares. Further as seen from the balance sheet of the appellant firm as at 31.03.2004 and as at 31.03.2009, there was no investment made by the firm in SEL. After taking into consideration these facts, it is amply clear that the appellant firm did not invest its money in the shares of SEL. Instead the investment was made by Sh. R.K Jain out of his own individual funds. Therefore the case law relied on by the A.O viz CIT V/s National Travel Services (202 Taxman 327) is not applicable to the facts of the instant case. Having considered the facts of the case and the ratio laid down in a number of cases by various High Courts and Tribunals, I am of the view that addition u/s 2(22)(e) is not sustainable in the hands of the appellate firm (as neither it is a registered shareholder of SEL nor its money was invested in the shares of SEL).Addition made u/s. 2(22)(e) is deleted. However , A.O. is at liberty to take appropriate action in accordance with law to assess the said sum in the hands of Shri. R.K. Jain, who is both a registered and beneficial shareholder.

5. The ld.DR was unable to controvert the factual finding of the ld.CIT(A) that the investment made by Shri R.K. Jain in SEL was in his own individual capacity and not on behalf of the firm. Therefore we do not find any infirmity in the findings of the Ld.CIT(A) that the assessee firm was neither the registered shareholder nor beneficial shareholder of SEL so as to invoke section 2(22)(e) of the Act in its hands on receipt of advances from SEL.

He was also unable to point out any infirmity in the distinction made by the ld.CIT(A) of the decision of Delhi High Court in the case of National Travel Services (supra), where the facts of the case as noted by the Ld.CIT(A) was that the partners had invested in the company on behalf of the partnership from the funds of the partnership , and accordingly the firm was held by the Hon'ble court to be beneficial owner of the shares in the company.

Therefore the order of the Ld.CIT(A) holding that the decision of the Hon'ble Delhi High Court in the case of National Travel Services(supra) will not apply in the facts of the present case, we find, remains uncontroverted before us.

6. The law as to in whose hands deemed dividend as per section 2(22)(e) of the Act, is to be taxed, has been laid down by the Hon'ble Apex court in the case of CIT Vs. Madhur Housing & Development Company (2018) 93 taxmann.com 502 (SC) wherein they agreed with the order of the Hon'ble High court of Delhi holding that deemed dividend is taxable only in the hands of shareholder. The Hon'ble court agreed with the interpretation of the section by hon'ble High Court that section 2(22)(e) of the Act only enlarges the definition of dividend and cannot be extended further for broadening concept of shareholder. That where conditions for treating loans and advances as deemed dividend is established by the Revenue, Revenue can treat dividend income in the hands of shareholders.

Even the jurisdictional High Court in the case of CIT Vs. Daisy Packers P.Ltd., and the Hon'ble Delhi High Court in the case of CIT Vs. AnkitechP.Ltd. (2012) 340 ITR 14 held that deemed dividend is taxableonly in the hands of the shareholder.

7. The assessee firm in the present case, neither being registered shareholder nor beneficial shareholder as per the factual finding of the ld.CIT(A) which has remained uncontroverted before us, there is no reason to tax the amount received by it by way of advance from SEL amounting to Rs.2,28,53,926/- as deemed dividend in terms of section 2(22)(e) of the Act.

The order of the ld.CIT(A) is, therefore upheld, and ground of appeal of the Revenue is rejected.

8. In the result, appeal of the Revenue is dismissed.

Order pronounced in the Court on 27th October, 2023 at Ahmedabad.

Sd/- Sd/-

(SIDDHARTHA NAUTIYAL) (ANNAPURNA GUPTA) JUDICIAL MEMBER ACCOUNTANT MEMBER

Ahmedabad,dated 27/10/2023