

**आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, 'सी', मुंबई।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**MUMBAI BENCHES "C", MUMBAI**

श्री जी. मंजूनाथ, लेखा सदस्य, एवं  
श्री रविश सूद, न्यायिक सदस्य के समक्ष

**Before Shri G. MANJUNATHA, Accountant Member and**  
**Shri RAVISH SOOD, Judicial Member,**

**ITA NO.5019/Mum/2017**  
**Assessment Year: 2014-15**

DCIT-2(2)(2), Room No.545, 5 <sup>TH</sup> Floor, Aayakar Bhavan, M. K. Road, Mumbai-400020	<b>बनाम/</b> Vs.	M/s Perfect Engineering Associates Pvt. Ltd. Mehar House, 15, Cawasji Patel Street, Fort, Mumbai-400001
(राजस्व /Revenue)		(निर्धारिती /Assessee)
<b>P.A. No.AAACP2016Q</b>		

राजस्व की ओर से / Revenue by	Shri R. Sindhu
निर्धारिती की ओर से / Assessee by	Shri Hari S. Raheja

सुनवाई की तारीख / <b>Date of Hearing :</b>	<b>04/02/2019</b>
<b>आदेश</b> की तारीख / <b>Date of Order:</b>	<b>13/02/2019</b>

**आदेश / O R D E R**

Per G. Manjunatha (Accountant Member)

This appeal filed by the Revenue is directed against the order of the Ld. CIT(Appeal)-5, Mumbai, dated 10/04/2017 and it

pertains to AY 2014-15. The Revenue has raised the following grounds of appeal:-

*“Whether on the facts and in the circumstances of the case, the Ld. CIT(A) is right in deleting the addition made holding that since the assessee company is not the share holder in other company, provision of Sec.2(22)(e) of the Act cannot be invoked relying on the decision of the Hon’ble Bombay High Court in the case of Universal Medicare, 324 ITR 263 (Bom.) and Bhaumik Colours 313 ITR 146 (Bom.) ignoring the fact that the shareholders of the assessee company holding more than 20% share holding are the major share holder of M/s Shivsmruti Investment & Services Pvt. Ltd.”*

2. The brief, facts of the case are that the assessee is engaged in the business of taking contract for water pipelines with pumping machineries including laying, jointing, installation, erection and commissioning of the projects. The assessee had filed return of income for the AY 2014-15 on 30/09/2014, declaring total income of Rs.98,55,870/-. The case of the assessee was selected for scrutiny and notice u/s 143(2) and 142(1) of the Act, were issued. In response to the notices, the Ld. Authorised Representative (in short “AR”) of the assessee appeared from time to time and filed various details as called for. During the assessment proceedings, the Ld. Assessing Officer noticed that the assessee had taken loan of Rs.66,08,535/- from M/s Shivsmruti Investment & Services Pvt. Ltd. The Ld. AO further observed that M/s Shivsmruti Investment & Services Pvt.

Ltd. was having reserves and surplus in excess of loans taken by the assessee. It was further noticed that the two common directors holding 46% of shares in M/s Shivsmruti Investment & Services Pvt. Ltd. and in M/s Perfect Engineering Associates Pvt. Ltd., therefore, called upon the assessee as to why the provisions of section 2(22)(e) of the Income Tax Act, 1961 shall not be invoked to tax loan taken from the above company as the deemed dividend. In response, the assessee has stated that in order to apply the provisions of section 2(22)(e) of the Act, there should be registered and beneficial interest in the company. The assessee has taken loan from another company where common directors are involved, therefore, the provisions of section 2(22)(e) of the Act, cannot be applied. The assessee has relied upon the decision of the Hon'ble Bombay High Court in the case of Universal Medicare 324 ITR 263 (Bom.). The Ld. AO, after considering the provisions of section 2(22)(e) of the Act and submissions of the assessee, held that the statutory fiction of deemed dividend arising at the time of giving loan by the company will be active at the moment the loan is given to any concern in which shareholders are members or partners and in which there has been substantial interest. Accordingly, the loan taken by the

assessee company, from M/s Shivsmruti Investment & Services Pvt. Ltd. has been considered as deemed dividend under the provisions of section 2(22)(e) of the Act.

3. Aggrieved by the order of the Ld. AO, the assessee preferred an appeal before the Ld. CIT(A). Before the Ld. CIT(A), it was argued that provisions of section 2(22)(e) of the Act, cannot be invoked as the assessee is neither the shareholder nor does it have any beneficial interest in the shares of M/s Shivsmruti Investment & Services Pvt. Ltd. The assessee has relied upon the decision of the Hon'ble Bombay High Court in the case of CIT vs Impact Containers Pvt. Ltd. (Bom.). The Ld. CIT(A), after considering the submissions of the assessee and also following the decision of the Hon'ble Bombay High Court in the case of Universal Medicare 324 ITR 263 (Bom.) and Bhaumik Colours 313 ITR 146(Bom.) held that the assessee company is not a shareholder in another company and hence provisions of section 2(22)(e) of the Act, cannot be invoked. Accordingly, the addition made by the Ld. AO towards loan taken from M/s Shivsmruti Investment & Services Pvt. Ltd. u/s 2(22)(e) of the has been

deleted. Aggrieved by the order of the Ld. CIT(A), the Revenue is in appeal before this Tribunal.

4. The Ld. DR submitted that the Ld. CIT(A) was erred in deleting the addition made by the AO towards loan under section 2(22)(e) of the act, without appreciating same that the shareholders of the assessee company holding more than 20% shareholding are the major shareholder of M/s Shivsmruti Investment & Services Pvt. Ltd..

5. The Ld. AR, on the other hand, submitted that in order to invoke provisions of section 2(22)(e) of the Act, there should be beneficial ownership of the shares by any person but in this case, shares are held by the company, therefore, provisions of section 2(22)(e) of the Act cannot be invoked to tax loans and advances as deemed dividend. The Ld. AR for the assessee further submitted that the "B" Bench of the ITAT Mumbai, in the case of M/s Neha Home Builders Pvt. Ltd. vs DCIT has considered the identical issue in the light of the provisions of section 2(22)(e) of the Act, and also by considering the latest judgement of Hon'ble Supreme Court in the case of Gopal & Sons (HUF) (2017) 77 taxmann.com 71(SC) held that in respect of loan, the assessee

was neither the beneficial shareholder nor the registered shareholder of the assessee company, the amount so received is not liable to tax as deemed dividend. The Ld. CIT(A), after considering the submissions of both sides, has rightly deleted and his order should be upheld.

6. We have heard both the parties, perused the material available on record and gone through the order of the authorities below. We have also considered the provisions of section 2(22)(e) of the Act, in the light of various judicial precedence cited by both parties. It is an admitted fact that the assessee has taken loan from another company where two common directors held more than 46% equity shares. The AO has considered loan taken from M/s Shivsmruti Investment & Services Pvt. Ltd. within the provisions of section 2(22)(e) of the Act on the ground that as per provisions of section 2(22)(e) of the Act, any loans and advances from a company where a person held more than 20% beneficial ownership in the said company, then the loans and advanced received from that company shall be treated as deemed dividend to the extent of reserves and surplus of the lending company. In this case, there is no dispute with regard to the fact that as on

date of loan, the company i.e. M/s Shivsmruti Investment & Services Pvt. Ltd. is having reserves and surplus in excess of loans and advances given to the assessee company. The only dispute is whether the said loans and advances shall be treated as deemed dividend within the meaning of section 2(22)(e) of the Act, when recipient company was neither beneficial nor registered owner of shares in other company. Admittedly, the assessee is not the beneficial ownership in the lending company, but two common shareholders are owned more than 40% equity shares in the above company. When the assessee is neither beneficial nor registered in lending company, then loans and advances received from the said company cannot be brought to tax within the ambit of provisions of section 2(22)(e) of the Act. This legal proposition has been laid down by the Hon'ble Bombay Court in the case of CIT vs Impact Containers Pvt. Ltd. (Bom.), where the Hon'ble High Court by following its earlier decision in the case of Universal Medicare 324 ITR 263 (Bom.) (324 ITR 263)(Bom) and Bhaumik Colours (313 ITR 146)(Bom.) held that when the recipient of the loan was not a shareholder in any of the entities which have advanced loans and advance, then the addition is required to be deleted. This legal proposition is further supported

by the decision of the jurisdictional ITAT, Mumbai, "B" Bench in the case of M/s Neha Home Builders Pvt. Ltd. vs DCIT (ITA No.3157/Mum/2018), where the Co-ordinate Bench, after considering the various case laws, including the decision of the Hon'ble Supreme Court in the case of Gopal & Sons (HUF) (2017) 77 taxmann.com 71(SC) held that since assessee was neither the beneficial nor the registered shareholder of the company, the amount so received is not liable to be taxed as deemed dividend. The relevant observation of the Tribunal is as under:-

"18. Now we deal with the decisions relied by the CIT(A) for holding that amount received by the assessee is liable to be taxed as deemed dividend.

19. In the case of Gopal And Sons (HUF) v/s CIT [2017] 77 taxmann.com 71 SC, the assessee is a Hindu Undivided Family (HUF). During the previous year, the assessee had received certain advances from one M/s. G.S. Fertilize s (P) Ltd. (hereinafter referred to as the 'Company'). The Company is the manufacturer and distributor of various grades of NPK Fertilizers and other agricultural inputs. In the audit report and annual return for the relevant period, which was filed by it before the Registrar of Companies (ROC), it was found that the subscribed share capital of the said Company was Rs. 1,05,75,000/- (ie., 10,57,500 shares of Rs. 10/- each). Out of this, 3,92,500 number of shares were subscribed by the assessee which represented 37.12% of the total shareholding of the Company. From this fact, the AO concluded that the assessee was both the registered shareholder of the Company and also the beneficial owner of shares, as it was holding more than 10% of voting power. On this basis, after noticing that the audited accounts of the Company was showing a balance of Rs. 1,20,10,988/- as "Reserve & Surplus" as on 31st March, 2006, this amount was included in the income of the assessee as deemed dividend.

20. It is also found as a fact, from the audited annual return of the Company filed with ROC that the money towards share holding in the company was given by the assessee / HUF. Though, the share certificates were issued in the name of the Karta, Shri Gopal Kumar

Sanei, but in the annual returns, it is the HUF which was shown as registered and beneficial shareholder. In any case, it cannot be doubted that it is the beneficial shareholder. Even if we presume that it is not a registered shareholder, as per the provisions of Section 2(22)(e) of the Act, once the payment is received by the HUF and shareholder (Mr. Sanei, karta, in this case) is a member of the said HUF and he has substantial interest in the HUF, the payment made to the HUF shall constitute deemed dividend within the meaning of clause (e) of Section 2(22) of the Act.

21. It is clear from the above order that all the parties have clearly held that HUF was real beneficial owner of the company, accordingly amount so received was correctly held to be deemed dividend. However, in the present case assessee neither a registered nor beneficial share holder of EIPL which is not disputed by the revenue authority. Hence, decision of Gopal and Sons HUF will not apply in present case. But it supports the contention of assessee that addition cannot be made in assessee's hand because NHBPL is not a beneficial shareholder of EIPL.

22. In the case of National Travel Services [2018] 89 taxmann.com 332 (SC), the assessee is a partnership firm consisting of three partners, namely, Mr. Naresh Goyal, Mr. Surinder Goyal and M/s Jet Enterprises Private Limited having a profit sharing ratio of 35%, 15% and 50% respectively. The Assessee firm had taken a loan of Rs.28,52,41,516/- from M/s Jetair Private Limited, New Delhi. In this Company, the Assessee subscribed to the equity capital of the aforesaid Company in the name of two of its partners, namely, Mr. Naresh Goyal and Mr. Surinder Goyal totaling 48.19 per cent of the total shareholding. Thus Mr. Naresh Goyal and Mr. Surinder Goyal are shareholders on the Company's register as members of the Company. They hold the aforesaid shares for and on behalf of the firm, which happens to be the beneficial shareholder.

23. However, in the present case assessee is neither registered shareholder nor beneficial shareholder of EIPL.

24. National Travel case neither any decision was rendered nor was any stay on applicability of decision of Hon'ble Supreme Court in case of CIT Vs. Ankitech P. Ltd. in Civil Appeal No.3961 of 2013 given. In that case matter was only referred to larger bench for reconsideration and nothing has been decided yet. Hence, till date Larger Bench not decided the case, the earlier law will hold good and be in operation and binding on all courts and tribunal throughout; the territory of India. As per Article 141 of the Constitution of India which lays down that the law declared by the Supreme Court shall be binding on all courts throughout the territory of India. Earlier in case of CIT Vs. Ankitech P. Ltd. in Civil Appeal No.3961 of 2013 Hon'ble Supreme Court lay down the Law that for attracting section 2(22)(e) shareholder needs to be registered and beneficial share holder. In the present case it is a settled fact that the assessee is neither a registered nor a beneficial shareholder. Thus with no stretch of

imagination the assessee can be covered under the definition of Section 2(22)(2) i.e., deemed dividend.

25. The similar issue was come before the Hon'ble Kerala High Court in case of CIT v/s Settlement Commission (IT & WT) (2009) 176 Taxman 421 (Kerala) where the Hon'ble High Court held as under:-

*"In this case, the Settlement Commission has rejected Ext. P2 on the ground that the issue raised is a debatable issue. But, I feel that when there is a decision of the Apex Court, no Inferior Court or Tribunal can say that the issue is a debatable issue for the reason that a Bench of two Judges of the Apex Court has doubted the correctness of the decision of the Constitution Bench. Even assuming there is a final judgment of a two Judges Bench of the Apex Court, the same has to be ignored and Inferior Courts and Tribunals are bound to follow the decision of the Constitution Bench in view of the law relating to precedents and a so article 741 of the Constitution of India. So, the rejection of Ext P2 application is unjustified."*

26. In view of the above, the decision of the Hon'ble Supreme Court as on today established binding. Under Article 141 of the Constitution, ratio of decision of the Hon'ble Supreme Court and principle underlying decision is binding. It is most crucial to note that in that case matter was referred to reconsider the earlier decision with their observation that for applying deemed dividend provision it is sufficient if the shareholder is beneficial shareholder. It need not be necessary that shareholder must be registered shareholder. Because as per earlier decision for applying deemed dividend shareholder must satisfy both character of shareholder i.e. Registered as well as beneficial shareholder. Thus, as per observation of this decision also shareholder needs to be beneficial Shareholder. If the shareholder is not a beneficial shareholder then as per this observation also provisions of deemed dividend will not apply. Hence, all the decision supports the contention of assessee that deemed dividend cannot be apply in assessee's hand as it is neither registered nor beneficial shareholder of EIPL.

27. In view of the above discussion, we can safely conclude that since assessee was neither the beneficial nor the registered shareholder of the company, the amount so received is not liable to be taxed as deemed dividend. Moreover, the transaction between two group concerns were in the nature of current account and inter banking account containing both types of entries i.e., receipts and payments, the same cannot be brought in the purview of loans and advances so as to attract Section 2(22)(e)."

7. In this view of the matter and respectfully following the ratios of the case laws discussed hereinabove, we are of the considered view that there is no error in the reasons recorded by

the Ld. CIT(A), while deleting the addition towards the deemed dividend u/s 2(22)(e) of the Act. Hence, we are inclined to uphold the order of the Ld. CIT(A) and dismissed the appeal filed by the Revenue.

In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on 13/02/2019.

**Sd/-**

(Ravish Sood)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 13/02/2019

*Shekhar, P.S./नि.स.*

**Sd/-**

(G. Manjunatha)

लेखा सदस्य / ACCOUNTANT MEMBER

**आदेश की प्रतिलिपि अग्रहित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant (Respective assessee)
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**