

dik

**IN THE HIGH COURT OF JUDICATURE AT  
BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
INCOME TAX APPEAL (IT) NO. 576 OF 2016**

Principal Commissioner of Income Tax ]  
11, 4<sup>th</sup> Floor, Room No. 437, Aayakar ]  
Bhawan, M.K.Road, Mumbai 400 00 ] ...Appellant.

Vs.

M/s Sunjewels International Ltd. ]  
Unit # 116, SDF-IV, SEEPZ Andheri (East) ]  
Mumbai 400 096 ] ...Respondent.

....

Mr Arvind Pinto for the Appellant.  
Mrs Sanjukta Chowdhury a/w Mr Pramod Kumar Parida for the  
Respondent.

**CORAM : S. C. DHARMADHIKARI &  
B.P.COLABAWALLA, JJ.**

**RESERVED ON : 1<sup>st</sup> October, 2018**

**PRONOUNCED ON : 8<sup>th</sup> February, 2019**

**JUDGMENT [ PER B. P. COLABAWALLA J. ]:**

1. Admit. Calling for paper-book is dispensed with. By consent of parties, taken up for hearing and final disposal.

2. By this appeal, the revenue takes an exception to the

Judgment and Order passed by the Income Tax Appellate Tribunal, Mumbai, 'E' Bench, (for short the "**ITAT**") dated 20<sup>th</sup> February, 2015. The Assessment Year (for short "**A.Y.**") in the present appeal is with reference to the A.Y. 2009-10.

3. Mr Pinto, the learned advocate appearing on behalf of the appellant - revenue, would submit that the impugned order gives rise to the following two questions of law which require consideration by us under Section 260A of the Income Tax Act, 1961 (for short the "**I.T. Act**") and read thus:-

- "(1) Whether in law and on the facts and in circumstances of the case, the Hon'ble ITAT was justified in upholding the order of the Ld. CIT(A) and thereby not sustaining the disallowance made by the Assessing Officer u/s 2(22)(e) of the Income Tax Act, 1961 without appreciating the fact that the Reserve and Surplus of lender companies viz. M/s NSN Jewellers Pvt. Ltd. and M/s KSN Trading Pvt. Ltd. exceeded the amount advanced to the assessee company thereby falling within the ambit of provision of sec. 2(22)(e) of the Income Tax Act, 1961.
- (2) Whether on law and in the facts of the instant case, was the Tribunal justified in not appreciating another significant fact that the said transaction falls with the second limb of Section 2(22)(e) i.e. payments 'made to any concern in which the shareholder is a member'."

4. The brief facts of the case are that the respondent - assessee is a company engaged in the manufacturing and export of

studded jewelry. The assessee claims an exemption of its profits earned in the new units established in the Special Economic Zone under Section 10AA of the I.T. Act, 1961. During the course of audit of the income declared by the assessee company for the A.Y. 2009-10, the Assessing Officer (for short “**A.O.**”) *inter alia* noted that the assessee had obtained unsecured loans from two related companies, namely, NSN Jewelers Pvt. Ltd. and KSN Trading Pvt. Ltd. On calling for the details of shareholding pattern of the creditor companies (i.e. the companies that had given loans to the assessee), it was noted by the A.O. that a company called “Sunjewels India Pvt. Ltd.” is a substantial shareholder in both the creditor companies (NSN Jewelers Pvt. Ltd. and KSN Trading Pvt. Ltd.) as well as the assessee company. The A.O. further noted that these creditors have reserves and surplus in excess of the amounts advanced to the assessee company. In these circumstances, the A.O. came to the conclusion that the conditions for invoking of Section 2(22)(e) of the I.T. Act 1961 are complied with and which deal with the concept of 'deemed dividend'. Accordingly, the A.O. came to the conclusion that the loans given by the creditor companies were to be taxed as 'deemed dividend' in the hands of the assessee company.

5. Aggrieved by the order passed by the A.O., the assessee

company filed an appeal before the Commissioner of Income Tax (Appeals) [for short "**CIT(A)**"]. On the issue of 'deemed dividend' under Section 2(22)(e) of the I.T. Act, 1961, the CIT(A) by its order dated 10<sup>th</sup> May, 2013 held that the assessee company not being a shareholder in the lender/creditor companies, the provisions of section 2(22)(e) were not applicable. Relying upon the ratio in the case of **Universal Medicare [(2010) 190 Taxman 144 (Bom)]**, the addition was deleted.

6. Being aggrieved by this order of the CIT(A), the revenue preferred an appeal before the ITAT. The ITAT, by the impugned order confirmed the findings of the CIT(A), on the question of 'deemed dividend' and dismissed the appeal of the revenue. This is how the appeal has now come up before us.

7. Mr Pinto, learned advocate appearing on behalf of the revenue, submitted that during the A.Y. in question, the assessee company had taken unsecured loans of Rs.1.51 Crores from M/s NSN Jewelers Pvt. Ltd. and Rs.86.51 Lacs from M/s KSN Trading Pvt. Ltd. He brought to our attention the shareholding of the assessee company as well as the shareholding pattern of M/s KSN Jewelers Pvt. Ltd. and M/s KSN Trading Pvt. Ltd. This shareholding pattern

has been set out by the A.O. in his assessment order dated 6<sup>th</sup> December, 2011. Mr Pinto then submitted that Section 2(22)(e) of the I.T. Act, 1961 *inter alia* stipulates that the dividend includes any payment by a company, not being a company in which the public are substantially interested, by way of loans or advances to (1) a shareholder being a person who is the beneficial owner of the shareholding not less than ten percent of the voting power or (2) to any concern in which such shareholder is a member or a partner and in which he has a substantial interest. He submitted that “any concern” would also include a company. He submitted that from looking to this definition it was apparent that the payment by a private limited company (like in the present case) by way of loans or advances to a shareholder or to any concern is deemed to be a dividend, if all the conditions and percentage of shareholding are satisfied. In the facts of the present case, Mr Pinto submitted that looking at the shareholding pattern of the assessee company as well as the creditor companies, it was clear that the company “Sunjewels India Pvt. Ltd.” was holding 86.96 % of the shareholding in the assessee company as well as 99% shareholding in the creditor companies. This being the case, the loans given by the creditor companies to the assessee company would clearly fall within the definition of 'deemed dividend' as stipulated in Section 2(22)(e) of

the I.T.Act, 1961 and would have to be taxed accordingly in the hands of the assessee company. He therefore submitted that the questions of law reproduced earlier be answered in favour of the revenue and against the assessee company. He therefore submitted that the questions of law reproduced earlier be answered in favour of the revenue and against the assessee company.

8. To understand this argument, it would be necessary to reproduce the provisions of Section 2(22)(e) of the I.T. Act, 1961 insofar as it relates to the controversy raised in the present appeal. It reads thus:-

**“2. In this Act, unless the context otherwise requires ---**

**(22) dividend includes ---**

**(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 31<sup>st</sup> 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 per cent 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.”**

9. What Section 2(22)(e) of the I.T. Act, 1961 stipulates is

that 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) by way of an advance or loan to a shareholder, being a person who is the beneficial owner of shares, holding not less than ten per cent voting power, shall be deemed as dividend in the hands of such shareholder. Section 2(22)(e) further stipulates that if monies are paid by a company (not being a company in which the public are substantially interested) by way of an advance or loan to any concern in which such shareholder is a member or partner in which he has a substantial interest.

10. In the facts of the present case, admittedly the assessee company is not a beneficial owner of any shares in the creditor companies which have advanced the loans. The common shareholder having a substantial interest in the assessee company as well as in the creditor companies is one "Sunjewels India Pvt. Ltd." As mentioned earlier "Sunjewels India Pvt. Ltd." holds 86 per cent of the shareholding in the assessee company and 99 per cent shareholding in the creditor companies. It is also an admitted fact that the loans given by the creditor companies was not to "Sunjewels India Pvt. Ltd." but was to the assessee company. This being the factual

position, we find that the CIT(A) as well as ITAT were fully justified in holding that this case did not fall within the provisions of Section 2(22)(e) of the I.T. Act, 1961.

11. For the second limb of Section 2(22)(e) of the I.T. Act, 1961 to come into play, the condition that has to be fulfilled is that the creditor companies ought to have given monies by way of an advance or loan to a concern in which the assessee company is a member or partner and in which it has a substantial interest. In other words, what the second limb of section 2(22)(e) contemplates is that, the creditor companies give a loan not directly to its shareholder but to any concern in which such shareholder has a substantial interest. It is then that the same would attract the second limb of Section 2(22)(e) of the I.T. Act, 1961. That is certainly not the factual situation before us. In these circumstances we do not find any fault with the findings given by the CIT (A) as well as the ITAT.

12. We must mention that Mr Pinto has brought to our attention a decision of the Supreme Court in the case of **National Travel Services Vs Commissioner of Income Tax, Delhi, VII dated 18<sup>th</sup> January, 2018**, wherein the issue about the correctness of the Judgment of the Supreme Court in the case of **C.I.T. Vs Ankitech**

**Private Ltd.** reported in **(2012) 340 ITR 14 (Del.)** has been referred to a larger bench. This decision cited by Mr Pinto would clearly show that in the facts of that case the assessee was 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 (the appellant before the Supreme Court) had taken a loan of Rs.28.52 Crores from M/s Jetair Private Limited, New Delhi. In this company (M/s Jetair Private Limited), the assessee firm subscribed to its equity capital in the name of two of its partners, namely, Mr Naresh Goyal and Mr Surinder Goyal totaling to 48.19 % of the total shareholding. It was this shareholding of the assessee firm that was held by the aforesaid two partners for and on behalf of the firm and who happened to be the beneficial shareholder. Relying upon the decision in the case of Ankitech Pvt. Ltd. it was sought to be argued before the Supreme Court that since the assessee firm was not a registered holder of the shares in Jetair Private Limited, New Delhi, any loan taken by the assessee firm from the said company could not be taxed as 'deemed dividend' in the hands of the assessee firm. It was in this light and considering the amended provisions of Section 2(22)(e) of the I.T. Act, 1961, that the Supreme Court was of the opinion that the case in Ankitech Private Limited

(supra) was not correctly decided, and therefore, referred the matter to a larger bench. The issue raised in this decision and which is now pending before the larger bench of the Supreme Court, does not arise for our consideration at all. As mentioned earlier, in the facts of the present case, admittedly the assessee company is not the beneficial owner of any shares in the creditor companies, and neither has any loan been given by the creditor companies to any concern in which the assessee company has a substantial interest. This being the case, we do not think that the issue which is now pending before the larger bench of the Supreme Court has any relevance to the factual situation before us.

13. In view of the foregoing discussion, the substantial questions of law framed by us earlier are answered in favour of the assessee company and against the revenue. The appeal is disposed of in the aforesaid terms. However, there shall be no order as to costs.

**( B.P.COLABAWALLA J. )**

**( S.C.DHARMADHIKARI J. )**