

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "G", MUMBAI**

**BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.2615/M/2017
Assessment Year: 2011-12**

M/s. Golani Brothers, 303, Dalamal Chambers, 29, New Marine Lines, Mumbai - 400 020 PAN: AACFG5348R	Vs.	DCIT-12 (2), Mumbai
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Vimal Punmiya, A R
Revenue by : Shri Chaudhary Arunkumar Singh, D.R.

Date of Hearing : 17.01.2019
Date of Pronouncement : 07.02.2019

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 23.12.2017 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2011-12.

2. The issue raised in ground No.1 by the assessee is against the order of Ld. CIT(A) confirming the addition of Rs.1,29,61,420/- as made by the AO on account of deemed dividend under section 2(22)(e) of the Income Tax Act by ignoring the fact that assessee is not a shareholder of M/s. Golani Construction India Pvt. Ltd. and provisions qua deemed dividend as envisaged under section 2(22)(e) are not applicable to the assessee who is not shareholder of the company who has

advanced the money. Whereas the issue raised in ground No.2 is as regards bogus purchases to the tune of Rs.4,09,657/-.

3. The Ld. A.R. at the time of hearing submitted before the Bench that ground No.2 is not pressed. Therefore, the same is dismissed as not being pressed.

4. The facts in brief are that the assessee filed return of income on 29.09.2011 declaring income of Rs.1,50,61,430/- which was revised on 30.03.2013 declaring income of Rs.1,91,57,582/-. Thereafter, the case of the assessee was selected under scrutiny. During the course of assessment proceedings, the AO observed that assessee has taken a loan of Rs.2,10,00,000/- from its sister concern a closely held company M/s. Golani Construction India Pvt. Ltd. The AO observed that two of the partners of the assessee firm are holding 20000 shares out of total share holding 30000 shares of the said company and the accumulated profit of the said company as on 31.03.2010 was Rs.1,29,61,420/- and on 31.03.2011 Rs.1,95,84,331/. Accordingly, the AO issued show cause notice to the assessee calling upon to explain as to why the loan receipt from M/s. Golani Construction India Pvt. Ltd. should not be assessed as deemed dividend in the hands of assessee firm under the provision of section 2(22)(e) of the Act which was replied of the assessee vide written submission dated 10.02.2014 by submitting that the assessee received interest bearing loans from M/s. Golani Construction India Pvt. Ltd. during 2011-12 and the said loan along with interest was returned by the assessee to M/s. Golani Construction India Pvt. Ltd. The AO, however, relying on the decision of Hon'ble

Supreme Court in the case of Smt. Tarulata Shyam v. CIT (1977) 108 ITR 345 (SC) treated the said loan as deemed dividend and thus accordingly made the addition of Rs.1,95,84,133/- by framing assessment under section 143(3) of the Act vide order dated 19.03.2014 besides making other additions.

5. In the appellate proceedings, the Ld. CIT(A) partly allowed the appeal of the assessee by sustaining the addition to the tune of Rs.1,29,61,420/- by observing and holding as under:

"13.6 I have gone through the decision also relied above of Binal Seventilal Koradia (HUF) vs. DIT which has relied on the decision of Bhaumik Colour P.Ltd. (supra), the relevant part of it which is extracted herewith.

"4. We observe that the AO considered a sum of Rs. 60,64,205 received from M/s. Karodia Constructions P. Ltd., by the assessee as deemed dividend under section 2(22) (e) of the Act. However, Id CIT(A) has held that assessee is not at all the shareholder of M/s. Karodai Constructions P. Ltd. Shri Binal S Karodia is a share holder in his individual capacity only and, therefore, assessee HUF cannot be said to be a shareholder or a beneficial share holder. Id CIT(A) by considering the decision of ITAT Special Bench in the case of ACIT vs. Bhaumik Colour Pvt Ltd. 118 ITD 1/(313 ITR 146(AT), held that loans received by the assessee from M/s. karodia Constructions PLtd., cannot be treated as deemed dividend u/s.2(22)(e) of the Act as recipient of money should be a registered share holder as well as beneficial share holder whereas in the case of the assessee none of the above conditions are satisfied.

5. Ld D.R, has not disputed above facts and as mentioned above, but dutifully relied on order of Assessing Officer.

6. The ITAT, Special Bench in the case of Bhaumik Colour Pvt Ltd (supra) held that provisions of section 2(22)(e) of the Act create a fiction bringing any amount paid otherwise than as dividend into net of dividend. Therefore, this clause must be given strict interpretation. It was held therein that if the person is a registered holder but not the beneficiary share holder, then provisions of section 2(22)(e) will not apply. Similarly, if a person is a beneficiary share holder but not a registered share holder, then also the first limb of provisions of section 2(22) (e) will not apply. The Hon'ble Rajasthan High Court in the case of Hotel Hill Top (2009) 313 ITR 116(Raj) has held that in order to attract the provisions of section 2(22)(e) of the Act, following four conditions are the sine quo non i.e.

(i) the assessee should be a shareholder of the company;

- (ii) the company should be a closely held company in which the public are not substantially interested ;*
- (i) there must be payment by way of advance or loan to a shareholder or any payment by the company on behalf of or for the individual benefit of the shareholder ; and*
- (iv) there must be sufficient accumulated profits in the hands of the company up to the date of such payment.*

It is evident from the above that the recipient of the loan from a closely held company in which the public are not substantially interested should be a registered shareholder as well as beneficial share holder in the lender company. However, in the case before us, assessee is neither a shareholder nor a beneficial shareholder as observed by Id CIT(A) and not disputed by Id D. R. at the time of hearing of the appeal. Therefore, the view taken by Id CIT(A) is directly covered by the decision of ITAT Special Bench in the case of Bhaumik Colour P. Ltd. as well as decision of Hon'ble Rajasthan High Court in the case of Hotel Hill Top (supra). It is relevant to state that same view has been taken by Hon'ble Bombay High Court in the case of Commissioner of Income-tax v. Universal Medicare Private Limited, 324ITR 263(Bom) as well as by Authority of Advance Ruling in the case of Madura Coats P. Ltd., In re, 274 ITR 609."

13.7 In effect, the decision of the Apex Court is to reiterate that the deeming provision is attracted once the condition of

- i) the beneficial shareholder of closely held company has substantial interest in the concern.
- ii) loan or advance is given.

The decision of Apex Court is with reference to the second limb of the provisions of section 2(22)(e).

In the present case, both conditions are fulfilled as the two beneficial shareholders have substantial interest in the concern (appellate firm), hence the deeming provision is attracted.

13.8 As regards the amount involved as per the ledger copy, the opening balance was Rs.40 lacs, there were multiple transactions during the year which increased to Rs. 1,34,63,7497- and later a negative balance appearing of Rs. 15,73,0477- as on 09-02-2011 which later increased to Rs.116,33,132/- of 31-03-2011. The closing balance is NIL. Thus, there were two instances of loans/advances given. As the reserves and surplus on 31-03-2010 was Rs.1,29,61,420/-, the deemed dividend would be limited to such amounts only. The addition made is thus upheld. Grounds of Appeal No. 3,4 & 5 are dismissed."

6. The Ld. A.R. vehemently submitted before the Bench that the assessee is not a shareholder of M/s. Golani Construction India Pvt. Ltd. and therefore the provision of section 2(22)(e) of

the Act would not apply to the assessee. The Ld. A.R. submitted that the assessee i.e. M/s. Golani Brothers a partnership concern have four partners Mira S. Golani, Kishore S. Golani, Ravi S. Golani and Nursing Lal D. Golani up to 17.02.2011 and were having profit share loading of 7%, 50%, 7% and 36% respectively. After reconstitution only first three partners remained in the assessee firm with profit sharing ratio of 7%, 68.50% and 24.50% respectively. In the M/s. Golani Construction India Pvt. Ltd. there were three shareholders Kishore S. Golani, Ravi S. Golani and Akash K. Golani with shareholdings of 15000, 5000 and 10000 share aggregating to 30000 shares. The Ld. A.R. submitted that the assessee is neither a registered shareholder nor a beneficial shareholder of M/s. Golani Construction India Pvt. Ltd. and therefore the provisions as contained in section 2(22)(e) of the Act in respect of deemed dividend are not applicable to the assessee. The Ld. A.R. submitted that the section 2(22)(e) of the Act further states that a shareholder has to be a beneficial owner of the shares not being shares entitled to fixed rate of dividend whether with or without a right to participate in profits holding not less than 10% of the voting power. Therefore, the Ld. A.R. submitted that expression 'shareholder' has to be both registered shareholder as well as beneficial shareholder. The Ld. A.R. submitted that if a person is a registered shareholder but not beneficial shareholder then section 2(22)(e) of the Act would not apply. Similarly if a person is beneficial shareholder but not a registered shareholder, then also the provision of section 2(22)(e) of the Act will not apply. The Ld. A.R. relied heavily on a series of decisions namely;

- (1) CIT vs. Ankitech P. Ltd. (2011) 199 Taxman 341 (Del. HC).
- (2) CIT vs. Impact Containers (P.) Ltd. (2014) 48 taxmann.com 294 (Bombay)
- (3) CIT vs. Narmina Trade Investment (P.) Ltd. (2017) 81 taxmann.com 129 (Bombay HC)
- (4) CIT vs. Sarva Equity (P.) Ltd. (2014) 44 taxmann.com 28 (Karnataka HC)
- (5) CIT vs. AR Magnetics (P.) Ltd. (2014) 220 taxman 209 (Delhi HC)
- (6) CIT vs. Daisy Packers (P) Ltd. (2014) 220 taxman 331 (Guj HC)
- (7) ITO vs Sagar Sahil Investment (P) Ltd. (2010) 37 SOT 1 (Mum) (URO)
- (8) ACIT vs. Bhaumik Colour (P) Ltd (2009) 118 ITD 1 (Mum)
- (9) Nirmala Realtors (P) Ltd. vs. DCIT (2011) 12 taxmann.com 216 (Agra)
- (10) CIT vs. Raj Kumar Singh & Co. (2005) 149 taxman 254 (All).

Alternatively, the Ld. A.R. submitted that the transactions between group companies can not be treated as loan advances falling under section 2(22)(e) of the Act as the inter-banking companies have current account accounting for all receipts and payments. The Ld. A.R. submitted that during the year 77 transactions both receipts and payments were entered into which can not be treated as deemed dividend within the meaning of section 2(22)(e) of the Act. In defence of his argument the Ld. A.R. relied on a series of decisions namely;

- (1) CIT vs. Jayant H. Modi (2015) 58 taxmann.com 366 (Bombay HC)
- (2) DICT vs. Schutz Dishman Bio-tech (P) Ltd. (ITA Nos.958 & 959 of 2015) (Guj HC)
- (3) Ravindra R Fotedar vs. ACIT (2017) 85 taxmann.com 314 (Mumbai-Trib)
- (4) Saamag Developers (P) Ltd. vs. ACIT (2018) 90 taxmann.com 20 (Delhi-Trib.)

The Ld. A.R. also submitted distinguished the decision relied upon by the Ld. CIT(A) by submitting that the same are distinguishable on facts in the case of Gopal And Sons (HUF) Vs CIT [2017] 77 taxmann.com 71 (SC). The facts in this case are that the assessee was both registered as well as a beneficial shareholder of the company holding more than 10% of the voting power whereas in the present case the assessee is neither a registered shareholder nor a beneficial shareholder of M/s. Golani Construction India Pvt. Ltd. In the above case of Gopal and Sons (supra) the money to purchase the shares in the company was given by assessee HUF and the shares were issued in the name of karta Shri Gopal Kumar Sanei but in general returns the HUF was shown as registered as well as beneficial owner whereas in the present case the facts are different. In the case of National Travel Services (2018) 89 taxmann.com 332 SC, the two partners were members of the company/shareholders of the company and they held the shares on behalf of the firm which happens to be a beneficial shareholder. However, in the present case again the assessee is neither a registered shareholder nor a beneficial shareholder. The Ld. A.R. submitted that AO also relied on the above case namely CIT vs. National Travel Services (supra) which is distinguishable on facts and finally submitted that in view of the aforesaid facts and the ratio laid down by the various courts the decision of Ld. CIT(A) may be reversed and addition made by the AO on account of deemed dividend should be deleted.

7. The Ld. D.R., on the other hand, relied on the order of authorities below by submitting that this is a clear cut case where the advance given by the company to the assessee a

partnership firm whose partners are shareholders in the lender company and therefore loan given to the assessee has to be assessed under section 2(22)(e) of the Act and therefore the order of Ld. CIT(A) should be affirmed. The Ld. D.R. relied on all the case laws as relied by the Ld. CIT(A) while passing the order.

8. We have heard the rival submissions of both the parties and perused the material on record. The undisputed facts are that the assessee is a registered firm who has taken loan from another company namely M/s. Golani Construction India Pvt. Ltd. of Rs.2.10 crores. The firm has following shareholders:

NAME OF PARTNER	SHARE OF PROFIT FROM 01.04.2010 TO 17.02.2011	SHARE OF PROFIT FROM 18.02.2011 TO 31.03.2011
MIRA .S. GOLANI	7%	7%
KISHORE .S. GOLANI	50%	68.5%
RAVI.S.GOLANI	7%	24.5%
NARSINGLAL D. GOLANI	36%	-

The shareholding of the lender company is also given as under:

NAME OF SHAREHOLDERS	NOS. OF SHARES HOLDING	% OF SHAREHOLDING
KISHORE .S. GOLANI	15000	50%
RAVI.S.GOLANI	5000	16.67%
AKASH K GOLANI	1000	33.33%
TOTAL	3000	100%

It is clear from the above that two partners of the assessee firm Kishore S Golani and Ravi S. Golani were holding shares in the lender company i.e. M/s. Golani Construction India Pvt. Ltd.

to the extent of 15000 and 5000 shares. The shareholding percentage worked out 15% & 16.67% respectively for both the shareholders. This is also undisputed that these shareholders have bought the shares in the lender company on their own absolute right and not on behalf of the firm. Now the issue before us whether the loan advanced by the M/s. Golani Construction India Pvt. Ltd. of Rs.2.10 crores to the assessee firm could be considered as deemed dividend under section 2(22)(e) of the Act to the extent the lender company has accumulated reserved and surpluses. It is clear from the above that the firm M/s. Golani Brothers is neither a registered shareholder nor a beneficial shareholder in the M/s. Golani Construction India Pvt. Ltd. Before reaching any conclusion we would like to touch upon the decision of the various judicial firms on the matter which is reproduced as under:

"10.. Hon'ble Supreme Court has approved the decision of Hon'ble Delhi High Court in case of Ankitech Pvt. Ltd., (2011) 199 Taxman 341, while

deciding the Civil Appeal No.3961 of 2013. Hon'ble Supreme Court observed that once it is found that such a loan or advance cannot be treated as deemed dividend at the hands of such a concern which is not shareholder, the provisions of [Section 2\(22\)e](#) cannot be applied. Hon'ble Supreme Court further observed as under:-

"Having perused the judgment and having heard arguments, we are of the view that the judgment is a detailed judgment going into [Section 2\(22\)\(e\)](#) of the Income Tax Act which arises at the correct construction of the said Section. We do not wish to add anything to the judgment except to say that we agree therewith."

11. Hon'ble Bombay High Court in the case of Impact Containers Ltd., (2014) 48 Taxman.com 294 observed that where certain companies advanced money to assessee-company in which one director of assessee was holding more than 10 per cent equity shares, since assessee itself was not shareholder of those lending companies, impugned addition made by Assessing Officer by invoking provisions of [section 2\(22\)\(e\)](#) was not sustainable.

12. Hon'ble Karnataka High Court in the case of Sarva Equity (P) Ltd., (2014) 44 Taxmann.com 28 observed as under:

"Whether in terms of [section 2\(22\)\(e\)](#), it is only person whose name is entered in Register of shareholders of company as holder of shares who can be said to be a shareholder qua company and- not a person beneficially entitled to shares - Held, yes - Whether, therefore, it is only where a loan is advanced by company to registered shareholder and other conditions set out in [section 2\(22\)\(e\)](#) are satisfied, said amount of loan would be liable to be regarded as deemed dividend within meaning of said section - Held, yes."

13. In the case of CIT vs. AR Magnetics (P) Ltd., (2014) 220 Taxman 209 (Delhi) (HC) & CIT vs. Daisy Packers (P) Ltd., (2014) 220 Taxman 331 (Guj) (HC), the Court observed as under:-

"The assessee company had received loan from another company. The assessee was not a shareholder of the other company. However, there was a common shareholder (individual) who held more than 50% in both the companies. In view of the above facts the AO held that the amount received by the assessee from an another company was deemed dividend u/s 2(22)(e) of the Act. The CIT(A) upheld the AO's order. On further appeal, the Tribunal deleted the addition made by AO following the decision of the jurisdictional High Court in CIT v. Ankitech (P.) Ltd. 340 ITR 14 (Delhi) where it has been held that deemed dividend provisions cannot be invoked merely because there are common shareholders between the two companies. The High Court followed the aforesaid judgment and dismissed revenue's appeal."

14. From the record, we also found that assessee has not invested even a single rupee in share capital of EIPL. Both the companies EIPL as well as NHBPL are part of Gundecha Group of Companies. The transactions between the group companies were current and inter banking accounts containing both type of entries i.e. receipts and payments. There are total 61 transactions entered during the year on need basis. In case where both receipts and payments is taking place in inter banking accounts the same cannot be regarded as Loans and Advances as contemplated u/s 2(22)(e) and thus no addition could be made as Deemed Dividend. Our view is supported by the decision of Gujarat High Court in the case of Schutz Dishman Bio-tech (P) Ltd., (IT Appeal Nos. 958 & 959 of 2015 of 2015) (Guj. HC) observed as under:-

"If there are transactions in the form of current accommodation entries, they cannot be regarded to be loans and advances for the purpose of deemed dividend."

15. ITAT Mumbai Bench in the case of Ravindra R Fotedar (2017) 85 taxmann.com 314 observed as under:-

"Whether where Assessing Officer made addition to assessee's income "Under section 2(22)(e) in respect of loan given by one company to another company by taking a view that assessee was holding substantial interest i.e. more than ten per cent shareholding in both companies, in view of fact that transactions were in form of current accommodation entries and there was movement of funds in both ways on need basis, amount in question could

not be regarded as deemed dividend and, consequently, impugned addition was to be deleted - Held, yes."

16. Delhi Tribunal in the case of Saamag Developers (P) Ltd., (2018) 90 taxmann.com 20 observed as under:-

"Transactions between group concerns being current and inter banking accounts, additions made to assessee's income under section 2(22)(e) in respect of amounts received from various group companies could not be considered as loans and advances as contemplated under section 2(22)(e), hence, no additions could be made as deemed dividend under section 2(22)(e)."

17. In view of the above judicial pronouncements since transaction between group companies were carried as inter banking accounts containing both the types of entries i.e., receipts and payments, having entitled these two transactions, the amount cannot be treated as deemed dividend in the hands of the assessee company."

In the case of Gopal And Sons (HUF) Vs CIT [2017] 77 taxmann.com 71 (SC) , the facts are distinguishable as in that case assessee was registered as well as beneficial shareholder whereas in the present the assessee is neither a registered nor beneficial shareholder of M/S Golani Construction India Pvt Ltd. Similarly the facts in CIT vs. National Travel Services (supra) are also distinguishable on facts. In view of the above legal position vis a vis the ratio laid down by various judicial forums , we are of the opinion that the provisions of section 2(22)(e) of the Act are not applicable to the assessee and accordingly AO is directed to delete the addition of Rs. 1,29,61,420/- made on account of deemed dividend.

9. In result the appeal of the assessee is partly allowed.

Order pronounced in the open court on 07.02.2019.

Sd/-
(Mahavir Singh)
JUDICIAL MEMBER

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated: 07.02.2019.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.

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