IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : E : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.4384/Del/2014
Assessment Year: 2003-04

Mahesh Kumar Gupta, 47, Shardhanand Marg, Delhi.	Vs	ACIT, Central Circle-25, New Delhi.

PAN: AAGPG8365G

ITA No.4385/Del/2014
Assessment Year : 2003-04

Rukmani Gupta, 47, Shardhanand Marg, Delhi.	Vs.	ACIT, Central Circle-25, New Delhi.

PAN: AAOPG0280E

(Appellant)		(Respondent)
Assessee by	:	Shri Niren Gupta, CA
Revenue by	:	Ms Rinku Singh, Sr. DR
Date of Hearing	:	05.03.2019
Date of Pronouncement	:	29.04.2019

ORDER

PER R.K. PANDA, AM:

The above two appeals filed by the respective assessees are directed against the separate orders dated 3rd July, 2014 of the CIT(A)-1, New Delhi, relating to assessment year 2003-04. Since identical grounds have been raised by the assessees in

the respective appeals, therefore, these were heard together and are being disposed of by this common order.

ITA No.4384/Del/2014 (Mahesh Kumar Gupta)

2. Facts of the case, in brief, are that the assessee is an individual and filed his return of income u/s 139(1) of the Act declaring total income of Rs.12,84,588/-. The return was processed u/s 143(1) accepting the said income. Subsequently, the Assessing Officer reopened the assessment by issue of notice u/s 148 of the Act after recording the following reasons:-

> **"Reasons for initiation of proceeding u/s. 147 of the I T.Act in the case of Sh. Mahesh Kumar Gupta, 47, G. B. Road, Delhi, for the A Y. 2003-04 (PAN:AAGPG8365G)**
>
> The return of income u/s 139(1) in this case was filed on 02.12.2003 declaring taxable income of Rs.12,84,588 and the same was processed u/s 143(1) on its declared income.
>
> 2. The assessee, Sh. Mahesh Kr. Gupta is/was a director in M/s Ankitech Pvt. Ltd. in which 45.1% share is/was held by him. Thus, Sh. Mahesh Kumar Gupta is/was having substantial interest in M/s Ankitech Pvt. Ltd.
>
> **3.** As per information in my possession M/s Jackson Generator Pvt.Ltd. had given loan of Rs.6 32,72,265/- to its associates companies M/s Ankitech Pvt. Ltd in the F.Y 2002-03 relevant to A.Y.2003-04. M/s Ankitech Pvt. Ltd. was a private limited company in which 90% share are hold by Shri Mahesh Kr. Gupta (45.1% & Mrs. Rukmani Gupta 45.1%). These two share holders are also substantive share holder of M/s Jackson Generator Pvt. Ltd. holding 43.19% & 26.46% of share holding respectively. Thus the loan advanced by M/s Jackson Generator Pvt. Ltd. amounting to Rs.6,32,72,265/- crore was taxed as deemed divided u/s 2(22)(e) of the Income Tax Act, 1961, in the hand of M/s Ankitech Pvt. Ltd.
>
> 3.1 However, the matter was contested before CIT(A), ITAT and Mon'ble Delhi High Court. The Hon'ble Delhi High Court in its judgment dated 11.05.2011, while considering the assessee's contention that M/s Ankitech Pvt. Ltd. is not the share holder, hence cannot be taxed for deemed dividend, held that, the deemed

dividend is to be taxed in the hands of share holders. The relevant extract of the order is reproduced as under:

"24. ... The intention behind the provisions of Section 2(22)(e) of the Act is to tax dividend in the hands of shareholders. The deeming provisions as it applies to the case of loans or advances by a company to a concern in which its shareholder has substantial interest, is based on the presumption that the loans or advances would ultimately be made available to the shareholders of the company giving the loan or advance".

30 Before we part with, some comments are to be necessarily made by us. As pointed out above, it is not in dispute that the conditions stipulated in Section 2(22)(e) of the Act treating the loan and advance as deemed dividend are established in these cases. Therefore, it would always be open to the Revenue to take corrective measure by treating this dividend income at the hands of the shareholders and tax them accordingly. As otherwise, it would amount to escapement of income at the hands of the those share holders."

4. Thus, as per the above order, the dividend taxed in the hand of M/s Ankitech Pvt. Ltd. amounting to Rs.6,32,72,265/- on account of loan advanced by M/s Jackson Generator Pvt. Ltd. to M/s Ankitech Pvt. Ltd. is ordered to be taxed in the hands of share holders of M/s Jackson Generator Pvt. Ltd. who happens to control and owns shareholdings more than 20% in M/s Ankitech Pvt. Ltd. The share holders of M/s. Ankitech Pvt Ltd. are as under:

Name of Share holders	Details of share holding (In %) as on 31.03 2004	Whether Director or not
Sh. Mahesh Kr. Gupta	45.10%	Director
Ms. Rukmani Gupta	45.10%	Director

Accordingly, deemed dividend amounting to Rs.6.32 crores is to be added in the hand of above share holders for the A.Y.2003-04, in the ratio of their share holdings.

Thus the deemed dividend u/s 2(22)(e) in the hands of the above mentioned share holders in the ratio of their share holdings is worked out hereunder:

Name of Share holders	Details of share holding (In %}	Deemed dividend (Rs.)
Sh. Mahesh Kr. Gupta	45.10%	2,85,35,792
Ms. Rukmani Gupta	45.10%	2,85,35,792

5. In view of the above facts addition of Rs.2,85,35,792/- needs to be made in the hand of the assessee. Therefore, I have reason to believe that the income to

the extent of Rs. 2,85,35,792/- for the A.Y. 2003-04 has escaped assessment within the meaning of section 147 of the I.T. Act and it is a fit case for issuance of notice u/s 148 of the I.T. Act., 1961 r.w.s. 150(1) of the I.T. Act. Hence notice u/s. 148 is issued to the assessee for A.Y.2003-04.

Sd/-
(B.S. RAWAT)
Deputy Commissioner of Income Tax,
Central Circle-25, New Delhi."

3. The assessee, in response to the same, filed a letter submitting that the return already filed u/s 139(1) should be treated as return in response to the notice u/s 148 of the Act. The Assessing Officer, thereafter, issued statutory notices as required u/s 143(2)/142(1) to which the assessee appeared before the Assessing Officer and filed the required documents/details from time to time. Rejecting the various explanations given by the assessee that the deemed dividend is not assessable in the hands of the assessee u/s 2(22)(e) of the IT Act the Assessing Officer made addition of Rs.2,85,34,792/- in the hands of the assessee u/s 2(22)(e)(ii) of the IT Act (similar addition has been made in the hands of Rukmani Gupta).

4. Before CIT(A), it was submitted that the conditions set out in section 150 and Explanation-3 to section 150 are not satisfied and, therefore, the proceedings u/s 148 r.w.s 150 are time barred due to the following reasons:-

a) There is no finding or direction by the Delhi High Court as the words used are "it would always open to the revenue" giving a discretion to revenue to proceed further or not.

b) Section 150(1) is barred by limitation u/s 150(2).

c) Section 150(1) is not applicable because of non fulfillment of the Explanation (3) of sec.153(4) as the observation of the Delhi High Court was neither in the case of the assessee nor the assessee was given an opportunity of being heard before the said order was passed by the Delhi High Court.

5. It was submitted that there is no finding or direction in para 30 of the High Court order and it is merely an observation. Relying on various decisions, it was submitted that since the proceedings are barred by limitation, therefore, the order has to be treated as null and void.

6. So far as the merit of the case is concerned, it was argued that the provisions of section 2(22)(e) will apply only when the funds of the company are utilized for the benefit of the shareholders. In the present case, neither Shri Mahesh Kumar Gupta nor Rukmani Gupta has taken any advantage directly or indirectly, hence, no deemed dividend can be taxed in thei hands. It was argued that 'dividend' means some money has been parted with by the company and has been received by the shareholder Mahesh Kumar Gupta. Since Shri Mahesh Kumar Gupta has never received any money directly or indirectly, therefore, no amount can be taxed in the hands of the assessee as deemed dividend. It was accordingly argued that both factually and legally the addition is not sustainable since it is barred by limitation.

7. However, the ld.CIT(A) was not satisfied with the arguments advanced by the assessee and upheld the action of the Assessing Officer. The ld. CIT(A) held that the notice u/s 148 was not barred by limitation u/s 149 as Explanation u/s 150(1) gets

invoked in the case. He further held that the order of the Hon'ble High Court constitutes a direction and not a finding as argued by the ld. counsel for the assessee.

8. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds:-

> 1. " (i) That the learned CIT appeal contrary to the provisions of section 150(1) wrongly held that there was a finding and direction in the order of the High Court against the assessee and uphold the validity of the reopening of the case u/s 150(1).
>
> (ii)That the learned CIT(A) was wrong to hold that the judgment of the High Court was relevant in the case of the assessee under the provisions of the Act.
>
> 2. That the learned CIT(A) has wrongly interpreted the provisions of Section 150(2) and has held that the proceedings u/s 150(l) are not barred by limitation without any basis in facts or in law.
>
> 3. That the learned CIT(A) has wrongly interpreted the provisions of Section 153 Explanation (3) wrongly and has held the requirements of the Section were fulfilled as the assessee was a shareholder.
>
> 4. That the learned CIT(A) has wrongly interpreted the provisions of Section 2(22)(e) in holding that the same are applicable in the facts of this case.
>
> 5. That the applicability of Section 2(22)(e) has to fail as the Act has not prescribed any method for the computation of the deemed dividend in the hands of the assessee. The adhoc determination is contrary to law."

9. The ld. counsel for the assessee did not press the ground of appeal No.5 for which the ld. DR has no objection. Therefore, the said ground is dismissed as not pressed. So far as grounds of appeal Nos.1 to 3 are concerned, these are legal grounds challenging the validity of issue of notice u/s 148 of the IT Act on account of barred by limitation and the order of the Hon'ble High Court – whether it constitute a finding or a direction. The ld. counsel for the assessee, referring to the order of the Hon'ble Delhi High Court submitted that the findings are not directions, but, mere

observations. Therefore, the notice issued u/s 148 of the IT Act is barred by limitation under the provisions of section 150(1) of the IT Act. He submitted that in the instant case, the provisions of Explanation to section 153(4) applies and since the notice has not been issued within the statutory period, therefore, it is barred by limitation and, therefore, the subsequent proceedings should also be held to be barred by limitation. The ld. counsel for the assessee, referring to the affidavit filed before the ld.CIT(A), copy of which is placed at pages 14 and 15 of the paper book, submitted that the Hon'ble High Court while deciding the case in case of *Ankit ch Private Limited reported in 340 ITR 14(Del),* has not given any notice to the assessee nor any opportunity of being heard to the assessee was granted before deciding the case. Therefore, no addition could have been made in the hands of the assessee. So far as the merit of the case is concerned, he submitted that nothing has flown to the assessee directly or indirectly and, therefore, no addition u/s 2(22)(e) is warranted in the hands of the assessee.

10. The ld. DR, on the other hand, heavily relied on the order of the CIT(A). Referring to para 30 and 31 of the order of the Hon'ble High Court, the ld. DR submitted that the above paragraphs are both finding as well as direction. She submitted that the original assessment order was passed u/s 143(3). Referring to the decision of the Hon'ble Calcutta High Court in the case of *CIT v M/s Glass Equipment (India) Ltd. reported in 2014-TIOL-831,* she submitted that the date of original assessment order which was subject matter of appeal has to be considered for

determining the date of limitation with regard to the provisions of section 150(2) of the IT Act. Referring to the decision of Chennai Bench of the Tribunal in the case of *Smt. N. Illamathi vs. ITO reported in 2009-TIOL-238,* she submitted that the Tribunal in the said decision has held that the date of original assessment order which was subject matter of appeal has to be considered for determining the date of limitation for the purpose of section 150(2) of the IT Act. So far as non-granting of any opportunity to the assessee is concerned, she submitted that the Hon'ble High Court has given a clear-cut finding and the companies in which the assessees are substantial shareholders are parties and, therefore, it cannot be said that the assessees were not aware of anything. She accordingly submitted that the order of the ld.CIT(A) being in conformity with the law should be upheld.

11. We have considered the rival arguments made by both the sides and perused the orders of the authorities below. We have also gone through the various decisions cited before us. We find the Hon'ble High Court in the case of CIT vs. Ankitech Pvt. Ltd. (supra) at para 30 and 31 of the order has observed as under:-

> "30. Before we part with, some comments are to be necessarily made by us. As pointed out above, it is not in dispute that the conditions stipulated in Section 2(22)(e) of the Act treating the loan and advance as deemed dividend are established in these cases. Therefore, it would always be open to the Revenue to take corrective measure by treating this dividend income at the hands of the shareholders and tax them accordingly. As otherwise, it would amount to escapement of income at the hands of those shareholders.
>
> 31. We may also point out here that when these appeals along with other appeals were heard, some appeals were listed and the tax effect of which was less than `10 lacs and those were dismissed on that ground. Had those appeals been decided on merits, still the assessees would have succeeded. At the same time, in those cases, we would not like the shareholders to go scot free and therefore, even in those cases, it would be permissible

for the Revenue to take remedial steps by roping in the shareholder(s) and tax the deemed dividend at their hands."

12. A bare perusal of the above paras shows that it is a clear-cut direction by the Hon'ble High Court that the Revenue has to take corrective measure by treating the dividend income at the hands of the shareholders and tax them accordingly as otherwise it would amount to escapement of income-tax at the hands of those shareholders.

13. We find the provisions of section 150 read as under:-

"150. (1) Notwithstanding anything contained in section 149, the notice under section 148 may be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to [31c]any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision [32][or by a Court in any proceeding under any other law].

(2) The provisions of sub-section (1) shall not apply in any case where any such assessment, reassessment or recomputation as is referred to in that sub-section relates to an assessment year in respect of which an assessment, reassessment or recomputation could not have been made at the time the order which was the subject-matter of the appeal, reference or revision, as the case may be, was made by reason of any o her provision limiting the time within which any action for assessment, reassessment or recomputation may be taken."

14. A perusal of the above provisions show that the notice u/s 148 may be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order passed by the Hon'ble High Court. Since we have already held in the preceding paragraph that the order of the Hon'ble High Court is a direction and not a mere observation, therefore, the argument of the ld. counsel for the assessee that the

proceedings are barred by limitation will not hold good. Therefore, the arguments of the ld. counsel for the assessee are rejected and the assessment made u/s 148/143(3) of the Act is held to be valid as it is not barred by limitation.

15. So far as the argument of the ld. counsel for the assessee on merit is concerned, we do not find any force in the argument of the ld. counsel for the assessee that nothing has flown to the assessee. It is pertinent to mention here that before the Tribunal the assessee had argued that dividend cannot be paid to a non-shareholder and it would have to be taxed, if at all paid, in the hands of the shareholders who have a substantial interest in the assessee concern and also holding not less than 10% of the voting power in JGPL. The above facts are clearly discernible from placitum 7 of the Hon'ble High Court order reported in 340 ITR 14. The provisions of section 2(22)(e) reads as under:-

> "(*22*) "dividend" includes—
> (*a*) …… ;
> (*b*) …….;
> (*c*) ……..;
> (*d*) …….;
> (*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 31st 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;"

16. Further, the shareholding pattern of M/s Ankitech Pvt. Ltd. and M/s Jackson Generator Pvt. Ltd. are as under:-

"1.	Mahesh Kumar Gupta	43.19%
2.	Rukmani Gupta	26.46%
	Others	30.35%"

17. It is also not in dispute that Ankitech Pvt. Ltd., had received advance of Rs.6,32,72,365/- by way of book entry from JGPL. Therefore, in view of the deeming provision of section 2(22)(e), in both these companies, where Shri Mahesh Kumar Gupta and Rukmani Gupta are substantial shareholders, the provisions of section 2(22)(e) are clearly applicable. We, therefore, uphold the order of the CIT(A) and the grounds raised by the assessee are dismissed.

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18. After hearing both the sides and on perusal of the relevant material on record, we find the grounds raised by the assessee in the impugned appeal are identical to Ground Nos.1 to 4 of ITA No.4384/Del/2014. We have already decided the issue and the grounds raised by the assessee have been dismissed. Following similar reasoning, the grounds raised by the assessee are dismissed.

19. In the result, both the appeals filed by the assessee are dismissed.

The decision was pronounced in the open court on 29.04.2019.

Sd/-

(KULDIP SINGH)
JUDICIAL MEMBER

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMFBER

Dated: 29th April, 2019

dk

Copy forwarded to

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi