आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'A' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, AHMEDABAD

(***Convened through Virtual Court***)

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 430/Ahd/2016
(**निर्धारण वर्ष /** Assessment Year : 2012-13)

DCIT Circle-1(1)(2), 'A' Wing, Room No. 308, 3rd Floor, Pratyaksh Kar Bhavan, Ambawadi, Ahmedabad - 380015	**बनाम/** Vs.	**M/s. Cama Hotels Ltd.** Khanpur, Ahmedabad 380001
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCC5432G		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से /**Appellant by :**	Shri S. S. Shukla, Sr.DR
प्रत्यर्थी की ओर से/**Respondent by :**	Shri Rajesh C. Shah, A.R.

सुनवाई की तारीख / **Date of Hearing**	03/03/2021
घोषणा की तारीख /**Date of Pronouncement**	06/07/2021

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आदेश/O R D E R

PER PRADIP KUMAR KEDIA - AM:

The captioned appeal has been filed at the instance of the Revenue against the order of the Commissioner of Income Tax (Appeals)-1, Vadodara ('CIT(A)' in short), dated 16.12.2015 arising in the assessment order dated 30.12.2014 passed by the Assessing Officer (AO) under s. 143(3) of the Income Tax Act, 1961 (the Act) concerning AY 2012-13.

2. The ground of appeal raised by the Revenue reads as under:

> *"(1) The ld.CIT(A) has erred in law and on facts, in deleting the addition in respect of deemed dividend u/s 2(22)(e) of Rs.1,71,90,000/-.*
>
> *(2) The ld.CIT(A) has erred in law and on facts in deleting the disallowance of Rs.6,66,077/- made, towards the excess interest paid to the persons covered u/s40A(2)(b) of the I.T. Act."*

3. Ground no.1 relates to addition under s.2(22)(e) of the Act.

4. The assessee is a Limited company, in which the public are not substantially interested. In the course of assessment proceedings, the AO *inter alia* noticed that the assessee has availed unsecured loan from group concern, namely, Cama Motors Pvt. Ltd. (lender) to the tune of Rs.1,71,90,000/-. It was found that common Directors of the assessee company, namely, Shri Jehangir R. Cama, Mrs. Mehroo J. Cama and Shri Rustom J. Cama hold more than 10% of the share capital. The AO accordingly, by a brief order, invoked provisions of Section 2(22)(e) of the Act and made an addition of Rs.1,71,90,000/- in the hands of the assessee under s.2(22)(e) of the Act.

5. Aggrieved, the assessee preferred appeal before the CIT(A).

6. The CIT(A) after taking into account the factual position and the submissions of the assessee in rebuttal to the assessment order found merit in the plea of the assessee for reversal of the addition. The relevant part of the order of the CIT(A) is reproduced hereunder:

> *"2.3. I have gone through the facts and the submission of the appellant carefully. In the assessment order A.O has observed that the appellant has received an amount of Rs. 1,71,90,000/- from Cama Motors Pvt. Ltd. being unsecured loan. The assesses was required to*

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show cause as to why the unsecured loan received from Cama Motors Pvt. Ltd. should not be treated as deemed dividend u/s.2(22)(e) ofthe I.T. Act. TheA.O. has not accepted the submission of the assesses that it has no investment in shares with CMPL for reason that the common directors of the assesses company being Shri Jehangir R. Cama, Mrs. Mehroo J. Cama and Shri Rustom J. Cama hold more than 10% of the Share Capital i.e. Shri Jehangir R. Cama is holding 21.20% and Rustom J. Cama is holding 32.60% shares. In view ofthe above, the assessee's case squarely fell within the ambit of Section 2(2)(e) ofthe Act and Rs.1,71,90,000/- is treated as deemed dividend u/s.2(22)(e) of the I. T. Act in the hands of the assessee by the A.O.

The appellant has submitted that that Appellant company has not received new loan of Rs. 1,71,90,000/- from Cama Motors Pvt. Ltd. & has repaid Rs. 2,11,90,000/-thus there is net repayment of Rs.40,00,000/-.The appellant has submitted that the shareholders holding more than 10% shares in the lending company are not holding more than 20% share in the recipient Appellant Company which means that they are not having substantial interest in the recipient company. The appellant has also cited that the ***Hon'ble Mumbai Tribunal in the direct decision of ACIT Vs. Bhaumik Colour-118 ITD 1 (Mumbai Spl. Bench)*** *held that "as regards the applicability of the provision of sec. 2(22)(e). the same are not "At All" applicable as the Appellant does not hold any share in the lending Company." The appellant has further submitted that the amount of calculation of deemed dividend to be calculated and looked from the position on accumulated profits of the lending Company and it should not be on the basis of actual amount of loan granted and received by the recipient company. The appellant has also brought to the notice that CIT(A)-6 vide order dtd. 04/07/2014 for A.Y. 2010-11 has also deleted the addition made u/s. 2(22)(e) and the same squarely applies in current year also. That addition made of Deemed Dividend u/s. 2(22)(e) be deleted in full.*

2.4. Identical issue has also come up in appellant's own case for A.Y. 2009-10. Vide order dtd. 25-06-2012 in appeal no. CIT(A)-VI/ACIT(OSD)/R-1/184/11-12, my predecessor held as under:

> *"4.3 I have considered the facts of the case; assessment order and appellant's written submission. Appellant took loan from two of its associated group companies which assessing officer treated as deemed dividend under section 2(22) (e) of IT act. Appellant submitted that it was not holding any shares in these two companies and therefore there is no question of taxing deemed dividend in its hands in view of the decision of special bench of IT AT in the case of ACIT V. Bhaumik Colour Pvt. Ltd. reported in 118 ITD 1.* ***It is not in dispute that appellant is not a shareholder in either of these companies which advanced loans to the appellant and therefore respectfully following the decision of ITAT special bench Mumbai relied upon by the appellant, addition of deemed dividend cannot be made in the hands of appellant.*** *Accordingly the disallowance made by the assessing officer is*

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deleted. However in the said decision of special bench it is held that the provision of section 2(22) (e) can be attracted in the hands of shareholders. Therefore assessing officer is free to take appropriate measures in the cases of shareholders in respect of loans taken by the appellant under section 2(22) (e) of IT act. All other arguments of the appellant are not discussed here since the same are not relevant after deleting addition in the hands of appellant in previous para."

2.5. The view taken by the I.T.A.T, Mumbai Special Bench in the case of ACIT Mumbai vs. Bhaumik Colour (P) Ltd has been approved by the Hon'ble Bombay High Court in the case of CIT vs. Universal Medicare Private Limited (2010) 324 ITR 263 (Bom.) The Gujarat High Court in the case of CIT v/s Daisy Packers (P) Ltd has decided the issue in favour of the assessee, relying on the decision of the Division Bench of the High Court in CIT v. Ankitech (P.) Ltd. (2012) 340 ITR 14 (Del) wherein it was held that if the assessee-company does not hold a share in other company from which it had received deposit then it cannot be treated to be a deemed dividend under Section 2(22)(e) of the Act. From the reading of the provisions of section 2(22)(e), it is seen that the provision is intended to tax the dividend in the hands of a shareholder and the deeming provision as it applies to the case of loan or advance by a company to a concern in which is shareholder and has substantial interest, is based on the presumption that the loan or advance would ultimately be made available to the shareholder of the company giving loan or advance. Various court decisions e.g. Asstt. CIT v/s. Bhaumik Colour (P.) Ltd.[2009] 118 ITD 1 (Mum.) (SB) & jurisdictional High Court decision in the case of CIT v/s Daisy Packers (P.) Ltd [2013] 40 taxmann.com 480 (Gujarat), support this view that the deemed dividend u/s 2(22)(e) can only be assessed in the hands of the person who is a shareholder of the tender company and not in the hands of a person other than the shareholder. Facts remaining the same in the year under consideration and following the ratios of above decisions and above-mentioned order of my predecessor, impugned disallowance of Rs. 1,71,90,000/- is deleted in the hands of the appellant company. A.O. may take appropriate action in the cases of the shareholders, if required. This ground of appeal is allowed."

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7. Aggrieved by the relief granted by the CIT(A) and reversal of additions made under s.2(22)(e) of the Act, the Revenue has preferred appeal before the Tribunal.

7.1 The learned DR for the Revenue relied upon the assessment order and could not point out any specific defect in the order of the CIT(A).

7.2 The learned counsel for the assessee, on the other hand, justified the first appellate order and pointed out that Section 2(22)(e) of the Act has no applicability in the facts of the case. The case of the assessee is squarely covered by the exceptions provided in the provisions of Section 2(22)(e) of the Act itself. The learned counsel for the assessee broadly divided his contentions in two parts; (i) the unsecured loan received was in the ordinary course of business for which the interest has been charged by the lender company and such transactions have occurred in earlier and subsequent years also. The additions made in AY 2013-14 in assessee's own case was deleted by the CIT(A), which action was approved by the ITAT in *ITA No.42 & CO No. 40/Ahd/2017* order dated *10.12.2018* in the similar facts; (ii) the details of shareholding of lender company and the assessee company would show that the assessee company does not hold any share in the lender company which have given loan to the assessee. Furthermore, none of the shareholders of lender company holding more than 10% of its share capital holds 20% or more of the voting power of the assessee company and therefore the provisions of Section 2(22)(e) of the Act are not applicable at the threshold. It was contended that the AO proceeded on gross misconception of facts and wrongly applied the law without showing fulfillment of primary conditions of deeming provisions under s.2(22)(e) of the Act. It was thus submitted that no interference with the order of the CIT(A) is called for.

8. We have carefully considered the rival submissions and perused the orders of authorities below. The applicability of s.2(22)(e) of the Act is in controversy.

8.1 A perusal of the shareholding pattern placed before us shows that none of the shareholders of the lender company holding 10% or

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more of the voting power holds substantial interest in the assessee company. This being so, the basic condition s.2(22)(e) of the Act is not fulfilled in the present case. We, thus, totally fail to understand the approach of the AO in applying the law for additions of this magnitude. Secondly, we also affirmatively take note of the plea raised on behalf of the assessee that the lender company has given interest bearing loan to assessee and the loan is not interest free. This being so, the said loan cannot be said to be 'for the individual benefit of any such shareholder'. In the similar circumstances, the Hon'ble Calcutta High Court in the case of *Pradip Kumar Malhotra vs. CIT (2011)338 ITR 538(Cal)* has observed that advances given by the lender was not for the individual benefit of the shareholder but for business purposes and therefore such transactions would not fall within the sweep of deeming fiction created under s.2(22)(e) of the Act. This reason also on a standalone basis is sufficient to exclude the applicability of Section 2(22)(e) of the Act on the money received by the assessee.

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8.2 Thus, seen from any angle, additions are totally unjustified made by way of deemed dividend in the case of the assessee as rightly held by the CIT(A) on the factual backdrop. We thus see no error in the conclusion drawn in the first appellate order albeit for the reasons noted above.

9. Accordingly, Ground no.1 of Revenue's appeal is dismissed.

10. Second ground relates to disallowance out of interest on the ground that excessive interest has been paid to sister concern, namely, R. J. Cama & Co. Pvt. Ltd. and Cama Motors Pvt. Ltd.

11. The AO invoked the provisions of Section 40A(2)(b) of the Act and considered only 12% interest as reasonable benchmark *vis-à-vis* 15% per annum paid by the assessee to these lender companies. The AO accordingly disallowed Rs.5,47,950/- & Rs.1,18,127/- aggregating to Rs.6,66,077/- out of interest payments to these concerns under s.40A(2)(b) of the Act.

12. The CIT(A) in first appeal reversed the disallowance so made under s.40A(2)(b) of the Act in terms of the findings recorded below:

"3.3. I have gone through the facts and the submission of the appellant carefully. In the assessment order A.O has observed that the appellant if any excess payment is made to the related parties, such excess payment is not allowable as an expense. The assessee failed to give any explanation for giving excessive rate of interest when the assessee is able to procure the loan @12% to the parties unrelated to the assessee as has been discussed above. The A.O. has further held that the facts and circumstances in this year are identical to the immediately preceding year, taking a consistent view; disallowance is made in this year also. The A.O. has finally held that the assessee's plea that the addition was deleted by CIT(A), is of no assistance to it, as the appellate order has not been accepted and appeal has been filed against the order. Accordingly, excess payment of interest of Rs. 6,66,0777- [547950+118127] is disallowed.

The appellant has submitted that the appellant company has paid interest of Rs. 27,39,747/-to R.J. Cama Pvt. Ltd. and also paid the interest of Rs. 5,90,6337- to Cama Motors Pvt. Ltd. That the objective of Sec. 40A(2)(b) is to avoid evasion of tax through excessive or unreasonable payment to the associate concerns. The appellant has submitted that it had filed details before the AO showing that the rate of interest being paid to the Bank are on the contrary higher than the interest paid to Associate concern. The appellant has finally submitted that that in the previous Assessment year 2010-11, CIT(A)-6 has deleted the disallowance of interest exactly on similar grounds made by A.O. by applying provision of Sec. 40A(2)(b).

3.4. Identical issue came up in appellant's own case for A.Y. 2010-11 in appeal no. CIT (A)- VI/DCIT(OSD)/R. 1/2/13-14 dated 04/07/2014 as under:

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5.1 Identical issue came up in appellant's own case for A.Y. 2009-10. Vide order dtd. 25-06-2012 in appeal no. CIT(A)-VI/ACIT(OSD)/R-1/184/11-12, my predecessor held as under:

"3.3 I have considered the facts of the case; assessment order and appellant's written submission. Assessing officer disallowed interest in excess of 12% paid to related parties under section 40A (2b). Appellant submitted that appellant borrowed from the bank by providing security at the rate of 15% interest chargeable on monthly basis. This interest works out on annual basis at 16.08% and therefore it was argued that appellant paid less interest to related parties as compared to market rate of interest for unsecured loan and accordingly there was no element of excess interest in the case of related parties. ***Assessing officer did not dispute the appellant's claim of borrowings from bank at the annual rate higher than borrowings from related parties and just mentioned that rate of interest charged by the bank differs from bank to bank.*** *As far as appellant is concerned, bank charged more than the interest paid to related parties and therefore appellant has not paid excess interest as compared to independent borrowings. Assessing officer just took 12% rate of interest as market rate without mentioning any basis.* ***In the absence of any basis for adopting 12% interest as market rate, the same cannot be considered as market rate for the purpose of section 40A (2b).*** *From the undisputed facts of the case, there is no scope for treating interest payment to related parties excessive or unreasonable. Accordingly the disallowance made by the assessing officer is deleted."*

Facts remaining the same in the year under consideration and following the above-mentioned order, impugned disallowance is deleted. This ground of appeal is allowed".

After going through the facts of the case and the orders of my predecessors, it is seen that this year also the facts are identical to the previous years. Facts remaining the same in the year under consideration and following the above mentioned orders, impugned disallowance of Rs. 6,66,077/- is deleted. This ground of appeal is allowed."

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13. We have carefully considered the rival submissions on the issue. Identical issue has come up before the co-ordinate bench in the earlier year relevant to AY 2011-12 in ITA No.1437/Ahd/2015 wherein the co-ordinate bench has approved the reversal of disallowance made by the CIT(A) in these similar facts. The AO has not discharged the onus which lay upon it to show that the interest paid is excessive or unreasonable having regard to fair

market value of facility so provided. We thus see no reason to interfere with the order of the CIT(A). Accordingly, Ground no.2 of the Revenue's appeal is dismissed.

14. In the result, the captioned appeal of the Revenue is dismissed.

This Order pronounced on 06/07/2021

Sd/-	Sd/-
(RAJPAL YADAV)	(PRADIP KUMAR KEDIA)
VICE PRESIDENT	ACCOUNTANT MEMBER

Ahmedabad: Dated 06/07/2021

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

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2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।

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