

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ITA No.497/2011

% **Reserved on :** 15th November, 2011.
Date of Decision : 21st November, 2011.

CIT Appellant
Through: Mr. Kamal Sawhney, Sr. Standing
Counsel and Mr. Amit Shrivastava,
Adv.
versus

NAVYUG PROMOTERS PVT LTD Respondent
Through: Mr. Arta Trana Panda, Adv.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? Yes
3. Whether the judgment should be reported in the Digest? Yes

R.V. EASWAR, J.:

The Revenue has sought to raise the following questions as substantial questions of law in this appeal filed by it under Section 260A

of the Income Tax Act 1961 ('Act' for short) against the order of the Tribunal dated 8th July, 2010 in ITA No.2176/Del/2010:

- A) Whether on the facts and in the circumstances of the case the Tribunal was correct in holding that the deemed dividend under Section 2(22)(e) can be assessed in the hands of a registered shareholder as well as beneficiary shareholder and not in the hands of the assessee company?
- B) Whether the decision of the Tribunal in *ACIT Vs Bhaumik Colours Pvt. Ltd.* 314 ITR 80 (Mum) needs to be reconsidered as it has wrongly interpreted section 2(22)(e)?
- C) Whether the correct interpretation is to be found in *Skyline India Vs ITO* 24 SOT (Mum) and *Ex Tempore Securities Vs DCIT* 116 TTJ 525 (Mum)?

2. The respondent-assessee is a private limited company and the assessment year involved is 2006-07. In the assessment made u/S.143(3) of the Act, the AO made additions of Rs.4,95,00,000/- and Rs.1,10,29,778/- as deemed dividends u/S.2(22)(e) of the Act, received by the assessee-company as loans/advances from B.R. Arora & Associates P. Ltd. and Aricon Developers P. Ltd. respectively. It is an admitted fact that the assessee-company did not hold any shares in the above companies.

3. On appeal, the CIT(A) deleted the additions following the order of the Special Bench of the Tribunal, Mumbai in *ACIT v Bhaumik Colours Pvt. Ltd.* (314 ITR 80)(AT)(SB) in which it was held that an addition as deemed dividend under Sec.2(22)(e) can be made only when a shareholder of the company is in receipt of the loan or advance and not

on the ground that some other individual or person holds shares in the two companies. The appeal filed by the Revenue, against the decision of the CIT(A), was dismissed by the Tribunal following the order of the Special Bench cited supra. In doing so, the Tribunal found that the assessee-company was not a shareholder holding the required percentage of shares in the two companies from which it had received the loan or advance.

4. The revenue is in appeal raising the questions extracted above. The controversy is now concluded by the judgment of a division bench of this court in the case of *CIT v Ankitech Pvt Ltd* (ITA No.462/2009) and connected appeals on 11th May, 2011. A copy of the judgment has been filed before us. We have carefully gone through the same. After an elaborate discussion of the issue, and the case-law on the subject, the Division Bench has held that an assessee who is not a shareholder of the company, from which he received a loan or an advance cannot be treated as being covered by the definition of the word “dividend” as provided in Sec.2(22)(e) of the Act. It has been held :-

“24. The intention behind enacting provisions of Section 2(22)(e) is that closely held companies (i.e. companies in which public are not substantially interested), which are controlled by a group of members, even though the company has accumulated profits would not distribute such profit as dividend because if so distributed the dividend income would become taxable in the hands of the shareholders. Instead of distributing accumulated profits as dividend, companies distribute them as loan or advances to shareholders or to concern in which such shareholders have substantial interest or make any payment on

behalf of or for the individual benefit of such shareholder. In such an event, by the deeming provisions, such payment by the company is treated as dividend. 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.

25. Further, it is an admitted case that under normal circumstances, such a loan or advance given to the shareholders or to a concern, would not qualify as dividend. It has been made so by legal fiction created under Section 2(22)(e) of the Act. We have to keep in mind that this legal provision relates to “dividend”. Thus, by a deeming provision, it is the definition of dividend which is enlarged. Legal fiction does not extend to “shareholder”. When we keep in mind this aspect, the conclusion would be obvious, viz., loan or advance given under the conditions specified under Section 2(22)(e) of the Act would also be treated as dividend. The fiction has to stop here and is not to be extended further for broadening the concept of shareholders by way of legal fiction. It is a common case that any company is supposed to distribute the profits in the form of dividend to its shareholders/members and such dividend cannot be given to non-members. The second category specified under Section 2(22)(e) of the Act, viz., a concern (like the assessee herein), which is given the loan or advance is admittedly not a shareholder/member of the payer company. Therefore, under no circumstance, it could be treated as shareholder/member receiving dividend. If the intention of the Legislature was to tax such loan or advance as deemed dividend at the hands of “deeming shareholder”, then the Legislature would have inserted deeming provision in respect of shareholder as well,

that has not happened. Most of the arguments of the learned counsels for the Revenue would stand answered, once we look into the matter from this perspective.”

5. In the present case, it is an admitted fact that the assessee-company is not a shareholder holding the required percentage of shares in any of the two companies. Therefore, the judgment of this Court in *Ankitech Pvt Ltd* (supra) fully applies to the present case. We accordingly hold, following the said judgment, that no substantial question of law arises from the order of the Tribunal.

6. The appeal is accordingly dismissed with no order as to costs.

(R.V. EASWAR)
JUDGE

(SANJIV KHANNA)
JUDGE

NOVEMBER 21, 2011
vld