

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 30.11.2015

Coram

The Honourable Mr. Justice M. JAICHANDREN
and
The Honourable Mrs. Justice S. VIMALA

Tax Case Appeal No.892 of 2015

The Commissioner of Income Tax
Chennai

... Appellant/Appellant

-vs-

M/s. Farida Holdings Pvt Ltd.,
151/4, Mount Poonamallee Road
Ramapuram, Chennai - 600 089

... Respondent/Respondent

Tax Case (Appeal) filed under Section 260 A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal Madras B Bench, Chennai, dated 19.2.2014 in I.T.A.No.2208/Mds/2013 against the order of the Commissioner of Income Tax (Appeals)-II, Chennai-34, dated 27.08.2013 and made in ITA NO./487/2013-14 for the Assessment year 2009-10 against the order of the Deputy Commissioner of Income Tax Circle-II(1) Chennai, dated 18.12.2012 and made in GIR/PAN No.AAACF 1155A for the Assessment year 2008-2009

For appellant : Mr. T.R. Senthil Kumar
senior standing counsel for
income tax

सत्यमेव जयते

J U D G M E N T

The tax case appeal has been filed challenging the order passed by the Income Tax Appellate Tribunal, 'B' Bench, Chennai, Madras Bench, dated 19.2.2014, made in I.T.A.Nos.2208/Mds/2013, by raising the following substantial question of law:

"Whether on the facts and in the circumstances of the case, the Tribunal was right in deleting the addition made by the Assessing Officer towards deemed dividend under Section 2(22)(e) of the Income Tax Act?"

2. It has been stated that the assessee Company had filed its return of income, for the assessment year 2009-10, admitting a total income of Rs.3,75,770/- and it had shown loss of Rs.8,25,947/-, under Section 115JB. The return was processed under Section 143(1) of the Income Tax Act, 1961, (hereinafter referred to as 'the Act'), on 23.1.2011, determining a refund of Rs.3,72,560/-. A notice under Section 143(2) of the Act had been issued, on 23.8.2010. After calling for the necessary details, the assessment had been completed. During the year, the assessee had received dividend income of Rs.2,57,71,350/- and had claimed the same for exemption, under Section 10(34) of the Act. The assessee company had average investment of share of Rs.22,69,11,700/- during the year. The assessee company had not attributed any portion of its expenditure towards earning of the exempted income. Therefore, the assessing officer had asked the assessee as to why Section 14A read with Rule 8D should not be invoked. The assessee had submitted its reply by letter, dated 24.11.2011. The assessing officer had found that the assessee had earned an expenditure of Rs.29,42,543/- on account of administrative expenses and the total receipt amounts to Rs.2,79,31,350/-, which included the dividend income of Rs.2,57,71,350/- which was 92.27% of the total receipts and the administrative expenses. On that basis, the administrative expenses had been arrived at Rs.27,15,084/- for earning the exempted income. The assessing officer had estimated a sum of Rs.9,87,112/- towards the expenditure directly relating to the income which does not form part of the total income, under Rule 8D(2) (i) of the Act.

3. The following are the 100% subsidiary of the assessee company.

		as on	as on	Loan taken
		31.03.2008	31.03.2009	During the year
a)	Exeter Shoes P Ltd	Rs.1,85,10,656/-	Rs.3,66,96,126/-	Rs.1,81,95,470/-
b)	Farida leatherwear P Ltd	Rs.14,78,762/-	Rs.14,86,876/-	Rs.8,004/-
c)	Farida Shoes P Ltd; and	Rs.1,39,41,631/-	Rs.1,85,53,303/-	Rs.46,11,672/-
d)	Kenmore Shoes P Ltd	Rs.37,07,410/-	Rs.97,07,410/-	Rs.60,00,000/-
	Total			Rs.2,88,05,146/-

4. On a perusal of the balance sheet, it had been noted that the subsidiary companies had shown surplus amount, as on 31.3.2009. Insofar as Exciter Shoes P Ltd was concerned, it was Rs.3,32,44,992/-. Fardia Leatherwear P Ltd, it was Rs.2,10,56,010/- and for Farida Shoes P Ltd., it was a sum of Rs.22,05,05,192/- and for Kenmore Shoes P Ltd, it was a sum of Rs.2,22,55,697/- and for Exciter Shoes P Ltd, it was Rs.2,42,94,780/- and for Farida Primate Tannery P Ltd., it was Rs.1,58,83,034/- and for Stan Ford Shoes P Ltd., it was a sum of Rs.1,17,99,462/- and for Delta Shoes P Ltd., an amount of Rs.6,98,44,346/- has been shown as surplus.

5. It has been further stated that an explanation was sought from the assessee as to why it was not a deemed dividend, as contemplated under Section 2(22)(e) of the Act. The objection submitted by the assessee had been considered and it had been rejected by the assessing officer holding that the Section had contemplated under four classes of payment. The said section prescribes two basic conditions in order to bring the transaction under the category of deemed dividend.

6. It had been further stated that only loans and other payments made therein can be deemed dividend and to the extent that the company has accumulated profit on the date of the payment. Relying on the decision of the Supreme Court, in SADHNA TEXTILE P LTD Vs. CIT (188 ITR 318) and the decisions of the various High Courts and the Supreme Court, as well as that of the Tribunal of the Mumbai Bench relating to the issue concerned and by referring to the circular No.495, dated 22.9.1987 issued by the CBDT, the assessing officer had held that the manner of utilisation of the loans received by the assessee company, from its subsidiary companies, diverting the loan as advance, to the loss making subsidiary company, would not make any difference in the eye of law, as the amount received was assessable as deemed dividend under Section 2(22)(e) of the Act and therefore, an amount of Rs.2,88,05,146/- received by the assessee company, as a loan, from the subsidiary companies, had been treated as deemed dividend in the hands of the assessee company and therefore, the said amount had been added to the total income, under the head 'other sources'. Accordingly, the assessing officer had arrived at the taxable income of the assessee as Rs.3,13,20,580/-.

7. Aggrieved by the decision of the assessing officer, an appeal had been filed before the Commissioner of Income Tax (Appeals)-II, Chennai. By an order, dated 27.8.2013, the Commissioner of Income Tax (Appeals)-II, Chennai, had allowed the appeal filed by the assessee, following an earlier decision relating to the case of the assessee. Aggrieved by the same, the Revenue had filed an appeal before the Income Tax Appellate Tribunal, 'B' Bench, Chennai. The Tribunal had dismissed the

appeal, confirming the order passed by the Commissioner of Income Tax (Appeals)-II, Chennai.

8. Aggrieved by the same, the Revenue has filed the present appeal, before this Court, under Section 260 A of the Income Tax Act, 1961, based on the following grounds:

"a) The Tribunal missed to note the intention of the legislature is to tax the accumulated profit if it is utilized without paying the tax on it by the closely held group company. In the present case, the profit making subsidiary company utilized the accumulated profits without paying tax on the same.

b) The Tribunal failed to note that the conditions specified under Section 2(22)(e) such payment of loans/payments to shareholders who are beneficial owner of shares and when there are accumulated profits the conditions being fulfilled invoking of Section 2(22)(e) would be attracted.

c) The Tribunal erred in not considering the fact that the assessee company has transaction with its subsidiary companies only and there were no outside financing activity other than the subsidiary companies.

d) The Tribunal missed to note that for being a NBFC approval of the Reserve Bank of India is a must and the same was not produced before the AO.

e) The Tribunal ought to have seen that once the conditions prescribed under Section 2(22)(e) are fulfilled and the assessee holding more than 10% voting power and being the only shareholder of the subsidiary company and as per Section 2(31) defines a person which include a company and receive loans and advances from its subsidiary and therefore Section 2(22)(e) was attracted. Since the funds were available with the company in the form of profits the controlling group did not distribute the accumulated profit as dividend to the shareholders so as to avoid the payment of tax on accumulated profits.

f) The Tribunal failed to note that the assessee company is a shareholder having 100% shareholding in the subsidiary company receives loans from the profit making subsidiary company which would clearly show that the accumulated profits were utilized by the group of companies without paying tax on the accumulated profits available with them.

g) The Tribunal missed to note that once the holding company receives advances from its subsidiary out of the accumulated profits Section 2(22)(e) was attracted and the further transfer to its subsidiary is only an application of funds which no way restrict the power of AO to invoke the provisions of Section 2(22)(e) in the hands of the holding company.

h) The Tribunal failed to note that for the assessment year 2005-06 on similar issue the department has filed an SLP against the decision of the Hon'ble High Court and the matter is pending before the Supreme Court and the same has not attained finality."

9. At this stage of the hearing of the appeal, the learned counsel appearing for the respondent/assessee had placed before this Court an order passed by the Division Bench of this Court, dated 17.6.2013, made in Tax Case (Appeal) No.16 of 2010. The said order reads as follows:

"The above Tax Case (Appeal) is filed at the instance of the Revenue against the order of the Income Tax Appellate Tribunal for the assessment year 2005-06 by raising following substantial question of law:

"Whether on the facts and circumstances of the case, the Appellate Tribunal was right in law that it is not a fit case for treating the advance inter se subsidiaries of the assessee holding company, as the deemed dividend in the hands of the assessee company?"

2. The assessee which is a holding company has 100% share in subsidiary companies. The assessee filed its return of income on 12.10.2003 for the assessment year disclosing loss of Rs.9,05,970/-. Thereafter, the case was selected for scrutiny and notice under Section 143(2) of the Income Tax Act was issued calling for certain details. The assessee company furnished the details about the subsidiary companies and the shares held by the assessee company in the same. As per the particulars, there were eleven subsidiary companies in which the assessee company is holding 100% shares. The particulars furnished by the assessee company also revealed that the assessee company received loans from some of the subsidiaries and advanced money to some of the subsidiaries. On the basis of the particulars so furnished by the assessee, ledger accounts of all the subsidiary companies were also verified and the verification revealed that the amount advanced to the assessee by subsidiaries is from and out of the accumulated profits. Thereafter, the assessee was

asked to show cause as to why the loans received by the assessee company from its subsidiaries should not be treated as deemed dividend under Section 2(22)(e) of the Income Tax Act. The assessee filed its reply on 3.12.2007, wherein it is stated that the amounts received by the assessee from its subsidiary companies are for the purpose of advancing amounts to sub subsidiaries without any benefit of interest being derived by the assessee company and cannot be treated as dividend amount under Section 2(22)(e) of the Income Tax Act. However, the Assessing Officer arrived at the conclusion that the assessee company had received loans in cash from its subsidiary companies to the tune of Rs.2,92,39,206/- and treated the transactions as loan transactions covered under Section 2(22)(e) of the Income Tax Act. The Assessing Officer thus rejected the assessee's contention that the provisions of Section 2(22)(e) of the Income Tax Act would not be applicable to the assessee's case and added the same as addition in the income of the assessee and passed an order by assessing the said income by way of reassessment under Section 143(3)(ii) of the Income Tax Act. Aggrieved against the same, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeal) reversed the finding of the Assessing Officer on the ground that there is no evidence to hold that the assessee company received any benefit in the transactions involving advances within the subsidiary companies. On examination it would reveal that the advances by the advance giving subsidiary companies are from out of their profits and these advances were not interest bearing and partly allowed the appeal by holding that impugned addition of Rs.2,92,39,206/- was unwarranted and deleted the same. Aggrieved against the same, the Revenue went on appeal before the Income Tax Appellate Tribunal. The Tribunal also confirmed the finding of the Commissioner of Income Tax (Appeal). Hence, the present appeal by the Revenue.

3. The Commissioner of Income Tax (Appeals) and the Appellate Tribunal, on the basis of the available particulars, categorically came to the conclusion that the assessee company is only a intermediary between the two subsidiary companies and no beneficial interest has been accrued to the assessee company by the advances between the subsidiary companies and sub subsidiary companies. Consequently, the ingredients of Section 2(22)(e) of the Income Tax Act is not attracted.

4. In the circumstances, we hold that the order passed by the Income Tax Appellate Tribunal confirming the order of the Commissioner of Income Tax (Appeals) does not call for interference. The above Tax Case Appeal is therefore, dismissed. No costs."

10. The learned counsel appearing for the appellant, while reiterating the grounds raised on which appeal had been filed, has also submitted that the Revenue had challenged the order passed by the Division Bench of this Court, dated 17.6.2013, made in Tax Case (Appeal) No.16 of 2010, before the Supreme Court, in S.L.P.No.1358 of 2013 and that the matter is pending disposal.

11. In view of the submissions made by the learned counsel appearing for the appellant and in view of the decision of the Division Bench of this Court, dated 17.6.2013, made in Tax Case (Appeal) No.16 of 2010, we are of the considered view that the Revenue has not shown sufficient cause or reason to interfere with the order passed by the Income Tax Appellate Tribunal, 'B' Bench, Chennai, confirming the order passed by the the Commissioner of Income Tax (Appeals)-II, Chennai. Accordingly, the Tax Case Appeal is dismissed. Connected M.P.No.1 of 2015 is closed. No costs.

Sd/-
Assistant Registrar(VI)

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Sub Assistant Registrar

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TO

1. The Commissioner of Income Tax (Appeals)-II, Chennai -34.

2. The Deputy Commissioner of Income Tax Circle-II, Chennai.

3. The Income Tax Appellate Tribunal,
Madras, ' Chennai.

+ 1 cc to M/s. T.R. Senthilkumar, Advocate Sr.64983

Tax Case Appeal No.892 of 2015

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