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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **DECIDED ON: 09.02.2015**

+ ITA No.57/2015,
ITA No.67/2015, CM No.2230/2015
ITA No.68/2015, CM No.2231/2015

COMMISSIONER OF INCOME TAX (TDS)-I Appellant
Through: Mr. Kamal Sawhney, Sr. Standing
Counsel.

versus

C.J. INTERNATIONAL HOTELS PVT. LTD. Respondent
Through: Mr. Mayank Nagi with Ms. Bhawna
Bakshi, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K. GAUBA
S.RAVINDRA BHAT, J. (OPEN COURT)

1. Two questions have sought to be urged on behalf of the Revenue in the present appeals directed against the judgment of the ITAT. These are, firstly, to initiate proceedings against the assessee in default who does not deduct tax and secondly on merits the applicability of Section 2 (22) (e), in the circumstances of the case.

2. These appeals concern the Assessment Years 1999-2000, 2000-01 and 2001-02. Ms. Harjit Kaur, concededly a shareholder of M/s Pure Drinks (New Delhi) Ltd. had borrowed amounts from C.J. International Hotels Pvt. Ltd. i.e., the assessee. The Assessing Officer

(AO) sought to bring them to tax under Section 2 (22) (e) reasoning that since she had more than 10% stake in the assessee company, and that the other conditions spelt out in Section 2 (22) (e) were satisfied, it had to be treated as deemed dividend. The assessee contended in the appeal that the initiation of proceedings under Section 201 was barred; it was contended on merits that Harjit Kaur was a shareholder in M/s Pure Drinks (New Delhi) Ltd. and could not be considered as a shareholder in C.J. International Hotels Pvt. Ltd. The other contention was that the said individual could not be considered even as a beneficial shareholder of the assessee. Both the contentions were accepted by the CIT (A) and the ITAT.

3. Mr. Kamal Sawhney, Sr. Standing Counsel in support of the Revenue's appeal argues that given the terms of Section 201, no limitation can be imputed and that if Parliament had so intended like other instances in the Income Tax Act, a specific period would have been engrafted. He also relied upon specific amendments made to secure Section 201 by virtue of Finance Act 2/2009 w.e.f. 1.4.2010 and the other 2/2014 w.e.f. 1.10.2014. It was argued next that since the shareholder was a direct beneficiary and a beneficial owner of shares of the assessee, the AO acted correctly within jurisdiction in invoking Section 2 (22) (e).

4. Counsel for the assessee points out that the ruling of this Court as to the period of limitation, i.e., *Commissioner of Income Tax v. NHK Japan Broadcasting Corporation*, (2008) 305 ITR 137 (Del) and *CIT Vs. Hutchison Essar Telecom Ltd.* (2010) 323 ITR 230 (Delhi) concludes the issue. In those judgments, two Division

Benches consistently ruled that the foundational requisite for initiation of proceedings under Section 201 is a period of four years if no limitation is prescribed. The Revenue had contended that since these matters were carried in appeal by special leave to the Supreme Court, the issue was left open. In the absence of compelling reasons, this Court should follow the ruling in *NHK Japan (supra)*.

5. So far as the question on merits is concerned, learned counsel relies upon the Division Bench ruling in *Commissioner of Income Tax v. National Travel Service*, (2012) 347 ITR 305 (Del) and *CIT Vs. Ankitech (P) Ltd.* (2012) 340 ITR 14 to say that the requirement of Section 2 (22) (e) is fulfilled only if both the pre-conditions are met with.

6. It is evident from the above discussion that the assessee was sought to be proceeded against Section 201 as one in default, after the period of four years. This Court is conscious that the text of the provision nowhere limits the exercise of powers. Equally, there are several provisions of enactment, i.e., Sections 143 (2), 147, 148 and 263, and even through introduction of specific provisions in Section 153 of the Act, where the time limit is specifically prescribed. At the same time, this Court in *NHK Japan (supra)* was of the opinion that the power to treat someone as assessee in default is too drastic, vague and oppressive since it is conditioned by some measure of limitation. In these circumstances, the Court had insisted that for the purpose of initiation of proceedings under Section 201, the AO has to act within four years. In *NHK Japan*, the Court did take note of the judgment in *State of Punjab v. Bhatinda District Co-op Milk Producers Union*

Ltd. (2007) 9 RC 637.

7. The judgment in *NHK Japan* to a certain extent was limited by the amendment to Section 201 by substitution of Section 201 (3) w.e.f. 1.4.2010 by Finance Act No.2/2009. This substitution was in turn amended w.e.f. 1.10.2014 – by Finance Act No.2/2014. As a result, the provision which exists as on date is as follows: -

“201. (3) *No order shall be made under sub-section (1) deeming a person to be an assessee in default for failure to deduct the whole or any part of the tax from a person resident in India, at any time after the expiry of seven years from the end of the financial year in which payment is made or credit is given.*”

8. Secondly, Section 201 itself was amended by introduction of sub-section 1 (A) - with retrospective effect, from 1.4.1966. The provision underwent legislative changes on different occasions. The decision in *NHK Japan* was rendered on 23.04.2008. The Revenue’s appeal was rejected on 3.7.2014. Although, the Supreme Court had granted special leave and has apparently stated in its final order rejecting the Revenue’s appeal that the question is left open, the mere circumstance that the Parliament did not spell out any time limit before it did eventually in 2009 - and subsequently in 2014 - would not lead to the sequitur that this Court’s ruling in *NHK Japan* requires consideration. In that judgment, the Division Bench had given various reasons, including the application of the rationale in *Bhatinda District (supra)*. In *NHK Japan*, the Court had noticed that the facts in *Bhatinda District (supra)* judgment concern exercise of jurisdiction

by a statutory authority in the absence of specific period of limitation.

The Court in *Bhantida District (supra)* held as follows:

“17. It is trite that if no period of limitation has been prescribed, statutory authority must exercise its jurisdiction within a reasonable period. What, however, shall be the reasonable period would depend upon the nature of the statute, rights and liabilities thereunder and other relevant factors.

18. Revisional jurisdiction, in our opinion, should ordinarily be exercised within a period of three years having regard to the purport in terms of the said Act. In any event, the same should not exceed the period of five years. The view of the High Court, thus, cannot be said to be unreasonable. Reasonable period, keeping in view the discussions made hereinbefore, must be found out from the statutory scheme. As indicated hereinbefore, maximum period of limitation provided for in Sub-section (6) of Section 11 of the Act is five years.”

9. More recently in *Commissioner of Income Tax-III v. Calcutta Knitwears, Ludhiana* (2014) 362 ITR 673 (SC), the Supreme Court had the occasion to deal with the correct position in law as to the initiation of income tax proceedings. Although, the context of the dispute was in respect of recording of a satisfaction note as to the initiation of proceedings against third parties under erstwhile Section 158BD of the Act which did not prescribe the period of limitation and left it to the discretion of the AO to decide on being satisfied that such proceedings were required to be initiated, the Court limited such discretion in the following terms:

“44. In the result, we hold that for the purpose of Section 158BD of the Act a satisfaction note is sine qua non and must be prepared by the assessing officer before he

transmits the records to the other assessing officer who has jurisdiction over such other person. The satisfaction note could be prepared at either of the following stages: (a) at the time of or along with the initiation of proceedings against the searched person under Section 158BC of the Act; (b) along with the assessment proceedings under Section 158BC of the Act; and (c) immediately after the assessment proceedings are completed under Section 158BC of the Act of the searched person.”

10. An added reason why the submission of the Revenue is unacceptable is that had the Parliament indeed intended to overrule or set aside the reasoning in *NHK Japan (supra)*, it would have, like other instances and more specifically in the case of Section 201 (1A), brought in a retrospective amendment, nullifying the precedent itself. That it chose to bring Section 201 (3) in the first instance in 2010 and later in 2014 fortifies the reasoning of the Court. Accordingly, the issue is answered against the Revenue.

11. So far as the question on the merits, i.e., applicability of Section 2 (22) (e) goes we are of the opinion that on both counts, the Revenue has to fail. Concededly, the individual Harjit Kaur was not a shareholder of the present assessee but rather the shareholder of another concern which held shares in assessee company. In *Ankitech (supra)* - and later in *National Travel Service*, the Court underlines the need to limit the application of a fiction which otherwise would follow its own path by stating as follows: -

“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 share holder/member of the payer company. Therefore, under no circumstances, 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 counsel for the Revenue would stand answered, once we look into the matter from this perspective."

12. Later, with respect to the mandatory need to fulfill both pre-conditions which are conjunctive and not dis-conjunctive, as is now sought to be argued by the Revenue, too, *Ankitech (supra)* was decisive:

"The expression 'shareholder being a person who is the beneficial owner of shares' referred to in the first limb of section 2 (22) (e) refers to both a registered shareholder and beneficial shareholder. If a person is a registered shareholder but not the beneficial shareholder then the provision of section 2 (22) (e) will not apply. Similarly, if a person is a beneficial shareholder but not a registered shareholder then also the first limb of the provisions of section 2 (22) (e) will not apply."

13. It is, therefore, clear that in the absence of any finding that Harjit Kaur owned the shares in terms of Section 201A or was beneficial owner in terms of such provision - on both counts - the findings being adverse to the Revenue, no question of law arises.

14. For the above reasons, the appeals cannot succeed and are dismissed accordingly.

**S. RAVINDRA BHAT
(JUDGE)**

**R.K. GAUBA
(JUDGE)**

FEBRUARY 09, 2015
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