

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 07.12.2016

Pronounced on : 19.12.2016

Coram:

The Hon'ble Mr.Justice HULUVADI G.RAMESH

AND

The Hon'ble Dr. Justice ANITA SUMANTH

TAX CASE APPEAL No.1465 of 2007

Commissioner of Income Tax,
Chennai .

.. Appellant

Versus

Mr.C.Subba Reddy,
19/1, Third Street,
R.A.Puram, Chennai 600 028.

.. Respondent

Appeal under Section 260A of the Income Tax Act, 1961,
against the order of the Income Tax Appellate Tribunal, Madras 'A'
Bench dated 09.02.2007 in ITA No.2975/Mds/2004.

For Appellant .. Mr.T.Ravikumar,
Senior Standing Counsel

For Respondent .. Mr.S.Sridhar

JUDGMENT

(Judgment of this Court was delivered by ANITA SUMANTH, J.)

1. The Assessee/Respondent is carries on the business of Real Estate Development as a proprietorship under the name and style

of Ceebros Property Development ('CPD'). It entered into an Agreement with an entity by the name and style of Ceebros Hotels Private Limited ('CHPL'), sub-contracting a construction contract to it. In respect of assessment year 2001-02, a return of income was filed by the Assessee that was taken up for assessment under scrutiny.

2. In the course of assessment, the Assessing Authority noted that the financials revealed an amount of Rs.1.61 crores (approx) due from CPD to CHPL. Since CPD was a share holder in CHPL, a closely held company, holding substantial voting rights and CHPL had accumulated profits as on 31.03.2001, the provisions of Section 2(22)(e) of the Income Tax Act (hereinafter referred to as 'Act') were invoked. The assessment was completed vide order dated 22.03.2004 invoking the provisions of Sec 2(22)(e) and bringing to tax the aforesaid amount as deemed dividend.

3. The decision of the Calcutta High Court in the case of *M.D.Jindal vs. Commissioner of Income Tax (164 ITR 28)* was relied upon to counter the objection of the Assessee to the effect that the credit arose out of a business transaction to which the provisions of section 2(22)(e) would not stand attracted. The officer pressed into service clause (ii) of the exclusion to section 2(22)(e) of the Act to

state that only ordinary business transactions carried on by companies engaged substantially in the business of money lending would stand excluded from the mischief of section 2(22)(e) of the Act.

4. The Assessee's appeal before the Commissioner of Income Tax (Appeals) (CIT(A)) was allowed by order dated 31.08.2004. The account copy of CHPL for the period from 01.04.1997 to 31.03.2002 was examined. It was found that for the period from 01.04.1996 to 30.03.2001, the funds of the Assessee were, in fact, lying with the company and not vice-versa. The Commissioner notes that during 01.04.1996 to 31.03.2000, the quantum of funds of the assessee with the company ranged between 1.5 crores to 6.92 crores and during the previous year relevant to AY 2001-02, i.e. between 01.04.2000 to 31.03.2001, it ranged between 6.92 crores to 7.19 crores. CHPL raised an invoice for an amount of Rs.8.43 crores and after giving credit to the assessee's monies available with CHIL, a debit balance of Rs.1.61 crores as on 31.03.2001 was arrived at. The credit balance thus arose solely on account of the construction work carried on by CHIL as sub-contractor of CPD. The Commissioner (Appeals) also finds as a fact that the account copy for the period 01.04.2001 to 31.03.2002 revealed that the amount had been settled the next year and the

balance squared off. Thus there was no benefit derived by the assessee by reason of the credit of Rs.1.61 crores.

5. The order of the CIT(A) was carried in appeal before the Income Tax Appellate Tribunal ('Tribunal') which confirmed the aforesaid factual findings, dismissing the appeal of the Revenue by order dated 09.02.2007, assailed in appeal before us. The appeal raises the following Substantial Question of Law for our consideration:

i) Whether on the facts and circumstances of the case, the Tribunal was right in holding that the provisions of Section 2(22)(e) treating a loan or advance as a deemed dividend does not apply if the loan is given as part of a contractual obligation?

ii) Whether on the facts and circumstances of the case, the Tribunal was right in interpreting the Section on the basis of intention of the legislature, when the words of the Section are clear and unambiguous?

iii) Whether on the facts and circumstances of the case, the Tribunal was right in looking at the transaction between the two companies in other years to arrive at the conclusion that the loan granted in the relevant financial year does not amount to deemed dividend under Section 2(22)(e) of the Act?'

6. We have heard the submissions of Mr.T.Ravikumar, learned counsel appearing for the Revenue and Mr.S.Sridhar, learned

counsel appearing for the Assessee.

7. The provisions of Section 2(22)(e) impose a deeming fiction and the conditions imposed therein call for strict and concurrent satisfaction being – (i) payment by closely held company, (ii) of the nature of an advance or loan, (iii) to a share holder or beneficial owners of shares, (iv) with more than 10% voting power, (v) for his individual benefit.

8. In the present case, the credit arises by virtue of a contractual obligation and a business transaction and has been settled the very next year. There is no individual benefit derived by the Assessee. Moreover, the credit does not satisfy the definition of 'advance' or 'loan'. The fiction thus fails on several counts. The Revenue relies upon the judgment of the Supreme Court in the case of *Miss P.Sarada vs. Commissioner of Income Tax (229 ITR 444)* and the decision of the Calcutta High Court in *M.D.Jindal vs. Commissioner of Income Tax (164 ITR 28)*.

9. In the first case, the assessee had made withdrawals from out of accumulated profits that were deemed to be dividend u/s 2(22)(e) of the Act. The defence taken was that the withdrawals

could be taken to have been paid from out of monies lying to the credit of another shareholder. This was negated by the Supreme Court. In the present case, there are no withdrawals and as the findings of fact by the lower authorities reveal, the frequency of advances by the Assessee to the company was more than in the reverse. The Calcutta High Court, in the case of M.D.Jindal, dealt with a transaction that was found to be colourable. The concurrent finding of fact in that case was to the effect that the transaction was a device designed to circumvent the provisions of Section 2(22)(e) of the Act. The veil was thus lifted and the true facts brought to light. In the present case, there is no such allegation and on the contrary, the concurrent finding is to the effect that no benefit has accrued to the assessee, the credit is the result of a business transaction and is neither in the nature of a loan or a deposit. The decisions relied upon by the revenue do not advance its case, being distinguishable on facts.

10. Various case laws have been cited by the counsel appearing for the Assessee but we do not consider it necessary to advert to the same in view of our conclusion on the facts of the present case, that the provisions of Sections 2(22)(e) of the Act do not stand attracted.

11. The Substantial Question of Law is answered in favour of the Assessee and the Department Appeal stands rejected. No costs.

(H.G.R.,J) (A.S.M.,J)

19 .12.2016

Index: Yes/No
vga/msr

HULUVADI G.RAMESH, J

AND

Dr.ANITA SUMANTH,J

Vga/msr

**PRE DELIVERY JUDGMENT IN
T.C.A.No.1465 of 2007**

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