

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

I.T.A.No.106 of 2015

JUDGMENT: (per Hon'ble Sri Justice Ramesh Ranganathan)

This appeal, under Section 260-A of the Income Tax Act, 1961 (for short "the Act"), is preferred by the Revenue against the order passed by the Income Tax Appellate Tribunal in I.T.A.No.376 of 2013 dated 31.10.2013 for the assessment year 2009-10.

In the order under appeal, the Tribunal noted that the assessee was one of the directors of M/s.Charan Life Devices Pvt. Ltd which did not have any landed property or building of its own; the company was facing hurdles in obtaining loans and financial assistance from banks and other financial institutions to conduct their business; the directors had mortgaged their personal properties to enable the company to obtain cash credit facilities/term loans from banks and financial institutions; this process continued from the inception; the directors desired to change this process, and decided to transfer their personal assets in favour of the company to obviate such a situation in future; the company had faced serious problems when they had earlier applied for loans for investment in its subsidiary PHEPL; the directors entered into an agreement with the company for the sale of their properties in the latter's favour; the total value of the sale consideration was Rs.1,70,00,000/-; copies of the agreement of sale were on record; as on date, the full consideration was not received; to facilitate transfer of property, the company had paid them an advance of Rs.94,75,000/- as part payment; the property was not totally handed over by the builder by the time of the search; the registration process could not be completed as the original documents were pledged with the bank for the purpose of obtaining loan for the business of the company; the sanction letter of Citi Bank had also been produced; the intention of the directors was only to transfer the property to the company; the transaction was not beneficial to the shareholders, but was in the interests of the company and for its benefit; and the advance

paid by the company to the directors, towards part-payment of the sale consideration of the property, could not be treated as deemed dividend as it had not been proved that the transaction was for the benefit of the shareholders/directors.

The Tribunal further observed that it was the intention of the directors to transfer the property to the company, for which they received advance; the directors were mortgaging their personal properties as security for the cash credit facilities/terms loans extended to M/s.Charan Life Devices Pvt. Ltd earlier; it is in such circumstances that they had decided to transfer their personal assets to the company, and had entered into an agreement of sale; it is only if there is a beneficial transfer to the shareholders/directors, can a loan or advance be considered as deemed dividend; in the present case, the advance paid was not for the benefit of the shareholders; and as it was a non-gratuitous advance, for the purpose of the company's business, it could not be treated as deemed dividend.

Sri J.V. Prasad, learned Senior Standing Counsel for Income Tax, would submit that any advance by the company, in which the public has no substantial interest, to a shareholder, being a person who is the beneficial owner of the shares, would fall within the definition of 'dividend' under Section 2(22)(e) of the Act; it is only if it falls within the exception under Clauses (i) to (v) thereunder would it not fall within the definition of 'dividend'; Clause (ii) of Section 2(22)(e) of the Act makes an exception, of any advance or loan made to a shareholder by a company, in the ordinary course of its business, where lending of money is a substantial part of the business of the company; in the present case, M/s.Charan Life Devices Pvt. Ltd. is not carrying business of lending money; consequently the advance paid by the company to the assessee would fall within the definition of "dividend" under Section 2(22)(e) of the Act; and the Tribunal had erred in holding otherwise.

On the other hand, Sri B.Chandrasen Reddy, learned counsel for the respondent-assessee, would submit that where the transaction is for the beneficial interest of the company, and not for the benefit of the

director/shareholder, it would be a transaction in the normal course of business; such transaction would not fall within the definition of 'dividend' under Section 2(22)(e) of the Act; as such transactions do not fall within the main part of Section 2(22)(e) itself, it is unnecessary to examine whether it is excluded in terms of Clauses (i) to (v) thereunder; and the question, which arises for consideration in this appeal, is covered by the judgment of the Delhi High Court in ***Commissioner of Income Tax vs. Creative Dyeing and Printing P. Ltd.***^[1].

In ***Creative Dyeing and Printing P. Ltd.***¹, a Division Bench of the Delhi High Court held that Section 2(22)(e) of the Act can be applied to 'loans' or 'advances' simpliciter, and not to those transactions carried out in the course of business as such; in the course of business transactions between a company and a stockholder, the company may be required to give advance in mutual interest; there is no legal bar in having such transactions; what is to be ascertained is the purpose of such a transaction; if the amount is given as an advance simpliciter, without any further obligation behind receiving such an advance, it may be treated as 'deemed dividend'; if it is otherwise, the amount given cannot be branded as an 'advance' within the meaning of 'deemed dividend' under Section 2(22)(e) of the Act; like Clause (ii) of Section 22(2)(e), dividend does not include advance or loan made by a company in the ordinary course of its business; by granting advance if the business purpose of the company is served, and is not a sum which it would otherwise have distributed as dividend, it cannot be brought within the deeming provision; and such an 'advance' cannot be treated as deemed dividend.

The Division Bench of the Delhi High Court further held that Section 2(22)(e) is in the nature of an explanation; Clause (ii) thereunder cannot have a bearing on the interpretation of the main provision of Section 2(22)(e) itself; once it is held that the business transaction does not fall within Section 2(22)(e), it is unnecessary to examine clause (ii) of Section 2(22)(e) of the Act as it gives an example of one of the situations where the loan/advance will not be treated as a deemed dividend; that

cannot be expanded to take away the basic meaning, intent and purport of the main part of Section 2(22)(e); and, therefore, transactions in the ordinary course of business would not fall within the ambit of Section 2(22)(e) of the Act. S.L.P (Civil).No.18197 of 2010 preferred against the judgment in **Commissioner of Income Tax vs. Creative Dyeing and Printing P. Ltd**, was dismissed by the Supreme Court.

As has been rightly held by the Tribunal, transfer of property, which belonged to the assessee-director, to the company was to enable the latter to secure loans from banks. It is evident from the material placed on record that even earlier the assessee, as a director of the Company, had mortgaged their personal property to enable the company to obtain loans from banks/financial institutions. It is evident, therefore, that the advance received by the assessee, for sale of the subject property in favour of the company, was in the normal course of business; and it was a transaction in the interests of the company to enable it to offer the said building as security for the loan to be obtained from banks/financial institutions.

As held by the Delhi High Court, in ***Creative Dyeing and Printing P. Ltd.*¹**, it is only if the advance paid is for the benefit of the shareholder/director, can it be said to be “deemed dividend” within the meaning of Section 2(22)(e) of the Act. The Tribunal has rightly held that the subject transaction is not for the benefit of the assessee, but is for the benefit of the company; and it is a transaction in the ordinary course of business. The conclusion of the Tribunal, that such transactions would not fall within the definition of deemed dividend under Section 2(22)(e) of the Act, is in accordance with law. No substantial question of law arises for consideration in this appeal necessitating interference under Section 260-A of the Act. The appeal fails and is, accordingly, dismissed. The miscellaneous petitions pending, if any, shall also stand dismissed. There shall be no order as to costs.

RAMESH RANGANATHAN, J

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THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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