

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO.387 OF 2016

The Principal Commissioner of Income Tax-17 ... Appellant
V/s.

Smt.Kayan Jamshid Pandole ... Respondent

Mr.P.C.Chhotaray for the Appellant.

Mr.Porus Kaka, Senior Counsel with Mr.Divesh Chawla i/by Mr.
Atul Jasani for the Respondent.

**CORAM : AKIL KURESHI AND
M.S.SANKLECHA, JJ.**

DATE : NOVEMBER 19, 2018.

P.C.:-

1. The Appeal is directed against the judgment of Income Tax
Appellate Tribunal dated 14th January, 2015.

2. Following questions are presented for our consideration:

“(a) Whether on the facts and in the circumstances of the case and in law, the Hon'ble Income-tax Appellate Tribunal was justified in holding that the amount of Rs.2,78,46,000/- received by the assessee from Spirax Marshall (P) Ltd on sale of its shares to the said company under the Scheme of Arrangement, which is treated as deemed dividend under section 2(22)(d) of the Act, is exempt under Section 10(34) of the Act?

(b) Whether on the facts and in the circumstances of the case and in law, in this peculiar case, the assessee can claim exemption under section 10(34) of the Act when the company

M/s Spirax Marshall (P) Ltd has not paid additional income-tax under section 115-O of the Act?”

3. Brief facts are as under:

Respondent-assessee is an individual. The issue pertains to the Assessment Year 2008-09. The assessee was holding shares of one M/s Spirax Marshall Limited pursuant to a scheme of arrangement formulated by the company and approved by the Bombay High Court, the Company purchased shares held by the assessee and several other shareholders of the same group. The income received by the assessee under such arrangement was offered by the assessee by way of capital gain in the return filed for the said assessment year. The Revenue was of the opinion that the income was in the nature of a deemed dividend in terms of Section 2 (22)(d) of the Income Tax Act, 1961 (“the Act” for short).

4. The issue eventually reached the Tribunal. The Tribunal by the impugned judgment accepted the Revenue's contention and held that the income was not in the nature of capital gain, but a deemed dividend. However, the Tribunal thereafter examined the

question whether the dividend would be exempt from tax under Section 10(34) of the Act. The Tribunal referred to the said provision as also Section 115-O and held that the dividend would be tax-free in the hands of the receiver. It is this views of the Tribunal the Revenue has challenged the present appeal.

5. Learned counsel for the Revenue submitted that the Tribunal committed an error in holding that the income was exempt under Section 10(34) of the Act. He further submitted that the company had not paid any tax on distribution of such dividend as required under Section 115-O. The assessee, therefore, cannot claim exemption under Section 10(34) of the Act. Learned counsel agreed that against the judgment of the Tribunal in case of **Kamal Imran Panju, Mumbai Vs. Department of Income Tax**¹ who is an assessee similarly situated as the present one, the Revenue has not preferred any appeal before the High Court. He, however, submitted that non-filing of the appeal by the Revenue was on account of misinterpretation of the relevant provisions. When court interpretation was adopted, the revenue

1 I.T.A.No.7620/Mum/2011

formed a belief that the question requires further consideration. In this context, learned counsel relied on the judgment of Supreme Court in the case of **Commissioner of Income-Tax Vs. Modipon Limited**¹ to argue that merely because in case some other assessee, Revenue has not preferred appeal, would not preclude the revenue from filing appeal in later cases.

6. On the other hand, learned counsel Mr.Porus Kaka appearing for the assessee submitted that the income generated by way of buy back of shares by the company was in the nature of capital gain. Assessee had offered the same to tax accordingly. If the Revenue contends that the income is in the nature of deemed dividend, the effect of Section 10(34) of the Act would automatically follow. He further submitted that all other assessees who were shareholders of the same company and who formed a common group had made declaration in the income tax returns declaring the gain as a capital gain. The Revenue has not opposed these claims in their cases. The Revenue has isolated the cases of only two assessees for a differential treatment. He

1 (2018) 400 ITR 1(SC)

further pointed out that case of **Kamal Imran Panju** also arose out of the same arrangement. In said case, the revenue chose not to pursue the issue beyond the level of the Tribunal. On the question of consistency, therefore, he argued that the revenue would be precluded from pursuing the present appeal.

7. At the outset, we may notice that according to the assessee the sale of shares did not result into any dividend and it was a capital gain. It was Revenue who had argued that income is not in the nature of capital gain but a deemed dividend. It would be open for the assessee to pursue the line that the Tribunal had committed error in rejecting the assessee's contention in this regard. Surely, however, the Revenue cannot change the stand that income was in the nature of deemed dividend. We have, therefore, examined the entire issue in this backdrop.

8. Section 2(22) of the Act as is well known includes range of situations under which payment by company to its shareholders would amount to distribution of dividend. Clause (d) of Section 2(22) provides that any distribution to its

shareholders by the company on reduction of capital to the extent to which the company possesses the accumulated profit which arose after end of previous year, under certain circumstances would be included in the term "dividend".

9. Section 10(34) in turn exempts from payment of tax, any income by way of dividend referred to Section 115-O. As per Sub-section (1) of Section 115-O notwithstanding anything contained in the provisions of Act and subject to the provisions of the said section in addition to the income tax chargeable in respect of the total income of the domestic company, any amount declared, distributed or paid by such company by way of dividend on or after 1st April, 2003 would be chargeable to additional income tax referred to as tax on distributed profits.

10. The question would be whether the deemed dividend under Section 2(22)(d) would fall within the purview of Sub-Section 1 of Section 115-O of the Act. However, the legislature has advisedly cleared this position by providing an explanation to Section 115-Q of the Act. Before we refer to the explanation,

we may note that Section 115-Q provides that if any Principal Officer of domestic company and a company does not pay tax on distributed profits in accordance with the provisions of Section 115-O then he or it shall be deemed to be an assessee in default in respect of the amount of tax payable by him or it and all the provisions of the Act for collection and recovery of the income tax shall apply. This provision thus makes a specific reference to unpaid distribution tax by a company. An explanation to Section 115-Q which existed at the relevant time but which was omitted by the Finance Act, 2018 and provided that for the purposes of the said Chapter (Chapter XIID) which contains Section 115-O and 115-Q, the expression “dividend” shall have the same meaning as it given to dividend under Sub-Section (22) of Section 2, but shall not include sub-clause (e) thereof.

11. The plain effect of the explanation, therefore, would be that even the deemed dividend under Section 2(22)(d) of the Act would be covered from the purpose of Chapter XIID. In turn, therefore, such deemed dividend would be one which is referred to Section 115-O of the Act. Inescapable conclusion, therefore,

would be that such dividend also would be exempt from tax in the hands of the receiver in terms of Section 10(34) of the Act.

12. The contention of the counsel for the Revenue that the company having not paid such dividend distribution tax, exemption under Section 10(34) should be deprived to the assessee needs to be noted only for rejection. If a certain income is exempt at the hands of receiptant by virtue of statutory provision, unless a provision is made in the statute itself, such exemption cannot be withdrawn only because the payer has not paid tax. The statute has made specific provision for recovery or unpaid tax from the company. In the result, the tax appeal is dismissed.

13. For the view that we have taken, it is not necessary for us to elaborate on the assessee's contention of consistency and the Revenue's arguments that even if no appeal has been filed in the similar case, the present appeal would still be maintainable.

(M.S.SANKLECHA,J.)

(AKIL KURESHI,J.)