

\$~3

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA 555/2019**

PR. COMMISSIONER OF INCOME TAX-9 Appellant

Through: Mr.Zoheb Hossain, Sr. Standing
Counsel.

versus

VERIZON INDIA PVT. LTD. Respondent

Through: Mr.N.Venkataraman, Sr.Advocate
with Mr.R.Satish Kumar, Mr.Jatin
Rajput and Mr.Vinay K.Sharma,
Advocates.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE TALWANT SINGH

ORDER

%

22.08.2019

1. The Revenue is in appeal against an order dated 10th September 2018 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No.6053/Del/2012 for the Assessment Year ('AY') 2008-09.

2. The Revenue questions the correctness of the decision of the ITAT that the sum of Rs.6,40,37,615/- is taxable as 'deemed dividend' under Section 2(22)(e) of the Income Tax Act, 1961 ('Act') not in the hands of the Respondent Assessee but only in the hands of M/s. Verizon Asia Pacific Holdings Pvt. Ltd., Singapore (hereafter 'Verizon Singapore').

3. At the outset it requires to be noted that the Division Bench of this Court in ***Commissioner of Income Tax v. Ankitech Pvt. Ltd.*** [2012] 340 ITR 14 (Del) held that where there is an arrangement under which an entity has borrowed a loan from another entity then it is the lender which holds the shares of the borrower which should be held liable to pay tax on such ‘deemed dividend’ and not the borrower itself. The above decision of this Court in ***Ankitech Pvt. Ltd.*** was affirmed by the Supreme Court in ***CIT v. Madhur Housing and Developing Company*** [2018] 401 ITR 152 (SC).

4. Subsequently, in ***National Travel Services v. Commissioner of Income Tax Delhi*** (2018) 401 ITR 154 SC a two-Judge bench of the Supreme Court doubted the correctness of the decision of this Court in ***Ankitech Pvt. Ltd.*** (*supra*) only to the extent whether the expression ‘shareholder’ should also include a beneficial owner of shares. A reference was made to the amendment in Section 2(22)(e) of the Act and it was observed in paras 18 and 19 as under:

“18. This being the case, we are of the view that the whole object of the amended provision would be stultified if the Division Bench judgment were to be followed. *Ankitech’s* case, in stating that no change was made by introducing the deeming fiction insofar as the expression “shareholder” is concerned is, according to us, wrongly decided. The whole object of the provision is clear from the Explanatory memorandum and the literal language of the newly inserted definition clause which is to get over the two judgments of this Court referred to hereinabove. This is why “shareholder” now, post amendment, has only to be a person who is the beneficial owner of shares. One cannot be a registered owner and beneficial owner in the sense of a beneficiary of a trust or otherwise at the same time. It is clear therefore that the

moment there is a shareholder, who need not necessarily be a member of the Company on its register, who is the beneficial owner of shares, the Section gets attracted without more. To state, therefore, that two conditions have to be satisfied, namely, that the shareholder must first be a registered shareholder and thereafter, also be a beneficial owner is not only mutually contradictory but is plainly incorrect. Also, what is important is the addition, by way of amendment, of such beneficial owner holding not less than 10% of voting power. This is another indicator that the amendment speaks only of a beneficial shareholder who can compel the registered owner to vote in a particular way, as has been held in a catena of decisions starting from *Mathalone vs. Bombay Life Assurance Co. Ltd.*, [1954] SCR 117.

19. This being the case, we are prima facie of the view that the *Ankitech* judgment (*supra*) itself requires to be reconsidered, and this being so, without going into other questions that may arise, including whether the facts of the present case would fit the second limb of the amended definition clause, we place these appeals before the Hon'ble Chief Justice of India in order to constitute an appropriate Bench of three learned Judges in order to have a relook at the entire question.”

5. Thus, it is seen that what has been doubted by the Supreme Court in *National Travel Services* (*supra*) about the decision in *Ankitech Pvt. Ltd.* (*supra*) is only to the extent whether to attract Section 2(22)(e) of the Act, a shareholder need not be a registered shareholder but could be a beneficial owner of such shares. To the extent that *Ankitech Pvt. Ltd.* (*supra*) holds that the borrower cannot be fastened with the tax liability *qua* such deemed dividend the correctness of the said decision has not been doubted in *National Travel Services* (*supra*).

6. Turning to the impugned order of the ITAT the Court finds that it is consistent with the law explained by this Court in *Ankitech Pvt. Ltd.* (*supra*) as affirmed by the Supreme Court in *CIT v. Madhur Housing and Developing Company* (*supra*). In the present case the Assessee is only a borrower from VCIPL of a sum of Rs. 16.73 crores (which the AO has restricted to Rs. 6.40 crores to the extent of available accumulated profits). The ITAT further held that merely because Verizon Singapore holds more than 10% of the voting power in both VCIPL as well as the Assessee will not permit the Revenue to tax the aforementioned loan as a deemed dividend in the hands of the Assessee which is only the borrower.

7. Learned counsel for the Revenue took the Court through Section 2(22) (e) of the Act which defines the expression ‘dividend’ and urged that the Assessee can be proceeded to be taxed by treating the amount borrowed by it, only because Verizon Singapore holds more than 10% of the share holding of the Assessee. According to him the Assessee should be held to be a ‘beneficial shareholder’ which can compel Verizon Singapore to vote in a particular way.

8. A proper reading of Section 2(22)(e) of the Act can only lead to one conclusion, which is also what the ITAT concluded, viz., that the said amount which is borrowed by the Assessee from VCIPL, in which Verizon Singapore holds more than 10% of voting power can if it all, be taxed only as deemed dividend in the hands of Verizon Singapore and not the Assessee.

9. In that view of the matter, no substantial question of law arises. The appeal is dismissed.

S. MURALIDHAR, J.

TALWANT SINGH, J.

AUGUST 22, 2019 / mw