IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income-tax)
(Original Side)

Present:
The Hon'ble Mr. Justice Bhaskar Bhattacharya
And
The Hon'ble Mr. Justice Sambuddha Chakrabarti

I.T.A. No.219 of 2003

Pradip Kumar Malhotra
Versus
Commissioner of Income-tax, West Bengal-V

For the Appellant: Mr. J. P. Khaitan,
Mr. C. S. Das.

For the Respondent: Mr. P. K. Bhowmick.

Heard on. 14.07.2011

Judgment on: August 2, 2011.

Bhaskar Bhattacharya, J.:

This appeal under Section 260A of the Income-tax ("Act") is at the instance of an assessee and is directed against an order dated April 23, 2003 read with the order dated July 10, 2003 passed by the Income-tax Appellate Tribunal, "C" Bench, Kolkata, in ITA No.38(Kol) of 2002 for the Assessment Year 1999-2000 and thereby dismissing the appeal filed by the assessee.

Being dissatisfied, the assessee has come up with the present appeal.

The facts leading to the filing of the present appeal may be summarized thus:-

a) The appellant is assessed to tax under the Income-tax Act (hereinafter referred to as "the Act") and the present appeal arises out of the assessment for the Assessment Year 1999-2000 for which the relevant previous year was the Financial Year ending March 31, 1999.

b) The appellant has substantial shareholding in a private company called Sumoson Exports (P) Ltd. The appellant has his immovable property being plot No.22, Sector XIV, Gurgaon, Haryana which was let out to the said company on monthly rent. In the year 1987, the appellant permitted the company to provide the said property which was of substantial value, as collateral security to Vijaya Bank in order to enable the said company to obtain loan from the said bank.

c) Consequently, the property was mortgaged to the bank and in December, 1987, the Board of Directors of the company passed a resolution authorizing the appellant to obtain from the company interest-free deposit up to Rs.50,00,000/- as and when required for making available the said property as collateral security to the bank for the loan facility enjoyed by the company.

d) According to the appellant, he required funds for his personal needs and security including education of his son abroad. During the Financial Year 1997-98 relevant to the Assessment Year 1998-99, the appellant requested the said company to purchase the said property or to release the same so that the appellant could sell it to some other person. The said company, however, wanted to purchase the said property but subsequently finding itself unable to do so, tried to have it released. According to the appellant, being approached by the said company, the bank did not agree to release the property unless the same was replaced by another property by way of security and the company found that it was not possible for it to provide any other property as security. Accordingly, the said company requested the appellant to let the said property remain under mortgage and as already resolved by the Board in the December, 1987, the appellant was permitted to draw up to Rs.50,00,000/- from of interest in installment so as not to jeopardize the business of the company.

e) During the previous year relevant to the Assessment Year 1998-99, the appellant received from the said company, a sum of Rs.10,00,000/- as advance rent which was to be adjusted against the rent payable to the appellant by the said company. After such adjustment for the year ending on March 31, 1998, the amount of advance rent stood reduced to Rs.7,88,795/-.

f) The Assessing Officer in the assessment order for the Assessment Year 1998-99 sought to treat the said sum of Rs.7,88,795/- as deemed dividend under Section 2(22)(e) of the Act.

g) On appeal, the appellant succeeded before the Commissioner of Income-tax (Appeals) who by an order dated June 9, 2000 held that the said amount did not fall within the purview of Section 2(22)(e).

h) Against the said order dated June 9, 2000, the Revenue preferred an appeal before the Income-tax Appellate Tribunal. Before the Tribunal, it was contended on behalf of the Revenue that the Assessing Officer was not given any notice regarding hearing of the appeal before the Commissioner of Income-tax (Appeals) and as such, the provisions of Section 250(1) were violated. The Tribunal by its order dated October 30, 2002 accepted the said contention of the Revenue and set aside the said order dated June 9, 2000 and restored the appeal to the Commissioner of Income-tax (Appeals) with a direction to decide the same on merits after giving opportunity of being heard to both the parties.

i) During the previous year relevant to Assessment Year 1999-2000, the appellant obtained from the said company a sum of Rs.20,75,000/- by way of security deposit. Out of the said amount, a sum of Rs.20,00,000/- was subsequently returned by the appellant to the said company in the Financial Year 2001-2002.

j) According to the appellant, in the assessment made on September 18, 2001 for the Assessment Year 1999-2000, the Assessing Officer added the said sum of Rs.20,75,000/- as deemed dividend under Section 2(22)(e) by not following the decision of the Commissioner of Income-tax (Appeals) dated June 9, 2000 for the Assessment Year 1988-99 on the ground that the department was in appeal against the same before the Tribunal.

k) Being dissatisfied, the appellant preferred an appeal before the Commissioner of Income-tax (Appeals) who by an order dated December 19, 2001 following the appellate order dated June 9, 2000 for the Assessment Year 1998-99 deleted the said addition of Rs.20,75,000/-.

l) Being dissatisfied, the Revenue preferred an appeal before the Tribunal and the Bench of the Tribunal observed that since the Commissioner of Income-tax (Appeals) in the Assessment Year 1999-2000 had followed his order for the Assessment Year 1998-99 which had since been set aside by the Tribunal with a direction to the Commissioner of Income-tax (Appeals) to re-decide the appeal, the order of the Commissioner of Income-tax (Appeals) for the Assessment Year 1999-2000 should also be set aside and the matter should be remanded for a fresh decision.

m) In such circumstances, no submissions were allowed to be made on behalf of the appellant on merits nor were documents included in the paper book concerning the same considered by the Tribunal.

n) According to the appellant, on May 2, 2003, he was surprised to receive an order dated April 23, 2003 passed by the Tribunal upholding the order of the Assessing Officer even though at the time of hearing, the Tribunal had indicated that the matter would be remanded to the Commissioner of Income-tax (Appeals) for fresh decision. The appellant claimed that the Tribunal without examining any of the documents included in the paper book and without hearing of the appellant on merits wrongfully and illegally upheld the order of the Assessing Officer treating the said amount of Rs.20,75,000/- as dividend within the meaning of Section 2(22)(e).

o) Accordingly, the appellant immediately filed a miscellaneous application before the Tribunal for appropriate rectificatory order.

p) The said miscellaneous application was initially heard on June 6, 2003 when the Tribunal directed the appellant to file written submissions on the merits of the case. Accordingly, the appellant filed a detailed note of his submissions before the next date of hearing, namely, July 4, 2003 indicating the events that happened earlier.

q) The Tribunal, however, by an order dated July 10, 2003 rejected the miscellaneous application on the ground that there was no mistake which required rectification and the Tribunal could not review its earlier decision.

r) Being dissatisfied with the order dated April 23, 2003 read with the subsequent order dated July 10, 2003, the appellant has come up with the present appeal.

A Division Bench of this Court at the time of admission of this appeal formulated the following substantial questions of law:

"(i) Whether the Tribunal was justified in law in allowing the Revenue's appeal and upholding the treatment of the sum of Rs.20,75,000/- as dividend under section 2(22)(e) of the Income Tax Act, 1961 without granting any opportunity to the appellant to make his submissions on merits and without considering the documents placed on record by him in the Paper Book.

"(ii) Whether on a true and proper interpretation of section 2(22)(e) of the Income Tax Act, 1961 the Tribunal was justified in law in holding that the sum of Rs.20,75,000/- received by the appellant from M/s. Sumoson Exports (P) Ltd., because the appellant's valuable immovable property was mortgaged with the bank as security for the

loan facility enjoyed by the said company, was loan/advance/dividend to a shareholder within the meaning of the said section and the purported findings of the Tribunal in that behalf are arbitrary, unreasonable and perverse having been arrived at by ignoring the documents in the Paper Book before the Tribunal.

"(iii) In the event the answer to Question no.(ii) is in the affirmative, whether, and in any event, having regard to the provisions of sections 10(3) and 115-O of the Income Tax Act, 1961, the appellant was liable for any tax on the said sum of Rs.20,75,000/-."

At the very outset, Mr. Khaitan, the learned Senior Counsel appearing on behalf of the appellant, submitted that he does not want to press point Nos. 1 and 3 and wants to restrict his submission only on point No.2 on merit.

According to Mr. Khaitan, in the case before us, the amount of payment made by the company in favour of the appellant as a consequence of the fact that he has allowed his property to be mortgaged by the company before a bank, the said amount given by the company cannot be said to be a deemed dividend within the meaning of Section 2(22) (e) of the Act. In support of such contention, Mr. Khaitan has relied upon a Division Bench decision of Delhi High Court in the case of Commissioner of Income-tax Vs. Creative Dyeing and Printing P. Ltd., reported in [2009] 318 ITR 476 (Delhi). Mr. Khaitan further draws our attention by referring to the Income-tax Reports (Statutes) that the said decision against

such Revenue went in appeal but the Supreme Court dismissed the Special Leave Petition being S.L.P. (Civil) No.18197 of 2010. Mr. Khaitan further places reliance upon the decision of the Bombay High Court in the case of Commissioner of Income-tax Vs. Nagindas M. Kapadia, reported in [1989] 177 ITR 393 (Bom.). Mr. Khaitan further prays for setting aside the order passed by the Tribunal and for not treating the amount as deemed dividend.

Mr. Bhowmick, the learned Counsel appearing on behalf of the respondent, has, on the other hand, supported the order of the Assessing Officer and prayed for dismissal of the appeal.

The only question that arises for determination in this appeal is whether the amount of Rs.20,75,000/- released by the company in favour of the appellant can be said to be a deemed dividend within the meaning of Section 2(22)(e) of the Act.

In order to appreciate the said question, it will be profitable to refer to the provisions contained in Section 2(22) of the Act, which is quoted below:

"Section 2(22) .dividend" includes—

(a) any distribution by a company of accumulated profits, whether capitalised or not, if such distribution entails the release by the company to its shareholders of all or any part of the assets of the company;

(b) any distribution to its shareholders by a company of debentures, debenture-stock or deposit certificates in any form,

whether with or without interest, and any distribution to its preference shareholders of shares by way of bonus, to the extent to which the company possesses accumulated profits, whether capitalised or not;

(c) any distribution made to the shareholders of a company on its liquidation, to the extent to which the distribution is attributable to the accumulated profits of the company immediately before its liquidation, whether capitalised or not;

(d) any distribution to its shareholders by a company on the reduction of its capital, to the extent to which the company possesses accumulated profits which arose after the end of the previous year ending next before the 1st day of April, 1933, whether such accumulated profits have been capitalised or not;

(e) any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) made after the 31st day of May, 1987, by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power, or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern), or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits; but "dividend" does not include—

(i) a distribution made in accordance with sub-clause (c) or sub-clause (d) in respect of any share issued for full cash consideration, where the holder of the share is not entitled in the event of liquidation to participate in the surplus assets;

(i-a) a distribution made in accordance with sub-clause (c) or sub-clause (d) in so far as such distribution is attributable to the capitalised profits of the company representing bonus shares allotted to its equity shareholders after the 31st day of March, 1964, and before the 1st day of April, 1965;

(ii) any advance or loan made to a shareholder or the said concern by a company in the ordinary course of its business, where the lending of money is a substantial part of the business of the company;

(iii) any dividend paid by a company which is set off by the company against the whole or any part of any sum previously paid by it and treated as a dividend within the meaning of sub-clause (e), to the extent to which it is so set off;

[(iv) any payment made by a company on purchase of its own shares from a shareholder in accordance with the provisions of Section 77-A of the Companies Act, 1956;

(v) any distribution of shares pursuant to a demerger by the resulting company to the shareholders of the demerged company (whether or not there is a reduction of capital in the demerged company).]

Explanation 1.—The expression "accumulated profits", wherever it occurs in this clause, shall not include capital gains arising before the 1st day of April, 1946, or

after the 31st day of March, 1948, and before the 1st day of April, 1956.

Explanation 2.—The expression "accumulated profits" in sub-clauses (a), (b), (d), and (e) shall include all profits of the company up to the date of distribution or payment referred to in those sub-clauses, and in sub-clause (c) shall include all profits of the company up to the date of liquidation, but shall not, where the liquidation is consequent on the compulsory acquisition of its undertaking by the Government or a corporation owned or controlled by the Government under any law for the time being in force, include any profits of the company prior to three successive previous years immediately preceding the previous year in which such acquisition took place.

Explanation 3.—For the purposes of this clause,—

(a) "concern" means a Hindu undivided family, or a firm or an association of persons or a body of individuals or a company;

(b) a person shall be deemed to have a substantial interest in a concern, other than a company, if he is, at any time during the previous year, beneficially entitled to not less than twenty per cent of the income of such concern;"

(Emphasis supplied by us).

After hearing the learned Counsel for the parties and after going through the aforesaid provisions of the Act, we are of the opinion that the phrase "***by way of advance or loan***" appearing in sub-section (e) must be construed to mean

those advances or loans which a share holder enjoys for simply on account of being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power; but if such loan or advance is given to such share holder as a consequence of any further consideration which is beneficial to the company received from such a share holder, in such case, such advance or loan cannot be said to a deemed dividend within the meaning of the Act. Thus, for gratuitous loan or advance given by a company to those classes of share holders would come within the purview of Section 2(22) but not to the cases where the loan or advance is given in return to an advantage conferred upon the company by such share holder.

In the case before us, the assessee permitted his property to be mortgaged to the bank for enabling the company to take the benefit of loan and in spite of request of the assessee, the company is unable to release the property from the mortgage. In such a situation, for retaining the benefit of loan availed from Vijaya Bank if decision is taken to give advance to the assessee such decision is not to give gratuitous advance to its share holder but to protect the business interest of the company.

The view we propose to take finds support from the two decisions, one of the Bombay High Court and the other of the Delhi High Court relied upon by Mr. Khaitan as indicated earlier.

We, therefore, find that the authorities below erred in law in treating the advance given by the Company to the assessee by way of compensation to the assessee for keeping his property as mortgage on behalf of the company to reap the benefit of loan as deemed dividend within the meaning of Section 2(22) (e) of the Act.

We, consequently, set aside the order of the Tribunal below by directing the Assessing Officer not to treat the advance of Rs.20,75,000/- as a deemed dividend.

The appeal is, thus, allowed by answering the point No.ii in the affirmative and against the Revenue.

In the facts and circumstances, there will be, however, no order as to costs.

(Bhaskar Bhattacharya, J.)

I agree.

(Sambuddha Chakrabarti, J.)