IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "L", MUMBAI

BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER

ITA NO. 1003/MUM/2017 : **A.Y : 2010-11**

DCIT-1(1)(2), Mumbai (Appellant)	Vs.	M/s. Gilbarco Veeder Root India Pvt. Ltd., 1st floor, Tower No.1, Equinox Business Park [Peninsula Techno Park], Bandra Kurla Complex, Off LBS Marg, Kurla (W), Mumbai 400 051. (Respondent) **PAN : AADCG4992P**

Appellant by : Shri Samuel Darse
Respondent by : Shri Ketan Ved

Date of Hearing : 03/04/2018
Date of Pronouncement : 20/06/2018

O R D E R

PER G.S. PANNU, AM :

The captioned appeal by the Revenue is directed against the order of CIT(A)-2, Mumbai dated 16.11.2016, pertaining to the Assessment Year 2010-11, which in turn has arisen from the order passed by the Assessing Officer, Mumbai dated 29.02.2016 under section 143(3) r.w.s. 147 of the Income Tax Act, 1961 (in short 'the Act').

2. In this appeal, Revenue has raised the following Grounds of appeal (Revised ground)

"1. Whether on the facts and circumstances of the case and in Law, the Ld.CIT(A) was right in deleting the addition of Rs.90 crores as deemed dividend u/s.2(22)(e) of the I T Act, 1961

2. Whether on the facts and in the circumstances of the case and in Law, the Ld.CIT(A) was right in deleting the addition of Rs.90 crores as deemed dividend u/s.2(22)(e) of the I T Act, 1961 considering the subsequent decision of Hon. Supreme Court in the case of Gopal and Sons (HUF) vs CIT Kolkata dated 07.01.2017 in Civil Appeal No. 12274 of 2016 wherein it was held that in the light of Explanation 3 to section 2(22)(e) of the Act, the amount received by the 'concern' is taxable in the hands of the 'concern'

3. Whether on the facts and circumstance of the case and in law, the ld.CIT(A) was right in holding that the Intercorporate Deposit given the the assessee is a deposit just by placing reliance on description given by the assessee as 'Intercorporate Deposit (ICD)' without ascertaining whether such Intercorporate deposit is infact a deposit or a loan.

4. Whether on the facts and circumstance of the case and in law, whilst it is true that it is the obligation of Assessing Officer to conduct proper scrutiny of material, given the fact that the Assessing Officer did not examine whether the Intercorporate Deposit (ICD) is a deposit of a loan, so as to attract the provisions of sec2(22)(e(of the Act, the obligation to conduct proper inquiry would shift to ld. CIT(A) in view of the decision of Hon. Delhi Court in the case of CIT II vs Jansampark Advertising and Marketing P Ltd in ITA No 525/2014 dated 11.03.2015."

3. As a perusal of the Grounds of appeal reveal, the solitary issue arises from the action of CIT(A) in deleting the addition of Rs. 90 crores made by the Assessing Officer treating such sum as 'deemed dividend' within the meaning of Sec. 2(22)(e) of the Act.

4. Briefly put, the relevant facts are that the appellant is a company incorporated under the provisions of the Companies Act, 1956 and is, *inter-alia*, engaged in the business of manufacture and sale of petrol dispensers, related accessories apart from carrying on maintenance services and research & development activity. A return of income was filed by the assessee on 15.10.2010 declaring a loss of Rs.15,01,86,230/- and assessment u/s 143(3) of the Act was completed on 22.03.2014 assessing the loss at Rs.14,97,30,670/-. Subsequently, the Assessing Officer reopened the assessment by issuing notice u/s 148 of the Act and in the ensuing assessment, an addition of Rs. 90 crores has been made by invoking Sec. 2(22)(e) of the Act, which is the subject matter of appeal before us. In this context, the Assessing Officer noted that assessee had received a sum of Rs.90 crores from one, M/s. Portescap India Pvt. Ltd. (hereinafter referred to as 'Portescap'). It was further noticed by the Assessing Officer that there was common shareholder, both in the assessee-company and Portescap. The 100% shareholding of assessee-company is held by one, M/s. Kollmorgen India Investment Company, Mauritius (hereinafter referred to as 'Kollmorgen') while so far as the shareholding of Portescap is concerned, it was also entirely held by Kollmorgen, albeit 99.99% directly and 0.01% through its nominee, Mr. Jim Eder. The amount received from Portescap was sought to be taxed by the Assessing Officer on the strength of Sec. 2(22)(e) of the Act. Before the Assessing Officer, assessee made varied submissions. Firstly, assessee explained that the amount in question was received in three tranches during the year as Inter Corporate Deposit (ICD) and not as any 'loan' or 'advance' so as to be covered by Sec. 2(22)(e) of the Act. Secondly, it was canvassed that even if the ICD was to be understood as loan for the purpose of Sec. 2(22)(e) of the Act, it would not be covered

under the said section as it was raised for a specific purpose. Assessee pointed out that the ICD was availed from Portescap for a specific purpose, i.e. to pay the purchase consideration for acquiring the Petrol Dispensing Pumps and Systems Division of Larsen & Toubro Ltd. Without prejudice to the above submissions, assessee also pointed out that even if the amount was to fall within the purview of Sec. 2(22)(e) of the Act, the same could not be taxed in its hands as it was not a shareholder or member of the lending company, i.e. Portescap.

5. The Assessing Officer considered the submissions. Firstly, with regard to the plea of ICD, the Assessing Officer held that every kind of lending would be covered by the expression 'loan' and 'advance' for the purposes of Sec. 2(22)(e) of the Act. On the alternate plea, the Assessing Officer inferred that the impugned sum was covered by the second category of payments referred to in Sec. 2(22)(e) of the Act, namely, the recipient of the amount being a concern in which the shareholder has a substantial interest. For the said reason, the Assessing Officer treated the receipt of Rs.90 crores from Portescap as deemed dividend u/s 2(22)(e) of the Act.

6. Before the CIT(A), assessee reiterated the submissions made before the Assessing Officer. Apart therefrom, assessee also pointed out that it was incorporated on 13.07.2009 as a wholly owned subsidiary of one, M/s. Videojet Technologies India Pvt. Ltd. (hereinafter referred to as 'Videojet') and that only subsequently, vide an agreement with Kollmorgen dated 17.03.2009 (which was registered on 29.03.2010), the shareholding was transferred to Kollmorgen. Assessee explained that the impugned sums were received in three instalments, namely, Rs.24 crores on 29.10.2009,

Rs.26 crores on 02.03.2010 and the balance Rs.40 crores on 03.03.2010. On this basis, a plea was raised that on the dates when the amounts were advances by Portescap to the assessee-company, there was no common shareholding inasmuch as Kollmorgen became a registered shareholder on 29.03.2010, which is posterior to the impugned payments made to the assessee-company. It was, therefore, contended that Kollmorgen was not a shareholder of the assessee-company when it received the ICD from Portescap and it was only subsequent to the disbursement of the ICD that Kollmorgen has purchased the shares from Videojet. Therefore, as per the assessee, Sec. 2(22)(e) of the Act could not be invoked *qua* the impugned sums in the absence of any common shareholding on the date of advancing of ICDs. Before the CIT(A), assessee also pointed out that assessability of such sums in the hands of the assessee was wrong inasmuch as the amount was liable to be taxed in the hands of the shareholder and not in the hands of the recipient-assessee. In nut-shell, the plea of the assessee was that Sec. 2(22)(e) of the Act was inapplicable in the instant case. The CIT(A) accepted the plea of the assessee principally on the ground that the deemed dividend could not be assessed in the hands of the assessee-company as it was not a shareholder in Portescap from whom such sum was received. In coming to such a decision, the CIT(A) has relied on a host of judicial pronouncements, including the judgments of the Hon'ble Bombay High Court in the case of (i) CIT vs *Universal Medicare (P.) Ltd., 324 ITR 263 (Bom.), (ii) CIT vs Impact Containers, 367 ITR 346 (Bom.) and (iii) CIT vs NSN Jewellers (P) Ltd., Income Tax Appeal no. 2312 of 2011 (Bombay HC).* Against such a decision of the CIT(A), Revenue is in appeal before us.

7. Before us, the ld. DR has assailed the order of CIT(A) by pointing out that in view of the judgment of the Hon'ble Supreme Court in the case of *Gopal and Sons (HUF) vs CIT, Kolkata-XI, (2017) 77 taxmann.com 71 (SC),* the amount received by the assessee-company is taxable in the hands of the concerned recipient also and not the registered shareholder only.

8. On the other hand, the learned representative for the assessee has defended the decision of the CIT(A) by pointing out that the judgment of the Hon'ble Supreme Court in the case of *Gopal and Sons (HUF) (supra)* is wholly inapplicable as it has been rendered under different fact-situation. In support of his proposition, reliance has been placed on the judgment of the Hon'ble Madras High Court in the case of *PCIT vs M/s. Ennore Cargo Container Terminal P. Ltd., T.C (A) Nos. 105 and 106 of 2017* dated 27.03.2017, which has been rendered under identical circumstances, a copy of which has been placed on record.

9. We have carefully considered the rival submissions. The appellant before us is a company which has received a sum of Rs.90 crores from other concern, i.e. Portescap. The assessee-company as well as the other concern, i.e. Portescap, have common shareholders inasmuch as the entire shareholding of the assessee-company as well as that of Portescap is held by Kollmorgen, either by itself or through its nominee. The case of the Assessing Officer is that the amount of Rs.90 crores received by the assessee-company from Portescap is assessable as 'deemed dividend' u/s 2(22)(e) of the Act. The CIT(A) has rejected the stand of the Assessing Officer primarily on the ground that 'deemed dividend' can only be assessed in the hands of the registered shareholder, and that the assessee-company is

not a shareholder of Portescap. The Revenue contends, and as is manifested in the assessment order, that Sec. 2(22)(e) of the Act, *inter-alia*, includes in its sweep payment to any concern in which such shareholder is a member or a partner and has a substantial interest.

10. We have considered this aspect of the matter as also the provisions of Sec. 2(22)(e) of the Act. Shorn of other details, Sec. 2(22)(e) of the Act covers within its sweep three categories of payments. Firstly, the payment by way of loan or advance to a shareholder; secondly, payment to any concern in which such shareholder is a member or a partner; and, thirdly, any payment made on behalf of or for the individual benefit of any such shareholder. Ostensibly, assessee-recipient is not a shareholder in the payer company, i.e. Portescap and, therefore, it is not covered by the first category of payment. In fact, it is the second category which is sought to be invoked by the Assessing Officer. No doubt, there is a common shareholder, both in the assessee-company and Portescap, and even if we were to assume that the amount received by the assessee-company is for the benefit of the stated aforesaid common shareholder, yet, it could only be assessed in the hands of such registered shareholder and not in the hands of the assessee-company. This proposition has been relied upon by CIT(A) to delete the addition, and which is well supported by the judgments of the Hon'ble Bombay High Court in the case of *Universal Medicare (P.) Ltd. (supra), Impact Containers (supra) and NSN Jewellers (P) Ltd.* (supra). Thus, we find no justifiable ground to interfere in the conclusion drawn by the CIT(A).

11. So far as the reliance placed by the Revenue on the judgment of the Hon'ble Supreme Court in the case of *Gopal and Sons (HUF) (supra)* is

concerned, the same, in our view, is quite inapplicable to the facts of the present case. Firstly, the assessee before the Hon'ble Supreme Court was a HUF and the issue was as to whether the loans and advances received by the HUF could be treated as 'deemed dividend' within the meaning of Sec. 2(22)(e) of the Act. Notably, in the case before the Hon'ble Supreme Court, the payment was made by the company to the HUF and the shares in the company were held by the *karta* of the HUF. It is in this context that the Hon'ble Supreme Court upheld the addition in the hands of the HUF as factually the HUF was the beneficial shareholder. The fact-situation in the case before us stands on an entirely different footing inasmuch as the assessee-recipient of money is neither the registered nor the beneficial shareholder of the payer company, i.e. Portescap. Ostensibly, the common registered as well as beneficial shareholder of assessee-company and Portescap is Kollmorgen and not the assessee-company. Therefore, the decision of the Hon'ble Supreme Court in the case of *Gopal and Sons (HUF) (supra)* is inapplicable to the facts of the present case. In fact, the learned representative for the respondent-assessee has correctly placed reliance on the judgment of the Hon'ble Madras High Court in the case of *M/s. Ennore Cargo Container Terminal P. Ltd. (supra),* which has been rendered in a somewhat identical situation. In order to elaborate the point, the following discussion in the judgment of the Hon'ble Madras High Court, which is reproduced hereinafter, would show that in the present circumstances before us, the ratio of the decision of the Hon'ble Supreme Court in the case of *Gopal and Sons (HUF) (supra)* is not attracted :-

> *"4.2 The Revenue seeks to assess as income the capital advance received by the assessee-company from Indev Logistics Pvt. Ltd. on the ground that it is deemed dividend received by the assessee-company for the benefit of*

the registered shareholder. For this purpose, the provisions of Section 2(22)(e) of the Income-tax Act, 1961 (in short 'the Act') is sought to be relied upon. The Tribunal has rejected the said contention of the Revenue, principally, on the ground that deemed dividend can only be assessed in the hands of the registered shareholder for whose benefit the money was advanced.

4.3 As indicated above, there is no dispute that the assessee did receive capital advance from Indev Logistics Pvt. Ltd. There is also no dispute that there are common shareholders both in the assessee-company and Indev Logistics Pvt. Ltd. Therefore, quite correctly, as noted by the Tribunal, though, the advance received by the assessee company may have been for the benefit of the aforementioned registered shareholders, it could only be assessed in the hands of those registered shareholders and not in the hands of the assessee-company.

4.4 In our view, on a plain reading of the provisions of Section 2 (22)(e) of the Act, no other conclusion can be reached. As a matter of fact, a Division Bench of this Court, in the case of Commissioner of Income Tax vs. Printwave Services P. Ltd., (2015) 373 ITR 665 (Mad.), has reached a somewhat similar conclusion.

5. Mr. Senthil Kumar, however, contends to the contrary and relies upon the judgment of the Supreme Court in Gopal and Sons (HUF) vs. Commissioner of Income-tax, Kolkata-XI, (2017) 77 taxmann.com 71 (SC).

5.1 In our view, the question of law considered by the Supreme Court in the case of Gopal and Sons (supra) was different from the issue which arises in the present matter. The question of law which the Supreme Court was called upon to consider was whether loans and advances received by a HUF could be deemed as a dividend within the meaning of Section 2(22)(e) of the Act. The assessee in that case was the HUF and the payment in question was made to the HUF. The shares were held by the Karta of the HUF. It is in this context that the Supreme Court came to the conclusion that HUF was the beneficial shareholder.

5.2 In the instant case, however, both the registered and beneficial shareholders are two individuals and not the assessee-company. Therefore, in our view, the judgment of the Supreme Court does not rule on the issue which has come up for consideration in the instant matter."

12. Thus, in view of the aforesaid discussion, we hereby affirm the decision of CIT(A) and Revenue fails in its appeal.

13. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on 20th June, 2018.

Sd/-	Sd/-
(RAM LAL NEGI)	**(G.S. PANNU)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Date : 20th June, 2018

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Copy to :

1) The Appellant
2) The Respondent
3) The CIT(A) concerned
4) The CIT concerned
5) The D.R, "L" Bench, Mumbai
6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai