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

INCOME TAX APPEAL NO. 197 OF 2013

Commissioner of Income Tax,
Central IV .. Appellant.
V/s.
Jignesh P. Shah .. Respondent.

Mr. Arvind Pinto, for the Appellant.
Mr. Mihir Naniwadekar, for the Respondent.

CORAM: M.S.SANKLECHA, &
G.S.KULKARNI, JJ.
DATE : 20th JANUARY, 2015.

P.C:-

This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 8th May, 2012 passed by the Income Tax Appellate Tribunal (the Tribunal) for the Assessment Year 2007-08.

2 The Revenue has formulated the following re-framed question of law for our consideration:

> *" Whether the facts and in the circumstances of the case and in law, the Tribunal is right in placing reliance on the judgment in the case of ACIT v/s. M/s. Bhaumik Colours Pvt. Ltd. whereas in the instant case, the assessee is a registered and beneficial share holder of a company that has given loans to a third company that lent these, monies to the Assessee?".*

3 We find that the impugned order has upheld the order of the CIT(A) dated 28th March, 2011, holding that the issue arising before it

was covered by the decision of the Special Bench of the Tribunal in ***Bhaumik Colours Pvt. Ltd. 313 ITR 146 (AT)*** read with decision of this Court in CIT v/s. Universal Medicare Pvt. Ltd. 324 ITR 263. It is pertinent to note that in paragraph 6 of the impugned order, Tribunal recorded as under:-

> ***"6:-*** *At the time of hearing, no one appeared on behalf of assessee in spite of giving notice. However, ld. D. R. fairly conceded that the issue involved is covered in favour of assessee by the decision of ITAT (SB) in the case of Bhaumik Colours P Ltd (supra). Further, ld. D. R. referred to the decision of Hon'ble Apex Court in the case of L Alagusundaram Chettiar vs. CIT 252 ITR 893 (SC) but when it was pointed out that the said decision pertains to section 2(6A) (e) of 1922 Act, and whereas the decision by ITAT in the case of Bhaumik Colours (supra) is under 1961 Act and similar view has been taken by Hon'ble Bombay High Court in the case of Commissioner of Income Tax vs. Universal Medicare Private Limited 324 ITR 263 (Bom.), ld. D. R. submitted that she dutifully relies on the decision of Assessing Officer."*

4 In view of the above, we indicated to Mr. Pinto, learned Counsel appearing for the Revenue that it appears that the Revenue had conceded before the Tribunal that the issue involved in the Appeal before it is covered by the Special Bench of the Tribunal. However, Mr. Pinto submitted that if paragraph 6 is read in its entirety it would be evident that Departmental Representative appearing for the Revenue had relied upon the decision of the Assessing Officer and not upon the decision referred to earlier. Although we do not agree with the above submission as our reading of the above paragraph is that Departmental Representative placed reliance upon the decision of the Assessing Officer in support of her submission that the decision of the Supreme Court in ***L Alagusundaram Chettiar vs. CIT 252 ITR 893*** supports the case of the

Revenue. At that time, the Tribunal pointed out that same deals with deemed dividend under Income Tax Act, 1922 while the decision of this High Court in Universal Medicare Pvt. Ltd. (supra) deals with Act.

5 Be that as it may to avoid needless controversy, we have considered the challenge of the Revenue to the impugned order independently and not shut out the Revenue because of the concession made by it before the Tribunal.

6 The undisputed facts are that the assessee received loan from one M/s. NS Fincon Pvt. Ltd. The Revenue seeks to tax this loan as deemed dividend. The case of the Revenue before us is that one M/s. La-fin Financial Services Pvt. Limited had advanced money to M/s. NS Fincon Pvt. Ltd. who in turn advanced money to the Respondent-Assessee. The Respondent-Assessee a 50% share holder of M/s. La-fin Financial Services Pvt. Limited and in view thereof, loan advanced by M/s. NS Fincon Pvt. Ltd. to the Respondent-Assessee is to be treated as a dividend in the hands of Respondent-Assessee. It is also an admitted position that the Respondent-Assesee is not a share holder in M/s. NS Fincon Pvt. Ltd. The Assessing Officer brought to tax the amount of loan received by the Respondent-Assesee from M/s. NS Fincon Pvt. Ltd. as deemed dividend under Section 2 (22)(e) of the Act.

7 On Appeal, the CIT(A) held that the loan given by M/s. NS Fincon Pvt. Ltd to the Respondent-Assessee is not the payment made by it to its share holder. Thus, Section 2 (22)(e) of the Act could have no application. The CIT(A) further held that Section 2 (22)(e) of the Act creates a fiction by bringing to tax an amount as dividend when the amount so received is otherwise then dividend. Therefore, Section 2(22)

(e) of the Act has to be strictly read.

8 On further appeal to the Tribunal by the Revenue, the impugned order placed reliance upon the decisions of this Court in Universal Medicare (P) Ltd. (supra) read with its decision in Bhaumik Colours (P) Ltd. (supra) and the decision of Rajasthan High Court in ***CIT v/s. Hotel Hilltop 313 ITR 116*** to uphold the order of the Commissioner of Income Tax (Appeals). Thus upholding the conclusion that deemed dividend can be assessed only in the hands of a shareholder of the lender company. In this case, the Respondent-Assessee is admittedly not the shareholder of M/s. NS Fincon (P) Ltd.

9 This Court in the case of Universal Medicare (supra) while approving the decision of the Special Bench of the Tribunal in Bhaumik Colours (supra) inter alia observed that:

> *" All payments by way of dividend have to be taxed in hands of the recipient of the dividend namely the share holder.*
> … … …. …
> *Consequently, the effect of clause (e) of Section2 (22) is to broaden the ambit of the expression 'dividend' by including certain payments which the company has made by way of a loan or advance or payments made on behalf of or for the individual benefit of a share holder. The definition does not alter the legal position that dividend has to be taxed in the hands of the shareholder."*

10 Further, this Court in the case of ***CIT v/s. Impact Containers Pvt. Ltd. - 367 ITR 346*** while dealing with the issue of deemed dividend categorically held that Section 2(220(e) of the Act cannot be applied/ invoked where the assesee is not a shareholder of the leading company. The objective of Section 2(22)(e) of the Act is only to ensure that the

Company in which the public are not substantially interested would not distribute its prosperity amongst shareholders by calling them the loan/ advances, as tax would be payable if the same were distributed as dividend.

11 The submission on behalf of the Revenue made before us is that one has to look at the substance of the transaction and that if one looks at the substance, then the Respondent-Assessee would be chargeable to tax. This is not acceptable as fiscal status have to be interpreted strictly. We can do no better then meet the submission of the Revenue by inviting attention to the decision of the Supreme Court in ***CIT v/s. Vatika Township 2015 (1) SCC 1*** wherein it has been observed as under:-

> *"**41.2:-** At the same time, it is also mandated that there cannot be imposition of any tax without the authority of law. Such a law has to be unambiguous and should prescribe the liability to pay taxes in clear terms. If the provision concerned of the taxing statue is ambiguous and vague and as susceptible to two interpretations, the interpretation which favours the subjects, as against the Revenue, has to be preferred. This is a well-established principle of statutory interpretation, to help finding out as to whether particular category of assessee is to pay a particular tax or not. No doubt, with the application of this principle, the courts make endeavour to find out the intention of the legislature. At the same time, this very principle is based on "fairness" doctrine as it lays down that if it is not very clear from the provisions of the Act as to whether the particular tax is to be levied to a particular class of persons or not, the subject should not be fastened with any liability to pay tax. This principle also acts as a balancing factor between the two jurisprudential theories of justice – Libertarian theory on the one hand and Kantian theory along with Egalitarian theory propounded by John Rawls on the other hand.*
>
> *41.3 Tax laws are clearly in derogation of personal*

rights and property interests and are, therefore, subject to strict construction, and any ambiguity must be resolved against imposition of the tax.

…. …. …. ….

41.4 Again as United States v. Merraim, the Supreme Court clearly stated at US pp. 187.88

" On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear impost of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favour of the taxpayer. Gould v. Gould L Ed p. 213: Usp 153.

41.5 As Lord Carins said many years ago in Partington v. Attorne General (LR p. 122)

"…. as I understand the principle of all fiscal legislation it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however, apparently within the spirit of the law the case might otherwise appear to be."

Thus on strict interpretation of Section 2(22)(e) of the Act, unless the Respondent-Assessee is the shareholder of the company lending him money, no occasion to apply it can arise.

12 In the present facts, it is an admitted position that Respondent-Assessee is not a shareholder of M/s. NS Fincon Pvt. Ltd. from whom he has received loan. Therefore, no fault can be found with the decision of the Tribunal in having followed the decision of the High Court

in Universal Medicare (supra). This view has been further reiterated by another Division Bench of this Court in Impact Containers (supra) rendered on 4th July, 2014.

13 We are of the view that as the issue raised by the Revenue stands concluded by the order of this Court, no substantial question of law arises for our consideration. Accordingly, **Appeal dismissed**. No order as to costs.

(G.S.KULKARNI,J.) **(M.S.SANKLECHA,J.)**