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

INCOME TAX APPEAL (IT) NO. 722 OF 2015

Shri. Sahir Sami Khatib]
Plot No.25 "Shoa", Greater Bombay Co-op.]
Society, Gulmohar Cross Road No.5 JVPD]
Scheme, Mumbai- 400 049.] ...Appellant.

Vs.

Income Tax Officer -8 (2)-3]
Room No.213, 2nd Floor, Aayakar Bhavan]
M.K.Road, Mumbai 400 020] ...Respondent.

WITH
INCOME TAX APPEAL (IT) NO. 724 OF 2015

Shri. Sarosh Sami Khatib]
Plot No.25 "Shoa", Greater Bombay Co-op.]
Society, Gulmohar Cross Road No.5 JVPD]
Scheme, Mumbai- 400 049.] ...Appellant.

Vs.

Income Tax Officer -8 (2)-3]
Room No.213, 2nd Floor, Aayakar Bhavan]
M.K.Road, Mumbai 400 020] ...Respondent.

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Ms Shobha Jagtiani a/w Mr Ravi Rattesar I/b D.M.Harish and Co. for the appellant in both the appeals.
Mr Akhileshwar Sharma for the Respondent in both the appeals.

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CORAM : S. C. DHARMADHIKARI &
B.P.COLABAWALLA, JJ.

RESERVED ON : 10th September, 2018

PRONOUNCED ON : 3rd October, 2018

JUDGMENT [Per B. P. Colabawalla J.]:

1. By these two appeals filed under Section 260A of the Income Tax Act, 1961 (for short the **"I. T. Act, 1961"**), the appellant – assessee challenges two separate orders of the Income Tax Appellate Tribunal, E-Bench, Mumbai (for short the **"ITAT"**), by which the ITAT allowed the appeals filed by the revenue and restored the order of the Assessing Officer (for short the **"A.O."**). Both these appeals relate to the Assessment Year (for short **"A.Y."**) 2007-08. Income Tax Appeal No. 722 of 2015 has been filed by one Sahir Sami Khatib and Income Tax Appeal No. 724 of 2015 has been filed by one Sarosh Sami Khatib. Both these appeals are almost identical, and therefore, are being disposed of by this common Order and Judgment. Considering that the facts are almost identical, for the sake of convenience, we shall refer to the facts in Income Tax Appeal No. 722 of 2015.

2. The appellant – assessee is a shareholder in a company known as M/s Medley Laboratories Pvt. Ltd. (for short "**M/s**

MLPL") and M/s Oryx Fisheries Pvt. Ltd. (for short "**M/s OFPL**"). The appellant holds 15% equity shares in M/s MLPL and 45% equity shares in M/s OFPL. During the A.Y. 2007-08, M/s MLPL (lender) had given a loan / advance of Rs.91,85,874/- to its sister concern M/s OFPL (borrower). The appellant filed his return of income for A.Y. 2007-08 on 31.07.2007 declaring a total income of Rs.20,24,512/-. Considering that the appellant was a registered as well as a beneficial shareholder of both M/s MLPL and M/s OFPL, relying on the decision of the ITAT in the case of **ACIT** Vs **Bhaumik Colours Pvt. Ltd. (313 ITR 146)** the A.O. treated this loan (along with interest) of Rs.99,86,874/- as a deemed dividend under Section 2(22)(e) of the I. T. Act, 1961 in the hands of the appellant on a protective basis. The reason why the same was done on a protective basis was because this loan in question was also treated as a deemed dividend in the hands of the borrower company (M/s OFPL) and assessed as such on a substantive basis.

3. Being aggrieved by the order of the A.O., the appellant – assessee preferred an appeal before the Commissioner of Income Tax (Appeals) [for short "**CIT(A)**"] who deleted the addition made under Section 2(22)(e) of the I. T. Act, 1961, on the ground that the loan was not received by the assessee but by M/s OFPL. The CIT(A) was

further of the view that this addition of **deemed dividend** was already made on a substantive basis in the hands of M/s OFPL. For all these reasons, the CIT(A) set aside the order of the A.O.

4. Being aggrieved by the Judgment and Order of the CIT(A), the revenue approached the ITAT. Before the ITAT it was *inter alia* pointed out that the addition made under Section 2(22)(e) of the I.T.Act, 1961 in the hands of M/s OFPL had already been deleted by the ITAT by following the decision in the case of **Bhaumik Colour Pvt. Ltd.** (**313 ITR 146**) wherein it was held that no addition can be made under Section 2(22)(e)of the I.T.Act, 1961 other than to the beneficial share holder of the company. It was submitted before the ITAT that, admittedly the appellant – assessee was holding more than 10% shareholding in M/s MLPL (the lender company) and also having a substantial interest in M/s OFPL (the borrowing company). It was submitted before the ITAT that the appellant – assessee was holding 45% of the shareholding in M/s OFPL. This being the case, it was submitted that the provisions of Section 2(22)(e) of the I. T. Act, 1961 were clearly attracted and the loan given by M/s MLPL to M/s OFPL was assessable as a **deemed dividend** in the hands of the appellant – assessee. The appellant – assessee, on the other hand, submitted before the ITAT that the order passed by the Tribunal in

the case of M/s OFPL was already challenged before this Court, and therefore, the revenue could not assess the same income in the hand of two assessees. It was further submitted that even the addition under Section 2(22)(e) of the I.T.Act, 1961 could not be made in full in the hands of the appellant – assessee when there are other shareholders of the borrowing company (M/s OFPL) and it cannot be termed that the entire benefit had been taken by the appellant – assessee alone. In short it was the case of the appellant – assessee before the ITAT that the addition, if any, under Section 2(22)(e) of the I. T. Act, 1961 should be proportionate to the shareholding of the assessee in the borrowing company (M/s OFPL). After hearing the revenue and the assessee, the ITAT, relying upon the decision of this Court in the case of **CIT** Vs **Universal Medicare Pvt. Ltd. (324 ITR 263)** allowed the appeal filed by the revenue. The ITAT also held that under the provisions of Section 2(22)(e) of the I. T. Act, 1961, two conditions were required to be fulfilled, namely, that the assessee would have to have not less than 10 % of the voting power in the lending company and a substantial interest in the borrowing company. Since, both these conditions were satisfied, in absence of any provision for proportionate addition, nothing could be read into to the unambiguous language of Section 2(22)(e) of the I. T. Act, 1961. It is being aggrieved by this order of the ITAT that the

appellant - assessee is before us under Section 260A of the I.T.Act, 1961.

5. We must mention that as far as Income Tax Appeal No. 724 of 2015 is concerned, the facts are almost identical except that that the appellant in this appeal holds 15% equity shares in M/s MLPL and 99% equity shares in M/s Steranco Health Care Pvt. Ltd (for short **"M/s SHCPL"**). The loan given by M/s MLPL to M/s SHCPL is also different, namely, to the tune of Rs.27.25 Lacs. Other than this, there is no difference between the two appeals.

6. In this factual backdrop, Ms Jagtiani, learned advocate appearing on behalf of the both appellants, submitted that the impugned orders passed by the ITAT, gave rise to the following substantial questions of law and which read as under:-

> "**(I) Whether on facts and circumstances of the case and in law, the Hon'ble ITAT has erred in proceeding to convert the protective assessment into a substantive assessment, by confirming the entire addition of Rs.99,36,274/- u/s 2(22)(e).**
>
> **(II) Whether on facts and circumstances of the case and in law, the Hon'ble ITAT has erred in not setting aside / remanding the protective assessment, to the Assessing Officer, for the purposes of adjudicating whether and to what extent the addition needed to be confirmed in the hands of the Appellant as the shareholder was not the recipient of any loan or advance.**

(III) Without prejudice, whether on facts and circumstances of the case and in law, the Hon'ble ITAT erred in rejecting the contention that the addition u/s 2(22)(e), should be restricted only to the extent of the shareholder's proportionate shareholding in the Company, which was 15 % in the hands of Lender Company and 45 % shareholding in the hands of the Borrower Company.

(IV) Whether on facts and circumstances of the case and in law, the Hon'ble ITAT failed to consider that the application of Section 2(22)(e) would lead to a patent absurdity, if the shareholder who is not the recipient but has a limited interest in the concern (which has received the loan/ advance), is taxed in respect of the entire amount of deemed dividend.

(V) Whether on facts and circumstances of the case and in law, the Hon'ble ITAT erred in holding that in the absence of specific provisions for making proportionate addition u/s 2(22)(e), the entire amount will be taxed in the hands of the shareholder who only holds a percentage of the shareholding.

(VI) Without prejudice, whether on facts and circumstances of the case and in law, the Hon'ble ITAT ought to have held that if there is no specific provisions or just mechanism to tax different shareholders with respect to their proportionate interest, therefore the entire charge fails."

7. Ms Jagtiani submitted that the ITAT erred in converting the protective assessment into a substantive assessment by confirming the entire addition of **deemed dividend** in the hands of the assessee. She submitted that the ITAT ought to have remanded the protective assessment (in part) to the A.O. for the purposes of

adjudicating whether and as to what extent the addition needs to be confirmed in the hands of the appellant – assessee, as the shareholder was not the recipient of any loan or advance.

8. Her further submission was that, in any event, the addition, if any, under Section 2(22)(e) of the I.T.Act, 1961, could be restricted only to the extent of the appellant – assessee's proportionate shareholding in the borrowing company (M/s OFPL). She submitted that other than the appellant – assessee there were also other shareholders of M/s OFPL, and therefore, it was highly unfair if the entire addition was made in the hands of the appellant – assessee. She submitted that if there is no specific provision or a just mechanism to tax different shareholders with respect to their proportionate interest, the entire charging section fails and on this ground also the order impugned herein gives rise to a substantial question of law. Considering all this, Ms Jagtiani submitted that the questions of law as proposed by her and as reproduced by us above, give rise to substantial questions of law that require consideration by this Court under Section 260A of the I. T. Act, 1961. In support of her propositions, Ms. Jagtiani relied upon the following decisions:-

(i) **The Commissioner of Income Tax** Vs. **Impact Containers Pvt. Ltd.** [**(2014) 367 ITR 346 (Bom)**];

(ii) **The National Travel Services** Vs **Commissioner of Income Tax, Delhi VIII,** (**Civil Appeal No.2068-2071 of 2012 decided on 18th January, 2018)**; and

(iii) **Puneet Bhagat** Vs **Income Tax Officer, Ward 1(2), New Delhi (in ITA Nos.3025/Del/2015 and ITA No. 3026/Del/2015 decided on 16th December, 2015 by the ITAT Delhi.).**

9. On the other hand, Mr Akhileshwar Sharma, learned advocate appearing on behalf of the Respondent – revenue, supported the order of the ITAT as well as the order of the A.O. He submitted that the reasoning given by the ITAT cannot be faulted and which certainly would not give any rise to the substantial question of law that would require any consideration by this Court. He submitted that the ITAT, whilst coming to its conclusions, had followed the law as laid down by this Court in the case of **Universal Medicare Pvt. Ltd. (supra)** and hence, no interference was called for in the impugned order. Consequently, he submitted that these appeals be dismissed with costs.

10. We have heard the learned counsel for parties at length and have perused the papers and proceedings in the present appeal including the orders passed by the A.O., CIT(A) as well as that of the ITAT. We find considerable force in the argument of Mr Sharma that

these appeals do not give rise to any substantial question of law.

11. It is not in dispute before us that the appellant in Income Tax Appeal No.722 of 2015 is a 15% shareholder in M/s MLPL and a 45% shareholder in M/s OFPL. Similarly, it is also not in dispute that the appellant in Income Tax Appeal No. 724 of 2015 is a 15% shareholder in M/s MLPL and a 99% shareholder in M/s SHCPL. In both these appeals, it was found that M/s MLPL had given a loan and advances to M/s OFPL and M/s SHCPL respectively. The appellant in both the appeals, is not only holding more than 10% in M/s MLPL but also having a substantial interest in M/s OFPL as well as M/s SHCPL. The appellant in Income Tax Appeal No. 722 of 2015 admittedly holds 45% of the shareholding in M/s OFPL and the appellant in Income Tax Appeal No.724 of 2015 admittedly holds 99% of the shareholding in M/s SHCPL. It, therefore, can hardly be disputed that both the appellants have a substantial interest in the borrowing companies. These facts are not disputed. It is, in these facts, that the ITAT, after examining the definition of the word **'dividend'** in Section 2(22)(e) of the I. T. Act, 1961 as well as the ratio of this Court in the case of **Universal Medicare Pvt. Ltd. (supra)** came to a finding that since the assessees were shareholders holding more than 10% of the equity shares of the lending company (M/s. MLPL) and also having a

substantial interest in the borrowing companies (45% in OFPL and 99% in SHCPL), the conditions as prescribed under Section 2(22)(e) of the I. T. Act, 1961 were satisfied to include the appellants within the ambit of deemed dividend to be taxed in the hands of the appellant – assessee. We do not find that this issue decided by the Tribunal gives rise to any substantial question of law. All that the ITAT has done is, come to a conclusion that the assessee who is the shareholder in both the lending company as well as borrowing company and having substantial interest therein, the **deemed dividend** would have to be taxed in the appellant – assessee's hand. In coming to this conclusion the ITAT has correctly relied upon a decision of this Court in the case of **Universal Medicare Pvt. Ltd. (supra).** Since this issue is already decided against the appellant – assessees by a decision of this Court, we do not think that this finding of the ITAT gives rise to any substantial question of law.

12. Equally, we find that the reasoning given by the ITAT that there cannot be any proportionate addition of **deemed dividend** taking into consideration the percentage of the shareholding in the borrowing company, does not give rise to any substantial question of law. In the factual matrix before the ITAT, it held that Section 2(22)(e) of the I. T. Act, 1961 does not postulate any such situation.

This is especially the case before us as there is only one shareholder that has a shareholding in the lending company as well as in the borrowing company. This being the case and purely factual in nature, we do not think that the ITAT was in any event incorrect in rejecting this argument of the assessee. We may hasten to add that different considerations may arise if two or more shareholders are shareholders of the same lending company and the same borrowing company. In such a factual position it could possibly be argued that the addition ought to be made on a proportionate basis. However, we are not examining this issue in the present case as the facts before us are completely different.

13. In view of what we have held, we find that the reliance placed by Ms Jagtiani on the Judgments referred to above have absolutely no application to the facts and circumstances of the present case. In the decision of **Impact Containers Pvt. Ltd. (supra)** (and to which both of us were a party), this Court followed its earlier decision in **Universal Medicare Pvt. Ltd. (supra) [(2010) 324 ITR 263 (Bom.)]**. In fact, the specific argument made in this case was that the decision in **Universal Medicare Pvt. Ltd.** required reconsideration. The decision of this Court in **Impact Containers Pvt. Ltd. (supra)** negated that contention and

reaffirmed the proposition that was laid down in **Universal Medicare Pvt. Ltd.** This judgement therefore does not assist the appellant in manner whatsoever.

14. We find that even the decision of the Supreme Court in the case of **National Travel Services** Vs **Commissioner of Income Tax, Delhi VIII** (supra) would have no application to the facts of the present case. The facts before the Supreme Court reveal that the appellant – assessee was a partnership firm consisting of three partners, namely, Mr Naresh Goyal, Mr Surinder Goyal and M/s Jet Enterprises Pvt. Ltd. having a profit sharing ratio of 35%, 15% and 50% respectively. The assessee firm had taken a loan of Rs.28.52 Crores from M/s Jetair Pvt. Ltd. In this company, the assessee subscribed to its equity capital in the name of two of its partners, namely, Mr Naresh Goyal and Mr Surinder Goyal totaling to 48.19% of the total shareholding. Thus Mr Naresh Goyal and Mr Surinder Goyal were shareholders in the company's register as members of the company. They held the aforesaid shares for and on behalf of the firm, which happens to be the beneficial shareholder. The question that arose before the Supreme Court was whether Section 2(22)(e) of the I.T.Act, 1961 gets attracted when a loan had been given to the shareholder, who after the amendment, is a person who is the

beneficial owner of the shares holding not less than 10% of the voting power and where the loan is made to any concern in which such shareholder, is a partner and in which he has a substantial interest, which is defined as being an interest of 20 % or more of the share of the profits of the firm. After discussing the law on the subject, the Supreme Court finally held that the view taken by the Supreme Court in its order dated 5th October, 2017 passed in **Civil Appeal No. 3961 of 2013** (**CIT Delhi-II Vs. Madhukar Housing and Development Company**) in which the Supreme Court expressly affirmed the reasoning of the Delhi High Court in **C.I.T.** Vs **Ankitech Pvt. Ltd. [340 ITR 14 (Del)]** needs to be reconsidered, and therefore, the matter was placed before the Honourable Chief Justice of India in order to constitute an appropriate Bench of three learned Judges in order to have a re-look at the entire question. We fail to see how this Judgment, by any stretch of the imagination, can be of any assistance to the appellant – assessee. The issue before the Supreme Court in that case, as mentioned earlier, was totally different from the facts before us. The question before the Supreme Court was whether the assessee – partnership firm could be saddled with an addition of **deemed dividend** under Section 2(22)(e) of the I.T.Act, 1961 when the assessee was admittedly not a shareholder of the borrowing company, whereas only its partners were the registered shareholders

thereof. That is not the issue that is before us at all, and therefore, this Judgment is of no assistance to the appellant – assessee.

15. The last decision relied upon by Ms Jagtiani was a decision of the Delhi ITAT wherein it appears that the Delhi ITAT has allowed the proportionate allocation of **deemed dividend** on the basis of the shareholding of the borrowing company. We find this Judgment to be wholly inapplicable to the facts of the present case as in the facts of this decision, both the shareholders were holding more than 10% in the lending company and more than 46% in borrowing company. In fact, there were only two shareholders of the lending company as well as of the borrowing company. It was in these peculiar facts that the Delhi ITAT came to a conclusion that the **deemed dividend** ought to be proportionately divided. In the facts before us, and as mentioned earlier, the appellant - assessee is the only shareholder who is the shareholder of the lending company as well as that of the borrowing company. This being the case, the ratio of the Delhi ITAT is squarely not applicable to the facts and circumstances of the present case.

16. For all the aforesaid reasons, we do not find that the impugned orders passed by the ITAT give rise to any substantial

question of law. Both the appeals are accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

(B.P.COLABAWALLA J.) **(S.C.DHARMADHIKARI J.)**