ORDER SHEET

ITA 23 OF 2009
IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

COMMISSIONER OF INCOME TAX, KOL-III
Versus
SHREE BALAJI GLASS MANUFACTURIN Pvt. Ltd.

BEFORE:
The Hon'ble JUSTICE GIRISH CHANDRA GUPTA
The Hon'ble JUSTICE ARINDAM SINHA
Date : 13th July, 2016.

For Appellant/Petitioner : Mr.Nizamuddin,Advocate

For Respondent : Mr.N.K.Poddar, Sr.Advocate

The Court : This appeal is directed against a judgement and order dated 8th August, 2008 passed by the learned Income Tax Appellate Tribunal, "A" Bench, Kolkata in ITA No.73/Kol/2008 pertaining to the assessment year 2004-05 by which an appeal preferred by the revenue was dismissed. The aggrieved, the revenue, has come up in appeal.

The following question of law was formulated on 1st April, 2009 when the appeal was admitted :

" Whether the Income Tax Appellate Tribunal was justified in allowing relief to the assessee by treating the amount under the head 'reserve and surplus' representing share premium and credit balance of profit and loss account as not falling within the ambit of deemed dividend under section 2(22)(e) of the Income Tax Act, 1961 ?"

The facts and circumstances of the case, briefly stated, are as follows :

The assessee borrowed a sum of Rs.1,12,50,000/- from Pushpak Commercial Finance Pvt. Ltd. and a sum of Rs.1,79,50,000/- from Anjani Highrise Pvt.Ltd. Part of the aforesaid amounts representing share premium and accumulated profits were treated as deemed dividend by the assessing officer. The finding of the assessing officer was reversed by the CIT (Appeal) and upheld by the learned Tribunal. It is against this order that the present appeal has been preferred.

The necessary ingredients in order to impart character of deemed dividend to any payment made by a company is that such payment should have been made by the company from out of its accumulated profits. It is not in dispute that in the hands of Anjani High Rise Pvt Ltd there was no accumulated profit. The money was lent from out of reserve and surplus constituted by share premium account whereas in the case of Pushpak Commercial Finance Pvt.Ltd., the accumulated profits were only a sum of Rs.18,36,454.03/-. The money lent was a sum of Rs.1,12,50,000/-. The aforesaid payment of more than Rs.1.12 Crores, it may rightly be contended, included the accumulated profit of Rs.18,36,454/- . The balance sum admittedly

was from out of the share premium account. Unless the payment is made from out of accumulated profits the payment does not partake the character of deemed dividend, as would appear from Section 2(22)(e), from a plain reading thereof for which no elaboration is required.

The question still remains as to whether Pushpak Commercial Finance Pvt.Ltd. can be said to have lent a sum of Rs.18,36,454/- from out of the accumulated profits. That question has been answered in the negative by the learned Tribunal by relying on the exceptions provided under Clause (e) of sub-section 22 of Section 2. The relevant exception is as follows :

> *"(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*."

Parties were at issue only with regard to the question whether lending of money formed substantial part of the business of the company, Pushpak Commercial Finance Pvt Ltd. That question was answered by the learned Tribunal as follows :

> " *Coming to the aspect of "substantial part of business" as per clause (ii) of section 2(22)(c) it has been agitated by the department that in the case of Pushpak Commercial Finance Pvt. Ltd. A.O. should be upheld as less than 51% application of funds is towards money lending. The assessee has canvassed that 34.98% as considered by the CIT(A) should be upheld. We have seen that registration for a specific activity was accorded to the said*

lending company by the RBI which is the Regulatory Body and it enjoyed the status of NBFC. We have also seen that fund utilization to the extent of 34.98% has been made towards money lending activity by the said concern, it is also seen that section 2(22)(c) does not define or lay down a percentage for the word "substantial" used there. The assessee has sought to draw strength from Section (32) of Section 2 which defines the expression person who has substantial interest in the company to mean in which a person who is the beneficial owner of the equity shares not less than 20% of the voting power. Strength has also been drawn on behalf of the assessee from clause (b) of Explanation 3 to Section 2(22) which lays down that 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 20% of the income of such concern. Inviting attention to Section 13(3)(b) of IT Act it was submitted that the word "substantial contribution" has been defined to mean upto the end of the relevant previous year exceeding Rs.50,000/-. However, without getting into the references to "Substantial" made in the said section or other sections of the Act which may be in a different context the legislative intent interpreted by the CIT(A) being not in violation of any statutory restriction and not at variance of any order of a Co-ordinate Bench or Higher forum does not warrant any interference. No reasons let alone a good reason has been advanced by the department to merit an interference. Thus in the facts as they stand we reject the

department arguments in regard to the Pushpak Commercial Finance Pvt.Ltd. and uphold the impugned order for reasons given hereinabove."

The learned Tribunal has found that 34.98% funds of Pushpak Commercial Finance Pvt Ltd were utilized in money lending. The learned Tribunal was of the opinion that utilization of 34.98% of the total funds in the business of money lending constitutes a substantial part of the business of the company.

Mr.Nizamuddin, learned advocate appearing for the appellant has not been able to point out any mistake on the part of the learned Tribunal in arriving at the aforesaid conclusion.

The question as to whether the learned Income Tax Appellate Tribunal was justified in allowing the relief to the assessee when the money was paid from out of reserve and surplus representing share premium is answered in the affirmative because share premium does not constitute accumulated profits or even profits of the company. The balance sum of Rs.18 lakhs and odd paid from out of the accumulated profits would not bring the payment made by Pushpak Commercial Finance Pvt Ltd. to the assessee within the mischief of Section 2(22)(e) because the payment has been held to have been made by Pushpak Commercial Financed Pvt Ltd in the ordinary course of its business of money lending which is substantial part of the business of the company.

The issue only was whether money lending was a substantial part of the business of Pushpak. The learned Tribunal decided that issue in the affirmative. Mr.Nizamuddin has not advanced any submission to show that

the aforesaid view of the learned Tribunal is wrong in law. We , as such, find no reason to interfere with the views taken by the learned Tribunal. Therefore, the question formulated above is answered accordingly.

The appeal is, thus, dismissed.

Parties, however, shall bear their own costs.

(GIRISH CHANDRA GUPTA, J.)

(ARINDAM SINHA, J.)

ssaha
AR(CR)