

IN THE HIGH COURT OF DELHI

ITA No. 333/2006

COMMISSIONER OF INCOME TAX

Vs

M/s GOPAL CLOTHING COMPAY PVT LTD

Sanjiv Khanna and R V Easwar, JJ

Dated: March 22, 2012

Appellant Rep by: Mr Anupam Tripathi, Adv for Mr Kamal Sawhney, Sr. Standing Counsel.

Respondent Rep by : Mr C S Aggarwal, Sr. Adv with Mr Prakash Kumar, Adv

JUDGEMENT

In the cause list ITA No. 333/2006, Commissioner of Income Tax versus M/s Gopal Clothing Company Private Limited, which pertains to assessment year 1996-97, is listed. However, we notice that along with the said appeal, the Registry has also enclosed files of ITA Nos. 732/2004, 739/2004, 722/2005, 857/2006 and 861/2006. These appeals pertain to assessment years 1994-95, 1994-95, 1996-97, 1997-98 and 1997-98, respectively. For each assessment year, two appeals have been preferred because cross-appeals were filed before the Income Tax Appellate Tribunal (tribunal, for short).

2. With the consent of the counsel for the parties, we take up all the appeals for hearing. We may note that a common question of law has been raised in these appeals and they relate to question of deemed dividend under Section 2(22)(e) of the Income Tax Act, 1961 (Act, for short).

3. The common substantial question of law raised in the aforesaid appeals reads as under:

"Whether the ITAT was correct in law in holding that the provisions of Section 2(22)(e) of the Income Tax Act, 1961 were not applicable to the transaction in question, in the facts and circumstances of the present case?"

4. The respondent assessee is a company and had 10 shares in East India Impex (Delhi) Private Limited. The assessee did not hold 10% or more voting rights in East India Impex (Delhi) Private Limited. The Assessing Officer invoked Section 2(22)(e) of the Act on the ground that one Subhash Sahni had more than 10% shareholding in East India Impex (Delhi) Private Limited and had substantial interest, i.e., more than 20% shareholding in the respondent assessee. The Assessing Officer observed that the assessee had taken unsecured loans in the three years from East India Impex (Delhi) Private Limited and after examining the balance sheet of East India Impex (Delhi) Private Limited held that they had sufficient accumulated profits and balance in the general reserves for the said company to pay dividend. Accordingly, Rs.1,46,72,750/-, Rs.4,50,60,577/- and Rs.4,32,57,916/- were brought to tax as deemed dividend in the assessment years 1994-95, 1996-97 and 1997-98 respectively.

5. In the first appeal, the Commissioner of Income Tax (Appeals) reduced the said amount to Rs.15,11,000/-, Rs.14,06,113/- and Rs.77,49,000/- for the assessment years 1994-95, 1996-97 and 1997-98 respectively. The reduction was made by the CIT(Appeals) on the ground that certain amounts had been repaid and that cannot be treated and regarded as deemed dividend. The Assessing Officer, we may note had computed the deemed dividend by taking into account the debit balance at the end of the year but did not reduce from the said amount the credit balance. We wish to clarify that we are not expressing any opinion on the aforesaid method adopted by the Assessing Officer or the CIT(Appeals).

6. On cross-appeals being preferred both by the Revenue and the assessee, the tribunal by the impugned orders has deleted the addition on various grounds. It has been held that provisions of Section 2(22)(e) were not attracted as the assessee was not holding the minimum prescribed voting rights in M/s East India Impex(Delhi) Private Limited. The shareholding of a common shareholder or a director cannot be taken into consideration. The fact that two companies, i.e. the assessee and the East India Impex (Delhi) Private Limited had common shareholders, cannot be a ground to invoke Section 2(22)(e) of the Act, if the assessee did not have the prescribed voting rights. The tribunal also examined the merits of the case and held that the transactions between the assessee and the East India Impex (Delhi) Private Limited were business transactions and cannot be treated as loans or advance.

7. We need not examine the second aspect on merits. The first aspect, i.e., whether or not the respondent assessee had the requisite voting rights and shareholding of common shareholders can be taken into consideration for applying Section 2(22)(e) of the Act stands decided by this Court in *CIT versus Ankitech Private Limited, (2011) 242 CTR 129 (Delhi)*. In the said decision, it has been held that to attract the provisions of Section 2(22)(e) of the Act, payment must be made to the person, who is a registered holder of shares and the shareholder alone. Even after the amendment with effect from 1988 and introduction of the words "a person who is the beneficial owner of shares" cannot be construed to in a way alter the position that the shareholder has to be the registered shareholder. The amendment imposes an additional condition that the registered shareholder must also be the beneficial shareholder of the company that has furnished loan/advance. The fact that the shareholders of the assessee company were also shareholders of the company which had given "loan/advances" is not suffice and does not meet the requirement of Section 2(22)(e). The voting rights of the shareholder, i.e., the assessee can and should be taken into consideration.

8. When we apply the aforesaid legal position to the admitted facts as elucidated and stated above, the question of law has to be answered in negative, i.e., in favour of the assessee and against the Revenue.

The appeals are dismissed. No order as to costs.