IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 253 of 2015

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE M.R. SHAH
and
HONOURABLE MR.JUSTICE S.H.VORA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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PRINCIPAL COMMISSIONER OF INCOME TAX....Appellant(s)
Versus
RAM SHIPPING INDUSTRIES PVT LTD....Opponent(s)

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Appearance:
MR MANISH BHATT, ADVOCATE for the Appellant(s) No.1
MRS MAUNA M BHATT, ADVOCATE for the Appellant(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE M.R. SHAH**
and
HONOURABLE MR.JUSTICE S.H.VORA

Date : 16/04/2015

ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE M.R. SHAH)

[1.0] Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the learned Income Tax Appellate Tribunal, Mumbai Bench 'E', Mumbai (hereinafter referred to as the "Tribunal") dated 14/10/2014 in ITA No.399/Mum/2013 for the Assessment Year 2009-10, the revenue has preferred the present Tax Appeal to consider the following substantial question of law;

> *"Whether the Appellate Tribunal has substantially erred in deleting the addition on the ground that assessee company is not a registered share holder of the lender company, when the definition of deemed dividend under Section 2(22)(e) clearly includes registered as well as beneficial shareholders?"*

[2.0] The assessee who was dealing in the ship breaking activity filed the return of income for the Assessment Year 2009-10 declaring the total income at Rs.1,50,59,920/-. The return of income was duly processed under Section 143(1) of the Income Tax Act, 1961 (hereinafter referred to as the "Act") on 02/08/2010 and the case was selected for scrutiny and notice under Section 143(2) of the Act was issued and served upon the assessee. During the course of the assessment proceedings the Assessing Officer noticed that the assessee-Company had obtained loan of Rs.7,93,30,000/- from one of its group Company i.e. M/s. Shree Ram Vessel Scrap Pvt. Ltd.. The Assessing Officer asked the assessee to submit the balance sheet, Profit & Loss and shareholding pattern of the said Company. The assessee submitted the details as called

for by the Assessing Officer. On perusal of the details subitted by the assessee, the Assessing Officer observed that the assessee-Company and M/s. Shree Ram Vessel Scrap Pvt. Ltd. had common shareholding pattern as below;

Sr. No.	**Name of the shareholder**	**No. of shares & % share in M/s. Shree Ram Vessel Scrap Pvt. Ltd.**	**No. of shares & % share in M/s. Shree Ram Vessel Scrap Pvt. Ltd.**
1	Ranjanben Mukeshbhai Patel	4,95,000 shares 44.2%	5,00,000 shares
2	Mukeshbhai Balabhai Patel (AAPPP8456N)	1,25,000 shares 11.16%	15,62,500 shares 52%

[2.1] On perusal of the said chart, the Assessing Officer observed that Shri Mukeshbhai Balabhai Patel and Ms. Ranjanben M. Patel had substantial interest i.e. more than 10% shareholding" in the assessee-Company and also holds more than 10% shares in M/s. Shree Ram Vessel Scrap Pvt. Ltd. Since the common shareholders were having substantial interest, the Assessing Officer invoked the provision of Section 2(22)(e) of the Act and required the assessee to explain as to why the loan obtained by the assessee-Company from M/s. Shree Ram Vessel Scrap Pvt. Ltd. should not be considered to be taxed as deemed dividend. In reply it was submitted that the assessee-Company is not a registered shareholder and, therefore, the amount obtained by the assessee from M/s. Shree Ram Vessel Scrap Pvt. Ltd could not be treated as deemed dividend, however, the Assessing Officer did not accept the said submission of the assessee and added a sum of Rs.4,14,71,946/-, which represented the amount shown as reserved and surplus in the books of M/s. Shree Ram Vessel Scrap Pvt. Ltd.

[2.2] Feeling aggrieved and dissatisfied with the aforesaid addition made by the Assessing Officer invoking the provisions of Section 2(22)(e) of the Act, the assessee preferred appeal before the learned CIT(A) and the learned CIT(A) dismissed the said appeal and confirmed the addition made by the Assessing Officer.

[2.3] Feeling aggrieved and dissatisfied with the aforesaid addition made by the Assessing Officer confirmed by the learned CIT(A), the assessee preferred further appeal before the learned Tribunal and by the impugned judgment and order the learned Tribunal relying upon the decision of the Bombay High Court in the case of **CIT Vs. Impact Containers Pvt. Ltd and Ors.** in ITA No.114/2012 and the decision of the Delhi High Court in the case of **CIT Vs. Ankitech Pvt. Ltd.** reported in **340 ITR 14 (Del.)** allowed the said appeal and deleted the addition made by the Assessing Officer invoking Section 2(22)(e) of the Act.

[2.4] Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the learned Tribunal, the revenue has preferred the present Tax Appeal with the aforesaid proposed substantial question of law.

[3.0] We have heard Shri Manish Bhatt, learned Counsel appearing on behalf of the revenue at length. We have also considered and gone through the impugned judgment and order passed by the learned Tribunal; the assessment order as well as the order passed by the learned CIT(A) making the addition of Rs.4,14,71,946/- made by the Assessing Officer

invoking Section 2(22)(e) of the Act. In paras 24 to 27, the Delhi High Court in the case of **Ankitech Pvt. Ltd.(Supra)** has held and observed as under;

> *"24. The intention behind enacting the provisions of Section 2(22)(e) is that closely-held companies (i.e. companies in which public are not substantially interested), which are controlled by a group of members, even though the company has accumulated profits would not distribute such profit as dividend because if so distributed the dividend income would become taxable in the hands of the shareholders. Instead of distributing accumulated profits as dividend, companies distribute them as loan or advances to shareholders or to concern in which such shareholders have substantial interest or make any payment on behalf of or for the individual benefit of such shareholder. In such an event, by the deeming provisions, such payment by the Company is treated as dividend. The intention behind the provisions of Section 2(22)(e) of the Act is to tax dividend in the hands of shareholders. The deeming provisions as it applies to the case of loans or advances by a Company to a concern in which its shareholder has substantial interest, is based on the presumption that the loans or advances would ultimately be made available to the shareholders of the Company giving the loan or advance.*
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> *25. Further, it is an admitted case that under the normal circumstances, such a loan or advance*

given to the shareholders or to a concern, would not qualify as dividend. It has been made so by a legal fiction created under Section 2(22)(e) of the Act. We have to keep in mind that this legal provision relates to "dividend". Thus, by a deeming provision, it is the definition of dividend which is enlarged. Legal fiction does not extend to "shareholder". When we keep in mind this aspect, the conclusion would be obvious, viz, loan or advance given under the conditions specified under Section 2(22)(e) of the Act would also be treated as dividend. The fiction has to stop here and is not to be extended further for broadening the concept of shareholders by way of legal fiction. It is a common case that any company is supposed to distribute the profits in the form of dividend to its shareholders/members and such dividend cannot be given to non-members. The second category specified under Section 2(22)(e) of the Act, viz, a concern (like the assessee herein), which is given the loan or advance is admittedly not a shareholder/member of the payer company. Therefore, under no circumstance, it could be treated as shareholder/member receiving dividend. If the intention of the Legislature was to tax such loan or advance as deemed dividend at the hands of "deeming shareholder", then the Legislature would have inserted a deeming provision in respect of shareholder as well, that has not happened. Most of the arguments of the learned Counsel for the revenue would stand answered, once we look

into the matter from this perspective.

26. In a case like this, the recipient would be a shareholder by way of deeming provision. It is not correct on the part of the Revenue to argue that if this position is taken, then the income "is not taxed at the hands of the recipient". Such an argument based on the scheme of the Act as projected by the learned Counsel for the revenue on the basis of Sections 4, 5, 8, 14 and 56 of the Act would be of no avail. Simple answer to this argument is that such loan or advance, in the first place, is not an income. Such a loan or advance has to be returned by the recipient to the Company, which has given the loan or advance.

27. Precisely, for this very reason, the Courts have held if the amounts advanced are for business transactions between the parties, such payment would not fall within the deeming dividend under Section 2(22)(e) of the Act."

Considering the provisions of Section 2(22)(e) of the Act, we are in complete agreement with the view taken by the Delhi High Court.

[4.0] Shri Bhatt, learned Counsel appearing on behalf of the revenue has as such tried to justify the decision of the Delhi Court in the case of **Ankitech Pvt. Ltd. (Supra)** and has vehemently submitted that the Delhi High Court has not considered the third category i.e. shareholder in the assessee-

Company holding not less than 10% of the voting power in the Company from whom the loan or advance is taken. However, on considering Section 2(22)(e) of the Act, we are not at all impressed with the aforesaid. If the contention on behalf of the revenue is accepted, in that case, it will be creating the third category / class, which is not permissible. What is provided under Section 2(22)(e) of the Act seems to be that the assessee-Company must be a shareholder in the Company from whom the loan or advance has been taken and should be holding not less than 10% of the voting power. It does not provide that any shareholder in the assessee-Company who had taken any loan or advance from another Company in which such shareholder is also a shareholder having substantial interest, Section 2(22)(e) of the act may be applicable.

[5.0] No error has been committed by the learned Tribunal in deleting the addition made by the Assessing Officer invoking Section 2(22)(e) of the Act. We confirm the impugned judgment and order passed by the learned Tribunal. No question of law, much less substantial question of law arises in the present Tax Appeal. Under the circumstances, the present Tax Appeal deserves to be dismissed and is accordingly dismissed.

(M.R. SHAH, J.)

(S.H. VORA, J.)

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