

आयकर अपीलीय अधिकरण, मुंबई “ई” खंडपीठ
Income-tax Appellate Tribunal -“E”Bench Mumbai
सर्वश्री राजेन्द्र,लेखा सदस्य एवं सी. एन. प्रसाद,न्यायिक सदस्य
Before S/Shri Rajendra,Accountant Member and C.N. Prasad,Judicial Member
आयकर अपील सं./ITA/7397/Mum/2014,निर्धारण वर्ष /Assessment Years: 2011-12

DCIT-28 (3)(1) 3 rd Flr, Vashi Rly Station Complex Vashi, Navi Mumbai-400 703.	vs.	M/s. S.R.M. Agro Foods Office No.519, Plot No.20, The Great Eastern Galleria, Sector-4, Nerul Navi Mumbai-400 706. PAN:AANFS 1876 K
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

Revenue by:Shri N. Sathya Moorthy-DR

Assessee by: Shri Mitesh Thakkar

सुनवाई की तारीख / **Date of Hearing:** 18.07.2016

घोषणा की तारीख / **Date of Pronouncement:** 24.08.2016

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the order dtd.12/09/2014 of the CIT(A)-33,Mumbai,the Assessing Officer(AO)has filed the present appeal. Assessee-firm, engaged in the business of export of meat and seafood, filed its return of income on 25/09/2011, declaring total income of Rs. 2.39 crores.The AO completed the assessment u/s.,143(3) of the Act,on 26/12/2013,determining the income of the assessee at Rs.5.19 crores.

2.First ground of appeal pertains to deleting the addition of Rs. 2.39 crores, made by the AO,u/s.2(22)(e) of the Act.During the assessment proceedings, the AO noted that the assessee had two partners, that each of the partners was also holding more than 10% shares in SRM Agro Foods Private Ltd. (SAFPL) and SPHYNK Agro private Ltd. (SAPL), that it had received advances from the said companies.The AO was of the opinion that the provisions of section 2 (22) (e) of the Act were applicable in the case under consideration to the extent of committed profits retained by those companies. In reply to the show cause notice issued by the AO, the assessee replied that both the partners did not have substantial interest in the firm, that SRMAFPL had received unsecured loans from both the partners amounting to Rs.64.26 lakhs and Rs.5.40 lakhs respect -

tively, that during the year at any point of time loans and advances given by the company to the assessee did not exceed loan given by the directors to the company, that any sum due to assessee could not be considered as deemed dividend, that the amount of Rs.35.30 lakhs, advanced by the company to the firm was less than advance received of Rs.64.26 lakhs by the company from its directors and who were also partners of the assessee-firm. With regard to the advance received from SAPL it was contended that both the partners of the assessee firm were also shareholders of the company, that during the year under consideration the assessee had sale and purchase transaction with the company, that the advances received were with respect to the commercial transaction, that the provisions of section 22(22)(e) of the Act were not applicable. However, the AO was of the opinion that the assessee had satisfied all the conditions to attract the provisions of section 22(22)(e) of the Act, that the partners of the assessee-firm held more than 10% shares in both the companies, that the companies were having accumulated profits, that the assessee had received substantial advances from the companies. He, therefore, computed the peak advances and taxed the same as dividend u/s. 22(22)(e) of the Act.

3. Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA) and made the same submissions that were advanced before the AO. After considering submission of the assessee and the assessment order, he held that loans/advances to the specified shareholders or for the benefit of such shareholders or to the concerns in which such shareholders were substantially interested, were taxable as dividend. He referred to the case of Universal Medicare Private Ltd. (324 ITR 263) of the Hon'ble Bombay High Court wherein the Hon'ble Court had approved the decision of the Special Bench of the Tribunal that the dividend can be taxed in the hands of shareholder only and not in the hands of the concern and that the shareholder had to be both registered shareholder as well as beneficial shareholder. He also referred to the

case of Sea Queen Developers (ITA/3086/MM/2013) wherein it was held that provisions of section 2(22)(e) of the Act would not be applicable to the case of a firm when it was neither registered shareholder nor beneficial shareholder. Finally, he held that the amounts in question squarely fell under the provisions of section 2(22)(e) of the Act and were liable to be taxed as such in the hands of the registered and beneficial shareholders i.e. partners of the assessee-firm. Accordingly, he directed the AO to delete the additions made by him in the hands of the firm and tax the said amounts in the hands of the individual partners.

4. During the course of hearing before us, the Departmental Representative (DR) supported the order of the AO. The Authorised Representative (AR) referred to the pages 26 to 35 of the paper book and argued that the transactions in question were business transactions. He relied upon the cases of Rajkumar (ITA No. 1130 of 2007, dated 14/05/2009) of the Hon'ble Delhi High Court.

5. We have heard the rival submissions and taken note of the material available on record. The undisputed fact, not contravened by the AO, is that the assessee firm is not the share holder of the companies i.e. it is also a fact that in case of one of the companies the transactions were in the course of regular business-it was neither loan nor advance. As the assessee was not registered shareholder of the companies, so, the provisions of section 2(22)(e) were not applicable to it. The FAA has held that section had to be applied in the cases of the individual partners.

5.1. Here, we would like to refer to the case of Subrata Roy (375 ITR 207) of Hon'ble Delhi High Court. In that matter the Hon'ble Court has held as under:

“Section 2(22)(e) of the Income-tax Act, 1961, enacts that payment by a company, not being a company in which the public are substantially interested, of any sum (whether representing a part of the assets of the company or otherwise) made after May 31, 1987, but by way of advance or loan to a shareholder, being a person who is the beneficial owner of the shares, not being shares entitled to a fixed rate of dividend,

whether with or without a right to participate in profits, holding not less than 10 per cent. voting power is deemed to be dividend. The second class of payments is by way of advance or loan to any concern in which such shareholder is a member or partner and in which he has substantial interest. The third class is payment by any such company for the individual benefit of any such shareholders to the extent of which the company in either case possesses accumulated profits. Section 2(22)(e) pulls in notional or artificial income for assessment by a fiction. The primary burden to bring to tax amounts, on the ground that the transaction is a deemed dividend, (when it is not so otherwise) is upon the Department. To discharge that burden, the Department cannot rest content or surmises and assumptions ; it should premise them, rather on facts.”

We would also like to refer to the case of Impact Containers P.Ltd.(367ITR346) of the Hon’ble Bombay High Court, wherein the Hon’ble Court has held as under:

“A bare perusal of section 2(22) of the Income-tax Act, 1961, would indicate that the term “dividend” includes any distribution by a company of accumulated profits. any distribution to its shareholders by a company of debentures, debenture stock, or deposit certificates in any form, whether with or without interest, any distribution made to the shareholders by the company on its liquidation, any distribution made to the shareholders by a company on the reduction of its capital and all this is dealt with by sub-clauses (a) to (d) of section 2(22). Then comes sub-clause (e) which says that any payment by a company and not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) made after May 31, 1987, but by way of advance or loan to a shareholder being a person who is the beneficial owner of the shares not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits holding not less than 10 per cent. of the voting power. This is one category and the second one is a payment by way of advance or loan to any concern in which such shareholder is a member or partner and in which he had substantial interest. The third category is any payment by any such company for individual benefit of any such shareholders to the extent of which the company in either case possesses accumulated profits. The latter part of this definition states what is not included in “dividend” and the Legislature has carefully specified that any advance or loan made to a shareholder or concern in which shareholder is a member or partner and in which he has substantial interest, by the company in the ordinary course of his business where the lending of money is a substantial part of the business of the company or any dividend paid by a company which is set off by the company against the whole of any part of sum previously paid by it and treated as a dividend within the meaning of sub-clause (e) to the extent to which it is set off, is not dividend within the meaning of this definition.

A High Court must not brush aside the binding precedent or the judgment of a co-ordinate Bench simply because some of the arguments were either not canvassed or if canvassed were not considered. The binding precedent can be ignored only if it is per incuriam.

The view taken by the Bombay High Court in the case of UNIVERSAL MEDICARE P. LTD. [2010] 324 ITR 263 does not require any reconsideration. The High Court

merely restated the principle which remains unaltered throughout from the case of RAMESHWARLAL SANWARMAL v. CIT [1980] 122 ITR 1. The Supreme Court held that it is only where a loan is advanced by the company to the registered shareholder and other conditions set out in section 2(6A)(e) of the Indian Income-tax Act, 1922, are satisfied that the amount of the loan would be liable to be regarded as deemed dividend within the meaning of that provision. The loan granted to the beneficial owner of the share, who is not a registered shareholder would not fall within the meaning of section 2(6A)(e) of the 1922 Act. What the section is designed to strike at is advance or loan to a shareholder and the word "shareholder" can mean only the registered shareholder. All the three limbs of the section analyzed in UNIVERSAL MEDICARE denote the intention that closely held companies, namely, companies in which public are not substantially interested which are controlled by a group of members, even though having 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 the 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 provision, such payment by the company is treated as dividend. The purpose is to tax dividend in the hands of the shareholder."

After considering the above and respectfully following the above mentioned judgments of the Hon'ble Delhi and Bombay High Courts we are of the opinion that the order of the FAA does not suffer from any legal infirmity. So, upholding the same we decide the first ground of appeal against the AO.

6.Second ground of appeal is about deleting the addition, amounting to Rs.39,00,434/-, made by the AO, u/s.40(a)(i) of the Act. During the assessment proceedings, the AO found that the assessee had debited to its profit and loss account export commission. He directed it to furnish details of tax deducted at source from the payments, as the payments were made to non-resident entities. In its reply, the assessee admitted that no tax was deducted at source, that the non-resident agents were operating from their respective countries and procured export orders for the assessee firm outside India, that the commission was also paid outside India, that no tax was required to be deducted u/s.195 of the Act. However, the AO held that commission payable to agents abroad was deemed to arise in the group in India, that provisions of section 40 were applicable to the payments in question.

7. Aggrieved by the order of the AO, the assessee preferred an appeal before the FAA. After considering the available material, he held that the AO had disallowed the payment made to foreign agents only on the ground that no tax was deducted at source as per the provisions of section 195 of the Act, that there was no other ground for disallowance of such payments, that the foreign agents procured export orders, that the entire services were rendered outside India, that the commission agents did not have any Permanent Establishment in India, that the amounts paid by it to the agents for rendering services did not accrue in India. Finally, he deleted the addition made by the AO.

8. Before us, the DR stated that matter could be decided on merits. The AR supported the order of the FAA. He relied upon the case of *Armeyesh Global* (ITA/ 8822/Mum/2010-AY.2007-08, dated 04/05/2012).

We are aware that the section 195 of the Act deals with the deduction of tax at source by the payer, i.e., the assessee, if the payments are to be made to a non-resident. The obligation to deduct the tax at source arises only when the payment is chargeable under the provisions of the Act-i.e. taxable in India. Facts of the case are that the assessee had made payments to non-resident agents, that the agents did not have PE in India, that the services were rendered outside India. In our opinion, considering these facts the assessee had rightly not deducted tax at source for making the payments to the non-resident agents.

We find that in the case of *Faizan Shoes Pvt. Ltd.* (367 ITR 155) the Hon'ble Madras High Court has dealt the issue of deduction of tax at source with regard to the payment made to foreign entities. The facts of the case were that the assessee was engaged in the leather business. For the AY.2009-10, it entered into an agency agreement with a non-resident agent to secure orders from various customers, including retailers and traders, for the export of leather shoe uppers and full shoes by the assessee. In terms of the agency agreement, the business was to be transacted by opening letters of credit or by cash against documents

basis. The non-resident agent was responsible for prompt payment in respect of all shipments effected on cash against documents basis. It undertook to pay commission of 2.5% on the free on board value on all orders procured by the non-resident agent. The assessee claimed the commission as expenditure in terms of section 37 of the Act. The AO Officer disallowed the claim of the assessee u/s.40(a)(i), holding that the payment of commission to the non-resident agent was to be dealt with in accordance with the provisions of section 9(1) read with section 195, that the amount paid to the non-resident agent was deemed to have accrued or arisen in India u/s.9(1)(vii) and that since it had not deducted tax at source on the payments made to the non-resident agent, the expenditure was to be disallowed u/s.40(a)(i). The Tribunal, while concurring with the findings of the FAA that the non-resident agent was only procuring orders for the assessee and following up payments and no other services were rendered, held that the non-resident agent did not provide any technical services to the assessee, that the commission payment made to the non-resident agent did not fall under the category of royalty or fees of technical services and, therefore, the Explanation to section 9(2) had no application to the facts of the assessee's case. The commission payments to the non-resident agents were not chargeable to tax in India and, therefore, the provisions of section 195 were not applicable. On appeal, the Hon'ble Court held as under:

Held, dismissing the appeal, that on a reading of section 9(1)(vii), commission paid by the assessee to the non-resident agents would not come under the term "fees for technical services". For procuring orders for leather business from overseas buyers, wholesalers or retailers, as the case may be, the non-resident agent was paid 2.5 per cent. commission on free on board basis. This was a commission simpliciter. What was the nature of technical service that the non-resident agents had provided abroad to the assessee was not clear from the order of the Assessing Officer. The opening of letters of credit for the purpose of completing the export obligation was an incident of export and, therefore, the non-resident agent was under an obligation to render such services to the assessee, for which commission was paid. The non-resident agent did not provide technical services for the purposes of running of the business of the assessee in India. Therefore, the commission paid to the non-resident agents would not fall within the definition of "fees for technical services" and the assessee was not liable to deduct tax at source on payment of commission."

Considering the facts of the case and the above judgment, we hold that the order of the FAA needs no interference from our side. So, confirming his order, we decide the second ground against the AO.

Appeal by the AO stands dismissed.

फलतः निर्धारिती अधिकारी द्वारा दाखिल की गई अपील नामंजूर की जाती है.

Order pronounced in the open court on 24th August, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक 24 अगस्त, 2016 को की गई।

Sd/-

(सी. एन. प्रसाद / C.N. Prasad)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 24.08.2016.

Jv.Sr.PS.

Sd/-

(राजेन्द्र / Rajendra)

लेखा सदस्य / ACCOUNTANT MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR "E" Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ, आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.