आयकर अपीलीय अधिकरण "बी" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL " B " BENCH, MUMBAI

BEFORE SHRI B. RAMAKOTAIAH, AM AND Dr. S.T.M. PAVALAN, JM

आयकर अपील सं./I.T.A. No. 7698 /Mum/2011
(**निर्धारण वर्ष /** Assessment Year :2008-09

ACIT-2(1), Aayakar Bhavan, R. No. 561, 5th Floor, M.K. Road, Mumbai-400 020.	**बनाम**/ Vs.	M/s Bakhtawar Const. Co. Pvt. Ltd. 1st Floor, Meher House, 15, Caswasji Patel Street, Fort, Mumbai- 400 001
स्थायी लेखा सं./PAN : AAACB4942P		
(अपीलार्थी / **Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by** :	Shri Mohit Jain.
प्रत्यर्थी की ओर से/ **Respondent by** :	Shri Prakash K. Jotwani

सुनवाई की तारीख /**Date of Hearing : 10.04.2013**
घोषणा की तारीख /**Date of Pronouncement : 19.04.2013**

आदेश / O R D E R

PER B. RAMAKOTAIAH, A.M. :

This Appeal by Revenue is against the order of the CIT(A)-4 Mumbai date 16.08.2011. Revenue has raised following two grounds.

> *"2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating AO's stand that there was an arrangement amongst the shareholders in distributing the company's assets in colourable fashion in the grab of family settlement to avoid taxation*
>
> *3. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in adjudicating the case by concentrating on the applicability of sec.*

> *2(22)(a) which taxes the recipient, whereas in the instant case the AO has established distribution of dividend, consequent to the colourable device of family settlement and had levied dividend distribution tax."*

2. Briefly stated the facts of the case are that Late Mrs. Mehro N Irani had two daughters Mrs. Zinia Lawyer and Mrs. Bakhtawar Chenoy. There are two families, family of Mrs. Zinia Lawyer and Mrs. Bakhtawar Chenoy, both sisters and daughters of Late Mrs. Mehro N. Irani. The assessee company along with other business entities and properties were jointly managed by Lawyer and Chenoy family. But subsequently as observed by the A.O. due to family arrangements a flat bearing No. 141 in El-cid building, Ridge Road, Malabar Hill, Mumbai, has been gifted by the assessee company to the husband of Mrs. Bakhtawar Chenoy, namely, Mr. Bezan Dinkoo Chenoy. The assessee claimed it as a gift from the assessee company to Mr. Chenoy. A.O. had held it as deemed dividend as per the provisions of section 2(22)(e) of I.T. Act, which has been disputed by the assessee claiming that Mr. Chenoy is not a shareholder and further claiming that it is not a distribution of accumulated profits and further disputing that if it is not a distribution then it cannot be more than Rs.83,438/- the WDV of the said flat. The detailed submissions of the assessee before the CIT(A) have been extracted in Para 16 in page Nos. 10 to 17 in the order of the CIT(A). After considering the submissions, the Ld. CIT(A) deleted the addition made under section 2(22)(e) of I.T. Act and also consequent levy of dividend distribution tax under section 115-O. The order of the CIT(A) vide para 18 & 19 is as under:-

> "*18. I have considered the facts of the case and submissions of the assessee. The assessee has claimed to have gifted flat No. 141 in El-cid building, Ridge Road, Malabar Hill, Mumbai, to Mr. Bezan Dinkoo Chenoy. The Written Down Value (W.D.V) of the flat was Rs.83,438/- whereas the A.O. made the addition of this transfer of flat under section 2(22)(a) at Rs.4,29,67,167/-. The Assessee has claimed that Mr. Bezan Dinkoo Chenoy was not the shareholder of the assessee company at any time and even his wife Mrs. Bakhtawar Chenoy was not the shareholder on the date on which the flat was gifted. Assessee has mainly dispute the action of the A.O. on three counts.*
>
> *(i) that the transfer is not to a shareholder and, therefore, provisions of section 2(22)(a) do not apply,*

(ii) That it is not a distribution of assets and

(iii) That it is not a distribution of accumulated profits.

Any further claimed that if at all it is a distribution it cannot be more than the WDV of the flat Rs.83,438/-.

Considering the claim of the assessee, one by one, the claim of the assessee that it is not distribution of assets does not find favour with the language used in clause (a) of sub-section 22 of section 2 which is as follows:-

"(22) dividend includes-

(e) any distribution by a company of accumulated profits, whether capitalized or not, if such distribution entails the release by the Company to its shareholders of all or any part of the assets of the Company."

The language used by the provision clearly says that if such distribution entails the release of all or any of the assets of the company and, therefore, release of a flat definitely involves release of the assets of the company.

Secondly, the assessee has claimed that it is not out of the accumulated profits, whereas assessee has merely claimed that the distribution should be out of profits but the assessee has never denied that there are not sufficient accumulated profits and therefore to be covered by the provisions of section 2(22)(a) distribution of accumulated profits will mean release of any asset or part of an asset when the accumulated profits exist and, therefore, assessee does not succeed on this count also.

Lastly, coming to the claim that distribution should be to its shareholders to which assessee has claimed that it should be more than one shareholder but even one shareholder will be covered by this, but coming to the real objection that the recipient of the gift is not even a shareholder. In this regard, assessee has relied on four case laws which are as follows:-

(i) ACIT Vs. Bhaumick Colour Pvt., 112 ITD 1(SB) Mumbai.

(ii) CIT Vs. Hilltop 217 CTR 527 (Raj).

(iii) CIT Vs. Ankitech Pvt. Ltd. Delhi, reported in ITAT online ITA No. 462 of 2009, Copy of which has been filed by the Assessee.

(iv) CIT Vs. P.V. John 181 ITR 1 (Ker).

All the four cases relied by the assessee relate to clause (e) of sub-section (222) of section (2). But the word used is 'shareholder' in clause (e) also. In all these decisions it has been held that the payee should be a shareholder and also a registered shareholder. Therefore, even in clause (a) the distribution of such

> *assets should naturally be to shareholder/shareholders because the word used in clause (a) is also 'shareholders". A shareholder can only be a shareholder when he is registered as shareholder with the Company. Therefore, such shareholder must be a registered shareholder. The language of clause (a) of sub-section (22) of section 2 as reproduced above does not have any possibility of covering any other person other than a shareholder and, therefore, the release of assets by the company should be to a shareholder and that too a registered shareholder to come under the mischief of section 2(22)(a). Whereas in the case under consideration the recipient of the gift is admittedly not a shareholder. Similar type of gift were not found taxable even under section 2(22)(e) by Hon'ble Kerala High Court in the case of P.V. John (supra). Therefore, the claim of the assessee on this issue is allowable. Hence, the addition made by the AO, under section 2(22)(a) is deleted.*
>
> *19. The assessee has also raised the objection that A.O. has wrongly levied dividend distribution tax under section 115O. But when the addition under section 2(22)(a) is deleted, then dividend distribution tax under section 115O is also not leviable. Hence the ground of appeals is allowed."*

3. Ld. DR relied on the orders of the AO in explaining the facts whereas the Learned Counsel relied on the order of the CIT(A) and submissions made in this regard. It was also stated that the Assessing Officer has reopened the assessment by recording reasons on 30th March 2013 holding that provisions of section 50C are applicable on the gift. He placed on record the satisfaction recorded by the Assessing Officer in initiating the reassessment proceedings and submitted that assessment is again reopened and for that reason also Revenue Appeal cannot survive. He also referred to the facts as placed before the authorities in the paper book from page Nos. 1 to 106.

4. We have considered the issue and rival contentions. As rightly considered by the Ld. CIT(A) the donee is not a shareholder and it is not distribution of assets, therefore the provisions of section 2(22)(e) does not arise. Since the order of the CIT(A) is correct both on facts and law and as he considered the issue after examining the submissions thoroughly, we see no reason to differ from the finding of the Ld.CIT(A). Since issue of reopening is not an issue before us, we are not commenting about the action of the A.O. in reopening the assessment. Incidentally, we are also unable to understand how provisions of section 2(22)(e) can be invoked in the hands of the assessee when the same should have been considered in the hands of the person who received it. It

is not explained how the property in the books of account gifted can be income to the assessee as a deemed dividend. We are also surprised that Ld. CIT approves second appeal mechanically without application of mind, on the order of Ld.CIT(A) who deleted the addition on other valid reasons. Be that as it may, we cannot consider the grounds raised by revenue as they have no merit. Accordingly they are dismissed. We intend to levy cost on AO and CIT for preferring this second appeal, but are restrained in doing so as there is no request from respondent. There is no order as to the costs.

5. In the result, appeal is dismissed.

Order pronounced in the open court on 19.04.2013 .
आदेश की घोषणा खुले न्यायालय में दिनांकः 19.04.2013 को की गई ।

Sd/-	Sd/-
(Dr. S.T.M. PAVALAN)	(B.RAMAKOTAIAH)
न्यायिक सदस्य / JUDICIAL MEMBER	लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 19.04.2013

व.नि.स. / *Ashish* PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-4, Mumbai
4. आयकर आयुक्त / CIT – **2, Mumbai**
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai B
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**