

THE INCOME TAX APPELLATE TRIBUNAL  
“E” Bench, Mumbai  
Shri Shamim Yahya (AM) & Shri Pavankumar Gadale (JM)

I.T.A. No. 7784/Mum/2019 (Assessment Year 2010-11)

M/s. Technithon Technologies Pvt. Ltd. Shiv Anand-A, 373/374 S.V. Road, Goregaon-W Mumbai-400 104.  PAN : AAACC3354J (Appellant)	Vs.	ITO-9(1)(2) 5 <sup>th</sup> Floor Earnest House Nariman Point Mumbai-400 021.  (Respondent)
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Assessee by	Shri Paras Savla
Department by	Shri Sanjeev Kashyap
Date of Hearing	08.06.2021
Date of Pronouncement	02.08.2021

O R D E R

Per Shamim Yahya (AM) :-

This is an appeal by the assessee directed against the order of learned CIT(A) dated 30.9.2019 pertains to A.Y. 2020-11.

2. The grounds of appeal read as under :

1. On the facts and circumstances of the case and in law, the learned CIT (A) erred in treating Rs. 75,00,000/- as deemed dividend under section 2(22)(e) of the Act being unsecured loan received by the Appellant company from its group company i.e. M/s. Trivedi Enterprises Pvt. Ltd (TEPL)
2. On the facts and circumstances of the case and in law, the learned CIT (A) failed to appreciate the fact that Appellant is not the shareholder of the TEPL, therefore, section 2(22)(e) cannot be invoked in the case of the Appellant.
3. The Ld. CIT(A) erred in directing the Assessing officer to pass two different orders giving effect to the CIT(A) order, which is a unique methodology unknown in law.
4. On the facts and circumstances of the case and in law, the learned CIT (A) erred in disallowing a sum of Rs. 10,000/- under section 14A of the Income Tax Act, 1961.

5. On the facts and circumstances of the case and in law, the learned CIT (A) erred in disallowing a sum of Rs. 60,310/- being payment made towards site expenses on ad hoc basis.
3. At the outset learned counsel of the assessee submitted that he shall not be pressing ground No. 4 and 5. Hence ground No. 4 and 5 are dismissed as not pressed.
4. As regards the grounds of appeal pressed the same relates to issue of treatment of deemed dividend of the unsecured loan received by the assessee from group Company M/s. Trivedi Enterprises Pvt. Ltd.
6. Brief facts of this issue noted by the assessing officer are that on perusal of the details filed by the AR it was noticed that the assessee has received unsecured loan from its group company M/s. Trivedi Enterprises P. Ltd. On perusal of ledger account M/s. TEPL maintained in the books of the assessee company, it was noticed that the assessee has received during the year a loan of Rs.1,05,00,000/- from the group company with closing balance at Rs. 75,00,000/-. On perusal of share holding pattern of the Assessee Company and M/s Trivedi Enterprises P. Ltd, it was noticed that Mr. Sanjay N. Trivedi and Mrs. S. Trivedi (Joint) have 20% equity share and 16.67% preference share holding in M/s. Trivedi Enterprises P. Ltd. Further, Mr. Sanjay N. Trivedi and Mrs. S. Trivedi (Joint) also hold 34% equity share holding in the assesses company. On Assessing Officer's inquiry about deemed dividend in this regard, in response the assessee responded that the same was for the purpose of the business. However, the assessee officer was not satisfied. He held as under :-

“In this case, all the conditions specified in section 2(22)(e) of the Act are satisfied and therefore, the provisions of this section are squarely attracted. In view of the clear position In law and the C.B.D.T. circular quoted above, the loans accepted by the assessee company are treated as deemed dividend u/s.2(22)(e) of the I.T. Act. The deemed dividend would be limited to the extent of loan accepted during the year of account or the accumulated profit available in the Reserves & Surplus of the lender company, whichever Is less. In this case, the gross receipt of loan by the assessee from M/s Trivedi Enterprises Pvt. Ltd. is Rs. 1,05,00,000/- and the profit and loss a/c

appropriation reported by M/s Trivedi Enterprises Pvt. Ltd is i,26,14,450/- (opening balance-Rs. 1,19,38,845/-).”

7. Against the order assessee appeal before the learned CIT(A). Learned CIT(A) accepted the assessee's plea that the disallowance if any should be restricted to be 75 lakhs. However as regards the plea of the assessee that assessee is not a registered shareholder of the company from where it has received the loan, the learned CIT(A) referred to the fact that on this issue the matter has travelled to the Supreme Court and the Hon'ble Supreme Court has referred the matter to a Larger Bench. He noted that on similar facts ITAT has directed that the AO should await the order of Supreme Court and then decide the issue. Hence, the learned CIT(A) remitted the matter to the AO and directed him decide the issue after the receipt of Supreme Court order on the above. The learned CIT(A) held as under :

“5.4.5 The issue before me is whether a sum treated as dividend u/s. 2(22)(e) is taxable in the hands of the recipient of the sum or in the hands of the shareholder of the payer. There are conflicting decisions on this issue. In the recent judgement, the Hon'ble Supreme Court in *National Travel Services vs. CIT* [2018] 89 Taxmann.com 232(SC) dealing in the case of *Ankitech Pvt. Ltd.* and Section 2(22)(e) held as under:

"17. We are of the view that it is very difficult to accept the reasoning of the Division Bench. It is not enough to say that *Ankitech's* case refers to the second limb of the amended definition, whereas the present case refers to the first limb, for the simple reason that the word "shareholder" in both limbs would mean exactly the same thing. This is for the reason that the expression "such shareholder" in the second limb would show that it refers to a person who is a "shareholder" in the first limb.

18. This being the case, we are of the view that the whole object of the amended provision would be stultified if the Division Bench judgment were to be followed. *Ankitech's* case (supra), in stating that no change was made by introducing the deeming fiction insofar as the expression "shareholder" is concerned is, according to us, wrongly decided. The whole object of the provision is clear from the Explanatory memorandum and the literal language of the newly inserted definition clause which is to get over the two judgments of this Court referred to hereinabove. This is why "shareholder" now, post amendment, has only to be a person who is the beneficial owner of shares. One cannot be a registered owner and beneficial owner in the sense of a beneficiary of a trust or otherwise at the same time. It is clear

therefore that the moment there is a shareholder, who need not necessarily be a member of the Company on its register, who is the beneficial owner of shares, the Section gets attracted without more. To state, therefore, that two conditions have to be satisfied, namely, that the shareholder must first be a registered shareholder and thereafter, also be a beneficial owner is not only mutually contradictory but is plainly incorrect. Also, what is important is the addition, by way of amendment, of such beneficial owner holding not less than 10% of voting power. This is another indicator that the amendment speaks only of a beneficial shareholder who can compel the registered owner to vote in a particular way, as has been held in a catena of decisions starting from *Mathalone v. Bombay Life Assurance Co. Ltd.* [1954] SCR 111.

19. This being the case, we are prima facie of the view that the *Ankitech (P.) Ltd.* case (supra) itself requires to be reconsidered, and this being so, without going into other questions that may arise, including whether the facts of the present case would fit the second limb of the amended definition clause, we place these appeals before the Hon'ble Chief Justice of India in order to constitute an appropriate Bench of three learned Judges in order to have a relook at the entire question.

20. Ordered accordingly. "

5.4.6 The same issue came up before the Hon'ble ITAT, 'A' Bench, Mumbai in ITA No.7765/Mum/2011 in the case of *M/s. Apurva Developers Pvt. Ltd. vs. ITO for A.Y. 2005-06*. In that case, the Hon'ble ITAT, 'A' Bench, Mumbai has directed the AO to "wait and follow the decision as per Para 19 of the above judgment of the Hon'ble Supreme Court." Taking a cue from the order of the Hon'ble ITAT, I direct the AO to follow the decision of the Hon'ble Supreme Court as per para 19 of its order in the case of *National Travel Services Pvt. Ltd. vs. CIT* (supra) once the Hon'ble Supreme Court decides the issue. The AO will allow further relief of Rs. 75 lakhs in case the Hon'ble Supreme Court decides the issue in favour of the appellant. It is however clarified that the relief of Rs. 30 lakhs mentioned in para 5.4.3 above will be given to the appellant after receipt of this order without waiting for the decision of the Hon'ble Supreme Court on this issue. Additional relief due to the appellant, if any, after the issue is decided by the Hon'ble Supreme Court, will be allowed by way of a supplementary order."

8. Against order assessee is in appeal before us.

9. We have heard both the parties and perused the records. We note that the Hon'ble Supreme Court has not reversed its order on the issue but has referred to a Larger Bench. Further we note that as per section 251 of the Act there is no power of learned CIT(A) to remand the matter. In this view of the

matter the order of learned CIT(A) remanding the issue the file of assessing officer is not at all sustainable. In this regard learned counsel of the assessee has also referred to the decision of honourable Bombay High Court for the proposition that the issue is covered in favour of the assessee.

10. Upon careful consideration we find that interest of justice demands that issue be remitted to the file of learned CIT(A), as he has no power to remand the issue to the assessing officer. The learned CIT(A) is directed to consider the issue afresh after considering all facts. Needless to add assessee should be granted adequate opportunity of being heard.

11. In the result, this appeal by the assessee is partly allowed for statistical purposes.

Pronounced in the open court on 2.8.2021.

Sd/-  
(PAVANKUMAR GADALE)  
JUDICIAL MEMBER

Sd/-  
(SHAMIM YAHYA)  
ACCOUNTANT MEMBER

Mumbai; Dated : 02/08/2021

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)  
ITAT, Mumbai

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