

Cit Vs. Hotel Hilltop

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SooperKanoon Citation : sooperkanoon.com/756749

Court : Rajasthan

Decided On : Mar-17-2008

Reported in : (2008)217CTR(Raj)527; [2009]313ITR116(Raj)

Judge : N.P. Gupta and; Deo Narayan Thanvi, JJ.

Appellant : Cit

Respondent : Hotel Hilltop

Disposition : Appeal dismissed

Judgement :

ORDER

1. This appeal by the revenue, against the judgment of the Tribunal dated 16.9.2004, was admitted vide order dated 29.3.2005, by framing following substantial questions of law:

1. Whether on the facts and in the circumstances of the case and in law, the learned Tribunal was justified in upholding the order of learned CIT(A) deleting the addition of Rs. 10 lakhs as deemed dividend under Section 2(22)(e) of the I.T. Act?

2. Whether the assessee firm whose partners holds 100% share in M/s. Hilltop Palace Hotels (P) Ltd. had received the payment of Rs. 10 lacs by way of security and not as an advance is perverse?

2. The necessary facts are, that a return was filed by the assessee (firm) M/s. Hotel Hilltop, 5, Ambavgarh, Udaipur, declaring income of Rs. 72,000/- on 3.1.92. The case was taken under scrutiny, and notices were issued. It appeared that the assessee had shown liability of Rs. 12,46,058/- under the head 'other liabilities', out of which, a liability to the extent of Rs. 10,87,747/- pertained to M/s. Hilltop Palace (P) Ltd. It also transpired to the Assessing Officer, that this liability consist of Rs. 10 lacs, received as an advance against the security from the company, to the firm, under agreement to hand over the management of the firm hotel, to the company, and balance amount of Rs. 87,747/- are of trade credits. The assessee, vide order-sheet dated 13.8.93, was asked to explain why the security of Rs. 10 lacs be not treated as dividend, under Section 2(22)(e) of the Income Tax Act, and added to the income of the firm. It is not in dispute that the amount of Rs. 10 lacs proceeded from the company to the firm. It is also not in dispute, that the shareholding pattern of the company is as under:

Share holding pattern of M/s. Hilltop Palace Hotels (P) Ltd. (1) Shri Roop Kumar Khurana 23.33% (2) Smt. Saroj Khurana 4.67% (3) Vikas Khurana 22% (4) Deshbandhu Khurana 25% (5) Shri Rajiv Khurana 25%

3. Likewise, it is also not in dispute, that at the relevant time constitution of the firm was as under:

Constitution of M/s Hotel Hilltop:

1. Shri Roop Kumar Khurana 45%

2. Shri Deshbandhu Khurana 55%

4. The assessing Officer, in these circumstances, found the amount to be deemed dividend, under Section 2(22)(e), and assessed it in the hands of the firm. This order was challenged in appeal, and the learned Commissioner found, that since the firm is not a shareholder of the company, the amount of Rs. 10 lacs cannot be assessed to tax under Section 2(22)(e), and thus, it was deleted.

5. Against this order of the CIT, the Revenue filed appeal before the learned Tribunal, and the Tribunal found, that provisions under Section 2(22)(e) are

deeming provisions, and are aimed at including the obvious, or what is uncertain, or to impose, for the purpose of a statute, an artificial construction of a word or phrase, that would not otherwise prevail. Then the definition, as given in Section 2(6A)(e) was also considered, and found, that since the firm is not a shareholder of the company, the amount of Rs. 10 lacs could not be assessed to tax under Section 2(22)(e). It was also found, that this amount cannot be stated to be an advance, or loan, as the agreement specifically mentions it as, security. It was also considered, that as on 1.4.90, the company has accumulated profits of Rs. 44,825/- only. Thus, the ingredients of the deeming clause are not satisfied. It was reiterated, that unless the firm is registered shareholder of the company, any amount of advance to the partners, cannot be taxed in the hands of the firm, as such. Thus, the appeal was dismissed.

6. We have heard learned Counsel on the questions framed.

7. Long drawn arguments were made on either side. However, before proceeding further, we may gainfully quote the provisions of Section 2(22)(e), which read as under:

2(22)(e) any payment by a company, 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 the 31st day of May, 1987, by way of advance or loan to a shareholder, being a person who is the beneficial owner of 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 ten per cent of the voting power, or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern) or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits.

8. From reading of the above provision, it is clear, that it comprehends manifold requirements, the first being, the payment should be made by way of loan or advance, to the concern. Of course on this aspect, the conclusion has been recorded by the Tribunal against the Revenue, but then on bare reading of the

agreement and considering the totality of circumstances, including the very nature of the term 'security', and the fact, that substantial portion of this Rs. 10 lacs of amount, say more than 9 lacs, have been advanced only during 7.1.91 to 22.3.91, it is difficult to accept, it as a security, in the sense of the term, as comprehended in the agreement, rather it clearly appears to be simply a nomenclature used, to borrow the words of the Assessing Officer 'transparent cover'. Be that as it may.

9. The more important aspect, being the requirement of Section 2(22)(e) is, that 'the payment may be made to any concern, in which such shareholder is a member, or the partner, and in which he has substantial interest, or any payment by any such company, on behalf, or for the individual benefit of any such shareholder....' Thus, the substance of the requirement is, that the payment should be made on behalf of, or for the individual benefit of any such shareholder, obviously, the provision is intended to attract the liability of tax on the person, on whose behalf, or for whose individual benefit, the amount is paid by the company, whether to the shareholder, or to the concern firm. In which event, it would fall within the expression 'deemed dividend'. Obviously, income from dividend, is taxable as income from other sources, under Section 56 of the Act, and in the very nature of things, the income has to be, of the person earning the income. The assessee in the present case is not shown to be one of the persons, being shareholder. Of course the two individuals being Roop Kumar and Devendra Kumar, are the common persons, holding more than requisite amount of share holding, and are having requisite interest, in the firm, but then, thereby the deemed dividend would not be deemed dividend in the hands of the firm, rather it would obviously be deemed dividend in the hands of the individuals, on whose behalf, or on whose individual benefit, being such shareholder, the amount is paid by the company to the concern.

10. Thus, the significant requirement of Section 2(22)(e) is not shown to exist. The liability of tax, as deemed dividend, could be attracted in the hands of the individuals, being the shareholders, and not in the hands of the firm.

11. Thus, the result of the aforesaid discussion is, that question No. 2, as framed, is answered in favour of the Revenue, and against the assessee, while question

No. 1 is answered against the Revenue, and in favour of the assessee, though for different reasons.

12. The net result of the answer to the above questions is, that the appeal fails and is dismissed.

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