(44)

HIGH COURT OF DELHI : NEW DELHI

+ **ITA No.159 of 2003**

Judgement reserved on: April 12, 2005

% Judgement delivered on: May 5, 2005

Durga Dass Aggarwal
C/o Suraj Bhan Sunil Kumar
2076, Tihara, Kinari Bazar
Delhi ...Appellant

! Through Mr. B. Gupta with
Mr. R.K. Chaufla, Advs.

Versus

$ 1. Commissioner of Income-tax-X
Drum Shape Building
I.P. Estate, New Delhi

2. Income-tax Officer
Ward 29(3)
Drum Shape Building
I.P. Estate, New Delhi ...Respondents

^ Through Mr. R.D. Jolly with
Mr. Vishnu Sharma, Advs.

Coram:

* **HON'BLE MR. JUSTICE SWATANTER KUMAR**
HON'BLE MR. JUSTICE MADAN B. LOKUR

1. Whether the Reporters of local papers may be allowed to see the judgement? Yes

2. To be referred to Reporter or not? Not necessary

3. Whether the judgement should be reported in the Digest? Not necessary

* **MADAN B. LOKUR, J.**

The Appellant-assessee is aggrieved by an order dated 5th August, 2002 passed by the Income-tax Appellate Tribunal, Delhi, Bench C (for short the Tribunal) in ITA No.4712/Del/95. The relevant assessment year is 1993-94.

2. The assessee is the Chairman of M/s Piping & Energy Private Limited (for short the company) and has a shareholding of

63.7% in the company. The assessee's wife holds the balance 36.3% shares in the company.

3. In the account that the assessee had with the company, certain amounts were reflected which, according to the Assessing Officer, were hit by the provisions of Section 2(22)(e) of the Income-tax Act, 1961 (for short the Act). The said provision reads as follows:-

> ""2(22) dividend includes -
>
> (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."

4. Upon an explanation having been called from the assessee and after considering his reply thereto, the Assessing Officer was of the view that the amounts shown in the account of the assessee were deemed dividend.

5. It transpires that the assessee was the owner of an industrial plot in Haryana. One of the requirements of holding the plot was that the assessee was required to make construction thereon. Since the assessee was a non-resident Indian, he claimed inability to personally make the construction and, therefore, entered into an agreement dated 16th April, 1992 with the company

wherein it was agreed, inter alia, that the company would make the construction on the industrial plot and would exploit the plot and the construction for a period of five years after which both the plot as well as the construction would revert to the assessee. During the period of five years, the assessee was not entitled to any amount from the company towards rent etc.

6. The Assessing Officer did not accept the contention of the assessee that the amount spent by the company was neither a loan nor an advance. Consequently, an appeal was filed before the Commissioner of Income-tax (Appeals) [hereinafter referred to as the CIT (A)] who agreed with the assessee in so far as the present dispute is concerned and deleted the addition as deemed dividend of the amount shown in the account of the assessee with the company.

7. Feeling aggrieved, the Revenue preferred an appeal before the Tribunal, which allowed the appeal. The assessee has now sought to raise a substantial question of law under Section 260A of the Act said to be arising out of the order passed by the Tribunal.

8. We are of the view that the appeal does not raise any substantial question of law, particularly in view of the facts of the present case.

9. The Tribunal rightly noted that one of the moot questions is whether the expenditure incurred by the company in raising the construction or even towards making part payment of the cost of the plot can be termed as a payment made by the company by way of loan or advance to its shareholder or for the individual benefit of such shareholder so as to bring it within the

definition of dividend in Section 2(22)(e) of the Act.

10. The Tribunal found that in the agreement dated 16th April, 1992 between the assessee and the company, it has been noted that the agreement is valid for a period of five years and is revocable/terminable by mutual consent. Till the agreement is not terminated, the building on the plot would continue to be an asset of the assessee on which capital appreciation would be declared by him in his wealth-tax returns and wealth-tax paid accordingly. It was noted that if the intention of the assessee and the company was that the construction would be an asset of the company, then such a provision would have formed a part of the agreement between the parties. Consequently, whatever expenditure was incurred by the company, having been debited to the individual account of the assessee instead of debiting it to the building account of the company, would necessarily imply that it was a loan or an advance

given to the assessee. It was also noted that the assessee continued to be in constructive possession of the building as well as the land and by lifting the corporate veil it could be said that whatever benefits attached to the construction would pass on to the assessee since only he and his wife were shareholders in the company. Under these circumstances, it was held that the payment made to the assessee by the company will be deemed dividend within the meaning of Section 2(22)(e) of the Act.

11. Learned counsel for the Appellant contended that there was no payment made to the assessee by the company and, therefore, it could not be said to be an advance nor was any loan paid by the company to be assessee and that no benefit had accrued to the assessee by the arrangement entered into with the company.

12. We are of the view that all these issues have been

considered and answered against the assessee by the Tribunal. The terms of the agreement dated 16th April, 1992, which have been referred to by the Assessing Officer as well as the Tribunal, clearly show that the asset was that of the assessee and he was to derive a benefit therefrom. He had even agreed to accept capital appreciation of the asset for the purpose of wealth-tax and also pay wealth-tax thereon.

13. Moreover, by lifting the corporate veil, there can be no doubt that the construction made by the company was for the benefit of the assessee who held the majority shares in the company, the balance being held by his wife. The assessee was admittedly not in a position to personally make the construction on the industrial plot, being a non-resident Indian, and the device of entering into an agreement with the company was resorted to apparently to retain the plot and other benefits derived therefrom.

14. The fact that the amounts expended by the company were shown in the personal account of the assessee further showed that the expenditure was not incurred by the company for its own benefit but essentially for the benefit of the assessee.

15. We are of the view that under these circumstances, no substantial question of law arises for consideration. The appeal is dismissed.

(Madan B. Lokur)
Judge

(Swatanter Kumar)
Judge

May 5, 2005
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Certified that the corrected copy of the judgment has been transmitted in the main Server.