* **THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA No.1879/2010**

Date of Decision : 11.05.2011

Commissioner of Income Tax
Delhi-XI, New Delhi **……Appellant**

Through: Ms. Prem Lata Bansal, Sr. Advocate, with Mr. Deepak Anand, Advocate.

Versus

Shri Sunil Chopra **……Respondent**

Through: Mr. Salil Aggarwal & Mr. Prakash Kumar, Advocates.

CORAM :
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

M.L. MEHTA, J. *(Oral)*

1. This is an appeal against the order of the Income Tax Appellate Tribunal (hereinafter referred to as the 'Tribunal') dated 12th February, 2010 whereby the two cross appeals – one filed by the assessee and the second by the Revenue against the order of the CIT(A) dated 18th June, 2009 passed for the assessment year 2005-06 were disposed of. The

appeal of the assessee was partly allowed, whereas the appe of the Revenue was dismissed vide impugned order. It is against this order that the Revenue is in appeal before us.

2. The appeal was admitted on the following substantial questions of law :

> "(a) Whether ITAT was correct in law in deleting the additions of Rs.10,20,000/-, Rs.15,40,000/- and of Rs.20,70,000/- being the loans taken from M/s. Sisbro Promoters Pvt. Ltd., M/s. Fitwell Fashion Fabrics Pvt. Ltd. and M/s. National Capital Region Pvt. Ltd., made by the AO, treating the same as deemed dividend under section 2(22)(e) of the Act?
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> (b) Whether ITAT was correct in law in deleting the addition holding that the money was taken by the assessee in the line of his business and therefore, could not be treated as deemed dividend?"

3. The facts, in brief, leading to filing of the present appeal are like these :

The assessee filed his return for the assessment year 2005-06 declaring total income of ₹15,33,270.00. The assessee described his income from business as property brokerage and from other sources. During assessment proceedings, the AO noticed that the assessee was deriving income from the business of property broker as commission and had also received advances/loans worth ₹1,40,04,030.00 from various

companies in which he was holding more than 10% of share

These companies were :

i) M/s Sisbro Promoters (P) Ltd.,
ii) M/s Fitwell Fashion Fabrics (P) Ltd.,
iii) M/s T.S.M. Polymers (P) Ltd. and
iv) M/s National Capital Region Electronics (P) Ltd.

He also noticed that public was not substantially interested in these companies, but these belonged to the assessee (Sunil Chopra), his wife (Rita Chopra) and father (Pran Nath Chopra) only. AO also noticed that these companies have given share application money to other companies in which the assessee had substantial interest. He also noticed that there was sufficient accumulated profit in these companies on the dates of payments of advances/loans. Therefore, AO made addition of ₹1,40,04,030.00 treating the total amount as deemed dividend under Section 2(22)(e) of the Act. The details of these as mentioned in summary form in the impugned order are as under :

"

S.No.	Name of company from which benefit accrues		Amount of benefit to 'a'	Accumulated profit as on 31.03.2004
	Sisbro Promoters Pvt. Ltd.	A B C	Rs.10,20,000/- Rs.19,00,000/- Rs.3,78,125/-	Rs.44,00,000/-
	Fitwell Fashion	A	Rs.15,40,000/-	Rs.71,76,953.45/-

	Fabrics Pvt. Ltd.	B	Rs.16,00,000/-	
			Rs.31,40,000/-	
	M/s TSM Polymers (P) Ltd.	A	Rs.27,90,125/-	Rs.54,00,000/-
			Rs.27,90,125/-	
	National Capital Region Pvt. Ltd.	A B	Rs.34,75,780/- Rs.13,00,000/-	Rs.51,00,000/-
			Rs.47,75,780/-	

4. The amounts mentioned against letter A in this table are the amounts taken by the assessee directly in his name whereas the amounts against letter B were taken by the companies where assessee has substantial interest. The AO has worked out the deemed dividend on the basis of the above table at Rs.1,40,04,030/-. He made the Addition of this amount in the taxable income of the assessee."

4. Dissatisfied with the additions, the assessee preferred appeal against the order of the AO before CIT(A) and contended there that the amount of ₹19,00,000.00 and ₹3,78,125.00 alleged to have been advanced by M/s Sisbro Promoters Pvt. Ltd. to M/s Sisbro India Pvt. Ltd. had not happened during the year under appeal. In this connection, the CIT(A) arrived at a conclusion that these transactions have taken place in the financial year 2003-04 and financial year 2000-01, and so these amounts cannot be considered as deemed dividend in the present assessment year. He accordingly deleted both these additions. The Revenue accepted this deletion made by the CIT(A) and did not challenge it before the Tribunal.

5. With regard to amount of ₹16,00,000.00 taken by M/s M Softpro Pvt. Ltd. from M/s Fitwell Fashion Fabrics Pvt. Ltd., it was contended by the assessee that these transactions also happened in financial year 2001-02 and the amount of share application received by M/s M.S. Softpro Pvt. Ltd. was of only ₹1,60,000.00 and not ₹16,00,000/-. The CIT(A) accepted the same and deleted this addition. This was also not challenged by the Revenue before the Tribunal.

6. With regard to amount of ₹27,90,125/- taken by assessee from M/s TSM Polymers Pvt. Ltd., it was contended by the assessee that he was not holding shares to the extent of 10% in this company. CIT(A) recorded a finding in this regard that the assessee was having share only to the extent of 5.691% and therefore Section 2(22)(e) was not attracted. This was also not challenged by the Revenue before the Tribunal. With regard to payment of ₹13,00,000.00 by M/s National Capital Region Electronics Pvt. Ltd. to Noida Promoters & Developers Pvt. Ltd. as share application money, AO considered it as deemed dividend under Section 2(22)(e). CIT(A) deleted this addition on the ground that M/s National Capital Regional Electronics Pvt. Ltd. had given this share application money for purchase of shares in M/s Noida Promoters & Developers Pvt.

Ltd. and so this cannot be treated as loan/advance in t context of Section 2(22)(e). In this way, the CIT(A) only treated the amounts of ₹10,20,000/-, ₹15,40,000/- and ₹20,70,000/- received as loan/advances from M/s Sisbro Promoters Pvt. Ltd., Fitwell Fabrics Pvt. Ltd. and National Capital Region Electronics Pvt. Ltd. as deemed dividend within the meaning of Section 2(22)(e) of the Act.

7. As stated above, both assessee and the Revenue feeling aggrieved against the order of the CIT(A) preferred cross-appeals before the Tribunal. The Tribunal observed as under :

> "16. Thus from the decision of the Hon'ble Jurisdictional High Court it is clear that if alleged loan/ advances taken by an assessee who is otherwise covered under the conditions of section 2(22) (e) for treating such advances as deemed dividend is able to establish that such advances / loans were not taken as loans rather they were business receipts in the ordinary course of business then those amounts would not fall within the ambit of deemed dividend. In the present case the AO did not consider any peripheral aspect. He has treated whatever type of receipts received by the assessee from the companies where public are not substantially interested as deemed dividend and made an addition of Rs.1,40,04,030/-. The assessee has demonstrated before the Ld. First Appellate Authority as to how AO has construed all the receipts as deemed dividend without analytically examining them. Ld. CIT(A) excluded substantial portion from the such deemed dividend and revenue has not challenged the action of the Ld. CIT(A) as discussed in the foregoing paragraphs by us. It indicate that Ld. AO did not deem it fit to consider the contention of assessee. The assessee right from the very beginning contending that he is in the business of brokering of real estate. The companies

whenever had any surplus fund they advance it to t assessee for making investment in the real estate. Neither the assessee nor the companies are disputing this conduct. Before Ld. CIT(A) it was pointed out that for M/s National Capital Region even agreement to purchase was executed. The Ld. CIT(A) has disbelieved this claim of the assessee on the ground that agreement was not registered. Hence it is only projected as a colourable device to avoid the mischief of section 2(22) (e) of the Act. The assessee is claiming these advances as advance for investment in his books of accounts. This aspect has not been disputed by the AO. The Ld. CIT(A) also was of the opinion that argument of business advance for taking way the amount from ambit of deemed dividend can be considered only when advancing company is in the money lending business. The nature of assessee's business is such that he is earning income from brokerage of real estate. He alleged that these companies have advanced money for investment in the real estate. This demonstrates that money was taken by the assessee in the line of his business. The AO has not brought any contrary material on the record rather he presumed every type of amount as deemed dividend. He has worked out the total amount as deemed dividend at Rs.1,40,04,030/-. As against this Ld. CIT(A) has worked out roughly Rs.45,00,000/-. The department has accepted the finding of Ld. CIT(A) with regard to the deletion of additions except a sum of Rs.13 lacs disputed by it in its appeal. Taking into consideration this approach of the AO vis a vis, the contention of assessee and the judgment of Hon'ble Delhi High Court in the case of CIT Vs. Creative, Dyeing and Printing Pvt. Ltd. (supra) we allow the first fold of grievance raised by the assessee and delete the additions of Rs.10,20,000/-, Rs.15,40,000/-, Rs.20,70,000/-. Similarly we upheld the deletion of Rs.113 lacs which was received by the company where assessee is substantially interested from National Capital Region Electronics Pvt. Ltd. as share application money."

8. From the order of the Tribunal, it may be seen that it has only commented upon the finding recorded by the AO. Before

proceeding further to see the reasoning of the Tribunal, we may note the background of the proceedings before the AO. The AO recorded that during the course of assessment proceedings, the assessee in reply to show cause notice furnished his response. With regard to the amount of ₹34,75,780/- received from M/s National Capital Region Electronics Pvt. Ltd., the assessee stated that the said amount was received against sale of property in terms of agreement dated 18th September, 2003. Here it may be noted that the companies are closely-held companies in which the only Directors are none other than the family members of the assessee. The AO recorded the said agreement to be sham and rightly so, inasmuch as the agreement was executed on 18th September, 2003 and the handing over of the property was to be done before 31st December, 2008. In any case, this property was still being reflected in the balance sheet of the assessee as on 31st March, 2005, even though the agreement was entered on 18th September, 2003. The CIT(A) also disbelieved the claim of the assessee on this count. The Tribunal in this regard has recorded that the assessee was claiming this advance for investment in his books of accounts and the AO has not disputed this. Apparently, this was a

perverse recording by the Tribunal inasmuch as it has be seen that AO and CIT(A) have categorically recorded this transaction as colourable device. It is unbelievable that an agreement was executed on 18th September, 2003 and the payment was made, but the possession of the property was to be handed over after more than five years. Even the property continued to be reflected in the balance sheet of the assessee after two years of the agreement. Similarly, in respect of ₹27,90,125/- shown as loan/advance from M/s TSM Polymers Pvt. Ltd., the assessee had replied to the AO that this was received against sale of property under the terms of the agreement dated 18th September, 2003. With regard to this entry also, the Tribunal made a sweeping observation that the assessee was claiming these as advance for investment in his books of accounts and this aspect was not disputed by the AO. He also observed that the business of the assessee is earning brokerage from the business of real estate and this demonstrated that he had taken the money in the line of his business. The observation of the Tribunal that the AO had not brought any contrary material on record was equally perverse and against the facts recorded by the AO. In this regard also, it may be noted that though the agreement was executed on

18th September, 2003 for the sale of the property, but t property continued to be reflected in the balance sheet of the assessee as on 31st March, 2005. The AO rightly recorded both these aspects to be not covered by the exception to deemed dividend as contemplated under Section 2(22)(e). Consequently, he rightly held these transactions as sham and treated them as deemed dividend of the assessee under Section 2(22)(e).

9. With regard to the payments made by the companies in which the assessee held shares, to the other companies in which he had substantial interest and which the assessee was taking to be towards allotment of shares, the AO recorded that the assessee was required to produce the certificate from the Registrar of Companies in support of his contention that shares had indeed been allotted to the investing companies. However, no evidence could be produced regarding the allotment of shares. Consequently, AO treated these amounts of advances/ loans also as deemed dividend under Section 2(22)(e) in the hands of assessee. In this regard also, the observations of the Tribunal are not only unwarranted but devoid of any basis. It seems to have taken as correct what was stated by the assessee before it. We have seen the order

of the AO which is well reasoned and a speaking or Likewise, the observation of Tribunal that the assessee has demonstrated before the first Appellate Authority as to how AO construed all receipts as deemed dividend without analytically examining them, and that the CIT(A) excluded substantial portion from such deemed dividend and the Revenue has not challenged the same, are all irrelevant and uncalled for. Similarly, the observation that the assessee right from the beginning has contended that he is in the business of brokerage of real estate and whenever the company had any surplus, they used to advance the money to the assessee for making investment in real estate, and that neither the assessee nor the companies are disputing this conduct is nothing but getting swayed away with the statements of the assessee. Though these were questions of facts which were recorded by the authorities below, but since great perversity and infirmity was pointed out by the learned counsel for the Revenue in the findings and observations recorded by the Tribunal, we chose to examine the factual matrix as noted above.

10. For all these reasons, the impugned order is not sustainable. Consequently, we answer both the questions in negative, i.e.,

in favour of the Revenue and against the assessee. We all

the appeal of the Revenue and set aside the impugned order.

M.L. MEHTA
(JUDGE)

A.K. SIKRI
(JUDGE)

May 11, 2011
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