



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

+ **ITA No. 610/2009**

% Date of Decision: 17<sup>th</sup> March, 2011

**COMMISSIONER OF INCOME TAX**

**... APPELLANT**

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

*Versus*

**LATE SHRI C.R. DASS**

**... DEFENDANT**

*Through:* Mr. Satyen Sethi, Advocate.

**CORAM:**

**HON'BLE MR. JUSTICE A.K.SIKRI**

**HON'BLE MR. JUSTICE M.L.MEHTA**

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|---------------------------------------------------------------------------------|----|
| 1. Whether the Reporters of local papers<br>may be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not?                                           | No |
| 3. Whether the judgment should be<br>reported in the Digest?                    | No |

**A.K. SIKRI, J. (Oral)**

1. This case pertains to the assessment year 1998-99. For this year, the assessee had filed the return declaring income of



Rs.1,14,000/-. This return was processed and accepted by the Assessing Officer vide order dated 29<sup>th</sup> October, 1998.

2. The assessee, at that time, was the Director of M/s Pearey Lall & Sons (EP) Ltd., and was also having the shares in the Company, which were, admittedly, much less than 10% at the relevant time. M/s Pearey Lall & Sons (EP) Ltd. (hereinafter, referred to as 'the Company') has also been assessed to tax in Rohtak. In respect of his case for the year 2002-03, the Company had filed appeal before the CIT(A), Rohtak. While deciding the said appeal, the CIT(A), Rohtak found that the assessee, herein, had given property No. 27, Auranged Road, New Delhi to the Company on lease on 16<sup>th</sup> March, 1998 at a monthly rent of Rs.12,000/-. The account of the assessee was also credited with Rs.75 lakhs as interest free security deposit. This amount was not actually paid to the assessee and instead the assessee was issued 74,560 shares of Rs.100/- each on 25<sup>th</sup> March, 1998 and the account of the assessee was debited with the consideration for issuance of the said shares, thereby, debiting the account of the assessee to the extent of Rs.74,56,000/-. With the issuance of these shares, the share holding of the assessee increased to 44.57%. The CIT(A), on the basis of the aforesaid facts, opined that the interest free security deposit of Rs.75 lakhs



should be treated as deemed dividend within the meaning of Section 2(22)(e) of the Income Tax Act (hereinafter, referred to as 'the Act'). While passing the order in the appeal, in respect of the Company, at the same time, CIT(A) wrote for providing this information to the Assessing Officer of the assessee herein. On the basis of this information, the Assessing Officer issued notice under Section 148 of the Act on 18<sup>th</sup> October, 2006 seeking to reopen the assessment in respect of the assessment year 1998-99 in the light of the aforesaid. The assessee objected to this assessment on the ground that a notice was issued after the expiry of six years from the end of the assessment year, and thereafter, was clearly barred by limitation. Even on merits, the assessee contended that provisions of Section 2(22)(e) had not been attracted and therefore, no such addition can be made. The Assessing Officer repelled both the contentions of the assessee and passed an assessment order dated 30<sup>th</sup> October, 2006 thereby making an addition of Rs.75 lakhs as deemed dividend in the hands of the assessee under Section 2(22)(e) of the Act. Against this order of the Assessing Officer, the assessee preferred an appeal to the CIT(A). The assessee pressed both the contentions which were raised before the Assessing Officer as well, namely, issuance of notice under



Section 148 as barred by limitation, and even on merits, the addition was untenable. The CIT(A) accepted both these contentions of the assessee and deleted the addition made by the Assessing Officer.

3. We may point out, at this stage, that on the question of limitation, the Department had contended that, no doubt, notice was issued after the expiry of six years, since the assessment was reopened on the basis of “directions” given by the Appellate authority i.e. the CIT(A), Rohtak, the limitation period, as prescribed under Section 149 of the Act was not applicable, having regard to the provisions of Section 150(1) of the Act. The assessee on the other hand had argued that the order of the CIT(A), Rohtak passed in the case of the Company could not amount to “directions” within the meaning of Section 150 of the Act as it could not be treated as giving the appeal effect. Some case law was also stated by the assessee in support of these aforesaid contentions. The CIT(A) observed as under while holding that the notice issued under Section 148 of the Act was time barred:-

“First of all, it is a moot point as to whether the reopening at the instance of the CIT(A), Rohtak, who had no jurisdiction over the assessee is good in law and also permissible. The CIA(A) was deciding the appeal in the case of the company M/s Pearey Lall & Sons, for the asstt, year 2002-03, and not in the case of this



assessee. Further “Directions” can be given only for the same assessment year and for the same assessee. This is the law laid down in the case of Consolidated Coffee Ltd. Vs. ITO 155 ITR 729 (Kerala) and in the case of CIT Vs. Raghubur Singh Trust 123 ITR 438 (SC).

4.2 It is also a moot point as to whether the assessee’s case can be reopened beyond the period of six years in view of the specific provisions of section 149. In my opinion it cannot be reopened.”

4. As mentioned above, the CIT(A) did not rest its decision on the question of limitation and went into the merits of the case as well. The assessee, in this aspect, had argued that the case was not covered by the provisions of Section 2(22)(e) because of the following reasons”-

1. Security deposit of Rs.75 lakhs credited to the assessee in the books of the Company on 16<sup>th</sup> March, 1998 and on that date the assessee had admittedly shareholding much less than 10% and thus provision of Section 2(22)(e) were not attracted.
2. The assessee had never received any money i.e., the aforesaid amount of Rs.75 lakhs after few days i.e. on 25<sup>th</sup> March, 1998, he was allotted shares and for this reason also the question of treating the aforesaid amount as deemed dividend would not arise. It was argued by the assessee that Section 2(22)(e) created a legal fiction and such a provision has to be strictly



construed. The CIT(A) accepted this plea of the assessee as well. It was now the turn of the Revenue to feel aggrieved by this order of the CIT(A) and accordingly, the Revenue approached the Income Tax Appellate Tribunal (hereinafter, referred to as 'ITAT') by filing an appeal. This appeal was filed on solitary ground which was taken in the following manner:-

“On the facts and in the circumstances of the case and **in law**, the Ld. CIT(A) has erred in deleting the addition of Rs.75 lakh right made by the A.O.”

5. The aforesaid ground taken by the Revenue was treated by the Tribunal as challenge on merits only. The Tribunal held the view that CIT(A) had initiated the proceedings also on the ground that re-opening of the re-assessment proceedings was beyond the period of six years and thus time barred, but Revenue had not challenged these findings of the CIT(A).
6. Based on this reason, the Tribunal dismissed the appeal holding that when the notice under Section 148 of the Act, after a period of six years was held to be time barred and instead challenge was allowed thereto, question of deciding the addition on merit did not arise.



7. Challenging the aforesaid order of the Tribunal, Ms. Prem Lata Bansal, learned senior counsel for the Revenue made strenuous plea that the ground taken by the Revenue challenging the deletion of the addition of Rs.75 lakhs made by the Assessing Officer was wide enough to include challenge to the finding of the CIT(A) holding the reassessment proceedings as time barred and a very myopic view was taken by the ITAT in not construing the aforesaid ground in its proper prospect.
8. Though, Mr. Satyen Sethi, learned counsel for the assessee joined the issue, he submitted that for going into the issue he was ready to argue the appeal on merits as well.
9. Learned counsels for both the parties agree the issue to be decided on merits. It is because of this reason that we heard learned counsels for the parties on merits on the addition of Rs.75 lakhs made by the Assessing Officer under Section 2(22)(e) of the Act which has been deleted by the CIT(A). Facts demonstrated above would clearly reveal that admittedly as on 16<sup>th</sup> March, 1998 when the transaction of lease was entered into between the assessee and the Company, the share holding of the assessee in the Company



was much less than 10%. Thus, he was not having more than 10% beneficial interest in the Company as on that date. It is on this date, i.e., 16<sup>th</sup> March, 1998 that the assessee leased out the premises of the Company at a monthly rent of Rs.12,000/- and as per the lease agreement, the Company also agreed to pay some security deposit of Rs.75 lakhs, which money was not paid on that date, but the amount of the assessee was credited to this account/amount. The question as to whether this amount of Rs.75lakhs received by the assessee could be treated as deemed dividend income as per the provision of Section 2(22)(e) of the Act on the date of transaction, is to be examined. It hardly needs to be emphasized that Section 2(22)(e) of the Act creates a legal fiction and therefore, such a provision is to be strictly construed. Rigor of Clause (e) of Section 2(22) has to be strictly complied with before the receipt at the hands of the assessee is to be treated as deemed income. On that date, i.e., 16<sup>th</sup> March, 1998, the assessee had less than 10% beneficial interest in the Company. This amount, therefore, by no stretch of imagination can qualify as deemed income under the aforesaid provision. We are therefore, in agreement with the approach taken by CIT(A) in deleting the aforesaid addition made by the Assessing Officer.



10. We may record that since the assessee has succeeded on merits, having not gone into the issue of limitation and therefore it be not construed that as far as limitation is concerned we have opined in favour of the Revenue.
  
11. The present appeal is dismissed on the aforesaid ground holding that no substantial question of law arises for consideration.

**A.K.SIKRI  
(JUDGE)**

**M.L.MEHTA  
(JUDGE)**

**MARCH 17, 2010**

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