IN THE INCOME TAX APPELLATE TRIBUNAL

"H" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA no.2774/Mum./2019
(Assessment Year : 2015–16)

Asstt. Commissioner of Income Tax
Circle–3, Kalyan, Dist. Thane ……. Appellant

v/s

Herbert Brown Pharmaceuticals &
Research Laboratories
W-256/257/258–A, MIDC
Phase–II, Shivaji Udyog Nagar
Dombivali (E), Mumbai 400 001
PAN – AAAFH7347B ……. Respondent

Revenue by : Shri Gurbinder Singh
Assessee by : None

Date of Hearing – 23.02.2021	Date of Order – 10.03.2021

O R D E R

PER S. RIFAUR RAHMAN, A.M.

The aforesaid appeal has been filed by the Revenue challenging the order dated 20th February 2019, passed by the learned Commissioner (Appeals)–1, Mumbai, pertaining to the assessment year 2010–11.

2. The issue arising out of the grounds of appeal raised by the Revenue is, whether or not the learned Commissioner (Appeals) was

justified in deleting the addition of ₹ 2,89,21,986, made by the Assessing Officer in the hands of the assessee firm under section 2(22)(e) of the Income Tax Act, 1961 (for short *"the Act"*).

3. Brief facts are, the assessee firm is engaged in the business of manufacturing and trading of chemicals and drugs and intermediates. For the year under consideration, the assessee filed its return of income on 29th September 2015 declaring total income of ₹ 26,55,170. The Assessing Officer from the material available before him observed that the assessee has borrowed loans from private limited companies wherein common shareholders held over 10% of the voting rights. The amount of loans taken by the assessee, details of common shareholders and their share holding ratios, details of the reserves and surplus available with those companies are given below:–

Name & Particulars	*M/s. Shirdi Chemicals Pvt. Ltd.*	
	Shares	*%*
Usha S. Acharya	*235000*	*30%*
Percentage of share holding of Usha S. Acharya in assessee firm as a partner		*45%*
Reserves & Surplus as on 31.03.2015		*₹16,11,00,736*
Amount of Loan / Advance given to assessee firm		*₹2,89,21,986*
Amounts attracting provisions of section 2(22)(e)		*₹2,89,21,986*

4. From the above, the Assessing Officer was of the view that the amount of loans to the extent of the reserves and surplus available with M/s. Shirdi Chemicals Pvt. Ltd., falls within the ambit of provisions of section 2(22)(e) of the Act and, hence, liable to be taxed in the hands of the assessee under the head *"Income From Other Sources"*. The Assessing Officer sought explanation by issuing a specific show cause notice dated 30th November 2017. The assessee in response to such notice submitted that the assessee firm is not a shareholder and hence, provisions of section 2(22)(e) of the Act is not applicable for the reason that to receive dividend one must be a shareholder. In support of this contention, the assessee relied upon the decision of the Hon'ble Supreme Court in CIT v/s C.P. Mudaliar, [2972] 83 ITR 170 (SC). The assessee in support of its claim, also relied upon various other judicial pronouncements and made similar arguments. The Assessing Officer after considering detailed submissions of the assessee made disallowance for the reason that the assessee firm having received an advance in whatever form, the same falls within the ambit of the provisions of section 2(22)(e) of the Act. He observed that the assessee's contention that the provisions of section 2(22)(e) of the Act are not application to trade advances, the same was not found acceptable to the Assessing Officer for the reason that the language used in this section refers to *"any payment by a*

company by way of advance or loan" and the assessee firm having received an advance in whatever form the same falls within the ambit of section 2(22)(e) of the Act. The Assessing Officer further observed that the exception is available in case the lending company is engaged in the money lending business and in the present case none of the lenders specified in the above table are engaged in the business of money lending and the advances are not made during the normal course of business activity. Accordingly, the Assessing Officer held that the amounts are clearly falling within the ambit of provisions of section 2(22)(e) of the Act and are liable to be taxed in the hands of the assessee under the head *"Income From Other Sources"*. The assessee being aggrieved by the order of the Assessing Officer, filed appeal before the first appellate authority.

5. During the first appellate proceedings the assessee contested the addition under section 2(22)(e) of the Act and the assessee's arguments on this issue were as follows:–

> *"The AO has erred in understanding the facts of the case. The additions made are in mechanical nature without application of mind. The AO failed to appreciate that, the advances given, were trade advances and not gracious loans. There were in nature of a business transaction and not for the benefit for the shareholder.*
>
> *The AO failed to appreciate the fact that, the Firm is not a shareholder of the Company & the sections re/ales to deemed dividend. Dividend is received by a shareholder and in this case the Firm / assessee is not a shareholder of the Company.*

> *Lastly, the assessee has been scrutinized every year and never prior to A Y 2010-11 the issue was raised by the AO ever. The facts and circumstances were same and they were accepted by the department. What changed after AY 2010-11/s that, the AO could make big additions as they were made the earlier year. No AO applied his mind for understanding the facts of the case nor how the law interpreted the sec. 2(22)(e).”*

6. The learned Commissioner (Appeals), considering the submissions of the assessee deleted the addition made by the Assessing Officer under section 2(22)(e) of the Act by following the decision of his predecessor–in–office who previously allowed the assessee’s claim in assessee’s own case as well following the order of the Tribunal passé din assessee’s own case for the assessment year 2019–10, 2010–11, 2011–12, 2012–13 and 2013–14 wherein the Tribunal has allowed identical issue raised by the assessee. The Revenue being aggrieved by this order of the learned Commissioner (Appeals), preferred appeal before the Tribunal.

7. Before us, when the case was called for hearing, neither the respondent assessee nor any of her authorised representatives appeared before us to represent the case. There is no application for adjournment either. Consequently, we proceed to dispose off the appeal after hearing the learned Departmental Representative and on the basis of material available on record.

8. The learned Departmental Representative relied upon the order of the Assessing Officer and submitted that though the recipient of loan or advance by the company is not a shareholder but is a concern in which shareholders are having substantial interest. He submitted that the learned Commissioner (Appeals) has incorrectly interpreted the provisions of section 2(22)(e) even though at least one shareholder holding 30% share in the company and 45% share in the assessee's firm. While concluding, the learned Departmental Representative further submitted that the learned Commissioner (Appeals) failed to appreciate the judgment of the Hon'ble Supreme Court in Gopal & Sons (HUF) v/s CIT, [2017] 391 ITR 001 (SC), wherein the Hon'ble Court by dismissing the assessee's appeal held that even if HUF is not a registered shareholder in lending company, once payment is received by HUF and Karta, who is shareholder in lending company, has substantial interest in HUF, payment made to HUF shall constitute deemed dividend in HUF's hand as per Explanation 3 to section 2(22)(e) of the Act.

9. Considering the submissions the learned Departmental Representative and on a perusal of the material on record in the light of the decisions relied upon, we find that the issue on applicability of provisions of section 2(22)(e) of the Act is squarely covered in favour

of the assessee by the decision of the Co–ordinate Bench of the Tribunal in assessee's own case in preceding assessment year 2019–10, 2010–11, 2011–12, 2012–13 and 2013–14 wherein the Bench in Revenue's appeal declined to interfere with the order of the first appellate authority and upheld the same. Consequently, we do not find any infirmity in the order passed by the learned Commissioner (Appeals) by allowing the claim of the assessee. We also note that the facts of the decision of the Hon'ble Supreme Court in Gopal & Sons (HUF) (supra), are distinguishable in nature insofar as the facts of the present issue are concerned. Therefore, the case law relied upon by the Revenue is not applicable to the facts of the present appeal. Accordingly, the order of the learned Commissioner (Appeals) is hereby upheld by dismissing the grounds raised by the Revenue.

10. In the result, Revenue's appeal is dismissed.

Order pronounced in the open court on 10.03.2021

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

Sd/-
S. RIFAUR RAHMAN
ACCOUNTANT MEMBER

MUMBAI, DATED: 10.03.2021

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The CIT(A);

(4) The CIT, Mumbai City concerned;

(5) The DR, ITAT, Mumbai;

(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai