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

\+ **ITA 589 OF 2011**

Judgment Reserved On: 19.09.2011

% *Judgment Delivered On:30.9.2011*

COMMISSIONER OF INCOME TAX . . . APPELLANT

Through: Mr. Abhishek Maratha, Sr. Standing Counsel with Ms. Anshul Sharma, Advocate.

VERSUS

ARVIND KUMAR JAIN . . RESPONDENT

Through: Mr. Ved Jain, Advocate.

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J

1. The assessee is in the business of trading i.e. purchase and sale of books and journals. During the assessment proceedings, the Assessing Officer found that the assessee is a shareholder in a company called A & A Periodical Subscription Agency Pvt. Ltd. (hereinafter referred to as the A & A Periodicals). The paid up share capital of A & A Periodicals was 50,2000/- [50,200 shares of Rs. 10 each]. The assessee was holding 50% shares in this company and remaining 50% shares were held by Smt. Sunita Jain. The AO further found that in the books of accounts the assessee had shown taking

unsecured loan of Rs. 47,23,5318/- from A & A Periodicals. The assessee being 50% shareholder in the said company, the aforesaid purported loan received by the assessee was treated as 'deemed dividend' under Section 2 (22) (e) of the Act.

2. We may note that explanation furnished by the assessee was that the aforesaid amount was not a loan and in fact there was a business transaction between the assessee and A & A Periodicals and the amount reflected running business relationship and there was a running account maintained by the assessee showing those transactions. This explanation was, however, not accepted by the Assessing Officer as in the books of accounts, the amount was shown as "unsecured loan".

3. The assessee challenged the said addition by filing appeal before the CIT (A) who accepted the explanation furnished by the assessee. It was found, as a fact, that both the assessee as well as the A & A Periodicals were in the business of trading i.e. purchase and sale of books and journals; there were business transactions between the assessee and the A & A Periodicals; a running account was being maintained reflecting the regular transactions between the two business entities; and the amount of Rs. 47,25,318.80 paise was the result of those business transactions. From this, the CIT (A) concluded that the amount was not given by A & A Periodicals to the assessee by way of loan but on this basis, allowing the appeal of the assessee, the CIT (A) deleted the additions. The matter was taken in further appeal before the ITAT by the Revenue. However, the appeal of the Revenue has been dismissed by the Tribunal vide impugned order dated 16.7.2010 holding that the payment made by the A & A Periodicals to the

assessee is not in the nature of loan or advance. The finding of the CIT (A) is affirmed by the ITAT, on the basis of books of accounts produced before the Assessing Officer and shown to the Tribunal as well that all the transactions between the two entities are recorded in the current account maintained by the parties and outstanding in the said account was merely because of the trade transaction and did not represent any advance or loan.

4. It is not in dispute that Section 2 (22) (e) of the Act creates a fiction of making such loan and advance under circumstances, as deemed dividend, would be attracted only when some loan or advance is given by the company to another person who is having particular shareholding in the said company. However, in the present case, two authorities below have arrived at a finding of fact that the amount in question represented the credit balance as a result of transactions between A & A Periodicals and the assessee on account of business relations and payment was not in the nature of 'loan or advance'.

5. In ***CIT*** Vs. ***Raj Kumar*** (2009) 318 ITR 462, this Court has held that if the payments are made by such a company to even its shareholder having substantial interest but are the result of business transactions between the parties, then such payments cannot be treated as loan or advance and the money so received cannot be treated as deemed dividend within the meaning of Section 2 (22)(e) of the Act. The following discussion in the said judgment spells out the conditions which are to be fulfilled before the amount paid is treated as deemed dividend as well as the principle that trade advance does not fall within the ambit of provisions of Section 2 (22) (e) of the Act:-

"(i) The company making the payment is one in which public are not substantially interested.

(ii) money should be paid by the company to a shareholder holding not less than ten per cent (10%) of the voting power of the said company. It would make no difference if the payment was out of the assets of the company or otherwise.

(iii) The money should be paid either by way of an advance or loan or it may be "any payment" which the company may make on behalf of, or for the individual benefit of, any share holder or also to any concern in which such shareholder is a member or a partner and in which it is substantially interested.

(iv) And, lastly, the limiting factor being that these payments must be to the extent of accumulated profits, possessed by such a company."

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Therefore, if the said background is kept in mind, it is clear that Sub-clause (e) of Section 2(22) of the Act, which is pari-materia with Clause (e) of Section 2(6A) of the 1922 Act, plainly seeks to bring within the tax net accumulated profits which are distributed by closely held companies to its shareholders in the form of loans. The purpose being that persons who manage such closely held companies should not arrange their affairs in a manner that they assist the shareholders in avoiding the payment of taxes by having these companies pay or distribute, what would legitimately be dividend in the hands of the shareholders, money in the form of an advance or loan.

If this purpose is kept in mind then, in our view, the word "advance' has to be read in conjunction with the word "loan'. Usually attributes of a loan are that it involves positive act of lending coupled with acceptance by the other side of the money as loan: it generally carries an interest and there is an obligation of re-payment. On the other hand, in its widest meaning the term "advance' may or may not include lending. The word "advance' if not found in the company of or in conjunction with a word "loan' may or may not include the

obligation of repayment. If it does then it would be a loan. Thus, arises the conundrum as to what meaning one would attribute to the term "advance'. The rule of construction to our minds which answers this conundrum is noscitur a sociis. The said rule has been explained both by the Privy Council in the case of Angus Robertson v. George Day (1879) 5 AC 63 by observing "it is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them" and our Supreme Court in the case of Rohit Pulp & Paper Mills ltd v. CCE, AIR 1991 SC 754 and State of Bombay v. Hospital Mazdoor Sabha, AIR 1960 SC 610.

It is important to note that Rohit Pulp (supra) was the case dealing with taxation. In brief in the said case the assessee was seeking to take benefit of an exemption notification. The Department denied the benefit of the "notification' on the ground that the paper manufactured by the assessee was "coated paper' to which as per the proviso to the said notification the concession was not available. The Supreme Court in coming to the conclusion that the assessee's case did not fall within the proviso and was thus entitled to the benefit of the notification applied the rule of construction of noscitur a sociis.

Importantly, the broad principles which emerge from the judgment of the Supreme Court with regard to the applicability of the said rule of construction are briefly as follows:

(i) does the term in issue have more than one meaning attributed to it i.e., based on the setting or the context one could apply the narrower or wider meaning;

(ii) are words or terms used found in a group totally "dissimilar' or is there a "common thread' running through them;

(iii) the purpose behind insertion of the term.

Let's examine as to whether based on the aforesaid tests the said rule of construction "noscitur a sociis' ought to be applied in the instant case.

(i) the term "advance' has undoubtedly more than one meaning depending on the context in which it is used;

(ii) both the terms, that is, advance or loan are related to the "accumulated profits' of the company;

(iii) and last but not the least the purpose behind insertion of the term advance was to bring within the tax net payments made in guise of loan to shareholders by companies in which they have a substantial interest so as to avoid payment of tax by the shareholders;

Keeping the aforesaid rule in mind we are of the opinion that the word "advance' which appears in the company of the word "loan' could only mean such advance which carries with it an obligation of repayment. Trade advance which are in the nature of money transacted to give effect to a commercial transactions would not, in our view, fall within the ambit of the provisions of Section 2(22)(e) of the Act. This interpretation would allow the rule of purposive construction with noscitur a sociis, as was done by the Supreme Court in the case of LIC of India v. Retd. LIC Officers Assn. [2008] 3 SCC 321."

6. Learned counsel for the appellant hammered the fact that the amount was shown by the assessee himself in his books of accounts as "unsecured loan" and, therefore, the order of the Assessing Officer was correct.

7. It is trite law that mere nomenclature of entry in the books of accounts is not determinative of the true nature of transaction. See ***Commissioner of Income Tax*** Vs. ***India Discount Co. Ltd.*** 75 ITR 191 (SC), ***Commissioner of Income Tax*** Vs. ***Provincial Farmers (P) Ltd***. 108 ITR 219 (Cal) and ***KCP Ltd***. Vs. ***CIT,*** 245 ITR 421. In the present case after going through the relevant evidence as well as current account maintained

between the parties, it has been established that the payment made were the result of trading transaction between the parties and the amount was not given by way of loan or advance.

7. We thus, find that no question of law arises in this appeal which is accordingly dismissed.

(A.K. SIKRI)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

SEPTEMBER 30, 2011
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