आयकर अपीलीय अधिकरण ,इन्दौर न्यायपीठ ,इन्दौर

IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE

श्री डी.टी.गरासिया ,न्यायिक सदस्य

तथा

श्री ओ.पी.मीना ,लेखा सदस्य के समक्ष

BEFORE SHRI D.T. GARASIA, JUDICIAL MEMBER
AND
SHRI O.P. MEENA, ACCOUNTANT MEMBER

आ.अ.सं /.I.T.A. No. 632/Ind/2013		
निर्धारण वर्ष/ Assessment Year:2008-09		
Shri Hemant Jain 3 Janki Nagar Indore 452001	Vs.	DCIT 1(1), Indore
अपीलार्थी /Appellant		**प्रत्यर्थी /Respondent**
स्था.ले.सं./**PAN:ABHPJ 1977 H**		

अपीलार्थी की ओर से/Appellant by	**Shri Anil Garg, CA and Shri Arpit Gaur CA**
प्रत्यर्थी की ओर से/Respondent by	**Shri Rajib Jain JCIT**

सुनवाई की तारीख/Date of hearing	**03.01.2017**
उद्घोषणा की तारीख/Date of pronouncement	**16.01.2017**

आदेश /O R D E R

PER O.P. MEENA, ACCOUTANT MEMEBR.

1. This appeal is filed by the assessee against the order of ld. Commissioner of Income tax (Appeals)-I, Indore [hereinafter referred to as the CIT (A)] dated 22.08.2013. This appeal pertains to Assessment Year 2008-09 as against appeal decided in respect of assessment order dated 02.12.2010 passed u/s. 143(3) of Income Tax Act, 1961(herein after referred to as "the Act) by the DCIT 1(1), Indore [hereinafter referred to as the AO].

2. The assessee has taken following grounds of appeal:-

1(i) That, the learned CIT(A) grossly erred both on facts and in law, in confirming the addition of Rs. 57,75,019/- made by the learned AO in appellant`s income by invoking provision of section 2(22)(e) of Income Tax Act,1961.

(ii) That, the learned CIT (A) grossly erred in confirming the addition made by the AO under section 2(22)(e) of the Act, without appreciating the material fact that the appellant had not taken any loan or advance from M/s. Lakhanlal Kantilal Brokers Pvt. Ltd. The learned AO also erred in not considering the material fact that the impugned sum of Rs. 1,00,00,000/- was recovered by the Appellant from the above named company on behalf of one of his debtors only and therefore, the transaction does not fall within the mischief of provisions of section 2(22)(e) of Income Tax Act,1961.

2(i) That, the learned CIT(A) grossly erred, both on facts and in law, in confirming addition of Rs.15,57,894/- made by the learned AO in appellant`s income on account of alleged speculation transactions.

(ii) That, the learned CIT (A) grossly erred, in not considering and appreciating the material fact that the impugned payments were genuinely made by the appellant, during the ordinary course of his carrying out delivery based business and the transaction covered by impugned payments were not speculative transactions within the definition of clause (5) of section 43 of Income Tax Act,1961.

(iii) That, Without prejudice to above, the learned CIT(A) grossly in not appreciating the material fact that if the nature of the subject transaction is regarded as that of speculative loss transaction than, correspondingly , the

nature of other transaction, under which the appellant has earned income by receiving payments from various parties, should also have been regarded as speculative profit transaction and accordingly, the alleged speculative loss transaction ought to have been allowed to be set-off against the speculative profit transaction under the provisions of sub-section (1) of section 73 of the Act.

(iv) That, Without prejudice to above, even by assuming and not admitting, if the payments of Rs. 15,57,894/- were regarded as speculation transactions, not eligible for set-off from gain from other transaction of the similar nature, than the loss of Rs. 15,57,894/- arising on account of impugned transaction was ought to have been allowed to be carried forward for set-off under the provision of sub-section (2) of section 73 of the Act.

3. Ground no. 1 relates to addition of Rs. 57,75,019/- as deemed dividend u/s. 2(22)(e) of the Act.

4. Succinctly, facts as culled out from the orders of lower authorities are that the assessee is an individual and was a shareholder in a company named M/s. Lakhanlal Kantilal Brokers Pvt. Ltd. (in short LKBPL). The AO found that there are several transactions between the assessee and the above company during the subject year. Ongoing through the accounts of the company, it was noticed that the company's account showed credit balance on 08.02.2008 amounting to Rs. 57,75,019/-. Since the assessee is a shareholder of the previously mentioned company, and therefore provisions of section 2 (22) (e) are applicable. It was explained by the assessee, that the company accounts was always having debit balance but on the said date, it shows

credit balance due to the reasons that the assessee had issued a cheque on the said date but it could not be cleared on the same day due to the reasons that next days were Saturday and Sunday. It was further argued that the company as well as the assessee transacted same amount of Rs. 1,00,00,000/- payable to each other, one of them by R TGS and the other one by cheque. It has been further referred that it that the cheque issued was cleared late; hence, it shows credit balance on 08.02.2008. It was argued that there was no credit of the Company. However, this submission of the assessee was not found acceptable on the ground that said amount reflected credit of the assessee's account by an amount of Rs. 1,00,00,000/- received on 08.02.2088 whereas payment of Rs. 1,00,00,000/- has been reflected on 12.02.2008 . Thus, there is a wide gap of four days between the above transaction. It is noteworthy that the balance of the company after receipt of above sum Rs. 1,00,00,000/- and the credit balance was at Rs. 57,75,019/- which clearly deemed dividend as the said date. This aspect has been examining the perspective of the conditions laid down in section 2 (22) (e). The assessee is a shareholder in the said company. His share holding pattern of the company more than the specified percentage. The company has sufficient reserve and surplus as per balance sheet. Accordingly, the amount of Rs. 57,75,019/- was added as deemed dividend under section 2 (22) (e) of the Income Tax Act,1961 in the hands of the assessee.

5. Being, aggrieved the assessee filed an appeal before the ld. CIT (A).
6. The Ld. CIT (A) observed that as per the bank account of Gurudev Corporation in Dena Bank, the assessee received Rs. 1 crore from LKBPL on

08.02.2008. As a result, there was a credit balance of Rs. 1 crore on 08.02.2008. This amount was returned back on same day but it was received on 12.02.2008 in account of Gurudeo Corporation, a proprietary concern of the assessee as cheque could not be cleared being Saturday and Sunday. The AO did not agree with this proposition. However, in appeal the assessee has taken different stand that the amount was not a loan or advance from LKBPL but it was recovered from this company on behalf of one of its debtors namely Kandla Expert Corporation (KEC). If L KBPL has paid Rs. 1 crore to the appellant on behalf of KEC, then in the ledger account of appellant`s proprietary concern, i.e. M/s. Gurudev Corporation (GC) ,there should be a debit entry in books of LKBPL and there has to be a corresponding credit entry in ledger account of KEC on 08.02.2008. In the books of account of M/s. LKBPL and M/s. GC does not draw any credit on 08. 02. 2008. Similarly, no entry of Rs. 1 crore is seen in the books of the appellant i.e. GC. In fact no debit or credit entries there in account of KEC for the whole of February 2008. Not only that without such transaction of Rs. 1 crore being entered in ledger account of KEC by the appellant, the balance debit comes to Rs. 5,02,12,141/- in account of KEC and appellant has shown exactly the same balance in its return of income in schedule 6 of which did deal sundry debtors. Hence it is very clear that such transaction of Rs. 1 crore has nothing to move with KEC and that is why such argument was never taken before AO. Therefore, the new argument taken by the appellant is disapproved from the ledger account of the appellant himself and also from the fact that the KEC did not come from the same. The confirmation or copy on company LKBPL in this regard and their

affidavit is of no help to the appellant because third party KEC has not confirmed that they were told LKBPL to pay such amount of Rs. 1 crore to the appellant on 08.02.2008 and even if such entry is reversed subsequently should appear in the ledger account of all three parties, namely the appellant, LKBPL, and KEC, but such entries are not reflected in their ledger accounts. The Ld. CIT (A) further observed that even amount of Rs. 1 crore received on 8.2.2008 and returned back on 12.02.2008 , even then it amounts deemed dividend u/s. 2(22)(e) of the Act in the light of ratio laid down in the case of Walchand & Co. Ltd. [1975] 100 ITR 598(Bom) . Hence, temporary loans or short holding of loan amounts to deemed dividend within the mischief of section 2(22) (e) of the Act. Further the said company had sufficient surplus and reserve, hence, conditions of section 2(22) (e) are fulfilled. Accordingly, CIT (A) had confirmed the addition made by the AO.

7. Being, aggrieved the assessee filed this appeal before the tribunal.

8. The learned Counsel for the assessee, submitted that the learned AO has not brought on record that the assessee was having more than 10% of the Voting was of the company of LKPBL on the date of transaction and accumulated profit to the extent of Rs. 57, 75, 019/-on the date of transaction i.e. 08-02-2008 The AO has not discharge his initial onus of proving that the case of the assessee falls within the provisions of section 2 (22) (e). Therefore, the resultant action of the AO in making addition deserved to be quashed. Without prejudice to the above, it was contended that the assessee had never taken any loan or advance from the subject company i.e. LKBPL to fall within the provisions of section 2 (22) (e), contrary, it was the assessee who & had given

loan and advances from time to time to LKBPL. It was submitted that, on the date of subject transaction, the appellant owed the sum of Rs. 3, 60, 24, 122/- from KEC against the sale of goods made by him from time to time to KEC. The learned Counsel for the assessee referred PB Page No 8 to establish that the assessee was to receive the above amount from KEC on 08.02.2008. The learned Counsel referred PB page No 7B, to submit that the assessee was having deposit with LKBPL of Rs. 42, 24, 981/- as on 08.02.2008 i.e. the before entering the subject transaction of Rs. 1 crore on 08. 02. 2008. Therefore, the learned Counsel submitted that the assessee`s proprietorship concern M/s. GC had received the sum of Rs.1 crore from the company LKBPL not on its own account but on behalf of one of its customer namely KEC. Similarly, on the same day, the same costumers i.e. KEC owed a sum of Rs. 5, 11, 00,440/- from the LKBPL in two separate accounts. The LKBPL was showing credit balance of Rs.1,50,46,318/- and of Rs. 3,60,54,122/- in the name of KEC as reflected PB Page 10 and PB Pg15 respectively. It was submitted that such costumers i.e. KEC was dealing with the assessee was also caring on business of forward trading through the company LKBPL. In addition, during the course of carrying out day-to-day regular business transactions, KEC owed the above stated sum from LKBPL. Thus, , in aggregate, a sum of Rs. 5,11,00.440/- [1,50,46,318+n3,60,54,122] was payable by M/s. LKBPL to M/s. KEC, immediately before the happening of the impugned transaction. The assessee raised a demand on 7.2.2008 to KEC to make some payment. On the other hand, KEC raised demand with LKBPL and verbally asked the LKBPL to make payment of Rs. 1 crore through RTGS to the assessee against its dues. Accordingly, LKBPL

had transferred a sum of Rs. 1 Crore through RTGS on 08.02.2008 from its Axis Bank to the account of GC with Dena Bank (PB-21). Subsequently, their legal Counsel, advised the KEC that after amendment in the provisions of section 40A, (3) of the Act, the KEC was not entitled to make payment to one creditor by rotating the funds through one debtor. It was therefore, the KEC immediately a day after i.e. on 09.02.2008, made verbal request to the assessee to reverse the earlier instruction for transaction dtd. 08.02.2008. Accordingly, GC has refunded the same amount of Rs. 1 crore by issuing cheque no. 293484 dtd. 09.02.2008 in favour of LKBPL. However, as 10th and 11th February 2008 being Saturday and Sunday, LKBPL has presented the cheque on 11th February with SBI and said cheque was duly realized on 12.02.2008. (PB Pg21].It was further submitted that the above fund remained with the assessee just for a one day inasmuch as on 08.02.2008, it was received and on 09.02.2008, it was refunded through cheque by the assessee. The learned Counsel submitted that due to inadvertent mistake on the part of accountant of GC, the receipt of Rs. 1 crore was wrongly credited in the account of LKBPL on 08.02.2008 and consequently, the debit entry regarding repayment was made on 12.02.2008 in the name of LKBPL. However, both these entries ought to have been made in the account of KEC as the assessee because of KEC carried out these transactions only. With regard to CIT (A) is observation that the transaction made on behalf of KEC is not reflected in the books of accounts of LKBPL , it was submitted that as be PB Page No 12 , which is copy of KEC in the books of LKBPL clearly showed that the company has duly debited the account of KEC only and not that of the assessee while

giving a sum of Rs. 1 crore on 08.02.2008 and the due credit was given to the account of KEC only and not the account of the assessee. These facts speaks that the LKBPL has never given any loan or advance to the assessee. Consequently, question of deemed dividend u/s. 2(22) (e) does not arise. Further the payment vouchers and receipt vouchers prepared by LKBPL placed at PB Page No 22 & 23 and affidavit of director of LKBPL placed at PB Page No 24 & 25 also showed that the assessee has not taken any loan and advance from LKBPL. The learned Counsel also filed an affidavit of CA Sachin Bhaiji who was representing the assessee before the AO stating that the submission were made by him before the AO without consulting the assessee and he was not fully aware about actual facts. Therefore, it was contended that the transaction were entered in to during normal course of business of trading of the assessee and therefore, such transaction cannot be held as falling within the ambit of section 2(22)(e) of the Act. The learned Counsel also placed reliance on following decision in support of his proposition. i) CIT vs. Creative Dyeing and Printing (P) Ltd. [2009] 318 ITR 476(Del), ii) CIT vs. Ambassador Travels (P) Ltd. (2009) 318 ITR 476(Del),iii) CIT vs. Vikram Ved (2014) 367 ITR 365(Bom), iv) Mukundray K shah vs. CIT (2005) 277 ITR 128(Kol), v) CIT vs. Ankitech Pvt. Ltd. & ors (2011) 242 CTR 1029(Del). , vi) Jamu V Sungand vs. DCIT (2006) 100 TTJ (Mum) 1034 vii) DCIT vs. Lakra Brothers (2007) 106 TTJ (Chd) 250. It was also submitted that the assessee has not derived any material benefit from this transaction as during the intervening period the assessee has utilized only a sum of Rs. 4 Lakh and odd and remaining balance was lying in his bank account. Without prejudice to above, it was submitted

that accumulated balance in Profit & Loss Account at the beginning of the year was at Rs. 37,19,911/- only and the AO without bringing on record any material that the accumulated profit as on the date of impugned transaction raised an amount of Rs. 57,75,019/- equivalent to subject addition was computed, hence, the AO is not justified.

9. The Ld. D.R. relied on the order of lower authorities and submitted that the contention of the assessee is not acceptable as the assessee is not able to justify that the transaction entered in to with LKBPL, is rotated through KEC for purpose normal business transactions. Therefore, the finding as given by the lower authorities be upheld.

10. We have heard the rival submissions of both the parties and have perused the material available on record. It is seen that the KEC owed the assessee an amount of Rs. 3.60 crore because of business transaction with the assessee. Similarly, LKBPL owed an amount of Rs. 5.11 crore to KEC because of business transactions. We also find that the assessee has raised a demand against KEC on 07.02.2008. Accordingly, on verbal instruction of KEC, M/s. LKBPL has transferred a sum of Rs. 1 crore on 08.02.2008 by RTGS to the assessee. Therefore, this amount was received from LKBPL on behalf of M/s. KEC is in the nature of business receipts of the assessee routed through LKBPL , hence, it cannot be regarded as loan and advance from LKBPL. We also find that when the KEC was advised by its legal counsel that such transfer is not allowable as per amended provisions of section 40A (3) of the Act. Consequently, the KEC has requested the assessee to refund the said amount to LKBPL. However, the assessee could not refund the same

immediately as 10th and 11th of February there being Saturday and Sunday, hence, the said amount could be refunded by cheque issued on 11.02.2008 to LKBPL, which was cleared on 12.02.2008. The learned Counsel has relied in the case of CIT vs. Ambassador Travels (P) Ltd. (2009) 318 ITR 476(Del), wherein it was held that where assessee, a travel agency, booking resorts for customers of the companies, they were normal business transactions and could not be treated as deemed dividend u/s. 2(22)(e) because of share holding pattern. Similar in the case of both the assessee as well as LKBPL and KEC were dealing in same line of business and amount was received from LKBPL on account of business transactions on behalf of KEC as LKBPL had to pay a sum of Rs. 5.11 Crores to KEC and in turn the assessee was to receive Rs. 3.60 Crores from KEC. Therefore, this being not in the nature of loan and advance , hence, does not falls under the provision of section 2(22)(e) of the Act. We also note that the assessee had debit balance with LKBPL and never received any loan and advance from LKBPL. This view of us is also supported by decision ACIT vs. C. Rajini (Smt) (2011) 9 ITR (Trib) 487 (Chennai)(Trib) and Dy. CIT vs. C. Subba Reddy (HUF) (2011) 9 ITR (Trib) 487 (Chennai) (Trib) wherein the **a**ssessee was a director in two companies holding substantial shareholding in both. Certain sum was transferred from one company to another at instance of assessee. Assessee having substantial credit balance with company, cannot held as loan or deposit nor can be assessed as deemed dividend. Further the case laws relied by the A.R. also supports his view. Thus, the circumstantial evidences shows that the assessee had received the sum of Rs. 1 crore on 08.02.2008 on account of business receipts

on behalf of KEC who in turn to receive the said sum from LKBPL. We also find from the copy of bank account that the entries of this transaction are duly reflected in respective accounts. We also find that the assessee has not availed any benefit because of this transaction as only a sum of Rs. 4 Lakh was only paid and balance amount was lying in bank account of the LKBPL. Thus, it appears to be genuine business transaction carried out in the normal course of business. We also find that the director of LKBPL has furnished an affidavit in this regard. Further, the CA Shri Sachin Bhaiji also give an affidavit stating that he has not consulted the assessee regarding facts and could not bring before the AO proper facts. Therefore, this was inadvertent mistake took place due to negligence of employee of KEC. In view of these facts and circumstances, we are of the considered opinion that the AO was not justified in treating such a single entry of receipts as deemed dividend u/s. 2(22)(e) of the Act. Accordingly, ground no. 1 of the appeal of the assessee is allowed.

11. Ground no. 2 relates to confirming the addition of Rs.15,57,894/- being speculation transaction without considering material facts.

12. Briefly stated the facts apropos of this ground are that the AO noticed some credit notes given to various parties. According to the AO, the assessee entered in to supply of goods at future date but did not deliver the goods and paid the difference of amount of agreed rate with current rate current, hence, this was in the nature of speculation transaction. It was also found that there was no reference of purchase and sale of goods with respect of three parties with whom settlement was made. Hence, the AO treated the

aggregate sum of Rs. 15,57,894/- as speculation transaction and consequently, same were added to total income.

13. Being, aggrieved the assessee filed an appeal before the ld. CIT (A). the Ld. CIT (A) noted that parties in respect of which credit notes issued , the assessee has not carried out any transaction other than settlement , hence, the assessee was not eligible for claim of set-off in respect of speculation loss against other transaction.

14. Being, aggrieved the assessee filed this appeal before the tribunal. Before us, the learned Counsel for the assessee submitted the assessee has entered in to contracts in normal course of business but in some cases due to unforeseen circumstances normal and business, compulsion actual delivery does not take place. In such case contract between parties gets rescind but in order to avoid legal suits and protracted litigation, some mutual settlement is made. The Ld. A.R. argued that the assessee had received credit of Rs. 1,15,84,725/- from various parties and likewise he also compelled to make payment to various parties of Rs. 17,55,161/- by way of settlement and earned profit of Rs. 98,29,564/- which duly included in grounds profit of Rs. 2,02,75,422/- shown in audited accounts and such fact was not disbelieved by the AO. Therefore, the AO should have considered the same allowed the deduction even on account of speculation transaction loss.

15. The Ld. DR relied on the orders of lower authorities.

16. We have heard the rival submissions of both the parties and have perused the material available on record. We find that the assessee had carried out certain transaction, which are not delivery based hence; the AO has rightly

treated the same as speculation transaction. However, we find from the contention of the ld. A.R. that the assessee has also received a sum of similar in nature from various parties, which has been duly claimed to have been reflected in Profit & Loss Account and included in gross profit shown by the assessee. We therefore, consider it appropriate to restored this issue to the file of the AO to verify whether the assessee has also shown profit on account of speculation transaction , and if found correct , the AO may allow set-off of loss on account of speculation transaction or balance may allowed to be carried forward . This ground of appeal is therefore, set-aside to the file of the AO.

17. In the result, the appeal of the assessee is partly allowed.

18. The order pronounced in the open court on 16.01.2017

Sd/-	**Sd/-**
(डी.टी.गरासिया)	(ओ.पी.मीना)
न्यायिक सदस्य	लेखा सदस्य
(D.T.GARASIA)	**(O.P.MEENA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

दिनांक /**Dated : 16th January, 2016.**