IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "B", BANGALORE

Before Shri George George K, JM & Shri Jason P.Boaz, AM

ITA No.396/Bang/2017 : Asst.Year 2013-2014

Shri Hemanth Kumar Bothra No.14, 7th Cross, Jal Bharat Nagar, Banaswadi Road, Bengaluru – 560 033. **PAN : AAAPH9863N.**	Vs.	The Asst.Commissioner of Income-tax, Central Circle 1(2) Bengaluru.
(Appellant)		(Respondent)

Appellant by : Shri Lakshmy Karthik, CA
Respondent by : Shri Padmameenakshi, JCIT

Date of Hearing : 23.10.2017		**Date of Pronouncement : 03.11.2017**

O R D E R

Per George George K, JM

This appeal, at the instance of the assessee, is directed against the order of the CIT(A)-11, Bangalore, dated 16.12.2016. The relevant assessment year is 2013-14.

2. The solitary issue raised by the assessee, in his grounds of appeal, is that the CIT (A) erred in confirming the addition of Rs.1,00,50,743 made by the AO on account of deemed dividend u/s 2(22)(e) of the Act.

3. Briefly stated, the facts of the issue are as follows:

The assessee, an individual, had shown his income from salary, house property, business and other sources. During the relevant period under dispute, the assessee had furnished his return of income admitting a total income of Rs.14,75,250

which comprised, among others, a new unsecured loan creditor for a sum of Rs.1.53 crores. Being queried during the course of assessment proceedings, it was explained that the new advance of Rs1.53 crores was received from M/s. Nokha Investments Pvt. Ltd. [NIPL] in November, 2012. Out of this, Rs1.38 crores and Rs.15 lakhs were received on 5.11.2012 and on 27.11.2012 respectively. Scrutinizing upon the details furnished by the assessee, the AO found that at the time of receiving the advance, the assessee was a share-holder with 55.05% share-holding in NIPL which was a private limited company in which the public were not substantially interested. According to the AO, as per the balance sheet as on 31.3.2012 [at the end of the earlier previous year] NIPL had accumulated profits of Rs.1,00,0,743. During the relevant previous year under dispute, NIPL had earned further profits. According to the AO, in terms of s. 2(22)(e), the amount of advance to the extent of accumulated profits as on the date of giving the advance was liable to be taxed as deemed dividend income. After due consideration of the assessee's explanation as incorporated in his impugned order under consideration, the AO had made an addition of Rs.1,00,50,743 as deemed dividend u/s 2(22)(e) of the Act in the hands of the assessee for the following reasons:

> *"5.....The explanation is a self-serving argument and is an attempt to give a simple and straight-forward loan, the colour of an 'advance for purchase'. The unconvincing nature of the explanation is borne out by the fact that the property in question was ultimately not transferred by the assessee to M/s. Nokha Investments Pvt Ltd. the*

judgments cited by the assessee are not applicable to the facts of the assessee's case. In Bagmane constructions Pvt Ltd, the land was being purchased by the shareholder on behalf of the company out of the company's funds. The facts of the assessee's case are different from those cited by the assessee. In the case of the assessee, the property is held by him on his own behalf and he has ultimately not transferred the property to the company. Therefore, the transaction cannot be accepted a s a commercial transaction and is nothing but a pure and simple loan. The assessee has shown the amount of Rs.1,53,00,000/- as a loan in the return of income. The assessee owns shares in the company, not being shares entitled to a fixed rate of dividend, holding not less than ten per cent of the voting power. In the circumstances, the provisions of section 2 (22)(e) are clearly attracted in the case of the asssessee.

6. As mentioned earlier, the accumulated profit of M/s. Nokha Investments Pvt. Ltd at the beginning of the year on 1.4.2012 was Rs.1,00,50,743/-. In respect of the income earned by M/s. Nokha Investments Pvt. Ltd during the relevant previous year, it has been submitted that the same accrued to the company in connection with transactions carried out after the date on which the company gave the advance to the assessee. Therefore, as on the date of advance, the accumulated profit of the company was Rs.1,00,50,743/- only.

7.....
.....".

4. Aggrieved, the assessee took up the issue with the first Appellate Authority. After careful consideration of the assessee's contentions, various case laws relied upon by the assessee and extensively quoting the decision of the (i) Hon'ble Madras High court in the case of Sunil Kapoor v. CIT, Chennai and (ii) the findings of the earlier Bench of this Tribunal in the case of DCIT v. Tobby Simon, the CIT (A) was

of the view that the provisions of s 2(22)(e) of the Act were clearly attracted in the case of the assessee. For ready reference, the relevant portions of the reasoning of the CIT (A) are extracted as under:

> *"7……None of the case laws relied upon by the appellant are applicable to the facts of the case. In view of the definition, the basic criteria for invocation of provision of 2(22)(e) are that*
>
> ***(i)*** *The company making payment shall be company in which the public are not substantially interested;*
>
> ***(ii)*** *The company shall have accumulated profit;*
>
> ***(iii)*** *The share holders must be holding more than 10% of the shares;*
>
> ***(iv)*** *The payment to the shareholders or to the concerns in which the shareholder has a substantial interest shall constitute deemed dividend in the hands of the payee; &*
>
> ***(v)*** *The deemed dividend shall be restricted to the accumulated profits.*
>
> *Applying the above principles, it is seen that the appellant has more than 10% of shares in M/s. Nokha Investments Pvt Ltd from whom the money was received, M/s. Nokha Investments Pvt Ltd is a company in which the public are not substantially interest and it had sufficient accumulated profits. Thus, the payment made to the appellant can be strictly construed as deemed dividend. The argument of the appellant that the money was not a loan doesn't appear to be correct. The appellant has taken loan from the company in which it had 55.05% interest. All the paper work submitted by the appellant is only to camouflage the real intention of the appellant. The appellant has given very flimsy reason stating that M/s. Nokha Investments Pvt Ltd was not interested in buying the property due to fall in market value of property and consequent change in circumstances. By this act of the*

appellant, the company has not derived any benefit whatsoever. M/s. Nokha Investments Pvt Ltd is not in the money lending business.....".

5. Aggrieved, the assessee come up with the present appeal before appeal. During the course of hearing, the learned counsel for the assessee had reiterated what has been contended before the authorities below. In furtherance, the elaborate submissions made are summarized as under:

- during the year under dispute, the assessee agreed to sell his property situated at III Block, HRBR Extension which he had constructed partly through own funds and through housing loan borrowed from HDFC Bank to NIPL for a consideration of Rs.3 crores;

- that when NIPL was looking for a property around HRBR area for locating its corporate office, the assessee volunteered to sell his property and, accordingly, a Memorandum of Understanding dt. 7.9.2012 was entered into between them wherein it was agreed, among others, that before executing the agreement for sale, the assessee will ensure that the subject property was free from all the encumbrances. In order to ensure for a clear title, NIPL agreed to give Rs.1.38 crores as advance towards consideration for purchase of the subject property on the understanding that the loan liability towards HDFC be discharged before the transfer of the same to NIPL. It was further agreed that NIPL would pay a further advance not exceeding Rs.15 lakhs for meeting incidental expenses in connection with the transfer of the subject property; and that

it was agreed that the advances paid would be adjusted towards the total cost of the property to be paid by NIPL to the assessee;

- that it was, further, agreed in the MOU that the transaction should be over on or before 4.11.2013 or else, NIPL would be at liberty to cancel the MOU and recover the advances along with 12% of interest. In case, NIPL did not acquire the property as agreed upon, then the assessee would be liable to return only the advances so received;

- the facts were that on receipt of the advances, the loan with HDFC was cleared and the subject property was free from all the encumbrances as agreed upon. However, due to fall in the market value of the property and consequent changes in the circumstances, the Board of NIPL decided to cancel the MOU entered into, as a result of which, Rs.1.53 crores was returned by the assessee to NIPL

5.1 Extensively quoting the provisions of s. 2 (22)(e) of the Act and also citing the various case laws, namely:

(i) CIT v. Hindustan Petroleum Corporation Ltd – 187 ITR 1 (Bom);

(ii) Gopal and Sons (HUF) v. CIT (SC);

(iii) CIT v. Creative Dyeing and Printing Pvt Ltd – 318 ITR 476 (Del);

(iv) S.A. Builders v. CIT – 288 ITR 1 (SC);

(v) M/S. Dina Sudhir Shah Mumbai v. ACIT – ITA NO.4184/Mum/2014Gopal and Sons (HUF) v. CIT (SC);

(vi) CIT v. Creative Dyeing and Printing Pvt Ltd – 318 ITR 476 (Del);

(vii) S.A. Builders v. CIT – 288 ITR 1 (SC);

(viii) M/s. Dina Sudhir Shah Mumbai v. ACIT – ITA NO.4184/Mum/2014 – ITAT, Mumbai;

5.2 It was submitted that the provisions of s 2 (22(e) of the Act shall apply only when the amount was given as loan or advance and that the commercial and trading transactions are excluded from the ambit of the provisions of s. 2 (22)(e) of the Act and that the payment of advance of money was towards a commercial transaction relating to sale of property and the same cannot be considered to be in the nature of loan or advance as upheld by various judgments (supra).

5.3 In conclusion, it was prayed that the provisions of s. 2(22)(e) of the Act shall not apply to the impugned transaction and, hence, the addition made by the AO and, subsequent confirmation by the CIT (A) requires to be deleted.

5.4 To substantiate his contentions, the learned counsel had furnished copies of (i) Memorandum of Understanding; and (ii) case laws relied in the form of a paper book.

6. On the other hand, the learned D.R supported the stand taken by the assessing officer as well as the first appellate authority. As there was no infirmity in the stand of the

authorities below, it was pleaded that the addition made as well as confirmed by the CIT (A) deserves to be sustained.

7. We have carefully considered the rival submissions and perused the relevant case records as well as the various case laws relied on by the learned counsel [Refer: paper book of the assessee].

8. Before taking up the issue for adjudication, we would like to point out that during the course of hearing; the learned counsel had sought the permission of this Bench to furnish a petition for admission of additional evidence [dt.23.10.2017] along with the copies of the following documents as additional evidence, namely:

(a) copy of bank statement for the period from 1.10.2012 to 31.03.2013 evidencing receipt of advance from the company and also the full and final settlement of loan from HDFC Bank Ltd; and

(b) Copy of confirmation letter from HDFC Bank on full and final settlement of housing loan.

8.1 In substance, it was prayed to admit the additional evidence and dispose of the appeal in accordance with the merits of the issue.

8.2 After due consideration of rival submissions, the petition for admission of additional evidence furnished by the assessee was admitted and ordered to take on record.

9. The crust of the issue for consideration before us is: Whether the AO was within his domain to invoke the

provisions of s 2 (22)(e) of the Act to treat a sum of Rs.1,00,50,743/- as deemed dividend?

9.1 It was the case of the assessee that he had entered into a Memorandum of Understanding [dated 7.12.2012] with NIPL to sell the subject property for a consideration of Rs.3.25,00,000/- (sic) Rs.3,00,00,000/- [Refer: page 2 of MOU] and received an advance of Rs.1.53 crores which will be adjusted against the sale consideration of Rs.3 crores. It was the contention of the assessee that as soon as the receipt of the advance, the same was immediately paid to HDFC Ltd to clear the loan availed on the subject property and, thus, claimed before the AO that the payment made by NIPL was advance for the purchase of the subject property and, hence, such an advance cannot be termed as deemed dividend u/s 2 (22) (e) of the Act. It was, further, argued that due to fall in market value of property, the Board of NIPL decided against acquiring the property and consequently, the assessee returned the advance of Rs.1.53 crores to NIPL on 26.3.2013.

9.2 However, the AO took a divergent view that at the time of receiving the advance, the assessee was a share-holder with 55.05% share-holding in NIPL which was a private limited company in which the public were not substantially interested. It was, further, stated by the AO that as per the Balance sheet as on 31.3.2012 i.e., at the end of the earlier previous year, the company, NIPL had accumulated profits of Rs.1,00,50,743/-.During the relevant previous year, NIPL had earned further profits. According to the AO, in terms of s. 2

(22)(e) of the Act, the amount of advance to the extent of accumulated profits as on the date of giving the advance was liable to be taxed as deemed dividend income of the assessee. To strengthen his stand, the AO held that the explanation was a self-serving argument and was an attempt to give a simple and straight-forward loan the colour of an 'advance for purchase'. Subsequently, the first appellate authority also took a stand that the assessee had more than 10% of shares in NIPL from whom the money was received, NIPL was a company in which the public were not substantially interested and it had sufficient accumulated profits. Thus, the payment made to the assessee can be strictly construed as deemed dividend. The argument of the assessee, according to the CIT(A), that the money was not a loan doesn't appear to be correct. The assessee had taken loan from the company in which he had 55.05% interest. All the paper work submitted by the assessee was only to camouflage the real intention of the assessee. In the view of the CIT (A), the assessee had given very flimsy reason stating that NIPL was not interested in buying the property due to fall in market value of property and consequent change in circumstances. By this act of the assessee, the company had not derived any benefit whatsoever. Before us also, the assessee had not contravened the stand of the authorities below with any documentary evidence.

9.3 On a careful perusal of the copy of the Memorandum of Understanding [Refer: Paper Book of the assessee], we find that the assessee had himself signed on behalf of NIPL

(purchaser) and for himself (seller). The authenticity of the so called MOU cannot also be cross verified as it was not registered with the registering authority. Thus, the AO's observation that "the explanation [of the assessee] is a self serving argument...." [Para 5 of the asst. order] cannot be brushed aside. The assessee's argument that due to fall in market value of property and subsequent change in circumstances, the sale process fell through etc., cannot be taken its face value as no documentary evidence was adduced to substantiate its claim. The salient feature in the issue was that the subject property was owned by the assessee [the seller] who himself was holding 55.05% share in NIPL [the purchaser] and, thus, in our view, the so called 'fall in market value of property and subsequent change in circumstances' would not have come in the way of alleged sale transaction of the subject property.

9.4 We have with due respects perused the case laws on which the assessee had placed strong reliance and of the view that those case laws will not come to the rescue of the assessee. The case laws relied on by the assessee are for the proposition that when amounts are advanced for business transaction / out commercial expediency, the same would not come within the purview of deemed dividend u/s 2(22)(e) of the Act. In the instant case, as mentioned earlier, the amounts received by assessee is nothing but loan / advance from NIPL and assessee is camouflaging the same as a commercial transaction relating to sale of property in order to

get over the provisions of Section 2(22)(e) of the Income-tax Act.

9.5 In over-all consideration of the issue as deliberated upon in the fore-going paragraphs and also the reasoning of the assessing officer as well as the CIT (A), we are of the view that the AO was within his realm to invoke the provisions of s. 2 (22)(e) of the Act. In substance, we uphold the action of the authorities below in the matter. It is ordered accordingly.

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

Order pronounced on this 03rd day of November, 2017.

Sd/-	Sd/-
(Jason P.Boaz)	**(George George K.)**
Accountant Member	**JUDICIAL MEMBER**

Bangalore ; Dated : 03rd November, 2017.
Devdas*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT, Bengaluru.
4. CIT(A)-11, Bengaluru
5. DR, ITAT, Bangalore
6. Guard file.

True copy

BY ORDER,

(Asstt. Registrar)
ITAT, Bangalore