

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A": NEW DELHI
BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 808/Del/2013
(Assessment Year: 2009-10)

Ashwani Kapoor, A-44, Kailash Colony, New Delhi PAN:AIGPK9963L (Appellant)	Vs.	ITO, Ward-3(2), New Delhi (Respondent)
--	-----	---

ITA No. 1245/Del/2016
(Assessment Year: 2008-09)

ACIT, Circle-6(1), New Delhi (Appellant)	Vs.	Ashwani Kapoor, A-44, Kailash Colony, New Delhi PAN:AIGPK9963L (Respondent)
---	-----	---

Assessee by :	Shri K Sampath, Adv
Revenue by:	Shri RC Pandey, Sr. DR
Date of Hearing	28/08/2017
Date of pronouncement	09/11/2017

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by the Assessing Officer in ITA No. 1245/Del/2016 for Assessment Year 2008-09 against the order of the Id CIT (A)-XIV, New Delhi who vide order dated 15.10.2015 deleted the addition of Rs. 98 lakhs relying upon the decision of the Hon'ble Delhi High Court, which the Id Assessing

Officer treated as deemed dividend u/s 2(22) (e) of the Income Tax Act, 1961.

The revenue has raised the following grounds of appeal:-

- “1. On the facts and in the circumstances of the case and in law, the Id CIT(A) has erred in deleting the addition made by the AO amounting to Rs. 9800000/- u/s 2(22)(e) of the Act, 1961.
2. On the facts and in the circumstances of the case and in law, the Id CIT(A) was not justified in reversing the AO’s rejection as claimed by the regarding advance of Rs. 9800000/- received from M/s. Competent Holdings Ltd.”

2. The brief facts of the case are that the assessee is an individual who filed his return of income of Rs. 5363400/- on 11.09.2008. During the appellate proceedings for Assessment Year 2009-10 the Id CIT (A) directed the Assessing Officer to verify the impugned assessment year where the assessee has taken an advance of Rs. 98 lacs from M/s. Competent Holding ltd wherein the assessee is a Director and holding beneficial ownership of more than 10%. The Competent Holding Ltd has also held the accumulated profit of Rs. 10.27 crores. Hence, the provisions of section 2(22) (e) of the Act were invoked in reassessment proceedings. The assessee submitted that the above sum was received by assessee for advance against sale of property at basement of A-44, Kailash Colony, New Delhi and therefore, it is a business transaction hence, provisions of section 2(22)(e) of the Act do not apply. The Id Assessing Officer rejected the contention of the assessee and treated the above sum as deemed dividend u/s 2(22) (e) of the Act. Consequently, assessment u/s 143(3) read with Section 147 of the Act was passed on 10.02.2014 determining total taxable income of Rs. 15163400/-. The assessee aggrieved with the order of the Id AO preferred appeal before the Id CIT (A), who deleted the above addition holding that as assessee as well as the Competent Holding are in the business of real estate who entered into an “Agreement to Sale” on 09.01.2008 for the sale of the property for Rs. 1.25 crores against which the advance of Rs. 98 lakhs was received. He was of the opinion that the transaction of the assessee is business transaction therefore, relying on the decision of the Hon'ble Delhi High Court in

case of CIT vs. Ambassador Travels Pvt Ltd. 73 Taxman 407 he deleted the addition. Therefore, the revenue is in appeal before us.

3. For Assessment Year 2009-10 the assessee has filed this appeal wherein an addition of Rs. 37 lakhs has been made in the hands of the assessee u/s 2(22)(e) of the Act on the similar transaction of Rs. 37 lakhs confirmed by the Id CIT(A).
4. Before us the Id Authorised Representative submitted that the above transaction between the assessee and the Competent Holding Ltd is a business transaction and therefore, not falling within the definition of deemed dividend. He referred to the copy of "Agreement to Sale" between the assessee and the company dated 09.01.2008. He referred to cheque issued by the company to the assessee. He also referred to the minutes of the meeting of the lender dated 04.01.2008 to substantiate his claim. He also submitted the copy of "Memorandum of Understanding" dated 01.09.2008 on this issue. In view of this he submitted that above transaction is a commercial transaction which does not fall within the ambit of the "advance" u/s 2(22)(e) of the Act. He further referred to the latest circular issued by CBDT dated 12.06.2017 wherein, the revenue has accepted that "trade advances" are not covered in the ambit of deemed dividend.
5. The Id Departmental Representative vehemently contested the claim of the assessee and supported the orders of the lower authorities. He specifically referred to the decision of the Hon'ble Supreme Court in case of PK Badiyani Vs. CIT 105 ITR 642 and of Hon'ble Delhi High Court in case of CIT Vs. Sunil Chopra 242 CTR 498 (Delhi).
6. We have carefully considered the rival contentions and perused the orders of the lower authorities. The brief facts in the present case are that assessee is a director with 36.30 % shareholding in the company M/s competent Holdings private limited. Both the assessee as well as that company is having one of the main business activities of real estate business. The assessee entered into an "Agreement to Sale" on 09/01/2008 with the company for sale of the basement

of property at a – 44, Kailash colony, New Delhi which was used by the company as a rented premises since 2003. According to the agreement, the property was to be sold at Rs. 1.25 crores and up to 31.03.2008, the company gave assessee an advance of Rs. 98 lakhs. Later on, this property was not transacted for the reason that the company got a better property hence it cancelled the “Agreement To Sale” entered with the assessee through a “Memorandum of Understanding”. According to the agreement to sell, the assessee was paid Rs. 5 Lacs by cheque No. 301849 on 09/01/2008. A further sum of Rs. 70 lakhs was to be paid to the assessee on or before 31st of January 2008 and further the balance sale consideration of Rs. 50 Lacs was to be paid before 30 of September 2008. In view of this only sum of Rs. 75 lakhs was to be paid to the assessee by the competent Holdings private limited up to 31st of March 2008. However, the assessee has received a sum of Rs. 98 lakhs for the year ended on 31st of March 2008. The Ld. assessing officer as well as the Ld. CIT (A) has not doubted the fact of the issue that assessee has received advanced from M/s competent Holdings private limited which is pertaining to the transaction of sale of property. The ld AO has rejected the claim of the assessee holding that “any payment” is covered under the provisions of section 2 (22) (e) in the context of advance or loan. The Ld. CIT (A) however accepted the claim of the assessee that Rs. 98 lakhs was taken as an advance against agreement to sale of the property and therefore it cannot be considered as a deemed dividend under section 2 (22)(e) of the act. The Ld. CIT(A) also relied upon the decision of the Hon’ble Delhi High Court in case of CIT Vs. Ambassador Travels Pvt Ltd 73 taxman 407 (Del) wherein it has been held that the assessee shareholder and entered into normal business transaction with the companies in which he has substantial interest, hence, tribunal was right in holding that provisions of section 2 (22) (e) were not applicable. We fully agree with the contention of the Ld. CIT (A) that provisions of section 2 (22) (e) are not applicable in case of advances which are in the nature of business advances.

Such a view is further accepted by the Central board of direct taxes in its latest circular no 19/2017 dated 12/06/2017 as under :-

“SECTION 2(22) OF THE INCOME-TAX ACT, 1961 - DEEMED
DIVIDEND - CBDT'S CLARIFICATIONS ON SETTLED VIEW OF
SECTION 2(22)(e) OF SAID ACT ON TRADE
ADVANCES/COMMERCIAL TRANSACTIONS

CIRCULAR NO.19/2017 [F.NO.279/MISC./140/2015/ITJ], DATED 12-6-
017

Section 2(22) clause (e) of the Income-tax Act, 1961 (the Act) provides that "dividend" includes any payment by a company, not being a company in which the public are substantially interested, of any sum by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits holding not less than ten per cent of the voting power, or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern) or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits.

2. The Board has observed that some Courts in the recent past have held that trade advances in the nature of commercial transactions would not fall within the ambit of the provisions of section 2(22) (e) of the Act. Such views have attained finality.

2.1 Some illustrations/examples of trade advances/commercial transactions held to be not covered under section 2(22) (e) of the Act are as follows:

Advances were made by a company to a sister concern and adjusted against the dues for job work done by the sister concern. It was held that amounts advanced for business transactions do not fall within the definition of deemed dividend under section 2(22) (e) of the Act. (CIT v. Creative Dyeing & Printing Pvt. Ltd.¹, Delhi High Court).

Advance was made by a company to its shareholder to install plant and machinery at the shareholder's premises to enable him to do job work for the company so that the company could fulfil an export order. It was held that as the assessee proved business expediency, the advance was not covered by section 2(22)(e) of the Act. (CIT v. Amrik Singh, P&H High Court)².

A floating security deposit was given by a company to its sister concern against the use of electricity generators belonging to the sister concern. The company utilised gas available to it from GAIL to generate electricity and supplied it to the sister concern at concessional rates. It was held that the security deposit made by the company to its sister concern was a business transaction

arising in the normal course of business between two concerns and the transaction did not attract section 2(22) (e) of the Act. (CIT, Agra v. Atul Engineering Udyog, Allahabad High Court)

3. In view of the above it is, a settled position that trade advances, which are in the nature of commercial transactions would not fall within the ambit of the word 'advance' in section 2(22)(e) of the Act. Accordingly, henceforth, appeals may not be filed on this ground by Officers of the Department and those already filed, in Courts/Tribunals may be withdrawn/not pressed upon.

4. The above may be brought to the notice of all concerned.”

7. Therefore, in view of the above facts the transaction of loan of Rs. 98 lakhs given by competent Holdings private limited to the assessee is required to be tested whether it is a “trade advance” or not. It is now an undisputed fact that assessee as well as the competent Holdings Ltd entered into a commercial transaction for which company has made certain payments. The agreement was entered into w.e.f. 09/1/2008 between the assessee and M/S competent Holdings Ltd and therefore from this date commercial transaction between the two parties has started. The assessee has been paid a sum of Rs. 5 Lacs on 9/1/2008. Therefore, this sum cannot be treated as deemed dividend in the hands of the assessee. Further, up to 31st of January 2008 the assessee was to be paid a sum of Rs. 70 lakhs. Therefore, this sum also becomes the “trade advance” by the company to the assessee. However Before us, The assessee has not furnished the Ledger account of the above company in books of the assessee or the Ledger account of the assessee from the books of the company, hence, we are unable to determine the exact amount of trade advances on account of these transactions. Even otherwise if it is accepted that balance of Rs. 70 lakhs paid by the company to the assessee is also part of these transactions, even then a sum of Rs. 23 lakhs is required to be explained by the assessee that they are forming part of the consideration of these “sale agreement” between the assessee and the competent Holdings private limited. Furthermore, the confusion has also arisen because assessee has submitted the copy of the memorandum of understanding dated

1/9/2008 between the assessee and the competent Holdings Ltd wherein in the last paragraph of page No. 1 it has been mentioned that the competent Holdings Ltd has entered into an agreement to sell dated 09/01/2008 with the 1st party to purchase entire basement floor, for a sum of Rs. 1.25 crores and advanced the sum of Rs. 98 lakhs to the 1st party. However, in absence of the Ledger account it cannot be verified that on that particular date i.e. on 1/9/2008 the competent holding Ltd has paid a sum of Rs. 98 lakhs to the assessee or not. Now, we come to the argument of the Id DR, who has placed reliance on the decision of the Hon'ble Delhi High Court in CIT versus Sunil Chopra. We have carefully perused the decision and according to us, the facts of the present case are different from the case cited before us. In that, particular case before the Hon'ble Delhi high court, the revenue has disbelieved the agreement between the parties. However, before us, the lower authorities have not disputed the agreement between the parties. The second decision relied upon by the revenue of the Hon'ble Supreme Court in 105 ITR 642 was also not on the facts before us. In that decision the issue before the Hon'ble court was that whether the mutual open and current account in the books of the company can be considered as deemed dividend or not. Therefore, the decisions relied by the Ld. authorized representative does not help the case of the revenue. Therefore we set aside the issue for verification of the amount received by the assessee in pursuance of this agreement as trade advance to the file of the Ld. assessing officer with a direction that if the assessee has received the above sum after 09/01/2008 up to 31/03/2008 in pursuance of this agreement then such amount cannot be treated as deemed dividend under section 2 (22) (e) of the act. In view of this ground No. 1 and 2 of the appeal of the revenue are set aside to the file of the Ld. Assessing officer with above direction. In the result ground No. 1 and 2 of the appeal of the revenue is partly allowed .

8. In the result, appeal of the Revenue is partly allowed with above directions for statistical purposes.

9. ITA No. 808/D/2013 is filed by the assessee against the order of Ld. CIT (A) – VI, New Delhi dated 23/11/2012, wherein the addition of Rs. 37 lakhs in the hands of the assessee on account of the deemed dividend under section 2 (22) (e) is confirmed. Assessee in its appeal has raised following grounds of appeal:-

“That on the facts and in the circumstances of the case and in law, the authorities below erred in invoking section 2(22)(e) of the Income Tax Act to add in a sum of Rs. 37 lakhs to the returned income which being erroneous and illegal must be quashed.”

10. The facts relating to this appeal are that assessee has credit of loan of Rs. 1.35 crores during the year, comprising of Rs. 98 lakhs as opening balance and Rs. 37 lakhs during the year. The assessee has also repaid Rs. 75 Lacs to the company. The Ld. assessing officer treated the sum of Rs. 37 lakhs as deemed dividend under section 2 (22) (e). The assessee aggrieved with the order of the Ld. assessing officer preferred an appeal before the Ld. CIT (A) who confirmed the above sum. Therefore, now assessee is in appeal before us.
11. The contention of the Ld. authorized representative remained the same that above transactions are “commercial transactions” in nature and therefore they are not covered as deemed dividend in the hands of the assessee. The Ld. departmental representative vehemently submitted that the order of the lower authorities have correctly interpreted the provisions of section 2 (22) (e). Further, the Ld. departmental representative relied upon the order of the Hon’ble Supreme Court in 105 ITR 642 in case of Sh. PK Badiani VS CIT and decision of the Hon’ble Delhi High Court in CIT versus Sunil Chopra 12 Taxmann.com 496.
12. The contention of the assessee is the same is being already recorded for in assessment year 2008 – 09 that above advances are trade advances and part of the “commercial transaction” between the assessee and the above company. Therefore, we examine the whole transaction with respect to the above

agreement submitted before us. In the present case, the opening outstanding balance crediting the account of the above company is Rs. 98 lakhs. Thereafter on respective date assessee has repaid a sum of Rs. 74.25 Lacs. Thereafter the closing balance before the amount of loan given by the company to the assessee remained of Rs. 23.75 lakhs only. Further during the year the loans have been given by the company to the assessee from 26/2/2009 to 20/3/2009 of Rs. 37 lakhs. However, during the year the assessee has also entered into the transaction with the company that assessee will retain a sum of Rs. 60 lakhs as security deposit for the facility of mortgage of this property and the office space in the premises of the assessee shall be utilized by the company, free of rent. Therefore, the sums of Rs. 60 lakhs are also advance against rent or security deposit for rent. If the amount of Rs. 37 lakhs is clubbed with the transaction of the above commercial transaction of the sale of property between the assessee and the M/s. Competent Holding Ltd than as on 30/03/2009 the assessee is having only loan of Rs. 60.75 Lacs. The assessee has paid back the sum of Rs. 75,000/- to the company on 31/03/2009 leaving deposit of Rs. 60 lakhs as per agreement. Therefore, it is apparent that the whole transaction was the transaction of security deposit with the assessee for use of the property of the assessee on rent as well as to facilitate the mortgage of the assessee's property for the purpose of loan to the company for purchase of new property. Therefore it cannot be denied that above transactions are transactions of commercial nature between the assessee and the company which are beyond the scope of loans and advances as per provisions of section 2 (22) (e) of the act. In view of the above facts the addition in the hands of the assessee of Rs. 37 lakhs which is less than Rs. 60 lakhs required to be retained by the assessee as security deposit, cannot be made under section 2 (22) (e) of the act. In view of this, the solitary ground in appeal of the assessee is allowed.

13. In view of this ITA No. 808/del/2013 filed by the assessee for assessment year 2009 – 10 is allowed.

Order pronounced in the open court on 09/11/2017.

-Sd/-

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated:09 /11/2017
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi