

IN THE INCOME-TAX APPELLATE TRIBUNAL "A" BENCH MUMBAI
BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER
AND SHRI PAWAN SINGH, JUDICIAL MEMBER
ITA No.4505/Mum/2013 (Assessment Year 2009-10)

DCIT 9(2) Room No. 218, 2 nd Floor, Aayakar Bhavan, M.K. Road, Mumbai-20.	Vs.	Shri Ashok D. Jain 11, Unnat Nagar CHS, M.G. Road, Goregaon(W), Mumbai-62. PAN: AACPJ7464P
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Appellant

Respondent

Respondent by : Shri Rajesh Kumar Yadav (DR)
Appellant by : Shri Naresh Jain (AR)
Date of Hearing : 25.04.2018
Date of Pronouncement : 27.04.2018

ORDER

PER PAWAN SINGH, JUDICIAL MEMBER;

1. The instant appeal by Revenue under section 253 of the Income-tax Act (the Act) is directed against the order of Id. Commissioner of Income-tax (Appeals)-20 [Id. CIT(A)], Mumbai dated 25.03.2013 for Assessment Year 2009-10. The Id CIT(A) reversed the finding of assessing officer in making the disallowance under section 2(22)(e) while passing Assessment Order under section 143(3) of the Act dated 21.12.2011. The Revenue has raised the following grounds of appeal:

1. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of Rs. 2,19,78,500/- made by the AO as deemed dividend u/s. 2(22)(e) of the IT Act., without appreciating that all the conditions prescribed in the said section are fulfilled in the assessee's case?*

2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in treating the "loans" as. "advanced for commercial purpose", hence not covered under section 2(22)(e) of the IT Act. i.e. in terms of 2(22)(e)(ii), without appreciating that the assessee failed to establish during assessment as well as appellate proceeding that the impugned loan was utilized for any commercial purpose since the development agreement produced by the assessee was not implemented, as evident from the records of the year under consideration and the following year?

2. Brief facts of the case are that the assessee is proprietor of M/s Nitika Tower and is one of the Director in M/s Jalaram Polymers Pvt Ltd, filed his return of income for Assessment year 2009-10 on 30.09.2009 declaring total income of Rs. 32,01,510/-. The assessment was completed on 21.12.2011 under section 143(3) of the Act. The Assessing Officer while passing the assessment order made the addition of Rs. 2,19,78,500/- under section 2(22)(e) of the Act. On appeal before the Id. CIT(A), the entire addition on account of deemed dividend under section 2(22)(e) was deleted. Thus, aggrieved by the order of Id. CIT(A), the Revenue has filed the present appeal before us.
3. We have heard Id. Departmental Representative (DR) for the Revenue and Id. Authorized Representative (AR) of the assessee and perused the material available on record. The Id. DR for the Revenue supported the order of Assessing Officer. The Id. DR for the Revenue further submits that the Id. CIT(A) deleted the addition on the basis of agreement propounded by assessee subsequently, after raising the issue by assessing

officer during the assessment, showing the commercial expediency about lending of money. The assessee has prepared the agreement after raising the query by the Assessing Officer. There is no provision under section 2(22)(e) for end use of money. The Id. CIT(A) has not made appropriate enquiry before deleting the addition. It was duty of the Id. CIT(A) to make adequate and sufficient enquiry before deleting the addition in support of his submission, the addition in support of his submission, the Id. DR for the Revenue relied upon the decision of Hon'ble Delhi High Court in case of CIT vs. Jansamparak Advertising & Marketing (P.) Ltd. [375 ITR 373 (Delhi).

4. On the other hand, the Id. AR of the assessee supported the order of Id CIT(A). The Id. AR of the assessee submits that there was no reason for making addition on account of deemed dividend. The assessee made a joint venture with the company for commercial transaction. The assessee received money purely for carrying out activities for development of land and executed the joint venture agreement dated 5th April 2006 between assessee and his mother and M/s Jalaram Polymer Pvt. Ltd. In consequence of agreement amount was remitted by Pvt. Ltd. Company to M/s. Nikita Developers on consideration for carrying out construction activities in a joint venture. Thus, the genuine business transaction in advance for development of land cannot be treated as deemed dividend. The Assessing Officer has not carried out proper enquiry with regard to

end use of money. During the appellate stage, the Id. CIT(A) directed the Assessing Officer to investigate about the end use of money, received by assessee from M/s Jalaram Polymer Pvt. Ltd., and to ascertain if the amount was utilized for joint venture as claimed by assessee. The Assessing Officer has not disputed the end use of money. The Assessing Officer has not brought any material against the assessee. The amount received by M/s. Nikita Developers was for commercial expediency. In support of his submission, the Id. AR of the assessee relied upon the Circular No. 19 of 2017 of CBDT dated 12.06.2017 and the decision of Hon'ble Supreme Court in case of Amrik Singh [2015] 8 TMI 1262 (SC). The assessee also relied on the decision of Hon'ble Delhi High Court in CIT Vs Arvind Kumar Jain[2012]Taxman 44 (Delhi) (MAG).

5. We have considered the rival submission of the parties and have gone through the orders of authorities below and the material placed before us. The Assessing Officer during the assessment from the balance sheet of M/s. Nikita Developers, wherein assessee is proprietor, noted that Nitika Tower has shown a loan of Rs. 2,19,78,500/- from M/s Jalaram Polymer Pvt. Ltd. The assessee has substantial shareholding in M/s Jalaram Polymer Pvt. Ltd. The assessee was asked to explain as to why the loan/advance of Rs. 2,19,78,500/- appearing in the balance sheet should not be treated as dividend income in the hand of assessee. The assessee filed its reply dated 05.12.2011. In the reply the assessee contended that

loan from M/s Jalaram Polymer Pvt. Ltd. was in due course of business and for commercial expediency for development of land under joint venture agreement. The contention of assessee was not accepted by Assessing Officer. The Assessing Officer concluded that the normal course of business of M/s Jalaram Polymer Pvt. Ltd. is not a land development. Thus, the advance is not a normal course of business of M/s Jalaram Polymers. Further, the joint venture development of land is not borne out from the P & L A/c, balance sheet of the assessee and the same is an afterthought. The Assessing Officer also concluded that M/s Jalaram Polymer Pvt. Ltd. has reserve and surplus amount at Rs. 3,41,33,404/- as on 31.03.2009 and Rs. 2,56,28,123/- as on 31.03.2008. Thus, the aforesaid advance was treated as dividend income in the hand of assessee. Before the Id. CIT(A) the assessee furnished written submissions and explained that in the joint venture the Company (M.s Jalaram Polymers) is also one of participant, the amount was given for commercial transaction, thus, improper presentation in the balance sheet, the genuine bushiness transaction or advances for development of land, cannot be treated as deemed dividend. On the written explanations and submissions of assessee the Id CIT(A), issued order under section 250(4) dated 07.08.2012, for consequential enquiry and directed the assessing officer to furnish the report on or before 14.09.2012. No remand report was furnished by assessing officer till that date. The Id CIT(A) again vide reminder dated

17.09.2012 directed the assessing officer to furnish the remand report within seven days, but, again the assessing officer failed to furnish his remand report within time fixed by Id CIT(A). However, on further reminder of the Id CIT(A), the assessing officer filed his remand report dated 01.03.2013. In the remand report the assessing officer contended that in the books of account of both the concern the amount has been shown "loan" and only when during the assessment the issue of deemed dividend was raised the assessee submitted copy of the agreement (joint Venture). The assessing officer also shown his reservation that the land for the development of which, the joint venture was prepared, was jointly owned by Smt. Anchidevi Jain and assessee, and all the amount is received by assessee alone. The amount was received in the account of Nitika Tower and not in the name of assessee. On the remand report of assessing officer the assessee filed his comments/ rejoinder, wherein the assessee repeated his earlier version. The assessee also explained that the funds were taken purely for commercial transaction during the course of regular business. Funds were transferred to Nitika Tower, who has to execute the said agreement of joint venture. After considering the submission of the assessee and the remand report furnished by assessee, the Id CIT(A) observed that the assessing officer had to find out whether the amount was utilized for joint venture as claimed by the assessee or not. The assessing officer has given his counter comments; therefore, the

veracity of the joint venture cannot be discarded. The Id CIT(A) also examined the objection of assessing officer that the agreement was prepared when the issue of deemed dividend was raised. The Id CIT(A) concluded that the from the agreement it is evident that the stamp paper was purchased on 14.03.2006 and agreement was executed on 05.04.2006 and the same is duly attested by Notary, which cannot be disbelieved. The Id CIT(A) on the basis of material on record observed that as per the term and conditions of the agreement the amount was not given in the name of individual but to Nitika Tower (developer), who has to carry out the development activity in survey No.414,CTS, No.1208, Malad South, Borivali. The assessing officer has not proved the facts otherwise. On the basis of his conclusion the Id CIT(A) held that such transaction is beyond the scope of section 2(22)(e) of the Act.

6. We have seen the CBDT Circular No19/2017 dated 12.07.2017, wherein it is clarified that the trade advances, which are in the nature of commercial transaction would not fall within the ambit of word 'advance' in section 2(22)(e) of the Act. It is further clarified that appeals may not be filed by the officers of the department and appeal filed, in the Courts/ Tribunal may be withdrawn. As we have seen that the assessee has proved that has received the money for commercial expediency and is not covered by the provisions of section 2(22)(e) of the Act.

7. The case law relied by Id DR for the revenue in CIT Vs Jansamparak Advertisings & Marketing (P) Ltd, is not helpful to him, as the instant case is not such, where the lower authorities has not carried out necessary investigation and the submission of the assessee was accepted unilaterally by Id CIT(A). The assessee throughout the assessment and at the stage of first appellate stage contended that the money was advanced for commercial expediency, which he has proved. The assessing officer made addition/ disallowance on this basis of assumption and presumptions. The assessing officer has not disputed the end use of money. Thus, we don't accepted the submissions of the Id. DR that the assessee after raising the question related to the deemed dividend propounded the joint venture agreement, when the assessee has executed the agreement with the company in the year 2006 for development of land stand in his own name along with his mother. With this observation no interferences is call for in the finding of Id CIT(A). In the result the grounds of appeal raised by the revenue are failed.

8. In the result, appeal filed by revenue is dismissed.

Order pronounced in the open court on 27.04.2018.

Sd/-
G.S. PANNU
ACCOUNTANT MEMBER

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

Mumbai, Date: 27.04.2018
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Copy of the Order forwarded to :

1. Assessee
3. The concerned CIT(A)
5. DR "A" Bench, ITAT, Mumbai
6. Guard File

2. Respondent
4. The concerned CIT

**BY ORDER,
Dy./Asst. Registrar
ITAT, Mumbai**