In the Income-Tax Appellate Tribunal,
Agra Bench, Agra

Before: Shri A.D. Jain, Judicial Member And
Shri Dr. Mitha Lal Meena, Accountant Member

ITA No.266/Agr/2014
A.Y.: 2008-09

ACIT, Circle 4(1), Agra. **(Appellant)**	vs.	M/s Roger Industries Ltd., 8B/7A, Dev Nagar, Bye Pass Road, Agra PAN AADCR 7954 C **(Respondent)**

Appellant by	Shri Deependra Mohan, Advocate
Respondent by	Shri Waseem Arshad, Sr. D.R.

Date of Hearing	11.09.2018
Date of Pronouncement	09/10/2018

ORDER

Per Dr.Mitha Lal Meena, A.M.:

This is the Department's appeal filed against the order of the CIT(A)-II, Agra, in respect of Assessment Year 2008-09, raising following grounds of appeal:

> *"1. That the Ld, CIT(A)-II, Agra has erred in law and on facts in deleting the addition of Rs. 69.91,127/- made by the AO u/s 2(22)(e) without appreciating the facts that there is no specific mention in section 2(22)(e) that the amount of deemed dividend will only by taxed in the hands of registered share holder. Further Ld. CIT(A)-II, Agra has treated advances/loans received by the assessee company from M/s Euro Safety Footwear India Ltd. as commercial transactions ignoring the actual nature of receipts. The relevant provisions of section*

2(22)(e) i.e. 'any payments to any concern in which such share holder is a member or a partner and in which he has a substantial interest' is applicable in the case of assessee company.

2. *That the order of Ld. Commissioner of Income Tax Appeals)-ll, Agra being erroneous in law and on facts deserves to be quashed and that of the Assessing Officer deserves to be restored."*

2. Vide application dated 20.12.2017, the Department has filed additional grounds of appeal as under:

"1. That the Ld. CIT(A) erred in directing the admission of additional evidence in the form of collaboration agreement to be obtained from the Bank without adjudicating whether it was legally incumbent upon the parties to file the collaboration agreement that order to avail of the credit facilities from the Bank.

2. *That the Ld. CIT(A) failed to adjudicate upon whether the said "Collaboration agreement" was a material fact for adjudicating that monies were advanced in the course of business when in fact the collaboration agreement was setting up of Business of Euro safety Footwear (India) Pvt. Ltd. in earlier years and for this year it was not Roger Industries that had advanced the money but it was Euro Safety Footwear (India) Pvt. Ltd. that had advanced the monies.*

3. *That the Ld. C1T(A) failed to appreciate that "Corporate Guarantee" in earlier year was not dependent upon a collaboration agreement and such a guarantee could not be a material fact in the year in question.*

4. *That decision of Godrej &Boycee (SC) be made applicable u/s 14A in respect of advances made.*

5. *That the Ld, CIT(A) failed to appreciate that Bank was not a custodian of collaboration agreement. The bank did not require the collaboration agreement and as such merely because the bank provided the same, the*

same was not an index of genuineness of the collaboration agreement."

3. There are two main issues identified for adjudication in the ground and additional grounds of appeals, as follows:

a) Assessment of certain amount received by the assessee company from M/s. Euro Safety Footwear (P) Ltd as deemed dividend u/s 2(22)(e) of the Act and therefore, adjudicated together for brevity.

b) Admission of additional evidence in the form of collaboration agreement.

4. Briefly, the fact as per record are that the AO made addition of Rs.69,91,127/-, on account of deemed dividend since he found that the assesse company had received certain amountsfrom M/s. Euro Safety Footwear (P) Ltd. and the same attracted the provisions contained in section 2(22)(e) of the Income Tax Act, 1961. The ld. CIT(A) deleted the addition holding that the assesse company has received the amount from M/S Euro Safety Footwear (P) Ltd. on account of commercial transaction and business expediency and it is also not registered shareholder of the payer company.

5. The ld. DR has contended that the ld. CIT(A) has erred in deleting the addition ignoring the actual nature of receipts and the relevant provisions of section 2(22)(e) i.e, any payments to any concern in which

such shareholder is a member or a partner and in which he has a substantial interest is applicable in the case of assesse company.

6. On the other hand, the ld. Counsel for the assessee has placed strong reliance on the impugned order.

7. We have heard both the parties on this issue and have perused the relevant material on record with regard thereto. The assessee company has received certain amounts from M/S Euro Safety Footwear (P) Ltd., Shri Kulbir Singh is a shareholder having substantial interest in both the companies. The assessee company has received the amount on two counts –

1) It has purchased shoes from M/s Euro Safety Footwear (I) (P) Ltd. in the Financial Year 2006-07, 2007-08 and F.Y.-2008-09 as well.
2) The advance made by M/S Euro Safety Footwear (P) Ltd. was out of contractual obligation.

8. A tripartite collaboration agreement was entered between M/S Roger Industries Ltd., M/S Euro Safety Footwear (P) Ltd and Shri Kulbir Singh. As per the terms of agreement, M/S Euro Safety Footwear (P) Ltd. raised funds from the Bank on the basis of bank guarantee of M/S Roger Industries Ltd. and Shri Kulbir Singh. The advance made by M/S Euro Safety Footwear (P) Ltd. was out of contractual obligation. The assessee

company has entered into a collaboration agreement with M/S Euro Safety Footwear (P) Ltd. and Shri Kulbir Singh. It has been mentioned in the collaboration agreement that as result of giving of bank guarantee the financial resources of M/S Roger Industries Ltd. and Shri Kulbir Singh have squeezed out and they cannot raise further finance from bank and in consideration of the same it was agreed that M/S Euro Safety Footwear (P) Ltd. shall provide from time to time interest free advance to M/S Roger Industries Ltd. to meet out its financial obligations as and when required by them in the ordinary course of business.

9. It has also been brought on record that the transactions are on account of commercial expediency and the same are outside the ambit of Section 2(22)(e) of the Income Tax Act, 1961. The assesse has placed reliance on the decision of ITAT, Chennai wherein on identical facts, in ITA no. 1270/Mds/2011 (A.Y.-2006-07) in the case of 'ACITvs G.Sreevidya'has held that -

> *"In order to attract the provisions of section 2(22)(e), the important consideration is that there should be loan/advance by a company to its shareholder. Every amount paid must make the company a creditor of the shareholder of that amount. At the same time, it is to be borne in mind that every payment by a company to its shareholders may not be loan/advance. In the present case, the amount was withdrawn by the*

assessee from the company only to meet her short term cash requirements. By virtue of offering personal guarantee and collateral security for the benefit of the company, the liquidity position of the assessee had gone down. In the strict sense if it is to be construed the amount forwarded by the company to the assessee was not in the shape of advances or loans. The arrangement between the assessee and the company was merely for the sake of convenience arising out of business expediency. In the facts and circumstances of the case, it is not appropriate to hold that the amount withdrawn by the assessee partakes the character of deemed dividend under the provisions of section 2(22)(e) of the Act.

The case of the assessee is squarely covered by the Division Bench judgement of the Hon'ble Calcutta High Court in the case of Pradip Kumar Malhotra vs. CIT reported at 338 ITR 538 (Cal), wherein the facts were similar to the facts of the instant case. In Pradip Kumar's case assessee had substantial holding in private company. The assessee permitted his immovable property to be mortgaged to the bank for enabling the company to take the benefit of loan. The Board of Directors of the company passed a resolution to obtain interest free deposit upto `50 lakhs as and when required. The assessee obtained from the company a sum of ` 20,75,000/- by way of security deposit. Out of this amount, a sum of `20 lakhs was returned by the assessee to the company. The Assessing Officer added the sum of `20,75,000/- as deemed dividend. The Hon'ble High Court while allowing the appeal of the assessee held that for retaining the

benefit of loan availed of from the bank, if decision was taken to give advance to the assessee such decision was not to give gratuitous advance to its shareholder but to protect the business interest of the company. The sum of `20,75,000/- could not be treated as deemed dividend. The Division Bench of the Hon'ble Calcutta High Court followed the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Creative Dyeing & Printing P.Ltd. reported as 318 ITR 476(Del). In the instant case also the assessee was allowed to withdraw funds from the company as per requirement for personal purposes against the personal guarantee and the collateral security given by her to facilitate her availing of credit facility of the company.

It is a well settled law that loan or advance given to a shareholder by a company in which public is not substantially interested and which had accumulated profits, the amount advanced as loan to such shareholder is deemed to be dividend as per the provisions of section 2(22)(e) of the Act. However, the facts and circumstances of each case have to be scrutinized before applying the ratio of the cases holding above well settled law. In the facts and circumstances of the instant case, judgements relied upon by the DR in the cases of Sarada P.(supra), P.K.Abubucker (supra) and TarulataShyam (supra) are not applicable.

The Commissioner of Income Tax (Appeals) vide order dated 6.4.2011 has rightly deleted the addition made on account of "deemed dividend" by the Assessing Officer. We do not find any infirmity in the order passed by the Commissioner of Income Tax (Appeals). In view of our aforesaid findings, the appeal of the Revenue fails and

the same is dismissed being devoid of any merit".

Thus, the advance received on account of commercial expediency cannot be treated as deemed dividend u/s 2(22)(e) of the Income Tax Act, 1961.

Similarly in the case of Pradip Kumar Malhotra vs CIT (2011) 338 ITR 538 the Hon'ble Delhi High Court has held that only gratuitous loans advanced by company to shareholder can be treated as deemed dividend u/s 2(22)(e).

10. During the course of assessment proceedings, the assessee company was required to explain as to why the transactions of receipt of money by the assessee company may not be treated as deemed dividend u/s 2(22)(e). To which the assessee replied that since the assessee company has purchased shoes from M/S Euro Safety Footwear (P) Ltd., these are commercial transactions and the provisions of Section 2(22)(e) are not attracted. The assessee believed that the reply would be convincing and did not file any other evidence at that point of time. However, after the additions were made, the assessee during the course of appellate proceedings placed on record the evidences in the form of collaboration agreement, sanction letter of bank etc. These evidences alongwith the submissions of the assessee were forwarded to the AO for comments. The AO made inquiries from the Bank and has confirmed the genuineness of the documentary evidences in the form of bank letter, collaboration agreement and bank sanction

letter. The CIT(A) has in his order at para 11.11 on page 49 considered this aspect also and after giving due opportunity and verification of these agreements accepted the same.

11. It is also evident that M/S Roger Industries Ltd. is neither a registered share holder nor a beneficial shareholder in M/S Euro Safety Footwear (P) Ltd. No advance has been made to Shri Kulbir Singh by M/S Euro Safety Footwear (P) Ltd. In the case of 'Raj Kumar Singh & Co. vs. DCIT' 52 TTJ 221 (All), the Tribunal held that Sec 2(22)(e) can be invoked only in case of registered shareholder and not a beneficial shareholder. Shares, though belonging to the firm but registered in the name of partners, the firm cannot be made liable under Sec 2(22)(e) in respect of loans obtained from the company.

12. Similarly, In the case of 'Income Tax Officer vs. S. S. Shetty' 14 TTJ 71 (Bom), the Tribunal held that the loan advanced by a private company to HUF of which the members were directors in the company cannot be deemed as 'dividend' in the hands of HUF as HUF was not a registered shareholder.

13. In the case of assessee since the assessee is not the shareholder of the company, the advanced received from M/S Euro Safety Footwear (P) Ltd., cannot be regarded to be deemed dividend within the provisions of sec 2(22)(e) of the Income Tax Act, 1961.

14. Similar issue came up for consideration before Mumbai ITAT

(Special Bench) in case of 'ACIT vs. Bhaumik Colour P. Ltd.' 313 ITR 146(AT). The Special Bench held that the provisions of section 2(22)(e) do not spell out as to whether the income has to be taxed in the hands of shareholder or the concern(non-shareholder). It further observed that since the provisions are ambiguous, therefore it is necessary to examine the intention behind enacting the provisions of section 2(22)(e) of the act. In furtherance it was stated that the intention behind the provisions of section 2(22)(e) is to tax dividend in the hands of shareholder. The deeming provisions as it applies to the case of loans or advances by a company to a concern in which its shareholder has substantial interest, is based on the presumption that the loans or advances would ultimately be made available to the shareholders of the company giving the loan or advances. The intention of the Legislature is therefore to tax dividend only in the hands of the concern and accordingly it held that deemed dividend under section 2(22)(e) of the act can be assessed only in the hands of any other person.

15. In the case of M/S India Casting Co., in ITA no.55/Agr/2012 wherein it was held "As regards the judgement of Hon'ble Delhi High Court in the case of CIT vs. National Travel Services, 202 Taxman 327 (Delhi) cited by the ld. Departmental Representative, we noticed that in another judgement in the case of 'CIT vs. Ankitech (P) Ltd.', 199 Taxman 341 (Del), the Hon'ble Delhi High Court decided the issue in favour of

the assessee considering the judgment of Hon'ble Bombay High Court in the case of ‘CIT vs. Universal Medicare Pvt. Ltd.’, 190 Taxman 144 (Mum) and judgment of Rajasthan High Court in the case of CIT vs. Hotel Hilltop (supra). In the case of ‘CIT vs. Ankitech (P) Ltd.’ (supra), the Hon'ble Delhi High Court has affirmed the order of I.T.A.T., Special Bench, Mumbai in the in case of ‘Bhaumik Colour’ (Supra). However, the Hon'ble Delhi High Court has taken a different view in the case of CIT vs. National Travel Services (supra) wherein it has been held that for the purpose of section 2(22)(e) of the Act the partnership firm is to be treated as the shareholder and it is not necessary that it is to be "registered share holder". The Hon'ble Delhi High Court has decided the issue in favor of the Revenue.

16. From the above discussion, we have noticed that there are two possible views and interpretation on this issue under consideration before us. Hon'ble Bombay High Court in the case of ‘CIT vs. Universal Medicare Pvt. Ltd.’ (supra), Hon'ble Rajasthan High Court in the case of ‘CIT vs. Hotel Hilltop’ (supra) and Hon'ble Delhi High Court in the case of ‘CITvs. Ankitech (P) Ltd.’ (supra) decided the issue in favour of the assessee but in subsequent judgement Hon'ble Delhi High Court in the case of CIT vs. National Travel Services’ (supra) has decided the issue against the assessee and in favour of the Revenue. Under such

circumstances, the Hon'ble Supreme Court in the case of 'CIT vs. Vegetable Products Limited', 88 ITR 192 (SC) has held as under: -

> *"There is no doubt that the acceptance of one or the other interpretation sought to be placed on section 271(1) (a)(i) by the parties willful lead to some inconvenient result, but the duty of the court is to read the section, understand its language and give effect to the same. If the language is plain, the fact that the consequence of giving effect to it may lead to some absurd result is not a factor to be taken into account in interpreting a provision. It is for the legislature to step in and remove the absurdity. On the other hand, if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted. This is a well-accepted rule of construction recognised by this court in several of its decisions. Hence, all that we have to see is, what is the true effect of the language employed in section 271(1)(a)(i). If we find that language to be ambiguous or capable of more meanings than one, then we have to adopt that interpretation which favours the assessee, more particularly so because the provision relates to imposition of penalty."*

17. The Hon'ble Patna High Court in the case of 'Tata Iron & Steel C. Ltd. vs. Union of India', 75 ITR 676 (Patna) has held that *in a case of reasonable doubt, the construction must be beneficial to the tax payer is to be adopted.In addition to above, the proposition of law relating to the issue as to which view, in case there are two possible views, should be followed, in case of provision of law is liable to interpretation, then interpretation in favour of the assessee should be adopted.*

18. The accumulated profits include reserve and surplus as well as the current year profits and as a logical corollary would include accumulated losses as well. In the instant case the accumulated losses of M/S Euro Safety Footwear (P) Ltd. as on 31.03.2007 were Rs.46,86,013.07 and this is without including the b/f depreciation loss as per Income Tax Act of Rs. 29,78,934/-.While calculating accumulated profits depreciation at the rate mentioned in the IT Act, 1961 shall be taken into account and not depreciation as provided in the books. The view has been upheld by the Hon'ble Bombay High Court in the case of Navnit Lal C. Jhaveri vs. CIT reported at (1971) 80 ITR 582. The accumulated profits as on 16.09.2008 were Rs.21,24,721/-. Therefore, even if the advances received from the sister concern are treated as deemed dividend the same can only be to the extent of accumulated profits i.e., Rs.21,24,721/-. The AO having not made any comment in this regard in the remand report, he appeared to have agreed with the assessee's I.T.A No. 261/Agra/2013 12 contention.

19. The matter came before this Bench in the case of Shri Kulbir Singh, wherein identical additions were made on protective basis. In ITA no. 261/Agra/2013 vide order dated 29.11.2016 it has been held that the transactions were on account of commercial expediency and do not attract the provisions of Sec 2(22)(e) of the Act.

20. CBDT in its Circular no. 19/2017 dated 12.06.2017 has directed "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 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 and not pressed upon.

21. The next objection of the pertains to the admission of additional evidence in the form of collaboration agreement by the ld CIT(A).

22. The AO, during the course of assessment proceedings, required the assesse company to explain as why the transactions of receipt of money by it may not be treated as deemed dividend u/s 2(22)(e). To which the assesse replied that since the assesse company has purchased shoes from M/S Euro Safety Footwear (P) Ltd., there are commercial transactions and the provisions of Section 2(22)(e) are not attracted. The assesse believed that the reply would be convincing and did not file any other evidence at that point of time. However, after the additions were made, the assesse during the course of appellate proceedings placed on record the evidences mentioned at para 8, above. These evidences alongwith the submissions of the assesse were forwarded to the AO for comments by the CIT(A). The AO made inquiries from the Bank and has confirmed the genuineness of the documentary evidences in the form of bank letter, collaboration

agreement and bank sanction letter. The CIT(A) has in his order at **para 11.11 on page 49** considered this aspect also and after giving due opportunity and verification of these agreements accepted them.

23. The additional evidence placed by the assessee during the course of appellate proceedings was rightly admitted by the Hon'ble CIT(A)-II, Agra as the same was within the framework of law. The decision of **jurisdictional Hon'ble Allahabad High Court** in the case of '**CIT vs. M/S Aakar Constructions (P) Ltd.'** in ITA No.: 8/2011 dated 23.01.2012 is relevant in this regard wherein it was held –

> *"In this regard Rule 46-A of the Income Tax Rules prescribed that an opportunity will have to be given to the A.O. before admitting fresh evidence. In the instant case, the CIT(A) vide his letter dated 08.10.2009 has called the remand report from the A.O., who in his report did not find any defect in the books of accounts produced before him by the assessee. Thus, the A.O. got the sufficient opportunity to examine the books of accounts. The CIT(A) has exercised his power mentioned in section 250 (4) of the Act, which provides that the CIT(A) may remand the case to the A.O. and call for the remand report on the assessment on certain points. Hence, there is no violation of Rule 46A.*
>
> *Needless to mention that the power of the Appellate Commissioner is co-terminus with the power of the Assessing Officer. Appellate authority has all the powers, which the original authority has subject to condition/restriction, if any, prescribed by law as per the ratio laid down in the following cases:*
>
> ***1. Jute Corp. of India Ltd. vs. CIT, 187 ITR 688,693 SC; and***

2. CIT vs. NirbheramDaluram, (1997) 224 ITR 610 (SC).

In view of above, we are of the view that no substantial question of law is emerging from the impugned order passed by the Tribunal. Therefore, the impugned order passed by the Tribunal is hereby sustained along with the reasons mentioned therein.

The appeal filed by the department has no merit and the same is dismissed at the admission stage".

24. Further, this Bench in the case of '**Mukesh Kumar Agarwal, Agra vs Department of Income Tax' in** ITA No. 374/Agra/2010 Asst. Year: 2005-06 **on 6 March, 2012 has dismissed the appeal of the revenue on similar facts.**

25. The **CIT(A) at page 45-46 para 11.9** hadalso asked the AO to give comments if it is found that the collaboration agreement was found to be genuine, as to why the money received by M/s Roger Industries Ltd. should not be considered as taken during the course of normal business transactions, and she failed to submit any comment on this aspect after having found the collaboration agreement to be genuine on making enquiry from the bank.

26. Thus, proper opportunity was given by the Ld. CIT(A) to the assessing officer to rebut the claim of the assessee that there was a collaboration agreement between M/s Euro Safety Footwear Private Limited and M/s Roger Industries Limited which was produced and submitted to the bank much before this transaction took place and hence

was a normal business transaction between both the companies and could not be classified as deemed dividend u/s 2(22)(e) of the act .

27. The decisions cited by the Sr. D.R. in the case of 'M/s Haji Lal Mohd. Biri Works Ltd. vs. CIT' 199 CTR 170 (All) and 'CIT vs Manish Buildwell Pvt Ltd.' are on clearly distinguishable facts from the present facts, as in these case it was found by the Hon'ble High Court thatno reasonable opportunity to the assessing authority to examine new evidence produced in evidence and rebuttal, was given by the CIT(A). Whereas, in the instant case the A.O. was given a reasonable opportunity to comment on the genuineness of the collaboration agreement and bank sanction letter. The CIT(A) specifically asked the A.O. vide letter no. 468/CIT(A)-II/Agra/ACIT 4(1)/Agra/2011-12/994 dated 10.10.2013 and it was only after the receipt of remand report vide latter no F.No.ACIT 4(1)/Remand report/2013-14 dated 20.02.2014 and after considering the same the appellate order has been passed.

28. The Sr. D.R. has also referred to the following case laws:

I. Krishna Gopal Maheshwari vs ACIT

II. CIT vs. Subrta Roy and

III. Gopal and Sons (HUF) vs CIT

All these above cited cases have been considered and distinguished by this very bench of ITAT, Agra in the case of 'ACIT vs.

Royal Motors Bhopal (P) Ltd.' in ITA no. 158/Agr/2015 AY-2010-11.

29. On the basis of the above, it is seen that the ld. CIT(A) was well justified in holding that deemed dividend can be taxed only in the hands of the recipient, either being individual shareholder, or the concern in which the individual has a substantial interest, or if any payment is made on behalf of, or for the individual benefit of the individual shareholder, which is not the case herein.

30. In view of above discussion, we find no error in the order under appeal qua this issue, the same is hereby confirmed. Ground no. 1 to 3and additional grounds 1 to 5 are rejected.

31 In the result, the appeal is dismissed.

(Order pronounced in the open Court on 09/10/2018)

Sd/-	**Sd/-**
(A.D. Jain)	**(Dr. Mitha Lal Meena)**
Judicial member	**Accountant Member**

Dated: 09/10/2018
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Copy of order forwarded to:

(1)	*The appellant*	*(2)*	*The respondent*
(3)	*Commissioner*	*(4)*	*CIT(A)*
(5)	*Departmental Representative*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Agra Bench, Agra

		Date		
1.	Draft dictated / (DNS)	04.10.2018		PS
2.	Draft placed before author	09.10.2018		PS
3.	Draft proposed & placed before the second member			JM/AM
4.	Draft discussed/approved by Second Member.			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			PS/PS
6.	Kept for pronouncement on			PS
7.	File sent to the Bench Clerk			PS
8.	Date on which file goes to the AR			
9.	Date on which file goes to the Head Clerk.			
10.	Date of dispatch of Order.			