IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "E", MUMBAI

BEFORE SHRI G.S. PANNU, VICE PRESIDENT
AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER

ITA No. 1411/Mum/2014
Assessment Year: 2009-10

Mr. Sajid Nadiadwala, Nadiadwala Villa, Ocean view, J.P. Road, Versova, Mumbai [PAN : AAGPS5417D]	Vs.	Commissioner of Income Tax-11, Mumbai
(Appellant)		(Respondent)

Appellant by	:	Shri Hiro Rai, AR
Respondent by	:	Shri Manjunath Karkihalli, DR

Date of Hearing : 10-05-2019		Date of Pronouncement :24-06-2019

O R D E R

PER G.S. PANNU, VICE PRESIDENT:

1. This appeal by the assessee is directed against the order passed by the CIT– 11 Mumbai, dated 26.12.2013, holding the assessment order passed by the Assessing Officer u/s.143(3)of the Act, dated 30.12.2011, as erroneous insofar as it was prejudicial to the interest of the Revenue under section 263 of the Income-tax Act, 1961 (in short "the Act").

2. Briefly put, the relevant facts are that the appellant before us is an individual earning income under various heads viz. Income from Salary, House property, Business and Profession and Other sources. For the assessment year under consideration, there turn of income filed by him was subject to scrutiny assessment u/s.143(3) of the Act, dated 30.12.2011, wherein the total income was assessed at Rs.2,85,30,370/- Subsequently, the Commissioner invoked his revisionary jurisdiction and issued a notice u/s263 of the Act, dated 18.10.2013, proposing that the assessment order, dated 30.12.2011(supra),was erroneous in so far as it was prejudicial to the interests of the Revenue, in as much as the Assessing Officer ought to have made an addition of the entire loans/advances received from the company in

which assessee was a major shareholder as per the provisions of section 2(22)(e) of the Act and should not have restricted the addition only to the extent of Rs. 2.30 crores. In this context, the relevant discussion by the Commissioner shows that his examination of assessment order showed that the assessee had received Rs.7,79,24,880/- as loans and advances during the year from Nadiadwala Grandson Entertainment Pvt. Ltd. (hereinafter referred to as "NGEPL") in which he was a shareholder holding approximately 98% interest in the company. The Commissioner further noticed that accumulated profits of the NGEPL as on 31.03.2009 was Rs.7,25,30,011/- and NGEPL was not a company in which public was substantially interested and, hence, Assessing Officer should have treated the entire loan/ advances received by the assessee from the said company to the extent of accumulated profits as deemed dividend u/s 2(22)(e) of the Act. Whereas, according to the Commissioner, only part addition was made in the assessment order dated 30.12.2011 (supra).

3. In reply to the show cause notice, the assessee resisted the action of the Commissioner and, interalia, furnished written submissions dated 17.12.2013. The appellant company resisted the action of the Commissioner both on the point of jurisdiction as well as on the merits of the issue. In paras 2 (I) and (II) of his order, the Commissioner has briefly noted the submissions put-forth by the assessee. However, the Commissioner was not satisfied with the submissions put-forth and held that the requisite conditions prescribed for invoking section 263 of the Act were fulfilled in the present case and he, directed the Assessing Officer to enhance the addition under section 2(22)(e) of the Act by Rs. 49,71,263/-. In this manner, the Commissioner partly agreed with the alternate submission of the assessee that further addition, if any, can be made only to the extent of Rs. 49,71,263/- and directed the Assessing Officer to make further addition only to the extent of Rs. 49,71,263/- and his relevant discussion is contained in last para of his order, which we would reproduce and refer to it in detail later in this order.

4. Against such a decision, assessee is in appeal before the Tribunal. At the time of hearing, the learned representative for the assessee has made various

submissions, but a pertinent point has been raised, which is based on the ratio of the judgment of Hon’ble Jurisdictional High Court in the case of *CIT vs. Fine Jewellery (India) Ltd.[2015] 372 ITR 303 (Bom.)*. It is sought to be emphasized that the Assessing Officer after due application of mind arrived at a conclusion that the amount received by the assessee from NGEPL was in the normal course of business. It was advanced by the NGEPL to the assessee for utilisation towards production of a movie namely “Houseful”. The Assessing Officer after due application of mind agreed with the contention of the assessee that advances received by the assessee was in the nature of business advances and thus, addition u/s 2(22)(e) of the Act was restricted only to the extent of Rs. 2.30 crore found to be utilised by the assessee for the purpose of purchase of car. On this basis, it has been argued that the order of the Commissioner is untenable in law. In support of his proposition, he has relied upon the following discussion in para 8 and 9 of the judgment of Hon’ble Jurisdictional High Court in the case of CIT vs. Fine Jewellery (India) Ltd. (supra):

> *"8. We find that the impugned order of the Tribunal does record the fact that specific queries were made during the Assessment proceedings with regard to details of expenditure claimed under the head "miscellaneous expenses" aggregating to Rs. 2.94 crores. The respondent-assessee had responded to the same and on consideration of response of the respondent-assessee, the AO held that of an amount of Rs. 17.98 lakhs incurred on account of repairs and maintenance out of Rs. 2.94 cores is capital expenditure. This itself would be indication of application of mind by the AO while passing the impugned order. The fact that the assessment order itself does not contain any discussion with regard to the balance amount of expenditure of Rs. 1.76 crores i.e. Rs. 2.94 crores less Rs. 17.98 lakhs claimed as revenue expenditure would not by itself indicate non application of mind to this issue by the AO in view of specific queries made during the assessment proceedings and the Respondent-assessee's response to it. In fact this Court in the case of "Idea Cellular Ltd. v. Dy. CIT [2008] 301 ITR 407" has held that if a query is raised during assessment proceedings and responded to by the Assessee, the mere fact that it is not dealt with in the Assessment Order would not lead to a conclusion that no mind had been applied to it.*

9. Moreover, from the nature of expenditure as explained by the petitioner to the AO during the assessment proceedings itself indicates that the view that the same were in the realm of revenue expenditure, is a possible view. Therefore, we find no fault in the impugned order having followed the binding decision of the Supreme Court in the case of Max India Ltd. (supra), while allowing the appeal before it."

(Underlined for emphasis by us)

5. In order to appreciate the point sought to be raised by the assessee, we may refer to the relevant contents of the order passed by the Commissioner u/s 263 of the Act, which reads as under:

"2.The AO found during the course of assessment proceeding that the assessee had received Rs.7,79,24,880/- towards loan/advances during the year from M/s. Nadiadwala Grandson Entertainment Pvt. Ltd. The assessee was a shareholder of the said company holding about 98% interest therein. The AO further found that the accumulated profit of the said company as on 31-3-2009 was Rs.7,25,30,011/-. He also observed that the said company is not a company in which the public are substantially interested. All these facts were discussed by the AO in para 6 of the assessment order passed u/s.143(3) of the I.T. Act, 1961 on 30-12-2011. In view of these facts, the AO held at page 5 as under:

"In view of the above finding, the transaction of the assessee with the said company squarely falls within the mischief of the provision u/s.2 (22) (e) of the Act."

In terms of the aforesaid, what the Commissioner has sought to make out is that though, on appreciation of facts, Assessing Officer arrived at a conclusion that transaction of the assessee falls within the mischief of section 2(22)(e) of the Act, but he erred in not treating the entire amount received by the assessee as 'deemed dividend' and restricting the addition only to the extent of Rs. 2.30 crore in the assessment order dated 30.12.2011(supra). Thus, the Commissioner found the assessment order to be erroneous in so far as it is prejudicial to the interests of the

Revenue for the aforesaid reason.

6. Now, we may touch upon the manner in which the Commissioner has justified the fulfilment of conditions prescribed in section 263 of the Act in his order. Pertinently, and as has also been explained by the Hon'ble Supreme Court in *Malabar Industrial Co. Ltd. vs. CIT 243 ITR 83*, invoking of section 263 of the Act can be justified only on satisfaction of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. It is trite position of law that even if one of the aforesaid conditions is absent in a given case, then invoking of section 263 of the Act would be untenable in law. In this background, we may now examine the manner in which the Commissioner has dealt with the conditions prescribed u/s. 263 of the Act in his order. The relevant discussion is contained at page 4 &5 of his order, which reads asunder:

> *"The submissions of the assessee have been duly considered. He has made an alternative submissions. The same are being dealt with as under:-*
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> *Submission No. 1: The assessee has given the computation of the possible maximum addition u/s. 2 (22) (e) at page No.11 of the paper book. After adjusting opening balance of earlier year and the credit balances, the amount of deemed dividend has been computed by assessee at Rs. 2,80,04,713/-. After adjusting the addition of Rs. 2,30,33,450/- already made by the AO, the balance addition has been worked at Rs. 49,71,263/-. I agree with the manner of computation made by the learned AR of the assessee. The opening balance coming from earlier year cannot be added during the assessment year under consideration. Further, any amount paid by the company to the extent of credit balance of the assessee cannot come within the purview of section 2(22)(e) of the Act. The computation made on the basis of these facts by learned AR of the assessee is therefore, acceptable, subject to the verification of facts and arithmetical calculation by the AO.*
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> *Submission No. 2: I do not agree with the submissions of the learned AR of the assessee. After considering all the submissions of the assessee made*

during the course of assessment proceeding, the AO found that the submissions were not acceptable and the transaction of the assessee with the said company squarely fell within the mischief of the provision of section 2(22)(e) of the Act. Having held so in clear words on page No.5, the AO should have made the addition on account of deemed dividend to the extent of loan/advance taken from the said company limited by the accumulated profit. However, the AO made the addition of Rs. 2,30,33,450/- only which was the purchase cost of the Bentley Car. The contention of the learned AR of the assessee that the AO had accepted the submission of the assessee that the said amounts had been received in the normal course of business except the sum of Rs.2,30,33,450/- and so he restricted the addition to that extent is not correct. The AO has not accepted anywhere in the assessment order that the loans/advances taken from the said company were utilized in the normal course of business. Though the assessee had made submission in this regard, the AO had not accepted the same. As the quantum of addition made by him was not in accordance with the conclusion made by him and also the provision of law the assessment order passed by him was definitely erroneous and prejudicial to the interest of revenue. Further submission of learned AR that the AO had taken one of the possible views and so his order cannot be revised u/s.263 is also not acceptable. In this case, the AO had not taken one of the possible views but he had made the addition of the smaller amount in contradiction to the conclusion made by himself. The judgments relied on by learned AR are not applicable to a situation where the AO makes the addition incontradiction to his own conclusion in the assessment order. So, none of the judgments is applicable to the facts of the case.

<u>Submission No. 3</u>: This submission of learned AR of the assessee is also not acceptable as the issue before the CIT(A) was limited to the addition of Rs.2,30,33,450/- and the present revision proceeding was initiated for addition beyond the said sum of Rs.2,30,33,450/-.

To sum up, the AO is directed to enhance the addition made u/s. 2(22)(e) by Rs.49,71,263/- after verifying the facts & arithmetical calculation given by the assessee at page no.11 of the paper book."

7. Ostensibly, the Commissioner concludes that the Assessing Officer had not taken one of the possible views but he had made the addition of the smaller amount in contradiction to the conclusion made by himself that the transactions of the assessee falls within the mischief of section 2(22)(e) of the Act, resulting in prejudice caused to the Revenue. At this juncture, it is important to refer to the manner in which the Assessing Officer dealt with the issue after arriving at a conclusion that transactions were hit by the provisions of section 2(22)(e) of the Act. The relevant para of the assessment order is reproduced hereunder:

> *"The accumulated profits of NGEPL at year ended 31.03.2009 is Rs.7,25,30,011/-. In the proprietary books of the assessee the year end liability payable to NGEPL is Rs. 2,54,24,881/-. The debit balance in the capital account of the assessee, on account of withdrawals out of transfer of funds from NGEPL to personal account at the year-end, is Rs.1,99,65,273/-, where from the various expenses and personal drawings have been incurred and met. Similarly, the assessee also received funds from NGEPL, which were deployed and used for purchase of Bentley car at a cost of Rs.2,30,33,450/-. Accordingly taking into account the overall movement of funds and the direct nexus of funds utilized for purchase of car, deemed dividend under section 2(22)(e) of the Act is taxed at Rs.2,30,33,450/-."*
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> (Underlined for emphasis by us)

The above discussion in the assessment order clearly reveals that the fact situation noted by him was not contrary to the conclusion arrived at by him. The Assessing Officer points out that he has considered the overall movement of funds and thereafter arrived at a conclusion that since there was direct nexus between utilisation of funds for purchase of car, the amount only to that extent was treated as deemed dividend u/s 2(22)(e) of the Act. Pertinently, the Commissioner in his order has stated only selective part of the order passed by the Assessing Officer dated 30.12.2011 (supra) to hold that the addition made by the Assessing Officer was contrary to his own conclusion and was thus prejudicial to the Revenue. It is a well settled proposition that a document should be read as a whole in order to understand the intent and purpose of the parties and to

arrive at conclusion there-from. The said law is equally applicable to an assessment order. It should be read as a whole to understand as to whether or not the Assessing Officer has applied his mind on the facts before him.

8. On going through the order passed u/s 143(3) of the Act dated 30.12.2011 (supra), we find that the Assessing Officer after considering the plea of the assessee accepted that the transaction between the assessee and NGEPL was in the course of normal business, arrived at a conclusion that provisions of section 2(22)(e)of the Act are applicable only to the extent of funds utilised by the assessee for purchase of car and not for the balance amount. Thus, Assessing Officer has a possible view.

9. Per contra, the ld. DR relied upon the observation in the order passed u/s 263 of the Act to state that the Assessing Officer has not accepted anywhere in the assessment order that the loans/advances taken from the said company were utilized in the normal course of business. Though the assessee had made submission in this regard, the Assessing Officer had not accepted the same. As the quantum of addition made by him was not in accordance with the conclusion made by him and also the provision of law, the assessment order passed by him was definitely erroneous and prejudicial to the interest of Revenue, as per the Ld.DR.

10. On the other hand, the assessee relied upon the decision of Hon'ble Jurisdictional High Court in the case of *CIT vs. Fine Jewellery (India) Ltd.* for the proportion that the fact that the assessment order itself does not contain any discussion would not by itself indicate non application of mind on the issue by the Assessing Officer if specific queries were made during the assessment proceedings and the assessee responded to the same.

11. We find that the decision relied upon by the assessee is relevant in the present case as the Assessing Officer has very much applied his mind on the issue and arrived at conclusion. Further, the Hon'ble Jurisdictional High Court in the case of *CIT vs.*

Gabriel India Ltd. 203 ITR 108 held that there must be material before the Commissioner to satisfy himself that two requisites provided u/s. 263 are present, otherwise power cannot be exercised at the whims and caprice of the Commissioner. It is not permitted u/s 263 of the Act to substitute the judgment of the Commissioner for that of Assessing Officer unless the conditions stipulated therein are satisfied. The order of the Assessing Officer cannot be termed as erroneous simply because Commissioner does not agree with the conclusion drawn by the Assessing Officer. In another case from Hon'ble Jurisdictional High Court in *CIT vs. Development Credit Bank Limited (2010) 323 ITR 206*, in a similar situation, wherein assessment order was passed after considering all details called for and furnished by the assesses, the Commissioner invoked revisional jurisdiction on the ground that enquiry was not conducted; and the Hon'ble High Court held that the Commissioner was not justified in invoking the revisional jurisdiction. In view of the above discussion, the impugned order of the Commissioner is untenable in the eyes of law.

12. Resultantly, we set aside the order of the Commissioner and restore the assessment order dated 30.12.2011 (supra), qua the issue relating to the enhancement of addition on account of deemed dividend u/s 2(22)(e) of the Act. Resultantly, the appeal is allowed.

Order pronounced in the open court on 24th June, 2019

Sd/-	Sd/-
(RAM LAL NEGI)	(G.S. PANNU)
JUDICIAL MEMBER	VICE PRESIDENT

Mumbai, Date : 24 -06-2019

SSL / TNMM

Copy to :

1) The Appellant
2) The Respondent
3) The CIT(A) concerned
4) The CIT concerned
5) The D.R, Mumbai
6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai