

**IN THE INCOME TAX APPELLATE TRIBUNAL "D", BENCH  
MUMBAI**

**BEFORE SHRI M.BALAGANESH, AM  
&  
SHRI RAM LAL NEGI, JM**

**ITA No.5805/Mum/2016  
(Assessment Year: 2008-09)**

**ITA No.6928/Mum/2016  
(Assessment Year :2009-10)**

|  |     |  |
|--|-----|--|
| Mr. Mukesh Thakurdas<br>Jaisinghani<br>202, 2 <sup>nd</sup> Floor, Ratan Deep<br>Apartment, Sapna Garden<br>Road, Sector – 17<br>Ulhasnagar – 421 003<br>Dist: Thane | Vs. | Asst. Commissioner of Tax<br>Circle-2, Kalyan<br>2 <sup>nd</sup> Floor, Mohan Plaza<br>Wayale Nagar<br>Kadakpada, Kalyan – 421<br>301<br>Dist: Thane |
| <b>PAN/GIR No. ADOPJ7369L</b>  |     |  |
| <b>(Appellant)</b>   | ..  | <b>(Respondent)</b>  |

**ITA No.5806/Mum/2016  
(Assessment Year: 2008-09)**

**&**

**ITA No.6929/Mum/2016  
(Assessment Year :2009-10)**

|  |     |  |
|--|-----|--|
| Mr. Raju Thakurdas<br>Jaisinghani<br>202, 2 <sup>nd</sup> Floor, Ratan Deep<br>Apartment, Sapna Garden<br>Road, Sector – 17<br>Ulhasnagar – 421 003<br>Dist: Thane | Vs. | Asst. Commissioner of Tax<br>Circle-2, Kalyan<br>2 <sup>nd</sup> Floor, Mohan Plaza<br>Wayale Nagar<br>Kadakpada, Kalyan – 421<br>301<br>Dist: Thane |
| <b>PAN/GIR No. ACOPJ7036K</b>  |     |  |
| <b>(Appellant)</b>   | ..  | <b>(Respondent)</b>  |

|                              |                           |
|------------------------------|---------------------------|
| Assessee by                  | Shri Neelkanth Khandelwal |
| Revenue by                   | Shri D.G. Pansari         |
| <b>Date of Hearing</b>       | <b>04/09/2019</b>         |
| <b>Date of Pronouncement</b> | <b>04/10/2019</b>         |
|                              |                           |

**आदेश / ORDER**

**PER BENCH:**

This appeal in ITA Nos. 5805/Mum/2016, 6928/Mum/2016, 5806/Mum/2016 & 6929/Mum/2016 for A.Y.2008-09 & 2009-10 arise out of the order by the Id. Commissioner of Income Tax (Appeals)-3, Thane in appeal No.211-THN/15-16, 212-THN/15-16, 213-THN/15-16 & 214-THN/15-16 respectively dated 01/08/2015, 15/07/2016 respectively (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 27/03/2015 by the Id. Asst. Commissioner of Income-Tax, Circle-2, Kalyan (hereinafter referred to as Id. AO). Since identical issues are involved in these appeals, they were heard together and are being disposed off by this consolidate order, for the sake of convenience.

2. We find that the assessee had raised additional grounds of appeal challenging the validity of reopening of assessment on the ground that approval u/s 151 of the Act was not given by the competent authority. We have perused the assessment records. We find that the original assessment was completed u/s 143(1) of the Act. Hence the case of the assessee falls within the ambit of provisions of section 151(2) of the Act. We find that the approval for reopening the assessment had been granted by the Learned Joint Commissioner of Income Tax after duly satisfying

himself about the reasons recorded for reopening the assessment, which is evident from the perusal of the assessment records. Hence the additional grounds raised by the assessee in this regard challenging the validity of reopening the assessment are dismissed.

3. Though the assessee had raised several grounds which are merely argumentative in nature, the only effective issue to be decided in this appeal is as to whether the Id CITA was justified in confirming the addition made u/s 2(22)(e) of the Act in the facts and circumstances of the case.

4. The brief facts of this issue are that the assessee is an individual engaged in the business of transport hiring services and also a partner in 4 firms. The Id AO observed that the assessee had received advances of Rs 48,75,000/- during the year under consideration from M/s Dheeraj Estate Private Limited (DEPL), in which assessee is a Director, having 20% of shareholding in the company. The assessee stated that the advances were in the nature of current account transactions in the ordinary course of business and cannot be treated as advancing loan u/s 2(22)(e) of the Act. During the course of assessment proceedings, a Memorandum of Understanding (MOU) entered into between M/s DEPL and assessee dated 2.5.2006 wherein the assessee was shown as 'Aggregator of lands' and M/s DEPL was shown as 'Developer'. Pursuant to the said MOU, it was agreed that the Developer would provide periodical advances to the assessee aggregator for procuring lands either in the individual name of the assessee or in his group concerns name and as per the MOU, such procurement made by all means, would have to be construed as procurement been made for and on behalf of M/s DEPL for the purpose of development. Accordingly, M/s DEPL started making

payments to the assessee on a periodical basis. Since this MOU was unregistered, the Id AO rejected the said contention as the assessee failed to produce evidence with respect to copies of agreements for purchase of land as claimed to have been made from such loan transaction. Accordingly, the Id AO added back a sum of Rs 48,75,000/- , being the amounts received by the assessee from M/s DEPL u/s 2(22)(e) of the Act. The accumulated profits of M/s DEPL as at the end of the earlier previous year was only Rs 34,75,096/-. Despite this, the Id AO proceeded to treat the sum of Rs 48,75,000/- as deemed dividend u/s 2(22)(e) of the Act which figure was beyond the accumulated profits as on 31.3.2007 on the ground that the profits earned by M/s DEPL upto the date of loan should also be considered (i.e the broken period profits in financial year 2007-08 commencing from the 1<sup>st</sup> april to the relevant date of loan transaction). The action of the Id AO was upheld by the Id CITA. Aggrieved, the assessee is in appeal before us.

5. We have heard the rival submissions. It is not in dispute that the assessee is a shareholder in M/s DEPL , a company in which public are not substantially interested having not less than 10% of voting power. It is not in dispute that the assessee holds 20% of shareholding in DEPL. It is not in dispute that the monies were advanced by M/s DEPL to the assessee on a periodical basis for the purpose of procurement of lands by assessee for and on behalf of M/s DEPL in the capacity of an aggregator. The crucial document relied upon in this regard is the MOU entered into between M/s DEPL and the assessee on 2.5.2006 pursuant to which advances were made to the assessee. This MOU was not registered but the same was duly notarized by a competent person. The relevant extracts of the said MOU are reproduced in the order of the Id CITA in pages 9 & 10. From the perusal of the same, the intention of both the

parties i.e M/s DEPL and the assessee are duly brought out in the said MOU thereby establishing the business nexus of the advances. We find that the assessee is a partner in 4 firms viz M/s K Bhatia Developers , Shree Balaji Enterprises, M/s Mahima Infra Estates and M/s K Bhatia Estates. This goes to prove that the assessee is very well experienced and conversant with the real estate activities and procurement of lands thereon for the purpose of real estate business. Hence the assessee assuming the role of an 'aggregator' in the MOU dated 2.5.2006 entered into with M/s DEPL for procuring lands on behalf of DEPL cannot be summarily dismissed. Hence the intention of the assessee and M/s DEPL while entering into MOU cannot be ignored. It is a fact that the assessee has received periodical advances from DEPL during the year and had also repaid it regularly to DEPL. It is not in dispute that the advances received by the assessee from M/s DEPL have been utilized for making investments by him in the partnership firms owned by him. It is not in dispute that the said partnership firms are also engaged in real estate activities only. Moreover, the MOU clearly provides for a mandate that pursuant to advances made by DEPL to assessee, even if the lands were procured by the assessee in his individual name , or in his firm's name or in any other concerns' name, the same would have to be construed as lands procured in the capacity of 'aggregator' as defined in MOU for and on behalf of M/s DEPL only. We are convinced that the entire transactions of receipt of advances and repayment thereon falls within the ambit of 'trade advance' within the meaning of section 2(22)(e) of the Act and hence the provisions of deemed dividend cannot be invoked in the facts and circumstances of the instant case. When advances were made in the ordinary course of business by M/s DEPL to the assessee in connection with its business transaction, the same would not partake the character of loan or advance within the meaning of section 2(22)(e) of the Act as the

same is squarely excluded by the statute itself. Hence the advance received by the assessee from M/s DEPL takes the character of trade advances in the nature of commercial transaction. Once it is in the nature of trade advance, the same cannot be construed as deemed dividend u/s 2(22)(e) of the Act as per the Circular of the CBDT vide Circular No. 19/2017 dated 12.6.2017 which is reproduced herein for the sake of convenience:-

**CIRCULAR NO.19/2017 [F.NO.279/MISC./140/2015/ITJ]**

**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 12-6-2017**

*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:*

- i. 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.<sup>1</sup>, Delhi High Court).*
- ii. 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. (CITv. Amrik Singh, P&H High Court)<sup>2</sup>.*

*iii. 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.*

5.1. We find that the main contention advanced on behalf of the revenue was that MOU was not registered and it is only an afterthought to escape from the rigours of the provisions of section 2(22)(e) of the Act. It is well settled that registration of MOU is only for the limited purpose of enforceability of the said MOU giving the legal right to sue for the concerned parties. Merely because a MOU is unregistered, it does not take away the genuine transactions carried out by the parties pursuant to MOU. It is for the parties to MOU to decide whether to register the MOU or not. Mere registration alone would not make the transactions genuine. What is to be seen is the substance of the transaction in the light of business acumen of the parties involved thereon, capacity to act as aggregator to procure lands for and on behalf of M/s DEPL. It is not in dispute that the said MOU dated 2.5.2006 had been duly notarized on 2.5.2006 itself by a competent person. In case if the revenue had any doubt regarding the veracity of the said document, then nothing prevented the revenue from examining the said Advocate Notary by either issuing notice u/s 133(6) of the Act or by issuing summons u/s 131 of the Act. Hence without carrying out necessary examination in the manner

known to law, the document placed on record by the assessee cannot be summarily brushed aside.

5.2. We also find that the Id AO had categorically given a finding that from the books of accounts of M/s DEPL and the assessee, it is clear that the transactions between the assessee and M/s DEPL were frequent by way of frequent advancing of monies to assessee and frequent repayments made by the assessee to M/s DEPL. This finding clearly goes in favour of the assessee as the subject mentioned transaction is only in the nature of current account transaction carried out by the assessee. From the perusal of the ledger account of assessee as appearing in the books of M/s DEPL for the period 1.4.2007 to 31.3.2008, we find that there was a opening credit balance of Rs 20,25,000/- lying to the credit of the assessee in the books of M/s DEPL. Against such credit, the monies were paid to the assessee by M/s DEPL on a periodical basis. This itself goes to prove the existence of account being operated on a current account basis and not loan or advance so as to fall within the ambit of provisions of section 2(22)(e) of the Act. The law is now well settled that the current account transactions are outside the ambit of provisions of section 2(22)(e) of the Act. The Id AR rightly placed reliance on the decision of the Hon'ble Calcutta High Court in the case of Pradip Kumar Malhotra vs CIT reported in 338 ITR 538 (Cal). We find that a similar view was taken in yet another decision of Hon'ble Calcutta High Court in the case of CIT vs Gayatri Chakraborty reported in 407 ITR 730 (Cal).

5.3. In view of our aforesaid observations, we direct the Id AO to delete the addition made towards deemed dividend u/s 2(22)(e) of the Act in the facts and circumstances of the instant case. Hence there is no need to adjudicate the dispute relating to the issue whether the accumulated

profits as at the end of the earlier previous year should be taken or accumulated profits upto the date of advancing the loan should be taken for the purpose of working out the figure of deemed dividend and the same is left open. Accordingly, the grounds raised by the assessee in ITA No. 5805/Mum/2016 on merits of the addition are allowed.

6. In the result, the appeal of the assessee for the Asst Year 2008-09 in iTA NO. 5805/Mum/2016 is partly allowed.

**ITA No. 6928/Mum/2016 – Asst Year 2009-10**

7. We find that the issue in dispute for this Asst Year is identical to Asst Year 2008-09 except with variance in figures. During the year under consideration, we find from the ledger account of the assessee as appearing in the books of M/s DEPL, the assessee had overdrawn Rs 48,75,000/- as on 1.4.2008 and had repaid during the year to the tune of Rs 38,95,000/- and had further drawn monies from M/s DEPL to the tune of Rs 1,21,00,000/-, thereby leaving a closing balance of Rs 1,30,80,000/- . This goes to prove the existence of current account transactions between the assessee and M/s DEPL apart from the business nexus of advances as detailed hereinabove for Asst Year 2008-09. Hence the decision rendered by us in Asst Year 2008-09 with regard to taxability of deemed dividend u/s 2(22)(e) of the act would apply with equal force for this Asst Year also except with variance in figures. Accordingly, the grounds raised by the assessee are allowed.

8. In the result, the appeal of the assessee in ITA No. 6928/Mum/2016 is allowed.

**ITA No. 5806/Mum/2016 – Asst Year 2008-09**

**ITA No. 6929/Mum/2016 – Asst Year 2009-10**

9. Both the parties before us mutually agreed that the facts in these appeals are identical with that of Shri Mukesh Thakurdas Jaisinghani. The decision rendered hereinabove in the case of Shri Mukesh Thakurdas Jaisinghani would apply with equal force for Shri Raju Thakurdas Jaisinghani also for both the assessment years in dispute before us in view of identical facts, except with variance in figures and variance in extent of shareholding in M/s DEPL. Accordingly, the appeal of the assessee for Asst Year 2008-09 is partly allowed and appeal of the assessee for Asst Year 2009-10 is allowed.

10. TO SUM UP:-

| <b>ITA No.</b>       | <b>AY</b>      | <b>Appeal By</b> | <b>Result</b>         |
|----------------------|----------------|------------------|-----------------------|
| <b>5805/Mum/2016</b> | <b>2008-09</b> | <b>assessee</b>  | <b>Partly Allowed</b> |
| <b>6928/Mum/2016</b> | <b>2009-10</b> | <b>assessee</b>  | <b>Allowed</b>        |
| <b>5806/Mum/2016</b> | <b>2008-09</b> | <b>assessee</b>  | <b>Partly Allowed</b> |
| <b>6929/Mum/2016</b> | <b>2009-10</b> | <b>assessee</b>  | <b>Allowed</b>        |

Order pronounced in the open court on this

04/10/2019

**Sd/-**  
**(RAM LAL NEGI)**  
**JUDICIAL MEMBER**

Mumbai; Dated  
KARUNA, *sr.ps*

**Sd/-**  
**(M.BALAGANESH)**  
**ACCOUNTANT MEMBER**

04/10/2019

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)  
ITAT, Mumbai