IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B" DELHI

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
&
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

I.T.A. No.1570/DEL/2019
Assessment Year 2012-13

Deeptti Ispat Pvt. Ltd. 39/77, West Punjabi Bagh New Delhi	Vs.	ITO, Ward-7(1) New Delhi
TAN/PAN: AADCD0829N		
(Appellant)		(Respondent)

Appellant by:	Shri Nitin Gulati, Advocate		
Respondent by:	Shri Vivek Kumar Upadhyay, Sr.DR		
Date of hearing:	16	01	2024
Date of pronouncement:	14	02	2024

O R D E R

PER PRADIP KUMAR KEDIA-A.M. :

The captioned appeal has been filed at the instance of the assessee against the first appellate order of the Commissioner of Income Tax (Appeals)-XXXIV, New Delhi ('CIT(A)' in short) dated 26.12.2018 arising from the assessment order dated 31.03.2015 passed by the Assessing Officer (AO) under Section 143(3) of the Income Tax Act, 1961 (the Act) concerning AY 2012-13.

2. The assessee has raised two issues by way of its grounds of appeal which read as under:

"1. The addition of Rs. 2,08,50,000/- for deemed u/s. 2(22)(e) of I.T Act is not based on the facts. The amount of Rs. 2,00,00,000/- was given for purchase of property and Rs. 8,50,000/- was opening balance which cannot be treated as deemed dividend. The act of confirming such addition by the Ld. CIT(A) is wrong and illegal as it is against the circular 19/2017 issued by the board and judicial pronouncements of various Courts.

2. That the appellant duly furnished the evidence in support of share application money received by it during the year but the Ld. CIT(A) has wrongly and illegally confirmed the unwarranted action of the A.O. of making the addition of Rs. 9,67,000/- in the income of the

assessee u/s. 68 of the Income Tax Act, 1961."

3. The first issue concerns additions of Rs.2,08,50,000/- by invoking provisions of Section 2(22)(e) of the Act.

4. When the matter was called for hearing, the ld. counsel for the assessee submitted at the outset that provisions of Section 2(22)(e) of the Act has been wrongly invoked by the Revenue in the facts of the case. The ld. counsel made two fold submissions for non-applicability of Section 2(22)(e) of the Act.

4.1 Firstly, the ld. counsel submitted that the assessee is a substantial shareholder holding 10.29% voting power in the lender company namely, M/s. Advance Impex Pvt. Ltd (AIPL). The account of AIPL got credited by Rs.2 crore by way of transfer entry from M/s. T.S. Ispat Pvt. Ltd. (TSIPL). The assessee-company has not taken any loan from AIPL *per se*. The amount of Rs.2 crore received in the name of AIPL got credited by way of a journal entry without any actual flow of fund from AIPL. A party namely, TSIPL was a debtor of AIPL and the receivables of AIPL towards TSIPL was transferred in the books of assessee by way of a general entry by crediting liability on account of AIPL to be paid to TSIPL. The ld. counsel thus contends that the deeming fiction of Section 2(22)(e) are not attracted in the absence of any actual cash advance or loan from the AIPL to the assessee and a mere creation of debtor and lender relationship between the company and the assessee is not sufficient for the purposes of Section 2(22)(e) of the Act. There being so, in the absence of any actual outgo or flow of money from AIPL to the assessee shareholder, a mere entry to create debt could not be treated as deemed dividend under Section 2(22)(e) of the Act in the light of the judgment rendered in the case of *G.R. Govindarajulu Naidu v. CIT [1973] 90 ITR 13 (Mad),.*

4.2 Secondly, the transaction was actuated by commercial motive in the ordinary course of business and therefore, such transaction is

outside the ambit of deeming fiction of Section 2(22)(e) of the Act. To support such plea, the ld. counsel pointed out that assessee-company entered into an agreement with one Mr. Ashok Kumar, Angoori Devi, Brahm Singh and Ajab Singh who were the owner of ½ portion of property at 172, Khasra No.693, Pilkhuwa Tehsil, Hapur District, Ghaziabad (UP) on 06.01.2011 for a total consideration of Rs.1,94,30,000/-. An amount of Rs.40 lakh were paid as advance on the same date against such proposed purchase of property and remaining amount was to be paid at the time of execution of sale deed. The copy of agreement was adverted for such affirmation. The ld. counsel pointed out that AIPL was already holding another ½ portion of the said property and it approached the assessee-company for purchase of remaining ½ portion. In this backdrop, the assessee entered into an agreement with M/s. AIPL for a proposal sale of this property for a consideration of Rs.2 crore on 15.03.2011 and receipt by way of journal entry was made against sale of one ½ portion of the property to be acquired from Mr. Ashok Kumar and others. The selling party Mr. Ashok Kumar and others however did not register the sale deed in favour of the assessee. The legal notices were sent to selling party to give effect to the understanding to the sale of property to the assessee. As the transaction of the purchase of the property was not successful, the assessee-company was not able to fulfill the agreement of sale of this property to M/s. AIPL, as was credited in terms of the agreement. The amount was thus eventually refunded to AIPL by taking loan from lender namely BTM Exports of Rs.2 crore. Under the circumstances, the transaction which was backed with commercial intent cannot be regarded as a loan or advance simpliciter. The transaction being business transaction which would have benefitted the assessee-company as well as the lender-company, although did not fructify, falls outside the scope of Section 2(22)(e) of the Act as held by the Hon'ble Delhi High Court in the case of *CIT vs. Creative*

Dyeing and Printing Pvt. Ltd. in ITA No.250/2009 judgment dated 22nd September, 2009. Similar view has been taken by the Hon'ble Punjab & Haryana High Court in the case of *CIT vs. Amreek Singh in ITA No.5/2014 & others judgment dated 02.02.20215* and plethora of other judgments from High Court of different jurisdiction. The ld. counsel also made reference to Circular No.19/2017 dated 12th June, 2017 by CBDT to submit that in the event of business expediency, the advances received are not covered by Section 2(22)(e) of the Act. The ld. counsel thus submitted that both AO and CIT(A) have misdirected themselves in law in making the impugned additions and urged for suitable relief.

5. The ld. DR for the Revenue, on the other hand, relied upon the observations made in the assessment order and the first appellate order. It was pointed out that the basic fact remains that the assessee has received loan amounting to Rs.2 crore during the year under consideration from AIPL in which the assessee-company is holding 10.29% equity shares and thus such transaction is squarely covered under Section 2(22)(e) of the Act.

6. We have carefully considered the rival submissions and perused the assessment order as well as the first appellate order.

7. The controversy involves applicability of deeming provisions of Section 2(22)(e) of the Act in the given set of facts. The assessee company holds 10.29% of the voting power in AIPL and has received an amount of Rs.2 crore during the year under consideration from AIPL. It is the case of the Revenue that the amount received by the shareholder, i.e., assessee-company holding substantial interest in the lender-company is covered within the ambit of Section 2(22)(e) of the Act. The assessee on the other hand contends that amount received by way of alleged loan/advances from AIPL is in the nature of business transaction. The amount was received against proposal sale of property

under acquisition from Mr. Ashok Kumar and others which will immensely benefit the lender as it has already one ½ portion in the same property. The acquisition of the property however fell through and could not be completed and therefore, amount recorded through journal entry was eventually returned. Such plea is supported by documents placed before the lower authorities as well as before the Tribunal. The Revenue has doubted the *bona fides* of such plea to allege that such documents have been created to come out of the ambit of Section 2(22)(e) of the Act. We however find strength in the plea of the assessee. The assessee has claimed that it has paid advances to the proposed seller for purchase of property which, in turn, was proposed to be sold to the lender AIPL. The assessee has also attempted to sue the proposed seller by way of legal notice etc. The assessee, to our mind, has given reasonable corroboration to such plea. The Revenue, on the other hand, has not brought any material to justify the suspicion. In such eventualities, the transaction being in the character of business transaction is outside the scope of Section 2(22)(e) in the light of the CBDT Circular No. 19/2017 and several judgments cited on behalf of the assessee. The impugned addition made under Section 2(22)(e) of the Act thus cannot be countenanced in law on this score alone.

8. We also simultaneously observe that the liability of TSIPL towards AIPL was imported in the books of the assessee by way of a journal entry and there is no actual transfer of funds from lender AIPL to shareholder assessee. Such transfer by way of journal entry has been held to be outside the scope of Section 2(22)(e) of the present Act as held in the case of *CIT vs. Smt. Savitri Sam, 236 ITR 1003 (Mad.)*. The Hon'ble High Court observed therein that the expression 'payment' in Section 2(22)(e) cannot be equated with transfer entry amounting to payment. Such act would tantamount to introducing another fiction in the provisions of Section 2(22)(e) by construing even a transfer entry

amounting to payment.

9. Section 2(22)(e) enacts a deeming fiction whereby the scope and ambit of the word 'dividend' has been enlarged to bring within its sweep certain payments made by a company as per the situations enumerated in the said section. Such a deeming fiction cannot be given a wider meaning that what it purports to be. The provision has to necessarily accorded strict interpretation and the ambit of fiction cannot be pressed beyond its true limits. The purpose of Section 2(22)(e) is to tax a payment by way of loan or advances in the hands of shareholder as 'dividend' by fiction and this fiction cannot be extended to mean that a transfer of sum by journal entry without any actual payment to the shareholder is also to be included.

10. In this view of the matter, the action of the CIT(A) is thus set aside and the AO is directed to reverse the addition made under Section 2(22)(e) of the Act.

11. Ground No.1 of the appeal of the assessee is allowed.

10. Ground No.2 concerns addition of Rs.9,67,000/- towards share application money under Section 68 of the Act.

12. The ld. counsel pointed out that the aforesaid amount of Rs.9,67,000/- was obtained from five persons tabulated hereunder:

Particulars	*Amount received during the year (in Rs.)*
Arun Gupta	*1,72,000*
Atul Garg	*2,13,000*
Jagmander Dass Garg	*1,72,000*
Prem Chand Garg	*2,12,000*
Ravi Kumar Garg	*1,98,000*
Total	*9,67,000*

13. The subscribers are family members of the directors/shareholders of the assessee-company. As contended, the AO

and the CIT(A) has not made any inquiry from such share applicants by any issue of notice under Section 131 or under Section 133(6) of the Act. The assessee, on its part, has filed copy of confirmation, copy of return and the bank statement of the share applicant. The CIT(A) doubted the capacity of such share applicants without making any inquiry and simply on the basis of low value transactions in the bank statement. The ld. counsel assailed such act of the Revenue Authorities and stated that the suspicion on account of genuineness of transaction or capacity of the share applicants could not be entertained without making requisite inquiry from the share applicants. The lesser number of transactions in the bank or return filed under Section 44AB by the share applicants, by itself, is not sufficient to dislodge the *bona fides* of the transaction in the absence of any adverse material and in the absence of any inquiry. The Revenue Authorities have failed to take note of the fact that the share applicants are family members and such investments by family members of such small amounts is in accord with conventional constructs and postulations which defines small entities in India. The ld. counsel thus submitted that the additions made are a token exercise without any justification or any concrete adverse evidences and thus requires to be reversed.

14. The ld. DR for the Revenue, on the other hand, relied upon the first appellate order.

15. On consideration of the rival submissions and material placed on record, we see force in the plea of the assessee. As contended, share application money has come from the family members of the directors and shareholders of small amounts. The confirmation, IT return and the bank statement of the share applicants were placed before lower authorities. The additions made by the AO and confirmed by the CIT(A) appears to be guided by mere suspicion. The Revenue Authorities are not empowered to act arbitrarily when the assessee has

furnished an explanation which is supported by the relevant documents. Needless to say, suspicion is mother of inquiry but does not take place of proof. If the explanation of the assessee were suspected as unreliable, the AO ought to have made further inquiry to rebut the stand of the assessee. Addition under Section 68 on mere suspicions and conjectures without displacing the material placed, in our view, is opposed to the position of law enunciated in plethora of judicial precedents. We are thus inclined to agree with the plea raised on behalf of the assessee. The additions made under Section 68 on this score is thus reversed.

16. Ground No.2 is thus allowed.

17. In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 14/02/2024

Sd/-	**Sd/-**
[KUL BHARAT]	**[PRADIP KUMAR KEDIA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

DATED: **/02/2024**

Prabhat