

**आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ “डी” मुंबई**  
**IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH, MUMBAI**

सर्वश्री बी.आर.बास्करन, लेखा सदस्य एवं संदीप गोसाई, न्यायिक सदस्य के समक्ष  
**BEFORE S/SHRI B.R.BASKARAN, ACCOUNTANT MEMBER AND**  
**SHRI SANDEEP GOSAIN, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. No.4184/Mum/2014  
(निर्धारण वर्ष / Assessment Year :2009-10)

Asstt. Commissioner of Income Tax , 16(3), Matru Mandir, Tardeo Road, Mumbai-400007	<b>बनाम/</b> Vs.	Smt.Dina Sudhir Shah, 535, Panchratna, Opera House, Mumbai-400004
स्थायी लेखा सं./PAN :		
(अपीलार्थी / <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )

स्थायी लेखा सं./जीआइआर सं./PAN. :AAOPS6594H

अपीलार्थी की ओर से / Appellant by :	Shri Uday B Jakke
प्रत्यर्थी की ओर से/ Respondent by :	Dr.P.Daniel

सुनवाई की तारीख / **Date of Hearing** : **9.12.2015**  
घोषणा की तारीख / **Date of Pronouncement** : **17.12.2015**

**ORDER**

**PER B.R.BASKARAN,AM:**

The appeal filed by the Revenue is directed against the order dated 20.3.2014 passed by the Id. CIT(A)-27, Mumbai and it relates to the assessment year 2009-10.

2. The revenue is aggrieved by the decision of the Id.CIT(A) in cancelling the assessment of deemed dividend made under section 2(22)(e) of the Income Tax Act, 1961.

3. The facts relating to the issue are stated in brief. The assessee is engaged in the business of manufacture and export of cut and polished diamonds. The assessee is a shareholder in two closely held companies, viz., M/s Ace Divine Jewellery Pvt Ltd (ADJPL) and M/s Dinurje Jewellery Pvt Ltd (DJPL). The shareholding pattern of the above said companies as under:

Name of the shareholder	% of share held		
	Ace Jewellery Ltd	Divine Pvt	Dinurje Jewellery Pvt Ltd
Dina S Shah	75		72
Milan S Shah	20		23
Jesal Shah	1		1
Milan SI Shah-HUF	1		1
Premal Shah-HUF	1		1
Sudhir K Shah	1		1
Sudhir K Shah-HUF	1		1

The AO received an information that M/s ADJPL has given loan of Rs.4.64 to M/s DJPL. It was further noticed by the AO that M/s ADJPL was having reserve (accumulated profits) of Rs.6.87 cores. Since the assessee herein was holding shares of more than 20% in both the companies, the AO took the view that the provisions of section 2(22)(e) is applicable. Accordingly, the AO proposed to assess the loan amount of Rs.4.64 cr. as deemed dividend u/s 2(22)(e) of the Act. The AO further noticed that the above said amount of Rs.4.64 cr. included in certain trading transactions and the money transaction was to the tune of Rs.Rs.4.64 cr only. Even though the assessee filed written submissions on 25.3.2013 contending about the applicability of the provisions of section 2(22)(e) of the Act, yet the AO assessed the amount of Rs.4.48 referred above as deemed dividend in the hands of the assessee.

4. In the appellate proceedings, the assessee submitted before the Id. CIT(A) that the amount of Rs.4.64 cr. was given by ADJPL to DJPL as advance towards purchase of property. In support of the same, the assessee furnished a copy of Memorandum of Understanding (MOU) executed between both the parties on 19.5.2008. Accordingly, it was submitted that the payment of money was towards a commercial transaction and hence the same cannot be considered to be in the nature of loan or advance. Accordingly, it was contended by the assessee before the Id. CIT(A) that the provisions of section 2(22)(e) of the Act shall not apply to the impugned transactions. The assessee also placed reliance on the host of case laws. The Id.CIT(A) was convinced with the contentions and explanations given by the assessee. Accordingly he held that the provisions of section 2(22)(e) were not applicable to the impugned transactions. Accordingly, he cancelled the assessment of deemed dividend referred above. Aggrieved by the decision of the Id.CIT(A), the revenue is in appeal before us.

5. We heard the rival contentions and perused the record. The Id. DR submitted that the assessee has claimed that M/s ADJPL has given money to M/s DJPL in connection with purchases of property, but the property was not ultimately purchased and the advance amount might have been repaid. Accordingly he submitted that the payment made by the M/s ADJPL to M/s DJPL should be considered as loan transaction only. He further submitted that the provisions of section 2(22)(e) shall be attracted at the moment the loan was taken and the repayment of loan thereafter will not take transactions from the ambit of section 2(22)(e). Accordingly he submitted that the subsequent repayment of advance amount by M/s DJPL to M/s ADJPL will not be relevant here. He further submitted that the information received by the assessee shows that there was a financial

transaction between M/s DJPL and M/s ADJPL, meaning thereby it should be construed as loan transaction only.

6. On the contrary, the Id. AR submitted that the provisions of section 2(22)(e) of the Act shall apply only when the amount was given as loan or advance. He submitted that the commercial transactions and trading transactions are excluded from the ambit of the provisions of sec. 2(22)(e) of the Act. He submitted that the assessing officer himself has assessed a sum of Rs.4.48 crores as deemed dividend in the hands of the assessee, even though the outstanding amount was Rs.4.64 crores. While the assessing officer has excluded a sum of Rs.22.80 lakhs as relating to trading transactions, he did not properly examine the nature of the transactions pertaining to Rs.4.48 crores. He submitted that M/s DJPL owns a flat admeasuring about 1112 sq.ft. on the fifth floor of the Building known as "Panchratna", Opera House, Mumbai. By a MOU entered between the two companies cited above, DJPL agreed to sell the above said flat to M/s ADJPL for a total consideration of Rs.4.65 cr. In connection therewith M/s DJPL received an advance of Rs.4.48 cr. As per the terms and conditions entered into between the parties balance payment was to be made within 24 months. Accordingly he submitted that the amount of Rs.4.48 crores received by M/s DJPL was in connection with a commercial transaction relating to sale of building and hence, the same cannot be categorized as loan or deposit. He further submitted that the Ld D.R was right in stating that the provisions of sec. 2(22)(e) shall be attracted immediately on receipt of loan or advance. Accordingly he submitted that the nature of the transaction, i.e., whether it is a loan or not has to be determined at the time of making payment. He submitted that the assessee has proved that the transaction that took place between the two companies is a commercial transaction by furnishing evidences and the same has not been rebutted. The flat proposed to be purchased

by ADJPL is the place where diamond bourse was existed. Then the Government proposed to shift the Diamond Bourse to Bandra Kurla Complex and it was subsequently shifted also. When the news of shifting of Diamond Bourse came, the ADJPL decided that the acquiring the above said premises was not a viable proposition. Further the market rate of properties in that area was also fallen down. Hence the MOU was cancelled and the amount was repaid.

7. The Ld A.R submitted that the provisions of sec. 2(22)(e) of the Act was brought into the Act at a time, when the dividend distribution tax in vogue. The companies were giving loans to the beneficial share holders instead of dividends, in order to avoid payment of dividend distribution tax. Hence, in order to eliminate this practice, the provisions of sec. 2(22)(e) was brought into the Statute. Thus, the essential element that is required to be seen in order to apply the provisions of sec. 2(22)(e) is as to whether the individual share holder has benefited from the financial transaction or not. If the share holder is benefitted, then the provisions of sec. 2(22)(e) of the Act and if he is not benefitted, it may not be proper to apply the said provisions as the same defeats its objective. The Ld A.R submitted that, in the instant case, one closely held company has given money to another closely held company in relation to a commercial transaction. The assessee herein has not got any benefit at all in respect of this commercial transaction. Hence, the assessing officer was not right in invoking the provisions of sec. 2(22)(e) of the Act, when the assessee has not got any benefit at all.

8. The Id. AR further submitted that both the companies are having one more shareholder by name Milan S Shah and he also holds share of 20% voting power in ADJPL and 23% voting power in the other company. In this kind of situation, the statute is not clear about the imposition of tax

liability on a particular share holder. The natural solution is that the share holder, who has benefitted from the transaction should be imposed the liability of tax u/s 2(22)(e) of the Act. The Ld A.R submitted both the assessee herein as well as Milan S Shah has not benefitted from this commercial transaction. Even otherwise, since the transactions carried out between the two companies is a business/commercial transaction and hence the assessing officer was not justified in invoking the provisions of sec. 2(22)(e) in the hands of the assessee. He further submitted that the Id.CIT(A) has passed a speaking order by making reference to many case laws and hence the same needs to be sustained.

9. We have heard the rival contentions and carefully perused the record. The provisions of sec. 2(22)(e) reads as under:-

“Sec. 2 In this Act, unless the context otherwise requires....

(22) “Dividend” includes ....

(e) any payment by a company, not being a company in which the public are substantially interested, of any sum whether as representing a part of the assets of the company or otherwise) made after the 31st day of May, 1987, by way of advance or loan to a share holder, 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 (hereinafter 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.”

The provisions of sec. 2(22)(e) was interpreted by Hon'ble Delhi High Court in the case of CIT Vs. Rajkumar (318 ITR 462) and it was held that the trade advance given in connection with a commercial transaction would

not fall in the ambit of sec. 2(22)(e) of the Act. The following observations made by the Hon'ble Delhi High Court are relevant here:-

"Keeping the aforesaid rule in mind we are of the opinion that the word "advance" which appears in the company of the word "loan" could only mean such advance which carries with it an obligation of repayment. Trade advance which are in the nature of money transacted to give effect to commercial transactions would not, in our view, fall within the ambit of the provisions of sec. 2(22)(e) of the Act. This interpretation would allow the rule of purposive construction with *noscitur a sociis*, as was done by the Supreme Court in the case of LIC of India v. Retired LIC Officers Association (2008) 3 SCC 321. The observation in para 24 of the report being apposite are extracted hereinbelow:-

"Each word employed in a statute must take colour from the purport and object for which it is used. The principle of purposive interpretation, therefore, should be taken recourse to."

A close examination of the judgment of the Bombay High Court in the case of Nagindas M Kapadia (1989)(177 ITR 393) would show that the court excluded from the ambit of "dividend", monies which the assessee had received towards purchases. In our view, both the Commissioner of Income tax (Appeals) and the Tribunal have correctly appreciated this aspect of the matter in the said judgment of the Bombay High Court. The relevant portion of the judgment of the Bombay High Court which sets out this aspect of the matter is already extracted by us in the narrative given by us hereinabove. We are also in agreement with the view of the Tribunal that the judgment of the Supreme Court in the case of P.Sarada (1998)(229 ITR 444) and Smt. Tarulata Shyam (1977)(108 ITR 345) has not applicability to the present case. Both the judgments establish the principle that once the payment made to a shareholder is deemed as dividend then the mere fact that it is repaid would not take it out of the ambit of the tax net. In the instant case, however, a discussion with respect to which has been made hereinabove, the issue is whether the payment received by the shareholder would at all fall within the four corners of the provisions of section 2(22)(e) of the Act. Having held otherwise, the said judgments of the Supreme Court, in our view, will have no applicability to the facts of the instant case."

10. The decision rendered in the case of Rajkumar (supra) was followed by the Hon'ble Delhi High Court in the case of CIT Vs. Creative Dyeing and Princint P Ltd (2009)(318 ITR 476). In the said case, an advance was

given to the said assessee by the sister concern, which held 50% of the share holding in the assessee concern for modernization project. The advance so given was adjusted against the dues for job work to be done by the assessee. The Delhi High Court held that it was a business transaction and the advance was not assessable as a deemed dividend under section 2(22)(e) of the Act. The said decision was affirmed by the Supreme Court when the appeal of the Department in S.L.P. No.8558 of 2010 was dismissed by the Supreme Court on 7.7.2010.

11. Both the decisions discussed above lay down the principle that the advance given in connection with business or commercial transactions entered between the parties would not fall under the ambit of sec. 2(22)(e) of the Act, since the said advance payment shall fall under the category of "advance or loan" used in sec. 2(22)(e) of the Act. We notice that the Ld CIT(A) has applied these principles while adjudicating the issue before us. For the sake of convenience, we extract below the relevant observations made by Ld CIT(A):-

"2.4.9 Having weighed the pros and cons and after taking into consideration the Remand Report submitted by Ld.AO, I find that not only was the assessment order very cryptic and the appellant's submissions were summarily dismissed without even a spec of evidence being brought on record to suggest that the explanation offered was unfounded, from the records I also find that the appellant has been maintaining a consistent stand that money which was given by ADJPL to DJPL was towards purchase of a property for which a notarised MOU dated 09-05-2008 was presented during the course of assessment proceedings. The very same document was also produced before the undersigned and the same was forwarded to the Ld. AO in the remand proceedings. However, even in the second round, the Ld. AO did not find it worthwhile to comment on the veracity or otherwise of the document in question. Therefore, on the face of it, the MOU signed on a judicial stamp paper and which was duly notarised before the Notary Public, Government of Maharashtra, becomes a vital piece of evidence which could not

have been simply brushed aside without giving any cogent reasons. It could not also be said that this piece of evidence was an afterthought as not only is it dated 09-05-2008, it is also notarised on the same date and was presented before the Ld. AO during the assessment proceedings itself. Secondly, it is also corroborated by the payment of cheque No. 246161 dated 09-05-2008 drawn on Bank of India, SEEPZ branch, Mumbai.

2.4.10 It is trite law that while considering the provisions of section 2(22)(e), interpretation demands that transactions which were not in the nature of loans or advances have to be excluded. My attention has also been drawn to the latest decision of Madhya Pradesh High Court in the case of CIT v/s **Omprakash Suri 359 ITR 41** in which it has been held that provisions of section 2(22)(e) can be invoked only if the transactions between the parties are of the nature of Loans and Advances and whether the said transactions are of that nature, is a matter of fact. In the instant case, it is established from the nature of transactions that they were not loans or advances but were actually deposit for the proposed sale of office premises and hence, in this case, provisions of section 2(22)(e) would not apply.

2.4.11 Let us now also see the provisions relating to "deemed dividend". From a plain reading of sec.2(22)(e) it is apparent that its contents can be broken down for analysis into 4 parts:-

- i. Clause (e) applies to any payment by a company not being a company in which the public are substantially interested of any sum, whether as representing a part of assets of the company or otherwise made after the 31<sup>st</sup> May 1987;
- ii. Clause (e) covers a payment made by way of a loan or advance to (a) a shareholder, being a 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 (b) any concern in which such shareholder is a member or a partner and in which he has a substantial interest;
- iii. Clause (e) also includes in its purview any payment made by a company on behalf of or for the individual benefit, of any such shareholder,'

iv. Clause (e) will apply to the extent to which the company, in either case, possesses accumulated profits. The remaining part of the provision is not material for the purposes of this appeal.

2.4.12 By providing an inclusive definition of the expression 'dividend', cl.(e) of sec. 2(22) brings within its purview items which may not ordinarily constitute the payment of dividend. Parliament has expanded the ambit of the expression 'dividend' by providing an inclusive definition.

2.4.13 In order that the first part of clause (e) of section 2(22) is attracted, the payment by a company has to be by way of an advance or loan. The advance or loan has to be made, as the case may be, either to a shareholder, being a beneficial owner holding not less than ten percent of the voting power or to any concern in which such a shareholder is a member or a partner and in which he has a substantial interest. Sec. 2(22)(e) defines the ambit of the expression 'dividend'. All payments by "way of dividend have to be taxed in the hands of the recipient of the dividend viz. the shareholder. The effect of section 2(22) is to provide an inclusive definition of the expression 'dividend'. Clause (e) expands the nature of payments which can be classified as a 'dividend'. Clause (e) of section 2(22) includes a payment made by the company in which the public is not substantially interested by way of an advance or loan to a shareholder or to any concern to which such shareholder is a member or partner, subject to the fulfilment of the requirements which are spelt out in the provision. Similarly, a payment made by a company on behalf, or for the individual benefit, of any such shareholder is treated by cl. (e) to be included in the expression 'dividend'. Consequently, the effect of cl. (e) of s. 2(22) is to broaden the ambit of the expression 'dividend' by including certain payments which the company has made by way of a loan or advance or payments made on behalf of or for the individual benefit of a shareholder. The definition does not alter the legal position that dividend has to be taxed in the hands of the shareholder.

2.4.14 The Gujarat High Court in the case of CIT-II V/s Shripad Concrete (P) Ltd (2013) 33 taxmann.com 614 held as under:-

"Section 2(22) of the Income-tax Act, 1961 - Deemed dividend [Loans or advances] - Assessment year 2006-07 - During assessment proceedings, Assessing Officer found that

assessee had given certain amount as advance to its sister concern - Assessee's explanation was that said amount was not a loan or advance rather it represented value of goods sold to sister concern - Assessing Officer rejected assessee's explanation and made addition under section 2(22)(e) - Commissioner (Appeals) as well as Tribunal finding that assessee had in fact sold goods to its sister concern, set aside addition made by Assessing Officer - Whether since amount in question involved business transaction and it could not be categorised as loan or advance, question of application of section 2(22)(e) did not arise - Held, yes - Whether, therefore, impugned addition was rightly deleted - Held, yes [Para 2] [In favour of assessee”.

2.4.15 The Hon'ble High Court of Bombay in the case of CIT vs. Universal Medicare P Ltd (2010) 190 Taxman 144 (Born) has held as under:-

"In order that the first part of sub-clause (e) of section 2(22) is attracted, the payment by a company has to be by way of an advance or loan. The advance or loan has to be made, as the case may be, either to a shareholder, being a beneficial owner holding not less than ten per cent of the voting power or to any concern in which such a shareholder is a member or a partner and in which he has a substantial interest. In the instant case, the Tribunal had found that as a matter of fact, no loan or advance was granted to the assessee, since the amount in question had actually been defalcated and was not reflected in the books of account of the assessee. The fact that there was a defalcation seemed to have been accepted since that amount was allowed as a business loss during the course of the assessment year 2006-07. Consequently, according to the Tribunal, the first requirement of there being an advance or loan was not fulfilled. The finding that there was no advance or loan was a pure finding of fact which did not give rise to any substantial question of law.

2.4.16 It was held by the Hon'ble High Court in Smt. Savithri Sam 236 ITR 1003 (Mad) that the Tribunal was justified in holding that for the purpose of computation of Deemed Dividend u/s. 2(22)(e), there must be "actual payment of money" i.e. actual payment from company to the shareholder and not constructive.

2.4.17 From the ratio decidendi emerging from the above judgement when applied to the facts of the appellant's case, it emerges that the money that (DJPL) had to receive from ADJPL was for proposed sale of premises. For bringing it to tax as 'Deemed Dividend' ADJPL should have 'actually paid money' to the appellant and then only the provision of section 2(22)(e) could have been invoked. In view of the above decision of the Madras High Court, the sum of money paid by ADJPL to DJPL on account of proposed sale of office could not be brought to tax as 'payment by company of a loan'.

2.4.18 Similarly, in the case of CIT vs, Arvind Kumar Jain (2012) 205. Taxman 44 (Del.) (Mag), it was observed and held as under:-

"The assessee was holding 50 per cent shares in company 'A Books of Account of assessee revealed that it had received a sum as unsecured loan from company 'A '. Explanation furnished by the assessee that the aforesaid amount was not a loan but a business transactions between the assessee and company 'A' was not accepted by the Assessing Officer and alleged amount was treated as deemed dividend.

Held that mere nomenclature of entry in the books of account is not determinative of the true nature of transaction. In the instant case, after going through the relevant evidence as well as current account maintained between the parties, it had been established that the payment made was the result of trading transaction between the parties and the amount was not given by way of loan or Advance. Hence, such amount could not be treated as deemed dividend"

2.4.19 Thus, after taking into consideration, the totality of facts obtaining in this case, I find that the Ld. AO has proceeded only on the information received by him from ITO, 5(1 )(3), Mumbai and has not carried out any investigation himself whatsoever to reach to the truth of the matter. He has also brushed aside the appellant's submission regarding the existence of MOU in an arbitrary and whimsical manner. It is trite law that no addition can be made merely on conjectures and surmises and only the real income is to be brought to tax in the hands of the assessee. Merely because in some other assessee's case it was shown that certain advances were made by company X to company Y, the share holder of both the company could not be subjected to deeming fiction without making necessary verification of the nature of transaction.....

2.4.29 Further, in the case of Seamist Properties (P) Ltd V/s ITO 504 SOT 142(MUM), the Hon'ble Mumbai Bench of ITAT held as follows:

"As per the agreement between the assessee and 'S' Ltd, the assessee was to lease its bungalow to a new company to be formed. 'S' Ltd agreed to contribute Rs.2.50 crores in the said proposed new company, for purchasing machinery and equipment and setting up a studio at the said bungalow. 'S' Ltd. **Further agreed to deposit Rs.2.25 crores with the assessee immediately on signing the MOU, to show its bonafides. In the event of the proposed project not coming through, the MOU was to stand cancelled and the assessee was to refund the deposit of Rs.2.25 crores to 'S' Ltd.** It did so happen. All these facts remained unrebutted. From this factual matrix, it was evident that the provisions of section 2(22)(e) were, in no way, applicable"  
(emphasis supplied)

2.4.30 I find that the appellant's case is squarely covered by the above said decision of the Mumbai ITAT in the case of Seamist Properties (P) Ltd as even in that case a sum was advanced for which an MOU was signed and in the absence of the facts remaining uncontroverted, it was evident that the provision of section 2(22)(e) was in no way applicable. Therefore, I do not find any justification in the action of the Ld. AO in bringing to tax deemed dividend in the hands of the appellant. Accordingly, ground Nos. 1 to 3 are allowed."

12. A careful perusal of the order passed by Ld CIT(A) would show that the Ld CIT(A) has adjudicated this issue by following the principles laid down by the various Courts in the decisions referred supra. We notice that the Ld CIT(A) has appreciated the fact that the amount given by M/s ADJPL to M/s DJPL was in connection with a commercial transaction involving purchase of a property. It is further fortified by the fact that it is not shown by the AO that the assessee herein did receive any benefit out of it. The explanations of the assessee were duly supported by the documentary evidences. During the course of appellate proceedings, the Ld CIT(A) has also called for a remand report from the AO. But the

assessing officer could not contradict these factual aspects in his remand report. Under these set of facts, we are of the view that the decision rendered by Ld CIT(A) does not call for any interference. Accordingly, we uphold his order on this issue.

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

Order pronounced in the open court 17th Dec,2015.

Sd  
(संदीप गोसाईं/SANDEEP GOSAIN)  
न्यायिक सदस्य/Judicial Member

sd  
( बी.आर.बास्करन/ B.R.BASKARAN)  
लेखा सदस्य /Accountant Member

मुंबई Mumbai; दिनांक Dated.. 17th Dec, 2015

व.नि.स./ **SRL, Sr. PS**

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned
4. आयकर आयुक्त / CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /  
DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

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सहायक पंजीकार (Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai