INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B": NEW DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER

ITA Nos.2034,2035/Del/2016
Asstt. Years: 2011-12, 2012-13

DCIT Central Circle-29, Room No. 318, 3rd Floor, ARA Centre, Jhandewalan Extn. New Delhi.	Vs.	Shri Gaurav Arora FA-45, Shivaji Enclave New Delhi – 110 027 PAN ADQPA7169R
(Appellant)		**(Respondent)**

Department by:	Shri B.S. Rajpurohit, Sr. DR Nidhi Srivastava, CIT(DR)
Assessee by :	None
Date of Hearing	06/12/2018
Date of pronouncement	17/12/2018

O R D E R

PER O.P. KANT, A.M.

These two appeals by the revenue are directed against two separate order dated 22nd January, 2016 passed by the Ld. CIT(A) 30 New Delhi for assessment years 2011-12 and 2012-13 respectively. Since issues involved in both the appeals are common arising out of identical set of facts, therefore, same were heard together and are being disposed off by way of this consolidated order for convenience

Grounds of appeal in ITA No. 2034/Del/2016 for asstt. year 2011-12 are reproduced as under :-

(a) *"On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts in arriving at the conclusion that the transaction in the client ledger account, are related to business activities.*

(b) *On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts by holding that recasting of ledger account of assessee in the books of JCSL and FNSL by the AO is not correct.*

(c) *On the facts and in the circumstances of the case, the Ld. CIT(A) had erred in law and on facts by deleting the addition of Rs. 7,88,99,522/- made on account of deemed dividend u/s 2(22)(e) of the Act.*

(d) *That the order of the CIT(A) is perverse, erroneous and is not tenable on facts and in law.*

(e) *That the grounds of appeal are without prejudice to each other.*

(f) *That the appellant craves leave to add, amend, alter or forgo any ground(s) of appeal either before or at the time of hearing of the appeal."*

2. In assessment year 2012-13, the amount of issue in dispute involved is. Rs. 2,57,25,602/-.

3. At the outset, we would like to mention that despite notifying neither anybody attended on behalf of the assesssee nor any adjournment was filed. In view of no compliance by the assessee, it seems that assessee is not interested in prosecuting the appeal. Accordingly, we have heard the appeal ex part qua the assessee.

3. Brief facts of the case for asstt. Year 2011-12 are that the assessee filed return of income on 17.3.2012 declaring total income of Rs. 46,51,720/-. Subsequently on account of search and seizure action u/s 132 of the Income Tax Act 1961 (in short the Act) carried out on 30.3.2012, a notice u/s 153A of the Act was issued and assessment was completed on 31.3.2015 u/s 153A of the Act after making addition of Rs. 7,88,99,522/- on account of deemed dividend u/s 2(22)(2) of the Act. On further appeal, Ld. CIT(A) deleted the addition. Aggrieved the Revenue is in appeal before the Tribunal raising grounds as reproduced above.

4. Before us, Ld. DR relying on the order of the AO submitted that assessee has failed to demonstrate that the money advanced by the companies to him was in the nature of trade advance and, therefore, Ld. CIT(A) is not justified in deleting the addition.

4. We have heard the submissions of the Ld. DR and perused the relevant material on record including the impugned order of the Ld. CIT(A). In the case ,assessee is having substantial share holding in few companies namely M/s Jaypee Capital Services Ltd. (JCSL) ; M/s. Futurz Next Services Ltd. (FNSL) & M/s. Gen X Commodities Ltd. The AO noticed receipt of money by the assessee from these companies. The AO has also noted certain transactions inter se in these companies. According to the AO, these transactions falls in the nature of deemed dividend in the hands of the assessee. Ld. CIT(A) however, after detailed verification of the facts has observed that these transactions were in the nature of the trade advance. As far as the share holding of the company in those companies is concerned, there is no dispute between the Revenue and the assessee. The only dispute is in respect whether the advances were in the nature of trade or not. The Ld.CIT(A) has noted that those companies were engaged in the

brokerage of stock derivatives, currency and commodities etc. and the transactions of the assessee with those companies are in respect of dealing with shares, commodities, etc. Relevant finding of the Ld. CIT(A) on the issue in dispute are reproduced are as under :-

"8.3 Findings: The findings are as under:

8.4 I have carefully considered the assessment order, written submissions, case laws relied upon and oral arguments of the Ld. AR.

The A.O. in the assessment order, has made an addition of Rs. 7,88,99,522/- u/s 2(22)(e), for the following reasons:

(i) The companies namely M/s Jaypee Capital Services Pvt. Ltd.(JCPL), M/s Futurz Next Services Ltd.(FNSL) and M/s Gen X Commodities Ltd (GCL), are closely held companies, in which assessee has substantial share holding. There are large number of transactions including payments by the 2 companies JCPL and FNSL to the assessee. Further, the group companies are also making the payments to each other regu arly as per the ledger account submitted.

(ii) The ledger account submitted by the appellant, consists of large number transactions in respect of shares transactions done by assessee, as client of JCPL and FNSL, which are not covered u/s 2(22)(e) of the act. However, where there are cheque payments, the same has to be considered as loan/advance for the purpose of section 2(22)(e) of the act.

It is further held by the A.O. that the 2 companies JCPL and FNSL, have granted advances in the nature of loan to each other, the assessee and also to the group company GCL. The payment received from the JCPL and

FNSL by assessee and group concerns, are to be treated as deemed dividend in the hands of the assessee.

The objections/arguments submitted by the appellant during the appellate proceedings are discussed as under:-

(i) The 2 companies JCPL and, FNSL, are share / currency / derivatives/commodities brokers, with whom the appellant and the group concerns maintain client account, in which business transaction of sale and purchase of share/currency/derivatives/commodities have taken place during the year under consideration.

In the appellate proceedings appellant has submitted that the accounts of the assessee and other concerns, in which he is substantially interested, with these 2 companies, are not in the nature of advance or loan. Therefore, it is claimed that these accounts relates to business transactions of share / currency / derivatives / commodities only, which is evident from the copy of accounts filed in the assessment proceedings, as well as in the appellant proceedings.

(ii) It has been further submitted that the special auditor as well as the A.O., have extracted the alleged account and re-casted account without following any accounting norm. For the purpose of making the alleged addition by the A.O., the method adopted is discussed as under:

(a) The special auditor, while recasting the account, has picked up the figures of cheque received and paid by the 2 companies. After taking the figure of money received and money paid, the special auditor has worked out the

peak balance of the same and treated it as deemed dividend in the hands of the appellant.

The A.O., while recasting the account, has picked up the figure of payments made by the 2 companies during the year and the negative balance appearing after the payments. Lower of the two figures i.e. amount paid by the companies and the negative balance appearing after the payment, has been taken as the deemed dividend by the A.O. The A.O. has adopted pick and choose, whereby he picked up only the transactions relating to purchase and sale of share / currency / derivatives /commodities .

(b) Both the above alleged accounts extracted by the special auditor and A.O., did not take into consideration, the business transactions entered into by the appellant/concern with these companies. This fact is evident from the amount of Rs.7,43,00,000/-, computed by the A.O. in the case of JCPL and Rs.45,99,522/-, in the case of FNSL on the basis of alleged re-casted copy of account, as against the actual copy of account maintained in the books of accounts of these 2 companies.

(c) It has been further submitted that the even alleged account prepared by the special auditor, which has not been followed by the A.O. and has prepared another account. The A.O. has taken alleged loan amount by adopting lesser of the payment made by the 2 companies to the appellant/concerns and net balance available on a particular date. Therefore, it is, submitted that even the

alleged account prepared by the A.O., does not reflect the correct nature of the account, as same is prepared without following any accounting principles and ignoring the nature of each transaction. It is argued that the A.O. cannot ignore the nature of business transactions entered into by the assessee with these companies, which are relating to share / currency / derivatives /commodities and therefore, it is wrong on part of the A.O. to consider running account of business transactions as loans and advances, so as to consider the same as deemed dividend under section 2(22)(e) of the Act.

(ii) It is further submitted by the appellant that the ledger account maintained in the books of accounts of these 2 companies, copy of which was submitted before the A.O. as well as in the appellate proceedings, shows that the same is a running account of purchase/sale. The cheque payments & receipts are relating to transactions of share/currency/derivatives/commodities and there is no loan/advance transactions.

Conclusion:

In view of the above discussion, the following facts emerges:

(a) The transactions of cheques received and paid from/to the 2 broker companies JCPL and FNSL, are related to the business transactions of sale/purchase of share / currency / derivatives / commodities carried out during the year under consideration, which cannot be segregated. If the transactions of cheque received and paid are taken out of the alleged client accounts, then there is no meaning of trading transactions. In the type of business transaction entered by the appellant with these 2 broker

companies, the transfer of funds/money on both the sides, is part and parcel of the business done, otherwise it will not be possible to settle the accounts.

It is not possible to settle the trading transactions without transfer of the funds/money. Therefore, the method adopted by the special auditor in the audit report, which has not been considered and also the method adopted by the A.O. in assessment order, is not correct. The positive and the negative balances, emerging out of the said accounts, is the result of business activities, which cannot be considered as loans/advances, as to cover the same within the provisions of section 2(22)(e).

(b) The 2 companies JCPL and FNSL are the registered stock, derivative, currency and commodities brokers. The JCPL deals in stock, currency and derivatives on NSE, BSE, USE and MCX Sx and the FNSL, deals in commodities on NCDEX and MCX. The transactions entered by the said companies with appellant and group concerns are related to their business only. The appellant and the group concerns, maintain client account with these 2 companies, where in large number of share / currency / derivatives / commodities trading transactions, has taken place in the year under consideration. These transactions are nowhere prohibited under any existing law and not covered u/s 2(22)(e) of the act.

(c) The transactions entered into are in the regular course of business and it is not a case where it has been alleged by the A.O. that transactions of sale/purchase of share / currency / derivatives / commodities, are not genuine. In fact, these purchase and sale transactions, have not even doubted by the special auditor in the

audit report as well as by the A.O. in assessment order. The special auditor and A.O. has re-casted the ledger account by not considering the business transaction of sale/purchase of share / currency / derivatives / commodities, which is not correct, since deemed dividend cannot be computed by way of pick and choose of few transactions, rather an account has to be considered in its entirety.

The above view, is also supported by the ratio laid down in the decision by Jurisdictional High Court of Delhi in the case of CIT Vs. Creative Dyeing & Printing (P.) Ltd., [2009] 184 TAXMAN 483 (DELHI), as under:

> *"11. The counsel for the appellant has very strenuously urged that neither the Tribunal nor the judgment of this Court in Raj Kumar's case (supra) deals with that part of the definition of deemed dividend under section 2(22)(e) which states that deemed dividend does not include an advance or loan made to a shareholder by a company in the ordinary course of its business where the lending of money is a substantial part of the business of the company [section 2(22)(e)(ii)] i.e., there is no deemed dividend only if the lending of moneys is by a company which is engaged in the business of money lending. Dilating further the counsel for the appellant contended that since M/s. Pee Empro Exports (P.) Ltd is not into the business of lending of money, the payments made by it to the assessee-company would therefore be covered by section 2(22)(e)(ii) and consequently payments even for business transactions would be a deemed dividend*

We do not agree. The Tribunal has dealt with this aspect as reproduced in para (9) above. The provision of section 2(22)(e)(ii) is basically in the nature of an explanation. That cannot however, have bearing on interpretation of the main provision of section 2(22)(e) and once it is held that the business transactions does not fall within section 2(22)(e), we need not to go further to section 2(22)(e)(ii). The provision of section 2(22)(e)(ii) gives an example only of one of the situations where the loan/ advance will not be treated as a deemed dividend, but that's a l The same cannot be expanded further to take away the basic meaning, intent and purport of the main part of section 2(22)(e). We feel that this interpretation of ours is in accordance with the legislative intention of introducing section 2(22)(e) and which has been extensively dealt with by this Court in the judgment in Raj Kumar's case (supra). This Court in Raj Kumar's case (supra) extensively referred to the report of the Taxation Enquiry Commission and the speech of the Finance Minister in the Budget while introducing the Finance Bill Ultimately, this Court in the said judgment held as under:

"10.3 A bare reading of the recommendations of the Commission and the Speech of the then Finance Minister would show that the purpose of insertion of clause (e) to section 2(6A) in the 1922 Act was to bring within the tax net monies paid by closely held companies to their principal shareholders in the guise of loans and advances to avoid payment of tax.

10.4 Therefore, if the said background is kept in mind, it is clear that sub-clause (e) of section 2(22) of the Act, which is pari materia with clause (e) of section 2(6A) of the 1922 Act, plainly seeks to bring within the tax net accumulated profits which are distributed by closely held companies to its shareholders in the form of loans. The purpose being that persons who manage such closely held companies should not arrange their affairs in a manner that they assist the shareholders in avoiding the payment of taxes by having these companies pay or distribute, what would legitimately be dividend in the hands of the shareholders, money in the form of an advance or loan.

10.5 If this purpose is kept in mind then, in our view, the word 'advance' has to be read in conjunction with the word 'loan: Usually attributes of a loan are that it involves positive act of lending coupled with acceptance by the other side of the money as loan: it generally carries an interest and there is an obligation of repayment. On the other hand, in its widest meaning the term 'advance' mayor may not include lending. The word 'advance' if not found in the company of or in conjunction with a word 'loan' may or may not include the obligation of repayment. If it does then it would be a loan. Thus, arises the conundrum as to what meaning one would attribute to the term 'advance: The rule of construction to our minds which answers this conundrum is noscitur a sociis. The said rule has been explained both by the Privy Council in the case of Angus Robertson v. George Day [1879] 5

AC 63 by observing 'it is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them' and our Supreme Court in the case of Rohit Pulp & Paper Mills Ltd v. Collector of Central Excise AIR 1991 SC 754 and State of Bombay v. Hospital Mazdoor Sabha AIR 1960 SC 610." (p. 165)

12. *Therefore, we hold that the Tribunal was correct in holding that the amounts advanced for business transaction between the parties, namely, the assessee company and M/s. Pee Empro Exports (P) Ltd. was not such to fall within the definition of deemed dividend under section 2(22)(e). The present appeal is therefore dismissed*

In view of the above, I hold that the transactions in the client ledger accounts, are transactions entered in the ordinary course of business and are relating to sale/purchase of share/currency/derivatives/commodities only. Therefore, I further hold that since these transactions are trading/business transactions, accordingly, provisions of section 2(22)(e), do not apply to the facts of the case of the appellant.

Accordingly, the addition made by the A.O. on account of deemed dividend of Rs. 7,88,99,522/-, is hereby deleted.

9. *The ground no. 15, is relating to charging of interest u/s 234A, 234B, 234C and 234D of the Act. This ground is consequential in nature. Accordingly, A.O. is directed to charge interest u/s 234A, 234B, 234C and 234D as per provision of the Act, on total income after giving effect to this order. Therefore, for statistical purposes, ground no. 15, is treated as allowed.*

10. In the result, the appeal is partly allowed."

5. The Ld. CIT(A) has observed that the transactions in the ledger account of the assessee are in regular course of the business of purchase and sales of the shares/currency/derivatives/commodities etc. The Ld. DR could not controvert the above factual findings of the Ld. CIT(A) before us. In view of the above facts, the Ld. CIT(A) is justified in holding that the transactions between the assessee and those companies are in the nature of trading transactions which are beyond the ambit of deemed dividend in view of the decisions of the Hon'ble Jurisdictional High Court in the case of CIT vs. Creative Dyeing & Printing (P.) Ltd. (Supra). The Ld. CIT(A) has followed the above decision of the Hon'ble Delhi High Court. In our opinion, the Ld. CIT(A) has not committed any error in following the above decision of the Hon'ble Delhi High Court. Accordingly, we uphold the same. The ground of appeal of the Revenue is dismissed.

6. Similarly, in the assessment year 2012-13 also similar grounds have been taken and therefore our directions in the above appeal will apply for 2012-13 also. Accordingly, both the appeals of the revenue are dismissed.

In the result both the appeals of the Revenue are dismissed.

This decision was pronounced in the Open Court on 17th December, 2018.

sd/-	sd/-
(H.S. SIDHU)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 17/12/2018

Veena

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi