IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A', NEW DELHI

BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No.1268/Del/2018
(Assessment Year : 2014-15)

Archana Sharma II F/130, Nehru Nagar, Ghaziabad **PAN No. AYUPS 6374 F**	Vs.	DCIT Circle – 1 Ghaziabad
(APPELLANT)		**(RESPONDENT)**

Assessee by	Shri Akhilesh Kumar, Adv. Shri Pushkar Pandey, Adv.
Revenue by	Shri Rajinder Jha, Sr. D.R.

Date of hearing:	28.04.2022
Date of Pronouncement:	26.07.2022

ORDER

PER ANIL CHATURVEDI, AM :

This appeal filed by the assessee is directed against the order dated 04.12.2017 passed by the Commissioner of Income Tax (Appeals) – Ghaziabad relating to Assessment Year 2014-15.

2. Brief facts of the case as culled out from the material on record are as under:-

3. Assessee is an individual who electronically filed her return of income for A.Y. 2014-15 on 22.12.2014 declaring total income at Rs.18,06,090/-. The case was selected for scrutiny and thereafter assessment was framed u/s 143(3) of the Act vide order dated 12.09.2016 determining the total income at Rs. 82,11,655/-. Aggrieved by the order of AO, assessee carried the matter before CIT(A) who vide order dated 04.12.2017 in Appeal No.477576661021016 dismissed the appeal of the assessee. Aggrieved by the order of CIT(A), assessee is now in appeal and has raised the following grounds:

1. *"That, Learned CIT(A) erred in not accepting the additional evidences filed by assessee without appreciating that the said documents were relevant for the proper disposal of appeal and even sale deed etc. was not even available during assessment proceeding and also even without seeking comments from Ld. AO on the same.*
2. *That, learned CIT(A) erred in sustaining the addition of Rs. 64,05,565/- u/s 2(22)(e) without appreciating the facts that the transfer of amount by company mainly by way of book entry was only and only for business purposes to save it from forfeiture and was not in the nature of loans and advances to assessee subject to s. 2(22)(e)(e) of the Act.*
3. *That, learned CIT(A) further erred in not appreciating the facts that the assessee was providing benefits to the company by keeping her personal properties under mortgage, by providing intt. Free funds etc. against which most of the amount under question was adjusted and even ultimately house under question is sold at loss by assessee.*
4. *That, learned CIT(A) even failed to appreciate that part amount of entry relating to earlier year itself is accepted and not considered loan in terms of s. 2(22)(e) of the act in earlier or current year."*

4. Before us, at the outset, Learned AR submitted that assessee does not wish to press Ground No.1 and that Ground Nos. 2 to 4 are interconnected which are with respect to the addition made u/s 2(22)(e) of the Act. In view of the aforesaid submissions of Ld AR, **ground No 1 is dismissed as not pressed** and we thus proceed with deciding ground no 2 to 4

5. During the course of assessment proceedings, AO noticed that assessee had purchased a property for Rs.3,60,00,000/- for the purpose of expansion of Ganesh Hospital Pvt. Ltd. of which the assessee was a promoter. AO noted that assessee had made aggregate payment of Rs.73,70,000/- to Shri Chander Prakash Bagai for purchase of adjacent old residential house in her own name but the payment was made through the bank account of Ganesh Hospital Pvt. Ltd. Before AO, assessee submitted that the hospital wanted to purchase adjacent residential house for its own use but due to the area being residential, assessee was forced to purchase the house in her own name, but since the property was for the purpose of the company, the payment was made through Ganesh Hospital Pvt. Ltd. It was thus contended that the transaction does not attract the provisions of s. 2(22)(e) of the Act. The submissions of the assessee were not found acceptable to AO. AO noted that assessee did not furnish any proof to support the claim that they had tried to get property converted for commercial use. AO was of the view that transaction attracted the provision of Section 2(22)(e) of the Act.

AO thereafter, and after giving the credit of balance of assessee with the company at the time of making above payment of Rs.9,64,435/-, held the balance amount of Rs.64,05,565/- to be deemed dividend taxable as income u/s 2(22)(e) of the Act and made its addition.

6. Aggrieved by the order of AO, assessee carried the matter before CIT(A) who upheld the order of AO. Aggrieved by the order of CIT(A), assessee is now before us.

7. Before us, Learned AR reiterated the submissions made by AO and CIT(A) and further submitted that assessee and her husband Late Anil Kumar Sharma, both qualified doctors are the promoter director/share holder of company, M/s. Ganesh Hospital Pvt. Ltd., which was running a small hospital in Ghaziabad. Ganesh Hospital Pvt. Ltd. had decided to buy the adjacent old residential house, situated at Nehru Nagar, Ghaziabad for a consideration of Rs.3.6 crores for the purpose of expansion of the hospital. For the purchase of the property assessee had entered into a sale agreement with vendor on 7th Feb 2013. As per the agreement, advance payment aggregating to Rs.90 lakh towards purchase of the property was made in F.Y. 2012-13 (Assessment year 2013-14) and F.Y. 2013-14 (assessment year 2014-15) and as per the terms of agreement Ganesh Hospital Pvt. Ltd. was required to make the balance payment of Rs.3.15 crore up to 12th Dec 2013 or the execution of

sale deed, whichever is earlier. The agreement, further stipulated that failure to make the full payment by the agreed date would result into forfeiture of the advance payments made by Ganesh Hospitals Pvt. Ltd. He submitted that after entering into aforesaid agreement for the purchase of property, Ganesh Hospitals Pvt. Ltd. approached various banks for loan to finance the purchase of property but the banks did not agree to provide loan for the purpose of purchase of property for commercial use. In the mean-time the seller was threatening to forfeit advance on account of default. Learned AR submitted that thereafter Axis Bank was approached who agreed to grant a loan of Rs.2.7 crore but in personal name of the assessee and not in the name of Ganesh Hospitals Pvt. Ltd. The company, to save the huge loss by way of forfeiture of advance of Rs.90 lakh, decided to buy property in the name of assessee/director. Thereafter loan of Rs.2.7 crore was obtained from Axis Bank which in turn was used to make the payment to the seller of the property and the sale deed was got registered. Learned AR thereafter submitted that the non purchasing of the property in the name of the director would have resulted into forfeiture of the advance payments made for purchase of the property resulting into huge loss and therefore it cannot be said that the transaction was for the benefit of the assessee. He submitted that it was the case of the business expediency and therefore the transaction therefore cannot be considered to be a transaction falling within the ambit of the word “loan” or “advance” as contemplated in section 2(22)(e) of the Act.

He placing reliance on the decision of Hon'ble Delhi High Court in the case of CIT vs. Rajkumar (2009) 318 ITR 462 submitted that Hon'ble High Court has held that trade advances which are in the nature of money transacted to give effect to a commercial transaction would not fall within the ambit of the provision of section 2(22)(e) of the Act. He thereafter submitted that loans or advances given for the business expediency or for the benefit of company cannot be considered to be deemed dividend and for aforesaid proposition, he relied on following decision:

1. CIT vs. Creative Dyeing and Printing (P) Ltd. 318 ITR 476 (Del).
2. Yashovardhan Taygi 184 ITD 461 (Del)

8. He thereafter submitted that assessee is maintaining a running current account with company whereby assessee gives personal funds to the company without interest from time to time to support company financially and on 01.04.2013 amount of Rs.41,75,281/- was receivable from the company and Rs.9,64,435/- was given to company on 01.05.2013. In those circumstances, the company transferred advance of Rs.90 lakhs paid to seller by passing book entries on 12.12.2013 and further Rs.28.60 lakhs was paid for expenses directly to the running account of assessee. He further submitted that the credit was also squared off by assessee in 2-3 month. He thereafter submitted that when the amount has given and taken through current account among related parties the transactions was not loan or advance and provision of Section 2(22)(e) of the Act are

not applicable and for this proposition, he relied on the following case laws:

1. CIT vs. Suraj Dev Dada (2014) 46 Taxmann.com 402 (P&H)
2. CIT vs. Gayatri Chakraborty (2018) 94 Taxmann.com 244 (Calcutta)
3. CIT vs. Idhayam Publications Ltd. (2007) 163 Taxman 265 (Mad.)
4. DCIT Circle – 62(1), New Delhi vs. Ramesh Kumar Pabbi New Delhi – 110017 – ITA No.6168/Del/2017
5. M/s. Exotica Housing and Infrastructure Company Pvt. Ltd. vs. ITO Ward 8(4), New Delhi ITA No.5188/Del/2019
6. Saamag Developers (P.) Ltd. (2018) 98 Taxmann.com 467 (Delhi-G)

9. NJP Hospitality (P.) Ltd. vs. ITO (2013) 3 Taxmann.com 26 (Del-E)

10. He further submitted that no addition u/s 2(22)(e) of the Act has been made in the past or in subsequent year. He therefore submitted that considering the aforesaid facts the amount cannot be considered to be deemed dividend u/s 2(22)(e) of the Act and therefore the addition can be deleted.

11. Learned DR on the other hand supported the order of lower authorities.

12. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the addition made u/s 2(22)(e) of the Act.

13. Section 2(22)(e) of the Act stipulates that any payment by a company, not being a company in which the public is substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) by way of advance or loan to a share holder, being a person who is the beneficial owner of the shares, holding not less than 10% voting power shall be deemed as dividend in the hands of the share holder. Section 2(22)(e) creates a fiction providing certain circumstances under which certain kinds of payments made to the persons specified therein are to be treated as deemed dividend income. As per the provision, the following conditions are to be satisfied:-

(1) The payer company must be a closely held company.
(2) It applies to any sum paid by way of loan or advance during the year to the following persons:-
    (a) A shareholder holding at least 10% of voting power in the payer company.
    (b) A company in which such shareholder has at least 20% of the voting power.
    (c) A concern (other than company) in which such shareholder has at least 20% of interest.
(3) The payment of loan or advance is not in the course of ordinary business activity.

14. Hon'ble Calcutta High Court in the case of Pradip Kumar Malhotra (2011) 338 ITR 538, while dealing with clause (e) of

section 2(22) of the Act has held that if loan or advance is given to a shareholder as a consequence of any further consideration which is beneficial to the company received from such a shareholder, in such case, such advance or loan cannot be said to a deemed dividend within the meaning of the Act. The relevant observation of the Hon'ble Court reads as under:

> *"10. After hearing the learned counsel for the parties and after going through the aforesaid provisions of the Act, we are of the opinion that the phrase "by way of advance or loan" appearing in sub-clause (e) must be construed to mean those advances or loans which a shareholder enjoys for simply on account of 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 ; but* ***if such loan or advance is given to such shareholder as a consequence of any further consideration which is beneficial to the company received from such a shareholder, in such case, such advance or loan cannot be said to a deemed dividend within the meaning of the Act. Thus, for gratuitous loan or advance given by a company to those classes of shareholders would come within the purview of section 2(22) but not to the cases where the loan or advance is given in return to an advantage conferred upon the company by such shareholder.****"* (Emphasis supplied)

15. We further find that Hon'ble Karnataka High Court in the case of CIT vs. N.S. Narendra [2021] 129 taxmann.com 335 (Kar) after considering various decisions cited therein has held that gratuitous loan or advance given by a company to the classes of shareholders specified therein would come within the purview of section 2(22) but not to the cases where the loan or advance is given in return to an advantage conferred upon the company by

such shareholder. The intention behind the provisions of section 2(22)(e) of the Act is to tax dividend in the hands of shareholders.

Thus the ratio of the various decisions rendered by the Hon'ble High Courts is that provisions of Section 2(22)(e) of the Act comes into play only if the advance or loan paid by the company is for individual benefit of the assessee or the alleged business transaction is a mere smoke screen to cover a benefit obtained by an assessee from the company in which he is a shareholder, without any business expediency.

16. In the present case, it is the contention of the assessee that the company had agreed to buy the adjacent old residential house for Rs.3.60 crores for the purpose of the expansion of its hospital and for which an advance payment of Rs.90 lacs was made to the vendor. Thereafter, as the company could not get the required loan from the banks in its name for making the balance payment of the consideration and there was every likelihood of the advance of Rs. 90 lacs that was given to the seller for the purchase of property being forfeited, loan was obtained in individual name of the assessee and the property was purchased. The property that has been purchased is also reflected in the books of account of the hospital. Before us, Revenue has not placed any material on record to demonstrate that the impugned transaction was a smoke screen to cover a benefit obtained by the assessee from the company in which the assessee is a shareholder. Further, Revenue has also not placed any contrary material on record to

the controvert the submissions of the Ld AR. In such a situation and in the light of the judicial decisions cited herein above, we are of the view that the amount advanced to the assessee was not a gratuitous loan but the transaction was entered to protect the advance money of Rs. 90 lacs from being forfeited and that the business expediency for entering the transaction has been proved by the assessee.

17. We find that Hon'ble Calcutta High Court in the case of Pradip Kumar Malhotra 338 ITR 538 has held that if loan or advance is given to a shareholder as a consequence of any further consideration which is beneficial to the company, in such a case such loan or advance cannot be said to be deemed dividend within the meaning of the Act. It has further held that gratuitous loan or advance given by a company to those classes of shareholders would come within the purview of Section 2(22) but not cases where the loan or advance is given in return to an advantage conferred upon the company by such shareholder.

18. Considering the totality of the aforesaid facts, we are of the view that the CIT(A) was not justified in upholding the addition made by AO by invoking the provisions of s. 2(22)(e) of the Act. We therefore set aside the addition made by AO and confirmed by CIT(A). **Thus the ground of the Assessee is allowed.**

19. In the result the appeal of the assessee is partly allowed.

Order pronounced in the open court on 26.07.2022

Sd/-	**Sd/-**
(ASTHA CHANDRA)	**(ANIL CHATURVEDI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Date:- 26.07.2022

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Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI