

**IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH "A", LUCKNOW**

**BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND SHRI. A. K. GARODIA, ACCOUNTANT MEMBER**

ITA No.597/LKW/2013
Assessment Year:2009-10

DCIT Range 2 Lucknow	v.	Sanjay Seth 701, Shalimar Apartments Prag Narain Road, Lucknow
		TAN/PAN:ANXPS7392D
(Appellant)		(Respondent)

Appellant by:	Shri. Punit Kumar, D.R.		
Respondent by:	Shri. H. P. singh, Advocate		
Date of hearing:	10	06	2015
Date of pronouncement:	17	06	2015

ORDER

PER SUNIL KUMAR YADAV:

This appeal is preferred by the Revenue against the order of the Id. CIT(A).

2. During the course of hearing, the Id. D.R. has filed revised grounds of appeal in place of original grounds of appeal running into three pages with a request to substitute the grounds of appeal by these revised grounds of appeal. Accordingly the revised grounds of appeal are taken on record in place of original grounds of appeal and the same are reproduced as under:-

1. *The Ld. CIT (A) has erred in law & on facts of the case in deleting the addition of Rs.32,81,823/- on account of 'deemed dividend' accruing to the assessee as per 1 provisions of section 2(22)(e) of the IT Act, 1961.*

2. *The Ld. CIT(A) has erred in law & on facts of the case in accepting belated disclosure of investment of Rs.3,47,12,678/-*

: -2- :

towards cost of construction of house and also in holding that there is only a minor difference of Rs.11,26,422/- (approx 3.24%) in aggregate cost of construction determined by the DVO and that has been disclosed by the assessee.

3. The Ld. CIT (A) has also erred in law & on facts of the case in not making an enhancement of Rs.16,77,677/-, being difference in cost of construction of Rs.49, 59,500/- determined by the DVO for the period pertaining to A.Y. 2009-10 and cost of Rs.32,81,823/- that has been disclosed by the assessee for the said period, in the income of the assessee for the assessment year under consideration.

4. The Ld. CIT (A) has also erred in law & on facts of the case in not providing any opportunity of being heard to the AO while deciding the appeal in the above case.

3. Apropos ground No.1, it is noticed that the assessee is a Director of SAS Hotels and Properties Pvt. Ltd. (hereinafter referred in short as Company) having more than 10% of voting power. The said Company is involved in the business of construction in real estate. The assessee has entered into an agreement dated 29.10.2007 with the said Company for construction of assessee's house at 8/3 & 8/4, Vikramaditya Marg, Lucknow. During the year under consideration, the work-in-progress was of Rs.32,81,823/-. As no payment was made by the assessee to the company during the year under consideration, an amount of Rs.32,81,823/- was treated by the Assessing Officer as deemed dividend under section 2(22)(e) of the Income-tax Act, 1961 (hereinafter called in short "the Act").

4. Assessee preferred an appeal before the Id. CIT(A) with the submission that the transaction entered into by the Director of the company with the company is a normal course of business, therefore, it does not fall under the purview of deemed dividend under section 2(22)(e) of the Act. The Id. CIT(A) re-examined the issue in the light of the relevant provisions

: -3- :

of the Act and has finally concluded that there is no amount remaining unpaid to the company and a sum of Rs.32,81,823/- paid by the company during the financial year 2008-09 relevant to the assessment year under consideration cannot be considered in isolation so as to treat it as deemed dividend under section 2(22)(e) of the Act. The Id. CIT(A) has further observed that this amount is neither loan nor advance given to the assessee. Moreover, it is a normal business transaction beyond the scope of section 2(22)(e) of the Act.

Now the Revenue is in appeal before the Tribunal and has simply placed reliance upon the assessment order whereas the Id. counsel for the assessee, besides placing strong reliance upon the order of the Id. CIT(A), has contended that provisions of section 2(22)(e) of the Act can only be invoked where an advance or loan is given by the company to its shareholders. In the instant case, the assessee has entered into an agreement with the company for construction of the property in its ordinary course of business, therefore, provisions of section 2(22)(e) of the Act cannot be invoked.

6. Having carefully examined the order of the Id. CIT(A) in the light of the rival submissions, we find that undisputedly the assessee is a Director of SAS Hotels and Properties Pvt. Ltd. having more than 10% of voting power. The said Company is also involved in the business of construction of real estate and the assessee has entered into an agreement on 29.10.2007 with the said Company for construction of assessee's house at 8/3 & 8/4, Vikramaditya Marg, Lucknow. The company has spent total amount of Rs.3,47,12,678/- on construction of the assessee's house during the financial years 2007-08 to 2011-12. Final bill of Rs.3,47,12,678/- was raised by the company on 31.5.2012 which was paid by the assessee as per schedule of payment. There is no amount remaining unpaid to the company. The Id. CIT(A) has examined the issue in dispute in the light of

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various judicial pronouncements and the relevant provisions of the Act in paras 4.4 to 4.9 of his order. The relevant observations of the Id. CIT(A) are extracted hereunder for the sake of reference:-

"4(8) In view of the examination above I find that the work of construction of the appellants residence was under taken by the company in the normal course of business as the company M/S SAS Hotels and Properties Private Limited is involved in the business of construction of real estate. Further, the construction has been done in earlier years also when the amount spent by the company was not treated as deemed dividend by the AO. Hence, simply because there are transactions of construction expenses and payments in the mutual, open, current, running and trade account with the company, the same cannot be considered as payment by way of loans or advances so as to attract provisions of section 2(22)(e) of the Act. It may also be noted that similar transactions have been made in earlier year also but never in past the same has been considered to be transaction attracting section 2(22)(e) of the Act Further, without prejudice to the legal position above as per which the transactions cannot be treated as deemed dividend under section 2(22)(e) of the Act, I find that the position of payment by the appellant to the company in respect of the work done by the company is as under

<i>Financial Year</i>	<i>Payment made by appellant to company</i>
<i>2007-2008</i>	<i>Rs.6,19,411/-</i>
<i>2009-2010</i>	<i>Rs. 60,00,000/-</i>
<i>2011-2012</i>	<i>Rs. 2,44,00,000/-</i>
<i>2012-2013</i>	<i><u>Rs. 36,93,267/-</u></i>
	<i>Rs. 3,47,12,678/-</i>

4(9) It would therefore appear that the company spent total amount of Rs.3,47,12,678/-on construction of appellant's house at 8/3 and 8/4 Vikramaditya Marg, Lucknow during final year 2007-2008 to financial tear 2011-2012. The final bill of Rs.3,47,12,678/- was raised by the company on 31.05.2012, which has been paid by the

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appellant as per schedule of payment above. There is no amount remaining unpaid to the company. The sum of Rs.32,81,823/- spent by the company during the financial year 2008-2009 relevant to the assessment year under consideration cannot be considered in isolation so as to treat it as deemed dividend under section 2(22)(e) of the Act. The amount of Rs.32,81,823/- is neither a loan nor an advance and moreover it is a normal business transaction beyond the scope of section 2(22)(e) of the Act. The addition of Rs.32,81,823/- made by the AO is deleted giving relief to the appellant."

7. Since the facts narrated by the Id. CIT(A) has not been disputed by the Id. D.R., we are of the view that it is not a case where advance or loan was given by the company to the shareholders for invocation of provisions of section 2(22)(e) of the Act. It was a commercial deal entered upon during the ordinary course of business of the company. Therefore, we are of the considered opinion that provisions of section under section 2(22)(e) of the Act cannot be invoked in this situation and the Id. CIT(A) has properly adjudicated the issue in the light of the relevant provisions of the Act. Since we do not find any infirmity therein, we confirm his order on this issue.

8. Apropos ground No.2, it is noticed that during the course of assessment proceedings, the Assessing Officer has made a reference to the DVO to ascertain the investment in the property and the DVO has accordingly valued the cost of investment in construction at Rs.3,58,39,100/- against the investment declared by the assessee at Rs.3,47,12,678/-. The assessee has furnished the detailed breakup of the investments before the Assessing Officer but the DVO's report was not received by the Assessing Officer before completion of the assessment. The DVO's report was received after assessment and the same was forwarded to the Id. CIT(A) for consideration. The Id. CIT(A) has

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considered the DVO's report and investment declared by the assessee and 10. In this regard, the Id. counsel for the assessee has contended that he was of the view that the difference between the DVO's report and the DVO has not taken the investment made in assessment year 2011-12. investment declared by the assessee is nominal between 10 to 15% and no He has estimated the investment at Rs.32,81,823/- in assessment year addition was made.

2008-09. If the total investment estimated by the DVO and declared by the

assessee is examined, the difference would be at Rs.11,22,422/- which is of the Id. CIT(A) with the submission that the Id. CIT(A) ought to have about 3.24% and for this minor difference, no addition is called for in the made addition with respect to the difference between the cost determined light of the order in the case of Income Tax Officer vs. Smt. Pramila Agarwal of this Bench of the Tribunal reported in 88 TTJ 91 and CIT vs.

Abesson Hotels (P) Ltd., 191 CTR 263.

11. Having carefully examined the order of the Id. CIT(A), we find force in the contentions of the Id. counsel for the assessee. The DVO has estimated the cost of investment at Rs.3,58,39,100/- against the cost of investment declared by the assessee at Rs.3,47,12,678/-. Therefore, the difference is about 3.24% and for this minor difference, no addition is called for. The relevant observations of the Id. CIT(A) in this regard are also extracted hereunder in order to understand the investment declared by the assessee and estimated by the DVO:-

"5. The AO referred the matter regarding valuation of property of the appellant to the District Valuation Officer (hereinafter referred to as the DVO). The AO vide letter dated 23.08.2012 forwarded the report of the DVO for being considered in the appellate

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proceedings. Notwithstanding the fact that as per discussion above, the transaction between the appellant and the company in which he is a beneficial share holder for more than 10% of the voting power cannot be considered as deemed dividend under section 2(22)(e) of the Act, I find that the DVO has valued the year wise construction at Rs.3,58,39,100/- as against declared cost of Rs.3,47,12,678/- as discussed above. The DVO did not take in to account the amount spent in financial year 2011-2012 in working out the estimated difference in valuation. The details are as under-

<i>Financial Year</i>	<i>Declared investment</i>	<i>Estimated by the DVO</i>
<i>2007-2008</i>	<i>Rs. 35,43,468/-</i>	<i>Rs. 53,54,850/-</i>
<i>2008-2009</i>	<i>Rs. 32,81,823/-</i>	<i>Rs. 49,59,500/-</i>
<i>2009-2010</i>	<i>Rs. 58,02,041/-</i>	<i>Rs. 87,68,000/-</i>
<i>2010-2011</i>	<i>Rs. 1,10,88,418/-</i>	<i>Rs. 1,67,56,750/-</i>
<i>2011-2012</i>	<i>Rs. 1,09,96,928/-</i>	<i>_____</i>
	<i>Rs. 3,47,12,678/-</i>	<i>Rs. 3,58,39,100/-</i>

The difference in the declared cost and estimated cost is Rs. 11,26,422/-, which is about 3.24%. Since the cost determined by the DVO is estimation, a minor difference of 10% to 15% is usually ignored as laid down in the case of ITO Vs. Smt. Pramila Agarwal reported in (2004) 88 TTJ (Luck) 91 and CIT Vs. Abesson Hotels (P) Ltd. reported in (2004)191 CTR (MP) 263. There is therefore no justification of any separate addition for the difference in construction cost as per DVO's report and such difference cannot be considered as deemed dividend as discussed above."

12. Since the difference is very nominal, we are of the view that no addition is called for in this regard. Accordingly we confirm the order of the Id. CIT(A) in this regard and for the same reason no addition is called for in assessment year 2009-10.

13. As the DVO has not taken into account the investment declared in financial year 2011-12 and determined the cost of investment in

: - 8 - :

assessment year 2008-09 at Rs.49,59,500/- against the investment declared by the assessee at Rs.32,81,823/-. Therefore, no separate addition on account of difference in investment declared by the assessee and estimated by the DVO in assessment year 2008-09 is called for. Accordingly, ground No.3 is also disposed of and the order of the Id. CIT(A) is confirmed in this regard.

In the result, appeal of the Revenue is dismissed.

Order was pronounced in the open court on the date mentioned on the captioned page.

Sd/-
[A. K. GARODIA]
ACCOUNTANT MEMBER

Sd/-
[SUNIL KUMAR YADAV]
JUDICIAL MEMBER

DATED: 17th June, 2015

JJ:1006

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

Assistant Registrar