

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D': NEW DELHI
(Through Video Conferencing)**

**BEFORE,
SHRI R.K.PANDA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**I.T.A No.1140/Del/2017
(ASSESSMENT YEAR 2013-14)**

The Asst. CIT, Central Circle-04, New Delhi.	Vs.	M/s Jakson Limited A-43, Phase-II, Noida Extension, Noida-201 305. PAN-AAACJ 5347C
(Appellant)		(Respondent)

Appellant By	Mrs. Aashna Paul, CIT-DR
Respondent by	Sh. Ved Jain, Adv. & Sh. Ashish Goel, CA
Date of Hearing	16.06.2021
Date of Pronouncement	13.09.2021

ORDER

PER SUDHANSHU SRIVASTAVA, JM:

This appeal is preferred by the Revenue against order dated 29.12.2016 passed by the Learned Commissioner of Income Tax (Appeals)-23, New Delhi {CIT(A)} for Assessment Year 2013-14.

2.0 The brief facts of the case are that the assessee company is engaged in the business of Manufacturing & Selling of Electric Generating sets. A search and seizure operation was carried on the Jakson Group of cases u/s 132 of the Income Tax Act, 1961 (hereinafter called 'the Act') on 3.10.2013. The original return u/s 139(1) of the Act was filed on 03.11.2013 declaring the income of Rs.54,83,75,670/-. The Assessment Proceedings in the assessee's case were initiated by issuing notice u/s 153A of the Act and in response to the said notice the return was filed declaring an income of Rs.54,83,75,670/- on 23.08.2015.

2.1 During the course of assessment proceedings, the Assessing Officer noticed that the assessee had received an amount of Rs.8,32,29,600/- under the head 'loans and advances' under unsecured loans and the assessee was required to show cause as to why the said amount should not be included in the income of the assessee as deemed income u/s 2(22)(e) of the Act for the reason that the said loan/advance had been received from a company M/s Emirates Technologies Ltd. in which 25% of shareholding each was

held by Shri Sameer Gupta and Shri Sandeep Gupta who also held 20.8% shareholding each in the assessee company. The Assessing Officer proceeded to add this amount to the income of the assessee. Further, the Assessing Officer also required the assessee to provide details along with confirmation of parties from whom purchases above Rs.10 lacs had been made during the relevant assessment year. The Assessing Officer also issued notices to some of the parties and thereafter, proceeded to make an addition of Rs.41,97,754/- on account of bogus purchases alleged to have been from a party M/s New Jain Spares. Apart from this, the Assessing Officer also made a disallowance of Rs.18,725/- by including income from sale of scrap from the profit eligible for deduction u/s 80IB of the Act. The assessment was completed at an income of Rs.63,58,21,150/-.

2.2 The assessee preferred an appeal before the Ld. First Appellate Authority and the Ld. CIT(A) given relief to the assessee on all the three issues agitated before him.

2.3 The Department is now before us challenging the relief allowed by the Ld. CIT(A) by raising the following grounds of appeal:-

“1. The order of the CIT(A) is not correct in law and facts.

2. On the facts and circumstances of the case, the CIT(A) has erred in deleting the addition of Rs.8,32,29,000/- made by AO on account of deemed dividend u/s 2(22)(e) of the Income Tax Act, 1961.

3. On the facts and circumstances of the case, the CIT(A) has erred in deleting the addition of Rs.41,97,754/- made by AO on account of bogus purchases.

4. On the facts and circumstances of the case, the CIT(A) has erred in deleting the addition of Rs.18,725/- made by AO on account of deduction u/s 80IB on scrap sale.

The appellant craves leave to add, amend any/all the grounds of appeal before or during the course of hearing of the appeal.”

3.0 The Ld. CIT-DR submitted that as far as the issue of deemed dividend was concerned, assessee company had received advance from group concern M/s Emirates Technologies Pvt. Ltd and both in the assessee company as well as M/s Emirates Technologies Pvt. Ltd, Sh. Sameer Gupta and Sh. Sandeep Gupta

held substantial interest. It was submitted that the provisions under the Act for deemed dividend are not restricted to a beneficial owner of shares only but are extended to any concern also, in which such shareholder is a member or a partner and in which he has a substantial interest. It was submitted that both Sh. Sameer Gupta and Sh. Sandeep Gupta had 20.08 % of share holding in the assessee company and 25% share holding in M/s Emirates Technologies Pvt. Ltd. It was argued that the advance received by the assessee company from this another group company would attract the provisions of Sec.2(22)(e) of the Act. The Ld. CIT-DR argued that it is not required that the advance has to be received by the listed share holders of the company and the requirement is of substantial interest of beneficial owners of the shares. The Ld. CIT-DR placed reliance on the judgment of the Hon'ble Apex Court in the case of *National Travel Service v. CIT (2018) 401 ITR 154/162 DTR 201 (SC)*, for the proposition that the moment there is a shareholder, who need not necessarily be a member of the Company on its register, who is the beneficial owner of shares, the section would be attracted without anything more.

3.1 On the issue of addition on account of bogus purchase, it was submitted that the Assessing Officer had made inquiry in respect of purchases by issuing notices u/s 133(6) of the Act and since no reply had been received from some of the parties, the assessee was asked to produce these parties. However, in the case of M/s New Jain Spares no reply had been received and the Assessing Officer had directed the assessee to produce the party but since the assessee failed to comply, therefore, the Assessing Officer had rightly treated the said purchase as bogus and added the same to the total income of the assessee. It was also submitted that the Ld. CIT(A) had given relief to the assessee after admitting some new evidence with which the Assessing Officer was not confronted with and, therefore, this was a clear violation of Rule-46A.

3.2 On the issue of disallowance u/s 80IB, the Ld. CIT-DR relied on the order of the Assessing Officer.

4.0 Per contra, the Ld. Authorized Representative (AR) submitted that as far as the issue of deemed dividend was

concerned, the assessee company was not a share holder in M/s Emirates Technologies Pvt. Ltd. and Shri Sameer Gupta and Shri Sandeep Gupta having shareholdings in both the company would not attract the provisions of Sec.2(22)(e) of the Income Tax Act, 1961. The Ld. AR also submitted that the assessee company had received this advance for the purchase for property on behalf of the M/s Emirates Technologies Pvt. Ltd. and, thus, it was a clear business transaction as was also evident from the audit report of M/s Emirates Technologies Pvt. Ltd. The Ld. AR also submitted that in the judgment relied upon by the Ld. CIT-DR in the case of National Travel Service v. CIT (supra), in paragraph 19 of the said judgment, the Hon'ble Apex Court had declined to adjudicate the issue and had referred the set of appeals to a larger Bench to be constituted by the Hon'ble Chief Justice of India for having a re-look at the entire question of law of deemed dividend post the amendment to Sec.2(22)(e) w.e.f. 01.04.1988. The Ld. AR placed reliance of the order of the Hon'ble Apex Court in the case of CIT vs. Madhur Housing & Development Company wherein the judgment of the Hon'ble Delhi High Court was upheld holding that although

there was a person having substantial interest in the assessee company as well as the company advancing the loan but since the company which had given loan to the assessee company was not a shareholder of the company which had given the loan, the loan was not as deemed income in the hands of the assessee company.

4.1 On the issue of bogus purchases, the Ld. AR placed reliance on the order of the Ld. CIT(A) and the findings as contained in para 4.7 onwards. It was stated that the party i.e. New Jain Spares was a party with which the assessee company had regular dealings and there were transactions with the said company both in the preceding as well as succeeding assessment years and that the Ld. CIT(A) had rightly deleted the addition.

4.2 On the issue of disallowance u/s 80IB, the Ld. AR placed reliance on the order of the Ld. CIT(A).

5.0 We have heard the rival submissions and we have also perused the material on record. As far as the issue of disallowance u/s 2(22)(e) of the Act by treating the amount of Rs.8,32,29,000/-

as deemed dividend is concerned, the Ld. CIT-DR had made vehement arguments against the deletion by the Ld. CIT(A) by placing reliance on the judgment of the Hon'ble Apex Court in the case of *National Travel Service vs. CIT (supra)* wherein it has been observed that the judgment of the Hon'ble Apex Court in the case of *Ankitech (P.) Ltd.* reported in 340 ITR 14 (Delhi) was not a correct interpretation of law. It is the contention of the Department that it is not necessary that the person advancing the loan should be a shareholder and even beneficial ownership/shareholding would attract the provisions of Section 2(22)(e) of the Act. We have carefully perused the judgment of the Hon'ble Apex Court in the case of *National Travel Service vs. CIT (supra)* and specially paragraph -19 of the said judgment, which is, the concluding paragraph, in which the Hon'ble Apex court has observed as under:

“19. This being the case, we are prima facie of the view that the Ankitech judgment (supra) itself requires to be reconsidered, and this being so, without going into other questions that may arise, including whether the facts of the present case would fit the second limb of the amended definition clause, we place these appeals before the Hon'ble Chief Justice of India in order to constitute an appropriate Bench of three learned Judges in order to have a relook at the entire question.”

5.1 Thus, it is clear that although the Hon'ble Apex Court has expressed its reservation about the applicability of the judgment rendered by the Hon'ble Delhi High Court in the case of Ankitech (P.) Ltd. (supra), the issue has been placed before the Hon'ble Chief Justice of India for constituting an appropriate bench of three learned Judges in order to have a relook at the question. Therefore, in our considered view the issue has still been left open by the Hon'ble Apex Court. We further note that the Hon'ble Apex Court in the case of CIT vs. Madhur Housing & Development Corporation (supra) has upheld the judgment of the Hon'ble Delhi High Court holding that although there was a person having substantial interest in the assessee company and the company which had given loan, the assessee company, not being a shareholder of the company which had given the loan, the loan was not assessable as deemed income in the hands of the assessee. We also note that although this judgment has been also doubted by the Hon'ble Apex Court in the case of *National Travel Service Vs. CIT*, unless the same is reversed, the same is binding on us. Therefore, we are afraid that

the reliance of the Department on the Hon'ble Apex Court's judgment in the case of *National Travel Service vs. CIT, Delhi (supra)* would not be of much help. Further, we also note that the Ld. CIT(A) in Para 4.5 onwards of the impugned order has also considered the various documents submitted by the assessee to establish that the transaction of advance was pertaining to a business transaction for purchase a property, and, therefore, on this account also the impugned transaction would not fall within the definition of deemed dividend u/d 2(22)(e) of the Act. In this regard, the categorical findings of the Ld. CIT(A) have not been refuted by the Ld. CIT-DR. Therefore, we have no reason to deviate from the finding of the Ld. CIT(A) on this issue and we, accordingly, dismiss Ground No.2 raised by the Department.

5.2 Coming to Ground No.3 relating to deletion of addition of Rs.41,97,754/- on account of bogus purchases, we note that in para 4.7 of his order, the Ld. CIT(A) has noted that the Assessing Officer had made a similar addition in Assessment Year, 2011-12, 2012-13 as well as in Assessment Year 2014-15 on account of

purchases from M/s New Jain Spares and while deleting the addition, the Ld. CIT(A) has relied on the findings recorded by him for the said earlier years. Thus, the Ld. CIT(A) has not given a detailed finding on the issue in the impugned assessment year. However, we have gone through the copies of documents submitted by the assessee on the issue during the course of assessment proceedings which include copies of purchase invoices, evidences of payments of these purchases having been made through banking channels, reconciliation with VAT returns and books of accounts and the purchases being reconciled with quantitative details. It is also undisputed that the assessee had been making purchases from this party on a regular basis. The sole basis on which the Assessing Officer had made the disallowance was that the assessee had failed to produce the said party when called upon by the Assessing Officer to do so. However, when the purchases are otherwise documented and the Assessing Officer has accepted the book results by accepting the books of accounts, non-appearance a party before the Assessing Officer cannot be the sole ground for treating the purchases as bogus. Also, it is undisputed that the said party had

running account in the books of account of the assessee company in which regular transactions were being made and the impugned purchase was not an isolated case of purchase. In such circumstances, we are of the considered view that the Ld. CIT(A) has rightly deleted the disallowance and we uphold the same and reject the ground No.3 of the Department's appeal.

5.3 As far as the issue of deduction u/s 80IB on sale of scrap is concerned, although the Ld. CIT(A) has not passed a speaking order on the same and has relied on his orders for the previous assessment years while deleting the addition, we note that the issue is squarely covered in favour of the assessee by numerous judicial precedents, case in point being the judgment of the Hon'ble Delhi High Court in the case of CIT vs. Sadhu Forging Ltd. reported in 336 ITR 444 (Delhi High Court). Similarly, orders were passed by this Tribunal in case of group companies of the assessee company i.e. in the case of Jakson & Co. vs. CIT, in ITA No.350/Del/2014 for Assessment Year 2010-11 vide order dated 06.01.2016 and in the case of Jakson Enterprises vs. ACIT in ITA Nos. 6791 to 6793/Del/2013 vide order dated 29th July, 2016 in which the

aforesaid order of the Hon'ble Delhi High Court in the case of CIT vs. Sadhu Forging Ltd. (supra) was followed. In the present case also, it is undisputed that the amount received by the assessee from sale of scrap pertained to scrap generated from the activities carried by the assessee which were part and parcel of the manufacturing process of the industrial undertaking. The Hon'ble Delhi High Court has observed in the case of CIT vs. Sadhu Forging Ltd. (supra), (*“that the receipts from sale of scrap being part and parcel of the activities and being approximate thereto would also be within the ambit of gains derived from industrial undertaking for the purposes of computing deduction u/s 80IB”*). Accordingly, respectfully following judgment of the Hon'ble Apex Court as aforesaid, we dismiss Ground No.4 raised by the Department.

6.0 In the final result, the appeal of the Revenue stands dismissed.

Order was pronounced on 13th September, 2021.

Sd/-
(R.K.PANDA)
ACCOUNTANT MEMBER
Dated: 13/09/2021
PK/Ps

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI