

**IN THE INCOME TAX APPELLATE TRIBUNAL
"B" Bench, Mumbai**

**Before Shri Jason P. Boaz, Accountant Member
and Shri Ram Lal Negi, Judicial Member**

ITA No. 5194/Mum/2014
(Assessment Year: 2010-11)

A C I T – 25(2)	Shri Mahesh K. Shah
Room No. 108, 1 st Floor	B-15, Paras Darshan
C-11, Pratyakshakar Bhavan	Vs. S.V. Road, Borivali (East)
B.K.C., Bandra (East)	Mumbai 400066
Mumbai 400051	

PAN – AAIPS6406N

Appellant

Respondent

Appellant by: Shri T.A. Khan
Respondent by: Shri Vijay Mehta

Date of Hearing: 04.01.2017
Date of Pronouncement: 31.01.2017

ORDER

Per Jason P. Boaz, A.M.

This appeal by Revenue is directed against the order of the CIT(A)-35, Mumbai dated 01.05.2014 for A.Y. 2010-11.

2. The facts of the case, briefly, are as under: -

2.1 The assessee, a civil contractor, filed his return of income for A.Y. 2010-11 on 25.09.2010 declaring income of ₹30,65,277/-. The case was taken up for scrutiny and the assessment completed under section 143(3) of the Income Tax Act, 1961 (in short 'the Act') vide order dated 14.03.2013 wherein the income of the assessee was determined at ₹25,11,68,150/- in view of the following additions/disallowances: -

(i) Unexplained Expenditure u/s. 69C	₹ 96,45,645/-
(ii) Disallowance u/s. 40(a)(ia)	₹ 26,301/-
(iii) Disallowance u/s. 14A r.w. Rule 8D	₹ 56,439/-
(iv) Addition on account of deemed dividend u/s. 2(22)(e)	₹ 1,23,75,485/-

2.2 Aggrieved by the order of assessment dated 14.03.2013 for A.Y. 2010-11, the assessee preferred an appeal before the CIT(A)-35, Mumbai

challenging the aforesaid additions/disallowances made therein and cited in para 2.1 (supra) at (i) Unexplained expenditure under section 69C of the Act and at (iv) addition on account of deemed dividend under section 2(22)(e) of the Act. The learned CIT(A) disposed off this appeal vide the impugned order, allowing the assessee relief on both the aforesaid issues raised in appeal.

3. Revenue, being aggrieved by the order of the CIT(A)-35, Mumbai dated 01.05.2014 for A.Y. 2010-11, has preferred the instant appeal, raising the following grounds as under challenging both the issues on which the learned CIT(A) allowed relief to the assessee: -

- "1. On the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in deleting the addition of Rs.96,45,645/- made u/s 69C of the Act as unexplained expenditure.*
- 2. On the facts and in the circumstances of the case and in law, the ld.CIT(A) erred in relying upon judgments of the CIT vs. Nikunj Eximp Enterprises Pvt. Ltd. without appreciating that the facts involved in the of the appellant's case are different from the facts of the above case laws.*
- 3. On the fact and in the circumstances of the case and in law, the Ld CIT(A) has grossly erred in not appreciating the fact that the notices under section 133(6) issued to parties from whom alleged bills were received were returned undelivered by the postal authorities and the assessee has also failed to produce the parties before the AO.*
- 4. On the facts and in the circumstances of the case and law, the Ld CIT (A) has grossly erred in deleting the disallowance made by the AO overlooking the explicit finding of the investigation carried out by the Sales Tax Department and corroborated by the enquiries of the AO.*
- 5. On the facts and in the circumstances of the case and in law, the ld.CIT(A) erred in deleting the addition of Rs.1,23,75,485/- which was made by invoking the provisions of section u/s 2(22)(e) of the income tax act by treating the loan taken by the appellant's proprietary concern M/s Giriraj Corporation and in his personal capacity from M/s Giriraj Civil Developers Pvt. Ltd. where the assessee is a Director holding more than 10% of equity shareholder, as deemed dividend.*
- 6. On the fact and the circumstances of the case and in law, the ld.CIT(A) relied on various judicial pronouncements while deciding the issue on deemed dividend without appreciating that the facts of the instant case is totally different from the facts of the case laws.*

7. *The appellant prays that the order of the Ld.CIT(A) on the above grounds be set aside and that of the A.O be restored.*
8. *The appellant craves leave to amend or alter any ground or add a new ground.”*

4. **Grounds 1 to 4 – Addition under section 69C of the Act**

4.1 In these grounds (supra), Revenue assails the impugned order of the learned CIT(A) in deleting the addition of ₹96,45,645/- made under section 69C of the Act as unexplained expenditure by erroneously relying on the decision of the Hon'ble Bombay High Court in the case of CIT vs. Nikunj Eximp Enterprises Pvt. Ltd. (372 ITR 619) (Bom). It is further contended that the learned CIT(A) ignored the fact that the notices issued under section 133(6) of the Act to the parties from whom bills were received, returned unserved and further that the assessee failed to produce these parties before the Assessing Officer (AO). It is also contended that the learned CIT(A) erred in ignoring the fact that addition made by the AO was based on the finding of the investigation carried out by the Sales Tax Department of Government of Maharashtra. The learned D.R. was heard in support of the grounds raised by Revenue and strong reliance was placed by him on the order of the AO on this issue.

4.2 Per contra, the learned A.R. of the assessee submitted that there was no error in the finding of the learned CIT(A) in the impugned order on this issue in deleting the addition under section 69C of the Act in view of following the binding decision of the Hon'ble Bombay High Court in the case of Nikunj Eximp Enterprises Pvt. Ltd. (supra), by which the case of the assessee is squarely covered. It was further contended that the assessee's case was squarely covered by the decision of the Coordinate Bench of the Tribunal, inter alia, the case of Vaman International Pvt. Ltd. in ITA No. 794/Mum/2015 dated 16.12.2016, wherein on similar facts and similar grounds of appeal raised by Revenue, the Coordinate Bench, relying, inter alia, on the decision of the Hon'ble Bombay High Court in the case of Nikunj Eximp Enterprises Pvt. Ltd. (supra) and other decisions of the ITAT, Mumbai Benches held that addition made by the AO under section 69C of the Act as unexplained expenditure is unsustainable and thereby dismissed Revenue, appeal.

4.3.1. We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncements cited. The facts that emerge from the record are that the assessee (Prop: M/s. Giriraj Corporation) is engaged, inter alia, in business as civil contractor. On the basis of information obtained from the website of the Sales Tax Department of Government of Maharashtra, by the AO in the course of assessment proceedings, the AO found that certain parties/dealers were issuing only bills without delivering any goods or materials, for a commission. On going through the list of such suspicious dealers listed by the Sales Tax Department, the AO noted that the assessee had made purchases from the following dealers, the list/details of which are as under: -

Sr. No.	Name of the Party	Amount of alleged purchase (₹)
1	Balaji Traders	25,35,745/-
2	Big Trade Agency Pvt. Ltd.	4,04,487/-
3	Blue Nile Enterprises	2,62,259/-
4	Dharmesh Trading Co.	13,32,097/-
5	Naman Enterprises	2,55,162/-
6	Om Enterprises	5,87,835/-
7	Pooja Corporation	3,83,095/-
8	Ramanand Sales Pvt. Ltd.	2,85,709/-
9	Riddhi Siddhi Trading Co.	13,55,826/-
10	Shubh Sales Corporation	2,89,834/-
11	Umiya Sales Agency	5,56,639/-
12	Yash Corporation	13,96,957/-
	Total	96,45,645/-

4.3.2 The statements/affidavits, etc. of the above parties, recorded by the Sales Tax Department were provided to the Income Tax Department and the same were given to the assessee on 05.03.2013. The said documents indicated that the above listed parties did not supply any goods to the assessee, but merely issued bills without delivering any goods or services, the payments received by these parties being returned to the assessee in cash for a small commission. Notices issued by the AO under section 133(6) of the Act to these parties were in most cases returned unserved by

the postal authorities with the remark 'left' or 'not known'. To ascertain the genuineness of such purchases amounting to ₹96,45,645/- the AO required the assessee to show cause as to why the aforesaid purchases should not be treated as unexplained expenditure. In reply thereto, the assessee in letter dated 13.03.2013, claimed that the aforesaid purchases are genuine and in this regard submitted copies of purchase invoices, copy of bank statements reflecting payments made to the above parties through banking channels, ledger extracts of some parties, site wise stock register and site wise goods inward register. The AO did not accept the explanations/details put forth by the assessee, brushing these aside, as he was of the view that the documentary evidence put forth was not supported by delivery challans, lorry receipts; that the said 12 parties from whom purchases were allegedly made did not attend in response to notices issued under section 133(6) of the Act; the said parties were not produced by the assessee and placed reliance on the statements, depositions, affidavits made before the Sales Tax Department. In that view of the matter, the AO treated the purchases from the aforelisted 12 parties (supra) amounting to ₹96,45,645/- as unexplained expenditure under section 69C of the Act in respect of alleged bogus purchases.

4.3.3 On appeal, the learned CIT(A), inter alia, placing reliance on the decision of the Hon'ble Bombay High Court in the case of Nikunj Eximp Enterprises Pvt. Ltd. (372 ITR 619) (Bom), by which she held the assessee's case was covered, allowed the assessee's appeal by deleting the addition of ₹96,45,645/- made under section 69C of the Act as unexplained expenditure, holding as under: -

“5.1. I have gone through the AO's contention and the submission of the appellant in this regard. The main contention of the A.O. is that:

- (i) There is information available from the Sales Tax Department, Govt. of Maharashtra;*
- (ii) The said persons have given deposition before the Sales Tax Department that they have only provided entries and have not actually supplied any material;*
- (iii) The said parties could not be produced by the appellant;*
- (iv) The notices sent were either returned back with the comment 'left', 'closed' or 'none appeared'.*

The appellant on the other hand has submitted that they have the audited accounts duly maintained, bills from the said parties and the bank statement evidencing the payments. In its support, the appellant has referred to the decision of M/s.Nikunj Enterprises wherein the Hon'ble Bombay High Court has held that merely because the suppliers have not appeared before the Assessing Officer or the CIT(A), one cannot conclude that the purchases were not made by the respondent-assessee. The appellant has given its facts regarding sale and the payments actually made which the AO has not disputed to highlight the point that the AO is not disputing the source of the expenditure by accepting the bank statement but is only doubting the existence of the parties to whom such payments have been made. It is also the appellant's contention that the A.O. has nowhere disputed the factum of sales. To this extent I am in agreement with the appellant that since the appellant has fulfilled its onus of making the payments by cheque and has supplied the address of the sellers, then it cannot be presumed that the suppliers were bogus simply because the sellers were not found at the given addresses. However, it also at the same time cannot be said that the information provided by the mahavat and the depositions of the sellers before the Sales Tax department of Maharashtra should not be taken cognizance of by the A.O. In light of the facts brought out above and the facts that the A.O. could not provide any substantive or credible evidence to establish that the list of allegedly suspicious suppliers on the website of Sales Tax Department was found to be sham, the appeal of the appellant is accepted.”

4.3.4 On an appreciation of the material on record, it is evident from the order of assessment that it is primarily on the basis of information/details obtained from the Sales Tax Department, Government of Maharashtra that the AO issued the show cause notice to the assessee to explain the said purchases and issued notices under section 133(6) of the Act to the said 12 parties from whom the said purchases were made, to which there was no response. We find that the AO primarily relying on the information obtained from Sales Tax Department, i.e. statements/affidavits given before them by these parties, held the said purchases amounting to ₹96,45,645/- to be bogus. While it may be true that the said parties did not appear before the AO, for whatever reason, the fact remains that the assessee had filed copies of purchase invoices; extracts of stock ledger showing entry/exit of materials, copies of bank statements to evidence that payments for these purchases were made through normal banking channels, etc. to establish genuineness of the aforesaid purchases. From the record it is evident that the AO has not doubted the sales affected by

the assessee and therefore it would be logical to conclude that without corresponding purchases being made, the assessee could not have effected sales.

4.3.5 In our considered view, the AO has not brought on record any material evidence to conclusively prove that the said purchases are bogus. Mere reliance by the AO on information obtained from the Sales Department or on statements/affidavits of the 12 parties before the Sales Tax Department or that these parties did not respond to notices issued under section 133(6) of the Act, would not in itself suffice to treat the purchases as bogus and make the addition under section 69C of the Act. If the AO doubted the genuineness of the said purchases, it was incumbent upon him to cause further inquiries in the matter in order to ascertain the genuineness or otherwise of these transactions. Without causing any further enquiries to be made in respect of the said purchases, the AO cannot make the addition under section 69C of the Act by merely relying on information obtained from the Sales Tax Department, the statements/affidavits of third parties, without the assessee being afforded any opportunity of cross examination of those persons for non-response to information called for under section 133(6) of the Act.

4.3.6 In the factual matrix of the case on hand, where the AO failed to cause any enquiry to be made to establish his suspicions that the said purchases are bogus, the assessee has brought on record documentary evidences to establish the genuineness of the said purchase transactions, the action of the AO in brushing aside these evidences cannot be accepted. Further the Hon'ble Bombay High Court in the case of CIT vs. Ashish International (ITA No. 4299 of 2009) (Bom) has held that the genuineness of the statements relied upon by Revenue is not established when the assessee disputes the correctness thereof and has not been afforded opportunity to cross examine these parties. Moreover, when the payments for the said purchases to the said 12 persons is through proper banking channels and there is no evidence brought on record by the AO to establish that the said payments were routed back to the assessee, the addition made by the AO is unsustainable. We are fortified in this view of

ours by the decisions, inter alia, the Hon'ble Bombay High Court in the cases of Nikunj Eximp Enterprises Pvt. Ltd. (supra) and Ashish International (supra) and the decision of the Coordinate Bench in the case of M/s. Vaman International Pvt. Ltd. (ITA No. 794/Mum/2015 dated 16.11.2016). In this factual and legal matrix of the case on this issue, as discussed above, we find no reason for interference in the order of the learned CIT(A) and consequently uphold her order deleting the addition of ₹96,45,645/- made under section 69C of the Act as unexplained expenditure in respect of the aforesaid purchases. Consequently, ground 1 to 4 of the Revenue's appeal are dismissed.

5. Grounds 5 & 6 – Deemed dividend under section (2)(22)(e) of the Act

5.1 In these grounds (supra), Revenue assails the impugned order of the learned CIT(A) in deleting the addition of ₹1,23,75,485/- as deemed dividend made under section 2(22)(e) of the Act in respect of loans taken by the assessee's proprietary concern and in his personal capacity from M/s. Giriraj Civil Developers Pvt. Ltd. where the assessee is a Director holding more than 10% of equity shareholding. It is contended that in doing so the learned CIT(A) relying on various judicial pronouncements without appreciating that the facts of the case on hand were different from those of the case's relied upon. The learned D.R. was heard and without elaborating on the grounds raised, placed reliance on the order of the AO in the matter.

5.2 Per contra, the learned A.R. of the assessee submitted that there was no error in the order of the learned CIT(A) in deleting the addition of deemed dividend made by the AO under section 2(22)(e) of the Act. According to the learned A.R. the very same issue of deemed dividend on identical facts, as in the year under consideration, was before the Coordinate Bench of the Tribunal in the assessee's own case for A.Y. 2009-10 and the Coordinate Bench in its order in ITA No. 6216/Mum/2012 dated 08.10.2014 has dealt with the matter in paras 2 to 6 thereof and following the ratio of the decisions of the Hon'ble Calcutta High Court in the case of Pradeep Kumar Malhotra (2011) 338 ITR 538 (Cal), the Hon'ble

Delhi High Court in CIT vs. Creative Dyeing and Printing P. Ltd. (2009) 318 ITR 476 (Del) and of the Hon'ble Bombay High Court in the case of CIT vs. Nagin Das M. Kapadia (1989) 177 ITR 398 (Bom) upheld the action of the learned CIT(A) in deleting the addition made under section 2(22)(e) and thereby dismissed Revenue's appeal on this issue. It was also submitted that another Coordinate Bench in the assessee's own case for A.Y. 2011-12 in its order in ITA No. 6865/Mum/2014 dated 21.09.2016 followed the earlier order for A.Y. 2009-10 and dismissed Revenue's appeal in the matter. It was submitted that, in short, this issue is covered.

5.3.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncements cited. The issue before us is whether the action of the learned CIT(A) was correct in deleting the addition of deemed dividend made by the AO under section 2(22)(e) of the Act in the year under consideration. We find that, as brought to the attention of the Bench, this very issue on identical facts was before the Coordinate Bench of the Tribunal in the assessee's own case for A.Y. 2009-10, wherein the Coordinate Bench dismissed Revenue's appeal on this issue; holding as under at paras 6 & 7 thereof as under: -

"6. We have heard the rival contentions, perused the relevant findings of the authorities below and the material available on record. It is undisputed fact that the assessee has offered his own asset valuing more than ₹2 crores as a collateral security to the bank so that the loan/credit facilities is available to the company, Giriraj Civil Developers Pvt. Ltd. When the assessee was in dire need for funds and had no assets against which he could have received loan from the bank, he approached the company for a loan. The said company on the basis of its board resolution, advanced loan to the assessee for sum of ₹83,60,000, on interest. The said loan has also been repaid back in the subsequent year. Now, these facts, whether it can be held that the provisions of deemed dividend under section 2(22)(e), can be held to be attracted. Under the deeming provisions of sub-clause (e) of section (2(22), a distinction has to be made in the cases, where the loan and advance has been given to shareholder merely because such a person is a beneficial owner of shares and from the cases where loan or advance has been given as the matter of commercial consideration which has been given as the matter of commercial consideration which has benefited the company from such a shareholder i.e., the loan or advance has been given in return of an advantage conferred upon the company by such shareholder. If in the course of any business transaction between the company and the

shareholder which is very beneficial to the company, then in such situation, the deeming fiction under section 2(22)(e) cannot be invoked. This distinction has been culled out by the Hon'ble Calcutta High Court in Pradip Kumar Malhotra (supra), wherein on similar set of facts the High Court observed and held as under: -

“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 the advantage conferred upon the company by such shareholder.

In the case before us, the assessee permitted his property to be mortgaged to the bank for enabling the company to take the benefit of loan and in spite of request for the assessee, the company is unable to release the property from the mortgage. In such a situation, for retaining the benefit of loan availed of from Vijaya Bank if decision is taken to give advance to the assessee such decision is not to give gratuitous advance to its shareholder but to protect the business interest of the company.

The view we propose to take finds support from the two decisions, one of the Bombay High Court and the other of the Delhi High Court relied upon by Mr. Khaitan as indicated earlier.,

We, therefore, find that the authorities below erred in law in treating the advance given by the company to the assessee by way of compensation to the assessee for keeping his property as mortgage on behalf of the company to reap the benefit of loan as deemed divined within the meaning of section 2(22)(e) of the Act.

We, consequently, set aside the order of the Tribunal below by directing the Assessing Officer not to treat the advance of Rs.20,75,000 as a deemed dividend.

7. Thus, in view of the facts of the case and also the ratio laid down by the Hon'ble Calcutta High Court, which is again based on the decision of the Hon'ble Delhi High Court in ICT v/s Creative Dying

and Printing Pvt. Ltd., (2009) 318 ITR 476 (Del.) and the decision of the Hon'ble Jurisdictional High Court in CIT v/s Nagin Das M. Kapadia, [1989] 177 ITR 393 (Bom.), we affirm the findings of the learned Commissioner (Appeals) and accordingly, grounds raised by the Department are dismissed.”

5.3.2 In view of the legal and factual matrix, being identical to those in A.Y. 2009-10 in the assessee's own case, and following the ratio laid down by the Hon'ble Calcutta High Court in Pradeep Kumar Malhorta (2011) 338 ITR 538 (Cal.), the Hon'ble Delhi High Court in Creative Dyeing and Printing Pvt. Ltd. (2009) 318 ITR 476 (Del.), of the Hon'ble Bombay High Court in CIT vs. Nagin Das M. Kapadia (1989) 177 ITR 398 (Bom.) and the decision of the Coordinate Bench in the assessee's own case for A.Y. 2009-10 (ITA No. 6216/Mum/2012 dated 08.10.2014) and A.Y. 2011-12 (IT No. 6865/Mum/2014 dated 21.09.2016) we uphold the findings of the learned CIT(A) in deleting the addition made by the AO under section 2(22)(e) of the Act on account of deemed dividend. Consequently, grounds 5 and 6 of the Revenue's appeal are dismissed.

6. **Grounds 7 & 8** being general in nature, no adjudication is called for thereon.

7. In the result, Revenue's appeal for A.Y. 2010-11 is dismissed.

Order pronounced in the open court on 31st January, 2017.

Sd/-
(Ram Lal Negi)
Judicial Member

Mumbai, Dated: 31st January, 2017

Sd/-
(Jason P. Boaz)
Accountant Member

Copy to:

1. The Appellant
2. The Respondent
3. The CIT(A) -35, Mumbai
4. The CIT - 25, Mumbai
5. The DR, "B" Bench, ITAT, Mumbai

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.