आयकर अपीलीय अधीकरण, न्यायपीठ – "B" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL
*KOLKATA BENCH "**C**" KOLKATA*

Before **Shri N.V.Vasudevan, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.667/Kol/2017 Assessment Year :2012-13

TCG Urban Infrastructure Holdings Pvt Ltd. Gr. Floor, Bldg Betta, Bengal Intelligent Park, Bock EP & GP, Salt Lake Electronics Comp. Sector V, Kolkata-91 [**PAN No.AADCS 8821 M**]	**V/s.**	Pr. Commissioner of Income Tax-1, -7, Chowringhee Square, 7th Floor, Kolkata-69
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri A.K.Tibrewal, FCA
प्रत्यर्थी की ओर से/By Respondent	Shri G. Mallikarjuna, CIT-DR
सुनवाई की तारीख/Date of Hearing	27-07-2017
घोषणा की तारीख/Date of Pronouncement	30-08-2017

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal has been filed by the assessee relating to assessment year 2012-13. The assessee is against the order passed by Commissioner of Income Tax-1, Kolkata under the provision of u/s 263 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') dated 15.02.2017. The assessee has filed following grounds:-

"*1. That the order passed by Ld. Principal Commissioner of Income Tax - 1, Kolkata under section 263 of the Income Tax Act, 1961 setting aside the assessment order dated 21st March, 2015 passed by the Deputy Commissioner of Income Tax, Circle- 2(2), Kolkata under section 143(3) of the Income Tax Act, 1961 is without jurisdiction, against law and facts of the case and therefore illegal and is liable to be quashed.*
2. That the Ld. Principal Commissioner of Income Tax - 1, Kolkata erred in assuming jurisdiction under section 263 of the Income Tax Act, 1961 on the

basis of audit objection and setting aside the aforesaid order dated 21 st March, 2015 passed under section 143(3) of the Act.

3. That the assessment order dated 21st March, 2015 passed by the Deputy Commissioner of Income Tax, Circle - 2(2), Kolkata under section 143(3) of the Income Tax Act, 1961 was neither erroneous nor prejudicial to the interest of Revenue within the meaning of section 263 of the Act and therefore Ld. Principal Commissioner of Income Tax - 1, Kolkata erred in assuming jurisdiction under section 263 of the Income Tax Act, 1961 setting aside the aforesaid order dated 21st March, 2015 passed under section 143(3) of the Act.

4. That the Ld. Principal Commissioner of Income Tax - 1, Kolkata erred in setting aside the order dated 21st March, 2015 passed under section 143(3) of the Income Tax Act, 1961 by invoking the provisions of section 263 of the Act by arbitrarily alleging that the journal entries for interest provisions of RS.3,03,55,433 and Rs.1,24,85,798 made on outstanding loans from Mls TCG Facilities Management Services Pvt Ltd and Mls TCG Software Parks Pvt. Ltd are Deemed Dividend under section 2(22)(e) of the Act.

5. That, on the facts and in the circumstances of the case, the impugned order passed by the Ld. Principal Commissioner of Income Tax - 1, Kolkata is perverse and is liable to be quashed."

Shri A.K. Tibrewal, Ld. Authorized Representative appeared on behalf of assessee and Shri G. Mallikrjuna, Ld. Departmental Representative represented on behalf of Revenue.

2. The effective issue raised by assessee in all the grounds of appeal is that Ld. Pr. CIT in his order passed u/s 263 of the Act erred in holding the order of Assessing Officer as erroneous in so far prejudicial to the interest of Revenue.

3. Briefly stated facts are that assessee is a private limited company and engaged in business of real estate, hiring of equipment, financing and consultancy. In the instances case the assessment was framed u/s. 143(3) of the Act vide order dated 2.1.03.2015 after making certain additions / disallowance to the total income of assessee at ₹9,32,25,610/- only. Subsequently Ld. CIT in his order passed u/s 263 observed certain infirmity in the order of AO on the basis of the following:-

i) The assessee is holding 100% shares of M/s TCG Facilities Management Services Pvt. Ltd. (TCGFMSL for short). The assessee during the year has received a loan of ₹3,03,55,433/- from TCGFMSL. There was an accumulated profit available with TCGFMSL as on

31.03.2012 for ₹13,09,50,759/- only. It was also observed that TCGFMSL is not into money lending business. Accordingly, Ld. CIT was of the view that loan taken by assessee attracts with the provision of 2(22)(e) of the Act and accordingly same should be treated as deemed dividend income of the assessee.

ii) Similarly, assessee was holding 65% shares of TCG Software Park Pvt. Ltd (for short TCGPPL). The assessee during the year has taken a loan of ₹1,24,85,798/- only from TCGPPL. There was an accumulated profit in the book of TCGFMSL as on 31.03.2012 for ₹6,85,70,941/-. It was also observed that TCGFMSL was not into the money lending business. Accordingly, Ld. CIT was of the view the provision of sec. 2(22)(e) of the Act is attracted and therefore the amount of loan received by the assessee should be treated as deemed dividend income of the assessee.

The Ld. CIT u/s 263 of the Act observed that AO failed to make any enquiry with regard to provision of Sec. 2(22)(e) of the Act and accordingly no addition was made by AO in his assessment proceedings. In view of above, Ld. CIT u/s 263 issued show show-cause notice vide letter No. Pr.CIT-1/Kol/TCG Urban Infra/SCN/DCIT, Cir-3(1)/2016-17/12589 dated 27.01.2017 for treating the order of AO as erroneous in so far as prejudicial to the interest of Revenue.

In compliance thereto, assessee submitted that in both the cases, assessee has taken loan in earlier years and in the year under consideration the loan amount was increased by the amount of interest expenses to be paid to TCGFMSL and TCGFPPL by ₹3,03,55,433/- and ₹1,24,85,798/- only respectively.

4. The assessee also submitted that the above entries for ₹3,03,55,433/- and ₹1,24,85,798/- are representing the journal entries. As such, no loan was received by assessee from the above stated companies during the year under consideration.

However the Ld. CIT disregarded the contention of the assessee and held the order of AO as erroneous in so far as prejudicial to the interest of Revenue by observing as under:-

> *"12. It may be further notice, that in order to provide clarity on the issue of "erroneous in so far as it is prejudicial to the interest of the revenue", a new Explanation has been inserted to clarify that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner.*
> *a) The order is passed without making inquiries or verification which, should have been made;*
> *b) The order is passed allowing any relief without inquiring into the claim;*
> *c) The order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or*
> *d) The order has not been passed in accordance with any decision, prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.*
> *This amendment takes effect from 1-6-2015.*
>
> *13. Having regard to the facts and circumstances of the case and in the light of the aforesaid decisions of Hon'ble Supreme Court and Hon'ble High Court and in accordance with the amendment made in Section 263 of the Act with effect from 01.06.2015, I hold that the impugned assessment order dated 21.03.2015 passed by the AO is erroneous in so far as it is prejudicial to the interests of thee revenue. I further hold, after giving the assessee an opportunity of being heard, that the impugned assessment order dated 21.03.2015 is liable to set-aside. Therefore, I set aside the said assessment to frame the assessment afresh after considering the aforesaid observations, Hon'ble Supreme Court and Hon'ble High Court decisions and the provisions of Sec. 2(220(e) of IT Act, 1961.*
> *14. In the result, the assessment order 143(3) dated 21.03,2015 for AY 2012-13 is set-aside to the file of the Assessing Officer with a direction to pass a fresh assessment order after considering the aforesaid observations and as per law and after giving an opportunity of being heard to the assessee."*

Being aggrieved by this order of Ld. CIT assessee came in appeal before us.

5. Before us Ld. AR for the assessee submitted that no loan was taken by assessee during the year from the aforesaid companies. The loan was taken by assessee from the aforesaid company in earlier years and the balance was brought forward in the year under consideration. The assessee during the year has credited both the loan accounts for the interest charged by the companies. For the purpose of interest only journal entries were made in the books of account of the assessee. Ld. AR further submitted that the amount of

loan was repaid during the year. Ld. AR in support of assessee's claim has produced the copies of confirmation as well as ledger of both the companies which are placed on record. He also claimed that all the aforesaid documents were duly furnished to AO at the time of assessment proceedings. Ld. AR further submitted that loan amount of both the parties were increased on account of interest charged by the company. However, the interest charged by the companies cannot be termed as loan received by the assessee. Accordingly, the question of treating the same (interest) as loan viz-a-viz as deemed dividend income u/s 2(22)(e) of the Act does not arise. Ld. AR in support of assessee's claim has relied on the order of this Co-ordinate Bench in the case of *Smt. Sangita Jain vs. ITO* in **ITA No. 1817/Kol/2009** dated 11.03.2016 wherein it was held as under:-

> *5. We have heard the arguments of both the sides and also perused the relevant material available on record. One of the main contentions raised by the ld. counsel for the assessee at the time of hearing before us is that the loan in question treated as deemed dividend under section 2(22)(e) by the authorities below was taken by the assessee from M/s. Surya Business Pvt. Limited on interest and since the said Company was compensated by way of interest paid by the assessee on loan, the assessee in real sense did not derive any benefit from the funds of the Company so as to attract the provisions of section 2(22)(e). Although the ld. D.R. has vehemently opposed this contention of the ld. counsel for the assessee by submitting that the payment of interest alone cannot be considered from the benefit angle as envisaged under section 2(22)(e), it is observed that the judicial pronouncements cited by the ld. counsel for the assessee clearly support the case of the assessee.*
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> *6. In the case of Pradip Kumar Malhotra reported in 338 ITR 538 cited by the ld. counsel for the assesese, it was held by the Hon'ble Calcutta High Court that the phrase "by way of advance or loan" appearing in section 2(22)(e) must be construed to mean those advances or loans, which a shareholder enjoys for simply on account of being a partner, who is the beneficial owner of shares, 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 shareholder, in such case, such advance or loan cannot be said to be deemed dividend within the meaning of the Act. It was held that gratuitous loan or advance given by a Company to those classes of shareholders thus would come within the purview of section*

2(22)(e) but not the cases where the loan or advance is given in return to an advantage conferred upon the Company by such shareholder. In the case of ACIT –vs.- M/s. Zenon (India) Pvt. Limited, a loan taken by the assessee was treated by the Assessing Officer as deemed dividend under section 2(22)(e), but the ld. CIT(Appeals) did not approve the action of the Assessing Officer after having noticed that interest at the rate of 9% per annum was paid by the assessee on such loan, which, according to him, was a consideration received from her shareholders, which was beneficial to the Company and the order of the ld. CIT(Appeals) giving relief to the assessee was upheld by the Tribunal vide its order dated 29.06.2015 passed in ITA No. 1124/KOL/2012 by relying on the decision of the Hon'ble Calcutta High Court in the case of Pradip Kumar Malhotra (supra). Keeping in view the said decision of the Hon'ble Calcutta High Court which has been followed by the Coordinate Bench of this Tribunal in the case of M/s. Zenon (India) Pvt. Limited (supra), we hold that the addition made by the Assessing Officer and sustained by the ld. CIT(Appeals) under section 2(22)(e) on account of loan received by the assessee from M/s. Surya Business Pvt. Limited on which consideration in the form of interest was paid by the assessee to the benefit of the Company is not sustainable. We, therefore, delete the same and allow Grounds No. 1 & 2 of the assessee's appeal.

7. As regards the issue involved in Ground No. 3 of the assessee's appeal relating to the disallowance of Rs.28,267/-, Rs.11,869/- and Rs.38,353/- made by the Assessing Officer and confirmed by the ld. CIT(Appeals) out of travelling & conveyance, telephone expenses and sales promotion expenses respectively, it is observed that these disallowances to the extent of 10% out of corresponding expenses were made by the Assessing Officer and confirmed by the ld. CIT(Appeals) for the involvement of personal element. At the time of hearing before us, the ld. counsel for the assessee has not been able to establish that proper record in the form of log book, call register, etc. is maintained by the assessee in order to show that all the expenses incurred under these three heads are wholly and exclusively for the purpose of assessee's business. Keeping in view this failure of the assessee and having regard to the nature of expenses claimed, we find ourselves in agreement with the authorities below that the involvement of personal element in these expenses cannot be ruled out and since the disallowance made at 10% for such personal element, in our opinion, is quite fair and reasonable, we find no justifiable reason to interfere with the same. Ground No. 3 of the assessee's appeal is accordingly dismissed."

In view of above the Ld. AR requested the bench to quash the order of Ld. CIT passed u/s 263 of the Act.

6. On the other hand, Ld. DR submitted that it is not clear whether the loan was taken in earlier year or during the year. If it was taken during the year then it had to taxed under the provision of Sec. 2(22)(e) of the Act and vice versa. He vehemently relied on the order of Ld. CIT.

7. We have heard the rival contentions of both the parties and perused and carefully considered the material on record; including the judicial pronouncements cited and placed reliance upon. We find that Ld. CIT(A) treated the order of AO as erroneous in so far as prejudicial to the interest of Revenue on the ground that assessee has taken loan from the aforesaid two parties which needs to be treated as deemed dividend income u/s.2(22)(e) of the Act.

On perusal of ld. CIT-A order, we note that the assessee has claimed that AO has conducted enquiry during the assessment proceedings. The relevant submission of the assessee before the ld. CIT reads as under:-

> *"4. The assessee company, during the previous year relevant to the Assessment Year 2012-13 did not receive any sum by way of Loan or advance from M/s TCG Facilities Management Services Pvt. Ltd and M/s TCG Software Parks pt Ltd. During the course of assessment proceedings the Assessee Company produced and furnished copy of the ledger account of the said two parties and explained that it did not receive any amount from the aforesaid parties during the relevant previous year. We are enclosing the copies of the ledger account of the two parties recorded in the regular books of account maintained by the assessee company along with the confirmation letters duly signed by both the parties. On perusal of the Ledger account and confirmation letter in respect of loan from the said party it would be found that the Assessee Company, during the relevant previous year mad e payments to the said two companies by way of repayment of the loans borrowed by it from them in earlier years. The amounts of Rs.3,03,55,433 and Rs.1,24,85,798, referred to in the Notice under section 263 of the Act, are interest provisions sonly made during the previous year."*

However we note that the ld. CIT-A has not commented on the submission of assessee rather just concluded that Assessing Officer during the course of assessment proceedings has not conducted any enquiry with regard to loan taken by the assessee. Therefore the income of assessee has been assessed by the AO without considering the aspect of deemed dividend on the loan taken by it under section 2(22)(e) of the Act. Thus the CIT under section 263

of the Act held the order of AO as erroneous in so far as prejudicial to the interest of revenue due to non-enquiry of the loan taken by it.

7.1 Now, the issue before us arises whether the loan taken by the assessee during the year is amounting to deemed dividend income in pursuance to the provision of Sec. 2(22)(e) of the Act. The assessee in the instant case claimed that it has not been received any loan during the year under consideration rather the loan amount was increased of the aforesaid two companies on account of interest charged by the companies on the amount of loan given to the assessee in the earlier years.

7.2. Now the issue is well settled that if the amount of loan is increased on account of interest charges then it cannot be amount as loan receipt by the assessee. Thus, the provision of Sec. 2(22)(e) of the Act cannot be attracted. In this connection, we relied on the order of the Co-ordinate Bench of this Tribunal in the case of *Smt. Sangita Jain* (supra) as discussed above.

However the Ld. CIT in his impugned order u/s 263 has alleged that AO has not carried out any verification for the amount of loan increased during the year. Now the fact needs to be ascertained whether the amount of loan increased during the year is due to the amount of interest or any fresh loan has been taken by assessee. In this regard, we find that the necessary details were duly furnished by the assessee during assessment proceedings as discussed. Thus it cannot be alleged that no enquiry was conducted during the course of assessment proceedings. In view of above we hold that the AO consciously has not made any addition on account of deemed dividend income. Our view gets strengthened by the judgment of the Hon'ble Delhi High Court in the case of *ITO* v. *D.G. Housing Projects Ltd.* [2012] 343 ITR 329/20 taxmann.com 587/[2013] 212 Taxman 32 (Mag.) (Delhi), whereby the Hon'ble High Court held as under :

> *"16. Thus, in cases of wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under section 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. CIT cannot remand the matter to the*

Assessing Officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the CIT must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the CIT and he is able to establish and show the error or mistake made by the Assessing Officer, making the order unsustainable in Law. In some cases possibly though rarely, the CIT can also show and establish that the facts on record or inferences drawn from facts on record per se justified and mandated further enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under section 263 of the Act. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean the CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question."

We see, in the present case, the ld CIT himself has not given any concrete finding as to the merits of the case and has directed the Assessing Officer to make further enquiry. In view of this, we hold that the assumption of jurisdiction u/s 263 of the Act by the ld CIT is not as per law. We quash the same. Hence, this ground of assessee's appeal is allowed.

9. **In the result, assessee's appeal stands allowed.**

Order pronounced in the open court 30/08/2017

Sd/-	Sd/-
(न्यायिक सदस्य)	(लेखा सदस्य)
(N.V.Vasudevan)	(Waseem Ahmed)
(Judicial Member)	(Accountant Member)

Kolkata,
*Dkp, Sr.P.S
दिनांकः- 30/08/2017 **कोलकाता** ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-TCG Urban Infrastructure Holdings Pvt. Ltd Gr. Floor, Bldg. Beta, Bengal Intelligent Park Block EP & GP, Salt Lake Electronics Comp. Sector-V, Kolkata-91
2. प्रत्यर्थी/Respondent-Pr. CIT-1, P-7, Chowringhee Square, 7th Floor, Kolkata-69
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata 4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata 6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

Sr. Private Secretary, Head of Office/DDO
आयकर अपीलीय अधिकरण,
कोलकाता ।