IN THE INCOME TAX APPELLATE TRIBUNAL

"C" BENCH, MUMBAI

BEFORE SHRI, J. SUDHAKAR REDDY, ACCOUNTANT MEMBER AND

SMT. ASHA VIJAYRAGHAVAN, JUDICIAL MEMBER

ITA no. 2483/Mum./2011
(Assessment Year : 2006-07)
Date of Hearing: 4.5.2011

Mr. Pravin Bhimshi Chheda
Shivsadan, Rajawadi
Ghatkopar (E), Mumbai 400 077
PAN – AABPC0292R ………………….. Appellant

v/s

Dy. Commissioner of Income Tax
Circle-22(1), Vashi, Navi Mumbai ………………. Respondent

ITA no. 6319/Mum./2009
(Assessment Year : 2006-07)

M/s. Sujyoti Enterprises
A/18, Matruchaya, Opp. "D" Colony
Vidyavihar (East), Mumbai 400 077
PAN – AAXFS7523B ………………….. Appellant

v/s

Income Tax Officer
Ward-22(1), Vashi, Navi Mumbai ………………. Respondent

Revenue by : Mr. S.S. Rana
Assessee by : Mr. Pradip Kapasi a/w
Mr. Haresh V. Kagrana

<u>O R D E R</u>

<u>PER J. SUDHAKAR REDDY, A.M.</u>

Appeal in ITA no.2483/Mum./2011, preferred by assessee, is directed against the order dated 17th February 2011, passed by the Commissioner (Appeals)-XXXIII, for assessment year 2006-07, and the appeal in ITA no.6319/Mum./2009, preferred by assessee, is directed against the order dated 29th September 2009, passed by the Commissioner (Appeals)-XXXIII, for assessment year 2006-07. Though, the assessees are different, since the issues are common, these appeals were clubbed and are heard together and are being disposed off by way of this consolidated order for the sake of convenience.

First we take up appeal in ITA no.2483/Mum./2011, Mr. Pravin Bhimshi Chhada.

2. Brief facts of the case are that, the assessee Mr. Pravin Bhimshi Chhada, is an individual and is director in M/s. Swati Energy & Projects Pvt. Ltd. (SEPL), as well as a partner in M/s. M/s. Sujyoti Enterprises. He has substantial interest in both the concerns. One Mr. Manish Dedhia, is an employee of M/s. Swati Energy & Projects Pvt. Ltd. He is also the proprietor of M/s. M/s. Power Service Corporation. M/s. Swati Energy & Projects Pvt. Ltd., has given an advance to M/s. Power Service Corporation (PCC), for the purchase of goods on 24th October 2005. The advance was of ₹ 1,40,00,000. On the very same day i.e., 24th October 2005, M/s. Power Service Corporation, gave a loan of an amount of ₹ 1,40,00,000, to M/s. Sujyoti Enterprise. M/s. Sujyoti Enterprise, has given back the money to M/s. Swati Energy & Projects Pvt. Ltd. on 24th October 2005 itself. The assessee as well as Mr. Manish Dedhia, claimed that the amount of ₹ 1,40,00,000, was advanced against the purchase orders. It is also stated that the purchases had ultimately taken place. M/s. M/s. Sujyoti Enterprise, is mainly in the

business of taking deposits and giving finance and that Mr. Mr. Manish Dedhia, has deposited the amount of ₹ 1,40,00,000, received by him as an advance for purchase of goods with M/s. Sujyoti Enterprises as deposit carrying interest @ 12% per annum. The Assessing Officer observed at Paras-5.5 and 5.6, as follows:-

> *"5.5 From the above, it can be safely concluded that the amount of ₹ 1,40,00,000 given by M/s. Swati Energy and Projects Pvt. Ltd. to Shri Manish Dedhia is not a purchase advance but money parked indirectly in the business controlled by the assessee as a partner i.e., M/s. Sujyoti Enterprises, for the following reasons:-*
>
> *(a) Neither Shri Manish Dedhia nor the assessee has explained as to why ₹ 1.40 crores i.e., more than purchase order i.e., ₹ 1.03 crores was paid by M/s. Swati Energy and Projects Pvt. Ltd. to Shri Manish Dedhia, which is not a prudent business act. The assessee in his submission stated that the advance was given for purchase of material of ₹ 2,01,75,535 is not correct, as Shri Manish Dedhia, admitted in his statement recorded under section 131 mentioned above that he has received purchase order of ₹ 1,03,75,734 only from M/s. Swati Energy and Projects Pvt. Ltd.*
>
> *(b) The amount of advance received was immediately given as loan / deposit on the same day to M/s. Sujyoti Enterprises, by Shri Manish Dedhia, without fulfilling the so called purchase order.*
>
> *(c) The assessee remained silent on the capability of Shri Manish Dedhia, for executing such a huge order, as he never dealt such business either and he does not possess the knowledge of the product.*
> *(d) Shri Manish Dedhia actually started activities in the booking purchase order in January 2006 by giving 10% advance only, but M/s. Swati Energy and Projects Pvt. Ltd. has given more than 100% advance which is not justifiable.*
>
> *(e) Shri Manish Dedhia has not supplied / purchased any material against the purchase order of ₹ 1.03 crores, for which he received advance of ₹ 1.40 crores. In fact as per assessee's own submission till date he had supplied materials of ₹ 5.28 lakhs against such huge advance of ₹ 1.40 crores.*
>
> *(f) The assessee remained silent why the said advance was not received back from Shri Manish Dedhia, as he grossly failed to fulfill the so called purchase order made by M/s. Swati Energy and Projects Pvt. Ltd.*
>
> *5.6 In view of the above, it is clear that the amount of advance given of ₹ 1,40,00,000 M/s. Swati Energy and Projects Pvt. Ltd. is*

nothing but transfer of money indirectly in M/s. Sujyoti Enterprises, where the Director of the company i.e., the assessee is a partner."

3. Thereafter, he relied on the judgment of Hon'ble Supreme Court in L. Alagusundaram Chettiar v/s CIT, (2002) 252 ITR 893, and Mrs. Tarulata Shyam & Ors. v/s CIT, (1977) 108 ITR 345 (SC), and came to a conclusion that the provisions of section 2(22)(e) of the Income Tax Act, 1961 (for short *"the Act"*), are attracted in the instant case. At Para-5.11, he referred to the order of the Commissioner (Appeals) in the case of M/s. Sujyoti Enterprises, wherein it was observed that this amount has to be taken in the hands of the partner of the firm Mr. Pravin Bhimshi Chhada. He assessed the amount of ₹ 1,40,00,000, as deemed dividend under the provisions of section 2(22)(e) of the Act.

4. Aggrieved, the assessee carried the matter in appeal, wherein he challenged the validity of re-opening as well as the application of the provisions of section 2(22)(e). The Commissioner (Appeals), vide Para-7.2 of his order, observed as follows:-

"7.2 Coming to the merit appellant has said that the transaction of ₹ 1.40 crores given to Shri Manish Dedhia by Swati Energy and Projects Pvt. Ltd. was in the nature of advances for materials supplied. The Assessing Officer has commented at length on the same in assessment order as well as in remand report and appellant has reiterated his comments in reply. I have also gone through documents and I find that appellant's plea is not supported by fact. From the additional evidences furnished also it is seen that during the assessment year 2007-08, there are two accounts of Swati Energy and Projects P. Ltd. They are (i) Swati Energy and Projects P. Ltd. and (ii) Swati Energy and Projects P. Ltd. Advance for A.Y. 2006-07 maintained in the books of Power Service Corp; Proprietary concern of Shri Manish Dedhia as per the additional documents filed during appellate proceedings. The transaction of ₹ 2,56,500 has been recorded as sales against an amount of ₹ 2,00,000 received on 17.01.2006, which is naturally an amount in the nature of ₹ 2,00,000 received on 17.01.2006, which is naturally an amount in the nature of advance against the sales business transactions of ₹ 2,56,500. Again this Swati Energy and Projects P. Ltd. Advance Account shows credit of ₹ 1.40 crores along with interest paid @ 12% i.e., ₹ 7,31,836. Subsequently, for the assessment year 2007-08, some sales have been shown totaling to ₹ 2,12,463 and Swati Energy and Projects P. Ltd. Advance Account further shows an interest amount of ₹ 16,80,000 on the balance

outstanding of ₹ 1,47,31,836 out of which earlier years interest of ₹ 7,31,836 has been paid. By the third assessment year i.e., 2008-09, the account is showing the remaining interest bearing advance amount of ₹ 1,56,80,000 adjusted towards the sale bills. Suddenly, the sales have increased as shown by bill no.4 at ₹ 47,25,928 which is adjusted from Advances. Then bill no.3 ₹ 14,99,400, Bill no.5 ₹ 23,21,494 and bill no.9 ₹ 39,47,625 and so on; which all are adjusted from the advance payments already received. As a result in the end the balance account is squared up with zero balance. Naturally Swati Energy & Projects P. Ltd. Advance Account is reflecting the direct entry of sales, sale bill number, amount which were adjusted against these advances leaving the balance at zero at the end. Thus the fact emerges that the so called advances reflected as advance for supply of material were actually loans given to Shri Manish Dedhia on which as per the return filed by way of additional evidence by the appellant during the appellate proceedings only interest accrued and paid also. This amount has not been reflected as advance in sales account in assessment year 2007-08 where already the only advance of ₹ 2,00,000 is appearing on 17.1.2006 against the sales made on 21.1.2006 for ₹ 2.56,500. In view of this fact at the end of third assessment year this advance has been squared up from sales bill and entries with zero closing balance, the whole purpose being served by them.

7.3 Having found that the advances made where vide in the nature of loan bearing interest and not advances for any material supplied only because the account of its employee Shri Manish Dedhia, Proprietary concern was utilised to give the amount to appellant, partner of Sujyoti Enterprises provisions of section 2(22)(e) are clearly attracted as decided by Hon'ble Supreme Court in L. Alagusundaram Chettiar v/s CIT (2001) 252 ITR 893 (SC) where in Apex Court held as under:-

> *"Loan of large amount was advanced by the company to a low paid employee who in turn advanced the same to the Managing Director (the assessee). It was held that the loan was advanced for the benefit of the assessee and hence was deemed dividend under section 2(6A)(9e) of the Old Act corresponding to section 2(22)(e) of the I.T. Act, 1961."*

5. On the other pleas taken by the assessee, the Commissioner (Appeals) relied on the decisions of Tribunal as well as the High Courts and negated the pleas. Aggrieved, the assessee is in further appeal before us, on the following issues:-

a) Validity of re-opening of assessment u/s 147 of the Act;

b) Validity of an addition of ₹ 1,40,00,000 as deemed dividend under section 2(22)(e);

c) Violation of principles natural justice; and

d) Levy of interest under section 234B, 234C of the Act.

6. Before us, learned Counsel, Mr. Pradip Kapasi, appearing on behalf of the assessee, at the outset, contends that he did not wish to press the issues – (a) Validity of re-opening of assessment u/s 147; (c) violation of natural justice; and (d) levy of interest under section 234B, 234C. Learned Departmental Representative, on the other hand, did not object to these submissions made by the learned Counsel. Consequently, the aforesaid grounds are dismissed as *"not pressed"*.

7. Learned Counsel, contends that the assessee holds 33.34% of the shares in the firm M/s. Sujyoti Enterprises and that the other brothers, Mr. Shantilal B. Chheda and Shri Mavji B. Chheda, holds similar shares of 33.33% each. He submits that the issue whether the company M/s. Swati Energy & Projects Pvt. Ltd., has accumulated profit is not in dispute. In short, he submits that except for the issue that he would raise in his argument, the other conditions laid down in section 2(22)(e) are fulfilled. Learned Counsel, submits that M/s. Power Service Corporation, is a proprietary concern of Mr. Mr. Manish Dedhia and M/s. Swati Energy & Projects Pvt. Ltd., has issued a cheque of ₹ 1,40,00,000, in favour of M/s. Power Service Corporation on 24th October 2005, as trade advance for supplying goods. He submits that the goods were actually supplied by M/s. Power Service Corporation to M/s. Swati Energy & Projects Pvt. Ltd. According to learned Counsel, the entire issue revolves around the question whether the transactions entered into by M/s. Swati Energy & Projects Pvt. Ltd., and M/s. Power Service Corporation, is genuine transaction or not and whether the amount given to M/s. Power Service Corporation is a loan or not.

8. He submits that the goods were actually supplied by M/s. Power Service Corporation to M/s. Swati Energy & Projects Pvt. Ltd. He further submits that interest has been paid on the amount deposited by M/s. Power Service Corporation with M/s. Sujyoti Enterprises and M/s. Power Service Corporation has offered to tax, the interest income earned from M/s. Sujyoti Enterprises and in the hands of M/s. Sujyoti Enterprises, the interest paid was allowed as expenditure. It was further submitted that the compensation was paid for delay in supply of goods by M/s. Power Service Corporation to M/s. Swati Energy & Projects Pvt. Ltd. He points out that the purchases have been accepted by the Revenue. Learned Counsel filed paper book containing 416 pages and drew the attention of the Bench to the statement of Mr. Mr. Manish Dedhia from Pages-6 to 10 and affidavit filed by Mr. Mr. Manish Dedhia at Pages-11 to 15 and submits that Mr. Mr. Manish Dedhia was consistent in his statement and had confirmed the facts stated by the assessee and it is not correct to say that the transaction was not genuine. He referred to the assessee's paper book Page-323, which consist of resolution passed by The Board of Directors of M/s. Swati Energy & Projects Pvt. Ltd., ledger account copies of M/s. Power Service Corporation. He argued that, other than being an employee, it was submitted that Mr. Mr. Manish Dedhia, was a partner in certain firms and sales of M/s. Power Service Corporation, was more than ₹ 39,00,00,000 in the year 2010. Efforts were made before us to demonstrate that, the turnover of firms, in which Mr. Mr. Manish Dedhia was a partner, was substantial and, hence it cannot be said that Mr. Mr. Manish Dedhia, is a man of no means or his incapability of executing the contract. He took this Bench to the various documents such as purchase order, correspondence, bank guarantee furnished, invoices, etc., to demonstrate his case that the transaction is genuine. He submits that the apparent is to be considered as real, unless it is proved otherwise. For this proposition, he relied on the following case laws:-

- *CIT v/s Durga Prasad More (1971) 82 ITR 540 (SC),*
- *Kalwa Devadattam & Ors. (1963) 49 ITR 165 (SC), and*

- *CIT v/s Century Building Industries Pvt. Ltd., (2007) 293 ITR 194 (SC)*

9. On the reliance placed by the Commissioner (Appeals) on the judgment of L. Alagusundaram Chettiar (supra). he submits that, on facts, the case is different as both the employees as well as the Finance Director had, in that case, admitted on oath that the employees were used as conduit for the shareholders to take loans from the company. He submits that no such admission is available in this case. On the reliance placed by the Commissioner (Appeals) in Mrs. Tarulata Shyam & Ors. (supra), learned Counsel distinguished the case and submits that the judgment would be applicable in a case where the assessee claims that the amount has been re-paid. He submits in this case of the assessee, there was no loan taken from the company and there is no repayment. Alternatively and without prejudice, the learned Counsel submits that the entire amount cannot be taxed in his hand as he was partner of only 1/3rd share in M/s. Sujyoti Enterprise.

10. Coming to the decision of Tribunal in 6319/Mum./2009, learned Counsel submits that M/s. Sujyoti Enterprises is not a partner in M/s. Swati Energy & Projects Pvt. Ltd., and hence, addition cannot be made in view of the Mumbai Special Bench decision in ACIT v/s Bhaumik Colour P. Ltd., 118 ITD 001 (SB). He submits that the Commissioner (Appeals) accepted this position.

11. He submits that thought he Commissioner (Appeals) had deleted the addition of ₹ 1,40,00,000, the assessee has filed the appeal disputing the observations made by the Commissioner (Appeals) that M/s. Power Service Corporation is a conduit. Aggrieved by these findings, an appeal was filed. Learned Counsel submits that these observations have to be expunged in the case of M/s. Sujyoti Enterprises, for the reasons already submitted and addition of ₹ 1,40,00,000 under section 2(22)(e) in the case of Mr. Pravin Bhimshi Chhada, has to be deleted.

12. Learned Departmental Representative, Mr. S.S. Rana, on the other hand, submits that all the basic requirements of section 2(22)(e) have been satisfied in this case. He relied basically on the order of the Assessing Officer and pointed out that Mr. Mr. Manish Dedhia, was a small time accountant with M/s. Swati Energy & Projects Pvt. Ltd. He took this Bench to question no.9 of the statement of Mr. Mr. Manish Dedhia, wherein he stated that he works between 03:00 pm and 07:00 pm and the work assigned to him is bank entry, cash entry and filing of journal vouchers in respective folders and that he receives ₹ 8,000 pm from M/s. Swati Energy & Projects Pvt. Ltd., and annually ₹ 1,42,866 from Sheetal Agency and that he works for Sheetal Agency from 07:00 pm to 10:00 pm. He also referred to answers to questions 27 to 29, to emphasis the point that Mr. Mr. Manish Dedhia, had on the same day, deposited ₹ 1,40,00,000, in M/s. Sujyoti Enterprises, because the directors of his employer company were partners in M/s. Sujyoti Enterprises. He also pointes out that the claim of M/s. Power Service Corporation that Mr. Chirag K. Mehta, was an employee, was found to be false and it was established that he was not working for M/s. Power Service Corporation, during the period in which the purchase order was given to it by M/s. Swati Energy & Projects Pvt. Ltd. He points out that it is unnatural for M/s. Swati Energy & Projects Pvt. Ltd., to have placed the order for supply of equipment through one of its employees instead of placing order directly with the supplier. He refers to Para-7.2 of Commissioner (Appeals)'s order and submits that due to circuitous entries, the advance reflected as advance for supply of material were actually a loan given to Mr. Manish Dedhia. He referred to the contradictory stand taken by the assessee, the first being that this is an advance for purchase of machinery and in alternative stand that the cycle of fund flow is completed and the same was done to increase credit limit from Punjab National Bank and so it is out of commercial expediency and outside the ambit of section 2(22)(e) of the Act. He points out that the Commissioner (Appeals) has rightly rejected this plea of the assessee by following the judgment of the Hon'ble Supreme Court in Mrs. Tarulata Shyam & Ors. (supra). He submits that the order of the

Commissioner (Appeals) should be upheld and the appeal of the assessee be dismissed.

13. Rival contentions were heard. On a careful consideration of the facts and circumstances of the case and on perusal of the papers on record, as well as the case laws cited before us, we hold as follows:-

i) The Commissioner (Appeals), at Page-12, first two paragraphs, observed as follows:-

> *"Further, on perusal of the bank statement of M/s. Sujyoti Enterprises, it is found that the same ₹ 1.40 crores which was received from M/s. Power Service Corporation, was again transferred into the account of M/s. Swati Energy & Projects Pvt. Ltd. by M/s. Sujyoti Enterprises, on the same date i.e., 24.10.2005.*
>
> *Hence, the claim of the assessee that M/s. Power Service Corporation was engaged in the business is not correct, given the fact that the amount of ₹ 1.40 crores originated from the account of M/s. Swati Energy & Projects Pvt. Ltd. was ultimately received back into its own account on the same date i.e., 24.1.2005, through the accounts of M/s Power Service Corporation and M/s. Sujyoti Enterprises. The same is also established by the ledger accounts filed by the assessee."*

ii) This shows that the transaction was a circuitous transaction and the money which initially belonged to M/s. Swati Energy & Projects Pvt. Ltd., was returned to the same company on the very same day through M/s. Power Service Corporation and, thereafter, M/s. Swati Energy & Projects Pvt. Ltd. As on 24th October 2005, there is no net outflow of funds from M/s. Swati Energy & Projects Pvt. Ltd. When there is no net outflow, there is no intention to give the money as a loan or an advance. Section 2(22)(e), has been brought into the Act with an object to curb the practice of companies, which had accumulated profits from giving loans to shareholders having substantial interest with an object of avoiding payment of dividend. In those years, when the provision was brought, dividends were taxeble. This has been brought out in the book Chaturvedi and Pithisaria's Income Tax Law, 5th Edn., at Page-197, Para-3, which reads as follows:-

> *"The mischief sought to be occurred by section 2(22)(e) – The companies to which section 2(22)(e) applies are (up to 1.4.1983), inter-alia, companies in which majority (more than 50 per cent) of the voting power lies in the hands of persons other than the public, etc., and that means that the companies are controlled by a group of persons allied together and having the same interest. It is for this group to determine whether the profits made by the company should be distributed as dividends or not. When the legislature realised that though money was reasonably available with the company in the form of profits, those in charge of the company deliberately refused to distribute it as dividends to the shareholders, but adopted the device of advancing the said accumulated profits by way of loan or advance was to evade the payment of tax on accumulated profits. It was with intention of curing such an similar mischiefs that these provisions were enacted. [see. Navnit Lal C. Javeri v. K.K. Sen (1965) 56 ITR 198, 207-8 (SC)."*

iii) Looking at the transaction from this angle, it is clear that there is no diversion of dividend or in fact any funds from the company as on the same day, the very same amount of ₹ 1,40,00,000 as come back into the coffers of M/s. Swati Energy & Projects Pvt. Ltd. If the intention was to give a loan or an advance, the question of the money being returned to M/s. Swati Energy & Projects Pvt. Ltd., on the same day does not arise.

iv) If the theory of the Revenue that the amount given to M/s. Power Service Corporation by M/s. Swati Energy & Projects Pvt. Ltd., is a non-genuine transaction is true, then this fact, if taken to its logical end, leads us to an inevitable conclusion that no funds whatsoever have gone out from M/s. Swati Energy & Projects Pvt. Ltd. and hence, there is no loan given by the company. There is no flow of fund or any benefit from M/s. Swati Energy & Projects Pvt. Ltd. to M/s. Sujyoti Enterprises or to its partner Mr. Pravin Bhimshi Chhada. Such a circuitous entries passed, in our humble opinion, cannot be considered as either loans or advances so as to attract section 2(22)(e). The Co-ordinate Bench of the Tribunal in G.M.J. Thampy, ITA no.1275 to 1277/Mum./2009, order dated 25th August 2010, vide Para-23 to 25, held as follows:-

> *"23. Coming to the assessment year 2004-05, a look at the ledger copy clearly shows that the amounts received from the company by*

the sole proprietary concern on 13-09-2003 and on 15-09-2003 of Rs.2.5 crores each were simultaneously and instantaneously transferred back to the proprietary concern. The assessee has not derived any benefit whatsoever from this transaction. When the admitted fact is that both the assessee and the company are having an open and mutual current account and that the financial transactions between the two entities are mutual transactions done out of commercial expediency and business necessity, each and every transaction cannot be considered as a loan or an advance. When an amount is not kept in the sole proprietary concern for a day and when the sole proprietary concern not used it, it cannot be called a loan or an advance. We hold that the addition of an amount of Rs.2,06,12,533/- made u/s 2(22)(e) has to be necessarily deleted as there is no loan or an advance as contemplated within the section 2(22)(e). There was neither a loan nor a repayment on facts.

24. Coming to the assessment year 2005-06, the transactions were also in the form of current account transactions, which were undertaken during the ordinary course of business. Amounts were exchanged between the parties and there is no finding that a particular transaction is a loan transaction. When there is an attempt to bring to tax a particular amount, the burden of proof lies on the Revenue to prove that the same is income as contemplated under the Act. In this case the Revenue has not discharged its burden that a particular amount received by M/s Riya Travels, a proprietary concern, is a loan or advance. On the other hand, the assessee has laid evidence to prove that this is neither a loan nor an advance. These findings of us are based on the proposition laid down in case laws, which will be discussed in this order.

25. On facts we find that on 2nd June, 2004, the proprietary concern had given an amount of Rs.15 lakhs to the company and this was repaid by the company on 08-06-2004. Similarly an amount of Rs.15 lakhs was once again advanced by the sole proprietary concern on 17-06-2004 and this was repaid by the private limited company to Riya Travels on 12-07-2004. Similarly an amount taken by the company on 19-11-2004 from the proprietary concern amounting to Rs.10 lakhs was returned to the proprietary concern on 22-02-2004. Thus on these facts, by no stretch of imagination, these transactions can be treated as loans or advances covered u/s 2(22)(e). This leaves us with only two transactions of 17-11-2004 and 18-11-2004 amounting to Rs.2.75 crores and Rs.4.25 crores respectively. Here also the amount received by the proprietary concern M/s Riya Travels, was instantaneously, on the same day transferred back to the company. The explanation is that the company is a member of the International Air Travels Association (IATA) and as per the terms and conditions, the assessee was required to provide bank guarantee to IATA. The guarantee amount was calculated by taking the total turnover as reduced by the amount of paid up share capital and reserves. It is well known that, higher amount of bank guarantee, higher is the fixed deposits that are required to kept with the bankers to obtain guarantee, as the bank insists on adequate margin. Higher *amount of fixed deposits involves blocking of substantial funds. The company for its own purposes, routed the amount through the proprietary concern, with an intention to increase its paid up of share capital and to minimize the instance of bank guarantee to be provided to IATA and consequently reduce the blocking of funds. <u>The question to be answered is, can this be called a loan or an advance. The money is not gone out of the coffer of the company, nor has "Riya Travels" used the amount for its purposes. A loan or advance pre-supposes the money of the company is out of the company, for being used by the other person for its use. When the money is simply circulated and has come back to the coffer of the company, simultaneously, we find difficulty in accepting the theory that a person has lent money to another</u>. In this case the company sought to achieve its object by using the sole proprietary concern. On this factual matrix, we are of the considered opinion, that the amount routed by the company, through the sister concern Riya Travels, cannot be considered as a loan or an advance given by the company to the sole proprietary concern. We rely on the finding of the Hon'ble Delhi High Court in the case of CIT vs. Raj Kumar (2009) 181 Taxman 155 where it has been held as follows :*

10.5 If this purpose is kept in mind then, in our view, the word 'advance' has to be read in conjunction with the word 'loan' . <u>Usually attributes of a loan are that it involves positive act of lending coupled with acceptance by the other side of the money as loan : it generally carries an interest and there is an obligation of repayment</u>. On the other hand, in its widest meaning the term 'advance' may or may not include lending. The word 'advance' if not found in the company of or in conjunction with a word 'loan' may or may not include the obligation of repayment. If it does then it would be a loan. Thus, arises the conundrum as to what meaning one would attribute to the term 'advance' . The rule of construction to our minds which answers this conundrum is noscitur a sociis. The said rule has been explained both by the Privy Council in the case of Angus Robertson vs. George Day (1879) 5 AC 63 (PC) by observing "it is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them" and our Supreme Court in the cases of Rohit Pulp & Paper Mills Ltd. vs. CCE AIR 1991 SC 754 and State of Bombay vs. Hospital Mazdoor Sabha AIR 1960 SC 610.

> *10.7 Importantly, the broad principles which emerge from the judgment of the Supreme Court with regard to the applicability of the said rule of construction are briefly as follows : (i) does the term in issue have more than one meaning attributed to it i.e., based on the setting or the context one could apply the narrower or wider meaning; (ii) are words or terms used found in a group totally 'dissimilar' or is there a 'common thread' running through them; (iii) the purpose behind insertion of the term.*

10.8 Let's examine as to whether based on the aforesaid tests the said rule of construction 'noscitur a sociis' ought to be applied in the instant case. (i) the term ' advance ' has undoubtedly more than one meaning depending on the context in which it is used; (ii) both the terms, that is, advance or loan are related to the 'accumulated profits' of the company; (iii) and last but not the least the purpose behind insertion of the term advance was to bring within the tax net payments made in guise of loan to shareholders by companies in which they have a substantial interest so as to avoid payment of tax by the shareholders.

10.9 Keeping the aforesaid rule in mind we are of the opinion that the word 'advance' which appears in the company of the word 'loan' could only mean such advance which carries with it an obligation of repayment. Trade advance which is in the nature of money transacted to give effect to a commercial transaction would not, in our view, fall within the ambit of the provisions of s. 2(22)(e) of the Act. This interpretation would alloy the rule of purposive construction with noscitur a sociis, as was done by the Supreme Court in the case of LIC of India vs. Retd. LIC Officers Association (2008) 3 SCC 321. The observations in para 24 of the report being apposite are extracted hereinbelow :

"Each word employed in a statute must take colour from the purport and object for which it is used. The principle of purposive interpretation, therefore, should be taken recourse toe." [emphasis added]

iv) In the present case, all the transactions have taken place on the same day and the money given by M/s. Swati Energy Projects P. Ltd. came back to it on the same day and the intention of the parties, as gathered from facts does not reflect that, it was to advance or loan or a deposit. Hence, in view of the finding of the Revenue that the transaction is not a genuine advance for purchase of goods, we have to take the conclusion to the logical end and hold that, in such a view of the matter, it is also not a loan or as advance, so as to attract section 2(22)(e).

v) Coming to the issue whether the advance given to M/s. Power Service Corporation, a proprietary concern of Mr. Mr. Manish Dedhia, it can be noticed that the year-wise turnover of M/s. Power Service Corporation is as follows:-

2005-06	*2,56,500*
2006-07	*2,12,463*
2007-08	*3,14,17,338*
2008-09	*1,78,34,311*
2009-10	*1,80,25,578*
2010-11	*1,37,16,896*

We also find that Mr. Mr. Manish Dedhia, is a partner in Sheetal Agencies, which has the following turnover:-

Sheetal Agency	*Turnover Amount in Cr.*	*Profit Amount in ₹*
2003-04	*4.16*	*36239*
2004-05	*82.32*	*1580853*
2005-06	*216.48*	*4667756*
2006-07	*51.10*	*1053071*
Total	*354.06*	

He is also a partner in another firm Sheetal Gaming Pvt. Ltd.

Sheetal Gamings Pvt. Ltd.	*Turnover Amount in Cr.*	*Amount in ₹. Profit Before Tax*
2006-07	*189.14*	*3184156*
2007-08	*211.52*	*4281701*
2008-09	*208.45*	*3823490*
2009-10	*209.65*	*3583543*
Total	*818.76*	
Total Sales	*1172.82*	

From the above figures, it cannot be said that M/s. Power Service Corporation is bogus entity or a paper entity. From the copies of purchase order, Bank Guarantee, supplies documentation, etc., available in the paper book, it cannot be said that the advance or loan was given for the benefit of M/s. Sujyoti Enterprises, or its partner. The undisputed fact is that, the machinery was ultimately supplied. It is not a case where M/s. Power Service Corporation took a loan and has re-paid the same. He took a trade advance and supplied machinery. There is no repayment in cash with interest.. Though the fact that Mr. Mr. Manish Dedhia, was an accountant with the assessee firm drawing small amounts as salary, prompts us to agree with the findings of the Assessing Officer, we are also influenced by the fact that the money was not returned but machinery was ultimately supplied. In any event, we restrain ourselves from giving a definite finding on this issue as it would not make a difference.

vi) Looking at the issue from any angle, if it is held that the loan was given to the partnership firm in which the shareholders were having substantial interest through a conduit i.e., M/s. Power Service Corporation, then, as the money was returned on the very same day to the company, it cannot be said that a loan still exists. We have to take the transaction to the logical conclusion. If, on the other hand, it is said that this is a trade advance given to M/s. Power Service Corporation, which had ultimately supplied machinery to the assessee, then, such an advance cannot be termed as a loan so as to bring it within the ambit of section 2(22)(e).

vii) Coming to the case laws, in our opinion, the judgments relied upon by the Revenue are not relevant to the facts of the case, as there is no repayment of a loan and also there is no loan at all, which is used by the shareholders or the firm M/s. Sujyoti Enterprises.

viii) Keeping view of the aforesaid discussions, we delete the addition in the hands of the assessee.

14. In the result, assessee's appeal is allowed in part.

15. Now, coming to the appeal in ITA no.6319/Mum./2009, M/s. Sujyoti Enterprises, the only grievance of the assessee is against the findings of the Commissioner (Appeals) on the issue whether the transaction with M/s. Power Service Corporation is genuine or not.

16. In view of our findings in Mr. Pravin Bhimshi Chhada, in ITA no.2483/ Mum./2011, vide Para-13 of this order, we do not adjudicate the same as it would be an academic exercise.

17. In the result, assessee's appeal is dismissed.

18. To sum up, assessee's appeal in ITA no.2483/Mum./2011, is allowed in part and appeal in ITA no.6319/Mum./2009, is dismissed.

Order pronounced in the open Court on 31st May 2011

Sd/-	Sd/-
ASHA VIJAYRAGHAVAN	**J. SUDHAKAR REDDY**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

MUMBAI, DATED: 31st May 2011

Copy to:

(1) The Assessee
(2) The Respondent
(3) The CIT(A), Mumbai, concerned
(4) The CIT, Mumbai City concerned
(5) The DR, "C" Bench, ITAT, Mumbai

TRUE COPY
BY ORDER

Pradeep J. Chowdhury
Sr. Private Secretary

ASSISTANT REGISTRAR
ITAT, MUMBAI BENCHES, MUMBAI