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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA 1/2021**

PR. COMMISSIONER OF TAX, ... Appellant

Through: Mr. Zoheb Hossain, Advocate with Mr. Vipul Agarwal, Advocate.

versus

SH ANUMOD SHARMA ..... Respondent

Through: Mr. R. Madhav Bera, Advocate with Mr. Paritosh Jain, Mr. Divyansh Jain, Mr. Dennis Panmei, Mr. Aakash Bhardwaj, Mr. Keshav Maheshwari, Mr. Rishi Jaiswal and Ms. Tanya Minocha, Advocates.

% ***Date of decision: 20th September, 2021***

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE NAVIN CHAWLA

MANMOHAN, J. (Oral)

1. Present appeal has been filed challenging the order dated 26th February, 2019 passed by the ITAT in ITA No. 6892/DEL/2015. In the present appeal, the Principal Commissioner of Income Tax ('PCIT') has proposed the following questions of law:-

> *"i. Whether on facts and in the circumstances of the case the Hon'ble ITAT has not erred in law in dismissing the appeal filed by the revenue and upholding the order of CIT(A) in deleting the addition of Rs. 10,57,01,194/- made by AO under section 2(22)(e) of the Income Tax Act, 1961*

in contravention of the law laid down by the Hon'ble Supreme Court in the case of Vikram Krishna Vs. PCIT (2020) 114 taxmann.com 197 (SC)?

ii. Whether in law and on facts of the case the order of the Hon'ble ITAT is not erroneous and not perverse?"

2. During the course of hearing, learned counsel for the appellant submits that the finding of the Commissioner, Income Tax Appeal ['CIT(A)'] and Tribunal are incorrect and bad in law and the finding of the Assessing Officer must be accepted, inasmuch as, the agreement between the parties was not registered and was made only on a stamp paper of Rs. 100/-.

3. Having heard learned counsel for the appellant, this Court finds that the issue canvassed during the hearing is not one of the proposed questions of law. In fact, the proposed question of law is that whether the Tribunal erred in deleting the addition of Rs. 10,57,01,194/- made by the Assessing Officer under Section 2(22)(e) of the Income Tax Act, 1961 ('the Act') in contravention of the law laid down by the Supreme Court in the case of ***Vikram Krishna Vs. PCIT (2020), 114 taxmann.com 197 (SC)***.

4. A perusal of the paper book reveals that the Supreme Court dismissed the Special Leave Petition *in limine* against the judgment of this Court in ***Vikram Krishna*** (supra). It is settled law that summary dismissal of Special Leave Petition does not mean approval by the Supreme Court of the view taken by the High Court. Further, the Division Bench had dismissed the appeal filed by the assessee holding that in view of the peculiar facts in that case, the agreement to sell and cancellation of such agreement was merely a cover up with the

camouflage for giving loan to the assessee by the company to avoid contravention under Section 2(22)(e) of the Act.

5. In the present case, both the CIT(A) as well as Tribunal have given findings of the fact that the advance received from the company by the assessee was in the nature of trade advanced booking of commercial place being built by the assessee. Both the CIT(A) as well as the Tribunal have further held that in the present case, it was the company which owed money to the assessee rather than the other way round. The relevant findings of the CIT(A) as well as Tribunal are reproduced hereinbelow:-

> Finding of the CIT(A):-
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> *"12. The AO had further highlighted in the assessment order at page no* 9 *that the appellant had taken loans and advances from Apra Auto (India) P Ltd in earlier years as well. In this regard, the appellant was directed to file his ledger account with Apra Auto (India) P Ltd and vice-versa* so *as to see if the facts were as highlighted by the AO in the assessment order. It is seen that for the FY 11-12 i.e. preceding FY, the appellant had a outstanding from Apra Auto (India) P Ltd as on 01.04.2010 to the tune of Rs 1,11,43,224 and during the entire year, various payments have been made either by the company or by the appellant but at no point of time, there is any net outstanding by the appellant towards Apra Auto (India) P Ltd. In view of this, the observations of the AO as mentioned above does not seem to have factual legs.*
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> *13. The perusal of AO/JCIT's comments in the remand report clearly shows that no distinction between the two deals has been pointed out either during assessment proceedings or the appellate proceedings. It has been the claim of the appellant that both the deals were entered into during the year under consideration in the normal course*

of business and the AO could not accept one with the outside party and reject one with the associate corporate entity. It is seen that the appellant had received an amount of Rs.2,50,00,000 from N.H. Learning Infrastructure Services Ltd in pursuance of the agreement to sell and the said receipt of amount has been accepted as such by the AO which means that the AO was satisfied with regard to the identity, creditworthiness and genuineness of the transaction so as not to invite any deeming provisions u/s 68 with reference to the said amount. This being so it was not open to the AO to treat another exactly similar transaction entered into by the appellant with the company in which he is substantially interested as not being in the ordinary course of business. Nothing has been highlighted to draw any distinction between the two transactions as the language as well as the judicial stamp paper used for both the transactions is exactly the same. Therefore, I don't find logic in the conclusion of the AO in treating the impugned transaction with M/s Apra Auto India P. Ltd as being one for the purposes of avoiding the provisions of section 2(22)(e). Here, it would be important to note that the appellant had an amount receivable to the tune of Rs 78,84,793 and Rs1,95,390 as on 31.03.2011 and 31.03.2011 from M/s Apra Auto India P. Ltd. The perusal of the copy of account shows that during the entire period of the FY under consideration, there have been amounts outstanding towards M/s Apra Auto India P. Ltd rather than the other way round. Therefore, apart from receipt of amounts on account of the proposed commercial sale by the appellant, no amounts had been received by the appellant from M/s Apra Auto India P. Ltd. The amounts that had been received were on account of repayments by M/s Apra Auto India P. Ltd to the appellant rather than other way round. The transaction of proposed sale of commercial space, being on commercial considerations and in the normal course of business of the appellant clearly comes in the exception clause of section 2(22)(e). In view of the above facts and circumstances of the case, the

addition made by the AO to the tune of Rs. 10,57,01,194 is directed to be deleted."

Finding of the Tribunal:-

"*17. In nutshell, the assessee has also not received any advance in the nature of loan or advances as contemplated in the section 2(22)(e) of the Income tax Act, 1961 but received advance against sale of commercial space developed by the assessee on his own land in collaboration with M/s Unitech Limited as per Buyer's agreement. We find that provisions of section 2(22)(e) of the Income tax Act, 1961 are not applicable in case of the assessee as the assessee has received advance of Rs.5,62,00,000/from the said company against sale of commercial space in Signature Tower - II, Sector - 15, Gurgaon, Haryana. Since, the said receipts of advance of Rs.5,62,00,000/- against sale of commercial space is not a receipt in the nature of loan or advance as contemplated in section 2(22)(e) of the Income tax Act, 1961 which attracts the provisions of in that section as the said advance is in the nature of business advance which did not fall within the ambit of provisions of section 2(22)(e) of the Income Tax Act, 1961.*

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19. Having gone through the entire factum of the issue, the case laws cited by both the parties, rationale of the ld. CIT (A), keeping in view the fact that it is the company which owes the assessee the money rather vice-versa, it is unequivocally proved that the advance received from the company by the assessee is in the nature of trade advance against the booking of commercial place being built by the assessee, we hereby decline to interfere with the order of the ld. CIT (A) in deleting the addition made by the AO u/s 2(22)(e)."

6. Keeping in view the concurrent findings of fact by the CIT(A) as well as by the Tribunal, this Court is of the view that the said

findings should not be lightly interfered with. In fact, the Supreme Court in ***Hero Vinoth (Minor) vs. Seshammal, (2006) 5 SCC 545*** has also held that *"in a case where from a given set of circumstances two inferences of fact are possible, the one drawn by the lower appellate court will not be interfered by the High Court in second appeal. Adopting any other approach is not permissible.*" It has also held that there is a difference between question of law and a "substantial question of law".

7. In any event the impugned judgment in no manner can be said to be in contravention of the judgment of this Court in ***Vikram Krishna*** *(*supra) which admittedly proceeded on the peculiar facts of the said case. Accordingly, the present appeal is dismissed.

MANMOHAN, J

NAVIN CHAWLA, J

SEPTEMBER 20, 2021
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