IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "B" : DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER

ITA.No.5188/Del./2019
Assessment Year 2013-2014

M/s. Exotica Housing & Infrastructure Company Pvt. Ltd., 228, Basement, Jagriti Enclave, Delhi - 092 PAN AABCE6019K	vs.	The Income Tax Officer, Ward – 8 (4), New Delhi.
(Appellant)		(Respondent)

For Assessee :	Shri Kapil Goel, Advocate
For Revenue :	Shri Jagdish Singh, Sr. D.R.

Date of Hearing :	18.06.2020
Date of Pronouncement :	24.06.2020

ORDER

PER BHAVNESH SAINI, J.M.

This appeal by Assessee has been directed against the Order of the Ld. CIT(A)-34, New Delhi, Dated 18.03.2019, for the A.Y. 2013-2014.

2. We have heard the Learned Representatives of both the parties through video conferencing and perused the material on record.

3. In the present appeal the assessee challenged the addition of Rs.2,88,92,817/- made on account of deemed dividend under section 2(22)(e) of the I.T. Act, 1961.

4. The brief facts of the case are that the assessee company is engaged in the business of commission agent and property development. The return declaring income of Rs.16,19,070/- was filed on 17.10.2013. The A.O. completed assessment under section 143(3) of the I.T. Act, 1961, after making the impugned addition of Rs.2,88,92,817/- under section 2(22)(e) of the I.T. Act on account of deemed dividend. The total income was assessed at Rs.3,05,11,890/-. It is observed by the A.O. that during the year under consideration, assessee company has received loans and advances for a value of Rs.23,70,33,000/- from M/s Exotica Housing and Infra Projects Pvt. Ltd., which was squared off during the year. The assessee held 98% shares of M/s Exotica Housing and Infra Project Pvt. Ltd. Therefore, A.O. has taken a view that case of the assessee has come within the purview of section 2(22)(e) of the Act and amount received was to be considered

as deemed dividend in the hands of the assessee. The A.O. issued show cause to the assessee as to why the amount in question should not be considered as deemed dividend and why the amount of Rs.2,88,92,817/- i.e. accumulated profit of advance giving company is not to be considered as undisclosed income of the assessee. The assessee submitted before the AO that it has taken money from its subsidiary company which was repaid within a short span of time. The transaction between the assessee company and its subsidiary company are in the nature of current account transactions. Hence provisions of section 2(22)(e) is not applicable in the case of the assessee. The A.O. however, did not accept the contention of the assessee as the amount was taken to discharge its liability by the assessee and advance was not made in the ordinary course of business. The A.O. accordingly made the impugned addition to the extent of accumulated profit of advance giving company as deemed dividend in the hands of the assessee.

5. The assessee challenged the addition before the Ld. CIT(A). The written submissions of the assessee is

reproduced in the appellate order in which the assessee reiterated the same facts before the Ld. CIT(A). It was also submitted that the transactions between the assessee company and its subsidiary company are in the nature of current account transactions, therefore, case of assessee would not fall within the provision to Section 2(22)(e) of the I.T. Act, 1961. It was submitted that it is a trite Law that current account transactions are outside the purview of deemed dividend and hence, same cannot be recorded as deemed dividend. It is submitted that no part of the current account can be treated as loans and advances as the amount is constantly moving one and the balances reflected in the current/running account are momentary in nature and subject to frequent changes. Several decisions of different Benches of the Tribunal and various High Courts were relied upon on this proposition that the amount in question could not be treated as dividend in view of the fact that the amount fell in clause (ii) of Section 2(22)(e) of the Act and it is specifically excluded from the definition of the dividend. The assessee in support of this contention also

enclosed statement of current account to show that current account transactions are outside the purview of the deemed dividend and cannot be taxed in the hands of the assessee. The money in question was advanced by subsidiary company to the assessee company in the ordinary course of business and as per Memorandum and Articles of Association money lending is one of the main objectives of the subsidiary company. The assessee also submitted that without prejudice to the above contention the accumulated profit shall not include the current year's profit and there is a distinction between accumulated profit of the business and current year's profit of the business.

6. The Ld. CIT(A), however, did not accept the contention of the assessee and distinguished all the decisions relied upon by the assessee and dismissed the appeal of assessee.

7. Learned Counsel for the Assessee reiterated the submissions made before the authorities below and referred to the copy of the current account between the parties which is filed at page No.7 of the PB and also referred to

page-6 of the PB to show that in earlier year as well in subsequent years on the same pattern no addition on account deemed dividend have been made against the assessee. He has relied upon the following decisions :

1.	Order of ITAT, Delhi G-Bench, Delhi in the case of Saamag Developers Pvt. Ltd., & Others New delhi vs., The ACIT, Central Circle-19, New Delhi in ITA.No.2053/Del./2017 etc., Dated 08.10.2018.
2.	Order of ITAT, Mumbai G-Bench, Mumbai in the case of Mr. Girish Vazirani, Mumbai vs., ITO, Ward-9(2)(1), Mumbai in ITA.No.83/Mum./2013, Dated 14.11.2014.
3.	Judgment of Calcutta High Court in the case of CIT vs., Gayatri Chakravarthy 407 ITR 730 (Cal.).
4.	Judgment of Hon'ble Punjab & Haryana High Court in the case of Surajdev Dada vs., CIT 367 ITR 78 (P&H).

8. On the other hand, the Ld. D.R. relied upon the Orders of the authorities below.

9. We have considered the rival submissions. The assessee submitted before A.O. that it has taken money from its subsidiary company M/s. Exotica Housing and Infra Projects Pvt. Ltd., which were repaid within a short span of time. The transactions between the assessee company and its subsidiary companies are in the nature of current account transactions. In support of this contention

the assessee has filed copy of the current account transactions before the authorities below. Copy of the same is also filed at page-7 of the PB in respect of assessment year under appeal. The assessee submitted that current account transactions are outside the purview of deemed dividend and cannot be regarded as deemed dividend. The assessee also submitted that the impugned amount which was received by assessee from subsidiary company could not be treated as deemed dividend in the view of the fact that the said transaction fall under Clause-ii of Section 2(22)(e) of the I.T. Act, 1961 and specifically excluded from the definition of *"Dividend"*. Section 2(22)(e), Sub-Clause-ii provides that *"Dividend does not include any advance or loan made to a share holder [or the said concern] by the Company in the ordinary course of its business where the lending of money is a specific part of business of the Company."* As per the said provision of Clause-ii of Section 2(22)(e) of the I.T. Act, 1961 any advance or loan made by the Company to a shareholder or a concern in which the share holder has substantial interest would not be regarded

as dividend if the advance or loan was made by the lending Company in the ordinary course of its business and lending of money was substantial part of the business of the lending company. The assessee further submitted before the authorities below that the money lend by the subsidiary Company to the Assessee Company was in the ordinary course of business and as per the Memorandum & Articles of Association money lending is one of the main part of the subsidiary company. This fact is not disputed by the authorities below. The assessee further submitted that the current account between the assessee company and the subsidiary company for business purpose would not be deemed dividend, so that no addition could be made. In the case of M/s. Saamag Developers Pvt. Ltd., vs., ACIT (supra), the ITAT, Delhi Bench considered an identical issue which was also considered in its case in earlier year in the light of several decisions of various Benches of the Tribunal and different High Courts and held that *"the relevant record reveal that they are in the form of current and inter banking account and contain both type of entries i.e., giving and*

taking the amount and appear to be current account and cannot be considered as loans and advances as contemplated under section 2(22)(e) of the I.T. Act, 1961." When subsequent year's appeals was considered by the Tribunal, the assessee relied upon Judgments of Hon'ble Delhi High Court in the case of Creative Dyeing and Printing Pvt. Ltd., 318 ITR 476 (Del.), CIT vs., Rajkumar 318 ITR 462 (Del.), CIT vs., Ambassador Travels Pvt. Ltd., 318 ITR 376 (Del.) and Judgment of Hon'ble Bombay High Court in the case of CIT vs., Nagindas M. Kapadia 177 ITR 393 (Bom.) in which it was held that *"the amounts advanced for business transaction will not fall within the definition of deemed dividend under section 2(22)(e) of the I.T. Act".* The Tribunal following the same decisions as well as decision in earlier year in the case of M/s. Saamag Developers Pvt. Ltd., New Delhi & Others (supra) held that *"the amount in question could not be treated as deemed dividend under section 2(22)(e) of the I.T. Act, 1961".* The findings of the Tribunal in paras 17 to 24 are reproduced as under :

"17. On Ground Nos. 5 and 6, assessee-company challenged the Order of Ld. CIT(A) in confirming addition of Rs.47,08,000/- under section 2(22)(e) of the I.T. Act, 1961.

18. During the course of assessment proceedings, transaction between group companies have been treated as deemed divided under section 2(22)(e) of the I.T. Act as a result of advance received by the assessee-company from the group companies has been covered as deemed divided to the extent of Rs.47,08,000/- by the A.O.

19. The addition was challenged before the Ld. CIT(A). Written submissions of the assessee-company is reproduced in the appellate order, in which the assessee-company explained that when the group of companies have been promoted by (i) Shri Dinesh Pandey, (2) Shri Pramod Pandey and (3) Smt. Kusum Pandey, consisting of the following entities along with assessee-company viz., (a) Saamag Construction Ltd., (b) Saamag Infrastructure Ltd., (c) Saga Developers Pvt. Ltd., (d) Pyramid Realtors Pvt. Ltd., (e) Max Buildtech Pvt. Ltd., (f) Hamshir Exim Pvt. Ltd., (g) Logic Construction Pvt. Ltd., and (h) Banyan Infrastructure Pvt.

Ltd., All these companies are engaged jointly in the business of real estate development i.e, acquisition of land, development thereof, construction of residential apartments, commercial complexes etc., It is a known fact that under the respective State Land Laws parcels of land can be acquired by one entity with restrictions on the area of land. It is an accepted practice in real estate business to have a number of entities of the same group which has an intention to develop a large/huge real estate project. In such cases, the business of real estate development is jointly done by such group entities in tandem with each other i.e., funds mobilized by each entity for acquiring land, for registration thereof, for development, construction, supervision of construction. The Saamag group of companies and a few outside concerns have expertise in the field of real estate development, came together for development of an Integrated Township in the State of Uttar Pradesh. The group also entered into a Consortium Agreement with the object of development of Integrated Township in the State of Uttar Pradesh. Different responsibilities have been provided to each constituent and

assessee company has been assigned the work of arranging finance and look-after implementation of the project, if awarded. The development of the Integrated Township envisaged acquisition of substantial area of land. These companies have received the advances from other group companies for the acquisition of the lands and other business purposes. The assessee consisting of the following entities along with assessee-company filed chart showing utilization of funds by the assessee-company received from (1) Hamshir Exim Pvt. Ltd., and (2) Max Buildtech Pvt. Ltd., It was submitted that money have been utilised and applied towards business of real estate development in respect of Bamhetta project and Rudrapur Project. Not a penny of monies so received has reached the shareholders. Nothing has endured to the benefit of shareholders i.e., Members of Pandey family who are having substantial shareholders in all Saamag group of companies. All monies have been applied for business purposes. Therefore, Section 2(22)(e) will not apply. The assessee-company relied upon the decision of Hon'ble Delhi High Court in the case of Creative Dyeing and

Printing Pvt. Ltd., 318 ITR 476 (Del.) in which it was held that "the amounts advanced for business transaction will not fall within the definition of deemed dividend under section 2(22)(e) of the I.T. Act." The assessee-company also relied upon decision of Hon'ble Delhi High Court in the case of CIT vs. Ambassador Travels Pvt. Ltd., (2009) 318 ITR 376 (Del.) in which the assessee-company also entered into normal business transactions as a part of its day-to-day business activities. It was held that "the financial transactions cannot in any circumstances be treated as loans or advances received by the assessee." The assessee-company also relied upon decision of Hon'ble Delhi High Court in the case of CIT vs. Raj Kumar 318 ITR 462 (Del.) in which the Hon'ble High Court interpreted the term "Advance" to mean such advance which carries an obligation of repayment. Here in, the sums of monies expended are towards purchase of land for the real estate business, such land being registered in the name of the member company. It was, therefore, held that "a trade advance which is in the nature of money transacted to give effect to a commercial transaction would not fall within the

ambit of the provisions of Section 2(22)(e) of the I.T. Act". The assessee-company also relied upon decision of the Hon'ble Bombay High Court in the case of CIT vs. Nagin Das M. Kapadia 177 ITR 393 (Bom.) in which it was held that "the words "Loans or Advances" can be applied to loans or advances simplicitor and not to those transactions carried-out in the course of business."

20. The Ld. CIT(A), however, did not accept the contention of assessee-company and noted that even if it is considered that these advances are business advances, Section 2(22)(e) does not differentiate between trade/business advance or other advance. Since the shareholding was more than 10% in assessee-company, therefore, addition was confirmed and appeal has been dismissed.

21. Learned Counsel for the Assessee reiterated the submissions made before the authorities below and submitted that that funds were taken from sister concerns for business transactions and amounts have been utilised for the purpose of business only. Therefore, the provisions of Section

2(22)(e) of the I.T. Act, will not apply. Further, the issue is covered by the Order of ITAT, G-Bench, in the case of assessee-company and others dated 12.01.2018 (supra).

22. On the other hand, Ld. D.R. relied upon the Orders of the authorities below and submitted that shareholding pattern and profit are not disputed. It is not proved that it was a commercial transaction. It is a loan or advance. Therefore, the addition is rightly made. The Ld. D.R. relied upon decision in the case of Smt. P. Sharada vs. CIT 229 ITR 444.

23. We have heard the rival submissions and perused the material available on record. It is not in dispute that when the group of companies confronted on various entities engaged jointly in the business of real estate development in the State of Uttar Pradesh. Consortium Agreement and other Agreements were executed between the group concerns. Different responsibilities have been attached to group of consortium. The assessee-company and others have been taken money from group companies and utilised for the purpose of development in respect of Bamhetta Project and

Rudrapur Project. No amount have gone to shareholder. The above contention of assessee-company have not been disputed by the authorities below. It is, therefore, clear that amounts have been received by assessee-company for business consideration and business transactions only carried out by the group companies. An identical issue have been considered by ITAT, Delhi Bench in the case of assessee-company and others and vide Order dated 12.01.2018, the Tribunal in paras 14 to 14.5.2 of the Order held as under :

> *"14. The aforesaid grounds relate to the issue with regard to the deemed dividend. The assesses are the group companies and are in the business of real estate development and were in the process of execution of various real estate projects including an integrated township at Village Shahpur Bameta, Ghaziabad. All the group companies maintained current account with each other and transferred the money as and when needed to each other. During the year under consideration also, the assessee had transferred certain money to other group companies and similarly the other group companies had also transferred certain money to the appellant from time to time as and when need arose.*
>
> *14.1 The AO was of the view that because the assessee had made advances to its sister concerns and the shareholders are*

common shareholders, hence whatever advance has been made by the assessee to other concerns having common shareholders, the same has to be assessed as deemed dividend u/s 2(22)(e) of the IT Act and then made the additions on protective basis in the hands of payer company, i.e. the assessee.

14.2. However, on appeal the Ld. CIT(A) accepted the assessee's arguments that as far as deemed dividend as contemplated u/s 2(22)(e) of the Act is concerned, the same cannot be considered in the hands of payer company and then deleted the additions as made by the AO.

14.2.1 However, looking into the accounts, the Ld. CIT (A) noticed that the assessee-company had received amounts from various group companies which have to be considered as deemed dividend u/s 2(22)(e) of the IT Act and then enhanced the income of the aforesaid assessee-companies by an amount which had been received.

14.3. The assessee has come forward in the present appeals against the action of the Ld. CIT(A) wherein he has enhanced the income of the assessee with an amount which had been received from other group companies. The assessee objected to the action of Ld. CIT(A) on the following grounds:

(i) No opportunity has been granted by the CIT (Appeals) before enhancing the income, hence the enhancement so made by CIT (Appeals) is against the law and in violation of natural justice.

(ii) It is a settled rule of law that unless and until the assessee falls within the ambit of charging section by clear words, he cannot be taxed by implications. Hence the charging section has to be construed strictly and for this purpose the appellant relied on the CWT vs. Eliss Bridge Gymkhana in 229 ITR 1. The appellant states that the addition as made by the CIT (Appeals) is not only against the very purpose of provision of section 2(22)(e) of the IT Act but is also not covered by the provision of section 2(22)(e) of the IT Act.

(iii) The provision of section 2(22)(e) of the IT Act is a deeming provision. Hence the deeming provision should be construed strictly and be confined and limited to the purpose for which they are created and should not be extended beyond their legitimate field as held by the Supreme Court in the case of CIT vs. Vadilal Lalubhai in 86 ITR 2 and 181 ITR 1 (Kerala), CIT vs. P.V. John.

(iv) In the case of CIT vs. Sarathy Mudaliar in 83 ITR 170, the Hon'ble Supreme Court.

14.3.1. In the case of CIT vs. Sarathi Mudaliar in 83 ITR 170, the Hon'ble Supreme Court, while considering the provision of Section 2(6A)(e) of the Indian Income-tax Act, 1922 (which is parimateria to Section 2(22)(e) of the IT Act), observed as under:

> *"Sec 2(6a)(2) gives an artificial definition of 'dividend'. It does not take in dividend actually declared or received. The dividend taken note of by that provision is a deemed dividend and not a*

> *real dividend. The loan granted to a shareholder has to be returned to the company. It does not become the income of the shareholder. For certain purposes, the Legislature has deemed such a loan as 'dividend'. Hence, sec. 2(6A)(e) must necessarily receive a strict construction …. (p. 173)."*

14.3.2. The Hon'ble Supreme Court, while considering the provision of Section 2(6A)(e) of the Indian Income-tax Act, 1922, which is parimateria to the provisions of Section 2(22)(e) of the IT Act, in the case of Navneet Lal C. Javeri vs. K.K. Sen, AAC in 56 ITR 198 at pages 207-208 of the Report had judicially noticed the purpose and the object of the insertion of such provision under the IT Act in the following words:

> *"In dealing with Mr. Pathak's argument in the present case, let us recall the relevant facts. The companies to which the impugned section applies are companies in which at least 75 per cent of the voting power lies in the hands of persons other than the public, and that means that the companies are controlled by a group of persons allied together and having the same interest. In the case of such companies, the controlling group can do what it likes with the management of the company, its affairs and its profits within the limits of the Companies Act. It is for this group to determine whether the profits made by the company should be distributed as dividends or not. The declaration*

of dividend is entirely within the discretion of this group. When the legislature realized 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 to one of its shareholders, it was plain that the object of such a loan or advance was to evade the payment of tax on accumulated profits under section 23A. It will be remembered that an advance or loan which falls within the mischief of the impugned section is advance or loan made by a company which does not normally deal in money-lending, and it is made with the full knowledge of the provisions contained in the impugned section. The object of keeping accumulated profits without distributing them obviously is to take the benefit of the lower rate of super-tax prescribed for companies. This object was defeated by section 23A which provides that in the case of undistributed profits, tax would be levied on the shareholders on the basis that the accumulated profits will be deemed to have been distributed against them. Similarly, section 12(1B) provides that if a controlled company adopts the device of making a loan or advance to one of its shareholders, such shareholders will be deemed to have received the said amount of the accumulated profits and would be liable to pay tax on the basis

that he has received the said loan by way of dividend. It is clear that when such a device is adopted by a controlled company, the controlling group consisting of shareholders have deliberately decided to adopt the device of making a loan or advance. Such an arrangement is intended to evade the application of section 23A. The loan may carry interest and the said interest may be received by the company; but the main object underlying the loan is to avoid payment of tax."

14.3.3. It has been consistently held by the various High Courts and the Tribunals that the business transactions are not covered by the provision of Section 2(22)(e) of the Act. The payments under business transaction are outside the purview of the provision of Section 2(22)(e) of the Act.

- *177 ITR 393 (Bom), CIT vs. Nagindas M. Kapadia*
- *173 Taxman 407 (Del), Ambassador Travels vs.*
- *(2005) 1 SOT 142 (Mum), Seamist Properties Ltd. vs. ITO*
- *(2007) 11 SOT 302 (Mum), M.S. Securities Ltd. vs. DCIT*
- *ITA No. 3036/Del/2005, Delhi Tribunal Bench order dated 9th May 2008 in the case of Creative Dyeing & Printing Pvt. Ltd. vs. ITO which has been affirmed by Delhi High Court reported in 318 ITR 476 (Del).*

14.3.4. Under the provisions of section 2(22)(e) of the IT Act, the legislature has uses the expression "by way of advances or loans" which shows that it is not all the payments

received from the sister company was to be treated as deemed dividend but only the payments which bear the characteristics of loans and advances are to be considered under the provisions of Section 2(22)(e) of the IT Act. Under the law, all the loans and advances are debts, but all debts are not loans and advances as contemplated u/s 2(22)(e) of the IT Act.

14.3.5. Under the Income-tax Act, the term 'loans and advances' has not been defined. Hence, it has to be understood in commercial sense and in the manner in which the Court has interpreted the same. The expression 'loan' was under consideration before the various Hon'ble High Courts and the Hon'ble Supreme Court of India.

14.3.6. In the case of Baidya Nath Plastic Industries (P) Ltd. & Others vs. K.L. Anand, Income Tax Officer in 230 ITR 522, the Hon'ble Delhi High Court, which is a Jurisdictional High Court, held that there is a distinction between the loan and deposit. In the case of loan, it is ordinarily the duty of the debtor to seek out the creditor and to repay the money according to the agreement, whereas, in the case of depositor to go to the depositee and make a demand for it.

14.3.7. In the case of Bombay Steam Navigation Co. Pvt. Ltd. vs. CIT in 56 ITR 52, the Hon'ble Supreme Court held that a loan of money undoubtedly results in a debt, but every debt does not involve a loan. Liability to pay a debt may arise from diverse sources, and a loan is only one of such sources.

Every creditor who is entitled to receive a debt cannot be regarded as a lender.

14.3.8. In the case of CIT, Lucknow vs. Bazpur Co-operative Sugar Factory Ltd. in 177 ITR 469, the Hon'ble Supreme Court further stated that for the purpose of loan there must be relationship of borrower and lender in the given transaction and if there is no relationship of borrower or lender then the amount received cannot be considered as loan.

14.3.9. In the case of Durga Prasad Mandelia's vs. Registrar of Companies (1987) 61 Companies Case 479, the Bombay High Court held as under:

> *"There can be no controversy that in a transaction of a deposit of money or a loan, a relationship of a debtor and credit must come into existence., The terms "deposit" and "loan" may not be mutually exclusive, but nonetheless in each case what must be considered is the intention of the parties and the circumstances. In the present case, barring the assertion of the respondent that the moneys advanced by the company to the Associated Cement Companies Ltd. constitute a loan and offend section 370 of the Companies Act, there is nothing else to show that these moneys have been advanced as a "loan". In the context of the statutory provisions, the word "loan" may be used in the sense of a "loan" not amounting to a deposit. The word "loan" in section 370 must now*

be construed as dealing with loans not amounting to deposits, because, otherwise, if deposit of moneys with corporate bodies were to be treated as loans, then deposits with scheduled banks would also fall within the ambit of section 370 of the Companies Act. Therefore, moneys given by the company to other bodies corporate is a loan within the meaning of section 370 of the Companies Act must be negatived. Therefore, the petitioners would well be entitled to the relief."

14.3.10. The expression "loans & advances" has also been used in the Interest Tax Act. Under the Interest Tax Act, the tax is leviable on interest. The interest has been defined under Interest Tax Act under section 2(7) of the Act in following words:

"(7) "interest" means interest on loans and advances made in India and includes –

(a) commitment charges on unutilized portion of any credit sanctioned for being availed of in India; and

(b) discount on promissory notes and bills of exchange drawn or mode in India;

but does not include –

(i) any amount chargeable to income-tax, under the Income Tax Act, under the head "Interest on Securities";

(ii) discount on treasury bills; (and)

(iii) interest on any term loan sanctioned before the 18th day of June 1980 where the agreement under which such loan has been sanctioned provides for the repayment thereof during a period of not less than three years.

Explanation. For the purposes of this sub-clause, "term loan" means a loan which is not repayable on demand;

(iv) interest on any deferred credit (that is to say, credit on the terms that the payment is to be deferred) sanctioned by a scheduled bank in connection with the export of capital plant and machinery outside India;

(v) interest on any loan in foreign currency sanctioned by any corporation or bank referred to in sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (9) for the import of capital plant and machinery from a country outside India."

14.3.11. The question arises before the Courts, whether the interest on debentures and Govt. Securities are liable to Interest tax or not. The Courts have consistently held that the debenture and the Govt. Securities do not bear the characteristics of loans and advances but they are the mode of investment. Hence, the interest received on debentures and Government Securities are not liable to tax under Interest Tax Act though they carry the interests thereon. To support his view, he relied upon following cases laws:-

- *259 ITR 312 (Bom), CIT vs. United Western Bank Ltd.*
- *259 ITR 295 (Bom), Discount & Finance House of India Ltd. vs. S.K. Bhardwaj*
- *87 ITD 11 (Del) PN Bank vs. DCIT*
- *115 ITD 218 (Ahd) (SB) Gujarat Gas Finance Service Ltd. v. Assistant Commissioner of Income Tax.*
- *[2006] 5 SOT 918 (Delhi)(SB) Housing & Urban Development Corporation Ltd. vs. JCIT*

14.3.12. In the case of Creative Dyeing & Printing Pvt. Ltd. in ITA No. 3036/ Del/2005, the Delhi Bench, ITAT vide order dated 9.5.2008 has held that if the amount received by the recipient company as investment from the payer company, then such amount will not be a loan and advance as contemplated u/s 2(22)(e) of the IT Act. The order of the Delhi Bench of the ITAT in case of Creative Dyeing & Printing Pvt. Ltd. has also been upheld by the Delhi High Court in CIT vs. Creative Dyeing & Printing Pvt. Ltd. in 318 ITR 476.

14.3.13. Section 2(22)(e) of the IT Act only considers those amounts which are having the characteristic of loans and advances. In the instant case, a transaction between the group concerns is not having a character of loans and advances but these are the current accounts. The transactions in current accounts are also outside the purview of section 2(22)(e) of the IT Act as held in the following cases:

- *28 SOT 383 (Mum Trib)*
  Bombay Oil Industries Ltd. vs. DCIT

- *367 ITR 78 (P&H)*
  CIT vs. Suraj Dev Dada

- *167 ITD 100 (Mum Trib)*
  Ravindra R. Fotedar vs. ACIT

- *IT Appeal Nos. 958 & 959 of 2015 dated 21.12.2015*
  DCIT vs. Schutz Dishman Biotech (P) Ltd. (Guj)

14.3.14. Under the provisions of section 2(22)(e) of the IT Act, the expression used is "company in either case possesses accumulated profits". In the case of Bhim Singh Jaipur vs. ACIT in ITA No. 89/JP/2008 as well as in the case of Madhuwanti Singh Jaipur vs. ACIT in ITA No. 88/JP/2008 reported in 42 Taxword 132, it has been held by the Tribunal, after considering the judgment of Delhi High Court in the case of R. Dalmia vs. CIT in 133 ITR 169, the expression "possess" means that there must be physical availability of the accumulated profits capable of disbursement and in case if the investment made by the payer company in their assets are already more than the accumulated profits shown in balance sheet, then it cannot be said that payer company possesses accumulated profits. In the instant case, all the payer companies are having investment in the real estate more than their accumulated profits shown in the balance sheet.

14.4. The Ld. CIT (DR) justified the action of the CIT(A) and stated that the additions as made are in accordance with

law because payer companies are having sufficient accumulated profits and the shareholders are common.

14.5. After hearing both the parties and perusing the relevant records, it reveals that they are in the form of current and inter banking accounts and contain both types of entries i.e. giving and taking the amount and appear to be a current account and cannot be considered as loans and advances as contemplated u/s 2(22)(e) of the IT Act.

14.5.1. We find that the Hon'ble Gujarat High Court in the case of DCIT vs. Shutz Dishman Biotech Pvt. Ltd, Tax Appeals No. 958 and 959 of 2015 dated 21st December 2015 held that if the accounts are inter banking accounts maintained by the parties, then they are not covered under the provision of section 2(22)(e) of the IT Act and no additions can be made as deemed dividend u/s 2(22)(e) of the IT Act. Similar propositions have also been made by the Punjab & Haryana High Court in the case of CIT vs. Suraj Dev Dada in 367 ITR 78 as well as the Mumbai Bench of the Tribunal in the case of Bombay Oil Industries Ltd. vs. DCIT reported in 28 SOT 383 and Ravindra R. Fotedar vs. ACIT in 167 ITD 100.

14.5.2. Keeping into consideration such position of law, we hold that the additions as made by the CIT (Appeals) in

terms of section 2(22)(e) of the IT Act are not correct because such amounts received cannot be considered as loans and advances. Even otherwise also, the payer companies had already made their investment in capital field more than the accumulated profits and in that situation it cannot be considered that those companies were having physical possession of accumulated profits capable of being disbursed. Therefore, the additions in dispute stand deleted".

23.1. In view of the above, it is clear that the identical issue have been decided by the Tribunal in the case of assessee and other group concerns. Following the same, we are of the view that the amount in question could not be treated as deemed dividend under section 2(22)(e) of the I.T. Act. The issue is covered in favour of the assessee by the Order of the Tribunal. We, accordingly, set aside the Orders of the authorities below and delete the entire addition. In the result, Ground Nos.5 and 6 of the appeal of the assessee are allowed.

24. In the result, ITA.No.2053/Del./2017 of the Assessee is allowed."

9.1. The ITAT, Mumbai Bench in the case of Mr. Girish Vazirani, Mumbai vs., ITO, Ward-9(2)(1), Mumbai in ITA.No.83/Mum/2013, Dated 14.11.2014 held as under :

> *"5. We found that similar issue has been considered by the Hon'ble Punjab and Haryana High Court in the case of Shri Suraj Dev Dada, reported in 367 ITR 78, wherein it was held that assessee having running account with the company, the provisions of Section 2(22)(e) of the Act were not attracted as this provisions was inserted to stop the misuse by the assessee by taking the funds out of the company by way of loans advances instead of dividends and thereby avoid tax.*
>
> *6. Applying the proposition of law as discussed above to the facts of the present case, we found that assessee was having debit balance only for 17 days out of 365 days. On all other dates, assessee was having credit balance and peak of such credit was Rs.8,49,700/-. It is also a matter of record that assessee has not charged any interest in respect of temporary advance given to the company. Accordingly, we do not find any merit in the action of the lower authorities for bringing such transaction in the net of the Section 2(22)(e) of the Act."*

9.2. The ITAT, Kolkata Bench-B, Kolkata in the case of M/s. Sree Krishna Gyanodaya Flour Mills Pvt. Ltd., Kolkata vs., Pr. CIT, Central, Kolkata-2 in ITA.No.1008/ Kol./2016, Dated 14.02.2018 in para-5 held as under :

5. We have heard the rival contentions and perused the material available on record. In the instant case, Ld. Pr. CIT u/s 263 of the Act held that the order of AO is erroneous in so far as prejudicial to the interest of revenue on the ground that AO has not treated the amount of loan received by the assessee from SVPL as deemed dividend income in pursuance to Sec. 2(22)(e) of the Act.

As per the assessee, the loan taken by assessee is representing the current account transaction, therefore the provision of Section 2(22)(e) of the Act cannot be attracted to such loan. We find important to refer the ledger of transactions between assessee and the SVPL in the books of assessee which is reproduced below:-

Ledger account
1-Apr-2011 to 31-Mar-2012

Date	Particulars	Vch Type	Vch No.	Debit	Credit
01-4-11	By opening balance				2,82,25,000
25-4-11	Indusind Bank Ch. No. Being the amount received from subhchintk Vancom Pvt. Lt. Through letter.	Receipt	11		50,00,00,000
30-6-11	To Aspective Vanlajaya Pvt. Ltd. being amountpaid to Subhchintak by aspective vanijya P ltd.	Journal	100	9,00,00,000	
15-7-11	To Octal Suppliers PVt.td. being amt paid to Subhchintak Vancom by octal suppliers on behalf of SKG	Journal	107	19,00,00,000	
27-7-11	To Indusind Bank Ch. No. being the amount paid to Subhchintak Vancom Pvt. Ltd. Through letter.	Payment	45	1,04,0,000	
29-9-11	To Aspective Vanijya Pvt. Ltd. Being amount paid to Subhchintak by apective vanijya p ltd.	Journal	115	7,00,00,000	
25.10.11	To Octal Suppliers Pvt. Ltd. Being amt. paid to Subhchintak Vancom by Octal Suppliers on behalf of SKG	Journal	119	21,00,00,000	
23-2-12	By Aspective Vanijya Pvt. Ltd. Being Aamt. Paid to Aspective Vannijya by Subchintak Vancom	Journal	197		56,00,00,000
	To closing balance			57,04,00,000 51,78,25,000	1,08,82,25,000
				1,08,82,25,000	1,08,82,25,000

On perusal of the above ledger, it is revealed that there are several transactions between assessee and SVPL and on some occasions, assessee has taken loan from SVPL and similarly on some occasions, assessee has given loan / advance to SVPL.

The purpose of Section 2(22)(e) of the Act is to tax the benefit extended by private limited company to its shareholders holding shares not less than 10% as beneficial owner of shares (not being shares entitled to a fixed rate of dividend income). There is no dispute with regard to shareholding of the assessee. Now coming to the amount of advance taken by assessee, we note that assessee has not only taken loan / advance from SVPL, but also it has sometime given advance to SVPL. Thus, there was change in the balance shown by assessee. Thus, it cannot be termed as advance taken by assessee as it was fluctuating during the year. In holding so, we find support and guidance from the order of co-ordinate Bench of this Tribunal in the case of *Bombay Oil Industries Ltd. vs. DCIT* reported in [2009] 28 SOT 383 (Bom), wherein it was held as under:-

> *"From the above it is clear there is distinction between deposits viz-a-vis loans/advances. Section 2(22)(e) enacts a deeming fiction whereby the scope and ambit of the word dividend has been enlarged to bring within its sweep certain payments made by a company as per the situations enumerated in the section.* **Such a deeming fiction would not be given a wider meaning than hat it purports to do**. *The provisions would necessarily be accorded strict interpretation and the ambit of the fiction would not be pressed beyond its true limits. The requisite condition for invoking Section 2(22)(e) of the Act is that payment must be by way of loan or advances. Since there is a clear distinction between the inter-corporate deposits viz-a-vz loans/advances, according to us the authorities below were not right in treating the same as deemed dividend u/. 2(22)(e) of the Act" [emphasis supplied]*

Similarly, we also support and guidance from the judgment of Hon'ble jurisdictional High Court in the case of *Pradip Kumar Malhotra v. CIT* 338 ITR 538 (Cal) wherein the Hon'ble High Court held as under:-

> *"The phrase* ***"by way of advance or loan"*** *appearing in sub-clause (e) of section 2(22) of the Income-tax Act, 1961, must be construed to mean those advances or loans which a shareholder enjoys simply on account of being a person who is the beneficial owner of share (not being share 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 share-holder, in such case, such*

advance or loan cannot be said to be deemed dividend within the meaning of the Act. thus, gratuitous loan or advance given by a company to those clauses of shareholders would come within the purview of section 2(22) but not cases where the loan or advance is given in return to an advantage conferred upon the company by such shareholder." [emphasis supplied]

From the foregoing discussion, there remains no doubt that the transactions between assessee and SVPL is representing current account transactions. Therefore, the provision of Section 2(22)(e) of the Act cannot be attracted to such transactions. Keeping in view the above discussions, and also bearing in mind the entire facts of the case, we deem it fit and proper to uphold the grievance of the assessee and quash the impugned revision order as devoid of jurisdiction. The assessee gets the relief, accordingly.

9.3. The crux of the above decisions are that the transactions carried out through current account for business purposes would not fall within the definition of *"Deemed Dividend"*. Considering the facts of the case in the light of above decisions, we examined the ledger account of the subsidiary company in the books of the assessee company, copy of which is filed at page-7 of the PB, which reveals that initially the assessee company has taken amount from the subsidiary company which was repaid and thereafter, it is the assessee company which has given the amount to the subsidiary company on most of the occasions

and later on the subsidiary company has returned the amount to the assessee. Therefore, such facts would clearly reveal that provisions of Section 2(22)(e) would not be attracted in the case of assessee company because on most of the occasions the assessee company has advanced the amount to the subsidiary company and ultimately the balance is squared-up at the end of the year. The assessee company has also filed copy of the ledger account of the subsidiary company for preceding A.Y. 2012-2013 at page-6 of the PB, which revealed that there was a substantial opening balance and subsidiary company has paid the amount to the assessee company and later on amounts have been returned by the assessee company to the subsidiary company. Learned Counsel for the Assessee submitted that similar is the pattern of the transaction in current year and in subsequent year as well and no addition have been made by the Revenue Authorities against the assessee company in earlier assessment year as well as in subsequent assessment year on account of deemed dividend under section 2(22)(e) of the I.T. Act, 1961. The ledger

account of the subsidiary company in assessment year under appeal also clearly reveals that it is the assessee company who have given the amount mostly to the subsidiary company which have been returned to the subsidiary company by the assessee company. Therefore, on such facts when the Revenue did not dispute the transactions in the current account between the assessee company and the subsidiary company in earlier as well as in subsequent year and the assessee company on most of the occasions have made payment to the subsidiary company, which have been returned by assessee company for business purposes, there was no reason to apply provisions of Section 2(22)(e) of the I.T. Act, 1961. It is clear from the Orders of the authorities below that assessee has been taken the plea consistently that provisions of Section 2(22)(e) of the I.T. Act, 1961, would not apply in the case of the assessee company because assessee company is maintaining the running transactions with its subsidiary company which are clear from PB-5 to 12 which are ledger account of this year as well as earlier year and subsequent

year and the same are in the nature of mutual and current account. Therefore, deeming provisions of Section 2(22)(e) of the I.T. Act, 1961, would not apply. Thus the rule of consistency shall have to be followed by the Income Tax Authorities as is held by the Hon'ble Supreme Court in the case of Radhasoami Satsung 193 ITR 321 (SC). The ledger account of the assessee company and the subsidiary company would clearly show the pattern of the similar transactions in nature which are purely temporarily financial accommodation for the business purposes. The assessee has pleaded before us that assessee company and its subsidiary company are in the same business of real estate and money have been used in the ordinary course of business of the assessee company. Therefore, it being the current account maintained between the assessee company and its subsidiary company, deeming fiction should not have been applied against the assessee. The above issue have been considered by the different Benches of the ITAT as reproduced above in which various decisions of different High Courts have been considered and it was held that

"when current account is maintained between the parties, provisions of Section 2(22)(e) of the I.T. Act, 1961, would not apply." Thus, the issue is covered by the aforesaid decisions of the Tribunal in favour of the assessee as well as various decisions considered by the Hon'ble jurisdictional Delhi High Court. In view of the above, we do not find any justification to sustain the addition. In view of the above findings, we set aside the Orders of the authorities below and delete the addition.

10. In the result, appeal of the Assessee allowed.

Order pronounced in the open Court.

Sd/-	Sd/-
(ANIL CHATURVEDI)	(BHAVNESH SAINI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Delhi, Dated 24th June, 2020

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'B' Bench, Delhi
6.	Guard File.

// BY Order //

Assistant Registrar : ITAT Delhi Benches :
Delhi.