

1. At question no. 8 of the notice dated your goodself asked why not the payment received from the M/S ABC Pvt. Ltd on account of renovation of your own building be deemed as dividend under section 2(22)(e).
2. It is submitted that the payment made to the assessee for renovation work by the tenant company has not come under purview of section 2(22)(e). The tenant company is using this premise as its registered office and is also carrying out its business operations from there. The company was using this place for its business activities, it was the company's decision to carry out certain additions to the said premises. The relevant extract of the provisions of section 2(22)(e) are as under:

“Dividend” includes—

*(e) any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) [made after the 31st day of May, 1987, **by way of advance or loan to a shareholder**, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power, or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern)] or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits;*

Therefore, any amount given by way of **loan** or **advance** by the company in which public are not substantially interested to any person holding not less than ten per cent of the voting power is deemed to be dividend in the hands of shareholder to whom amount has been paid. However, in the Income Tax Act, the words loan or advance has not been specifically defined and therefore the meaning of these words are taken as per the Black's Law Dictionary which provides as under:

Loan means a lending delivery by one party to and receipt by another party of sum of money upon agreement, express or implied to repay it with or without interest.

Advance means something which is due to a person but which is paid to him ahead of time when it is due to be paid.

Thus, loan involves lending coupled with acceptance by the other side of the money as loan, which generally carries an interest and there is an obligation of re-payment. On the other hand, advance means pre-payment of debt.

The Hon'ble High Court of Delhi held in the case of CIT v. Creative Dyeing & Printing (P.) Ltd. [2009] 318 ITR 476.

"From the ratio laid down in above cases and on the basis of judicial interpretation of words, 'Loans' or 'Advances', it can be held that section 2(22)(e) can be applied to 'Loans' or 'Advances' simplicitor and not to those transactions carried out in course of business as such. In the course of carrying on business transaction between a company and a stockholder, the company may be required to give advance in mutual interest. There is no legal bar in having such transaction. What is to be ascertained is what the purpose of such advance is. If the amount is given as advance simplicitor or as such per se without any further obligation behind receiving such advances, may be treated as 'deemed dividend', but if it is otherwise, the amount given cannot be branded as 'advances' within the meaning of deemed dividend under section 2(22)(e)."

In view of the above, in the instant matter, the amount was accepted only as a security deposit for the purpose of carrying out the work of renovation and refurnishing of the office of the company. Since the assessee being owner of the property has exclusive right to do construction, renovation, modification, etc. activities on such premises and for carrying out some renovation work, the company paid an amount to the assessee. Thus, the amount under consideration is neither in the nature of loan nor advance and does not falling in the purview of section 2(22)(e) of the Act. The renovation was to be done exclusively for the benefit of the company as the company used the said premises for carrying out its business activities and the cost was also to be borne by it and accordingly, the amount was paid by the company to assessee as decided through MOU (*copy enclosed at page no.....*).

Since, the amount received for renovation under MOU was a commercial arrangement for the benefit of the company and could not be brought under the scope of deemed dividend u/s.2 (22)(e). Therefore, the said payment cannot cover u/s 2(22)(e) in the hands of assessee.

3. It is further submitted that your good self in the contention that section 2(22)(e) does not specify the purpose of payment is incorrect. *The intention behind introduction of this section was to tax those transactions wherein amount is paid by a company to its shareholder which cannot be paid as dividend.* The deeming provisions of section 2(22)(e) of the Income Tax Act, cover only transactions bearing the nature of loan and advances and not covered each and every transaction between the company and its substantial shareholders. Further, it is a settled position of law that when a deeming provision is introduced, same has to be construed strictly and in this regard assessee relied on the decision of **Hon'ble Supreme Court in the case of CIT vs. Ajax Products Pvt.Ltd. [1965] 55 ITR 741.**
4. In the instant matter, assessee had let out the premise to the company which was used by the company for running its business operations and the renovation was to be carried out by the company for its own benefit and from its own money for which amount had been paid to the assessee. The renovation was not to be done for the benefit of assessee. In case, if the work had been carried out in the said premise, the benefit would have accrued to the company only and not to the assessee. The only benefit to assessee was to get receipt of increased rent in the capacity of an owner and same would be assessed under the income tax as income from house property. Thus, amount of Rs. 3,00,000/- received by the assessee is not taxable as deemed dividend under Income Tax.
5. Further it is submitted that the chargeability u/s 2(22)(e) of the Income Tax Act will not arise only on the basis of the entry made in the books of account made by the company as it's not the conclusive evidence of the nature of transaction. Thus the amount received by assessee-shareholder from a company as a result of other business transactions could not be regarded as deemed dividend merely because it had been passed through the loan account of such shareholders by the company in its books of account. In this regard reliance is placed on the decision of Hon'ble Delhi High Court in **CIT vs Arvind Kumar Jain (2012) 205 Taxman 44 (Delhi)**, wherein it was held as under:

“It is trite law that mere nomenclature of entry in the books of account is not determinative of the true nature of transaction. In the present case after going through the relevant evidence as well as current account maintained between the parties, it has been established that the payment made were the result of trading transaction between the parties and the amount was not given by way of loan or advance.”

In view of the above, the payment of Rs. 3,00,000/- cannot be considered as deemed dividend only on the basis of finding that M/ABC Pvt. Ltd had made a payment to the assessee shareholders and passed such amount through her loan account in its books.

6. Further it is submitted that the reliance has placed on decision of Hon'ble high Court of Calcutta in **Pradip Kumar Malhotra v. CIT (2011) 338 ITR 538** wherein it was held that the phrase 'by way of advance or loan' appearing in section 2(22)(e) must be construed to mean those advances or loans which a shareholder enjoys for simply on account of being a person who is beneficial owner of shareholding not less than 10 per cent of voting power, *but if such loan or advance is given to such shareholder as a consequence of any further consideration which is beneficial to company received from such a shareholder, such advance or loan cannot be said to be deemed dividend within meaning of Act.*

Since, the amount paid by the company to the assessee-director did not bear the characteristics of loans and advances, rather the amount had been paid by company in its own interest and that too for the purpose of business because the ultimate beneficiary of the proposed expansion of the building premises is company itself. *Thus, the ratio of the above case is very well applicable to the case of assessee* and the amount of Rs. 3,00,000/- received by the assessee from the Company is not deemed dividend within the meaning of Section 2(22)(e).

In view of the submissions, the amount paid by the company to the assessee director is in the nature of a security deposit only and not in the nature of any other advance or loan. The same is substantiated from the Memorandum of understanding between company and assessee. Thus, provisions of section 2(22)(e) are not applicable in the present case.