आयकर अपीलीय अधीकरण, न्यायपीठ – "C" कोलकाता,

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

Before **Shri S.S.Godara, Judicial Member** and
Dr. A.L. Saini, Accountant Member

ITA No.242/Kol/2018 & **C.O No.43/Kol/2018** (a/o ITA No.242/Kol/2018) Assessment Year :2013-14

DCIT, Circle-10(1), P-7, Chowringhee Square, 3rd Floor, Kolkata-69	**V/s**.	M/s Dream Bake Pvt. Ltd., 296, Kalukhan Road, Boral, Kolkata-700154 [**PAN No. AABCD 1189 R**]
अपीलार्थी /Appellant	..	प्रत्यर्थी/ प्रतयाक्षेपक Respondent/Co-objector

आवेदक की ओर से/By Assessee	Shri Aloke Kr. Ghosh, Advocate
राजस्व की ओर से/By Revenue	Shri Saurabh Kumar, Addl. CIT-DR
सुनवाई की तारीख/Date of Hearing	17-01-2019
घोषणा की तारीख/Date of Pronouncement	31-01-2019

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

This Revenue's appeal and assessee's cross objection for assessment year 2013-14 arises from Commissioner of Income Tax (Appeals)-4 Kolkata's order dated 07.11.2017 passed in case No.08/CIT(A)-4/2016-17 involving provision u/s 143(3) of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties. Case file perused.

2. The Revenue's sole substantive ground seeks to revive deemed dividend addition of ₹1,25,02,162/- in the nature of loan received from M/s Switz Foods Pvt. Ltd. in which one of its director Shri Arnab Basu holds

42.10% stake; made in the course of assessment framed on 01.03.2016 and deletion in CIT(A)'s order vide following detailed discussion :-

"6. Ground No. 4(a), (b) and (c) are against addition vi] s. 2(22)(e) of Rs. 1,25,02,162/ -.

6.1. The AO has stated the following in support of the disallowance:

1.1 "The assessee received total loan/advance of Rs. 1,25,02,162/- from M/ s Switz Foods Pvt. Ltd. on different dates during the period 01.04.2012 to 31.03.2013. A copy of such transactions held between the Assessee Company and M/ s Switz Foods Pvt. Ltd for the said period is filed by the assessee and placed on record. There was an opening balance of loan for Rs. 10,24,67,261/- and brought forwarded for identical party on 01.04.2012. It is pertinent to mention that Sri Arnab Basu, director and the key management person of the assessee company was a common and beneficial shareholder in botj the Assessee Company (the loan recipient) and loan provider company Switz Foods Pvt Ltd. During this year and before changing the holdings of Sri Arnab Basu in the said two companies as beneficial owner and has substantial interest in the companies, M/ s Switz Foods Pvt Ltd had provided the maximum and total amount of loan/ advances of Rs. 1,25,02,162/ - during the year on different dates. The holding of Sri Arnab Basu was 48.38% of shares in Switz Foods Pvt Ltd during the whole year while the holding of Sri Arnab Basu in Dream Bake Pvt Ltd was 42.10% at the beginning of the year and continues until the date of further allotment of twenty-eight lacs of new shares on 26.03.2013 to the different persons by way of increasing the authorized share capital of Rs. 28 crores only. Whereas, the period advancing of total loan of Rs. 1,25,02,162/- by M/s Switz Foods Pvt Ltd to the assessee company M/s Dream Bake Pvt. Ltd was between 01.07.2012 to 30.09.2012 [Rs 40,00,000/- in the month of July, 2012 + Rs. 35,02,162 in the month of August + Rs. 50,00,000/- in the month of September] only Thus, the percentage of shares of Amab Basu in both the loan provider and load recipient company was more than 20% during the course of loan received by the assessee company M/s Dream Bake Put Ltd. It should not be out of place to mention that the auditor of the assessee in his audit report vide schedule- IV to clause - 18 for the year ended on 31.03.2012 has not declared any amount of transactions actually held between said two related companies under the caption "Particulars of payments made to persons specified under Section 40S(2)(b)".

1.2 The assessee has filed a written contention opposing the view taken to treat the loan/ advance of Rs. 1,25,02,162/- (form Switz Foods Pvt Ltd) as Deemed dividend and cited various case laws of different high courts. It was also reiterated that Arnab Basu was no more beneficial owner in the assessee company due to less than 10% of holdings in the company on 31.03.2013. The said submission of the assessee has been considered but not accepted in view of provisions contained in 2(22)(e) of the I>T Act, 1961 and in the light of ratio of judgements of Hon'ble Apex Court and jurisdictional High Court in

Tarulata Shyam vs. CIT [1977J 10S ITR 345 (SC) [it was held that section 2(22)(e) of the IT Act 1961 is applicable even if loan is repaid before the end of the previous year. In other words, the liability is attracted at the moment the loan is given] and in CIT vs. Bhagwat Tewari [1976J 105 ITR 62 (Cal) [It was held that even bona fide loan for short duration is treated as dividend if all the conditions of section 2(22)(e) are satisfied.]

1.3 The assessee in writing, during the course of hearing explained that Switz foods Pvt Ltd having IT PAN: AAECS1805N is one of the associate/sister concern and filed the detail of transactions. Further, loan/ advance made by M/ s Switz Foods Pvt Ltd to the assessee company was not engaged in the ordinary business of loan providing or money lending is a substantial part of the business of the said company. Further, the beneficial owner Sri Arnab Basu of the assessee [Dream Bake Pvt Ltd] has substantial interest also in Switz Foods Pvt Ltd. therefore, in view of this, said loan transactions of Rs.1,25,02,162/- for the period 01.04.2012 to 31.03.2013 is completely covered by the definition of Deemed Dividend u/s 2(22)(e) of IT Act, 1961 and the entire amount of Rs. 1,25,02,162/- transacted till the month of September, 2012 before reduction of holding of Sri Arnab Basu not to consider as beneficial owner on or before 26.03.2013 is being treated as Deemed Dividend for this year and to add back the same in the hands of the assessee u/s 56(2)(i) of the IT Act, 1961. Penal proceedings u/s 271 (1)(c) of IT Act, 1961 has been initiated separately for furnishing inaccurate particulars of income. "

6.2. The Assessee has made detailed submission. Some of which is reproduced as below:

> *"3.2 It is humbly submitted that the appellant company maintains a running account in respect of Switz Foods wherein the expenses incurred on regular basis along with business advances/ loans given by Switz Foods s partly adjusted against the dues which later owes to the appellant on account of purchase of cakes and cookies. Copy of ledger accounts is enclosed herewith and marked as Annexure - 4. On bare perusal of the said ledger it is apparent that the advance given by the Switz Foods is towards reimbursement of certain expenses and advance towards securing supply of cakes and cookies. There are normal business advances given during the normal course of business.*

4.0 The appellant would also like to submit that during the relevant assessment year borrowed funds were mobilised from following stakeholders:-

Sl No.	*Stakeholders*	*Amount (Rs. in Crs)*	*Reference*
1	*Axis Bank*	*7,73,74,037/-*	*Schedule 2.3 'Secured Loans'*
2	*Other Banks*	*9,56,122/-*	*Schedule 2.3 'Secured Loans'*
3	*From Shareholders*	*12,25,31,032/-*	*Schedule 2.3 Unsecured I loan*

4.1 The appellant would also like to submit that all the above loans are personally guaranteed by the Mr. Arnab Basu & Mrs. Pratima Basu. Additionally, both Swithz Foods and Snow lion foods Pvt. Ltd. had given Corporate guarantee against those loans. This clearly indicates the deeper business interest that Switz Foods have in the appellant company and that is very usual as later is the major shareholder in the appellant company. In fact till last year the appellant company was the subsidiary of the Switz Foods and it is only this year the appellant company cease to be the subsidiary as shareholding of the Switz Foods reduced to 46. 76%. Relevant extract of shareholding pattern of the appellant company is enclosed herewith and marked as Annexure - 5 for ready reference.

5.0 It is further submitted that the appellant company has paid interest on the above borrowed funds received from Axis Bank & Switz Foods. During the year the company. has paid interest of Rs. 1,65,30,578/ - to Switz Foods which is evident from Schedule - 2.28 related to Related Party Transactions disclosures of the financial statement copy of which is enclosed as Annexure . 6 for ready reference. The appellant had also deducted tax on said payment of interest u/ s 194A of the Act @ 10%. Copy of the TDS Certificate is enclosed herewith and marked as ***Annexure - 7****. For ready reference. This clearly indicates that loan/advance received from Switz Foods is backed by commercial consideration and is not gratuitous in nature.*

6.0 The appellant would like to draw attention that part of the loan granted by Switz Foods is adjusted against he dues which it owes to the appellant in respect of recurring commercial transaction of purchase of packaged cakes & cookies. The appellant would also like to draw attention to the fact that at no point of time, any part of loan received from Switz Foods is diverted or paid to Mr. Arnab Basu. This indicates that the loan initially provided by the Switz Foods to the appellant is not because of influence or benefit of the Common Director of the appellant company i.e Mr. Arnab Basu rather in the hindsight of the larger business interest which Switz Foods have in appellant company business.

7.0 The appellant would also like to submit that the loans/ advances received from Switz Foods is not gratuitous rather it was for mutual benefit of both the appellant company as well as Switz Foods. In addition to cash inflow in form of interest, by parking its surplus fund with appellant company at competitive arm's length interest rate, Switz Foods was also able to secure commercial advantage by ensuring uninterrupted & assured supply of packaged cakes & cookies from appellant company in future years. Similarly, it was also advantageous from appellant's view point, as it was able to gamer necessary finance to meet the Junding gap for its expansion program. The above fact indicates that the grant of loan/ advances by Switz Foods to appellant company was not gratuitous and it was surely motivated by commercial consideration. The funds so advanced to the appellant company during the course of business is out of business exigencies and driven by commercial interest. Therefore, it is clearly established that there was a quid-pro-quo embedded in the captioned transaction. Thus, the amount so advanced does not fall within the sphere of loans and advances as referred to in section 2(22)(e) of the Act.

8.1 Plain reading of the above provision indicates that section 2(22)(e) is a deeming provision. As per said provision, in certain circumstances an advance or loan is deemed as dividend in the hands of the shareholders. Advances and loans have to be interpreted in its true sense. The legal fiction created in said section only refers to pure advances or loans. Any amount paid on account of business transactions between the entities falls outside the ambit of said section. In the present case, the loan/ advances provided by Switz Foods to the appellant company is out of business exigencies, therefore falls outside the purview of section 2(22)(e) of the Act. The above interpretation of the deeming provision is in accordance with the cardinal principle of interpreting deeming provision which demands strict interpretation of these provisions. Reliance is placed upon the following judicial pronouncements:
- Shekhawati General Traders Ltd. -vs.- ITO (1971) 82ITR 788 (SC)
- CIT -vs.- Bhupender Singh Atwal (1983) 140 ITR 928 (Cal.)

10.3 The appellant would like to draw attention towards the decision of Hon'ble Kamataka High Court in the case of M/s Bagmane Constructions Pvt. Ltd. -vs.- ACIT (2014) [ITA No. 473/20131 dated 16th September 2014 wherein the court while interpreting the provision of section 2(22)(e) has adopted purposive construction of the above provis on. The relevant extract of said decision is reproduced as under:

> *"27. In this background when we look at the aforesaid provision, it is clear that any payment made by a company by way of advance or loan has to be understood in the context of the object with which the said provision is introduced. Though the legislature has introduced (advance' as well as (loan which are two different words, the meaning of each of those words have to be understood in the context in which they are used."*

1 0.4 Similar view has been echoed in the following judicial pronouncements:
-CIT -vs.- Ankitech P Ltd. (2012) 340 ITR 14 (Del)
-CIT -vs.- Creative Dyeing and Printing P. Ltd. (2009) 318lTR 476 (Del)
-CIT -vs.- Raf Kumar (2009) 318lTR 462 (Del)

10.5 In the light of above mentioned submissions, it is clear that the provision of deemed dividend requires purposive construction and accordingly, will be attracted only if dividend is paid in guise of loans or advances. The provision will not attract in case of genuine loans or advances backed by commercial consideration. In the present case loan was given by Switz Foods to the appellant company out of its commercial interest and business expediency. A part of these loans were also adjusted against the outstanding dues which Switz Foods owes to appellant company arising out of sale of packaged cakes and cookies. These are genuine business transaction undertaken during normal course of business and hence not covered by provision of section 2(22)(e) of the Act.

11.0 Loans or advances received out of commercial consideration falls outside the ambit of provision of 'deemed dividend'.

11.1 As submitted in earlier para's ri. e. section I dealing with submission on facts], the appellant would like to reiterate that loan/ advances received by appellant company is out of commercial consideration and not for the sole benefit of common shareholder i. e. Mr. Arnab Basu. By providing the said loan, in addition to earning of handsome interest, the lender company has also been able to secure its commercial interests in the appellant company. and thus the said advance falls outside the purview of deemed dividend as specified u/.s 2(22)(e) of the Act.

11.2 The appellant would also like to place reliance on the recent CIRCULAR No.19/2017 [F.NO.279/MISC./140/2015/IT], DATED 12-6-2017 issued by CBDT on the very captioned matter. Vide the said Circular the CBDT has directed that trade advances, which are in the nature of commercial transactions would not fall within the ambit of the word 'advance' in section 2(22)(e) of the Act. Accordingly, henceforth, appeals may not be filed on this ground by Officers of the Department and those already filed, in Courts/Tribunals may be withdrawn/not pressed upon. Copy of the said Circular is enclosed herewith and marked as Annexure - 9 for ready reference. Therefore, the appellant case is covered by the said Circular and hence no addition should be made on account af deemed dividend.

11.3 The appellant case is covered by the decision of the Jurisdictional High Court in Pradip Kumar Malhotra -vs.- CIT (2011) 338 ITR 538 (Cal.) wherein it has been held that only gratuitous loan or advance given by a company to shareholders would come within the purview of section 2(22)(e). The genuine loan or advance given in return to an advantage conferred upon the company by such shareholder will not attract the provision of section 2(22)(e) of the Act. The relevant facts and decision of the Court is summarized as under:
The Assessee has further submitted the following:

11.S The appellant would also like to bring to your kind notice that in the appellant own case for AY 2010-11 and in AY 2011-12 & AY 2012-13 your predecessors had accepted the appellant submission and allowed the claim of the appellant by deleting the addition made by the AO u/ s 2(22)(e) of the Act. Therefore, the appellant would humbly submit before your goodself to follow the said decision and give relief to the appellant company. Copy of the said decisions are enclosed herewith and marked as Annexure - 10 collectively.

12.0 Deemed Dividend is taxable in the hands of shareholder only

12.1 The provision of section 2(22)(e) of the Act is a deeming provision. It treats loans and advances given by specified person or entity to shareholder or concern in which the said shareholders have substantial interest as dividend. It creates legal fiction for treating loans & advances as dividend. It is a settled rule of interpretation that a deeming provision which creates a legal fiction should not be stretched and applied beyond the fiction which it sought to create. It should not be given a wider meaning then that it purports to do. Dividend is taxable in the hands of a shareholder only. The provision of section 2(22)(e) does not contain anything or does not creates any fiction which enables to tax the same in the hands of non-shareholders also.

Therefore, even if the loan granted by Switz Foods to the appellant company is treated as deemed dividend the same should not be taxed in the hands of appellant company as it does not own any shares of Switz Foods.

12.2 The appellant would like to submit that there are series of decision delivered by the different benches of High Court which supports the above view and makes the issue no longer a res integra. The citations of those decisions are given as below for ready reference:
-CIT -vs.- Ankitech P. Ltd. & Ors. (2012) 340 ITR 14 (Del)
-CIT -vs.- Universal Medicare (P) Ltd. (2010) 324 ITR 263 (Bom.)
-ACIT -vs.- Hotel Hilltop (2009) 313 ITR 116 (Raj)
-CIT vs. Jignesh P. Shah (ITA No. 1970(2013 dated 20-01-2015)
-CIT v/so Impact Containers Pvt. Ltd. (2014) 367ITR 346 (Bom)
-ACIT -vs.- Bhaumik Colour P. Ltd (2009) 313 ITR 146 (Mum SB)
-Dhall Properties Pvt. Ltd. -vs.-ITO (ITA No. 70/Kol/2012)
-DCIT -vs.- Meenakshi Tea Co. Ltd.(1TA No. 953/Kol/2011)

*The appellant would like to submit that recently the Hon'ble Supreme Court has SC upholds Delhi HC ruling in Ankitech Pvt. Ltd.(supra) and Bombay HC ruling in Universal Medicare Pvt. Ltd. (supra), in a batch of over 135 appeals; HCs had approved Mumbai ITAT Special Bench ruling in Bhaumik: Color P. Ltd. (supra) to hold that deemed dividend u/ s. 2(22)(e} would be taxable only in the hands of '**registered'** shareholder and not loan recipient. Copy of the said decision has been enclosed herewith and marked as Annexure - 11 for ready reference."*

6.3. FINDINGS OF CIT(A) :
I have perused the Assessment order and the submissions of the Ld. AR and the case laws relied by the Ld. AR. In view of the Calcutta High Court's judgment in the case of Pradip Kumar Malhotra -vs.- CIT (2011) 338 ITR 538 (Cal.) ,2(22)e does hot get attracted in the case where genuine loans and advances given for he advantage of the lender. Further in view of the Board Circular No 19, 2(22)(e) does not attracted in the case of genuine business advances The as has proved it is having regular dealings with M/s Switz Foods Pvt. Limited, an associate concern. Therefore, in view of the Board Circular and Calcutta High Court/s judgment provisions of 2(22)(e) does not get attracted in the assessee's case. Further, Hon'ble Supreme Court has upheld the decisions of various High Courts holding that deemed dividend can be taxable only in the case of registered share holders and not in the hands of loan recipient in Civil Appeal No.3961 of 2013. In view of the decision of Supreme Court the addition is not sustainable. In view of the above, these grounds are Allowed."

3. We have heard rival contentions. The Revenue vehemently contends during the course of hearing that the Assessing Officer had rightly invoked deemed dividend provision as the assessee's director (supra) held 42.10% stake in M/s Switz Foods Pvt. Ltd. who in turn gave loan of the impugned sum.

It emerges at the outset during the course of hearing that the same issue had arose in preceding assessment year 2012-13 in Revenue's appeal ITA No.1878/Kol/2016 in assessee's case itself decided on 19.09.2018. A co-ordinate bench therein declined Revenue's identical arguments as follows:-

> "2. The Revenue's sole substantive ground seeks to revive the Assessing Officer's action making sec. 2(22)(e) deemed dividend addition of ₹2,42,00,000/- in assessment order dated 07.02.2015. Learned Departmental Representative invites our attention to the CIT(A)'s detailed discussion to this effect reading as under:-
>
> *"5. Ground No.2*
> *This ground is directed against the action of the AO in making addition of ₹2,42,00,000/- u/s. 2(22)(e) of the Act. this matte is discussed from para 4 to para 4.3 of the assessment order which is not repeated here again for the purpose of avoiding prolixity. However, during the appellate proceeding, the AR of the appellant apprised me of the fact that the same issue had been adjudicated upon by my predecessor CIT(A)-4, Kolkata exercising jurisdiction over the case vide order dated 31.03.2015 in Appeal No.241 of 2014-15 for the AY 2010-11 wherein the CIT(A) had deleted the addition made on identical sets of facts. Copy of the said order which is submitted has been perused and found correct. It was further informed that there was no second appeal in this regard preferred by the Department. Under the facts and circumstances and following the principles of consistency on the impugned matter at hand, I do not find any premise to support the decision of the AO on the issue and resultantly the decision of the erstwhile CIT(A) stands endorsed at this end for this year as well. In this respect, the detailed submission of the AR of the appellant along with a plethora of judicial decisions in the similar matter is not repeated here, considered to be not necessary since the CIT(A)'s appellate order on the same issue has been followed to maintain judicial consistency. In view of the foregoing discussion, this ground of appeal is allowed on both fact and law. reference may be made to the said CIT(A) s order dated 31.03.2015 from page 20 to page 29 wherein the matter has been exhaustively dealt with in favour of the appellant. This ground therefore stands allowed."*
>
> 3. Mr. Choudhury vehemently contends during the course of hearing that the CIT(A) has erred in law as well as on facts in deleting the impugned addition. His case is that assessee's director / key management personnel, Shri Arnab Basu is the common and beneficial shareholders in both this company (loan recipient) as well as loan provider entity M/s Switz Foods Pvt. Ltd. since having more than 20% share. We sought to know as to what transpired on the very issue in assessment year 2010-11. It has come on record that CIT(A) has followed his findings *mutatis mutandis* of the said preceding assessment year in the impugned assessment year. This clinching fact has gone unrebuttted from the Revenue side. Paper book page 2 comprises of said earlier assessment year lower appellate order holding the assessee to be neither the registered nor beneficial shareholder for invoking the impugned deeming fiction u/s. 2(22)(e). The CIT(A)'s order to this effect in said earlier assessment year reads as under:-

"4.4 Discussion, and, Appellate decision:
4.4.1. On the facts:
4.4.1.1. Prominent facts of this case are that even prior to the Loan, the appellant has been having regular day-to-day business dealings with SFPL. The manufactured products for the appellant ['Monginis' Cakes, Cookies, Biscuits] were supplied sale to SFPL, as also to other retail chains. The account maintained is a running account. Both entities are separate business entities and are having inter-dependent regular commercial dealings.

4.1.2 Coming to the Loana, the appellant was in the process of setting up a second manufacturing unit at Kandua Food Park, Sankrail, Howrah, Capital was required. To assist in the capital requirement, several group concerns and individuals assisted. Thus SFPL advanced the Loan; as also another group concern [Snow Lion] and also Mr. Arnab Basu, This has been explained in the Project Report. Thus the Loan was but part of a Loan Consortium. Thus therefore the Loan being for capital requirement, it was but business and commercial requirement. The Loan is directly linked to the setting up of the 2nd manufacturing unit. There is no conceivable way for diversion for the personal benefit of Mr. Arnab Basu.

4.4.1.3 It is a Loan with interest being charged at arm s length rate. During the year the interest paid is at ₹53,94,250/-. Thus, it is a commerc al Loan.

4.4.1.4 The Loan commercially benefitted both the pa ties – the appellant is setting up the 2nd manufacturing unit, and SFPL in getting steady and increase supply of the products as also interest on the loan.

4.4.1.5 In later year, in AY 2012-13 part of the outstanding Loan was converted into Equity.

4.4.1.6 Thus, on facts itself, the Loan is a purely commercial loan, and, for business requirements. There is direct quid-pro-quo and future business growth to both the parties.

4.4.2. On legal perspective:

4.4.2.1 Having held that the Loan is a purely a commercial loan directly linked to the setting-up of the second manufacturing unit, i.e. not conceivable that the Loan could be diverted for the personal benefit of Mr. Arnab Basu, thus section 2(22)(e) should not apply; however, since because of the ambiguity / mischief in the 2nd limb of section 2(22)(e), a brief discussion is hereunder.

4.4.2.2. The issue of 'deemed dividend' u/s 2(22)(e) has undergone / is undergoing numerous litigation in various Courts – because of the ambiguous wording and further having lost sight of the intent for which it was enacted.

4.4.2.3 Much before anything else, in plain speak the basic essence of 'Dividend' is to be understood. Dividend is distribution of profits absolutely upon a shareholder for his enjoyment. This fundamental aspect is borne in the preceding clauses (a) to (d) to section 2(22) – whereby the opening phrase is 'any distribution … … to its shareholder … …'. Thus, it is implicit that clause (e) be also read and interpreted in this same context of 'distribution to shareholder'.

4.4.2.4 The shareholder is the absolute owner of the benefit so distributed. And thus in arrangements were such that indirectly was designed for the personal benefit /

enjoyment of the shareholder. That is why the Courts in various judicial decisions have held that the section must be in the context of the registered shareholder [and not the concern]. So in this context itself, the appellant company not being the registered shareholder, the appellant is outside the scope of section 2(22)(e)
This is the ratio of the oft cited decision of the hon'ble ITAT Special Bench in ACIT Vs. Bhaumik Colour Pvt Ltd [2009] 313 ITR 146 (Mum SB).

Another aspect which needs to be kept in mind is that tax on dividend has undergone antipodal change. Since several years now there is tax paid at source itself upon the declaring of dividend [section 115-O]; and such tax—paid dividend is exclude from total income [section 10(34)]. Earlier, it was not so. The tax was to be paid by the shareholder; thus obviously there were ways to circumvent, and thus then was the origin of thee deemed dividend enactments. Point is – ultimately it must be that the benefit was for the shareholder.

4.4.2.5 There is no legal bar to obtain loan from group concerns; save, it at all only regarding the interest expense quantum in circumstances u/s. 40A(2). When there is no legal bar to obtaining Loan from group concern, then why should the ambiguity in the 2nd limb of section 2(22)(e). Such provision would stifle business growth. There is just no logic or rationale.

So, to just on the literal words in the section would be being goaded to trod with blinkers put upon.

4.4.2.6 As here we are discussing on the legal aspect of section 2(22)(e), and applied to the entire gamut of the facts and circumstances of this case I would also go to say that the exception in item (ii): 'any advance or loan made to a shareholder or the said concern by a company in the ordinary course of its business, where the lending of money is a substantial part of the business of the company', is applicable. The section after all is a deeming fiction section, so jolly-well it can be calibrated to the facts of this case on the follow ng logic:

- *'in the ordinary course of its business': it is in connection with the business of both the lender and the borrower that the sum had been advanced. There will be mutual benefit and progress.*
- *'the lending of money is a substantial part of the business of the company':*

The sum at ₹7.63 Crore is no mean sum by any standard. It is a substantial part of the business assets of the lender company.
Thus even so, upon legal-technico adaptation, the exception in tem (ii) can be applied.

4.4.2.7 As regards the judicial decisions relied upon by the Learned. AR, I find that the decision of the Hon'ble Delhi High Court in CIT Vs Creative Dyeing and Printing Pvt Ltd. (2009) 318 ITR 476 (Del) is similar to the facts of the appellant's case: it is hereunder:
CTR LIBRARY OF TAX CASES
COMMISSONER OF INCOME TAX vs. CREATIVE DYEING & PRINTING (P) Ltd.
HIGH COURT OF DELHI
A.K. Sikri & Vaimiki, J. Mehta, JJ
IT Appeal No.250 of 2009
2nd September, 2009
(2010) 229 CTR (Del) 250: (2009) 318 ITR 476; (2009) 184 TAXMAN 483 : (2009) 30 DTR
Legislation referred to
Section 2(22)(e)
Case pertains to

Asst Year:
Decision in favour of
Assessee
Dividend-Deemed dividend under s. 2(22)(e)-Advance for commercial purpose-Assessee company received funds for expansion of production capacity from PE Ltd. which has 50 per cent shareholding in the assessee and has common directors with the assessee-Transaction in question was a business transaction which would benefit both assessee company and PE Ltd. – Admittedly, the amount is to be adjusted against the moneys payable by PE Ltd., to the assessee company in the subsequent years – Contention of the Revenue that since Penalty Ltd. is not into the business of moneylending, the payments made by it to the assessee company would be covered by s. 2(22)(e) (ii) and consequently payments even for business transactions would be deemed dividend is not acceptable – Once it is held that business transactions do not fall within s. 2(22)(e), there is no need to go further to s. 2(22)(e)(ii) – Therefore, amount advanced for the business transaction by PE Ltd. to the assessee company did not fall within the definition of deemed dividend under s. 2(22)(e)
Held:
The finding of facts, arrived at by the Tribunal is that the transact on in question was a business transaction and which transaction would have benefited both the assessee company and PE Ltd. In fact, the counsel for he appellant has conceded that the amount is in fact not a loan but only an advance because the amount paid to the assessee company would be adjusted against the entitlement of moneys of the assessee company payable by PE Ltd. in the subsequent years. The contention that since PE Ltd. is not into the business of lending of money, the payments made by it to the assessee company would be covered by s. 2(22)(e) (ii) and consequently payments even for business transactions would be a deemed dividend is not acceptable. The provision of s. 2(22)(e)(ii) is basically in the nature of an Explanation. That cannot however, have bearing on interpretation of the main provision of s. 2(22)(e) and once it is held that the business transactions do not fall within s. 2(22)(e)(ii) gives an example only of one of the situations where the loan/advance will not be treated as a deemed dividend, but that's all. The same cannot be expanded further to take away the basic meaning, intent and purport of the main part of s. 2(22)(e). This interpretation is in accordance with the legislative intention of introducing s 2(22)(e). Therefore the Tribunal was correct in holding that the amounts advanced for bus ness transactions between the parties, namely, the assessee company and PE Ltd., was not such to fall within the definition of deemed dividend under s. 2(22)(e) – CIT vs. Raj Kumar (2009) 23 DTR (Del) 304: (2009) 181 Taxman 155 (Del) followed.

(Paras 10 to 12)

Conclusion:

Amount advanced to the assessee company by another company having common directors not being a loan but an advance for business transactions which is to be adjusted against the moneys payable by the latter to the assessee company in the subsequent years, same did not fall within the definition of deemed dividend under s. 2(22)(e)
In favour of:
Assessee
Case referred to
CIT vs. Ambassador Travels (P) Ltd (2008) 220 CTR (Del) 475 (2008) 8 DTR (Del) 108 (2008) 173 Taxman 407 (Del)
CIT vs. Nagiindas M Kapadia (1989) 75 CTR (Bom) 161 : (1989) 177 ITR 393 (Bom)
Navinit Lal C. Javeri vs. K.K.Sen AAC (1965) 56 ITR 198 (SC)
Counsel appeared:

Mr. Suruchi Aggarwal for the Appellant. M.P. Rastogi with K.N. Ahuja for the Respondent
JUDGMENT
VALMIKI J. MEHTA, J:

This appeal under s. 260A of the IT Act, 1961 (hereinafter referred to as the Act) is preferred by the Revenue against the order dt. 9th May, 2008 of the Income-tax Appellate Tribunal (hereinafter referred to as the 'Tribunal') whereby the Tribunal has held that the payment of an advance for a commercial purpose to the assessee company by its sister concern M/s Pee Empro Exports (P) Ltd is not deemed dividend under s. 2(22)(e) of the Act.

2. The facts of the case are that the respondent is engaged in the business of dyeing and printing of cloth and was acting as an ancillary unit of M/s Pee Empro Exports (P) Ltd. for the last several years. Both the assessee company and M/s Pee Empro Exports (P) Ltd. have common shareholders/directors Mr.P.S. Uppal. Mr. P.M.S. Uppal, Mr. Surinder Uppal and so on. The said M/s Pee Empro Exports (P) Ltd. in order to increase its export business and to compete with the international standards in garment exports had suggested modernization and expansion of the plant and machinery of the assessee company for which M/s Pee Empro Export (P) Ltd. made available a project report for such expansion on 28th July, 2000 to the assessee company. The assessee company in turn vide its letter dt. 30th Sept., 2000 informed M/s Pee Empro Exports that for increasing such capacity as desired by M/s Pee Empro Exports a huge investment is enquired and showed its inability to invest such large amount out of the present available funds M/s Pee Empro agreed then to make available funds to the extent of 50 per cent cost because it was not only in the interest of M/s Pee Empro Exports but also on account of fact that M/s Pee Empro itself owns 50 per cent shares in the assessee company.
The rest of the 50 per cent proje t cost was to be made available by the directors Mr P.S. Uppel and Mr. P.M.S. Uppal

3. The AO for this amount paid to the assessee company by M/s Pee Empro Exports (P) Ltd. made an addition of Rs.3,60,18,885 in terms of s 2(22)(e) of the Act as deemed dividend for the reason that the two directors of the assessee company, namely, MR. P.S Uppal and Mr. P.M.S. Uppal having more than 20 per cent share in the assessee company and who also held 27.42 per cent and 29.71 per cent share respectively in M/s Pee Empro Exports i.e. two directors have interest in the company from whom the amount has been received.

4. The relevant part of s 2(22)(e) is extracted as under"

> *'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 , 1986 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.*

*But '**dividend**' does not include*

> *(i)….*

> *(ii) any advance or loan made to a shareholder or the said concern by a company in the ordinary course of its business, where the lending of money is a substantial part of the business of the company'*

5. Before us, the learned counsel for the appellant/Revenue has contended that the preset case is a case of deemed dividend inasmuch as M/s Pee Empro Exports (P) Ltd. has given a loan to the assessee company but the lending company, namely, M/s Pee Empro Exports (P) Ltd. is not into the business of moneylending as required by s 2(22)(e)(ii). The counsel for the respondent, on the other hand, has referred to two recent Division Bench Judgments of this Court reported as CIT vs. Raj Kumar (2009) 23 DTR (Del) 304 (2009) 181 Taxmank 155 (Del) and CIT vs. Ambassador Travels (P) Ltd (2008) 220 CTR (Del 475 (2008) 8 DTDR (Del) 108 (2008) 173 Taxman 407 (Del) to contend that merely because a loan is given by M/s Pee Expro Exports (P) Ltd to the assessee company would not mean that the same would become a deemed dividend inasmuch as moneys are paid for transactions which are business transactions/commercial transactions and therefore, such transactions cannot fall under the expression 'deemed dividend' within the provision of s. 2(22)(e)

6. Before we refer to the rival contentions of the parties, we wou d like to reproduce the following findings of facts arrived at by the Tribunal :

> *'7.5 In the present case the amount paid by M/s Pee Empro Exports to the appellant-company does not bear the characteristic of loans and advanced. The amount has been paid by M/s Pee Empro Exports in its own interest and that too for the purpose of business because the ultimate beneficiary of the proposed expansion of plant and machinery is M/s Pee Empro Exports itself. M/s Pee Empro Exports has not made the payment to the appellant company for the individual benefit of Mr. R.S. Upal and Mr. P.M.S.Uppal and on the contrary these two directors have also provided funds to the appellant-company as owners of the company as also made by M/s Pee Empro Exports.*
>
> *The assessee undertook expansion of its capacity, which was in mutual interest of assessee as well Pee Empro Exports. If the assessee has not undertaken such expansion, no advance could have been made to it or that Pee Empro Exports would not have distributed as dividend to its shareholders. This but for the advances, the amount of advances could not have reached assessee at all. We therefore delete the additions as made by the AO as the amount received by assessee is not deemed dividend within the meaning of s 2(22)(e) of the Act.'*

The counsel for the Revenue has also further stated that it is not in dispute that the monies which have been advanced to the assessee company by M/s Pee Empro Exports (P) Ltd. have not to be repaid but have to be adjusted against the dues payable by M/s Pee Empro Exports (P) Ltd. to the assessee company in the subsequent years for the job work of printing and dyeing which is done by the assessee company for M/s Pee Empro Exports (P) Ltd.

7. We find that the Tribunal in the present case has very extensively dealt with legislative intention of introducing s 2(22)(e) and has referred to such legislative intention by reference to Supreme court judgment in the case of Navnit Lal C. Javeri vs. K.K. Sen AAC (1965) 56 ITR 198 (SC) where a similar provision of the IT Act, 1922 i.e. s 2(6A)(e) was in issue by reproducing thee relevant para in Navneet Lal's case (supra) as under:

> ' 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 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 the 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 s 23. 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 moneylending, and it is made with the full knowledge of the provision 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 s. 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 the Similarly 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 out 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 s 23A. The loan may carry interest and the said interest may be received by the company, but the main object underlying the loan s to avoid payment of tax.'

8. The Tribunal has also referred to the judgment of the Bombay High Court in the case of cit vs. Nagindas M Kapadia (1989) 75 CTR (Bom) 161: (1989) 177 ITR 393 (Bom) in which it was held that business transactions are outside the purview of s. 2(22)(e) of the At. In the said case, the company in which Kapadia was having substantial interest had paid various amounts to Kapadia. The Tribunal had found that Kapadia had business transactions with the company and on verification of the accounts, the Tribunal deleted the amounts which were relating to the business transactions and which finding was upheld by the High Court.

9. In the present case the Tribunal on considering decisions in various cases held as under:

'From the ratio laid down in above cases and on the basis of judicial interpretation of words, '**loans**' or '**advance**', it can be held that s. 2(22)(e) can be applied to '**loan**' 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 is the purpose of such advance. If the amount is given as advance simplicitor or as such per se without any further obligation behinds 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 s. 2(22)(e). Just as per cl. (ii) of s. 2(22)(e), dividend is not to include advance or loan made by a company in the ordinary course of business where the lending of money is substantial part of the business of the company advance in the ordinary course of carrying on business cannot be considered as '**dividend**' within the meaning of s. 2(22)(e). By granting advance if the business purpose of the company is served and which is not the sum, which it otherwise would have distributed as dividend, cannot be brought within the deeming provision of treating such 'advance' as deemed dividend'.

10. We agree with the aforesaid observations. The finding of facts, arrived at by the Tribunal in the present case is that the transaction in question was a business transaction and which transaction would have benefited both the assessee company and M/s Pee Empro Exports (P) Lt. In fact, as stated above, the counsel for the appellant has conceded that the amount is in fact not a loan but only an advance because the amount paid to the assessee company would be adjusted against the entitlement of moneys of the assessee company payable by M/s Pee Empro Exports (P) Ltd in the subsequent years.

11. The counsel for the appellant has very strenuously urged that neither the Tribunal nor the judgment of this Court in Raj Kumar's case (supra deals with the part of the definition of deemed dividend under s. 2(22)(e) which states that deemed dividend does not include an advance or loan made to a shareholder by a company in the ordinary course of its business where the lending of money is a substantial part of the business of the company [s.2(22)(e) (ii)] i.e there is no deemed dividend only if the lending of moneys is by a company which is engaged in the business of moneylending. Dilating further the counsel of the appellant contended that since M/s Pee Empro Exports (P)) Ltd. Is no into the business of lending of money, the payments made by it to the assessee company would therefore be covered by s.2(22)(e)(ii) and consequently payments even for business transactions would be a deemed dividend. We do not agree. The Tribunal has dealt with this aspect as reproduced in para (9) above The provision of s.2(22)(e)(ii) is basically in the nature of an Explanation. That cannot however, have bearing on interpretation of the main provision of s. 2(22)(e) and once it is held that the business transactions do not fall within s. 2(22)(e) gives an example only of one of the situations where the loan/advance will not be treated as a deemed dividend, but that['s all. The same cannot be expanded further to take away the basic meaning, intent and purport of the main part of s. 2(22)(e). We feel that this interpretation of ours is in accordance with the legislative intention of introducing s. 2(22)(e) and which has been extensively dealt with by this Curt in the judgment in Raj Kumar's case (supra). This Court in Raj Kumar's case (supra) extensively referred to the report of the Taxation Enquiry Commission and the Speech of the Finance Minister in the Budget while introducing the Finance Bill. Ultimately, this Court in the said judgment held as under:

'10.3. A bare reading of the recommendations of the Commission and the Speech of the then Finance Minister would show that the purpose of insertion of cl. (e) to s. 2(6A) in the 1922 Act was to bring within the tax net monies paid by closely held companies too their principal shareholders in the guise of loans and advances to avoid payment of tax.

10.4 Therefore, if the said background is kept in mind, it is clear that sub-cl.(e) of s. 2(22) of the Act, which is pari material with cl. (e) of s. 2(6A) of the 1922 Act, plainly seeks to bring within the tax net accumulated profits which are distributed by closely-held companies to its shareholders in the form of loans. The purpose being that persons who manage such closely-held companies should not arrange their affairs in a manner that they assist the shareholders in avoiding the payment of taxes by having these companies pay or distribute,

what would legitimately be dividend in the hands of the shareholders, money in the form of an advance or loan.

10.5 If this purpose is kept in mind then in our view, the word '**advance**' has to be read it conjunction with the word '**loan**'. Usually attributers 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. 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 not 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 nosciture 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 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 case of Rohit Pulp & Papea Mills Ltd. vs. CCE AIR 1991 SC 754 and State of Bombay vs. Hospital Mazdoor Sabha AIR 1960 SC 610.'

12. Therefore, we hold that the Tribunal was correct in holding that the mounts advanced for business transaction between the pa ties, namely, the assessee company and M/s Pee Empro Exports (P) Ltd. was not such to fall within the definition of deemed dividend under s. 2(22)(e). The present appeal is therefore dismissed.

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The Revenue had filed SLP before the Hon'ble Supreme Court against this judgment, which has been Dismissed.

10 INCOME TAX REPORTS (STATUTES) [Vol.328
Deduction only on actual payments
Contributions to provident fund and employees State insurance
10-7-2010: Their Lordships S.H. KAPADIA C.J.IL K.S. RADHAKRISHNAN AND SWATANTER KUMAR JJ. Dismissed the Department's special leave petition against judgment dated July 3, 2009 of the Karnataka High Court in I.T.A. No.939 of 2008 whereby the High Court following 298 ITR 141 held that the contributions to the provident fund and employees State insurance were allowable having been made before the due date for filing the return : CIT v. MYSORE PAPER MILLS LTD. : S.L.P. (Civil) No. 20231 of 2010.
Deemed Dividend
Amount advanced in course of business
7-7-2010 : Their Lordships S. H. KAPADIA C.J.I., K.S. RADHAAAAKRISHNAN AND SWATANTER KUMARJJ. Dismissed the Department's special leave petition against judgment dated September 22, 2009 of the Delhi High Court in I.T.A. No. 250 of 2009 reported in 318 ITR 476 whereby the High Court held that the amounts advanced for business transaction to the assessee company by the company P did not fall within the definition of deemed dividend under section 2(22)(e): CIT v. CREATIVE DYEING AND PRINTING (P) LTD: S.L.P (Civil) No. 18197 of 2010

4.4.2.8 Also in a recent judgment of the Hon'ble Karnataka High Court in M/s Bagmane Constructions Pvt Ltd Vs. CIT in ITA No.473/2013 in judgment dated 16.11.2014, the Hon'ble High Court has similarly held that loan or advance given to a

shareholder or to any sister concern as a consideration for the goods or for purchase of a capital asset, cannot be treated as deemed dividend u/s. 2(22)-(e).

In this case, the facts were even more direct – the company had advanced loan directly to the shareholder for purchase of capital asset [land: to comply with certain land transfer restrictions] to be used by the company. The Hon'ble High Court held that the advance was not for the personal benefit of the shareholder. So section 2(22)(e) was not applicable.

4.4.2.9 Thus, also from legal perspective, the provisions of section 2(22)(e) are not applicable to the facts of this appellant's case.

4.4.3 Thus, Ground of Appeal No.1 is hereby Allowed."

4. The registry has informed that Revenue has not preferred any appeal in assessment year 2010-11 against the above extracted CIT(A)'s order followed in the impugned assessment year. The instant issue has attained finality therefore in taxpayer's favour since the Revenue has itself accepted correctness of the CIT(A)'s order deleting the very addition in earlier assessment year. We thus reject its sole substantive grievance as well as main appeal."

There is no distinction on facts or law pointed out at the Revenue's behest. We therefore adopt the above detailed reasoning *mutatis mutandis* to confirm the CIT(A)'s findings deleting the impugned deemed dividend addition as per judicial consistency principle. The Revenue fails in its former substantive ground.

4. The Revenue s latter substantive ground seeks to revive sec. 14A r.w.s Rule 8D disallowance of ₹19,81,219/- made in the course of assessment and deleted in lower appellate proceedings. Suffice to say, the assessee has snot derived any exempt income in the impugned assessment year. Hon'ble jurisdictional high court's decision in *CIT vs. M/s Ashika Global Securities Ltd.* ITAT 100 of 2014 **GA No.2122 of 2014** decided on 11.06.2018 holds that section 14A r.ws. 8D Rule disallowance provision does not apply in absence of any exempt income derived in the relevant previous year. The CIT(A) has followed the very legal position while accepting assessee's arguments. The Revenue's instant last substantive ground also fails accordingly. The Revenue fails in its appeal ITA No.242/Kol/2018.

5. The assessee's cross objection 43/Kol/2018 supportive of CIT(A)'s order deleting the above two addition(s) is rendered infructuous.

6. This Revenue's appeal ITA No.242/Kol/2018 is dismissed and assessee's cross objection 43/Kol/2018 is dismissed as rendered infructuous.

Order pronounced in the open court 31/01/2019

Sd/- Sd/-

(लेखा सदस्य) (न्यायिक सदस्य)
(Dr.A.L. Saini) (S.S.Godara)
(Accountant Member) (Judicial Member)
Kolkata,
*Dkp, Sr.P.S
दिनांकः- 31/01/2019 **कोलकाता** ।

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

1. आवेदक/Assessee-M/s Dream Bake Pvt. Ltd. 296, Kalukhan Road, Boral, Kolkata-154
2. राजस्व /Revenue-DCIT, Cir-10(1), P-7, Chowringhee Square, 3rd Floor, Kolkata-69
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।