IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND SHRI S. JAYARAMAN, ACCOUNTANT MEMBER

ITA NOs.	A.Y.	APPELLANT	VS.	RESPONDENT
1223/Bang/2010	2006-07	Mr. A. Mohiuddin # 202, Veekay Chambers, Kulur Bangra Road, Kulur, Mangalore – 575 013 **PAN: AEBPM 6716Q**		The Assistant Commissioner of Income Tax, Central Circle, Mangalore.
163/Bang/2011	2003-04			
164/Bang/2011	2004-05			
165/Bang/2011	2005-06			
166/Bang/2011	2007-08			
167/Bang/2011	2008-09			
1088/Bang/2012	2007-08	Mrs. Shahanaz Mohiuddin, # 202, Veekay Chambers, Kulur Bangra Road, Kulur, Mangalore – 575 013 **PAN: AIIPM 7608B**		The Assistant Commissioner of Income Tax, Central Circle, Mangalore.
1118/Bang/2012	2007-08	The Assistant Commissioner of Income Tax, Central Circle, Mangalore.		Mrs. Shahanaz Mohiuddin, Mangalore – 575 013 **PAN: AIIPM 7608B**

Assessee by	:	Shri V. Srinivasan, Advocate
Revenue by	:	Shri K.V. Aravind, Standing Counsel

Date of hearing	:	04.11.2016
Date of Pronouncement	:	25.01.2017

O R D E R

Per Sunil Kumar Yadav, Judicial Member

These appeals are preferred by the assessee as well as revenue against the respective orders of the CIT(Appeals). Certain issues are common in these appeals, therefore, these were heard together and are being disposed of through this consolidated order. We, however, prefer to adjudicate them one after the other.

2. The facts in brief relating to these appeals borne out from the record are that the assessee, Shri A. Mohiuddin and his wife, Mrs. Shahanaz Mohiuddin are carrying on business of transportation and civil construction. The assessee is also Managing Director of M/s. HML Agencies Pvt. Ltd. [now known as Delta Infralogistics (Worldwide) Ltd.], which carries on the business of custom house agency and stevedoring at various ports.

3. A search was conducted in the residential premises of the appellant, Shri A. Mohiuddin on 17.01.2008 along with the search conducted in the business premises of M/s. HML Agencies Pvt. Ltd. During the course of search, statement of the assessee, Shri A. Mohiuddin was recorded u/s. 132(4) of the Act. Pursuant to the search, notice u/s. 153A was issued for AYs 2002-03 to 2007-08. In response to the aforesaid notice, the assessee had challenged the validity of search. That apart, it was also submitted that returns of income filed originally filed u/s. 139 of the Act may

be treated as return in response to notice u/s. 153A of the Act. The AO thereafter completed the assessment proceedings u/s. 153A r.w.s. 143(3) of the Act for the AYs 2002-03 to 2007-08 making several additions therein.

4. The assessee has challenged the assessment orders before the CIT(Appeals). The CIT(Appeals) disposed of the appeals filed by the assessee by passing two separate orders; one order dated 30.09.2010 relating to AY 2006-07 and the other common order dated 16.12.2010 for the AYs 2003-04, 2004-05, 2005-06, 2007-08 & 2008-09. In AY 2008-09, the CIT(Appeals) has given a partial relief, but in other appeals the order of the AO was confirmed.

5. Aggrieved, the assessee as well as revenue preferred the appeal against the respective orders before the Tribunal.

6. In all the appeals, the ld. counsel for the assessee has challenged the validity of the search by raising specific grounds before the Tribunal, but during the course of hearing, the ld. counsel for the assessee has opted not to press this ground relating to validity of the search. Accordingly, the grounds relating to validity of search are dismissed in all the appeals as not being pressed.

7. During the course of hearing, the ld. counsel for the assessee has filed synopsis of arguments and a chart relating to the additions made in different assessment years with his submissions. We therefore, for the

sake of brevity, instead of dealing with the issues ground-wise raised in the appeals, prefer to adjudicate the appeals issue-wise raised in the synopsis and the chart for different assessment years.

ITA 1223/Bang/2010

8. In this appeal, the assessee has assailed the order of CIT(A) that he has erred in confirming the addition of Rs.24,74,097/- as deemed dividend under section 2(22)(e) of the Act without appreciating the nature of transactions undertaken by the assessee with the company besides challenging the validity of search. Since the ground relating to validity of search has been withdrawn by the assessee, the only ground of appeal left with us is with regard to addition on account of deemed dividend and the facts borne out from the record are that during the course of assessment proceedings, the AO has noted that the assessee is a Managing Director of M/s. HML Agencies Pvt. Ltd., having more than 10% share holdings and has received a sum of Rs.24,74,097/- in total from the above said company during the impugned financial year and after having treated it as deemed dividend as per the provisions of section 2(22)(e) of the Act, he proposed to assess the same as deemed dividend. The assessee has submitted before AO that this is neither a loan nor advance but the amount drawn by way of remuneration to which he is entitled and hence the provisions of section 2(22)(e) are not applicable. AO was not convinced with the explanation of

the assessee and he accordingly treated this receipt as a deemed dividend and made the addition of the same.

9. Aggrieved, the assessee preferred an appeal before the CIT(A) with the submission that as per the ledger account in the books of M/s. HML Agencies Pvt. Ltd., from 01.04.2005 to 31.03.2006 at the end of the year, there is Nil balance. The assessee has current account with the company in which the assessee's remuneration is credited and the amounts drawn towards remuneration from time to time during the month and upto the period to which the remuneration is credited are found to be debited. Further he stated that the amounts which are debited in the current account are not in the nature of loan at all and they are in the nature of payments made towards remuneration to the appellant. Therefore the provisions of section 2(22)(e) are not applicable. It was further explained that the deemed dividend of Rs.4,67,300/- as on 16.02.2006 arose because of the two payments made for purchase of house, which was intended to be purchased by the company to be provided to the Managing Director. The company ought to have debited Rs.5,00,000/- each aggregating to Rs.10,00,000/- on 16.02.2006, Rs.3,99,797/- towards registration charges on 17.02.2006 and Rs.16,00,000/- payment made to the landlord on 18.2.2006 to the house account instead of the appellant's account as the house came to be purchased in the name of the appellant instead of in the name of the company to facilitate the purchase. Further when the loan was granted

with reference to the purchase, the said loan amount was credited to the appellant's account on 31.03.2006 as the debits were made to the appellant's account, thereby the balance is nullified. Since the property was to be purchased and provided to the Managing Director of the company, they should have figured as an asset of the company. However, the property came to be purchased in the name of the appellant and funds paid with reference to the same came to be debited to the appellant's account and the loan amount from bank also credited to the appellant's account. This is in terms of tacit contract of employment and it does not partake the character of a dividend much less a deemed dividend as the same is neither an advance nor a loan to attract the provisions u/s 2(22)(e) of the Act.

10. Debits in the account are not by way of any loans or advances on which interest is payable but it is a current account. Such excess of net debits by way of withdrawals in the current account at the end of the year could not be regarded as loans and advances within the meaning of Section 2[6A][e] of the Income Tax Act, 1922 corresponding to Section 2[22][e] of the Income Tax Act, 1961, except where interest is chargeable, as held by the Hon'ble Madras High Court in the case of CIT vs. K. Srinivasan reported in 50 ITR 788.

11. CIT(A) was not convinced with the explanation of the assessee and he accordingly confirmed the additions made by the Assessing Officer.

12. Now the assessee has preferred an appeal before the Tribunal and reiterated its contentions. The learned counsel for the assessee further contended that at the end of the year, there was Nil balance and whatever amount was debited to the account of the assessee it was later on credited after the loan was sanctioned from the bank. The detailed explanation with regard to the receipt in the current account and further credit on sanction of loan was duly explained to the AO and filed a reply dated 20.08.2009. Attention was also invited to the accounts of the assessee with M/s. HML Agencies Pvt. Ltd., to demonstrate that the assessee was maintaining a current account with the company in which the remuneration was credited from time to time and whatever cash payments were made on behalf of the company, the same was debited to the said account. He has also placed reliance upon the judgment of the jurisdictional High Court in the case of Bagmane Constructions P. Ltd., Vs. CIT 119 DTR 49, copy of which is placed at page Nos. 32-40 in support of his contention that loan or advance given to the shareholders or to a concern, under normal circumstances would not qualify as dividend. It was further contended that the jurisdictional High Court has clarified that such loan or advances given to such shareholder as a consequence of other consideration which is beneficial to the company received from such shareholder, any such advances or loan cannot be said to be deemed dividend within the meaning of the Act. Reliance was further placed upon the order of the Tribunal, Kolkata Bench, in the case of ITO Vs. Gayatri Chakroborty in ITA

No. 151/Kol/13 in which it was held that loan account is different from a current account with a shareholder. The transaction between the assessee and the company are in the nature of the current account, therefore provision of section 2(22)(e) of the Act will not be applicable to the case. Reliance was also placed upon the judgment of Hon'ble Punjab and Haryana High Court in the case of CIT Vs. Suraj Dev Dada 367 ITR 78 in which it has been held that company having running account with the shareholder and no evidence or intent to evade taxes, loan could not treated as a deemed dividend.

13. The learned DR on the other hand has placed reliance upon the order of the CIT(A).

14. Having heard the rival submissions and from careful perusal of the record, in the light of the judgments referred to the parties, we find that undisputedly the assessee was having a running account with the company in which there are so many debit and credit entries throughout the year. The copy of the current account statement is available at page Nos. 147 to 164 in which there are various debit and credit entries in different financial years. During the impugned assessment year, the remunerations payable to the assessee was credited in its current account besides a sum of Rs.4,67,300/-, Rs.5,00,000/-, Rs.10,00,000/- and Rs.16,00,000/- was credited to its accounts for different purposes. It is also an undisputed fact that amount was credited in order to purchase the house to be given to the

assessee (Managing Director) of the company. Later on the bank loan was sanctioned and accordingly the debit entries were made and at the end of the financial year there was Nil balance against the assessee. Since the assessee is the Managing Director and has been maintaining current account with the company in which debit and credit entries are found, it cannot be presumed that whatever credit entries are found in the current account amounts to be deemed dividend. We have also carefully perused the judgment of the jurisdictional High Court in the case of Bhagmane Construction Pvt. Ltd., Vs. CIT (supra). We find that in this judgment Their Lordships had categorically held that if any loan or advance given to such shareholder as a consequence to any further consideration which is beneficial to the company received from such shareholder, any such loan or advance cannot be deemed dividend within the meaning of the Act. The relevant observations of jurisdictional High Court is reproduced hereunder for the sake of reference:

> "The purpose of the insertion of sub-cl. (e) of s. 2(22) was to bring within the tax net accumulated profits which are distributed by closely held companies to his shareholders in the form of loans to avoid payment of dividend distribution tax under s. 115-O. 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 payment of tax by having these companies pay or distribute money in the form of advance or loan. Loan or advance given to the shareholders or to a concern, under normal circumstances would not qualify as dividend. 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 shareholder, in such case, such advance or loan cannot be said to a deemed dividend within the

> meaning of the Act. Thus, gratuitous loan or advance given by a company to those specified shareholders would come within the purview of s. 2(22) but not to the cases where the loan or advance is given in return to an advantage conferred upon the company by such shareholder. The intention behind the provisions of s. 2(22)(e) is to tax dividend in the hands of shareholders. It is in this background, the word "any payment", by a company, by way of advances or loans, has to be interpreted. The attribute of a loan is that it is a positive act o lending money coupled with acceptance by the other side of the repayment. The term "advance" may or may not include lending. The word "advance" if not found in the company or in conjunction with the word loan may or may not include the obligation of repayment. If it does then it would be a loan. However, the legislature has used the expression by way of advance or loan. Therefore, both these words are used to mean different things. The principle of statutory interpretation by which a generic word receives a limited interpretation by reason of its company is well established. In such circumstance, one can legitimately draw on the noscitur a sociis principle. In fact this latter maxim is only an illustration or specific application and broader than the maxim ejusdem generis."

15. We have also examined the order of the Tribunal in the case of ITO Vs. Smt. Gayatri Chakroborty in which it was held that loan account is different from the current account and the transaction between the assessee and the company are in the nature of the current account and therefore provisions of section 2(22)(e) of the Act will not be applicable. Similar view was also expressed by the Hon'ble Punjab and Haryana High Court in the case of CIT Vs. Suraj Dev Dada.

16. Turning to the fact of the case, we find that undisputedly the assessee maintained the current account with the company and the

amounts were credited to its account towards purchase of the property and later on when the loan was sanctioned from the bank, the credit entries were scored off. Therefore, since the credit entry was made for purchase of property for the company, the said credit entries cannot be called the deemed dividend in the hands of the assessee. Accordingly, we find no merit in the addition and therefore we set aside the order of the CIT(A) and delete the addition made in this regard.

ITA 163/Bang/2011

17. This appeal is filed by the assessee relating to AY 2003-04 and the assessee has raised two grounds; one relating to the addition on account of unexplained gift of Rs.6 lakhs, and the other relating to disallowance of expenses of Rs.64,614. These additions were challenged by the ld. counsel for the assessee mainly on the ground that no seized material relating to these additions was found during the course of search, therefore the additions are not sustainable in the eyes of law. In support of this contention, he placed reliance upon the judgment of Hon'ble Karnataka High Court in the case of *IBC Knowledge Park* reported in 136 DTR 65 and *CIT v. Lancy Constructions Ltd. (237 Taxman 728)*.

18. The ld. counsel for the assessee further contended that the assessment for the AY 2003-04 was completed, therefore on the basis of search, the other issues with regard to which incriminating material was not seized during the course of search cannot be examined.

19. The ld. DR, on the other hand, has contended that nothing has been placed on record by the ld. counsel for the assessee to establish that this issue was examined by the AO while completing the original assessment. If the issue was not examined, the revenue authorities are competent to examine the issue in the assessment proceedings initiated consequent to the search. It was further contended by the ld. DR that the judgment of Hon'ble Karnataka High Court is not applicable as in that case, the original assessment was concluded, but in the instant case no evidence has been placed to establish that original assessment was concluded.

20. On merits, it was contended by the ld. counsel for the assessee that assessee has filed additional evidence for declaration of gifts and the confirmation before the CIT(Appeals), but he did not admit the same and confirmed the addition.

21. Having carefully examined the orders of the lower authorities, we find that search was conducted upon the assessee as well as its company, M/s HML Agencies Pvt. Ltd., to which the assessee is the Managing Director. Nothing has been placed on record to establish as to how the original assessment was completed, either u/s 143(1) or 143(3).

22. We have also carefully examined the judgment of Hon'ble jurisdictional High Court in the case of *IBC Knowledge Park (supra)* and *Lancy Constructions Ltd. (supra)*, but we find that in those cases original assessment was concluded and thereafter search was conducted and

Their Lordships of the jurisdictional High Court have held that without finding any incriminating material during the course of search, additions cannot be made in assessment proceedings framed consequent to search. But in the instant case, nothing has been placed before us to establish as to how the assessment was completed. It is not clear whether assessment was concluded or not and in the absence of these facts, we are of the view that the judgment of jurisdictional High Court in the case of *IBC Knowledge Park (supra)* and *Lancy Constructions Ltd. (supra)* would not apply. Since the AO has noticed for the first time with regard to receipt of gift of Rs.6 lakhs, he is competent to examine the same.

23. On merits, we find force in the contention of the assessee that the additional evidence filed before the CIT(A) was not admitted and the addition was confirmed. We have also carefully examined the assessment order and the order of CIT(Appeals) and we find that before the AO the assessee sought time for filing additional evidence, but he was not allowed and when he filed the same before the CIT(A), it was turned down by the CIT(A). When the assessee has filed confirmation of declaration of gift, it should have been examined by the CIT(A) and thereafter he should have called for a remand report from the AO before deciding the issue. But he did not do so. Therefore, we are of the view that this issue requires fresh adjudication by the AO. We accordingly set aside the order of CIT(Appeals) and restore the matter to the file of the AO with a direction to

re-examine the genuineness of gift, after affording opportunity of being heard to the assessee.

24. So far as the other grounds relating to disallowance of Rs.64,614 is concerned, we find that similar disallowance was also made in **AY 2004-05 (ITA No.164/B/11)** and both the grounds were examined by the CIT(Appeals) in para 2.4.1 of his order. The AO has disallowed these expenses as it is not allowable against income from other sources and those expenses incurred for business purpose can only be allowed by computing the business income of the assessee. The CIT(A) has also examined the contentions of the assessee that the expenses are related to proprietary business of the appellant in the name of Delta Transport Corporation and Delta Constructions which have not been debited in the respective profit & loss account and therefore it was claimed separately. Since the expenses are wholly and exclusively incurred for the purpose of business, therefore same may be allowed as deduction. But the CIT(A) was not convinced with the contention of the assessee and he observed that assessee has separately prepared the profit & loss account and balance sheet for Delta Transport Corporation and Delta Constructions, the income/loss from which is separately computed in the computation of income, whereas the above expenses have been claimed in a profit & loss account separately prepared, which only includes receipt of interest and interest on income-tax refunds which are assessable under the head 'income from other sources'. The CIT(A) further observed that except

taking the argument that expenses are related to business of Delta Transport Corporation and Delta Construction, the assessee failed to produce any evidence to support that the expenses which have been disallowed by the AO are incurred for the purpose of business of the assessee or the expenses have been incurred for earning the income from other sources.

25. During the course of hearing of appeal, no evidence was filed before us that these expenses were incurred for the purpose of business of the assessee or for earning the income from other sources. In these circumstances, we find no merit in the assessee's claim. Accordingly, we dismiss the same.

ITA No.165/Bang/2011

26. In this appeal the assessee has assailed the order of CIT(Appeals) mainly on two grounds. One is with regard to addition of Rs.29 lakhs as unexplained investment in the property purchased from S.M. Rasheed u/s. 69B; and the other is on account of unexplained investment of Rs.14,52,000 in the immovable property at Ankola, besides the challenge to the validity of the search.

27. The grounds relating to validity of the search has already been withdrawn by the assessee and the same stands dismissed as stated above.

28. So far as the addition of Rs.29 lakhs on account of unexplained investment is concerned, it is noticed that during the course of search ledger book was seized wherefrom entry containing details of payments to Mr. S.M. Rasheed was found for purchase of land from him by the assessee. Out of the total amount of Rs.56 lakhs paid to S.M. Rasheed, Rs.29 lakhs was paid in cash and the balance amount was paid through cheque. Initially the assessee has admitted payment of cash of Rs.29 lakhs as additional income for the AY 2005-06, but later on, he retracted from the declaration made u/s. 132(4) of the Act. The retraction made by the assessee was not accepted by the department and the AO made the addition of Rs.29 lakhs u/s. 69B of the Act. The AO later on recorded the statement of S.M. Rasheed in which Mr. S.M. Rasheed has admitted the receipt of payment in cash of Rs.29 lakhs towards vacating the tenants who were occupying the land. But assessee was not allowed to cross-examine Mr. S.M. Rasheed. The assessee, however, made a request in writing to the AO to allow him cross-examination of Mr. Rasheed, but the AO did not allow the same. Copy of the letter by the assessee is appearing at page 178-179 of the assessee's compilation. But the AO while making the addition has strongly relied upon the statement of Mr. S.M. Rasheed.

29. The ld. counsel for the assessee strongly contended that first of all, no incriminating material was seized from the assessee during the course of search relating to this addition, therefore this addition is not sustainable in the eyes of law. On merits, the ld. counsel for the assessee has

contended that AO has solely relied upon the statement of Mr. S.M. Rasheed while making the addition, but he did not allow the assessee to cross-examine Mr. S.M. Rasheed nor did he dig out the correct facts. Therefore, there is a clear violation of the principles of natural justice and addition made by the AO is not sustainable in the eyes of law.

30. The ld. DR, on the other hand, has contended that during the course of search at the premises of M/s. HML Agencies Pvt. Ltd. of which the assessee is a Managing Director, a register was seized and it contained the details of payment to Mr. S.M. Rasheed for purchase of land from him by the assessee. In this register, details of payments were mentioned and in this regard assessee was examined u/s. 132(4) of the Act during the course of search and the assessee categorically admitted the payment in cash and has agreed for its surrender as additional income for AY 2005-06. But later on, he retracted from the said statement. On his retraction, the AO has examined the recipient of this cash Mr. S.M. Rasheed and Mr. S.M. Rasheed has admitted in his statement about the receipt of the said amount in cash. Therefore, it is not only the statement of Mr. Rasheed on which the AO has made the addition, but also there are other evidence which speaks of payment of cash of Rs.29 lakhs by the assessee to S.M. Rasheed. Therefore, no interference is called for in the order of CIT(Appeals).

31. Having carefully examined the orders of lower authorities in the light of rival submissions, we find that the assessee is a Managing Director of HML Agencies Pvt. Ltd. and search was simultaneously conducted upon the assessee and his companies and if the documents are found either from the assessee or company premises, the assessee cannot take a plea that seized material found at the premises of the company do not relate to any additions made in the hands of assessee. The assessee is not a stranger to this company. These companies are being controlled by the assessee. Therefore, we do not find any force in the argument of the assessee that seized material found at the business premises cannot be used against the assessee, though it relates to the transactions undertaken by the assessee.

32. We have also carefully examined the fact that search was conducted on 17.1.2008 and 18.1.2008 and assessee has made a surrender statement which was retracted on 15.4.2008 by writing a letter. Once the declaration has been retracted by the assessee, the AO is required to collect more evidence in support of the addition made by him. The AO accordingly recorded the statement of Mr. S.M. Rasheed, who admitted the receipt of Rs.29 lakhs in his statement, but the statement was recorded in the absence of assessee and assessee was not allowed to cross-examine Mr. S.M. Rasheed with regard to receipt of Rs.29 lakhs in cash. The assessee has specifically written a letter to the AO (copy placed in page 178-179 of compilation) through which a specific request was made to

afford opportunity to him to cross-examine Mr. S.M. Rasheed, but the assessee was not allowed to cross-examine Mr. Rasheed. The AO made the addition of Rs.29 lakhs as unexplained investment in the hands of assessee. While making the addition, the AO has put the main thrust on the statement of Mr. Rasheed, but the assessee was not allowed to cross-examine Mr. Rasheed. Therefore the statement of Mr. Rasheed was not tested upon the touchstone of cross-examination. It is settled position of law that opportunity should be afforded to the assessee relating to that evidence, which the AO intends to rely upon for making the addition. Since there is violation of principles of natural justice, we are of the view that assessee should be allowed to cross-examine Mr. Rasheed before making the addition. This aspect was also not looked into by the CIT(Appeals), though a specific plea was raised before him. We therefore set aside the order of CIT(Appeals) in this regard and restore the matter to the file of Assessing Officer with a direction to afford opportunity of cross-examination of Mr. S.M. Rasheed to the assessee and thereafter readjudicate the issue after affording opportunity of being heard.

33. So far as addition of Rs.14,52,000 is concerned, we find that during the course of search, a file was found and seized in which photocopy of sale agreement dated 4.10.2004 between Ramadas Venkatesh Shanbhogue of Ankola Taluk and assessee for sale of 3 acres of land property situated at Alageri Village, Ankola. As per the agreement, the sale consideration was fixed at Rs.20,100 per gunta (Rs.8,04,000 per acre)

and the assessee has paid an advance of Rs.51,000 and later on Rs.5 lakhs was also paid by the assessee to Shri Ramdas Venkatesh Shanbhogue on 19.12.2004. But as per Sale Deed found in assessee's file dated 17.1.2005, sale consideration was stated to be Rs.9,60,000 and the AO has worked out the difference of Rs.14,52,000 between the sale consideration as per agreement at Rs.24,12,000 and as per Sale Deed at Rs.9,60,000 and he accordingly added this amount as unexplained investment on account of on-money u/s. 69B of the Act. The assessee filed letter dated 30.6.2009 stating that the so-called sale agreement is nothing but a photocopy of signed agreement dated 4.12.2004 and in order to induce him to pay Rs.20,100 per gunta for 3 acres of land, this document was prepared. However, he has not agreed for the price offered by Mr. Ramdas Venkatesh Shanbhogue and finally the property was bargained for Rs.9,60,000 and accordingly sale deed was executed. The AO has also examined Ramdas Venkatesh Shanbhogue in this regard and he has also deposed that he has not received this on-money. Whatever sale consideration is mentioned in the sale deed was only received by him. He also supported the contentions of the assessee. The AO was not convinced with this explanation and he made an addition of Rs.14,52,000 as unexplained investment.

34. The assessee preferred an appeal before the CIT(Appeals), but did not find favour with him. Now the assessee is in appeal before the Tribunal.

35. During the course of hearing, the ld. counsel for the assessee has contended that AO has relied upon the photocopy of the so-called agreement, which was never materialised. The property was purchased from Ramdas Venkatesh Shanbhogue for a sum of Rs.9,60,000. Copy of the agreement is also placed on record and its translated copy in English is also placed on record. During the course of hearing, the ld. counsel has invited our attention to the statement of Ramdas Venkatesh Shanbhogue which is appearing at page 216 - 231 of the assessee's compilation. In response to a specific query, Mr. Ramdas Venkatesh Shanbhogue has categorically stated that he has not entered into agreement with the assessee on any occasion for the sale of land. With regard to receipt of cash relating to impugned property, it was stated by Ramdas Venkatesh Shanbhogue that he has not received any advance in the form of cash or cheque or DD from Mr. Mohiuddin as part consideration for sale of land. The entire sale consideration was received on the date of registration. It was specifically stated that he has not received any consideration over and above Rs.9,60,000 mentioned in the sale deed towards sale consideration of the said 3 acres of land in question. A specific query was raised to assessee in this regard and he has repeatedly denied any payment over and above the sale consideration. The ld. counsel further contended that since there is no independent evidence in support of the stand taken by the revenue that assessee has paid a sum of Rs.14,52,000 over and above the

sale consideration, the impugned addition is not sustainable in the eyes of law.

36. The ld. DR placed reliance upon the order of CITA.

37. Having carefully examined the orders of lower authorities in the light of rival submissions, we find that undisputedly the photocopy of agreement was found during the course of search, on the basis of which the AO has formed an opinion that assessee has paid a sum of Rs.14,52,000 over and above the sale consideration mentioned in the sale deed. But in this regard, he has not collected any other evidence except the document found during the course of search. The statement of assessee as well as Ramdas Venkatesh Shanbhogue was recorded on oath and in their statements, they have categorically denied the receipt of this amount of Rs.14,52,000 over and above the sale consideration mentioned in the sale deed. When the payer and payee have denied the receipt of the said amount which was considered to be on-money by the AO, the AO is required to collect some more evidence in support of his stand that some on-money was paid. Since the revenue has not brought out anything on record in this regard, except the photocopy of the said document which was duly explained by the assessee, we find no justification in this addition made by the AO. Accordingly, we set aside the order of CIT(A) and delete the addition.

38. Accordingly, this appeal is disposed of.

ITA No.166/Bang/2011

39. In this appeal the assessee has assailed the order of CIT(A) mainly on two grounds. First ground is with regard to addition made on account of deemed dividend and the other on account of cash paid over and above the transaction recorded in the books of accounts besides challenging the validity of the search. Since the ground relating to validity of search has been withdrawn by the assessee, we are left with only aforesaid remaining two grounds.

40. With regard to addition on account of deemed dividend, the learned counsel for the assessee has submitted that the AO has made addition of Rs.13,18,568/- as deemed dividend u/s. 2(22)(e) of the Act, consequent to the amounts debited and credited for running of current account of the assessee in the books of the company in which the assessee is a shareholder. The assessee has reiterated its argument that the assessee was having a current account with the company in which his remuneration was credited time to time. Therefore the amount credited in the current account cannot be treated to be loan or advance for treating it to be deemed dividend. Reliance was also placed upon the judgment of the Bhagmane Constructions, Suraj Dev Dada and Gayathri Chakroborti. This issue has already been examined by us in the foregoing appeals in which it was held that whenever the assessee has a current account with the company and regular debit and credit entries are found therein, the credit

entries found in the current account cannot be called to be the loan or advance for treating it to be deemed dividend. Accordingly, following the view taken in the above said appeals, we decide the issue in favour of the assessee. Accordingly, the addition made by the CIT(A) is deleted in this regard, after setting aside his order.

41. The other ground in this appeal relate to addition of Rs.40,79,000/- on account of cash payment made in purchase of property. The facts borne out of the record are that the wife of the assessee Mrs. Shahanaz Mohiuddin and Mrs. Baddrudin purchased the property. During the course of search, one document was seized with regard to the noting of cash payment in purchase of property. The AO assumed on the basis of the statement given by the assessee that a sum of Rs.35,50,000/- was a cash paid over and above the registered sale consideration. He has also placed reliance upon the statement of the assessee wherein he has deposed that he would declare it as his income in case of Mr. Bhadruddin's denial. Though the statement was retracted by the assessee vide letter dated 15.4.2008, the AO placed reliance upon the statements of the assessee and made the addition of Rs.40,79,000/- (Rs.35,50,000/- + Rs.5,29,000/-) as cash payment made over and above the sale consideration declared in the books of account. The assessee preferred an appeal before the CIT(A) with the submission that when the property was purchased by the two ladies, the addition on account of cash payment over and above the sale consideration cannot be made in the hands of the assessee alone. It was

also contended that when the statement was retracted, the same cannot be taken as a good piece of evidence against the assessee.

42. CIT(A) was not convinced with the contentions of the assessee and he accordingly confirmed the addition. Now the assessee is before us with the submission that the statement was recorded during the course of search on 18.01.2008 but by filing a letter dated 15.04.2008, the assessee has retracted from his statement by stating that all payments of purchase of property have been recorded in the books of accounts and he has not paid any sum over and above the sale considerations as recorded in the books of accounts. He further contended that money returned by the persons to whom monies were earlier paid were not recorded at all in those cases. The learned counsel for the assessee further contended that despite the retraction from the summarized statement of the assessee, the AO has not made any effort to collect some independent evidence to substantiate that the assessee has made the cash payment over and above the sale considerations recorded in the books of accounts. It was further contended that Mr. Bhadruddin has also denied the payment in cash because nothing was paid in cash to the seller over and above the sale consideration. The learned counsel for the assessee further contended that when the property was purchased in joint names, how the addition of cash payment can be made in the hands of one buyer and that too in the hands of the husband of the buyer. Therefore, the addition made by the AO is without any basis and deserves to be deleted.

43. The learned DR has on the other hand placed reliance on the order of the CIT(A).

44. Having carefully examined the order of the lower authorities in the light of the rival submissions, we find that undisputedly during the course of search one document was seized in which there were some entries of cash payment over and above the sale consideration for the purchase of property in the name of Mrs. Shahanaz Mohiuddin and Mrs. Bhadruddin. No doubt the assessee has made a statement during the course of search that though this amount was paid by Mr. Bhadruddin, but if he did not accept the same, he would surrender this amount. But after few months, the assessee has retracted from his earlier statement by stating that he has not made any cash payment over and above the sale consideration to purchase any property, though this retraction letter was given on 15.04.2008 and AO has completed his assessment on 4.12.2009. Therefore there was ample time with the AO to examine the veracity of this statement in which the assessee has acknowledged the payment of cash for purchase of property. But the AO has not made any effort in this regard. He simply relied upon the seized documents and the statement of the assessee made during the course of search. It is a settled position of law that once the surrender statement is retracted, the onus upon the AO is heavier and he has to bring some more independent evidence in support of his view or conclusion drawn on the basis of seized document and surrender statement. In such type of cases where the payer and payee are

involved and the payer disputes the payment of cash over and above the recorded consideration, the AO should have examined the payee to verify the correctness of statement. But in the instant case, the AO has neither examined the payee in this regard nor brought any independent evidence in support of his view or conclusion that the assessee has made a payment in cash over and above the recorded considerations. Moreover, when the property was purchased by two ladies, the addition of cash payment cannot be made in the hands of husband of one lady alone. If the facts of payment in cash is found to be correct, the addition can only be made in the hands of both the ladies in equal manner. But this has not been done by the AO. He has simply relied upon the statement of the assessee while making the addition in the hands of the assessee. This approach of the AO cannot be appreciated. Accordingly, we find no merit in this addition and we set aside the order of the CIT(A) and delete the additions.

ITA No.167/Bang/2011

45. This is an appeal preferred by the assessee against the order of the CIT(Appeals) *inter alia* on the following grounds:-

> "1. The orders of the authorities below in so far as they are against the appellant are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.
>
> 2.1 The learned CIT[A] is not justified in restricting a sum of Rs.75,02,887/- as against a sum of Rs. 1,86,01,958/ - as deemed divided u/s.2[22][e] of the Act under the facts and in the circumstances of the appellant's case.

2.2 The authorities below have erred that the decision of the Hon'ble Supreme Court in the case of P.SHARADA reported in229 ITR444 [SC] is clearly applicable to the facts of the appellant's case, without appreciating that it was rendered on a concession or admitted fact by the aforesaid assessee that such withdrawals amounted to an advance whereas, in the appellant's case the amount are mere debits and credits in the current account and there is no understanding to charge any interest on the current account and such debits are against the salary entitlements, etc., and these do not constitute loans and advance attracting the provisions of Section 2[22][e] of the Act.

2.3 Without prejudice to the above, the authorities below erred in assessing the aggregate of the debit balances during the year instead of the closing balance at the end of the year, which alone would constitute loan or advances in an extreme case to attract the provisions of Section 2[22][e] of the Act as per the ratio of the Madras High Court in the case of K.SRINIVASAN reported in 50 ITR 788 and in the instant case there is no excess withdrawal and therefore, there is no warrant to apply section 2[22][e] of the Act.

2.4 Without prejudice to the above, the authorities below have erred in taxing the aggregate of the debit balance that too as erroneously depicted by the A.O. in the assessment order as against the actual account copy as per the books of the company and filed with the authorities below [see paper book at Page Nos. 1 07 to No.113] without taking into account the credits by way of remuneration credited to the account as deemed dividend under the facts and in the circumstances of the appellant's. They failed to appreciate that even in extreme case at the end of the year since no amount is due, there is no justification to tax any sum as deemed dividend under the facts and in the circumstances of the appellant's.

2.5 The learned CIT[A] failed to appreciate that the extract of the accounts as shown at pages [15 & 16] of the assessment order is erroneous and quite different from the actual account copy of the appellant in the books of the company and he ought to have taken the same into consideration while dealing with the issue in the appeal.

3.1 The authorities below are not justified in disallowing a sum of Rs.16,145/- relating to his business of M/s.Delta Transport Corporation and Delta Constructions, which have not been debited in the respective Profit & Loss account and therefore, claimed separately. These expenses are incurred wholly and exclusively for the business and therefore, they are required to be allowed. The disallowance is purely on suspicion and surmise, assumptions and presumptions and consequently, requires to be deleted.

3.2 The learned CIT[A] erred in observing that except taking the argument that the expenses were related to business failed to produce any evidence to support the expenses disallowed by the learned A.O. were incurred for the purposes of the business of the appellant or incurred for earning the income brought to tax, which is very obvious on the very face of the financial statements, neither the learned A.O. or the learned CIT[A] have asked for production of the vouchers in relation to the expenses claimed in the financial statements.

3.3 The disallowance is purely on suspicion and surmise, assumptions and presumptions and consequently, requires to be deleted.

4. The authorities below are not justified in disallowing a sum of Rs.83,328/- as excess claim of depreciation under the facts and in the circumstances of the appellant's case. The addition made is purely on suspicion and surmise, assumptions and presumptions and contrary to the evidence on record.

5. Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies himself liable to be charged to interest *u/s.* 234B and 234C of the Act, which under the facts and in the circumstances of the appellant's case deserves to be cancelled.

6. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs.

46. Ground No.1 is general in nature and needs no independent adjudication.

47. Ground Nos. 2.1 to 2.5 relate to the addition on account of deemed dividend. This issue has been examined by us in the foregoing appeals in which we have categorically held for different reasons that the so-called advances shown to the assessee cannot be called to be deemed dividend. We accordingly, following the view taken in the foregoing appeals, hold that advances shown to the assessee cannot be called to be deemed dividend. Therefore, no addition u/s. 2(22)(e) is called for. We, therefore, set aside the order of the CIT(Appeals) and delete the addition in this regard.

48. Ground Nos.3.1 to 3.3 relate to the addition on account of disallowance of business expenses of Rs.16,145. This disallowance was made by the AO on verification of P&L account filed and having noted that assessee has claimed depreciation on the interest received from bank, assessee was asked to explain as to why this claim should not be disallowed. In response thereto, it was submitted that these are allowable expenses since the assessee is in the business of proprietary concern, M/s. Delta Transport Corporation. The AO did not find any merit in the submissions and accordingly disallowed the claim and made the addition.

49. Before the CIT(Appeals), though specific ground was raised, but no specific finding is given in this regard. We have, however, carefully

examined this ground, but we find no merit therein. Accordingly, we confirm the addition.

50. Ground No.4 relates to the addition of Rs.83,328 and in this regard it is noticed that assessee has claimed depreciation at Rs.5,88,355 on WDV of the assets as on 1.4.2006. The AO has also worked out the WDV of the assets as on 1.4.2007 also and having noted that excess depreciation was claimed at Rs.83,328, he disallowed the same.

51. Though a specific ground was raised before the CIT(Appeals), but the CIT(A) was not convinced with the arguments of the assessee and he confirmed the addition.

52. Now the assessee has raised a ground before the Tribunal, but could not explain as to why he has claimed excess depreciation. We therefore find no infirmity in the order of the CIT(Appeals). Accordingly, we confirm the same in this regard.

53. Accordingly, the appeal is partly allowed for statistical purposes.

ITA Nos.1088 & 1118/Bang/2012

54. These cross appeals are preferred by the assessee and the revenue against the order of the CIT(Appeals) pertaining to AY 2007-08. Since these appeals were heard together, they are disposed of through this consolidated order.

ITA No.1088/Bang/2012

55. This appeal is preferred by the assessee against the order of CIT(Appeals) *inter alia* on the following grounds:-

> "1. The orders of the authorities below in so far as they are against the appellant are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.
>
> 2. The order of re-assessment is bad in law and void-ab-initio for want of requisite jurisdiction especially, the mandatory requirements to assume jurisdiction u/s 148 of the Act did not exist and have not been complied with and consequently, the order of re-assessment passed requires to be cancelled.
>
> 2.1 The learned authorities below failed to appreciate the income which is sought to be assessed has been once been assessed u/s.143[3] by invoking the provisions of Section 153C of the Act and the said assessment has been cancelled and it cannot be said that income has not been assessed at all to acquire the character of income escaping assessment.
>
> 2.2 The learned authorities below failed to appreciate that if an income is liable for assessment and is assessed and such assessment is cancelled on account of any fault of the action of the A.O. the income so assessed will not acquire the character of income escaping assessment as per the ratio of the decision of the Hon'ble Supreme Court in the case of CHATIURAM HOLIRAM reported in 27 ITR 709.
>
> 2.3 The authorities below failed to appreciate that the assessment passed u/s.143[3] by invoking the jurisdiction u/s.153C of the Act is not similar to an assessment made under Chapter XIV-B i.e., u/s.158BD or 158BC of the Act, as in such cases, such assessment is in addition to the normal assessment.
>
> 2.4 The authorities below further failed to appreciate that u/s.153A or 153C of the Act, the concept of a block assessment and a regular assessment is not there and only one assessment u/s.143[3] or 144 is contemplated to be made with or without recourse to section 148 of the Act.

2.5 The authorities below failed to appreciate that the income earlier assessed and such assessment is cancelled and therefore, the assumption of jurisdiction u/s.147 of the Act, to assess it once again would not amount to assessing escaped income and consequent assessment requires to be cancelled.

3.1 Without prejudice to the above, the learned CIT[A] is not justified in sustaining a sum of Rs.1 ,54,742/- as deemed divided u/s.2[22][e] of the Act under the facts and in the circumstances of the appellant's case.

3.2 The learned CIT[A] has erred that the decision of the Hon'ble Supreme Court in the case of P .SHARADA reported in 229 ITR 444 [SC] is clearly applicable to the facts of the appellant's case, without appreciating that it was rendered on a concession or admitted fact by the aforesaid assessee that such withdrawals amounted to an advance whereas, in the appellant's case the amount are mere debits and credits in the current account and there is no understanding to charge any interest on the current account and such debits are against the salary entitlements, etc., and these do not constitute loans and advance attracting the provisions of Section 2[22][e] of the Act.

3.3 Without prejudice to the above, the learned CIT[A] erred in assessing the aggregate of the debit balances during the year instead of the closing balance at the end of the year, which alone would constitute loan or advances in an extreme case to attract the provisions of Section 2[22][e] of the Act as per the ratio of the Madras High Court in the case of K.SRINIVASAN reported in 50 ITR 788.

4. Without prejudice to the right to seek waiver with the Hon’ble CCIT/DG, the appellant denies herself liable to be charged to interest u/s.234A, 234B, 234C and 234D of the Act, which under the facts and in the circumstances of the appellant's case deserves to be cancelled.

5. The authorities below failed to appreciate that the levy of interest u/s.234A, 234B and 234C are compensatory in nature and if the pre-paid taxes and TDS are taken into account at the time of filing the return in response to notice u/s.153A rws 153C of the Act and the fact that TDS is required to be deducted if the deemed divided is sustained, there is no tax payable at all and

consequently, the levy of interest u/s.234A[3], 234B[3] and 234C are misconceived and unauthorized and liable to be cancelled.

6. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs."

56. Ground Nos.1 & 6 are general in nature and needs no independent adjudication.

57. Apropos ground Nos.2 & 3 which relate to the issue of deemed dividend and in this regard we find that the assessee was having a running current account with the company in which she is a director. In the running current account, remuneration was timely credited. This identical issue examined by us in the foregoing appeals in which we have held that amount credited in the current account of assessee cannot be termed to be the advances/loans for invoking the provisions of deemed dividend. Accordingly, following the view taken in the foregoing appeals, we hold that whatever credit account is found in the accounts of the assessee, the same cannot be termed as deemed dividend. We therefore set aside the order of the CIT(Appeals) and delete the addition.

58. Ground Nos.4 & 5 are consequential in nature and needs no independent adjudication.

59. Accordingly, this appeal of the assessee stands allowed.

ITA No.1188/Bang/2012

60. This appeal is preferred by the revenue against the order of CIT(Appeals) *inter alia* on the following grounds:-

> "1. The Ld. CI.T. (Appeals) erred in deleting the addition made amounting to Rs 40,79,000/- on unexplained investment in the land.
>
> 2. The Ld.CIT(Appeals) has made factual error by stating that Rs. 40,79,000 added as unexplained investment of the assessee has been substantially confirmed by the ClT(A) in the case of Shri Mohiuddin. But fact is that in the case of shri Mohiuddin, same income is added protectively.
>
> 3. For these and such other grounds that may be urged at the time of hearing the orders of Ld. C.I.T (A) may be set aside and that of assessing officer may be restored."

61. The issue involved in this appeal is with regard to addition of Rs.40,79,000 as unexplained investment in the land. On a careful perusal of the record, we find that during the course of assessment proceedings, the AO has noted that assessee has made a payment of Rs.40,79,000 over and above the sale consideration recorded in the books of account. Though the property was purchased in the name of two ladies, but the addition was made in the name of assessee as well as her husband. This issue was examined by us in the case of husband of assessee, Mr. A. Mohiuddin in ITA No.166/Bang/2011 in which we have discussed the facts of the case. Having carefully examined the legal position, we hold that addition cannot be made in the hands of Mr. A. Mohiuddin, the husband of

the assessee. Moreover, the AO has not examined the assessee in whose name, he intends to make the addition on protective basis. Even payee was not examined by the AO. For the detailed reasons, we have deleted the addition in the hands of Mr. A. Mohiuddin. Since we have dealt with the issue in detail in the foregoing appeal, we find no justification to deal with the issue again. Accordingly, following the view taken therein, we hold that this addition in the hands of assessee is not called for lack of investigation. We accordingly find no merit in the revenue's appeal. We dismiss the same.

62. In the result, the appeals of the assessees in ITA No.1223/Bang/2010, 166/Bang/2011 and 1088/Bang/2012 are allowed; ITA Nos. 163, 165 & 167/Bang/2011 are partly allowed for statistical purposes; ITA No.164/Bang/2011 is dismissed; and appeal by the revenue in ITA No.1118/Bang/2012 is dismissed.

Pronounced in the open court on this 25th day of January, 2017.

Sd/-	Sd/-
(S. JAYARAMAN) Accountant Member	(SUNIL KUMAR YADAV) Judicial Member

Bangalore,
Dated, the 25th January, 2017.

/D S/

Copy to:

1. Appellants
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.