IN THE INCOME-TAX APPELLATE TRIBUNAL, AGRA BENCH, AGRA

Before: Shri A.D. Jain, Judicial Member And
Shri Dr. Mitha Lal Meena, Accountant Member

ITA Nos. 322/Agra/2015
A.Ys: 2011-12

ACIT, Circle-2, Gwalior **(Appellant)**	vs.	Prem Motors, Kanwal Complex, A.G. Office Road, Gwalior. PAN : AABCP 2035 Q **(Respondent)**

ITA Nos. 327/Agra/2014
A.Ys: 2010-11

DCIT, Circle-2, Gwalior **(Appellant)**	vs.	Prem Motors, Kanwal Complex, A.G. Office Road, Gwalior. PAN : AABCP 2035 Q **(Respondent)**

Appellant by	Shri Waseem Arshad, Sr. DR
Respondent by	Shri Mahesh Agarwal, CA

Date of Hearing	23.10.2017
Date of Pronouncement	16.11.2017

ORDER

PER DR. MITHA LAL MEENA, A.M.:

These two appeals by the Revenue are directed against the order dated 12/08/2014 for AY 2010-11 and order dated 06/04/2015 for AY 2011-12 passed by the CIT (Appeals), Gwalior. Since the issues involved in both these appeals are common and grounds taken by the department are also same, both the appeals are disposed of by this common order.

2.0 First, we take up appeal in ITA No. 327/Agra/2014 in respect of AY 2010-11. The Revenue has taken up the following grounds of appeal: –

1. *"Whether on the facts and in the circumstances of the case, the CIT(A) was right in law and on facts in deleting the addition of Rs. 3,79,12,500/- made by the Assessing Officer u/s 2(22)(e) of the Income Tax Act, 1961 on account of the amounts / advances received by the assessee from M/s Tanushka Automobiles Pvt Ltd. and M/s Vinayaka Farms and Resorts (India) Pvt Ltd. (VFARPL), despite the fact that ShCharanjeet Nagpal was a shareholder holding 55.92% shares in the assessee company, 30% shares in TAPL and 49.50% shares in VFARPL i.e. was having substantial interest in the payee as well as payer companies ?".*

2. *"Whether on the facts and in the circumstances of the case, the CIT(A) was right in law and on facts in deleting the addition of Rs.39,12,696/- made by the Assessing Officer on account of income from house property as per provisions of section 22 read with 23 of the Income Tax Act, 1961?"*
3. *Whether on the facts and in the circumstances of the case, the CIT(A) was right in law and on facts in deleting the addition of Rs.13,75,355/- made by the Assessing Officer u/s 40A(2)(b) of the Income Tax Act, 1961?"*

3.0 Apropos ground No. 1,the CIT(A) deleted the addition of Rs. 3,79,12,500/- made by the Assessing Officer u/s 2(22)(e) of the Income Tax Act, 1961 on account of the amounts / advances received by the assessee from M/s Tanushka Automobiles Pvt Ltd. and M/s Vinayaka Farms and Resorts (India) Pvt Ltd. (VFARPL), despite the fact that ShCharanjeet Nagpal was a common shareholder.

3.1 The facts are that during the course of assessment the Assessing Officer (the AO) noticed that the assessee company has received advances/loans from and has paid various amounts to group concerns M/s Tanshaka Automobiles Pvt Ltd (TAPL) and M/s Vinayaka Farms & Resorts Pvt Ltd (VFARPL). He has also noted that

Shri Charanjeet Nagpal was a shareholder having55.92% shares in the assessee company during the FY 2009-10. During the financial year relevant Shri Charanjeet Nagpalwas also a shareholder of 30% shares in TAPL and 49.50% shares in VFARPL. Thus, Shri Charanjeet Nagpal was having substantial interest in the assessee company as well as in TAPL and VFARPL. It was also noted by the AO that accumulated profits of TAPL as on 31/03/2010 were Rs.4,19,38,246/- and of VFARPL as on 31/03/2010 were Rs. 36,76,575/-.

3.1.1 Under the given set of facts the AO was of the opinion that sec. 2(22)(e) of the Act was applicable to the amounts received by the assessee company from other group companies and, to the extent of their accumulated profits, amounts received by the assessee company was deemed dividend in its hand. Therefore, the AO show caused the assessee to explain why the amounts/loans received by it during the FY 2009-10 from VFARPL and TAPL be not treated as “Deemed Dividend” as per the provisions of section 2(22)(e) of the Income Tax Act, 1961. In response the assessee explained that VFARPL was in the money lending activity and its entire income was

only interest from money lending business. As such provisions of Sec. 2(22)(e) were not applicable to the amounts received from VFARPL. As regards TAPL it was explained that money/advance was received by the assessee under a mutual understanding between the two companies to the effect that the assessee company would permit its property to be mortgaged to the bank and would also give a corporate guarantee to the bank for the loan facility availed by TAPL and in turn TAPL would give short term business assistance in terms of funds to the assessee. It was also explained that the assessee company was neither a registered nor a beneficial share holder in any of the lending companies. The assessee therefore contended that provisions of Sec 2(22)(e) were not applicable to the amounts received from any of these two companies. He also relied on various case laws which are quoted by the AO in his order on page 4 under para 2.2. However, the AO was not satisfied with the explanation of the assessee. He was of the opinion that if loan or advance is given to a concern (ie. HUF, a Firm, Association of person, Body of individual or a company) in which a share holder (being a person who is the beneficial owner of shares holding not less than 10% of the

voting power) of the payer company (giving loan or advance) has substantial interest, then the provisions of section 2(22)(e) applicable to the concern receiving the loan/advance. Accordingly, the AO, vide 2.12 treated Rs. 3,69, 12,500/- and Rs. 10,00,000/- being advance/loan received by the assessee company from TAPL and VFARPL respectively (to the extent of their accumulated profits) as deemed dividend in the hands of the assessee company as per provisions of section 2(22)(e).

3.2 The assessee being aggrieved took the matter before the CIT(Appeals) and reiterated similar submissions. The Ld. CIT(A) deleted entire addition of Rs.3,79,12,500/-, interalia observing as under –

> *"5.3.2The third and major argument on the issue of deemed dividend made by the AR of the appellant is that the Vinayaka Farms & Resorts (I) Pvt Ltd. is neither a beneficial nor a registered shareholder of the appellant company and thus it is not a shareholder the question of deemed dividend does not arise. On this issue I am in agreement with the appellant that Vinayaka Farms & Resorts (I) Pvt Ltd is neither a beneficial nor a registered shareholder of the appellant. As is apparent from the above arguments placed by the appellant and various case laws cited there also seems to be unanimity in decisions on the issue of contention and argument raised by the appellant.*

Various High Courts and Tribunals have held passed similar judgments. The decision of Special Bench of the ITAT in the case of Commissioner of Income Tax v.Bhaumik Colour (P) Ltd – 118 ITD 1, decision of jurisdictional ITAT Agra Bench in the case of Atul Engineering Udyog – 133 ITD 1 and decision of various courts as under, have been cited by the appellant -

CIT VsAnkitechPvt Ltd and others 340 ITR 14 (Del)
CIT Vs AR Magnetics (P) Ltd (2014) 220 Taxman 209 (Del. HC)
CIT Vs Daisy Packers (P) Ltd. (2014) 220 Taxman 331 (Guj. HC)
CIT VsSuram Holdings (P) Ltd. (2014) 220 Taxman 327 (Raj. HC)
ACIT Vs Britto Amusement P. Ltd (2014) 360 ITR 544 (Bom. HC)
CIT Vs Hotel Hilltop – 313 ITR 116 (Raj)
CIT Vs Universal Medicare P. Ltd. 324 ITR 263 (Mum)

5.3.3 I am also of the view that the dividend even under section 2(22)(e) can be taxed only in the hands of the shareholder. As the appellant is neither a beneficial nor a registered shareholder of Vinayaka Farms & Resorts (I) Pvt Ltd and thus any advance received by the appellant from such a concern does not qualify the test of deemed dividend and thus are not liable to be taxed. In view of the above the addition u/s 2(22)(e) made by the AO for an amount of Rs.10,00,000/- being the amount received form M/s Vinayaka Farms & Resorts (I) Pvt Ltd is hereby deleted.

5.3.4 Similar is the situation for an amount of Rs. 3,69,12,500/- received by the appellant from Tanushaka Automobiles Pvt Ltd. Here also the appellant has argued that the appellant company is neither a registered nor a beneficial owner of shares of Tanushaka Automobiles Pvt Ltd. Here also the facts and circumstances are the same. As the appellant is neither a beneficial nor a registered shareholder of Tanushaka

Automobiles Pvt Ltd. and thus any advance received by the appellant from such a concern does not qualify the test of deemed dividend as discussed and elaborated in the preceding paragraphs. Thus, the same is not liable to be taxed in the hands of the appellant u/s 2(22)(e). In view of the above addition u/s 2(22)(e) made by the AO for an amount of Rs. 3,69,12,500/- being the amount received by the appellant from Tanushaka Automobiles Pvt Ltd is hereby deleted.

5.3.5 Thus, the appellant gets a relief of Rs.3,79,12,500/- (Rs. 10,00,000/- plus 3,69,12,500/-) on grounds 1 to 4."

3.3 The Ld DR supported the assessment order. His submission was that the assessee company is a concern in which Shri Charanjeet Nagpal holds substantial shareholding and he is also a substantial shareholder in the lender companies M/s Vinayaka Farms & Resorts (I) Pvt Ltd and M/s Tanushaka Automobiles Pvt Ltd. As such, the assessee company is a concern in which one of the shareholder, ie. ShCharanjeet Nagpal, of the lender companies has substantial shareholding and, therefore, despite that the assessee company is neither a registered nor a beneficial shareholder in any of the lender company, provisions of section 2(22)(e) are fully applicable. In support of his contention, he brought to our notice order of Hon'ble Allahabad High Court in the case of Shri Krishan

Gopal Maheswari (ITA No 23 of 2013), CIT V. Subrat Roy, Lucknow (Order dt. 27/08/2013) and an order of the Hon'ble Supreme Court in the case of 'Gopal & Sons (HUF) Vs. CIT', (Civil Appeal No. 12274 of 2016). On the basis of these cases, he vehemently argued that the loan/advance received by the assessee company from TAPL and VFARPL is fully covered by the provisions of section 2(22)(e) and the assessing officer was fully correct in treating the same as deemed dividend and assessing the same in the hands of the assesee company.

3.4 On the other hand Ld AR for the assessee CA Mahesh Agarwal supported the order of the CIT (Appeals). He contended that intention behind section 2(22)(e) was to curb the malpractices of closely held companies who do not distribute dividend but give loans / advances to their main shareholder and thereby avoid paying tax on dividend distribution. Since dividend could be given only to a registered shareholder, provisions of section 2(22)(e) could be attracted only in the hands of a registered shareholder. A non shareholder cannot be deemed as shareholder for the purpose of section 2(22)(e). His main contention was that addition u/s 2(22)(e) can be made only in the

hands of the registered and beneficial shareholder and since the assessee company does not hold any shares in the lender companies, the provisions of the section 2(22)(e) could not be applied to it. Ld AR again submitted that the CIT(A) has discussed the issue in detail covering all aspects and related case laws and is fully justified in deleting the impugned addition. The Ld Counsel for the assessee distinguished the cases cited by the Ld DR and in support of his arguments he relied on various case laws. He also placed before us a recent decision of the Hon'ble Appex Court delivered on 5th October 2017 in the case of CIT, Delhi – II Vs Madhur Housing and Development Company (Civil Appeal No. 3961 of 2013) and others.

3.5 We have heard both the parties, perused the material on record at length and considered the case laws cited in support.

3.6 It is undisputed fact the assesseee company is not a share holder in any of the lender companies ie TAPL and VFARPL though Shri Charanjeet Nagpal is a common shareholder having substantial shareholding in all the companies. Therefore the question before us to consider is whether, when the assessee company is neither a

registered nor a beneficial shareholder of the lender companies, the loan/advance received by the assessee company from these group companies could be taxed in its hand as “deemed dividend” within the provisions of section 2(22)(e).

3.6.1 The provisions of section 2(22)(e) came up for consideration before the Hon’ble Rajasthan High Court in the case of Hotel Hilltop (2009) 313 ITR 116. In this case the AO had added Rs. 10.00 Lac in the hands of Hotel Hilltop, a partnership firm, treating the amount received from Hiltop Palace Hotels (P) Ltd as deemed dividend being a “payment to a concern” which satisfied the condition of shareholding level as envisaged u/s 2(22)(e). The assessee objected to the addition in first appeal on the ground that he was not a registered shareholder of the lender company and succeeded. The department went before the Tribunal but there also the assessee succeeded. On further appeal by the department, Hon’ble Rajasthan High Court held in Para 7 & 8 as under: –

> *“7. The more important aspect, being the requirement of s. 2(22)(e) is, that "the payment may be made to any concern, in which such shareholder is a member, or the partner, and in which he has substantial interest, or any payment by any such company, on behalf, or for the individual benefit of any such shareholder..." Thus, the*

substance of the requirement is, that the payment should be made on behalf of, or for the individual benefit of any such shareholder, obviously, the provision is intended to attract the liability of tax on the person, on whose behalf, or for whose individual benefit, the amount is paid by the company, whether to the shareholder, or to the concerned firm. In which event, it would fall within the expression "deemed dividend". Obviously, income from dividend, is taxable as income from other sources, under s. 56 of the Act, and in the very nature of things, the income has to be, of the person earning the income. The assessee in the present case is not shown to be one of the persons, being shareholder. Of course the two individuals being Roop Kumar and Devendra Kumar, are the common persons, holding more than requisite amount of shareholding, and are having requisite interest, in the firm, but then, thereby the deemed dividend would not be deemed dividend in the hands of the firm, rather it would obviously be deemed dividend in the hands of the individuals, on whose behalf, or on whose individual benefit, being such shareholder, the amount is paid by the company to the concern.

8. Thus, the significant requirement of s. 2(22)(e) is not shown to exist. The liability of tax, as deemed dividend, could be attracted in the hands of the individuals, being the shareholders, and not in the hands of the firm."

3.6.2 The applicability of section 2(22)(e) to the non shareholder concern was also considered by Mumbai 'E' Special Bench of ITAT in the case of ACIT Vs BhaumikColourPvt Ltd. reported in (2009) 118 ITD 0001 and held as under: –

*"**34.** We are of the view that the provisions of s. 2(22)(e) do not spell out as to whether the income has to be taxed in the hands of the shareholder or the concern (non-shareholder). The provisions are ambiguous. It is therefore necessary to examine the intention behind enacting the provisions of s. 2(22)(e) of the Act.*

***35.** The intention behind enacting provisions of s. 2(22)(e) are that closely held companies (i.e., companies in which public are not substantially interested), which are controlled by a group of members, even though the company has accumulated profits would not distribute such profit as dividend because if so distributed the dividend income would become taxable in the hands of the shareholders. Instead of distributing accumulated profits as dividend, companies distribute them as loan or advances to shareholders or to concern in which such shareholders have substantial interest or make any payment on behalf of or for the individual benefit of such shareholder. In such an event, by the deeming provisions such payment by the company is treated as dividend. The intention behind the provisions of s. 2(22)(e) is to tax dividend in the hands of shareholder. The deeming provision as it applies to the case of loans or advances by a company to a concern in which its shareholder has substantial interest is based on the presumption that the loan or advances would ultimately be made available to the shareholders of the company giving the loan or advance. The intention of the legislature is therefore to tax dividend only in the hands of the shareholder and not in the hands of the concern.*

***36.** The basis of bringing in the amendment to s. 2(22)(e) of the Act by the Finance Act, 1987 w.e.f 1st April, 1988 is to ensure that persons who control the affairs of a company as well as that of a firm can have the payment made to a concern from the company and the person who can control the affairs of the concern can draw the same from the concern instead of the company directly making payment to*

the shareholder as dividend. The source of power to control the affairs of the company and the concern is the basis on which these provisions have been made. It is therefore proper to construe those provisions as contemplating a charge to tax in the hands of the shareholder and not in the hands of a non-shareholder viz., concern. A loan or advance received by a concern is not in the nature of income. In other words, there is a deemed accrual of income even under s. 5(1)(b) in the hands of the shareholder only and not in the hands of the payee viz., non-shareholder (concern). Sec. 5(1)(a) contemplates that the receipt or deemed receipt should be in the nature of income. Therefore the deeming fiction can be applied only in the hands of the shareholder and not the non-shareholder viz., the concern.

37. *The definition of dividend under s. 2(22)(e) of the Act is an inclusive definition. Such inclusive definition enlarges the meaning of the term "dividend" according to its ordinary and natural meaning to include even a loan or advance. Any loan or advance cannot be dividend according to its ordinary and natural meaning. The ordinary and natural meaning of the term dividend would be a share in profits to an investor in the share capital of a limited company. To the extent the meaning of the word "dividend" is extended to loans and advances to a shareholder or to a concern in which a shareholder is substantially interested deeming them as dividend in the hands of a shareholder the ordinary and natural meaning of the word "dividend" is altered. To this extent the definition of the term "dividend" can be said to operate. If the definition of "dividend" is extended to a loan or advance to a non-shareholder, the ordinary and natural meaning of the word "dividend" is taken away. In the light of the intention behind the provisions of s. 2(22)(e) and in the absence of indication in s. 2(22)(e) to extend the legal fiction to a case of loan or advance to a non-shareholder also, we are of the view that loan or advance to a*

non-shareholder cannot be taxed as deemed dividend in the hands of a non-shareholder.

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41.In the light of the above discussion, the questions referred to the Special Bench are answered as follows :

On the first question: Deemed dividend can be assessed only in the hands of a person who is a shareholder of the lender company and not in the hands of a person other than a shareholder.

On the second question: The expression 'shareholder' referred to in s. 2(22)(e) refers to both a registered shareholder and beneficial shareholder. If a person is a registered shareholder but not the beneficial shareholder then the provisions of s. 2(22)(e) will not apply. Similarly, if a person is a beneficial shareholder but not a registered shareholder then also the provisions of s. 2(22)(e) will not apply."

3.6.3 The aforesaid decisions of the Spl. Bench has been approved by Hon'ble Mumbai High Court in the case of M/s Universal Medicare Pvt Ltd reported in (2010) 324 ITR 263. Subsequently, various other High Courts have also approved the decision of Spl. Bench of ITAT as well as that of Rajasthan High Court.

3.6.4 Hon'ble Delhi High Court in the case of M/s Ankitech Pvt. Ltd. (ITA No. 462 of 2009) reported in 340 ITR 0014, held as follows: –

> *"**24.** The intention behind enacting provisions of s. 2(22)(e) is that closely-held companies (i.e. companies in which public are not substantially interested), which are controlled by a group of members, even though the company has accumulated profits would not distribute such profit as dividend because if so distributed the dividend income would become taxable in the hands of the shareholders. Instead of distributing accumulated profits as dividend, companies distribute them as loans or advances to shareholders or to concern in which such shareholders have substantial interest or make any payment on behalf of or for the individual benefit of such shareholder. In such an event, by the deeming provisions, such payment by the company is treated as dividend. The intention behind the provisions of s. 2(22)(e) of the Act is to tax dividend in the hands of shareholders. The deeming provision as it applies to the case of loans or advances by a company to a concern in which its shareholder has substantial interest, is based on the presumption that the loans or advances would ultimately be made available to the shareholders of the company giving the loan or advance.*
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> ***25.** Further, it is an admitted case that under normal circumstances, such a loan or advance given to the shareholders or to a concern, would not qualify as dividend. It has been made so by legal fiction created under s. 2(22)(e) of the Act. We have to keep in mind that this legal provision relates to "dividend". Thus, by a deeming provision, it is the definition of dividend which is enlarged. Legal fiction does not extend to "shareholder". When we keep in mind this aspect, the conclusion would be obvious, viz., loan or advance given under the conditions specified under s. 2(22)(e) of the Act would also be treated as dividend. The fiction has to stop here and is not to be extended*

further for broadening the concept of shareholders by way of legal fiction. It is a common case that any company is supposed to distribute the profits in the form of dividend to its shareholders/members and such dividend cannot be given to non-members. The second category specified under s. 2(22)(e) of the Act, viz., a concern (like the assessee herein), which is given the loan or advance is admittedly not a shareholder/member of the payer company. Therefore, under no circumstance, it could be treated as shareholder/member receiving dividend. If the intention of the legislature was to tax such loan or advance as deemed dividend at the hands of "deeming shareholder", then the legislature would have inserted deeming provision in respect of shareholder as well, that has not happened. Most of the arguments of the learned counsel for the Revenue would stand answered, once we look into the matter from this perspective.

26. *In a case like this, the recipient would be a shareholder by way of deeming provision. It is not correct on the part of the Revenue to argue that if this position is taken, then the income "is not taxed at the hands of the recipient". Such an argument based on the scheme of the Act as projected by the learned counsel for the Revenue on the basis of ss. 4, 5, 8, 14 and 56 of the Act would be of no avail. Simple answer to this argument is that such loan or advance, in the first place, is not an income. Such a loan or advance has to be returned by the recipient to the company, which has given the loan or advance.*

27. *Precisely, for this very reason, the Courts have held that if the amounts advanced are for business transactions between the parties, such payment would not fall within the deeming dividend under s. 2(22)(e) of the Act.*

28. *Insofar as reliance upon Circular No. 495, dt. 22nd Sept., 1997 issued by CBDT is concerned, we are inclined to agree with the*

observations of the Mumbai Bench decision in Bhaumik Colour (P) Ltd. (supra) that such observations are not binding on the Courts. Once it is found that such loan or advance cannot be treated as deemed dividend at the hands of such a concern which is not a shareholder, and that according to us is the correct legal position, such a circular would be of no avail.

29. *No doubt, the legal fiction/deemed provision created by the legislature has to be taken to 'logical conclusion' as held in Andaleeb Sehgal (supra). The Revenue wants the deeming provision to be extended which is illogical and attempt is to create a real legal fiction, which is not created by the legislature. We say at the cost of repetition that the definition of shareholder is not enlarged by any fiction.*

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32. *We, thus, answer the questions in favour of the assessee and against the Revenue, as a result, these appeals are dismissed."*

3.6.5 The above order of the Hon'ble Delhi High Court has since been approved by the Hon'ble Appex Court vide its order delivered on 5th October 2017 in the case of CIT, Delhi – II Vs Madhur Housing and Development Company (Civil Appeal No. 3961 of 2013) and others as placed before us by the Ld AR. While disposing off the Special Leave Petitions of number of cases filed by the Revenue, Hon'ble court has passed the following order: –

O R D E R

The impugned judgment and order dated 11.05.2011 has relied upon a judgment of the same date by a Division Bench of the High Court of Delhi in ITA No. 462 of 2009. Having perused the judgment and having heard arguments, we are of the view that the judgment is a detailed judgment going into Section 2(22)(e) of the Income Tax Act which arises at the correct construction of the said Section. We do not wish to add anything to the judgment except to say that we agree therewith.

These appeals are disposed of accordingly.

3.6.6 The issue in dispute as to applicability of section 2(22)(e) to a non shareholder recipient of loan / advance, thus, now stands settled. As far case laws, cited by the Ld DR, are concerned it would be suffice to say that they do not address the specific issue of treating receipt of an advance/loan as deemed dividend in the hands of the non shareholder recipient which is the core dispute in the present appeal.

3.6.7 In the present case, the assessee company is neither a registered nor a beneficial shareholder of the lender companies and the loan / advance is also not alleged to have been received by the

assessee company on behalf of or for the benefit of its alleged shareholder i.e. ShCharanjeet Nagpal.

3.6.8 In view of the aforesaid discussion and the judicial precedents, we do not find any error in the order of the CIT(Appeals) in deleting the addition of Rs. 3,79,12,500/- made by the AO u/s 2(22)(e) of the Act. Therefore, appeal this ground of appeal of revenue is dismissed.

4. Ground No. 2, the revenue objected the deletion by the CIT (Appeals) of the Rs.39,12,696/- made by the AO under the head "Income from House Property".

4.1 During assessment proceedings the AO noted that assessee's property at Kanwal Complex, City Centre, Gwalior was let out to two tanents namely Axis Bank and M/s Tanushaka Automobiles Pvt Ltd. (TAPL), a group concern. It was noted by the AO that 4200 Sft area on the ground floor was let out to Axis Bank @ 38/- per sq. ft. and the bank had given a deposit of Rs.9,57,600/- being equivalent to six month's rent. As regards M/s TAPL it was noted that assessee had rented out to them 100% of Basement, 50% of ground floor, 50% of Mezzanine and 100% of first floor of its property aggregating to 12600 Sq Ft @ 10,000/- per month and they had made a deposit of

Rs. 2.00 Crore on interest @ 6% p.a. Noting the disparity in rent from each of the tenant, the AO asked the assessee to justify the rental income shown by him.

4.1.1 In response the assessee explained that rent received was same as in the previous year which had been examined and accepted by his predecessor. It was also explained that assessee had fetched total rent of Rs. 20,35,200/- from the property as against its fair value fixed by the Municipal Corporation. Thus, the actual rent received being higher than the municipal valuation should be treated as fair rent for the purpose of section 23 of the Act. It was further stressed that the huge deposit of Rs.2.00 Crore by M/s TAPL at substantially low rate of interest adequately compensated for the low rent received from them.

4.1.2 The AO was not convinced and adopted the same rate of rent i.e Rs.38/- per sq ft., as realized from Axis Bank, to the portion let out to TAPL and accordingly made an addition of Rs.39,12,696/-.

4.2 The aggrieved assessee in appeal before the CIT(A) argued that rent agreement with TAPL started in 2001 while with Axis Bank was started later on and revised to the present rent in 2008. Further,

the portion let out to Axis Bank was at prime position of the property while portion let out to TAPL was mainly basement, mezzanine and first floor. Thus, the agreements as well as area let out were not comparable. Further, deposit from TAPL at very low rate of interest also compensated adequately and added to the profitability of the assessee. It was also stressed that total rent received for the property was much higher than the annual value fixed by the municipal corporation and therefore there was no under valuation of fair rent. The assessee also relied on various decisions as discussed by the CIT(A) in his order.

4.3 The CIT (Appeals) deleted the addition holding in para 7.3 of his order as under –

> *"I have gone through the various arguments of the AR and the written submissions given before me. The fact remains that the rent was received from Axis Bank at a much higher rate but also there is another fact that Tanushaka Automobiles Pvt Ltd had totally different terms and conditions of rental agreement. They were older tenant and the space given to Axis Bank was the prime space of the property. Further, the appellant had taken a security deposit of Rs. 2 Cr. from Tanushaka Automobiles Pvt Ltd. as against no security deposit received from Axis Bank Ltd. Thus arrival of fair rental value on rent received from Tanushaka Automobiles Pvt Ltd on the basis of rent received from Axis Bank Ltd would not be a correct position as the*

terms and circumstances of the both the tenants are different. In various case laws cited by the appellant it has been held that if the appellant has received an actual rent in excess of municipal valuation then such rent ought to be treated as fair rent in terms of section 23. Following the ratio laid down by said decisions I find that the actual rent received by the appellant is in excess of the fair rent as per municipal valuation of similar date filed before me by the appellant. In view of the above there is no justification by the AO in making an addition of Rs. 39,12,696/-. Thus the addition of Rs. 39,12,696/- made by the AO under section 23 is hereby deleted."

4.4 The Ld DR has relied on the assessment order. The Respondent Ld AR for the assessee has relied on the order of the CIT(A) and made similar arguments as made before the AO and the CIT(A). He drew out attention to the municipal valuation fixed for the said property by Nagar Palika Nigam, Gwalior on 27/06/2009 (APB / 90 & 91) and according to which as per computation sheet (APB/91) it is fixed at an Annual Value of Rs. 7,22,640/- only while the actual total rent received from the property is Rs.20,25,200/- . He further drew out attention to rent agreement with Tanushaka Automobiles Pvt Ltd. (APB / 94-97) and Lease agreement with Axis Bank Ltd. (APB / 112 – 128) with the submission that both properties has been let out on different terms and the area let out to them had no comparison with each otherin support of the order of the ld. CIT(A).

4.5 We have heard both the parties and have carefully gone through the material on record.

4.5.1 It is relevant to quote the provisions of section 22 and 23 of the Income Tax Act, 1961 as they govern the taxation of income from house property –

> **Income from House Property –**
> Sec 22. The annual value of property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner, other than such portions of such property as he may occupy for the purpose of his business or profession carried on by him the profits of which are chargeable to income tax, shall be chargeable to income tax under the head "income from house property".
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> **Annual value how determined.**
> **23.** (1) For the purposes of section 22, the annual value of any property shall be deemed to be—
> (a) the sum for which the property might reasonably be expected to let from year to year; or
> (b) where the property or any part of the property is let and the actual rent received or receivable by the owner in respect thereof is in excess of the sum referred to in clause (a), the amount so received or receivable; or
> (c) where the property or any part of the property is let and was vacant during the whole or any part of the previous year and owing to such vacancy the actual rent received or receivable by the owner in respect thereof is less than the sum referred to in clause (a), the amount so received or receivable :
> **Provided** that the taxes levied by any local authority in respect of the property shall be deducted (irrespective of the previous year in which

the liability to pay such taxes was incurred by the owner according to the method of accounting regularly employed by him) in determining the annual value of the property of that previous year in which such taxes are actually paid by him.

Explanation. —For the purposes of clause (b) or clause (c) of this sub-section, the amount of actual rent received or receivable by the owner shall not include, subject to such rules as may be made in this behalf, the amount of rent which the owner cannot realise.

(2) Where the property consists of a house or part of a house which—

(a) is in the occupation of the owner for the purposes of his own residence; or

(b) cannot actually be occupied by the owner by reason of the fact that owing to his employment, business or profession carried on at any other place, he has to reside at that other place in a building not belonging to him,

the annual value of such house or part of the house shall be taken to be nil.

(3) The provisions of sub-section (2) shall not apply if—

(a) the house or part of the house is actually let during the whole or any part of the previous year; or

(b) any other benefit therefrom is derived by the owner.

(4) Where the property referred to in sub-section (2) consists of more than one house—

(a) the provisions of that sub-section shall apply only in respect of one of such houses, which the assessee may, at his option, specify in this behalf;

(b) the annual value of the house or houses, other than the house in respect of which the assessee has exercised an option under clause (a), shall be determined under sub-section (1) as if such house or houses had been let.

4.6.1 A plain reading of the aforesaid provisions makes it clear that where a property is fully let out, its Annual Value is to be taken at

higher of the actual rent received / receivable from the said property or the sum for which the said property might reasonably be expected to let out from year to year. Thus, the question is what is the "reasonable rent"for which the property may be let out ? The Hon'ble Delhi High Court, in the case of 'John Tipson& Co. (P) Ltd and Others Vs CIT', reported as (2008) 298 ITR 0407 held vide Para 4 of the order as under –

> *"4. The next question is whether it is permissible or reasonable for the AO to conduct an enquiry into market rents prevailing in the contiguous areas for the purposes of computing the sum for which the property might reasonably be expected to let. There is a plethora of precedents on this issue, all enunciating that 'reasonable' rent can only be the 'standard' rent. After analyzing the decisions of the apex Court in Amolak Ram Khosla vs. CIT (1981) 131 ITR 589 (SC), Dewan Daulat Rai Kapoor vs. New Delhi Municipal Committee (1980) 122 ITR 700 (SC) and Sheila Kaushish vs. CIT (1981) 24 CTR (SC) 351 : (1981) 131 ITR 435 (SC), this Court has laid down in CIT vs. Raghubir Saran Charitable Trust (1990) 183 ITR 297 (Del), that the Tribunal was justified in holding that the market rent of the property could not be more than the standard rent. In Raghubir Saran Charitable Trust (supra) the AO had incorrectly computed the market rent of the house and had added the difference between the market rent so calculated and rent which was being actually paid. The same result was reached in L. Bansidhar& Sons vs. CIT (1993) 109 CTR (Del) 62 : (1993) 201 ITR 655 (Del) where however it was clarified that the position stood changed with effect from the 1976 amendment, after which the actual rent would be relevant only if it is higher than*

the standard rent. Once again the decision of this Court in CIT vs. Vinay Bharat Ram & Sons (HUF) (2003) 179 CTR (Del) 31 : (2003) 261 ITR 632 (Del) is topical. The Department had assailed the following remand order of the CIT(A)-

> *"The AO is directed to redetermine the annual value of the property in accordance with my findings, he will limit the same to the higher of the following (a) the municipal valuation, (b) the fair rent determinable under the Rent Control Act, and (c) the actual rent paid by the assessee. This direction I feel fairly and reasonably gives effect to the pronouncements of the Supreme Court on the subject from time to time."*

The Tribunal had affirmed the remand order. The Division Bench of this Court was of the view that no substantial question of law had arisen, and the appeal of the Department was dismissed. We may only add and clarify that the words 'municipal valuation' would in the syntax of the present IT Act and of municipal taxation statutes be synonymous and interchangeable with 'standard rent'."

4.6.2 Thus, the "reasonable rent" can only be the "standard rent" which is in syntax with the "municipal valuation". Hon'ble Calcutta High Court, in the case of Commissioner of Income Tax Vs Satya Co. Ltd (1997) 140 CTR 0569 also held vide Para 5 as under -

> *"**5.** The law on the point is settled by the decisions of this Court where it had taken into consideration all the decisions of the Supreme Court, including the amendments made w.e.f. 1st April, 1976. This Court has consistently taken the view that for the purpose of s. 22 r/w s. 23 of the Act, the Revenue was bound to fix the annual letting value based on*

the municipal valuation unless the same was lower than the actual rent received in respect of the period falling after 1st April, 1976."

4.7 In the present case, municipal valuation of the concerned property was made on 27/06/2009 by the Municipal Corporation fixing the annual value of the property at Rs.7,22,640/- relevant for the Assessment Year under appeal. In view of the decision of the Hon'ble Delhi High Court in the case of John Tipson& Co. (P) Ltd (Supra) as well Calcutta Hugh Court in the case of Commissioner of Income Tax Vs Satya Co. Ltd (Supra) as discussed above, the "reasonable rent" for which the property might be let out cannot exceed thesaid amount fixed as annual value by Municipal Corporation. As against this the assessee received total rent of Rs.22,25,200/- which is much higher than the municipal valuation. Thus, same is to be treated as "standard rent" for the property in question. So far as different rent fetched from different tenants is concerned it is suffice to say that area as well as terms of both the tenants were different and distinguishable in features. Rent received from M/s Axis Bank cannot be the basis of determining the rent from M/s Tanushaka Automobiles Pvt Ltd. Moreover, the property did not consist of different units. It

was a compact property some part of which was let out to one tenant and some part to other. Thus, the annual value of the said property was to be considered as a single unit as is done by the Municipal Corporation. In our opinion there is considerable force in the arguments of the Ld AR.

4.8 In view of the aforesaid discussion and considering all the aspects, we are of the considered opinion that the AO was not justified to make the impugned addition. Therefore, we find no reason to interfere in the order of ld CIT(A) on this issue. Ground No. 2 of the Revenue is accordingly dismissed.

5. In Ground No. 3, the revenue challenged the deletion by the CIT(A) of Rs.13,75,355/- made by the Assessing Officer u/s 40A(2)(b) of the Income Tax Act, 1961.

5.1 Brief facts are that the assessee had paid interest @ 6% per annum on the security deposit of Rs.2.00 Cr to M/s Tanushaka Automobiles Pvt. Ltd amounting to Rs.12,00,000/-. The AO also noted that assessee had received security deposit from other tenant and had given security deposits to others for the premises taken on

rent. However, no interest was either received or paid on such other deposits. On these facts the AO disallowed said interest of Rs.12,00,000/- holding as under: –

> "4.4.2 On perusal of these details it is evident that other than in the case of interest paid on security deposit received from TAPL the assessee has neither paid any interest on any of the security deposit received on account of renting of property owned by it nor has received any interest on any of the security deposit paid on properties taken on rent. In other words the assessee has made excess payment of interst of Rs.12,00,000/- @ 6% per annum on security deposit to TAPL which is one of the persons specified under section 40A(2)(b) of the Act while it has not paid any interest on security deposit to any of the persons who are not specified under section 40A(2)(b) of the Act.
>
> 4.4.3 As a general norm security deposits received while any property is given on rent i.e while entering into rental agreements are interest free and no interest is paid on such security deposits. Therefore interest of Rs.12,00,000/- @ 6% per annum paid by the assessee on security deposit to TAPL is disallowed in the hands of the assessee applying the provisions of 40A(2)(b) of the Act."
>
> Further, vide para 4.5 the AO also disallowed interest of Rs. 1,75,355/- paid by the assessee to M/s Tanushka Automobiles Pvt Ltd on the other loans / advances received from them on the ground that such loan/advance are since deemed as dividend u/s 2(22)(e) the interest paid on such deemed dividend cannot be allowed.
>
> Thus, total disallowance made by the AO u/s 40A(2)(b) came to be Rs.13,75,355/-

5.2 On appeal the ld. CIT(A) deleted the entire addition observing as under in para 8.2 of his order: –

> *"The provisions of section 40A(2)(b) talk about the payment made to specified persons on rates more than the fair market rate. As regards payment of interest is concerned it depends on agreement between the two parties. The only issue arise that whether the rate of 6% paid by the appellant is in excess of the fair market rate. As per the AO the entire interest paid has to be disallowed. The AO has not doubted the that the appellant received a security deposit and an advance. The AO has also not doubted the fact that there was a formal agreement between both the parties to pay interest. The AO has also not doubted the fact that the interest provided / paid by the appellant to Tanushka Automobiles Pvt Ltd was 6%. The AO has also not doubted and has allowed interest paid to other depositors @ 12% per annum by the appellant. Merely because no interest was paid on certain security deposit would not be a factor for determining the allowability of interest and applicability of section 40A(2)(b). The test thus would be whether the interest @ 6% paid by the appellant to Tanushak Automobiles Pvt Ltd was reasonable and fair as compared to the market rates. The AO has himself allowed interest paid to various depositors @ 12%. Further, the rate at which the appellant has borrowed funds from the banks is still higher. The rate of 6% paid by the appellant to Tanushka Automobiles Pvt Ltd cannot be considered as higher at all. Further as regards contention of the AO that once the same is considered as deemed dividend the interest would not be allowed, it has been held by me that above that the amount is not to be treated as deemed dividend. Furthermore, even if it would have been considered as the same the nature of amount received by the appellant from Tanushka Automobiles Pvt Ltd does not change. For the purpose of taxation a deeming fiction has been added but the nature of amount*

remains as loans and advance and thus even on this there is no question of disallowance. In view of the above discussion I hereby delete the disallowance of Rs.13,75,355/- made by the AO on account of interest paid by the appellant to Tanushaka Automobiles Pvt Ltd."

5.3 The Ld DR has relied on the assessment order whereas the Ld AR has supported the order of CIT (Appeals).

5.4 We have heard both the parties at length, perused the material on record and have considered the legal issues.

5.5 Sec. 40A(2)(b) of the Income Tax Act, 1961 prescribes certain specified persons, any payment to whom for the expenditure incurred by the assessee may be disallowed as per section 40A(2)(a) which reads as under -

" (2)(*a*) Where the assessee incurs any expenditure in respect of which payment has been or is to be made to any person referred to in clause (*b*) of this sub-section, and the Assessing Officer is of opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him therefrom, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction.

Thus, before making any disallowance it is to be established that the payment for such expenditure was “excessive or unreasonable” having regard to the “fair market value” for similar expenditure. Unless the expenditure is found excessive or unreasonable it cannot be disallowed.

5.6 We find Ld CIT(A) discussed the matter in detail and has deleted the addition after examining the records as well as legal position of disallowance u/s 40A(2)(b). We also find from the records that the interest @ 6% p.a was paid by the assessee to M/s Tanushaka Automobiles Pvt Ltd under a contractual obligation. The AO has not doubted the correctness of agreement nor has found it to be frivolous. The rate of interest i.e. 6% p.a too is not found to be excessive comparing to fair market rates.

5.7 Under the circumstances, we do not find any infirmity in the order of the CIT(Appeals) in deleting the addition of Rs.12,00,000/- made by the Assessing Officer U/s 40A(2)(b) of the Act. Accordingly, Ground No. 3 by the department is dismissed.

ITA No. 322/Agra/2015 for AY 2011-12

6.0 The facts in this appeal are exactly similar to those inITA No. 327/Agra/2015 for AY 2011-12. Therefore, our above observations in ITA No. 327/Agra/2015 for AY 2011-12 are squarely applicable, in mutatis mutandis, to ITA No. 322/Agra/2015 for AY 2011-12. Therefore, in accordance therewith, in this appeal also, the grievance of the assessee is accepted and grounds of appeal raised by the department are rejected.

7.0 In the Result, both the appeals of the department are dismissed.

Order pronounced in the open court on 16/11/2017

Sd/-	**Sd/-**
(A.D. Jain)	**(Dr. Mitha Lal Meena)**
Judicial member	**Accountant Member**

Dated: 16.11.2017
Aks/- DOC

Copy of order forwarded to:

(1)	*The appellant*	*(2)*	*The respondent*
(3)	*Commissioner*	*(4)*	*CIT(A)*
(5)	*Departmental Representative*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Agra Bench, Agra

		Date		
1.	Draft dictated /	07.11.2017		PS
2.	Draft placed before author	14.11.2017		PS
3.	Draft proposed & placed before the second member			JM/AM
4.	Draft discussed/approved by Second Member.			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			PS/PS
6.	Kept for pronouncement on	16.11.2017		PS
7.	File sent to the Bench Clerk	16.11.2017		PS
8.	Date on which file goes to the AR			
9.	Date on which file goes to the Head Clerk.			
10.	Date of dispatch of Order.			