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IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR.

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER
AND SH. N. K. CHOUDHRY, JUDICIAL MEMBER

I. T. A. No. 508/Asr/2017
Assessment Year: 2014-15

G. G. Oils & Fats Pvt. Ltd., 2301, Bhupindra Flour Mills, Amrik Singh Road, Bathinda [PAN: AADCG 8857 H]	vs.	Deputy Commissioner of Income Tax, Circle-1, Bathinda
(Appellant)		**(Respondent)**

Appellant by : Sh. P. N. Arora &
Sh. Parshotam K. Singla (Adv.)
Respondent by: Sh. Charan Dass (D.R.)

Date of Hearing: 11.04.2019
Date of Pronouncement: 05.07.2019

ORDER

Per Sanjay Arora, AM:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals), Bathinda ('CIT(A)' for short) dated 21.6.2017, dismissing the assessee's appeal contesting its' assessment u/s. 143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for Assessment Year (AY) 2014-15 vide order dated 16.12.2016.

2. The brief facts of the case are that the assesse-company, a dealer in edible/non-edible oils, was found during the assessment proceedings to have received unsecured loan/s during the relevant previous year, i.e., f.y. 2013-14, from another company, namely, Gurdas Agro Pvt. Ltd. (GAPL), in which it held shares with 34.40% voting power. The loan, which was interest-bearing,

was not for any particular amount, but in the form of an open current account with regular debits and credits during the year; the opening balance (as on 01.4.2013) being in fact at a debit (i.e., receivable) of Rs.279.48 lacs, which though stood liquidated by 15.4.2013, turning into a credit (payable) balance of Rs.304.91 lacs on that date. The peak balance for the year was at Rs. 3266.12 lacs on 06.11.2013. GAPL was a company in which public is not substantially interested, i.e., is company other than that defined u/s. 2(18) of the Act. To the extent of it's accumulated profit, therefore, the loan or advance to the assessee was liable to the assessed in it's hands as deemed dividend u/s. 2(22)(e) of the Act. The accumulated profit up to 31.3.2013, i.e., immediately prior to the current year, stood at Rs. 67.36 lacs. The profit for the year, as per the audited accounts, was at Rs. 150.00 lacs, so that, on a pro-rata basis (i.e., up to 06/11/2013), it worked to Rs. 49.81 lacs. The total accumulated profit up to that date, i.e., Rs.117.17 lacs, was accordingly, after show causing the assessee, brought to tax u/s. 2(22)(e) r/w s. 56 of the Act in assessment.

In appeal, the assessee raised several contentions, each of which was met by the ld. CIT(A). *The financial statements did not reflect any trading transaction or business relationship between the two, i.e., the payer (GAPL) and the payee (assessee) companies*, with in fact the balance as on 31.3.2014 (Rs. 14.48 lacs) being reflected as an 'unsecured loan' in the assessees' balance-sheet as at the year-end. The assessee had subscribed to 40 lakh shares in GAPL during the year, which worked to 34.40% share-holding therein, so that there was no merit in invoking the rule of consistency; the provision becoming accordingly applicable for the first time only for the current year. The assessee having received Rs. 4267.01 lacs during the current year, the Assessing Officer (AO) had, in fact, been reasonable in working the sum assessable u/s. 2(22)(e) u/s. 56 at Rs.117.17 lacs, which was accordingly confirmed by the first appellate authority, placing reliance on *Tarulata Shyam v. CIT* [1997] 108 ITR 345 (SC) and *Sarada (P.) v. CIT* [1998] 229 ITR 444 (SC).

Aggrieved, the assessee is in second appeal, raising the following grounds:

'1. That the order of Commissioner of Income Tax (Appeals) and Deputy Commissioner of Income Tax Circle-1 Bathinda is against law & facts.

2. That Commissioner of Income Tax (Appeals) was erred in law to sustain the amount to assess as 'deemed dividend' of Rs. 1,17,17,142.00 in absence of any adverse finding with regard to business loans & advances. The addition made by Assessing Officer u/s. 2(22)(e) of Income Tax Act 1961 is highly unjustified in eyes of law as the said section has been wrongly invoked.

3. That CIT (Appeals) was not justified to sustain the addition of Rs. 1,17,17,142.00 u/s. 56 on account of 'deemed dividend' without considering the facts and written submission filed during course of appellant proceedings.'

3. Before us, the assessee's prime contention was of having maintained a running account with GAPL. The transfer of funds from one company to another was on need basis. While the assesse-company was the beneficiary of the sums received therefrom, GAPL, the payer company, was the beneficiary of the sums paid by the assessee thereto. The same therefore could not be regarded as either a loan or an advance, for s. 2(22)(e) to apply, but only as an open, mutual and current account. The credit obtained only for a period of 82 days during the relevant year. It was under these circumstances that the Hon'ble jurisdictional High Court in *CIT v. Suraj Dev Dada* [2014] 367 ITR 78 (P&H), where the credit was for 55 days only, held that the provision of s. 2(22)(e), which was to stop the misuse by taking funds out of the company by way of a loan or advance instead of dividend and, thereby, avoid tax, could be invoked. Similar view, it was submitted, was expressed by the Hon'ble Calcutta High Court in *CIT v. Gayatri Chakraborty* [2018] 407 ITR 730 (Cal), rendered after considering the decisions by the Apex Court in *Sarda (P.)* (supra) and *CIT v. Mukundray K. Shah* [2007] 290 ITR 433 (SC). The decisions in *Tarulata Shyam* (supra) and *Sarda (P.)*, it was argued, are distinguishable inasmuch as there were no mutual benefits and obligations in the facts of the said cases. In both these cases there were only one-way transactions during the year, i.e., payment

by the payer-company to the assessee-shareholder, while in the instant case there are transactions both ways; the assessee-company also making payment/s to the payer-company (GAPL). This is particularly so as the two companies are in the same line of business. On a query by the Bench as to if the provision of interest, charged (to the assessee-company by GAPL) at Rs. 5.19 lacs for the year on the overdraft account, would take the sum borrowed by the assessee during the year (at a maximum of Rs.3266.12 lacs) out of the purview s. 2(22)(e), the ld. counsel for the assessee, Sh. Arora, did not offer any definite answer, with the Bench observing that these aspects of the matter have understandably been considered by the Hon'ble Apex Court per it's decisions in the matter.

The ld. Sr. Departmental Representative (DR) would rely on the impugned order, stating that neither the primary facts of the case are in dispute nor in fact the law in the matter, explained by the Apex Court per its' several decisions, to some of which reference stands made by the ld. CIT(A).

4. We have heard the parties, perused the material on record, and given our careful consideration to the matter. The edifice of the assessee's case is that it has both, given, as well as received, amounts to/from GAPL, i.e., to mutual benefit and, therefore, s. 2(22) (e) of the Act shall not apply even as held by the Hon'ble Courts, reference to which, including by the Hon'ble jurisdictional High Court, stands made. The matter, as we find, is no longer *res integra*, having been abundantly clarified, and in all its aspects, by the Hon'ble Courts, including by the larger Benches of the Apex Court, *all unanimous in their verdict*. The assessee's claim (refer its' Gd. 2) is also not tenable on facts. It is rather surprising that despite such clear enunciation of law per binding judicial precedents, such matters continue to be litigated before the appellate forums. It is the law as elucidated and the primary facts of the case, on both of which there is no dispute, or even scope for, that shall accordingly inform our order.

4.1 We may begin by reproducing the relevant provision, as under:

'**Definitions**

2. In this Act, unless the context otherwise requires,-

(1) – (21) …….

(22) dividend includes-

(a) – (d) ……..

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

but "dividend" does not include –

(i) …….

(ia) ……

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

(iii) any dividend paid by a company which is set off by the company against the whole or any part of any sum previously paid by it and treated as a dividend within the meaning of sub- clause (e), to the extent to which it is so set off.'

As a mere reading of the provision, language of which is clear and unambiguous, suggests and, in any case, upon a fair look and reading thereof, the provision is triggered where:

a) a loan or advance is given by a company (in which the public is not substantially interested) to a shareholder who beneficially owns shares therein to the extent not less than 10% of the voting power therein; or

b) a loan or advance is given by such a company to any concern in which such shareholder has substantial interest (explained as entitling him to a beneficial interest in 20% of its income); or

c) any payment is made by such a company on behalf of, or for the benefit of, such a shareholder.

The loan or advance or payment is, under such circumstances, to be deemed as dividend to the extent the paying company has accumulated profits, the exception being where the lending company is in the business of money lending.

4.2 We may at this stage advert to the relevant transactions comprising the impugned credit of Rs. 3266.12 lacs, deemed as dividend to the extent of the accumulated profit (of GAPL), on the basis of the ledger account of GAPL in the books of the assessee-company (PB pgs. 3-4):

Date	Particulars	Narration	Debit	Credit	Closing Balance
01/04/2013	Opening Balance		27947593		27947593.00 Dr
09/04/2013	HDFC BANK	Ch. No. :		xxx	
15/04/2013	HDFC BANK	Ch. No. :		xxx	
04/05/2013	HDFC BANK	Ch. No.:	xxx		
08/05/2013	HDFC BANK	Ch. No.:	xxx		
13/05/2013	HDFC BANK	Ch. No.:	xxx		0.00
23/05/2013	FLC INSURANCE EXP	Policy No.		xxx	
29/06/2013	HDFC BANK	Ch. No.:	xxx		
12/07/2013	HDFC BANK	Ch. No. :		xxx	0.00 '
29/07/2013	FLC INSURANCE EXP	Policy No.		xxx	
31/07/2013	FLC INSURANCE EXP	Policy No.		xxx	769144.00 Cr
15/10/2013	FLC INSURANCE EXP	Policy No.		247482.00	1016626.00 Cr
15/10/2013	FLC INSURANCE EXP	Policy No.		124491.00	1141117.00 Cr
16/10/2013	HDFCBANK	Ch. No:	769144.00		371973.00 Cr
17/10/2013	FLC INSURANCE EXP	Policy No.		250482.00	622455.00 Cr
05/11/2013	HDFC BANK	Ch. No.		54400000.00	55022455.00 Cr
05/11/2013	HDFC BANK	Ch. No.		54045000.00	109067455.00 Cr
05/1 1/2013	HDFC BANK	Ch. No.		54000000.00	163067455.00 Cr
05/11/2013	HDFC BANK	Ch. No.		53945000.00	217012455.00 Cr
06/11/2013	HDFC BANK	Ch. No.		54000000.00	271012455.00 Cr
06/11/2013	HDFC BANK	Ch. No.		55600000.00	326612455.00 Cr
13/11/2013 to 29/11/2013	HDFC BANK	Ch. No.	xxx		2121455,00 Cr
29/11/2013	HDFC BANK	Ch. No.	10000000.00		7878545.00 Dr
29/11/2013 to 08/01/2014	HDFC BANK	Ch. No.	xxx	xxx	1349481.00 Cr
05/02/2014 to 03/03/2014	HDFC BANK	Ch. No.	xxx	xxx	981313.00 Cr
31/03/2014	INTEREST PAID	INTEREST		518665.00	1499978.00 Cr
31/03/2014	TDS INTEREST (PAYABLE)	TDS ON INTEREST	51867		1448111.00 Cr

The payment of Rs. 6.22 lacs (on October 15 & 17, 2013) is on account of insurance in respect of foreign letter of credit (FLC) by GAPL for an on behalf of the assessee-company, claimed by the latter as an insurance expense. The balance payment of Rs. 3259.90 lacs (on November 5 & 6, 2013) is by way of direct payments, credited to the assessee's bank account with HDFC Bank. The same thus falls under limb (c) and, as the case may be, limb (a), afore-stated (para 4.1). The requirement of the payment being for the *benefit* of the payee-shareholder is attached only to payment/s made indirectly, i.e., to Rs.6.22 lacs in the instant case. The said benefit is implicit in the very credit of the same by the assessee to the account of GAPL (and the corresponding debit by GAPL in its' accounts to the assessee's account) and, further, it's claim as an expenditure by the assessee, i.e., as an expense of its' business, being incurred for its' purpose/s. There is no dispute and, in fact, a claim to that effect, i.e., of the payment received being for the assessee's benefit (and vice-versa)(refer para 3). Rather, the amount received (Rs.3266.12 lacs) being, on account of a lower amount of accumulated profit, far in excess of the sum deemed as dividend (Rs. 117.17 lacs), the indirect receipt (Rs.6.22 lacs) could easily be ignored or overlooked as being received, by implication, out of other than the profit of GAPL, the payer-company and, thus, not covered u/s. 2(22)(e), for it to be regarded as dividend there-under.

The only amount 'repaid' by the assessee to GAPL during this period (i.e., from 15.10.2013 to 06.11.2013) is Rs. 7,69,144 (on 16.10.2013), which is in respect of credits (dated 29.07.2013 & 31.07.2013) toward insurance payment. The same, though liable to be construed as dividend u/s. 2(22)(e), do not form part of the qualifying sum of Rs. 3266.12 lacs for us to dilate thereon. Continuing further, the entire credit of Rs. 3266.12 lacs stands repaid from 13/11/2013 to 29/11/2013, on which (later) date the assessee had in fact paid in excess by Rs. 78.79 lacs. The loan/advance by the assessee swelled to Rs. 284.29 lacs (by 04.12.2013), all through direct payments, only to be received

back, in full, before the year-end, on which date the credit balance of GAPL stood at Rs. 14.48 lacs (including a credit on account of interest, net of TDS, at Rs. 4.67 lacs).

4.3 The question that therefore assumes significance is if the fact of the subsequent repayment (of loan/advance) relevant, i.e., in determining if the amount received from the payer-company is to be, or is not to be, considered as dividend u/s. 2(22)(e)? This is as *de hors* the amounts paid by the assessee to GAPL, which are again, as we shall presently see, only in the nature of loans/ advances, either prior to 15/10/2013, or subsequent to 28/11/2013, the sums received by it from GAPL are only in the nature of loans/advances, on which in fact even interest stands charged. The *second* question that would follow, i.e., where the answer to the *first* question is in the affirmative, is the length of the period over which the credit obtains, being at 45 days (i.e., from 15.10.2013 to 29.11.2013) in the instant case? The *third* question in this regard that would need to be addressed, is if the subsequent, or even the prior conduct of the account, relevant? As where, for example, the assessee has, prior or subsequent to the receipt of loan or advance, given loan/advance to the payer-company, which may or may not be in the current year.

4.4 The issue of repayment of the amount received came up before the Tribunal in *Tarulata Shyam* (supra) in the context of s. 2(6A)(e), the analogous provision under the 1922 Act, introduced, along with s.12(1B), by Finance Act, 1955 w.e.f. 01.4.1955. There arose a difference between the Members of the Tribunal. The AM took the view that the moment a payment as envisaged u/s. 2(6A)(e) is received, it gets clothed with the character of dividend, and is to be regarded as the income of the assessee-shareholder, and that there-fore, the subsequent action or repayment by the share-holder cannot take it out of the mischief of the provision. The JM expressed a contrary opinion. If the amount

had been returned before the end of the year, no loan or advance from the section 23A company (i.e., a company in which the public is not substantially interested) can be said to have been availed of for his benefit by the shareholder. The matter was referred to the President of the Tribunal, who agreed with the view by the AM. A loan or advance received by a share-holder assumed the character of dividend and becomes his income by the fiction of s. 2(6A)(e), i.e., on its' receipt. It ceases to be the liability of the shareholder, i.e., for the purpose of taxation, *although he may in fact or in law remain liable to the payer-company for it*. If it is repaid, the same shall not liquidate or reduce the quantum of income, which had already accrued, and such repayment is not a permissible deduction u/s. 12(2). The majority opinion was challenged before the Hon'ble High Court, which held in favor of the Revenue, stating that the repayment before the end of the year was immaterial. This is precisely what had earlier been held in *K.M.S. Lakshmana Aiyer v. ITO (Addl.)* [1960] 40 ITR 469 (Mad). The matter was carried to the Apex Court, which affirmed the decision by the High Court per its' larger bench decision in *Tarulata Shyam* (supra). Section 2(22)(e), it was argued therein, should be read down inasmuch as it carried an irrebuttable presumption of a loan or advance to a substantial shareholder being a distribution of profit and, thus, dividend thereto, by definition, by a company (in which public is not substantially interested). It worked unfairly on those repaying the loan as against those retaining it. Besides, it may lead to double tax, as where the repaid amount is again lent to the shareholder during the year inasmuch as the same amount is liable to be regarded as dividend. The Apex Court agreed that the provision was harsher than sec. 108 of the Commonwealth Income-tax Act, which was its' inspiration. However, the Parliament had itself exercised its' legislative judgment, raising a conclusive presumption that in all cases where loans are advanced to a shareholder in a private limited company having accumulated profits, the advance should be deemed to be the dividend income of such shareholder. It is this presumption, it explained, which is the

foundation of the statutory fiction incorporated in s. 2(6A)(e). Thus, s. 108 of the Commonwealth Act appears to be more reasonable and less harsh than its Indian counterpart. The language of the provision was clear and unambiguous, and there was no scope for importing into the statute words that were not there. That would, it stated, be not to construe, but to amend the statute. There was, it explained, no justification to depart from the normal rule of construction according to which the intention of the Legislature is to be primarily gathered from the words used in the statute. Even if there be a *casus omissus*, it clarified, the defect can be remedied only by legislation and not by judicial interpretation. Referring to *Cape Brandy Syndicate v. IRS* [1921] 1 KB 64 (KB), it recalled the words of Rowaltt J., that: (at pg. 71)

"..... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

Further, once an assessee comes within the letter of law, he had to be taxed, however great the hardship may appear to be to the judicial mind. Noting the satisfaction of the conditions of the provision, it concluded as under: (pgs. 357 & 358)

'17……This highlights the fact that the legislature has deliberately not made the subsistence of the loan or advance, or its being outstanding no the last date of the previous year relevant to the assessment year, a pre- requisite for raising the statutory fiction. In other words, even if the loan or advance ceases to be outstanding at the end of the previous year, it can still be deemed as a "dividend" if the other four conditions factually exist, to the extent of the accumulated profits possessed by the company.

18. At the commencement of this judgment we have noticed some general principles, one of which is, that the previous year is the unit of time on which the assessment is based (s. 3). As the taxability of an income is related to its receipt or accrual in the previous year, the moment a dividend is received, whether it is actual dividend declared by the company or is a deemed dividend, income taxable under the residuary head, "income from other sources", arises. The charge being on accrual or receipt the statutory fiction created by s. 2(6A)(e) and s. 12(1B) would come into operation at the time of the payment by way of advance or loan, provided the other conditions are satisfied.

19. We do not propose to examine the soundness or otherwise of the illustrations given by Mr. Sharma since they are founded on assumed facts which do not exist in the present case.

20. For the foregoing reasons we would answer the question proposed in favour of the Revenue and dismiss this appeal with costs.'

The consistent view, therefore, right from the stage of the assessing authority, to the Apex Court, was the same, i.e., the repayment of a loan/s or advance/s was inconsequential for the purpose of application of the fiction of the provision of deemed divided, introduced on the statute book from AY 1955-56 onwards. Why, in a given case, the repayment may be after the close of the relevant year, and which would therefore have little bearing in the matter, while ought to be given regard to if the fact of the repayment is relevant? *How should, one may ask, it matter that the repayment is after x days or y days or any other*? In a given case the payment may be received at the fag-end of the year, or on the last date itself, so that repayment, even after a few days, falls in the following year. A loan or advance carries with it, by definition, an obligation for repayment (return of value), so that the fact of repayment - whether during or subsequent to the relevant year, would be, as clarified, of no moment. The length of the time for which the loan or advance obtains would accordingly be of no significance, i.e., for taxation purposes; the amount having been regarded, on its' receipt, as the income of the payee. The assessee's argument of having retained the credit (sum borrowed), which is on interest, for only 82 days during the year, would therefore be of no assistance thereto, being an irrelevant consideration. Comparison may, for the sake of discussion, as well as for better comprehension, also be made to sec. 68 of the Act deeming a credit as the income of the debtor where the same is not satisfactorily explained as to its nature and source. The subsequent discharge of the credit, as by repayment, where it is described as a loan or advance, is of little consequence, i.e., where it is deemed as an unexplained credit u/s. 68. Temporary loan/advance(s) were,

accordingly, even prior thereto, held as falling within the mischief of s. 2(22)(e). As explained in *Walchand & Co. Ltd. v. CIT* [1975] 100 ITR 598 (Bom), noted with approval in *Tarulata Shyam* (supra), the fact that the loan or advance was factually repaid or made good within a short period, is no defence to the attraction of the provision. Though stated to be a current account, the nature of the account showed it to be a loan, made further amply clear by the fact of charge of interest at the end of the year, even though the account had been squared off thereby. Sub-clause (e) (to s. 2(6A), corresponding to s. 2(22)(e) of the Act) was contrasted by the Hon'ble Court with the preceding sub-clauses, i.e., (a) to (d), which admittedly envisaged permanent distribution of the amount regarded as dividend. The duration of the loan or advance, which was only 23 days, regarded as immaterial for the purpose of dividend under sub-clause (e) (pgs. 602, 603). The similarity with the facts of the instant case is striking.

The 'repayment' of the loan or advance, which gets deemed, on receipt, on account of the legal fiction, as a distribution of profit and, thus, as income in the hands of the payee share-holder, is therefore of no consequence. As explained by the Apex Court it is this presumption *juris et de jure* which forms the foundation of the statutory fiction. The decisions in *CIT v. K. Srinivasan* [1963] 50 ITR 788 (Mad); *CIT v. P.K. Badiani* [1970] 76 ITR 369 (Bom); and *Walchand & Co. Ltd*. (supra) were, besides *K.M.S. Lakshmana Aiyer* (supra), also noted with approval in *Tarulata Shyam* (supra). The Hon'ble Court also drew on its' decision in *Navnit Lal C. Jhaveri v. AAC* [1965] 56 ITR 198 (SC), also relied upon before it.

The *first* question afore-stated (refer para 4.3) is, accordingly, answered in the negative. The *second* question, i.e., as regards the relevance of the retention period, does not consequently arise.

4.5 Continuing further, clearly, there is two-way traffic, i.e., receipt of loan or advance, as well as its' repayment, in the instant case. That the repayment was

in excess, constituting a loan/advance by the share-holder to the payee-company, would, in the context of the provision, carry no special significance. The plea of a *mutual, open and current account* was adopted in *P.K. Badiani* (supra). The Apex Court considered it relevant to reproduce the relevant part of the said decision in *Mukundray K. Shah* (supra), referred to during hearing by the ld. Sr. DR, as under: (at pg. 447)

'We also quote here-in-below para 19 and para 21 of the judgment of the Bombay High Court in the case of *CIT vs. P.K. Badiani* [1970] 76 ITR 369 (Bom):

"19. Now, the assessee's account for 1st April, 1957, to 31st March, 1958, shows that there are credits as well as debits. What has to be ascertained is whether the debits are 'loans', so that they can be deemed as dividends. The account is a mutual, open, and current account. Every debit, i.e., every payment by the company to the assessee, may not be a loan. To be treated as a loan, every amount paid must make the company a creditor of the assessee for that amount. If, however, at the time when the payment is made by the company is already a debtor of the assessee, the payment would be merely a repayment by the company towards its already existing debt. *It would be a loan by the company only if the payment exceeds the amount of its already existing debt* and that too only to the extent of the excess. Therefore, *the position as regards each debit will have to be individually considered*, because it may or may not be a loan. The two basic principles are, that only a loan, which would include the other payments mentioned in s. 2(6A)(e), can be deemed to be dividend and that too only to the extent that the company has at the date of the payment 'accumulated profits' after deducting therefrom all items legitimately deductible therefrom.

xxxx

21. As regards question Nos. 3 and 4, Mr. Rajgopal contended that the debit balance, if any, at the last date of the assessee's accounting year 1st April, 1957 to 31st March, 1958, should be taken as the amount to be treated as dividend and as the assessee's account is on the last day to his credit, no amount can be deemed to be dividend. As already pointed out, the position has to be ascertained at the date of each payment by the company to the assessee and this contention must, therefore, be rejected. If Mr. Rajgopal's contention was to be accepted, the result would be that if a shareholder borrows a large amount during the year, but repays it on the last day of the year, it would not be considered to be a loan, though the facts show that he did borrow a loan. Such a contradiction of the real fact would result if Mr. Rajgopal's contention were to be accepted. Mr. Rajgopal further contended that in any event the highest amount to the assessee's debit on any day of the year should be the amount to be deemed to be dividend. This argument, again, ignores the principle laid down by us, that the position at the date of each payment must be considered. Moreover, there is another reason and that is that if it were to be so done, it would not enable the position of the balance of the 'accumulated profits' being taken into account, as more than one shareholder may have borrowed loans from the company in an account similar to that of the assessee. All these contentions of Mr. Rajgopal ignore the

basic fact that s. 2(6A)(e) uses the words 'any payment' which means, every payment, and s. 2(6A)(e) requires the determination of two factors, viz., whether the payment is a loan and whether at the date when the payment is made there were 'accumulated profits' and that these two factors are to be correlated and the result must be ascertained at the date of each such payment." (emphasis, italicised in print, supplied)'

Neither, therefore, the fact of subsequent repayment, nor of the payment finding reflection in a current account, was considered as of any moment; the Hon'ble Court clarifying that the nature shall have to be examined with reference to each individual payment, i.e., whether it creates a debt or is in discharge of an earlier one. No wonder, then, that in *CIT v. Nagindas M. Kapadia* [1989] 177 ITR 393 (Bom), the advances received against purchases by the assessee share-holder were ignored from the running account and only the balance amounts, not relatable to business, representing only financial transactions, so isolated, were regarded as dividend u/s. 2(22)(e), upholding the Tribunal's view. A 'loan', according to Black's Law Dictionary, fifth edition, page 844, means "a lending; delivery by one party to and receipt by another party of sum of money upon agreement, express or implied, to repay it with or without interest [Isaacson v. House, 216, Ga. 698; 119SE 2D 113,116]". A loan is something quite different from a debt. For a loan, there must be a lender, a borrower, a thing loaned for use, as well as a contract between the parties for the return of the thing loaned. A loan contracted no doubt creates a debt but there may be a debt without contracting a loan. Every sale of goods on credit does not amount to a transaction of loan [*Lakhmichand Muchhal v. CIT* [1961] 43 ITR 315,317-8 (MP); *Bombay Steam Navigation Co. (1953) P. Ltd. v. CIT* [1965] 56 ITR 52, 57 (SC); *CIT v. Saurashra Cement & Chemical Industries Ltd.* [1975] 101 ITR 502, 510 (Guj)]. An 'advance', on other hand, means sums paid to a person ahead of the time when it is due to be paid (*K. Srinivasan* (supra)).

The transactions between the two companies in the instant case, it needs to be appreciated, are purely financial transactions, i.e., receipt and payment of money, either directly or indirectly (i.e., where the amount is paid – which is by

the payer-company, to another for and on behalf of the payee and, accordingly, debited to its' account or, correspondingly, credited to the account of GAPL by the assessee in its' books of account). Why, the same carries interest, implying that the same impinges on every amount received and repaid, as well as paid and received back, i.e., to all the debits and credits in account, representing financial transactions. That the same are in the nature of a financial accommodation is not in dispute. Money received on account of a business transaction (viz. advance against purchases), or otherwise received in the course of money lending business, from the payee-company, are excluded, by definition, from the purview of s. 2(22)(e), which targets only a loan/s or advance/s *simpliciter*. It is only in this context, i.e., where the amount advanced is for the purpose of business of the payee-company, that the same would stand excluded. No business purpose of GAPL, which is not in the business of money lending, is shown. The amounts paid and received in the instant case are clearly in the nature of a loan/s, i.e., sums borrowed, which though is not at a fixed amount or for a fixed period of time. This variability, though, would not alter the nature of the amounts as loan (or advance – signifying, here, a temporary loan). The charge of interest, confirms, if any was required, the nature of the amount paid and received as loan/s, adjusting the amount received firstly against the loan/s already advanced, and vice versa. Why, if the interest charged is at 10 % p.a., as for the preceding year (being not mentioned in the narration to relevant entry in accounts), the same, at Rs.5,18,665, implies an average loan of Rs. 51.87 lacs during the year. This though would be of no consequence; it having been sufficiently clarified that a reduction or even a ceasure of liability (on account of loan/advance) by the relevant year-end is not relevant.

This, then, answers the *third* question set up by us (refer para 4.3), in that the matter is factual and, accordingly, in the facts and circumstances of the case (also refer para 4.2), the impugned sum of Rs. 3266.12 lacs represents a loan, temporary in nature, having been paid in full by 29/11/2013, i.e., within 45

days, even as the fact of subsequent repayment or the length of period over which it obtains, is of no consequence as regards the attraction of the provision of s. 2(22)(e). *Further*, as the repayment depends on the availability of surplus funds with the assessee, being deployed in its' business, to sub-serve the interest of which the loan stands contracted, there could be no certainty as to the length of the retention period and, thus, the nature of a loan as a 'temporary' (itself a relative term) loan, is, in the facts and circumstances of the case, suspect.

4.6 We may next consider the decision by Hon'ble jurisdictional High Court in *Suraj Dev Dada* (supra). The Hon'ble Court, after reproducing the order by the Tribunal (at pages 83-84 of the Reports), states as under: (pg. 84)

'10. From the above, it emerges that CIT(A) and the Tribunal had concurrently recorded that the assessee had running account with the company - M/s Dada Motors Pvt. Limited and had been advancing money to it. It was further observed that the provisions of Section 2(22)(e) of the Act were not attracted in the present case as this provision was inserted to stop the misuse by the assessee by taking the funds out of the company by way of loan advances instead of dividends and thereby avoid tax. In the present case, the assessee had infact advanced money to the Company and there was credit for only 55 days for which provisions of Section 2(22) (e) of the Act could not be invoked. These findings were not shown to be erroneous or perverse in any manner.

11. In view of the above, *no substantial question of law arises in this appeal*. Consequently, finding no merit in the appeal, the same is hereby dismissed.'

(emphasis, supplied)

The only finding recorded by the Hon'ble Court is that the findings by the first and the second appellate authority have not been shown to be erroneous or perverse. How could that, by itself, one wonders, be regarded as a statement of law by it; it, in fact, clearly holding that in its view no substantial question/s of law arises for its' adjudication? How could then it be regarded as having expressed any view or answered the substantial question of law raised before it? Rather, it's observation even leaves the scope for the Hon'ble Court, while stating its' view in a later case – on a substantial question of law, expressing a different view, i.e., based on the arguments advanced and the position of law

urged on the basis of judicial precedents. The jurisdiction of the High Court under the Act, which is the third appellate authority there-under, arises only on a positive finding on a substantial question of law arising out of the order by the Tribunal, i.e., the second appellate authority under the Act. This is patent from a mere browse of sec. 260A where an appeal is preferred before the High Court; it reading as under:

Appeal to High Court.

260A. (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal *if the High Court is satisfied that the case involves a substantial question of law*.

(2) The Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner] or an assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be—

(a) filed within one hundred and twenty days from the date on which the order appealed against is received by the assessee or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner;

(b)

(c) in the form of a memorandum of appeal precisely *stating therein the substantial question of law involved*.

(2A) The High Court may admit an appeal after the expiry of the period of one hundred and twenty days referred to in clause (a) of sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.

(3) Where the High Court *is satisfied that a substantial question of law is involved* in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which—

(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).

(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.' (emphasis, supplied)

The Hon'ble Court might as well have declined admission, stating that no substantial question of law arises out of the order by the Tribunal. That it went through the Tribunal's order, delineating the facts as recorded by it, as well as it's decision, prior to holding that, in its' view, no substantial question of law arose in the facts of the case and its' adjudication by the Tribunal, only shows that it chose to make its' this finding (as to the non-arising of any substantial question of law out of the order by the Tribunal) transparent. Nothing, thus, turns on the assessee's reliance on the said decision.

4.7 Be that as it may, and particularly considering that assessee has also relied on decisions that suggest that a 'running account' would take the transactions entered into out of the purview of s. 2(22)(e) (or s. 2(6A)(e) of the 1922 Act), we may, for the sake of clarity, advert, once again, to the decisions by the Apex Court referred hereinabove, extracting from the decisions in *Tarulata Shyam* (supra) (at para 4.4); *Mukundray K. Shah* (supra) (para 4.5). On facts, we have already clarified that the nature of the financial transactions in the instant case is in the nature of loan/s, also adverting to the decisions wherein, similarly, open, current accounts were maintained.

A running account is nothing but an account with transactions both ways. The debits and credits (to the account of the payer-company) in its' accounts by the share-holder could imply payment/s, direct or indirect, by it to the said company and, accordingly, receipt back thereof, again, directly or indirectly. Again, it could well be that the debits represent repayment of the sums received, directly or indirectly, in the first instance by the assessee-shareholder and,

accordingly, credited to the account of the payer-company. Now, neither the sums paid by the share-holder nor their repayment, attract s. 2(22)(e). Their existence or otherwise, thus, as afore-stated, is of no signification in-so-far as the attraction of the said provision is concerned (refer paras 4.4 & 4.5). These, in fact, ought to be ignored, unless of course the private limited company to which the payments are made by the share-holder, is itself a share-holder (with a holding in excess of the threshold limit) in the share-holder company, being a company in which the public is not substantially interested (which the appellant company apparently is). *It is only the opposite set of transactions that hold significance as far as sec. 2(22)(e) is concerned*. That it, it is the payment by the payer-company to its' share-holder by way of a loan or advance that is liable to be, to the extent of its' accumulated profit, deemed as distribution of the said profit and, thus, dividend income in the hands of the payee-shareholder. Surely, as afore-explained, if there are sum/s already due by the payer-company thereto, the same would, unless there is an understanding to the contrary, firstly adjusted against the amount due. The payment, unless given as a consideration for value received earlier (or even to be received), itself creates an obligation for repayment, so that nothing turns, as explained by the Hon'ble Courts, by the fact of its' repayment which, as afore-discussed, could be immediately, or – though to no consequence, after a length of time. Why, the payment received being only as it would be required (for its' purposes) by the assessee-shareholder, should the length of time of retention be of any consequence; the income having been already arisen on the receipt of loan/advance? The retention in *Walchand & Co. Ltd*. (supra) was only 23 days, though found of no consequence by the Hon'ble Court. In fact, where the sums are borrowed for the purpose of its' business by the shareholder, as in the instant case, it would be guided in the matter by business considerations, i.e., the need for funds, besides being liable to be returned only where not required for the time being, therefor. That is, it is the business, for which the borrowing has been made, that would

dictate the length of retention, besides of course the terms of the borrowing contract, with the interest cost being liable to be absorbed as an expense thereof. The argument of the retention period being 'low' – a relative term, therefore carries no significance in the context of the provision, i.e., apart from legally, even factually; the repayment being a function of the business need/s. A repayment in disregard thereof may hurt the borrowers' business interest. How could, then, even factually speaking, the 'early' return, be of any import? It is for this and such other reasons that we stated hereinbefore the assessee's case as untenable even on facts.

The extension of a loan/advance carries with it an obligation to repay, with or without interest. This extension, which could be both ways, thus, does not create any mutual obligation i.e., apart from, and only understandably, that concomitant to the borrowing. As, for instance, of repayment, which could be on demand or after a fixed period. The two companies in the instant case are not in the business of money lending. As stated, and even otherwise stands to reason, a company would give funds to another only when they are for the time being surplus with it, as otherwise it would, besides facing logistical issues, not be acting in the interest of its' business. Similarly, the payer-company would borrow only when it requires money for it's purposes, and being at a cost, would retain it only for the period as is necessary. That is, in either case, each company, in receiving the loan or advance, is primarily catering to its' own (business) interest. *This is similar to any borrowing arrangement that a company may enter into with a bank or financial institution*. The lending company is, to the payee-company, only a source of funds. It is this very source, where the payee's interest in the payer-company exceeds a defined limit, and the latter, being a company in which the public is not substantially interested, is not in the business of money lending, that is proscribed or, more correctly, sought to be hit by the legal fiction by regarding it as distribution of profit, i.e., dividend, by definition, and deemed as the income of the payee to the extent of

the accumulated profit. The purpose to which the payee may deploy the funds received, i.e., business or otherwise, and which may perhaps be also of concern/ interest, as indeed it would be to any serious lender inasmuch as he would be interested in repayment, is of no significance or consequence as far as the deeming fiction of the provision is concerned. As explained in *Tarulata Shyam* (supra), the payee may, in law and in fact, be liable to repay and, in fact, even repay, but the provision nonetheless stands attracted on the receipt of the loan/advance where the other conditions of the provision are satisfied. A loan or advance for business purpose, i.e., where it serves a business purpose of the lending company, is excluded. No such business purpose informs the lending of GAPL to the assessee in the instant case, as none has been exhibited or, in fact, even stated. That the two companies are, as stated – without being shown, in the same line of business, is incidental; the borrowing by either being guided by its' own business interest, and the lending to each other being only for the reason that the two fall, as it appears, under the same management. It would, as afore-explained, be doing a disservice to its' own business if it did not do so, though there is nothing to suggest that. The balance outstanding (as at the year-end) is reflected as a loan or advance in the audited final accounts of both the companies. In fact, the repayment of the whole of it (which is by 29/11/2013), or nearly the whole of it, i.e., if the subsequent repayment is also to be taken into account i.e., save for Rs. 9.81 lacs (the balance outstanding representing interest, which though would assume the character of the principal, as the past conduct of the account shows), i.e., before the year-end, itself proves it to be nothing but financial transactions. It is for this reason that loan transactions, where the lender-company is in the business of money lending, are excepted u/s. 2(22)(e). The other aspect that prevailed with the Tribunal in *Suraj Dev Dada* (supra), the operative part of whose order stands reproduced by the Hon'ble Court in its' order, is that no 'misuse' of funds belonging to payer-company was shown, coupled with the fact of the assessee-appellant having lent the money to

the payer-company most of the time during the relevant year; the transactions being in the nature of a running account, with the credit obtaining for the period of only 55 days during the relevant year. We have also afore-discussed that the lending of money by a shareholder to the payer-company holds, in this context, no particular significance, being outside the ambit of the provision. There is no reference by the Tribunal to judicial precedents, or even the law in the matter, with reference to which we have stated the period of retention, or the length of time for which the credit obtains, as of no consequence, being not a relevant consideration. *When the factor of repayment of loan or advance, being in fact inherent thereto, itself is not relevant, how could the retention period, i.e., the period after which the repayment is effected, could possibly be*?

All these aspects have in fact been deliberated and concluded by the Apex Court per its' constitution bench decision in *Navnit Lal C. Jhaveri* (supra). The challenge in that case was to the *vires* of the analogous provision of s. 12(1B) r/w s. 2(6A)(e) of the 1922 Act. Per his dissenting judgment Raghubar Dayal J. held substantially the same what informs and guides the decision by the Tribunal in *Suraj Dev Dada* (supra), even as it is not competent for the Tribunal to, under the scheme of things, read down a provision that is *intra vires* the Constitution (of India) or read it inconsistent or *de hors* the decisions by the higher courts of law laying down the law in the matter. Loans borrowed by a shareholder from a company, the dissenting Justice stated, do not come within the general definition of income. As such, if the shareholder had been paid his share of profit ostensibly as a loan – which is really a share of profit, it can be taxed as 'income' under an appropriate enactment. However, any *ad hoc* payment to a shareholder as a loan/advance, unrelated to his share in the accumulated profit, *cannot rationally come within the expression of 'dividend'*. That is, it was not open to the Legislature to describe any payment of money by a company to a shareholder by the word 'dividend', and then provide that such payment will come within the expression 'income' for the purpose of any law

enacted by virtue of Entry 82, List 1, Schedule VII to the Constitution. The definition of dividend must have a rational connection with the concept of 'dividend' in the context of the profit of a company and its' distribution amongst the shareholders at any time after the profits have been earned. It was in fact 'unreasonable' to provide that a particular shareholder should be deemed to have received an amount in excess of his proportionate share (in the profit) as dividend. That it is to say, that the law, in his opinion, ought to have provided that the loan or advance by a company was, in substance, a distribution of profit by it and, further, could not ascribe such distribution as dividend in excess of the proportionate share of the payee in the accumulated profits. The same, however, did not find favor with the other four judges constituting the Bench, who delivered the majority opinion upholding the constitutionality of the provision of section 12(1B) r/w s. 2(6A)(e) of the Indian Income Tax Act, 1922, also finding the same as not violating fundamental rights guaranteed under Article 19(1)(f) and (g) of the Constitution. The scope of the relevant entry (in the Legislative lists), it explained, are not powers but fields of legislation and the widest import and significance should be attached to them. While section 2(6A), analogous to section 2(22) of the Act, defines dividend, including deemed dividend (under certain specified conditions) (both per clause (e) thereof), sec.12(1B) provides for bringing the amount outstanding as on 01.4.1955, i.e., even where received or accumulated over the past years, to tax. The Hon'ble Court noted a Circular by the Board providing a window whereby the provision was excepted on genuine repayments of such outstanding by 30.6.1955 (Circular No. 20 (XXI-6/55) dated 10.5.1955). The Hon'ble Court examined several precedents, including challenges to the provision of section 12B, enhancing the scope of 'income' to include 'capital gains'; to section 23A(1), providing an artificial dividend payout at a minimum of 60%, lest the shortfall therein be liable to super-tax, i.e., restraining the company from accumulating its' profit beyond 40% to build up reserves or to provide for

capital expenditure; and sec. 16(3)(a) (of the 1922 Act), seeking to tax the income arising to wife and minor son/s of the assessee-individual in his hands. All these provisions were considered by the Apex Court as reasonable steps taken by the Parliament, within it's legislative competence, toward countering tax evasion, also noting the rationale of each provision, i.e., the mischief that it was intended or designed to defeat. The word 'income', it opined, also making reference to the precedents which considered legislative competence, must receive a wide interpretation, the caveat being that there has to be a rational connection between the item taxed and the concept of income liberally construed. It also noted suitable conditions/exceptions being provided for in the impugned provisions (of ss. 2(6A)(e) and 12(1B)), as by way of restriction on their scope to transactions of/by companies, in which public is not substantially interested, with its' major shareholders, i.e., holding over a threshold (10%) voting power therein; exclusion of transactions in the ordinary course of business where the payer-company is in the business of money-lending; and, thirdly, making the deeming (of the loan/advance or payment) as dividend subject to and, further, to the extent of, accumulated profits of such company, all of which were regarded as necessary and suitable safeguards. Similar attempts, it noted, were also made by other countries in their domestic income-tax law. That the provision may cause hardship in some cases was considered as irrelevant (for determining the question of legislative competence). The argument with regard to the loan being interest bearing, and of it having been repaid since, were advanced and considered as not valid grounds for excluding the loan or advance given from the purview of or for the purpose of deeming the same as dividend (refer pgs. 208-210), which we may reproduce for ready reference:

'The loan may carry interest and the said interest may be received by the company; but the main object underlying the loan is to avoid payment of tax. It may ultimately be repaid to the company and when it is so repaid, it may or may not be treated as part of

accumulated profits. It is this kind of a well-planned device which s. 12(1B) intends to reach for the purpose of taxation.' (pg. 208)

The Hon'ble Court agreed that the doctrine does not mean that the Parliament can choose to tax as income an item which can in no rational sense be regarded as the citizen's income. The item taxed should be rationally capable of being considered as the income of the citizen. But in considering the question as to whether a particular item can be regarded as income in the hands of the citizen or not, it would not be appropriate, it held, to apply the tests traditionally prescribed by the Income Tax Act as such. Further, the provision does not affect the appellant's right to borrow money from any other source, or even from the payee-company where it is in the business of money lending. *The restriction imposed by the section could not, in it's view, be regarded as unreasonable* (pages 208, 210 of the Reports). The decision by the Hon'ble' High Court (reported at [1963] 48 ITR 451 (Bom)) upholding the constitutionality of the provision, was accordingly affirmed, also noting a similar challenge having been repelled in *K.M.S. Lakshmana Aiyer* (supra). The appeal was accordingly dismissed with costs. This was followed by another decision by the constitutional bench of the Apex Court in *Punjab Distilling Industries Limited v. CIT* [1965] 57 ITR 1 (SC), wherein, relying on, among others, the decision in *Navnit Lal C. Jhaveri* (supra), it upheld the constitutionality of s. 2(6A)(d), under challenge before it. There was no inconsistency, it clarified, between the receipt being a capital one under the company law and by fiction being treated as the income chargeable to tax under the Income-tax Act. The dividend u/s. 2(6A)(e) (corresponding to s. 2(22)(e) of the Act), it explained, was, as opposed to dividends u/ss. 2(22)(a) to (d), not a permanent payout. The appeal was dismissed with costs. The full bench decision by the Hon'ble jurisdictional High Court (reported at 48 ITR 288 (Punj)(FB)) was affirmed. Where, then, one may ask, is there any scope for an argument, introducing the notion of 'misuse' of funds belonging to the payer-company, so that where such misuse is not shown

– transferring, by implication, the onus of so showing on the Revenue, the section cannot be invoked? *The answer to this question could only be in the negative*. The aspect that informs the said question is if the section could possibly cover genuine cases of sums borrowed by a shareholder, temporary or otherwise. The question/s, though valid, does not survive after the afore-cited decisions by the larger benches of the Apex Court, which bind even its' lower constitution benches. Similar arguments/s, it would be noted, was also advanced in *Tarulata Shyam* (supra), stating that a condition similar to that in section 108 (1) of the Commonwealth Income Tax Act, from which the provision draws its inspiration, be read into the provision to make it 'reasonable'. The Apex court discountenanced the same, stating that such a conditions/s was not considered appropriate (by the Legislature) to be incorporated in the provision. The genuineness of the borrowing, inasmuch as the section does not draw any distinction between genuine and non-genuine transactions – which was argued as the principal flaw in the provision, targeting thus genuine loans/advances as well, which consideration also prevailed with the dissenting judge (in *Navnit Lal C. Jhaveri* (supra)) in holding otherwise, was not found a valid ground for striking down the provision which, in it's view, laid a reasonable restriction on the source of borrowing by a substantial shareholder in a private company. It must be remembered, it observed therein, that the loan/advance is made in full knowledge of the provision contained in the impugned section (page 207). If the Legislatures thinks, it explained, that loan/advance(s) in almost every case is a result of a device, it is competent to prescribe a fiction and hold that in cases of such loans/advances tax shall be recovered from the shareholder on the basis that he had received the dividend (page 209). *That, therefore, there is no 'misuse' of funds of/belonging to such a company, is of no moment in determining if the provision is in the facts and circumstances of the case attracted*, and toward which the Apex Court clarified that the provision impinges, subject to five conditions, on three types of payments.

These conditions were reiterated by the Apex court in *Tarulata Shyam* (supra), observing the fifth condition to be applicable for the transitional year (i.e., AY 1955-56) (pg. 355). All that therefore is relevant for the invocation of the section is the satisfaction of these four conditions, being, *firstly*, that the payer-company should be one in which the public is not substantially interested; *secondly*, the payee should be a share-holder in the company on the date/s on which the loan is advanced, the extent of his shareholding being immaterial; *thirdly*, the loan or advance could be deemed as dividend to the extent of the accumulated profit of the payer-company as on the date of the loan; and, *fourthly*, the loan must not be advanced by the company in the ordinary course of its business, where money lending is a substantial part of such business. It is surprising indeed that arguments of the nature raised before the Tribunal in *Suraj Dev Dada* (supra), as well as before us, continue to be so raised decades after the decisions by the larger benches of the Apex Court; the assessee also referring in its' written submissions, not adverted to during hearing, to the decision in *CIT (TDS) v. Schutz Dishman Bio-tech (P.) Ltd*. (TA No. 958 of 2018, dated 21/12/2015, at PB pgs. 10-12). The said decisions, which have been carefully perused, are without reference to the deliberations; the findings and the observations by the Apex Court per its larger bench decisions, since followed per its' division bench decisions. There is in fact no reference to even the earlier judgments by the same Court. That apart, the decisions are distinguishable on facts inasmuch as the same are based on mutual benefits and adjustment entries – without specifying the nature of the adjustments, while in the instant case the same are only receipt and payment of money, i.e., a loan or advance *simpliciter*. How, again, one wonders, is the fact of the assessee having also lent money to the company which, again, could be in the same year or in a preceding year, or even in the subsequent year, relevant. It is the lending transaction, as opposed to a business transaction, where the payer-company is a company in which the public is not substantially interested and the payee is a

substantial share-holder therein, that alone comes within the letter of law, and sought to be placed restriction on. The act of lending by the shareholder to the company is not in any manner targeted. It is in fact an independent transaction, i.e., of the loan and advance by such a company thereto. This is in fact admittedly so in the instant case, being dependent on the availability of surplus funds with the assessee and, further, on the same being required at the relevant time by the company. *It is the source of borrowing to a shareholder that the law places restriction on*. Considering the said restriction on it, it is not permissible for a shareholder to contend – though to be fair it has not been before us, that the loan or advance to it by the payer-company is in consideration of it, similarly, advancing monies thereto. That would tantamount to defeating the clear and strict provision of law which, as afore-noted, covers cases of genuine loans and advances as well, so that such an argument, shown to be factually not valid in the instant case, is not tenable. That is, such an argument, even where the loans by one to another do not carry interest, so that it may factually acquire some force, is not a valid argument, and such an arrangement would, in view of the clear language of the provision, listing four conditions noted supra, the cumulative satisfaction of which alone is relevant, not be a valid argument. In fact, the charge of interest, so that the funds are in the instant case made available by one to another at a cost, preclude the raising of such a contention as being imputed. What a shareholder does with its' funds, on which there is no embargo, is not relevant. It would be a different matter, we may add, where the funds borrowed or advanced, are for business purpose, in which case the same would stand to be adjusted against the business purpose for which the amount stands paid or received, viz. an advance against purchase of goods, while in the instant case the monies received, directly or indirectly, have been met by repayment of monies, i.e., are loans or advances *simpliciter*, to which, as clarified, the provision is applicable. The reliance on the cited decisions would therefore be of no assistance to the assesse.

4.8 It may also be clarified that the provision is attracted irrespective of the status of the shareholder. That is, is applicable to a share-holder, as explained in *Sadhana Textile Mills (P.) Ltd. v. CIT* [1991] 188 ITR 318 (Bom), to a corporate shareholder, as the assesse-company. We consider it pertinent to clarify this as it is stated that the provision is not applicable to an Inter Corporate Deposit (ICD), i.e., a deposit, by definition, by one company to another. *It is in fact nobody's case that the running account between the two entities constitutes an ICD(s).* Be that as it may, the provision covers *any payment* which is in the nature of a loan and advance, which the impugned borrowing/s is, so that the same gets hit by the provision irrespective of whether or not it stands to be regarded also as an ICD. The only thing relevant is if the payment can be regarded and, rather, is, in substance, a 'loan' or an 'advance', *both terms being judicially well defined*. An ICD, a deposit by definition, is, rather, only in the nature of a loan; deposits being a species of loans/advances. Its exclusion would therefore only be where the depositor (lending) company is in the business of money lending and the deposit is given in the normal course of its' business. The exclusion of a business advance, referred to earlier, i.e., even as the provision speaks of *any payment by way of a loan or advance*, covering therefore advances of all types, is only on the premise that the said word, read conjunctively with the word 'loan', applying the principle of *ejusdem generis*, should only include payments in the nature of loans, excluding business transactions, which have, as a matter of course, if not necessarily, to be settled by remitting funds; the provision in no manner seeking to impinge on genuine business transactions.

4.9 Finally, it is stated that the entries in the books of account are not determinative. The same seeks to perhaps meet the reflection of the outstanding sum (as at the year-end) as a loan or advance in the balance-sheet of the lender or the borrower company. It is nobody's case that the provision stands invoked

on account of such reflection, which has not been shown to be incorrect, so that there is no factual basis to the argument. The provision would in fact apply even if the shareholder does not, as is usually the case for an individual shareholder, maintain books of account, and which is so in the present case only because of it being a corporate entity. On the contrary, it is the assessee who draws on the accounts, stating it to be a running account and, further, a 'low' retention period, and on that basis plead that the provision shall not apply. The provision is applicable *qua* any payment and, therefore, would (or would not) apply with reference to each specific sum. It is immaterial whether such payment/s is recorded in the books of account or not, and the only thing relevant is if it is in the nature of a loan/s or advance/s. The assessee's argument, which is even otherwise not backed by any material and only in the nature of a bald statement, is therefore without merit.

4.10 The only other issue raised in appeal is the chargeability of the dividend under section 2(22)(e) as 'income from other sources' u/s. 56. No argument was advanced in this respect either before us or, as it appears from their orders, before the Revenue authorities. There is no reference thereto even in the written submissions by the assessee, adduced during hearing. So, however, the matter being legal, we would none-the-less consider the same. Section 56, in its relevant part, reads as under:

'Income from other sources.

56. (1) Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head "Income from other sources, if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E.

(2) In particular and without prejudice to the generality of the provisions of sub-section (1), the following income shall be chargeable to income-tax under the head "Income from other sources, namely:—

(i) dividends;'

Clearly, therefore, 'dividend' in section 56 refers to the dividend as defined u/s. 2 (22) of the Act. We have already held that the impugned sums qualify to be

dividend u/s. 2(22)(e). The only thing therefore that needs to be examined is if the same stands excluded from the purview of the 'total income' u/s. 2(45) of the Act. Chapter III of the Act, comprising sections 10 to 13B, specifies such incomes. Section 10(34), brought on the statute-book w.e.f. 01.4.2004, reads as under:

'Incomes not included in total income.

10. In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included—

(1) – (33) ….

(34) any income by way of dividends referred to in section 115-O;'

It is thus only the dividend declared, distributed or paid by a company, on which tax u/s. 115-O has been suffered, that falls u/s. 10(34), and would therefore not stand to be assessed u/s. 2(24)(ii) r/w s. 56 of the Act. The said dividend would only be that envisaged u/s. 2(22)(a), i.e., as declared observing the required procedure in its respect under the Companies Act, 1956 (or, as the case may be, Companies Act, 2013), to all the shareholders, i.e., in proportion to their shareholding. This would certainly not cover dividend which gets included within its definition under the Act in view of the extended meaning of the term 'dividend' by virtue of a legal fiction. The dividend deemed as such u/s. 2(22)(e) would, therefore, stand to be assessed and, accordingly, has been rightly brought to tax, u/s. 56 of the Act. The assesse fails on its' Gd. 3 as well.

In sum

5. The principal objection of the assessee in this case, as indeed in others cited by it, is that the amount advanced (by the payer-company, GAPL) stands since repaid, so that the provision of s. 2(22)(e) ought not to cover genuine cases of loans/advances, particularly where the shareholder has also given, similarly, loans/advances to the said company. The same accordingly has been discussed with reference to the foundational judgments by the Apex Court,

being by its' larger benches, settling the law in the matter, as in *Navnit Lal C. Jhaveri* (supra); *Punjab Distilling Inds. Ltd*. (supra) and *Tarulata Shyam* (supra), which in fact stand followed per it's later decisions, as in *Sarda (P.)* (supra) and *Mukundray K. Shah* (supra), to all of which extensive reference stands made. In fact, per these decisions itself the Apex Court has noted with approval several decisions by the Hon'ble High Courts cited before it, even as it, in each case, affirmed the decision by the Hon'ble High Court, under challenge before it. The matter stands discussed at length in this order (refer paras 4.1 thro' 4.10), to which therefore regard is to be had. We may, while concluding our order, extract from the decision in *Sarada (P.)* (supra) (pg. 448), i.e., apart from adverting similar extracts in the foregoing part of this order, if only to emphasize the unanimity and unambiguity in the law as clarified and settled by the larger benches of the Apex Court:

'……Sec. 2(22)(e) as it stood at the material time defined dividend to include "any payment by a company, not being a company in which the public are substantially interested, of any sum by way of advance or loan to a shareholder, being a person who has a substantial interest in the company.. to the extent to which the company... possesses accumulated profits". In the instant case there is no dispute that the appellant had a substantial interest in the company. The nature of the company is also not in dispute.

From the facts as stated hereinabove, it appears that the withdrawals made by the appellant from the company amounted to grant of loan or advance by the company to the shareholder. The legal fiction came into play as soon as the monies were paid by the company to the appellant. *The assessee must be deemed to have received dividends on the dates on which she withdrew the aforesaid amounts of money from the company. The loan or advance taken from the company may have been ultimately repaid or adjusted but that will not alter the fact that the assessee, in the eye of law, had received dividend from the company during the relevant accounting period*.

It was held by this Court in the case of *Smt. Tarulata Shyam & Ors. vs. CIT* [1977] 108 ITR 345 (SC) that the statutory fiction created by s. 2(6A)(e) of the Indian IT Act, 1922 would come into operation at the time of the payment of advance or loan to a shareholder by the company. The legislature had deliberately not made the subsistence of the loan or advance, or its remaining outstanding, on the last date of the previous year relevant to the assessment year a pre-requisite for raising the statutory fiction.' (emphasis, supplied)

The nature of transactions, purely financial in nature, has been found to be receipt and payment of money, i.e., a 'loan' by definition, a term judicially well

expounded. This aspect, denoting a primary fact, is in fact admitted. The genuineness of a loan or advance, i.e., creates an actual liability – an absence of which would attract s. 68, is not in issue. However, that the loan/advance represents an actual liability of the shareholder, which may have been repaid since, which could even be in the relevant year itself, did not find favour with the Apex Court in view of the clear, unambiguous language of the provision; it further noting that the object of the provision had a rational nexus with income, so that the provision, which it agreed was harsh, was within the legislative competence of the Parliament and, therefore, had to be given affect to. A parallel in this context stands drawn by us with section 68 of the Act. The argument of the sum not representing 'real income', though not specifically advanced before us, is implicit in the argument advanced with reference to the genuineness of the loan/ advance, and therefore considered. The same would not carry the assessee's case further, as would even otherwise be apparent from the host of decisions by the Apex Court. As explained in *Poona Electric Supply Co. Ltd. v. CIT* [1965] 57 ITR 521 (SC), the concept of 'real income' is subject to the provisions of the Act. The loan or advance being both ways would not carry any special significance in the context of the provision inasmuch as both qualify, independently, to be a loan or advance, which in the present case is with interest, further, establishing, if it was required, the payments to be purely financial transactions, i.e., loan/advance(s) *simpliciter*, squarely covered within the ambit of the provision, which seeks to place restriction on payments to a substantial shareholder by a company in which public is not substantially interested – nothing more and nothing less. In fact, loan/advance by one to another would only be if the funds are for the time being surplus with the lending company and, thus, independent of a subsequent loan, if any, to the borrower company. Further, it would arise only where, though available, the money is, at the same time, required by the borrowing company, so that there is no certainty under such an arrangement, both with regard with the quantum and

time of the source of funds for such an arrangement to be regarded as viable or a dependable one, or to contend of the loan being temporary. No business purpose has been shown or otherwise stated, so that the contention in its respect is a bald one. The period of retention has again been found to be not relevant. The aspect of set off of subsequent credits (receipts), i.e., subsequent to repayment of the earlier receipt, advanced in *Tarulata Shyam* (supra), though not answered by the Apex Court, being hypothetical (refer pg. 358 of the Reports), also do not arise in the instant case as the Revenue has brought only the peak credit during the year to tax. It may be noted that inasmuch as each payment qualifying as a loan or advance falls within the ambit of the provision, and its subsequent repayment held as of no consequence, the entire payment to (receipt by) the shareholder (company) would stand to be regarded as 'dividend'. In fact, a plea as to only the peak credit being regarded as dividend was raised, though not accepted, in *P.K. Badiani* (supra) (refer pg. 380), a decision which subsequently found approval in *Mukundray K. Shah* (supra). That is, the Revenue has, in regarding only the peak amount advanced as the qualifying amount, acted as reasonable as it could under the circumstances, i.e., given the settled law in the matter, the payment being regarded as dividend only under its artificial definition, as explained, per an irrebuttable presumption, statutorily provided. The question of the genuineness of the loan or advance, is, for the same reason, of no significance. The decisions cited are, besides being without reference to binding judicial precedents, distinguishable on facts. Further, being not a regular dividend, declared and paid by company, the same does not fall to be covered u/s. 10(34) and, thus, is not excepted u/s. 56. The same has, accordingly, been rightly brought to tax u/s. 2(24)(ii) r/w ss. 2(22)(e) and 56 of the Act by the Revenue, whose action is upheld. The assessee, in this view of the matter, fails. We decide accordingly.

6. In the result, the assessee's appeal is dismissed.

Order pronounced in the open court on July 05, 2019

Sd/-	Sd/-
(N. K. Choudhry)	(Sanjay Arora)
Judicial Member	Accountant Member

Date: 05.07.2019
/GP/Sr/ Ps.
Copy of the order forwarded to:
(1) The Appellant: G. G. Oils & Fats Pvt. Ltd., 2301, Bhupindra Flour Mills, Amrik Singh Road, Bathinda
(2) The Respondent: Deputy Commissioner of Income Tax, Circle-1, Bathinda
(3) The CIT(Appeals), Bathinda
(4) The CIT concerned
(5) The Sr. DR, I.T.A.T.

This is the true copy of the order pronounced on 05.07.2019, as corrected and modified by the corrigendum order dated 11.07.2019, both on record, and also being uploaded herewith.

By Order

IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR.

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER
AND SH. N. K. CHOUDHRY, JUDICIAL MEMBER

I. T. A. No. 508/Asr/2017
Assessment Year: 2014-15

G. G. Oils & Fats Pvt. Ltd., 2301, Bhupindra Flour Mills, Amrik Singh Road, Bathinda [PAN: AADCG 8857 H]	vs.	Deputy Commissioner of Income Tax, Circle-1, Bathinda
(Appellant)		**(Respondent)**

Appellant by : Sh. P. N. Arora &
Sh. Parshotam K. Singla (Adv.)
Respondent by: Sh. Charan Dass (D.R.)

CORRIGENDUM

Per Sanjay Arora, AM:

Order in this appeal, heard on 11/4/2019, stands since proposed. Certain omissions and corrections have however since come to light, which are being sought to be rectified through this corrigendum. The same may accordingly be considered as integral to the order under consideration.

1. In para 4.4 (in sub-para 2, beginning with the words 'The consistent view, therefore, …..), a comma ',' be read after the word 'repayment' occurring in the sentence beginning with the words 'The subsequent discharge of the ….') at page 12 of the order;

2. In para 4.5 (in sub-para 2, beginning with the words 'The transactions between the two companies……'), at page 16, the following sentence be read after the sentence beginning with the words 'Why, the same carries

interest,…..') and before the next sentence beginning with the words 'Money received on account……'), at page 17 of the order:

'That the same are in the nature of a financial accommodation is not in dispute.'

3. In para 4.6, after the reproduction of section 260A, the following be subscribed:(emphasis,supplied)'

4. In para 4.7 (in sub-para 3, beginning with the words 'The extension of a loan/advance carries with it…….'), the following sentence at page 23: '*When the factor of repayment of loan and advance itself is not relevant, how could the retention period, i.e., the period after which the repayment is effected, could possibly be*?', being the last sentence of the said sub-para, be read as:

'*When the factor of repayment of loan or advance, being in fact inherent thereto, itself is not relevant, how could the retention period, i.e., the period after which the repayment is effected, could possibly be*?';

5. In para 4.7 (in sub-para 4, beginning with the words 'All these aspects have in fact been deliberated and concluded by the Apex Court……') in the sentence (at pgs. 24-25) beginning with the words: 'The definition of dividend must have…..), the word 'the' be read between the words 'context of' and 'profit of a company';

6. In para 4.7 (in sub-para 4, beginning with the words 'All these aspects have in fact been deliberated and concluded by the Apex Court……'), after the sentence (at pg. 26) beginning with the words: 'There was no inconsistency, it clarified, ….) and ending with the words 'Income-tax Act.', the following sentence be read:

'The dividend u/s. 2(6A)(e) (corresponding to s.2(22)(e) of the Act), it explained, was, as opposed to dividends u/ss. 2(6A)(a) to (d), not a permanent payout,';

7. In para 4.7 (in sub-para 4, beginning with the words 'All these aspects have in fact been deliberated and concluded by the Apex Court……'), after the sentence (at pg. 27) beginning with the words: 'It must be remembered,…….'), the word 'therein' be read immediately after the word 'observed';

8. In para 4.7 (in sub-para 5, beginning with the words 'These conditions were reiterated by the Apex court in *Tarulata Shyam* (supra), ……..'), at page 27, the words 'before the Tribunal' be read after the words 'of the nature raised' and before the words 'in *Suraj Dev Dada* (supra)', in the sentence beginning with the words 'It is surprising indeed…..' at page 28 of the order;

9. In para 5, in the sentence beginning with the words 'The genuineness of a loan or advance' and before the words 'is not in issue', at page 33, the following words be read: 'i.e., creates an actual liability – an absence of which would attract s. 68,';

10. In para 5, after the words 'with the lending company and,' in the sentence beginning with the words: 'In fact, loan/advance by one to another would……'), at page 34 of the order, the following words be read:
'thus, independent of a subsequent loan, if any, to the borrower company. Further, it would arise only where, though available, the money is,';

11. In para 5, after the words 'dividend was raised' and before the words 'in *P.K. Badiani* (supra)' occurring in the sentence beginning with the words: 'In fact, a plea as to only the peak credit being regarded…'), at page 35 of the order, the following words be read: ', though not accepted,'

Order pronounced in the open court on July 11, 2019

Sd/- 11/07/2019	Sd/- 04/07/2019
(N. K. Choudhry)	(Sanjay Arora)
Judicial Member	Accountant Member

Date: 11.07.2019
/GP/Sr/ Ps.

Copy of the order forwarded to:

(1) The Appellant: G. G. Oils & Fats Pvt. Ltd., 2301, Bhupindra Flour Mills, Amrik Singh Road, Bathinda
(2) The Respondent: Deputy Commissioner of Income Tax, Circle-1, Bathinda
(3) The CIT(Appeals), Bathinda
(4) The CIT concerned
(5) The Sr. DR, I.T.A.T.

True Copy

By Order

IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR.

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER
AND SH. N. K. CHOUDHRY, JUDICIAL MEMBER

I. T. A. No. 508/Asr/2017
Assessment Year: 2014-15

G. G. Oils & Fats Pvt. Ltd., 2301, Bhupindra Flour Mills, Amrik Singh Road, Bathinda [PAN: AADCG 8857 H]	vs.	Deputy Commissioner of Income Tax, Circle-1, Bathinda
(Appellant)		**(Respondent)**

Appellant by : Sh. P. N. Arora &
Sh. Parshotam K. Singla (Adv.)
Respondent by: Sh. Charan Dass (D.R.)

Date of Hearing: 11.04.2019
Date of Pronouncement: 05.07.2019

ORDER

Per Sanjay Arora, AM:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals), Bathinda ('CIT(A)' for short) dated 21.6.2017, dismissing the assessee's appeal contesting its' assessment u/s. 143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for Assessment Year (AY) 2014-15 vide order dated 16.12.2016.

2. The brief facts of the case are that the assesse-company, a dealer in edible/non-edible oils, was found during the assessment proceedings to have received unsecured loan/s during the relevant previous year, i.e., f.y. 2013-14, from another company, namely, Gurdas Agro Pvt. Ltd. (GAPL), in which it held shares with 34.40% voting power. The loan, which was interest-bearing, was not for any particular amount, but in the form of an open current account

with regular debits and credits during the year; the opening balance (as on 01.4.2013) being in fact at a debit (i.e., receivable) of Rs.279.48 lacs, which though stood liquidated by 15.4.2013, turning into a credit (payable) balance of Rs.304.91 lacs on that date. The peak balance for the year was at Rs. 3266.12 lacs on 06.11.2013. GAPL was a company in which public is not substantially interested, i.e., is company other than that defined u/s. 2(18) of the Act. To the extent of it's accumulated profit, therefore, the loan or advance to the assessee was liable to the assessed in it's hands as deemed dividend u/s. 2(22)(e) of the Act. The accumulated profit up to 31.3.2013, i.e., immediately prior to the current year, stood at Rs. 67.36 lacs. The profit for the year, as per the audited accounts, was at Rs. 150.00 lacs, so that, on a pro-rata basis (i.e., up to 06/11/2013), it worked to Rs. 49.81 lacs. The total accumulated profit up to that date, i.e., Rs.117.17 lacs, was accordingly, after show causing the assessee, brought to tax u/s. 2(22)(e) r/w s. 56 of the Act in assessment.

In appeal, the assessee raised several contentions, each of which was met by the ld. CIT(A). *The financial statements did not reflect any trading transaction or business relationship between the two, i.e., the payer (GAPL) and the payee (assessee) companies*, with in fact the balance as on 31.3.2014 (Rs. 14.48 lacs) being reflected as an 'unsecured loan' in the assessees' balance-sheet as at the year-end. The assessee had subscribed to 40 lakh shares in GAPL during the year, which worked to 34.40% share-holding therein, so that there was no merit in invoking the rule of consistency; the provision becoming accordingly applicable for the first time only for the current year. The assessee having received Rs. 4267.01 lacs during the current year, the Assessing Officer (AO) had, in fact, been reasonable in working the sum assessable u/s. 2(22)(e) u/s. 56 at Rs.117.17 lacs, which was accordingly confirmed by the first appellate authority, placing reliance on *Tarulata Shyam v. CIT* [1997] 108 ITR 345 (SC) and *Sarada (P.) v. CIT* [1998] 229 ITR 444 (SC).

Aggrieved, the assessee is in second appeal, raising the following grounds:

'1. That the order of Commissioner of Income Tax (Appeals) and Deputy Commissioner of Income Tax Circle-1 Bathinda is against law & facts.

2. That Commissioner of Income Tax (Appeals) was erred in law to sustain the amount to assess as 'deemed dividend' of Rs. 1,17,17,142.00 in absence of any adverse finding with regard to business loans & advances. The addition made by Assessing Officer u/s. 2(22)(e) of Income Tax Act 1961 is highly unjustified in eyes of law as the said section has been wrongly invoked.

3. That CIT (Appeals) was not justified to sustain the addition of Rs. 1,17,17,142.00 u/s. 56 on account of 'deemed dividend' without considering the facts and written submission filed during course of appellant proceedings.'

3. Before us, the assessee's prime contention was of having maintained a running account with GAPL. The transfer of funds from one company to another was on need basis. While the assesse-company was the beneficiary of the sums received therefrom, GAPL, the payer company, was the beneficiary of the sums paid by the assessee thereto. The same therefore could not be regarded as either a loan or an advance, for s. 2(22)(e) to apply, but only as an open, mutual and current account. The credit obtained only for a period of 82 days during the relevant year. It was under these circumstances that the Hon'ble jurisdictional High Court in *CIT v. Suraj Dev Dada* [2014] 367 ITR 78 (P&H), where the credit was for 55 days only, held that the provision of s. 2(22)(e), which was to stop the misuse by taking funds out of the company by way of a loan or advance instead of dividend and, thereby, avoid tax, could be invoked. Similar view, it was submitted, was expressed by the Hon'ble Calcutta High Court in *CIT v. Gayatri Chakraborty* [2018] 407 ITR 730 (Cal), rendered after considering the decisions by the Apex Court in *Sarda (P.)* (supra) and *CIT v. Mukundray K. Shah* [2007] 290 ITR 433 (SC). The decisions in *Tarulata Shyam* (supra) and *Sarda (P.)*, it was argued, are distinguishable inasmuch as there were no mutual benefits and obligations in the facts of the said cases. In both these cases there were only one-way transactions during the year, i.e., payment

by the payer-company to the assessee-shareholder, while in the instant case there are transactions both ways; the assessee-company also making payment/s to the payer-company (GAPL). This is particularly so as the two companies are in the same line of business. On a query by the Bench as to if the provision of interest, charged (to the assessee-company by GAPL) at Rs. 5.19 lacs for the year on the overdraft account, would take the sum borrowed by the assessee during the year (at a maximum of Rs.3266.12 lacs) out of the purview s. 2(22)(e), the ld. counsel for the assessee, Sh. Arora, did not offer any definite answer, with the Bench observing that these aspects of the matter have understandably been considered by the Hon'ble Apex Court per it's decisions in the matter.

The ld. Sr. Departmental Representative (DR) would rely on the impugned order, stating that neither the primary facts of the case are in dispute nor in fact the law in the matter, explained by the Apex Court per its' several decisions, to some of which reference stands made by the ld. CIT(A).

4. We have heard the parties, perused the material on record, and given our careful consideration to the matter. The edifice of the assessee's case is that it has both, given, as well as received, amounts to/from GAPL, i.e., to mutual benefit and, therefore, s. 2(22) (e) of the Act shall not apply even as held by the Hon'ble Courts, reference to which, including by the Hon'ble jurisdictional High Court, stands made. The matter, as we find, is no longer *res integra*, having been abundantly clarified, and in all its aspects, by the Hon'ble Courts, including by the larger Benches of the Apex Court, *all unanimous in their verdict*. The assessee's claim (refer its' Gd. 2) is also not tenable on facts. It is rather surprising that despite such clear enunciation of law per binding judicial precedents, such matters continue to be litigated before the appellate forums. It is the law as elucidated and the primary facts of the case, on both of which there is no dispute, or even scope for, that shall accordingly inform our order.

4.1 We may begin by reproducing the relevant provision, as under:

'**Definitions**

2. In this Act, unless the context otherwise requires,-

(1) – (21) …….

(22) dividend includes-

(a) – (d) ……..

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

but "dividend" does not include –

(i) …….

(ia) ……

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

(iii) any dividend paid by a company which is set off by the company against the whole or any part of any sum previously paid by it and treated as a dividend within the meaning of sub- clause (e), to the extent to which it is so set off.'

As a mere reading of the provision, language of which is clear and unambiguous, suggests and, in any case, upon a fair look and reading thereof, the provision is triggered where:

a) a loan or advance is given by a company (in which the public is not substantially interested) to a shareholder who beneficially owns shares therein to the extent not less than 10% of the voting power therein; or

b) a loan or advance is given by such a company to any concern in which such shareholder has substantial interest (explained as entitling him to a beneficial interest in 20% of its income); or

c) any payment is made by such a company on behalf of, or for the benefit of, such a shareholder.

The loan or advance or payment is, under such circumstances, to be deemed as dividend to the extent the paying company has accumulated profits, the exception being where the lending company is in the business of money lending.

4.2 We may at this stage advert to the relevant transactions comprising the impugned credit of Rs. 3266.12 lacs, deemed as dividend to the extent of the accumulated profit (of GAPL), on the basis of the ledger account of GAPL in the books of the assessee-company (PB pgs. 3-4):

Date	Particulars	Narration	Debit	Credit	Closing Balance
01/04/2013	Opening Balance		27947593		27947593.00 Dr
09/04/2013	HDFC BANK	Ch. No. :		xxx	
15/04/2013	HDFC BANK	Ch. No. :		xxx	
04/05/2013	HDFC BANK	Ch. No.:	xxx		
08/05/2013	HDFC BANK	Ch. No.:	xxx		
13/05/2013	HDFC BANK	Ch. No.:	xxx		0.00
23/05/2013	FLC INSURANCE EXP	Policy No.		xxx	
29/06/2013	HDFC BANK	Ch. No.:	xxx		
12/07/2013	HDFC BANK	Ch. No. :		xxx	0.00 '
29/07/2013	FLC INSURANCE EXP	Policy No.		xxx	
31/07/2013	FLC INSURANCE EXP	Policy No.		xxx	769144.00 Cr
15/10/2013	FLC INSURANCE EXP	Policy No.		247482.00	1016626.00 Cr
15/10/2013	FLC INSURANCE EXP	Policy No.		124491.00	1141117.00 Cr
16/10/2013	HDFCBANK	Ch. No:	769144.00		371973.00 Cr
17/10/2013	FLC INSURANCE EXP	Policy No.		250482.00	622455.00 Cr
05/11/2013	HDFC BANK	Ch. No.		54400000.00	55022455.00 Cr
05/11/2013	HDFC BANK	Ch. No.		54045000.00	109067455.00 Cr
05/1 1/2013	HDFC BANK	Ch. No.		54000000.00	163067455.00 Cr
05/11/2013	HDFC BANK	Ch. No.		53945000.00	217012455.00 Cr
06/11/2013	HDFC BANK	Ch. No.		54000000.00	271012455.00 Cr
06/11/2013	HDFC BANK	Ch. No.		55600000.00	326612455.00 Cr
13/11/2013 to 29/11/2013	HDFC BANK	Ch. No.	xxx		2121455,00 Cr
29/11/2013	HDFC BANK	Ch. No.	10000000.00		7878545.00 Dr
29/11/2013 to 08/01/2014	HDFC BANK	Ch. No.	xxx	xxx	1349481.00 Cr
05/02/2014 to 03/03/2014	HDFC BANK	Ch. No.	xxx	xxx	981313.00 Cr
31/03/2014	INTEREST PAID	INTEREST		518665.00	1499978.00 Cr
31/03/2014	TDS INTEREST (PAYABLE)	TDS ON INTEREST	51867		1448111.00 Cr

The payment of Rs. 6.22 lacs (on October 15 & 17, 2013) is on account of insurance in respect of foreign letter of credit (FLC) by GAPL for an on behalf of the assessee-company, claimed by the latter as an insurance expense. The balance payment of Rs. 3259.90 lacs (on November 5 & 6, 2013) is by way of direct payments, credited to the assessee's bank account with HDFC Bank. The same thus falls under limb (c) and, as the case may be, limb (a), afore-stated (para 4.1). The requirement of the payment being for the *benefit* of the payee-shareholder is attached only to payment/s made indirectly, i.e., to Rs.6.22 lacs in the instant case. The said benefit is implicit in the very credit of the same by the assessee to the account of GAPL (and the corresponding debit by GAPL in its' accounts to the assessee's account) and, further, it's claim as an expenditure by the assessee, i.e., as an expense of its' business, being incurred for its' purpose/s. There is no dispute and, in fact, a claim to that effect, i.e., of the payment received being for the assessee's benefit (and vice-versa)(refer para 3). Rather, the amount received (Rs.3266.12 lacs) being, on account of a lower amount of accumulated profit, far in excess of the sum deemed as dividend (Rs. 117.17 lacs), the indirect receipt (Rs.6.22 lacs) could easily be ignored or overlooked as being received, by implication, out of other than the profit of GAPL, the payer-company and, thus, not covered u/s. 2(22)(e), for it to be regarded as dividend there-under.

The only amount 'repaid' by the assessee to GAPL during this period (i.e., from 15.10.2013 to 06.11.2013) is Rs. 7,69,144 (on 16.10.2013), which is in respect of credits (dated 29.07.2013 & 31.07.2013) toward insurance payment. The same, though liable to be construed as dividend u/s. 2(22)(e), do not form part of the qualifying sum of Rs. 3266.12 lacs for us to dilate thereon. Continuing further, the entire credit of Rs. 3266.12 lacs stands repaid from 13/11/2013 to 29/11/2013, on which (later) date the assessee had in fact paid in excess by Rs. 78.79 lacs. The loan/advance by the assessee swelled to Rs. 284.29 lacs (by 04.12.2013), all through direct payments, only to be received

back, in full, before the year-end, on which date the credit balance of GAPL stood at Rs. 14.48 lacs (including a credit on account of interest, net of TDS, at Rs. 4.67 lacs).

4.3 The question that therefore assumes significance is if the fact of the subsequent repayment (of loan/advance) relevant, i.e., in determining if the amount received from the payer-company is to be, or is not to be, considered as dividend u/s. 2(22)(e)? This is as *de hors* the amounts paid by the assessee to GAPL, which are again, as we shall presently see, only in the nature of loans/ advances, either prior to 15/10/2013, or subsequent to 28/11/2013, the sums received by it from GAPL are only in the nature of loans/advances, on which in fact even interest stands charged. The *second* question that would follow, i.e., where the answer to the *first* question is in the affirmative, is the length of the period over which the credit obtains, being at 45 days (i.e., from 15.10.2013 to 29.11.2013) in the instant case? The *third* question in this regard that would need to be addressed, is if the subsequent, or even the prior conduct of the account, relevant? As where, for example, the assessee has, prior or subsequent to the receipt of loan or advance, given loan/advance to the payer-company, which may or may not be in the current year.

4.4 The issue of repayment of the amount received came up before the Tribunal in *Tarulata Shyam* (supra) in the context of s. 2(6A)(e), the analogous provision under the 1922 Act, introduced, along with s.12(1B), by Finance Act, 1955 w.e.f. 01.4.1955. There arose a difference between the Members of the Tribunal. The AM took the view that the moment a payment as envisaged u/s. 2(6A)(e) is received, it gets clothed with the character of dividend, and is to be regarded as the income of the assessee-shareholder, and that there-fore, the subsequent action or repayment by the share-holder cannot take it out of the mischief of the provision. The JM expressed a contrary opinion. If the amount

had been returned before the end of the year, no loan or advance from the section 23A company (i.e., a company in which the public is not substantially interested) can be said to have been availed of for his benefit by the shareholder. The matter was referred to the President of the Tribunal, who agreed with the view by the AM. A loan or advance received by a share-holder assumed the character of dividend and becomes his income by the fiction of s. 2(6A)(e), i.e., on its' receipt. It ceases to be the liability of the shareholder, i.e., for the purpose of taxation, *although he may in fact or in law remain liable to the payer-company for it*. If it is repaid, the same shall not liquidate or reduce the quantum of income, which had already accrued, and such repayment is not a permissible deduction u/s. 12(2). The majority opinion was challenged before the Hon'ble High Court, which held in favor of the Revenue, stating that the repayment before the end of the year was immaterial. This is precisely what had earlier been held in *K.M.S. Lakshmana Aiyer v. ITO (Addl.)* [1960] 40 ITR 469 (Mad). The matter was carried to the Apex Court, which affirmed the decision by the High Court per its' larger bench decision in *Tarulata Shyam* (supra). Section 2(22)(e), it was argued therein, should be read down inasmuch as it carried an irrebuttable presumption of a loan or advance to a substantial shareholder being a distribution of profit and, thus, dividend thereto, by definition, by a company (in which public is not substantially interested). It worked unfairly on those repaying the loan as against those retaining it. Besides, it may lead to double tax, as where the repaid amount is again lent to the shareholder during the year inasmuch as the same amount is liable to be regarded as dividend. The Apex Court agreed that the provision was harsher than sec. 108 of the Commonwealth Income-tax Act, which was its' inspiration. However, the Parliament had itself exercised its' legislative judgment, raising a conclusive presumption that in all cases where loans are advanced to a shareholder in a private limited company having accumulated profits, the advance should be deemed to be the dividend income of such shareholder. It is this presumption, it explained, which is the

foundation of the statutory fiction incorporated in s. 2(6A)(e). Thus, s. 108 of the Commonwealth Act appears to be more reasonable and less harsh than its Indian counterpart. The language of the provision was clear and unambiguous, and there was no scope for importing into the statute words that were not there. That would, it stated, be not to construe, but to amend the statute. There was, it explained, no justification to depart from the normal rule of construction according to which the intention of the Legislature is to be primarily gathered from the words used in the statute. Even if there be a *casus omissus*, it clarified, the defect can be remedied only by legislation and not by judicial interpretation. Referring to *Cape Brandy Syndicate v. IRS* [1921] 1 KB 64 (KB), it recalled the words of Rowaltt J., that: (at pg. 71)

"..... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

Further, once an assessee comes within the letter of law, he had to be taxed, however great the hardship may appear to be to the judicial mind. Noting the satisfaction of the conditions of the provision, it concluded as under: (pgs. 357 & 358)

'17……This highlights the fact that the legislature has deliberately not made the subsistence of the loan or advance, or its being outstanding no the last date of the previous year relevant to the assessment year, a pre- requisite for raising the statutory fiction. In other words, even if the loan or advance ceases to be outstanding at the end of the previous year, it can still be deemed as a "dividend" if the other four conditions factually exist, to the extent of the accumulated profits possessed by the company.

18. At the commencement of this judgment we have noticed some general principles, one of which is, that the previous year is the unit of time on which the assessment is based (s. 3). As the taxability of an income is related to its receipt or accrual in the previous year, the moment a dividend is received, whether it is actual dividend declared by the company or is a deemed dividend, income taxable under the residuary head, "income from other sources", arises. The charge being on accrual or receipt the statutory fiction created by s. 2(6A)(e) and s. 12(1B) would come into operation at the time of the payment by way of advance or loan, provided the other conditions are satisfied.

19. We do not propose to examine the soundness or otherwise of the illustrations given by Mr. Sharma since they are founded on assumed facts which do not exist in the present case.

20. For the foregoing reasons we would answer the question proposed in favour of the Revenue and dismiss this appeal with costs.'

The consistent view, therefore, right from the stage of the assessing authority, to the Apex Court, was the same, i.e., the repayment of a loan/s or advance/s was inconsequential for the purpose of application of the fiction of the provision of deemed divided, introduced on the statute book from AY 1955-56 onwards. Why, in a given case, the repayment may be after the close of the relevant year, and which would therefore have little bearing in the matter, while ought to be given regard to if the fact of the repayment is relevant? *How should, one may ask, it matter that the repayment is after x days or y days or any other*? In a given case the payment may be received at the fag-end of the year, or on the last date itself, so that repayment, even after a few days, falls in the following year. A loan or advance carries with it, by definition, an obligation for repayment (return of value), so that the fact of repayment - whether during or subsequent to the relevant year, would be, as clarified, of no moment. The length of the time for which the loan or advance obtains would accordingly be of no significance, i.e., for taxation purposes; the amount having been regarded, on its' receipt, as the income of the payee. The assessee's argument of having retained the credit (sum borrowed), which is on interest, for only 82 days during the year, would therefore be of no assistance thereto, being an irrelevant consideration. Comparison may, for the sake of discussion, as well as for better comprehension, also be made to sec. 68 of the Act deeming a credit as the income of the debtor where the same is not satisfactorily explained as to its nature and source. The subsequent discharge of the credit, as by repayment, where it is described as a loan or advance, is of little consequence, i.e., where it is deemed as an unexplained credit u/s. 68. Temporary loan/advance(s) were,

accordingly, even prior thereto, held as falling within the mischief of s. 2(22)(e). As explained in *Walchand & Co. Ltd. v. CIT* [1975] 100 ITR 598 (Bom), noted with approval in *Tarulata Shyam* (supra), the fact that the loan or advance was factually repaid or made good within a short period, is no defence to the attraction of the provision. Though stated to be a current account, the nature of the account showed it to be a loan, made further amply clear by the fact of charge of interest at the end of the year, even though the account had been squared off thereby. Sub-clause (e) (to s. 2(6A), corresponding to s. 2(22)(e) of the Act) was contrasted by the Hon'ble Court with the preceding sub-clauses, i.e., (a) to (d), which admittedly envisaged permanent distribution of the amount regarded as dividend. The duration of the loan or advance, which was only 23 days, regarded as immaterial for the purpose of dividend under sub-clause (e) (pgs. 602, 603). The similarity with the facts of the instant case is striking.

The 'repayment' of the loan or advance, which gets deemed, on receipt, on account of the legal fiction, as a distribution of profit and, thus, as income in the hands of the payee share-holder, is therefore of no consequence. As explained by the Apex Court it is this presumption *juris et de jure* which forms the foundation of the statutory fiction. The decisions in *CIT v. K. Srinivasan* [1963] 50 ITR 788 (Mad); *CIT v. P.K. Badiani* [1970] 76 ITR 369 (Bom); and *Walchand & Co. Ltd*. (supra) were, besides *K.M.S. Lakshmana Aiyer* (supra), also noted with approval in *Tarulata Shyam* (supra). The Hon'ble Court also drew on its' decision in *Navnit Lal C. Jhaveri v. AAC* [1965] 56 ITR 198 (SC), also relied upon before it.

The *first* question afore-stated (refer para 4.3) is, accordingly, answered in the negative. The *second* question, i.e., as regards the relevance of the retention period, does not consequently arise.

4.5 Continuing further, clearly, there is two-way traffic, i.e., receipt of loan or advance, as well as its' repayment, in the instant case. That the repayment was

in excess, constituting a loan/advance by the share-holder to the payee-company, would, in the context of the provision, carry no special significance. The plea of a *mutual, open and current account* was adopted in *P.K. Badiani* (supra). The Apex Court considered it relevant to reproduce the relevant part of the said decision in *Mukundray K. Shah* (supra), referred to during hearing by the ld. Sr. DR, as under: (at pg. 447)

'We also quote here-in-below para 19 and para 21 of the judgment of the Bombay High Court in the case of *CIT vs. P.K. Badiani* [1970] 76 ITR 369 (Bom):

"19. Now, the assessee's account for 1st April, 1957, to 31st March, 1958, shows that there are credits as well as debits. What has to be ascertained is whether the debits are 'loans', so that they can be deemed as dividends. The account is a mutual, open, and current account. Every debit, i.e., every payment by the company to the assessee, may not be a loan. To be treated as a loan, every amount paid must make the company a creditor of the assessee for that amount. If, however, at the time when the payment is made by the company is already a debtor of the assessee, the payment would be merely a repayment by the company towards its already existing debt. *It would be a loan by the company only if the payment exceeds the amount of its already existing debt* and that too only to the extent of the excess. Therefore, *the position as regards each debit will have to be individually considered*, because it may or may not be a loan. The two basic principles are, that only a loan, which would include the other payments mentioned in s. 2(6A)(e), can be deemed to be dividend and that too only to the extent that the company has at the date of the payment 'accumulated profits' after deducting therefrom all items legitimately deductible therefrom.

xxxx

21. As regards question Nos. 3 and 4, Mr. Rajgopal contended that the debit balance, if any, at the last date of the assessee's accounting year 1st April, 1957 to 31st March, 1958, should be taken as the amount to be treated as dividend and as the assessee's account is on the last day to his credit, no amount can be deemed to be dividend. As already pointed out, the position has to be ascertained at the date of each payment by the company to the assessee and this contention must, therefore, be rejected. If Mr. Rajgopal's contention was to be accepted, the result would be that if a shareholder borrows a large amount during the year, but repays it on the last day of the year, it would not be considered to be a loan, though the facts show that he did borrow a loan. Such a contradiction of the real fact would result if Mr. Rajgopal's contention were to be accepted. Mr. Rajgopal further contended that in any event the highest amount to the assessee's debit on any day of the year should be the amount to be deemed to be dividend. This argument, again, ignores the principle laid down by us, that the position at the date of each payment must be considered. Moreover, there is another reason and that is that if it were to be so done, it would not enable the position of the balance of the 'accumulated profits' being taken into account, as more than one shareholder may have borrowed loans from the company in an account similar to that of the assessee. All these contentions of Mr. Rajgopal ignore the

basic fact that s. 2(6A)(e) uses the words 'any payment' which means, every payment, and s. 2(6A)(e) requires the determination of two factors, viz., whether the payment is a loan and whether at the date when the payment is made there were 'accumulated profits' and that these two factors are to be correlated and the result must be ascertained at the date of each such payment." (emphasis, italicised in print, supplied)'

Neither, therefore, the fact of subsequent repayment, nor of the payment finding reflection in a current account, was considered as of any moment; the Hon'ble Court clarifying that the nature shall have to be examined with reference to each individual payment, i.e., whether it creates a debt or is in discharge of an earlier one. No wonder, then, that in *CIT v. Nagindas M. Kapadia* [1989] 177 ITR 393 (Bom), the advances received against purchases by the assessee share-holder were ignored from the running account and only the balance amounts, not relatable to business, representing only financial transactions, so isolated, were regarded as dividend u/s. 2(22)(e), upholding the Tribunal's view. A 'loan', according to Black's Law Dictionary, fifth edition, page 844, means "a lending; delivery by one party to and receipt by another party of sum of money upon agreement, express or implied, to repay it with or without interest [Isaacson v. House, 216, Ga. 698; 119SE 2D 113,116]". A loan is something quite different from a debt. For a loan, there must be a lender, a borrower, a thing loaned for use, as well as a contract between the parties for the return of the thing loaned. A loan contracted no doubt creates a debt but there may be a debt without contracting a loan. Every sale of goods on credit does not amount to a transaction of loan [*Lakhmichand Muchhal v. CIT* [1961] 43 ITR 315,317-8 (MP); *Bombay Steam Navigation Co. (1953) P. Ltd. v. CIT* [1965] 56 ITR 52, 57 (SC); *CIT v. Saurashra Cement & Chemical Industries Ltd.* [1975] 101 ITR 502, 510 (Guj)]. An 'advance', on other hand, means sums paid to a person ahead of the time when it is due to be paid (*K. Srinivasan* (supra)).

The transactions between the two companies in the instant case, it needs to be appreciated, are purely financial transactions, i.e., receipt and payment of money, either directly or indirectly (i.e., where the amount is paid – which is by

the payer-company, to another for and on behalf of the payee and, accordingly, debited to its' account or, correspondingly, credited to the account of GAPL by the assessee in its' books of account). Why, the same carries interest, implying that the same impinges on every amount received and repaid, as well as paid and received back, i.e., to all the debits and credits in account, representing financial transactions. Money received on account of a business transaction (viz. advance against purchases), or otherwise received in the course of money lending business, from the payee-company, are excluded, by definition, from the purview of s. 2(22)(e), which targets only a loan/s or advance/s *simpliciter*. It is only in this context, i.e., where the amount advanced is for the purpose of business of the payee-company, that the same would stand excluded. No business purpose of GAPL, which is not in the business of money lending, is shown. The amounts paid and received in the instant case are clearly in the nature of a loan/s, i.e., sums borrowed, which though is not at a fixed amount or for a fixed period of time. This variability, though, would not alter the nature of the amounts as loan (or advance – signifying, here, a temporary loan). The charge of interest, confirms, if any was required, the nature of the amount paid and received as loan/s, adjusting the amount received firstly against the loan/s already advanced, and vice versa. Why, if the interest charged is at 10 % p.a., as for the preceding year (being not mentioned in the narration to relevant entry in accounts), the same, at Rs.5,18,665, implies an average loan of Rs. 51.87 lacs during the year. This though would be of no consequence; it having been sufficiently clarified that a reduction or even a ceasure of liability (on account of loan/advance) by the relevant year-end is not relevant.

This, then, answers the *third* question set up by us (refer para 4.3), in that the matter is factual and, accordingly, in the facts and circumstances of the case (also refer para 4.2), the impugned sum of Rs. 3266.12 lacs represents a loan, temporary in nature, having been paid in full by 29/11/2013, i.e., within 45 days, even as the fact of subsequent repayment or the length of period over

which it obtains, is of no consequence as regards the attraction of the provision of s. 2(22)(e). *Further*, as the repayment depends on the availability of surplus funds with the assessee, being deployed in its' business, to sub-serve the interest of which the loan stands contracted, there could be no certainty as to the length of the retention period and, thus, the nature of a loan as a 'temporary' (itself a relative term) loan, is, in the facts and circumstances of the case, suspect.

4.6 We may next consider the decision by Hon'ble jurisdictional High Court in *Suraj Dev Dada* (supra). The Hon'ble Court, after reproducing the order by the Tribunal (at pages 83-84 of the Reports), states as under: (pg. 84)

'10. From the above, it emerges that CIT(A) and the Tribunal had concurrently recorded that the assessee had running account with the company - M/s Dada Motors Pvt. Limited and had been advancing money to it. It was further observed that the provisions of Section 2(22)(e) of the Act were not attracted in the present case as this provision was inserted to stop the misuse by the assessee by taking the funds out of the company by way of loan advances instead of dividends and thereby avoid tax. In the present case, the assessee had infact advanced money to the Company and there was credit for only 55 days for which provisions of Section 2(22) (e) of the Act could not be invoked. These findings were not shown to be erroneous or perverse in any manner.

11. In view of the above, *no substantial question of law arises in this appeal*. Consequently, finding no merit in the appeal, the same is hereby dismissed.'

(emphasis, supplied)

The only finding recorded by the Hon'ble Court is that the findings by the first and the second appellate authority have not been shown to be erroneous or perverse. How could that, by itself, one wonders, be regarded as a statement of law by it; it, in fact, clearly holding that in its view no substantial question/s of law arises for its' adjudication? How could then it be regarded as having expressed any view or answered the substantial question of law raised before it? Rather, it's observation even leaves the scope for the Hon'ble Court, while stating its' view in a later case – on a substantial question of law, expressing a different view, i.e., based on the arguments advanced and the position of law urged on the basis of judicial precedents. The jurisdiction of the High Court

under the Act, which is the third appellate authority there-under, arises only on a positive finding on a substantial question of law arising out of the order by the Tribunal, i.e., the second appellate authority under the Act. This is patent from a mere browse of sec. 260A where an appeal is preferred before the High Court; it reading as under:

Appeal to High Court.

260A. (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal *if the High Court is satisfied that the case involves a substantial question of law*.

(2) The Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner] or an assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be—

(a) filed within one hundred and twenty days from the date on which the order appealed against is received by the assessee or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner;

(b)

(c) in the form of a memorandum of appeal precisely *stating therein the substantial question of law involved*.

(2A) The High Court may admit an appeal after the expiry of the period of one hundred and twenty days referred to in clause (a) of sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.

(3) Where the High Court *is satisfied that a substantial question of law is involved* in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which—

(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).

(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.' (emphasis, supplied)

The Hon'ble Court might as well have declined admission, stating that no substantial question of law arises out of the order by the Tribunal. That it went through the Tribunal's order, delineating the facts as recorded by it, as well as it's decision, prior to holding that, in its' view, no substantial question of law arose in the facts of the case and its' adjudication by the Tribunal, only shows that it chose to make its' this finding (as to the non-arising of any substantial question of law out of the order by the Tribunal) transparent. Nothing, thus, turns on the assessee's reliance on the said decision.

4.7 Be that as it may, and particularly considering that assessee has also relied on decisions that suggest that a 'running account' would take the transactions entered into out of the purview of s. 2(22)(e) (or s. 2(6A)(e) of the 1922 Act), we may, for the sake of clarity, advert, once again, to the decisions by the Apex Court referred hereinabove, extracting from the decisions in *Tarulata Shyam* (supra) (at para 4.4); *Mukundray K. Shah* (supra) (para 4.5). On facts, we have already clarified that the nature of the financial transactions in the instant case is in the nature of loan/s, also adverting to the decisions wherein, similarly, open, current accounts were maintained.

A running account is nothing but an account with transactions both ways. The debits and credits (to the account of the payer-company) in its' accounts by the share-holder could imply payment/s, direct or indirect, by it to the said company and, accordingly, receipt back thereof, again, directly or indirectly. Again, it could well be that the debits represent repayment of the sums received, directly or indirectly, in the first instance by the assessee-shareholder and, accordingly, credited to the account of the payer-company. Now, neither the

sums paid by the share-holder nor their repayment, attract s. 2(22)(e). Their existence or otherwise, thus, as afore-stated, is of no signification in-so-far as the attraction of the said provision is concerned (refer paras 4.4 & 4.5). These, in fact, ought to be ignored, unless of course the private limited company to which the payments are made by the share-holder, is itself a share-holder (with a holding in excess of the threshold limit) in the share-holder company, being a company in which the public is not substantially interested (which the appellant company apparently is). *It is only the opposite set of transactions that hold significance as far as sec. 2(22)(e) is concerned.* That it, it is the payment by the payer-company to its' share-holder by way of a loan or advance that is liable to be, to the extent of its' accumulated profit, deemed as distribution of the said profit and, thus, dividend income in the hands of the payee-shareholder. Surely, as afore-explained, if there are sum/s already due by the payer-company thereto, the same would, unless there is an understanding to the contrary, firstly adjusted against the amount due. The payment, unless given as a consideration for value received earlier (or even to be received), itself creates an obligation for repayment, so that nothing turns, as explained by the Hon'ble Courts, by the fact of its' repayment which, as afore-discussed, could be immediately, or – though to no consequence, after a length of time. Why, the payment received being only as it would be required (for its' purposes) by the assessee-shareholder, should the length of time of retention be of any consequence; the income having been already arisen on the receipt of loan/advance? The retention in *Walchand & Co. Ltd*. (supra) was only 23 days, though found of no consequence by the Hon'ble Court. In fact, where the sums are borrowed for the purpose of its' business by the shareholder, as in the instant case, it would be guided in the matter by business considerations, i.e., the need for funds, besides being liable to be returned only where not required for the time being, therefor. That is, it is the business, for which the borrowing has been made, that would dictate the length of retention, besides of course the terms of the borrowing

contract, with the interest cost being liable to be absorbed as an expense thereof. The argument of the retention period being 'low' – a relative term, therefore carries no significance in the context of the provision, i.e., apart from legally, even factually; the repayment being a function of the business need/s. A repayment in disregard thereof may hurt the borrowers' business interest. How could, then, even factually speaking, the 'early' return, be of any import? It is for this and such other reasons that we stated hereinbefore the assessee's case as untenable even on facts.

The extension of a loan/advance carries with it an obligation to repay, with or without interest. This extension, which could be both ways, thus, does not create any mutual obligation i.e., apart from, and only understandably, that concomitant to the borrowing. As, for instance, of repayment, which could be on demand or after a fixed period. The two companies in the instant case are not in the business of money lending. As stated, and even otherwise stands to reason, a company would give funds to another only when they are for the time being surplus with it, as otherwise it would, besides facing logistical issues, not be acting in the interest of its' business. Similarly, the payer-company would borrow only when it requires money for it's purposes, and being at a cost, would retain it only for the period as is necessary. That is, in either case, each company, in receiving the loan or advance, is primarily catering to its' own (business) interest. *This is similar to any borrowing arrangement that a company may enter into with a bank or financial institution*. The lending company is, to the payee-company, only a source of funds. It is this very source, where the payee's interest in the payer-company exceeds a defined limit, and the latter, being a company in which the public is not substantially interested, is not in the business of money lending, that is proscribed or, more correctly, sought to be hit by the legal fiction by regarding it as distribution of profit, i.e., dividend, by definition, and deemed as the income of the payee to the extent of the accumulated profit. The purpose to which the payee may deploy the funds

received, i.e., business or otherwise, and which may perhaps be also of concern/ interest, as indeed it would be to any serious lender inasmuch as he would be interested in repayment, is of no significance or consequence as far as the deeming fiction of the provision is concerned. As explained in *Tarulata Shyam* (supra), the payee may, in law and in fact, be liable to repay and, in fact, even repay, but the provision nonetheless stands attracted on the receipt of the loan/advance where the other conditions of the provision are satisfied. A loan or advance for business purpose, i.e., where it serves a business purpose of the lending company, is excluded. No such business purpose informs the lending of GAPL to the assessee in the instant case, as none has been exhibited or, in fact, even stated. That the two companies are, as stated – without being shown, in the same line of business, is incidental; the borrowing by either being guided by its' own business interest, and the lending to each other being only for the reason that the two fall, as it appears, under the same management. It would, as afore-explained, be doing a disservice to its' own business if it did not do so, though there is nothing to suggest that. The balance outstanding (as at the year-end) is reflected as a loan or advance in the audited final accounts of both the companies. In fact, the repayment of the whole of it (which is by 29/11/2013), or nearly the whole of it, i.e., if the subsequent repayment is also to be taken into account i.e., save for Rs. 9.81 lacs (the balance outstanding representing interest, which though would assume the character of the principal, as the past conduct of the account shows), i.e., before the year-end, itself proves it to be nothing but financial transactions. It is for this reason that loan transactions, where the lender-company is in the business of money lending, are excepted u/s. 2(22)(e). The other aspect that prevailed with the Tribunal in *Suraj Dev Dada* (supra), the operative part of whose order stands reproduced by the Hon'ble Court in its' order, is that no 'misuse' of funds belonging to payer-company was shown, coupled with the fact of the assessee-appellant having lent the money to the payer-company most of the time during the relevant year; the transactions

being in the nature of a running account, with the credit obtaining for the period of only 55 days during the relevant year. We have also afore-discussed that the lending of money by a shareholder to the payer-company holds, in this context, no particular significance, being outside the ambit of the provision. There is no reference by the Tribunal to judicial precedents, or even the law in the matter, with reference to which we have stated the period of retention, or the length of time for which the credit obtains, as of no consequence, being not a relevant consideration. *When the factor of repayment of loan and advance itself is not relevant, how could the retention period, i.e., the period after which the repayment is effected, could possibly be*?

All these aspects have in fact been deliberated and concluded by the Apex Court per its' constitution bench decision in *Navnit Lal C. Jhaveri* (supra). The challenge in that case was to the *vires* of the analogous provision of s. 12(1B) r/w s. 2(6A)(e) of the 1922 Act. Per his dissenting judgment Raghubar Dayal J. held substantially the same what informs and guides the decision by the Tribunal in *Suraj Dev Dada* (supra), even as it is not competent for the Tribunal to, under the scheme of things, read down a provision that is *intra vires* the Constitution (of India) or read it inconsistent or *de hors* the decisions by the higher courts of law laying down the law in the matter. Loans borrowed by a shareholder from a company, the dissenting Justice stated, do not come within the general definition of income. As such, if the shareholder had been paid his share of profit ostensibly as a loan – which is really a share of profit, it can be taxed as 'income' under an appropriate enactment. However, any *ad hoc* payment to a shareholder as a loan/advance, unrelated to his share in the accumulated profit, *cannot rationally come within the expression of 'dividend'*. That is, it was not open to the Legislature to describe any payment of money by a company to a shareholder by the word 'dividend', and then provide that such payment will come within the expression 'income' for the purpose of any law enacted by virtue of Entry 82, List 1, Schedule VII to the Constitution. The

definition of dividend must have a rational connection with the concept of 'dividend' in the context of profit of a company and its' distribution amongst the shareholders at any time after the profits have been earned. It was in fact 'unreasonable' to provide that a particular shareholder should be deemed to have received an amount in excess of his proportionate share (in the profit) as dividend. That it is to say, that the law, in his opinion, ought to have provided that the loan or advance by a company was, in substance, a distribution of profit by it and, further, could not ascribe such distribution as dividend in excess of the proportionate share of the payee in the accumulated profits. The same, however, did not find favor with the other four judges constituting the Bench, who delivered the majority opinion upholding the constitutionality of the provision of section 12(1B) r/w s. 2(6A)(e) of the Indian Income Tax Act, 1922, also finding the same as not violating fundamental rights guaranteed under Article 19(1)(f) and (g) of the Constitution. The scope of the relevant entry (in the Legislative lists), it explained, are not powers but fields of legislation and the widest import and significance should be attached to them. While section 2(6A), analogous to section 2(22) of the Act, defines dividend, including deemed dividend (under certain specified conditions) (both per clause (e) thereof), sec.12(1B) provides for bringing the amount outstanding as on 01.4.1955, i.e., even where received or accumulated over the past years, to tax. The Hon'ble Court noted a Circular by the Board providing a window whereby the provision was excepted on genuine repayments of such outstanding by 30.6.1955 (Circular No. 20 (XXI-6/55) dated 10.5.1955). The Hon'ble Court examined several precedents, including challenges to the provision of section 12B, enhancing the scope of 'income' to include 'capital gains'; to section 23A(1), providing an artificial dividend payout at a minimum of 60%, lest the shortfall therein be liable to super-tax, i.e., restraining the company from accumulating its' profit beyond 40% to build up reserves or to provide for capital expenditure; and sec. 16(3)(a) (of the 1922 Act), seeking to tax the

income arising to wife and minor son/s of the assessee-individual in his hands. All these provisions were considered by the Apex Court as reasonable steps taken by the Parliament, within it's legislative competence, toward countering tax evasion, also noting the rationale of each provision, i.e., the mischief that it was intended or designed to defeat. The word 'income', it opined, also making reference to the precedents which considered legislative competence, must receive a wide interpretation, the caveat being that there has to be a rational connection between the item taxed and the concept of income liberally construed. It also noted suitable conditions/exceptions being provided for in the impugned provisions (of ss. 2(6A)(e) and 12(1B)), as by way of restriction on their scope to transactions of/by companies, in which public is not substantially interested, with its' major shareholders, i.e., holding over a threshold (10%) voting power therein; exclusion of transactions in the ordinary course of business where the payer-company is in the business of money-lending; and, thirdly, making the deeming (of the loan/advance or payment) as dividend subject to and, further, to the extent of, accumulated profits of such company, all of which were regarded as necessary and suitable safeguards. Similar attempts, it noted, were also made by other countries in their domestic income-tax law. That the provision may cause hardship in some cases was considered as irrelevant (for determining the question of legislative competence). The argument with regard to the loan being interest bearing, and of it having been repaid since, were advanced and considered as not valid grounds for excluding the loan or advance given from the purview of or for the purpose of deeming the same as dividend (refer pgs. 208-210), which we may reproduce for ready reference:

'The loan may carry interest and the said interest may be received by the company; but the main object underlying the loan is to avoid payment of tax. It may ultimately be repaid to the company and when it is so repaid, it may or may not be treated as part of accumulated profits. It is this kind of a well-planned device which s. 12(1B) intends to reach for the purpose of taxation.' (pg. 208)

The Hon'ble Court agreed that the doctrine does not mean that the Parliament can choose to tax as income an item which can in no rational sense be regarded as the citizen's income. The item taxed should be rationally capable of being considered as the income of the citizen. But in considering the question as to whether a particular item can be regarded as income in the hands of the citizen or not, it would not be appropriate, it held, to apply the tests traditionally prescribed by the Income Tax Act as such. Further, the provision does not affect the appellant's right to borrow money from any other source, or even from the payee-company where it is in the business of money lending. *The restriction imposed by the section could not, in it's view, be regarded as unreasonable* (pages 208, 210 of the Reports). The decision by the Hon'ble' High Court (reported at [1963] 48 ITR 451 (Bom)) upholding the constitutionality of the provision, was accordingly affirmed, also noting a similar challenge having been repelled in *K.M.S. Lakshmana Aiyer* (supra). The appeal was accordingly dismissed with costs. This was followed by another decision by the constitutional bench of the Apex Court in *Punjab Distilling Industries Limited v. CIT* [1965] 57 ITR 1 (SC), wherein, relying on, among others, the decision in *Navnit Lal C. Jhaveri* (supra), it upheld the constitutionality of s. 2(6A)(d), under challenge before it. There was no inconsistency, it clarified, between the receipt being a capital one under the company law and by fiction being treated as the income chargeable to tax under the Income-tax Act. The appeal was dismissed with costs. The full bench decision by the Hon'ble jurisdictional High Court (reported at 48 ITR 288 (Punj)(FB)) was affirmed. Where, then, one may ask, is there any scope for an argument, introducing the notion of 'misuse' of funds belonging to the payer-company, so that where such misuse is not shown – transferring, by implication, the onus of so showing on the Revenue, the section cannot be invoked? *The answer to this question could only be in the negative*. The aspect that informs the said question is if the section could possibly cover genuine cases of sums borrowed by a shareholder, temporary or

otherwise. The question/s, though valid, does not survive after the afore-cited decisions by the larger benches of the Apex Court, which bind even its' lower constitution benches. Similar arguments/s, it would be noted, was also advanced in *Tarulata Shyam* (supra), stating that a condition similar to that in section 108 (1) of the Commonwealth Income Tax Act, from which the provision draws its inspiration, be read into the provision to make it 'reasonable'. The Apex court discountenanced the same, stating that such a conditions/s was not considered appropriate (by the Legislature) to be incorporated in the provision. The genuineness of the borrowing, inasmuch as the section does not draw any distinction between genuine and non-genuine transactions – which was argued as the principal flaw in the provision, targeting thus genuine loans/advances as well, which consideration also prevailed with the dissenting judge (in *Navnit Lal C. Jhaveri* (supra)) in holding otherwise, was not found a valid ground for striking down the provision which, in it's view, laid a reasonable restriction on the source of borrowing by a substantial shareholder in a private company. It must be remembered, it observed, that the loan/advance is made in full knowledge of the provision contained in the impugned section (page 207). If the Legislatures thinks, it explained, that loan/advance(s) in almost every case is a result of a device, it is competent to prescribe a fiction and hold that in cases of such loans/advances tax shall be recovered from the shareholder on the basis that he had received the dividend (page 209). *That, therefore, there is no 'misuse' of funds of/belonging to such a company, is of no moment in determining if the provision is in the facts and circumstances of the case attracted*, and toward which the Apex Court clarified that the provision impinges, subject to five conditions, on three types of payments.

These conditions were reiterated by the Apex court in *Tarulata Shyam* (supra), observing the fifth condition to be applicable for the transitional year (i.e., AY 1955-56) (pg. 355). All that therefore is relevant for the invocation of the section is the satisfaction of these four conditions, being, *firstly*, that the

payer-company should be one in which the public is not substantially interested; *secondly*, the payee should be a share-holder in the company on the date/s on which the loan is advanced, the extent of his shareholding being immaterial; *thirdly*, the loan or advance could be deemed as dividend to the extent of the accumulated profit of the payer-company as on the date of the loan; and, *fourthly*, the loan must not be advanced by the company in the ordinary course of its business, where money lending is a substantial part of such business. It is surprising indeed that arguments of the nature raised in *Suraj Dev Dada* (supra), as well as before us, continue to be so raised decades after the decisions by the larger benches of the Apex Court; the assessee also referring in its' written submissions, not adverted to during hearing, to the decision in *CIT (TDS) v. Schutz Dishman Bio-tech (P.) Ltd*. (TA No. 958 of 2018, dated 21/12/2015, at PB pgs. 10-12). The said decisions, which have been carefully perused, are without reference to the deliberations; the findings and the observations by the Apex Court per its larger bench decisions, since followed per its' division bench decisions. There is in fact no reference to even the earlier judgments by the same Court. That apart, the decisions are distinguishable on facts inasmuch as the same are based on mutual benefits and adjustment entries – without specifying the nature of the adjustments, while in the instant case the same are only receipt and payment of money, i.e., a loan or advance *simpliciter*. How, again, one wonders, is the fact of the assessee having also lent money to the company which, again, could be in the same year or in a preceding year, or even in the subsequent year, relevant. It is the lending transaction, as opposed to a business transaction, where the payer-company is a company in which the public is not substantially interested and the payee is a substantial share-holder therein, that alone comes within the letter of law, and sought to be placed restriction on. The act of lending by the shareholder to the company is not in any manner targeted. It is in fact an <u>independent</u> transaction, i.e., of the loan and advance by such a company thereto. This is in fact admittedly so in the instant

case, being dependent on the availability of surplus funds with the assessee and, further, on the same being required at the relevant time by the company. *It is the source of borrowing to a shareholder that the law places restriction on*. Considering the said restriction on it, it is not permissible for a shareholder to contend – though to be fair it has not been before us, that the loan or advance to it by the payer-company is in consideration of it, similarly, advancing monies thereto. That would tantamount to defeating the clear and strict provision of law which, as afore-noted, covers cases of genuine loans and advances as well, so that such an argument, shown to be factually not valid in the instant case, is not tenable. That is, such an argument, even where the loans by one to another do not carry interest, so that it may factually acquire some force, is not a valid argument, and such an arrangement would, in view of the clear language of the provision, listing four conditions noted supra, the cumulative satisfaction of which alone is relevant, not be a valid argument. In fact, the charge of interest, so that the funds are in the instant case made available by one to another at a cost, preclude the raising of such a contention as being imputed. What a shareholder does with its' funds, on which there is no embargo, is not relevant. It would be a different matter, we may add, where the funds borrowed or advanced, are for business purpose, in which case the same would stand to be adjusted against the business purpose for which the amount stands paid or received, viz. an advance against purchase of goods, while in the instant case the monies received, directly or indirectly, have been met by repayment of monies, i.e., are loans or advances *simpliciter*, to which, as clarified, the provision is applicable. The reliance on the cited decisions would therefore be of no assistance to the assesse.

4.8 It may also be clarified that the provision is attracted irrespective of the status of the shareholder. That is, is applicable to a share-holder, as explained in *Sadhana Textile Mills (P.) Ltd. v. CIT* [1991] 188 ITR 318 (Bom), to a

corporate shareholder, as the assesse-company. We consider it pertinent to clarify this as it is stated that the provision is not applicable to an Inter Corporate Deposit (ICD), i.e., a deposit, by definition, by one company to another. *It is in fact nobody's case that the running account between the two entities constitutes an ICD(s).* Be that as it may, the provision covers *any payment* which is in the nature of a loan and advance, which the impugned borrowing/s is, so that the same gets hit by the provision irrespective of whether or not it stands to be regarded also as an ICD. The only thing relevant is if the payment can be regarded and, rather, is, in substance, a 'loan' or an 'advance', *both terms being judicially well defined*. An ICD, a deposit by definition, is, rather, only in the nature of a loan; deposits being a species of loans/advances. Its exclusion would therefore only be where the depositor (lending) company is in the business of money lending and the deposit is given in the normal course of its' business. The exclusion of a business advance, referred to earlier, i.e., even as the provision speaks of *any payment by way of a loan or advance*, covering therefore advances of all types, is only on the premise that the said word, read conjunctively with the word 'loan', applying the principle of *ejusdem generis*, should only include payments in the nature of loans, excluding business transactions, which have, as a matter of course, if not necessarily, to be settled by remitting funds; the provision in no manner seeking to impinge on genuine business transactions.

4.9 Finally, it is stated that the entries in the books of account are not determinative. The same seeks to perhaps meet the reflection of the outstanding sum (as at the year-end) as a loan or advance in the balance-sheet of the lender or the borrower company. It is nobody's case that the provision stands invoked on account of such reflection, which has not been shown to be incorrect, so that there is no factual basis to the argument. The provision would in fact apply even if the shareholder does not, as is usually the case for an individual shareholder,

maintain books of account, and which is so in the present case only because of it being a corporate entity. On the contrary, it is the assessee who draws on the accounts, stating it to be a running account and, further, a 'low' retention period, and on that basis plead that the provision shall not apply. The provision is applicable *qua* any payment and, therefore, would (or would not) apply with reference to each specific sum. It is immaterial whether such payment/s is recorded in the books of account or not, and the only thing relevant is if it is in the nature of a loan/s or advance/s. The assessee's argument, which is even otherwise not backed by any material and only in the nature of a bald statement, is therefore without merit.

4.10 The only other issue raised in appeal is the chargeability of the dividend under section 2(22)(e) as 'income from other sources' u/s. 56. No argument was advanced in this respect either before us or, as it appears from their orders, before the Revenue authorities. There is no reference thereto even in the written submissions by the assessee, adduced during hearing. So, however, the matter being legal, we would none-the-less consider the same. Section 56, in its relevant part, reads as under:

'Income from other sources.

56. (1) Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head "Income from other sources, if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E.

(2) In particular and without prejudice to the generality of the provisions of sub-section (1), the following income shall be chargeable to income-tax under the head "Income from other sources, namely:—

(i) dividends;'

Clearly, therefore, 'dividend' in section 56 refers to the dividend as defined u/s. 2 (22) of the Act. We have already held that the impugned sums qualify to be dividend u/s. 2(22)(e). The only thing therefore that needs to be examined is if the same stands excluded from the purview of the 'total income' u/s. 2(45) of the Act. Chapter III of the Act, comprising sections 10 to 13B, specifies such

incomes. Section 10(34), brought on the statute-book w.e.f. 01.4.2004, reads as under:

'Incomes not included in total income.

10. In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included—

(1) – (33) ….

(34) any income by way of dividends referred to in section 115-O.'

It is thus only the dividend declared, distributed or paid by a company, on which tax u/s. 115-O has been suffered, that falls u/s. 10(34), and would therefore not stand to be assessed u/s. 2(24)(ii) r/w s. 56 of the Act. The said dividend would only be that envisaged u/s. 2(22)(a), i.e., as declared observing the required procedure in its respect under the Companies Act, 1956 (or, as the case may be, Companies Act, 2013), to all the shareholders, i.e., in proportion to their shareholding. This would certainly not cover dividend which gets included within its definition under the Act in view of the extended meaning of the term 'dividend' by virtue of a legal fiction. The dividend deemed as such u/s. 2(22)(e) would, therefore, stand to be assessed and, accordingly, has been rightly brought to tax, u/s. 56 of the Act. The assesse fails on its' Gd. 3 as well.

In sum

5. The principal objection of the assessee in this case, as indeed in others cited by it, is that the amount advanced (by the payer-company, GAPL) stands since repaid, so that the provision of s. 2(22)(e) ought not to cover genuine cases of loans/advances, particularly where the shareholder has also given, similarly, loans/advances to the said company. The same accordingly has been discussed with reference to the foundational judgments by the Apex Court, being by its' larger benches, settling the law in the matter, as in *Navnit Lal C. Jhaveri* (supra); *Punjab Distilling Inds. Ltd*. (supra) and *Tarulata Shyam* (supra), which in fact stand followed per it's later decisions, as in *Sarda (P.)*

(supra) and *Mukundray K. Shah* (supra), to all of which extensive reference stands made. In fact, per these decisions itself the Apex Court has noted with approval several decisions by the Hon'ble High Courts cited before it, even as it, in each case, affirmed the decision by the Hon'ble High Court, under challenge before it. The matter stands discussed at length in this order (refer paras 4.1 thro' 4.10), to which therefore regard is to be had. We may, while concluding our order, extract from the decision in *Sarada (P.)* (supra) (pg. 448), i.e., apart from adverting similar extracts in the foregoing part of this order, if only to emphasize the unanimity and unambiguity in the law as clarified and settled by the larger benches of the Apex Court:

'……Sec. 2(22)(e) as it stood at the material time defined dividend to include "any payment by a company, not being a company in which the public are substantially interested, of any sum by way of advance or loan to a shareholder, being a person who has a substantial interest in the company.. to the extent to which the company... possesses accumulated profits". In the instant case there is no dispute that the appellant had a substantial interest in the company. The nature of the company is also not in dispute.

From the facts as stated hereinabove, it appears that the withdrawals made by the appellant from the company amounted to grant of loan or advance by the company to the shareholder. The legal fiction came into play as soon as the monies were paid by the company to the appellant. *The assessee must be deemed to have received dividends on the dates on which she withdrew the aforesaid amounts of money from the company. The loan or advance taken from the company may have been ultimately repaid or adjusted but that will not alter the fact that the assessee, in the eye of law, had received dividend from the company during the relevant accounting period*.

It was held by this Court in the case of *Smt. Tarulata Shyam & Ors. vs. CIT* [1977] 108 ITR 345 (SC) that the statutory fiction created by s. 2(6A)(e) of the Indian IT Act, 1922 would come into operation at the time of the payment of advance or loan to a shareholder by the company. The legislature had deliberately not made the subsistence of the loan or advance, or its remaining outstanding, on the last date of the previous year relevant to the assessment year a pre-requisite for raising the statutory fiction.'

The nature of transactions, purely financial in nature, has been found to be receipt and payment of money, i.e., a 'loan' by definition, a term judicially well expounded. This aspect, denoting a primary fact, is in fact admitted. The genuineness of a loan or advance is not in issue. However, that the loan/advance represents an actual liability of the shareholder, which may have been repaid

since, which could even be in the relevant year itself, did not find favour with the Apex Court in view of the clear, unambiguous language of the provision; it further noting that the object of the provision had a rational nexus with income, so that the provision, which it agreed was harsh, was within the legislative competence of the Parliament and, therefore, had to be given affect to. A parallel in this context stands drawn by us with section 68 of the Act. The argument of the sum not representing 'real income', though not specifically advanced before us, is implicit in the argument advanced with reference to the genuineness of the loan/ advance, and therefore considered. The same would not carry the assessee's case further, as would even otherwise be apparent from the host of decisions by the Apex Court. As explained in *Poona Electric Supply Co. Ltd. v. CIT* [1965] 57 ITR 521 (SC), the concept of 'real income' is subject to the provisions of the Act. The loan or advance being both ways would not carry any special significance in the context of the provision inasmuch as both qualify, independently, to be a loan or advance, which in the present case is with interest, further, establishing, if it was required, the payments to be purely financial transactions, i.e., loan/advance(s) *simpliciter*, squarely covered within the ambit of the provision, which seeks to place restriction on payments to a substantial shareholder by a company in which public is not substantially interested – nothing more and nothing less. In fact, loan/advance by one to another would only be if the funds are for the time being surplus with the lending company and, at the same time, required by the borrowing company, so that there is no certainty under such an arrangement, both with regard with the quantum and time of the source of funds for such an arrangement to be regarded as viable or a dependable one, or to contend of the loan being temporary. No business purpose has been shown or otherwise stated, so that the contention in its respect is a bald one. The period of retention has again been found to be not relevant. The aspect of set off of subsequent credits (receipts), i.e., subsequent to repayment of the earlier receipt, advanced in *Tarulata Shyam* (supra), though

not answered by the Apex Court, being hypothetical (refer pg. 358 of the Reports), also do not arise in the instant case as the Revenue has brought only the peak credit during the year to tax. It may be noted that inasmuch as each payment qualifying as a loan or advance falls within the ambit of the provision, and its subsequent repayment held as of no consequence, the entire payment to (receipt by) the shareholder (company) would stand to be regarded as 'dividend'. In fact, a plea as to only the peak credit being regarded as dividend was raised in *P.K. Badiani* (supra) (refer pg. 380), a decision which subsequently found approval in *Mukundray K. Shah* (supra). That is, the Revenue has, in regarding only the peak amount advanced as the qualifying amount, acted as reasonable as it could under the circumstances, i.e., given the settled law in the matter, the payment being regarded as dividend only under its artificial definition, as explained, per an irrebuttable presumption, statutorily provided. The question of the genuineness of the loan or advance, is, for the same reason, of no significance. The decisions cited are, besides being without reference to binding judicial precedents, distinguishable on facts. Further, being not a regular dividend, declared and paid by company, the same does not fall to be covered u/s. 10(34) and, thus, is not excepted u/s. 56. The same has, accordingly, been rightly brought to tax u/s. 2(24)(ii) r/w ss. 2(22)(e) and 56 of the Act by the Revenue, whose action is upheld. The assessee, in this view of the matter, fails. We decide accordingly.

6. In the result, the assessee's appeal is dismissed.

Order pronounced in the open court on July 05, 2019

Sd/-	Sd/-
(N. K. Choudhry)	(Sanjay Arora)
Judicial Member	Accountant Member

Date: 05.07.2019
/GP/Sr/ Ps.
Copy of the order forwarded to:
(1) The Appellant: G. G. Oils & Fats Pvt. Ltd., 2301, Bhupindra Flour Mills,

Amrik Singh Road, Bathinda
(2) The Respondent: Deputy Commissioner of Income Tax, Circle-1, Bathinda
(3) The CIT(Appeals), Bathinda
(4) The CIT concerned
(5) The Sr. DR, I.T.A.T.

True Copy

By Order