IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH KOLKATA

BEFORE SHRI A.T.VARKEY, JM &DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.1265/Kol/2018

(निर्धारणवर्ष / Assessment Year: 2012-13)

DCIT, Circle-10(2), Kolkata	**Vs.**	**M/s Svarna Infrastructure & Builders Pvt. Ltd.** **DLF Falleria Unit, 306, 3rd Floor, Premises No. 02-0124, Action Area, 1B, New Town, Kolkata-700156.**
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **AAKCS 9050 M**		
(Appellant)	**..**	**(Respondent)**

C.O. No. 86/Kol/2019

(Arising out ofआयकरअपीलसं./ITA No.1265/Kol/2018)

(निर्धारणवर्ष / Assessment Year: 2012-13)

M/s Svarna Infrastructure & Builders Pvt. Ltd. **DLF Falleria Unit, 306, 3rd Floor, Premises No. 02-0124, Action Area, 1B, New Town, Kolkata-700156.**	**Vs.**	**DCIT, Circle-10(2), Kolkata**
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **AAKCS 9050 M**		
(Cross Objector)	**..**	**(Respondent)**

Appellant by : Smt. Ranu Biswas, Addl. CIT
Respondent by :Shri R. P. Agarwal, Sr. Advocate & Shri Nirav Sheth, FCA

सुनवाईकीतारीख/ **Date of Hearing** **: 06/01/2020**

घोषणाकीतारीख/**Date of Pronouncement** **: 10/06/2020**

आदेश / O R D E R

Per Dr. A. L. Saini:

The captioned appeal filed by the Revenue and the cross objection filed by the assessee, pertaining to assessment year 2012-13, are directed against the order passed by the Commissioner of Income Tax (Appeal)-4, Kolkata, in appeal no. 39/CIT(A)-4/2015-16/Kol, which in turn arises out of an assessment order passed by the Assessing Officer u/s143(3) of the Income Tax Act, 1961 (in short the 'Act') dated 09/03/2015.

2. The grounds of appeal raised by the revenue are as follows:

1. The ld. CIT(A) has erred in deleting the addition of Rs. 2,88,30,842/-, being the transaction with E-edit Infotech Pvt. Ltd, ignoring the fact that the assessee was holding all the shares of the above said company which needed to be considered whereas the amount of advances which was received by the assessee from its subsidiaries was rightly treated by the Assessing Officer as deemed dividend.

2. The ld. CIT(A) has erred in deleting the addition of Rs. 24,25,168/- being transaction with EDP Software Ltd. ignoring the fact that the assessee is holding all the shares of the above said company which needed to be considered, whereas the amount of advance which was received by the assessee from its subsidiaries was rightly treated by Assessing Officer as deemed dividend.

3. That the appellant craves leave to add, delete or modify any of the grounds of appeal before or at the time of hearing.

3. Ground No. 1 raised by the Revenue relates to addition of Rs. 2,88,30,842/- being the transaction with E-edit Infotech Pvt. Ltd; treated by assessing officer as deemed dividend u/s 2(22) (e) of the Act.

4. Facts of the case which can be stated quite shortly are as follows:The assessee company filed its return of income for the assessment year under consideration declaring total income of Rs. 79,51,000/-. Subsequently, assessment order u/s 143(3) of the Act was passed wherein Assessing Officer has treated Rs.

3,14,40,519/- as deemed dividend u/s 2(22)(e) of the Act. The Assessing Officer had made additions of Rs. 3,14,40,519/- in terms of provisions of section 2(22)(e) of the Act as shown below:

i) Rs. 2,88,30,842/- with respect to advance received from E. Edit Infotech P ltd.

ii) Rs. 1,84,509/- with respect to advance received from Nathvar Tracon (P) Ltd.

iii) Rs. 24,25,168/- with respect to advance received from EDP Software Ltd.

The basic grounds of additions by the Assessing Officer were that fresh advances have been given by the subsidiary companies to the assessee company and since such advances were not in the normal course of business, therefore the provisions of Section 2(22)(e) of the Act shall get attracted to the extent of accumulated profits of the respective subsidiary companies. Therefore, the AO made addition of Rs. 2,88,30,842/- with respect to advance received from E. Edit Infotech P ltd. The AO also made addition in respect of advance received from Nathvar Tracon (P) Ltd and from EDP software Ltd.

5. On appeal, the ld. CIT(A) deleted the addition. Aggrieved the Revenue is in appeal before us.

6. We have heard both the parties and perused the material available on record. We note that finding of the ld. CIT(A) that E- Edit Infotech Pvt. Ltd. is a lending company is perverse vide pg no. 15, para 3.2 of the order of ld. CIT(A). Since the object clause of memorandum of association of the E-Edit Infotech Pvt. Ltd. does not contain lending business activity. That is, the substantial part of business of E-edit Infotech Pvt. Ltd. was not granting of loans, and the said aspect has not been examined by ld CIT(A).Apart from this, the case of the assessee is that E-Edit Infotech Pvt. Ltd. advanced the money to the assessee for the purpose of purchase ofland and the said issue has also not been examined by the ld. CIT(A). This is evident from the finding portion of ld. CIT(A) which is reproduced below:

"Since all the grounds are interrelated therefore, I am taking up all the grounds together. I have perused the assessment order and the submissions of the appellant and the case laws on this subject. For the sake of clarity, I am discussing advances from the three companies separately since the applicability of section 2(22)(e) of the Act is dependent on several facts which arenot identical in all the cases.In respect of addition of Rs. 2,88,30,842./- with respect to amount received from E- Edit Infotech Pvt. Ltd., 1 find that the appellant was maintaining two ledgers for E-Edit Infotech Pvt. Ltd., one with respect to sale of immovable property and second one, being in the nature of current account. This is even evident from the assessment order wherein at Page 6, the Ld. Assessing Officer has reproduced ledger copy of first nature of transactions and at Page 7 to 9, wherein he has reproduced ledger copy of second nature of transactions. The Assessing Officer has separately calculated peak credit for both the types of transactions and applied the provisions of section 2(22)(e) of the Act.

Ld AR emphasized that the money advanced to the assessee co. by EIPL is either an advance for property and current account transaction or a loan. If it is an advance for property then it is a business advance and therefore section 2(22) (e) would not apply. The AR argued that alternatively if it is a loan then since substantial part of the business of the lending company is granting of loan and hence section 2 (22) (e) would not apply. Ld AR also pointed out that the assessee is subsequently paying interest on this loan/business advance amount (assessment order page 3 para 3).

I have gone through the audited accounts of E-edit Infotech Pvt. Ltd. for F.Y. 2011-12, wherefrom it is evident that the substantial part of business of E-edit Infotech Pvt. Ltd. was granting of loans."

7. We note that during the appellate proceedings, the A.R. of the assessee emphasized the money advanced to the assessee company by EIPL (E-edit Infotech Pvt. Ltd.) is either an advance for property or current account transaction. The ld. CIT(A) has also gone through the audited account of E-edit Infotech Pvt. Ltd. and noticed that substantial part of business of E-Edit Infotech Pvt. Ltd. was granting of loans. The ld DR submits before us that object clause of memorandum of association of E-Edit Infotech Pvt. Ltd. does not say that the company is in the business of money lending. It is also not clear that said advance by E-Edit Infotech Pvt. Ltd. is for advance for purchase of property / land. Both these issues have not been examined by ld. CIT(A). Therefore, we think it fit and appropriate to remit this issue back to the file of ld. CIT(A) for fresh examination. Therefore, we set aside the order of ld. CIT(A) and remit this issue back to the file of ld. CIT(A) for fresh adjudication in accordance to law. For statistical purposes, the ground raised by the Revenue is allowed.

8. Ground No. 2 raised by the revenue relates to addition of Rs. 24,25,168/- being transaction of EDP Software Ltd, treated by Assessing Officer as deemed dividend, under section 2(22) (e) of the Act.

9. At the outset itself the ld. Counsel submitted before us that the Assessing Officer has erred in making addition of Rs. 24,25,168/- u/s 2(22)(e) being trade advance received from EDP Software Ltd, since such advance was given by EDP Software Ltd in the ordinary course of business and substantial business of the said company were to deal in loan and advance, as evident from the audited accounts. Besides, there is no accumulated profits in the hands of the EDP Software Ltd., hence addition u/s 2(22)(e) should not be made. Whereas the ld. D.R. for the revenue has reiterated the stand taken by the Assessing Officer.

10. We have heard both the parties and perused the materials available on record. The ld Counsel submitted before us that in the instant case, the ld. Assessing Officer failed to appreciate the fact that there was no accumulated profit in the books of EDP Software Ltd as on 31.03.2011. At this juncture it is relevant to mention here the written submissions furnished by the assessee before the ld CIT(A) in respect of accumulated profit in the books of EDP Software Ltd as on 31.03.2012:

"Debit Balance of profit & loss account of EDP Software Ltd. was Rs. 10,60,332/-. Break up of Reserves & Surplus as on 31.03.2011 of EDP Software Ltd. is given below:

Sl. No.	*Particulars*	*Amount (Rs.)*	*Amount (Rs.)*
1.	*Securities Premium Account*		*34,85,000*
2.	*Debit Balance in Profit & Loss Account*	*(33,55,749)*	
3.	*Add: Surplus / (Deficit) during the year 2011-12*	*22,95,417*	*(10,60,332)*
	Total		*24,25,168*

It is further submitted that securities / share premium appearing under the head Reserves & Surplus cannot be construed as accumulated profits of the company as held by the Hon'ble Calcutta High Court in the matter of CIT, Kol-III vs. Shree Balaji Glass Manufacturing Pvt. Ltd. [2016] 386 ITR 128 (Calcutta) that where money was lent out of reserve and surplus representing share premium and not from accumulated profits, there

cannot be deemed dividend in hands of recipient. Hence, provisions of section 2(22)(e) is not applicable in the instant case. As such, the ld. Assessing Officer has erred in making addition of Rs. 24,25,168/- u/s 2(22)(e) of the Act."

11. We note that taking into account the above written submissions of the assessee, ld. CIT(A) deleted the addition observing the followings:

> *"In respect of addition of Rs. 24,25,168/- with respect to amount received from EDP Software Ltd., I have gone through the audited accounts for F.Y. 2011-12 and I find that EDP Software Ltd. had no accumulated profit as on 31.03.2011. I find force in the argument made by the A/R that securities / share premium appearing under the head reserves & surplus cannot be construed as accumulated profits of the company as held in by the Hon'ble Calcutta High Court in the matter of CIT, Kol-III vs . Shree Balaji Glass Manufacturing P Ltd. [201] 386 ITR 128 (Calcutta). Accordingly, where money was lent out from accumulated profits, there cannot be deemed dividend in hands of recipient. Thus, I direct the Assessing Officer to delete the addition of Rs. 24,25,168/- made u/s 2(22)(e) of the Act with respect to advance received from EDP Software Ltd."*

We note that assessee had submitted the figures of accumulated profit of M/sEDP Software Ltd as on 31st March 2012 which relates to assessment year 2012-13, and we noticed that accumulated profit is in negative, that is, loss to the tune of Rs.10,60,332/-.

We note thatsection 2(22) (e) of the Act states that *"any payment by a company…….for the individual benefit of any such shareholder, to the extent to which the company in either case possesses accumulated profits'.* That is, deemed dividend would be to the extent of accumulated profits of the company and that accumulated profit should be as on 31st March 2012 (P.Y.2011-12), however, in assessee`s case under consideration the accumulated profit as on 31st March 2012 is in negative, that is,loss to the tune of Rs.10,60,332/- , therefore, the provisions of section 2(22) (e) does not apply.That being so, we decline to interfere with the order of Id. C.I T.(A) in deleting the aforesaid addition. His order on this addition is therefore, upheld and the grounds of appeal of the Revenue are dismissed.

12. Now we shall take assessee's cross objection in C.O. No. 86/Kol/2018 for A.Y. 2012-13 wherein the grounds of appeal raised by the assessee are as follows:

G. No. 1
That in the facts and circumstances of the case, the Learned Assessing Officer has erred in treating the entire accumulated profit as on 01.04.2011 for the purpose of section 2(22)(e) of Income Tax Act. The Learned Assessing Officer should have reduced the opening balance of advance received while making addition of Rs. 2,88,30,842/- under section 2(22)(e) of the Act. The Learned CIT (A) has erred in not discussing this issue while passing appellate order.

G. No. 2
That in the facts and circumstances of the case, the learned assessing Officer has erred in treating the entire accumulated profit as on 01.04.2011 for the purpose of section 2(22)(e) of Income Tax Act. The Learned Assessing Officer should have reduced the opening balance of advance received while making addition of Rs. 24,25,168/- under section 2(22)(e) of the Act. The Learned CIT (A) has erred in not discussing this issue while passing appellate order.

G. No. 3
That in the facts and circumstances of the case, the Learned Assessing Officer has erred in making addition of Rs. 1,84,509/- under section 2(22)(e) of the Act, on account of advances received from NathvarTracon (P) Ltd, since such amount does not represent loan or advances in the nature of loan. The Learned CIT (A) erred in confirming the action of Learned Assessing Officer.

G. No. 4
That the appellant humbly craves leave to add, alter, withdraw all or any grounds of appeal at the time of hearing.

Now, we shall take these Cross Objections one by one

13. Cross objection no. 1 raised by the assessee relates to addition of Rs. 2,88,30,842/- u/s 2(22)(e) of the Act. We note that cross objection no.1 and ground no. 1 raised by the revenue in ITA No. 1265/Kol/2018 are identical. We have set aside the ground no. 1 raised by the revenue in ITA No.1265/Kol/2018 to the file of ld. CIT(A) to adjudicate the issue afresh therefore cross objection no. 1 raised by the assessee becomes infructuous.

14.The Cross Objection no. 2 raised by the assessee relates to addition of Rs. 24,25,168/- u/s 2(22)(e) of the Act. We note that cross objection no.2 and ground

no. 2 raised by the revenue in ITA No. 1265/Kol/2018 are identical. The Cross objection No. 2 raised by the assessee is supportive to the order of ld CIT(A).Since, we have confirmed the order passed by ld CIT(A), therefore cross objection no. 2 raised by the assessee becomes infructuous.

15. The CO No. 3 raised by the assessee relates to addition of Rs. 1,84,509/- u/s 2(22)(e) of the Act on account of advances received from Nathvar Tracon Pvt. Ltd.

16. The main grievance of the assessee in CO No. 3 is that the ld. CIT(A) has confirmed the addition without appreciating that the assessee is having current account with M/s Nathvar Tracon Pvt. Ltd. (i.e. the company from whom the assessee took the advance and given advance were through current account). The ld. Counsel took us through the page Nos. 10 to 12 of Assessing Officer's order wherein the Assessing Officer has mentioned the ledger account of Nathvar Tracon Pvt. Ltd. for the period of 01.04.2011 to 31.03.2012. We have examined the ledger account which is reproduced by the Assessing Officer on page no. 10 to 12 of his order and we noticed that the opening balance in the ledger account of Nathvar Tracon Pvt. Ltd. was debited on 01.04.2011 to the tune of Rs. 40,72,292/-. However, the closing balance as on 31.03.2012 was credited to the tune of Rs. 1,65,97,383/-. The assessee has taken amount from Nathvar Tracon Pvt. Ltd. and paid the amount during the year for the purpose of business therefore it is a current account and as per the ld. Counsel the addition u/s 2(22)(e) should not be made. As per the ld. Counsel for the assessee mere perusal of the ledger account placed on page no. 10 to 12 of the Assessment order, it is clear that the said account was for the purpose of doing business which was in the nature of current account wherein one can find debit entry and credit entry on several occasions which needs to be examined by the ld. CIT(A). Therefore, we are of the view that this matter should be remitted back to the file of ld. CIT(A) for fresh examination. We also make it clear that if the ld. CIT(A) having examined the ledger account finds that it is a current account, no addition is warranted as held by the Co-ordinate Bench of this Tribunal in ITA No. 1010/Kol/2016 for A.Y. 2012-13 in the case of M/s Snehapusph Barter Pvt. Ltd. wherein it was held as under:

"2. We have heard rival submissions and gone through the facts and circumstances of the case. The main thrust of the argument of the Ld. Counsel for the assessee is that while exercising the revisional jurisdiction u/s. 263 of the Act, not only that the impugned order of the AO should be erroneous but it has to be prejudicial to the interest of the revenue. According to the Ld. Counsel, from a perusal of the show cause notice (copy available at page 63 of the paper book) would reveal that the Pr. CIT found fault with the action of the AO in not enquiring as to the loan/advance to have been given by three companies, in which companies, according to Ld. Pr. CIT, the assessee had more than 10% shareholding. The Ld. Counsel drew our attention to the order passed by the AO giving effect to the impugned order of Pr. CIT passed u/s. 263 of the Act which is placed at pages 71 to 73 of the paper book. The Ld. Counsel drew our attention to page no. 72 of the paper book wherein the AO has stated that while during the assessment proceedings giving effect to 263 order, despite him giving notice to the assessee, the Ld. AR of the assessee did not turn up before him, so he was constrained to pass the order without hearing the Ld. AR. From a perusal of the order we understand that other than the written submission of the Ld. AR Shri Ravi Tulsiyan, no other averments were taken into consideration while passing the order while giving effect to the order passed u/s. 263 of the Act. Nevertheless, the AO in the said order clearly upheld the contention of the assessee in respect to two companies i.e. in respect of M/s. SKG Flour Mills and M/s. Jagadhatri Tracon Pvt. Ltd. and made no addition u/s. 2(22)(e) of the Act. Only in respect of the transaction of the assessee with M/s. Subhchintak Vancom Pvt. Ltd, the AO has made the addition while giving effect to the order of Pr. CIT u/s. 263 of the Act. In respect of M/s. Subhchintak Vancom Pvt. Ltd. the main crux of the argument of the assessee is that the assessee is having a current account with that of M/s. Subhchintak VancomPvt. Ltd. and the transactions cannot be characterized as loan/advances. In order to buttress this point, the Ld. AR drew out attention to page no. 62 which is the ledger of M/s. SubhchintakVancomPvt. Ltd. in the books of the assessee. From a perusal of the same, we note that the assessee on 05.06.2011 owed to M/s. Subhchintak VancomPvt. Ltd. Rs.1.35 cr. On 03.09.2011 the assessee owed Rs.85,000/- to M/s. Subhchintak VancomPvt. Ltd.. Whereas on 14.10.2011, the assessee gave Rs.1.09 cr. to M/s. Subhchintak VancomPvt. Ltd.; and on 25.12.2011 gave M/s. Subhchintak VancomPvt. Ltd. Rs.5 lacs; and Rs. 70 lacs; and on 15.03.2012 the assessee had given Rs. 60 lacs to M/s. Subhchintak VancomPvt. Ltd. In the assessment year under consideration, the assessee had given to M/s. Subhchintak Vancom Pvt. Ltd. Rs.2,44,25,000/- whereas it owed to M/s. Subhchintak Vancom Pvt. Ltd. Rs.1,35,85,000/-. From the ledger, the assessee had only debited Rs.1,35,85,000/- whereas M/s. Subhchintak VancomPvt. Ltd. has drawn Rs.1,08,40,000/- in excess from the assessee. From the aforesaid facts stated above, according to ld counsel it is a clear case wherein there is a shifting of balance is apparent. On such factual matrix the assessee's argument is that such kind of transaction cannot be termed as loan/advance to attract the provisions of section 2(22)(e) of the Act. The Hon'ble Supreme Court in the case of Kesari Chand Jaisukh Lal Vs. Shillong Banking Corporation Ltd. 1965 AIR 1711 has held as under:

"To be mutual there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations."

The Hon'ble Supreme Court in this context has further held as under: "The loans by the respondent created obligations on the appellant to repay them. The respondent was under independent obligations to repay the amount of the cash deposits and to account for the cheques, hundis and drafts deposited for collection. There were thus transactions on each side creating independent obligations on the other, and both sets of transactions were entered in the same account. The deposits made by the appellant were not merely complete or partial discharges of its obligations to the respondent. There were shifting balances; on many occasions the balance was in favour of the appellant and on many other occasions, the balance was in favour of the respondent. There were reciprocal demands between the parties, and the account was mutual."

3. The Hon'ble Calcutta High Court in the case of Pradip Kumar Malhotra Vs. CIT 338 ITR 538 (Cal) wherein the Hon'ble High Court has held as under:

"The phrase "by way of advance or loan" appearing in sub-clause (e) of section 2(22) of the Income-tax Act, 1961, must be construed to mean those advances or loans which a shareholder enjoys simply on account of 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; but if such loan or advance is given to such shareholder as a consequence of any further consideration which is beneficial to the company received from such a share-holder, in such case, such advance or loan cannot be said to be deemed dividend within the meaning of the Act. Thus, gratuitous loan or advance given by a company to those classes of shareholders would come within the purview of section 2(22) but not cases where the loan or advance is given in return to an advantage conferred upon the company by such shareholder."

4. The Coordinate Bench of this Tribunal in ITO Vs. Smt. Gayatri Chakraborty in ITA No. 151/Kol/2013 has held as under:

"14. We are of the view that in the present case also the transactions in question does not benefit the shareholder i.e. the Assessee alone and the results in no benefit to the company BAPL. The loan account is different from a current account with a shareholder and the transactions between the Assessee and BAPL are in the nature of current account and provisions of Sec.2(22)(e) of the Act will not be applicable to the case of the Assessee. We, therefore, concur with the decision of the CIT(A) and dismiss the appeal of the Revenue."

5. Similarly, the Coordinate Bench of this Tribunal in Mr. Purushottam Das Vs. DCIT and vice versa in IT(SS)A Nos. 60 to 62 & 73-76/Kol/2011 dated 17.10.2014 has held as under:

"5. ..... It is pertinent to note here that when dividends are declared by a company, it is solely the shareholders who benefit from the transaction. No benefits accrue to the company by way of dividend distribution. Thus, section 2(22)(e) of the Act covers only such situations, where the shareholder alone benefits from the loan transaction, because if the company also benefits from the said transaction, it will take the character of a commercial transaction and hence will not qualify to be dividend. In the case of the assessee, by giving and taking

financial assistance from each other. both the assessee and the company were benefited and such transactions between them were nothing but commercial transactions and dividend attributable to the shareholder is nothing to do with such business transaction. From the above discussions it can be said that sec.2(22)(e) of the Act covers only those transactions which benefit the shareholder alone and results in no benefit to the company. On the other hand, if the transaction is mutual by which both sides are benefited, it is undoubtedly outside the purview of provisions of sec. 2(22)(e) of the Act. From the above, it is clear that the loan account differs from current account and the provisions of section 2(22}(e} of the Act, being a deeming section, cannot be applied to current account. In such circumstances, we delete the addition and this common issue of assessee's appeals is allowed."

6. Further, we note that there is no interest element has been charged on the amounts owed by the assessee to M/s. Subhchintak VancomPvt. Ltd., so in the facts and circumstances of the case, the assessee by giving and taking financial assistance from each other, i.e. between the assessee and M/s. Subhchintak VancomPvt. Ltd. wherein both the parties were benefited and such transaction between them were nothing but commercial transactions and, therefore, cannot be termed as dividend attributable to the shareholder. From the above discussion it can be said that sec. 2(22)(e) of the Act covers only those transactions which benefited the shareholder alone and resultantly no benefit to the company M/s. Subhchintak VancomPvt. Ltd. On the other hand, if the transaction is mutual wherein both the sides are benefitted, it is undoubtedly outside the purview of sec. 2(22)(e) of the Act. We note that there is no loan/advance between M/s. Subhchintak VancomPvt. Ltd. and it cannot be called as a loan account. We find that there is mutuality and there were shifting of balances, so it is evident that there were reciprocal demands between parties and thus mutual in characteristic. The account maintained by the assessee with M/s. Subhchintak VancomPvt. Ltd. is an account so maintained in respect of mutual transfer of amount by way of giving and taking financial assistance. Therefore, it has the character of a current account and this current account is different from a loan account for the sole reason that the feature of mutuality is not present in a loan transaction. From the facts narrated above, it is clear that both the parties are beneficiary of the transaction being current account transaction i.e. shifting of balances, therefore, as held by the Hon'ble Supreme Court in Keshri Chand Jaisukh Lal, supra and Hon'ble Calcutta High Court in Pradip Kumar Malhotra, supra, we note that sec. 2(22)(e) of the Act is not attracted in the transaction with M/s. Subhchintak VancomPvt. Ltd. It should be remembered that for exercising revisional jurisdictional the Pr. CIT should find that the order of the AO is not only erroneous but also it should be prejudicial to the interest of revenue. It should be kept in mind that the assessee cannot dictate the AO how to pass the order or to ask how to investigate or what question to ask or what should be enquired into. We also note that a search warrant was executed in the case of the assessee on 15.06.2011 and search happened in the assessment year under consideration and, therefore, scrutiny u/s. 143(3) of the Act was framed. All the records including all the books of account were before the AO. Appraisal report prepared by the Investigation Wing was also before the AO. In the original assessment order itself in para 4 the AO notes that assessee has been served notice u/s. 143(2) and 142(1) of the Act along with the questionnaire dated 31.12.2012. The AO notes that the assessee's AR appeared from time to time and submitted details. Further,

we note that the original order of the AO was passed with the prior approval of JCIT, Range-4, Central Kolkata u/s. 153D of the Act. In such a scenario, the Pr. CIT while exercising his jurisdiction has to clearly spell out not only that the order of the AO is erroneous in so far as it is prejudicial to the interest of the revenue. In case, where the AO has taken a plausible view on a point of law or fact the Ld. Pr. CIT cannot exercise the jurisdiction u/s. 263 of the Act. In this case, we note that Pr. CIT found fault with the assessee on three counts. Firstly, the Pr. CIT found fault with the transactions between M/s. SKG Flour Mills Pvt. Ltd. and secondly, found fault with M/s. Jagadhatri Tracon (P) Ltd., which was apparently on a wrong assumption of facts which fact was evident from the order of AO passed while giving effect to the impugned order of Pr. CIT and, therefore, the original order of the AO cannot be termed as erroneous. Third fault as per the Pr. CIT was in respect to the transaction between assessee M/s. Subhchintak VancomPvt. Ltd., we note that the entire records were before the AO and the AO has taken a plausible view as per the law laid by the Hon'ble Supreme Court's and High court's order in Kesari Chand Jaisukh Lal Vs. Shillong Banking Corporation Ltd. 1965 AIR 1711 and Pradip Kumar Malhotra, (supra) respectively. Thus, the view of the AO in respect to the transaction cannot be held to be unsustainable in law. And, the phrase 'prejudicial to the revenue' has to be read in conjunction with 'an erroneous order' passed by the AO to exercise revisional jurisdiction. In this context, we say that erroneous means if on the face of the record the issue in question has not been enquired at all by the AO. It should be remembered that every loss of revenue as a consequence of an order of AO cannot be treated as prejudicial to the interest of revenue. When the AO adopted one of the course permissible in law and it has resulted in a loss to the revenue; or where two views are possible and AO has taken one view with which Pr. CIT does not agree, it cannot be stated an erroneous order prejudicial to the interest of revenue unless the order of AO is unsustainable in law as held by the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. Vs. CIT (2000) 243 ITR 83 (SC). In the facts and circumstances of the case as narrated above, original assessment order passed with the approval of JCIT u/s. 153D of the Act cannot be viewed as unsustainable in law. Further, when all the facts and the laws governing the issues were brought to the notice of the Pr. CIT for which show cause notice was issued by the Pr. CIT, while conveying his intention to invoke revisional jurisdiction u/s. 263 of the Act, we note that he has not discussed as to whether sec. 2(22)(e) of the Act is attracted and the transaction can be characterized or be termed as a loan/advance. We note that the Ld. Pr. CIT did not even care to discuss and pass a speaking order, has simply set aside the original assessment order, which action of Pr. CIT cannot be countenanced. Therefore, we are inclined to allow the appeal of the assessee and quash the impugned order of the Ld. Pr. CIT."

Therefore, we set aside the order of ld. CIT(A) and remit this issue back to the file of ld. CIT(A) for fresh examination and adjudicate the issue in accordance to law. Hence, we allow the CO no. 3 raised by the assessee for statistical purposes.

17.Before parting, it is noted that the order is being pronounced after 90 days of hearing. However, taking note of the extraordinary situation in the light of the Covid-19 pandemic and lockdown, the period of lockdown days need to be excluded. For coming to such a conclusion, we rely upon the decision of the Co-ordinate Bench of the Mumbai Tribunal in the case of DCIT vs. JCB Limited in ITA No. 6264/Mum/2018 and ITA No. 6103/Mum/2018 for A.Y. 2013-14 order dated 14.05.2020.

18. In the result, the appeal of the Revenue is partly allowed for statistical purposes and the cross objection of the assessee is also partly allowed for statistical purposes to the extent indicated above.

Order pronounced in the Court on 10.06.2020

Sd/-	**Sd/-**
(A.T.VARKEY)	**(A.L.SAINI)**
न्यायिकसदस्य / JUDICIAL MEMBER	**लेखासदस्य / ACCOUNTANT MEMBER**

दिनांक/ Date: 10/06/2020
(*SB, Sr.PS*)

Copy of the order forwarded to:
1. DCIT, Circle-10(2), Kolkata
2. M/s Svarna Infrastructure & Builders Pvt. Ltd.
3. C.I.T(A)- 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.
6. Guard File.

True copy

By Order

Assistant Registrar
ITAT, Kolkata Benches