

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
MUMBAI BENCH "G", MUMBAI**

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND  
SHRI AMARJIT SINGH, JUDICIAL MEMBER**

**ITA No.2723/M/2017  
Assessment Year: 2011-12**

M/s. Yasham Bio Sciences Pvt. Ltd.(Now known as Yasham Speciality Ingredients Pvt Ltd.) , B/5, Pooja Unit CHS Ltd., Model Town, J.P. Road, 4 Bunglows, Andhra (West), Mumbai – 400 053 <b>PAN: AAACY 2899N</b>	Vs.	DCIT 8(3), Now ITO 11(3)(4), Aayakar Bhavan, Mumbai - 400020
(Appellant)		(Respondent)

**ITA No.3015/M/2017  
Assessment Year: 2011-12**

M/s. Vivek Dattatray Samant, 405, Raheja Crest Bldg. 1 Off Link Orad, Oshiwara, Andheri (W), Mumbai – 400 053 <b>PAN: AAZPS 4623G</b>	Vs.	DCIT 8(3), Now ITO 11(3)(4), Aayakar Bhavan, Mumbai - 400020
(Appellant)		(Respondent)

**Present for:**

Assessee by : Shri N.R. Agarwal, A.R.  
Revenue by : Shri V. Vinod Kumar, D.R.

Date of Hearing : 21.09.2020

Date of Pronouncement : 25.09.2020

**ORDER**

**Per Rajesh Kumar, Accountant Member:**

The above titled appeals have been preferred by two different assesseees against two different orders dated 23.01.2017 & 06.02.2017 of the Commissioner of Income Tax

(Appeals) [hereinafter referred to as the CIT(A)] both relevant to assessment year 2011-12. The issue involved is inter connected as in one case Id. CIT(A) has held the addition to be substantive and in the other as protective.

### **ITA No.2723/M/2017**

#### 2. The grounds raised by the assessee are as under:

"1(a) On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) erred in confirming the addition of Rs. 1,04,00,000/- as deemed dividend under section 2(22)(e) of the Income Tax Act, 1961 and the reasons assigned for doing so are wrong and contrary to the facts and circumstances of the case, the provisions of Income Tax Act, 1961 and the Rules made there under.

l(b) On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) erred in considering the intercorporate deposits as deemed dividend chargeable to tax u/s 2(22)(e) of the Act and reasons assigned for doing so are wrong and contrary to the facts and circumstances of the case, the provisions of Income Tax Act, 1961 and the Rules made there under.

l(c) On the facts and circumstances of the case and in law, the learned lower authorities erred in considering the money received from lending companies as deemed dividend chargeable to tax u/s 2(22)(e) of the Act without appreciating that the money received from the lending companies (i.e., M/s. Yasham Chemphar Pvt. Ltd and M/s. Yasham Importers & Exporters Pvt. Ltd.) were during the course of business exigency as trade advance on current account basis to give effect to commercial transaction and as such the deeming provisions of the said section cannot be invoked in the hands of the assessee company and doing so is wrong and contrary to the facts and circumstances of the case, the provisions of Income Tax Act, 1961 and the Rules made there under.

l(d) On the facts and circumstances of the case and in law, the learned lower authorities erred in invoking provisions of section 2(22)(e) of the Act when the shareholders of the appellant company have not received any benefit in the transactions of commercial expediency between two concerns and as such doing so is wrong and contrary to the terms of principle of purposive interpretation of said deeming section as there being no intention to avoid payment of dividend distribution tax.

l(e) On the facts and circumstances of the case and in law, the learned lower authorities erred in considering the money received from lending companies as deemed dividend u/s 2(22)(e) of the Act without appreciating that assessee not being a shareholder of the lending companies, the deeming provisions of the said section cannot be invoked in the hands of the assessee company and doing so are

wrong and contrary to the facts and circumstances of the case, the provisions of Income Tax Act, 1961 and the Rules made there under.

l(f) Without prejudice to the above grounds of appeal, the learned Commissioner of Income Tax (Appeals) erred in confirming the action of learned Assessing Officer of making addition of Rs. 1,04,00,000/- as deemed dividend u/s 2(22)(e) of the Act on protective basis despite having confirmed the addition in the hands of shareholders of appellant company on substantive basis as it would tantamount to double taxation of deemed dividend under the deeming provisions of the said section and as such doing so is wrong and contrary to the facts and circumstances of the case, the provisions of Income Tax Act, 1961 and the Rules made there under.

The appellant craves leave to add, amend, alter, modify, and/or delete, any of the above grounds of appeal before or at the time of the hearing."

3. The facts in brief are that the assessee filed return of income on 03.09.2011 declaring income of Rs.2,27,88,850/- which was processed under section 143(1) of the Act. Thereafter, the case of the assessee was selected for scrutiny and statutory notices were duly issued and served upon the assessee. The assessee is engaged in the business of importing chemicals from overseas suppliers and dealing thereof. During the course of assessment proceedings, the AO observed that assessee has received loans from sister concerns under the same management having common shareholders as per details below:

Sr.No.	Name of the party	Additions during the year
1.	Yasham Cemphar Pvt. Ltd.	Rs.10,00,000/-
2.	Yasham Importers & Exporters Pvt. Ltd.	Rs.1,82,00,000/-
	Total	Rs.1,92,00,000/-

Accordingly, the AO asked the assessee to furnish the details of shareholding pattern and balance sheets of the lender companies in order to examine the applicability of section 2(22)(e) of the Act which were duly supplied the details whereof are as under:.

Shareholdings:

<u>Name of the company</u>	<u>Ms. Namita Samant</u>	<u>Mr. Vivek Samant</u>
<u>Others</u>		
Yasham Bioscience Pvt Ltd. 100000	50000 (20%)	100000(40%)
Yasham Chemphar Pvt Ltd NIL	23990 (16%)	126010 (84%)
Yasham Importers & Exporter Pvt Ltd 13500	9750 (18.57%)	29250 (55.71%)

The AO after considering the share holding pattern in the assessee and these two lender companies the details whereof is given in para 4.2 of the assessment order came to conclusion that assessee has received these amounts by way of unsecured loans. The AO noticed that Shri Vivek D. Samant and Smt. Namita V. Samant who held substantial shares of the assessee company also held substantial shareholdings in these two lender companies as on 31.03.2010 and 31.03.2011. The AO also noted that these two lending companies have also accumulated profit as detailed in para 4.2 of the assessment order and therefore the provisions of section 2(22)(e) of the Act are attracted. The AO further noted that it is not the business of the two lender companies to advance money in the ordinary course of business. Finally, the AO made the addition of Rs.1,04,00,000/- comprising Rs.94,00,000/- as peak credit on 22.06.2010 by excluding the opening balance qua the loan received from M/s. Yasham Importer and Exporter Pvt. Ltd. and Rs.10,00,000/- received from M/s. Yasham Chemphar Pvt. Ltd. by treating the same as deemed dividend under section 2(22)(e) of the Act. The AO made the protective addition in the case of the assessee whereas the substantial addition was made in the case of shareholders Shri Vivek D. Samant and Smt. Namita V. Samant.

4. In the appellate proceedings, the Ld. CIT(A) sustained the addition but the addition was sustained on substantive basis in the case of assessee whereas protective in the case of shareholders by observing and holding as under:

**“Ground No.3:**

Under this Ground of Appeal, the Appellant has agitated addition of Rs. 1,04,00,000/- u/s 2(22)(p) by way of deemed dividend. I have carefully considered the contentions of the Appellant and the Assessment records in this regard. On perusal of the same, I find that the A.O has rightly invoked the provisions of deemed dividend u/s 2(22)(e) because the case laws cited by the Appellant have now been distinguished and overruled by the recent judgement of **Hon'ble Supreme Court dated 04.01.2017 in the case of Gopal And Sons (HUF) Vs. CIT-KOLKATA-XI (Civil Appeal No.12274 of 2016)**. Therefore, the contention of the Appellant that the deemed dividend can be assessed only in the hands of registered shareholders is devoid of merit. Therefore, even the payment of interest or concept of inter corporate deposit does not hold good. I accordingly uphold the addition made by the A.O. in this regard.

**This Ground of Appeal is therefore dismissed.”**

5. The Ld. A.R. submitted before the Bench that the addition as sustained by Ld. CIT(A) is wrong and against the facts of the case and was confirmed by wrongly relying on a decision of the Hon'ble Supreme Court in the case of Gopal & Sons, HUF vs. CIT, Kolkata in CA No.12274 dated 04.01.2017 which is not applicable to the assessee's case as the facts in the said case are distinguishable vis-à-vis the facts of the assessee. The Ld. A.R. submitted that the Hon'ble Supreme Court in the case of Gopal and Sons as reported in 145 DTR 289 (SC) has held that loan obtained by the HUF from a company in which Karta was a shareholder is held to be deemed dividend whereas in the present case the facts are totally different as one sister company has advanced money to the another sister company for the purpose of business and out of commercial expediency. The Ld. A.R. also submitted that the decision of the Hon'ble Supreme

Court in the case of Gopal & Sons (supra) has been distinguished by the various decisions of the co-ordinate benches in the following cases:

- (i). M/s. Neha Home Builders Pvt. Ltd., v DCIT 13(1)(1) ITA No.3157/Mum/2018' B Bench dated 5/10/2018 (Para No. 19 to 21 of the order)
- ii) Income Tax Officer 6(1)(2) v Best CFS Private Limited I.T.A. No.4075/Mum/2013 'B' bench 5/12/2018 Last para of the order
- iii). DCIT-1(1)(2), vs M/s. Golani Brothers v DCIT 12(2) ITA No.2615/M/2017 'G' Bench
- iv). DCIT-1(1)(2), vs M/s. Gilbarco Veeder Root India ITA No.1003/M/2017 'L' Bench

6. The Id. Counsel of the assessee submitted that the case of the assessee is squarely covered by the decision of the co-ordinate benches of the Tribunal in assessee's own case in ITA No.7207/M/2010 A.Y. 2007-08 and 5659/M/2012 A.Y. 2009-10 wherein identical issue has been decided in favour of the assessee. The Ld. A.R. submitted that the Tribunal has to first decide whether the transaction is taxable as deemed dividend and if yes then in whose hands it is to be taxed whether in the assessee company's hand or its shareholders as stated above. The Ld. A.R. submitted that the so called unsecured loans were in fact taken solely out of business consideration between two sister concerns under the same management out of business consideration and commercial expediency and thus can not be treated as deemed dividend under section 2(22)(e) of the Act. The Id AR submitted that the Ld. CIT(A) confirmed the addition but reversed AO's order & confirmed on protective basis in the hands of Mr. Vivek Samant & Ms. Namita Samant & On substantive basis in the hands Assessee company. While doing so Ld. CIT(A) relied on Hon`ble S.C. decision in case of Gopal & Sons 145 DTR 0289 (SC) by ignoring the following decisions of Hon`ble Bombay High Court:

CIT v/s Universal Medicare Pvt. Ltd. 324 ITR 263 (Bom)  
CIT v/s ALFA Sai Minerals Pvt. Ltd. 398 ITR 660 (Bom)  
CIT v/s Narmina Trade Investment Pvt. Ltd. 388 ITR 243 (Bom)  
CIT v.s Impact Containers (P.) Ltd. (Bombay) 107 DTR 0145, 367 ITR 346:  
CIT v.s India Capital Market (P.) Ltd. (Bombay) 387 ITR 510  
ACIT v/s Britto Amusement Pvt. Ltd. 360 ITR 544 (Bom)

The ld. AR submitted that firstly it has to be decided whether transaction is taxable as a deemed Dividend & if Yes then in whose hands it is taxable whether assessee company or Share holder. The ld AR submitted that the current account or financial Transactions for business between sister concerns under common management for meeting business expediency cannot be treated as loans or advances u/s 2(22)(e) of the Income Tax Act, 1961. The ld AR submitted that the assessee company was engaged in the business of acting as commission agent for & then latter on importing bulk quantity of all kinds and varieties of speciality chemicals and ingredients used in pharmaceuticals, cosmetics and food industries and sell it across the country in small-small quantity to customers. Mr. Vivek Samant is the managing director and Mrs. Namita Vivek Samant is the whole time director of the above mentioned three companies. Thus, both the above companies and the appellant are under the common management. However, for the purpose of increasing its market share of such products in the market the sales were increased from Rs. 8.95 crores in FY 2009-10 to Rs. 17.50 crores in FY 2010-11. Therefore as and when the need arises for working capital purposes and on the availability of surplus funds with group concerns, the assessee was provided funds of Rs. 1,82,00,000/- from Yasham Importer & Exporter Private Limited (YIEPL) (Amalgamated company - Now known as Yasham Speciality Ingredients Private Limited) & Rs.

10,00,000/- from Yasham Chemphar Private Limited (YCPL) in AY 2011-12 for the purpose of business which were repaid within the same year at the competitive interest rate of 12.5%. Accordingly, as per the management decision, the funds were diverted from the group concern to another and made available to assessee for importing the products on its own account for trading purposes so as to earn higher margins. Further, it will be appreciated that majority of the customers are common in both the companies. Thus, the group companies were engaged in business which were complementary to each other. With the view to take advantage of optimum deployment of group funds in the current competitive environment, it resulted into benefits from economies of scale of operations & increase in market share for both companies. Thus, the above facts prove that under influence of common management, for commercial expediencies between the group concerns and for optimum utilisation of funds, such funds were diverted.

From the details of application of funds received from YIEPL and YCPL during FY 2010-11, it is evident that appellant had received funds on short term basis which were repaid during the said year. On perusal of such details, it is apparent that funds which were accepted by appellant from YIEPL and YCPL, were utilised for the purpose of business such as making import payments for purchases, payments of custom duties, taxes etc. Accordingly, it will be appreciated that funds were diverted by the group concerns to the appellant as the same group of people/ individuals were managing and taking decisions for there being business synergies between the group concerns as the combined efforts resulted into higher business volumes and

resulting profits thereon as compared to individual's efforts/capabilities of a concern. In fact, subsequently, the appellant and YCPL have been amalgamated with YIEPL with effect from appointed date 01/04/2012 which was approved by Order of Bombay High Court dated 22/03/2013 alongwith Scheme of Amalgamation to achieve integration of business operations, strategic flexibility and to pursue growth opportunities, synergy benefits through combined operations and cost efficiencies and will be conducive to better and more efficient and economical control and conduct of companies. Thus, it will be appreciated that the transactions between sister concern were always for business exigencies.

7. The ld. AR submitted that transfer of funds between group concerns under the same group for business purposes and being current account cannot be called as loans/advances and hence, cannot be treated as deemed dividend u/s 2(22)(e) of the Act. In this regard, reliance was placed on the following decisions:

Case laws for Funds given for business purposes

1). Chandrashekar Maruti vs. ACIT ITA No.5410/Mum/2012

47 CCH 0783, 183 TTJ 0459 ,

2). Ackruti City Ltd. vs. DCIT [ITA No. 4869/Mum/2009

Case laws for current & running account

3). Mr. Girish Vazirani, v ITO 9(2)(1) ITA No.83/Mum/2013 `G` bench Mumbai

4). M/s. Exotica Housing & Infrastructure Company Pvt. Ltd. v ITO 8(4)

ITA.No.5188/Del./2019 Bench "B" : DELHI

5). CIT vs. Suraj Dev Dada [(2014) 46 taxmann.com 402 (Punjab & Haryana)]

6.) Ravindra R Fotedar v ACIT 10 (2) ITA No.6778/Mum/2013 (Mumbai)

7) M/s. Neha Home Builders Pvt. Ltd., v DCIT 13(1)(1) ITA No.3157/Mum/2018

8. The ld. AR also referred to CBDT vide its Circular No. 19/2017 dated 12/06/2017 had clarified that trade advances which are in the nature of commercial transactions would not fall within the ambit of word "loan/advance" in section 2(22)(e) of the Act. Thus, the intention of legislature was not to cover the

commercial business transactions within the purview of deemed dividend u/s 2(22)(e) of the Act.

9. The ld. AR contended that inter-corporate deposits (ICDs) would not be covered within the purview of deemed dividend chargeable to tax u/s 2(22)(e) of the Act. In the instant case, the appellant had accepted short term funds of Rs. 1,82,00,000/- from Yasham Importer & Exporter Private Limited (YIEPL) & Rs. 10,00,000/- from Yasham Chemphar Private Limited (YCPL) which were repaid during the year under consideration. Such ICDs carry a prevailing competitive interest rate of 12.5% in respect of period for which funds were utilised by the appellant. The temporary receipts/diversion of funds at competitive interest rate are in the nature of ICDs to make judicious utilisation of funds for working capital purposes of the company. The process of giving and accepting ICDs is a means of alternative financing and cannot be treated as loan or advance. In fact, they were temporary parking of funds as investments with the appellant by the group concerns, influenced by common management. One of the requisite condition for invoking the provisions of section 2(22)(e) of the Act is that payment must be made by way of "loan or advances". The Hon'ble Bombay High Court in the case of *Durga Prasad Mandelia vs. Registrar of Companies [(1987) 61 Comp. Cas. 479 (Bom.)]* had made a distinction between deposits and loans in the context of Section 370 of Companies Act, 1956. In this decision, the assessee had advanced money to other body corporate. The question arose as to whether such advancing of money by assessee is in contravention of the provisions of section 370 of the Companies Act, 1956. The Hon'ble Bombay High Court held

that deposits cannot be equated with loans and accordingly, the provisions of section 370 of Companies Act, 1956 cannot be applied. Similarly in the following cases it has been held that ICDs are not loans or advances. Hence, ICDs placed under the influence of common management within group concerns, cannot be equated with loans and advances and accordingly, cannot be taxed as Deemed Dividend u/s 2(22)(e) of the Act. The ld AR also submitted that not a single Rupee is diverted to share holder by borrowing company for benefit of share holder In contrast funds are used for the business of the company. Object of section 2(22)(e) is to plug the loophole by not declaring dividend and not paying tax u/s 115O by share holder. The ld AR finally prayed that the appeal of the assessee may be allowed.

10. The Ld. D.R., on the other hand, relied on the order of authorities below by submitting that the financial transactions have taken place between three sister concerns having common shareholders. Since there is no dispute as to share holding pattern of both the sister concerns, therefore the money advanced by the two sister concerns to the assessee has to be treated as deemed dividend under section 2(22)(e) of the Act. The Ld. D.R. submitted that though the Ld. CIT(A) has changed the substantive and protective addition inter se between the assessee and its shareholders, however the principle and substantive issue remain the same. In the case of Gopal & Sons vs. CIT, Kolkata (supra) the similar issue was decided and the said decision can not be distinguished merely by the fact that the money was advanced to a HUF by a company in which karta was a shareholder whereas in the present case the money was

advanced by two sister concerns to their sister concern having common shareholders. Therefore, principally and broadly the issue remained same that the beneficial benefit of the shareholders remain the same though the money was advanced by one concern to another concern may be company or HUF. The Ld. D.R., therefore, prayed that the order of Ld. CIT(A) may kindly be affirmed.

11. After hearing both the parties and perusing the material on record, we find that the undisputed facts are that there are three sister concerns namely Yasham Bio Sciences Pvt. Ltd., the assessee, Yasham Chemphar Pvt. Ltd. and Yasham Importer & Exporter Pvt. Ltd. the two sister concerns of the assessee. There were common shareholders companies namely Shri Vivek D. Samant and Smt. Namita V. Samant and both were holding substantial share holdings in all these companies. We note that the money was advanced by these two sister concerns to the assessee, more particularly, Yasham Importer & Exporter Pvt. Ltd. advanced Rs.1,82,00,000/- to the assessee whereas Yasham Chemphar Pvt. Ltd. advanced Rs.10,00,000/- for the purpose of business of the assessee which were duly repaid within the same year along with interest @ 12.5% after due deduction of TDS. We note that the funds were diverted from its group companies to another group company, the assessee, for importing the products for trading purposes in order to realize higher profits and the funds were received on short term basis depending on the business requirements. The said money borrowed was repaid during the year itself and nothing was outstanding at the year end. Thus we can reasonably presume that these funds were moved from one company to another

which are under the same management and the purpose is to deploy the funds more efficiently and profitably and thus there exists a business and commercial expediency for the same. We find merit in the contentions of the Ld. A.R. that these transactions being in the nature of current account between the group concerns which can not be treated as loans or advances to be treated as deemed dividend under section 2(22)(e) of the Act. In the case of Chandrasekhar Maruti vs. ACIT (supra) the co-ordinate bench of the Tribunal has held that where there is a running account between the two sister concerns wherein there is a continuous exchange of transactions and the account was squared up during the year, no part of the said amounts could be treated as being attributed to the shareholders. We find that in the case of the assessee, the facts are exactly same as the funds were transferred to the sister concern inter se out of commercial expediency to maximise the profits which were fully repaid during the year after providing interest @ 12.5% p.a. can not be attributed for the benefit of the shareholders of the assessee company . Similarly, in the case of Akruti City Ltd. vs. DCIT (supra) the identical issue was decided in favour of the assessee by holding that financial transactions out of business expediency between two sister concerns can not be called as loans or advances for the purpose of invoking section 2(22)(e) of the Act. The same view as held by the Hon'ble High Court of Punjab & Haryana in the case of CIT vs. Suraj Dev Dada (supra) wherein it has been held that it will be a travesty of law to apply the provision of section 2(22)(e) of the Act where the assessee had running account with the company with whom the assessee advanced money to the company as and when required for the

purpose of business and also in real sense the assessee has not derived any benefit from the funds of the company. The issue is also clarified by CBDT in its circular No.19/2017 dated 12.06.2017 wherein it has been clarified that trade advances in the nature of commercial transactions would not fall within the ambit of words "loans/advances within the meaning of section 2(22)(e) of the Act. Besides, we note that the amount could at best be treated as inter corporate deposits (ICD) which does not fall within the ambit of section 2(22)(e) of the Act as in the present case the assessee has accepted short term funds of Rs.1,82,00,000/- from Yasham Importer & Exporter Pvt. Ltd. and Rs.10,00,000/- from Yasham Chemphar Pvt. Ltd. which were repaid during the year along with interest @ 12.5% per annum. Therefore, the ICDs between group companies can not be treated as loans/advances for the purpose of section 2(22)(e) of the Act. The case of the assessee is supported by the decisions of Bombay Oil Industries vs. DCIT (supra) Spl Bench, Gujarat Gas Financial Services Pvt. Ltd. vs. ACIT (supra) wherein similar ratio is laid. Considering the ratio laid down in the above decisions, we hold that ICDs between the common group companies can not be equated with the loans and advances for the purpose of deemed dividend under section 2(22)(e) of the Act. We further note that the money was not at all diverted for the benefit of shareholders by the assessee company but in fact used for its business. Considering the facts and circumstances of the case in the light of various decisions as discussed above, we are of the considered view that the money advanced by two sister concerns to the assessee company which was repaid during the year along with interest @

12.5% per annum and used for the purpose of business of the assessee is not a loan/deposit to be treated as deemed dividend. Accordingly, we are not in agreement with the conclusion drawn by the Ld. CIT(A) on this issue. Moreover, the decision of Gopal & Sons (supra) is clearly distinguishable on facts and has wrongly applied to the present case. The case of the assessee is squarely covered by the decisions of the co-ordinate benches of the Tribunal in assessee's own case in A.Y. 2007-08 and 2009-10 and on this core also the order of Ld. CIT(A) can not be sustained. Thus we are inclined to set aside the order of Ld. CIT(A) and direct the AO to delete the addition wherein the Ld. CIT(A) has sustained the addition as substantive.

12. Accordingly, the appeal of the assessee is allowed.

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13. The issue raised in ground No.1 is against the order of Ld. CIT(A) confirming the disallowance on proportionate basis on account of interest of Rs.3,57,651/- out of interest expenditure claimed by the assessee.

14. The facts in brief are that the AO during the course of assessment proceedings observed that the assessee has claimed interest payment of Rs.7,62,640/- on borrowed funds and also advanced interest free advances. Accordingly, the AO called upon the assessee as to why the proportionate interest attributable to advancing of interest free loans should not be disallowed and added to the income of the assessee. The assessee vide letter dated 23.12.2013 submitted that interest attributable to interest free advances worked out to

Rs.3,57,651/-. Accordingly, the same was disallowed and added to the income of the assessee.

15. The assessee challenged the said issue before the Ld. CIT(A) who confirmed the addition by holding that assessee himself admitted vide letter dated 23.12.2013 that interest of Rs.3,57,651/- is attributable to interest free advances and thus admitted the disallowance.

16. After hearing both the parties and perusing the material on record, we observe that the assessee's own funds were more than Rs.3.40 crores whereas the advances on which these interest paid advances were given were only to the tune of Rs.27 lakhs. Therefore, we find merit in the contentions of the Ld. A.R. that the funds were advanced out of own funds and not out of borrowed funds. The case of the assessee is squarely covered by decision of the Hon'ble Bombay High Court in the case of "CIT vs. Reliance Utilities and Power Ltd." (2009) 313 ITR 340 (Bom) wherein it has been held that if the interest free funds available with the assessee are sufficient to meet the its investments and at the same time the assessee has raised loan, then it can be presumed that investments were out of interest free funds available with the assessee. Under these circumstances, we are not in agreement with the conclusion drawn by the Ld. CIT(A) and the addition of Rs.3,57,651/- is ordered to be deleted. So far as the issue of assessee's own admission that interest of Rs.3,57,651/- relates to the interest free deposits is concerned, it is not a bar in challenging the issue before the appellate authorities as has been held in the following cases namely Dinanath Premkumar vs. ITO 13 TTJ 442 Del., Rachpal Singh

vs. ITO 93 TTJ 283 (Asr) and AS Vannia & Sons vs. ACIT 62 ITD 48 (Madras). In view of these facts, the ground is allowed and AO is directed to delete the disallowance.

17. The 2<sup>nd</sup> issue raised by the assessee is against the confirmation of addition of Rs. 2,13,012/- by ld CIT(A) as made by the AO on account of disallowance under section 14A rule 8D.

18. The facts in brief are that during the course of assessment proceedings, the AO noted that assessee has made investment in tax free income yielding securities to the tune of Rs.86,75,184/- and also received dividend of Rs.3,255/- which has been claimed under section 10(38) of the Act. According to the AO, the application of section 14A Rule 8D is mandatory and accordingly disallowance of Rs.2,13,012/- was calculated comprising Rs.1,63,337/- under rule 8D2(ii) towards interest and Rs. 49,675/- towards other expenses being a 0.5% of average investments.

19. In the appellate proceedings, the Ld. CIT(A) affirmed the said addition by observing and holding as under:

“Under this Ground of Appeal, the Appellant has agitated disallowance of Rs.2,13,012/- u/s 14A r. w. Rule 8D. I have carefully considered the contentions of the Appellant and the Assessment records in this regard. On perusal of the same, I find that the A.O. has made above disallowance by holding that the same is attracting Rule 8D(ii) and 8D(iii). On the other hand, the Appellant has contended that the A.O. has not considered capital account in partnership. On careful perusal of the same, I find that the contention of the A.O. is tenable because share of profit received by the Appellant from the partnership is exempt from tax and therefore liable to be included while calculating disallowance u/s 14A r.w.Rule 8D. As regards the disallowance made under Rule 8D(iii) it is seen that the AO has calculated the same @ 0.5% on the average value of the investment which works out at Rs.63,113/- as per the calculation submitted by the Appellant vide letter dated 26.5.2015, however, the AO has added only Rs.49,675/- which is found to be

reasonable under the facts and circumstance of the case. Accordingly, disallowance of Rs.2,13,012/- made by the AO under this ground needs to be upheld.

**Ground No.I is accordingly dismissed.”**

20. After hearing both the parties and perusing the material on record, we find that the interest disallowance of Rs.1,63,337/- under rule 8D2(ii) whereas the facts on record are that the assessee has capital balance of Rs.3,40,02,741/- whereas the investment in shares and PPF aggregated to only Rs.44,79,813/- on which the assessee received dividend income of Rs.3,255/- and PPF interest of Rs.1,15,254/- aggregating to Rs.1,18,509/-. We find merit in the contentions of the Ld. A.R. that when assessee's own funds are more than the investment made in tax free securities then presumption has to be drawn that investment made in securities yielding exempt income is out of own funds and not out of borrowed funds. The case of the assessee is squarely covered by the decision of jurisdictional Bombay High Court in CIT vs. HDFC Bank Ltd 366 ITR 505 Bom. Accordingly, we hold that interest disallowance of Rs.1,63,337/- is wrongly sustained by the ld CIT(A) and has to be deleted. So far as the disallowance of Rs.49,675/- is concerned, being 0.5% of average investment, we find that the assessee has not claimed any expenses in the profit & loss account which could be attributed as having been attributable to earning of exempt income. We have noted after examination of profit & loss account of the assessee that expenses claimed from business income were only Rs.7,87,273/- comprising Rs.7,62,640/- on account of interest, Rs.22,303/- as bank charges. Accordingly, we hold that the disallowance of Rs.49,675/- is also to be deleted. In view of our discussion

above, we direct the AO to delete the disallowance of Rs.2,13,012/-. Ground No.2 is allowed.

21. The issue raised in ground no. 3 is against the order of CIT(A) sustaining the addition in the hands of the assessee on protective basis though the AO made the addition on substantive basis.

22. We have already adjudicated in ITA No.2723/M/2017 in the case of M/s. Yasham Bio Sciences Pvt. Ltd. in which the addition was sustained as substantive addition by the Ld .CIT(A) that the financial transactions between the assessee and two sister concerns are not in the nature of loan/advances and the addition sustained under section 2(22)(e) of the Act on account of deemed dividend was held to be wrongly sustained by Ld. CIT(A) and deleted. Consequently the protective addition as sustained by Ld. CIT(A) in the case of the assessee does not survive and the AO is directed to delete the same.

23. Accordingly, the appeal of the assessee is allowed.

24. In the result, the appeals of the assesseees are allowed.

**Order pronounced in the open court on 25.09.2020.**

**Sd/-**  
**(Amarjit Singh)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(Rajesh Kumar)**  
**ACCOUNTANT MEMBER**

Mumbai, Dated: 25.09.2020.

\* Kishore, Sr. P.S.

Copy to: The Appellant  
The Respondent  
The CIT, Concerned, Mumbai

The CIT (A) Concerned, Mumbai  
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.