IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "D", MUMBAI

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

ITA Nos.3715, 3716 & 3717/M/2019
Assessment Years: 2010-11, 2011-12, 2013-14

Income Tax Officer-3(2)(2), Room No.673A, 6th Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s. Multiventure Financial Services Pvt. Ltd., 113, 1st Floor, Maker Chamber-V, Nariman Point, Mumbai – 400 021 **PAN: AADCM 2372F**
(Appellant)		(Respondent)

ITA No.3718/M/2019
Assessment Year: 2013-14

Income Tax Officer-3(2)(2), Room No.673A, 6th Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s. Multiventure Properties Pvt. Ltd., 113, 1st Floor, Maker Chamber-V, Nariman Point, Mumbai – 400 021 **PAN: AAECM7195F**
(Appellant)		(Respondent)

ITA No.4882/M/2019
Assessment Year: 2010-11

M/s. Multiventure Financial Services Pvt. Ltd., 113, 1st Floor, Maker Chamber-V, Nariman Point, Mumbai – 400 021 **PAN: AADCM 2372F**	Vs.	Income Tax Officer-3(2)(2), Room No.673A, 6th Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Vishnu Aggarwal, A.R.
Revenue by : Shri Bharat Andhala, D.R.

Date of Hearing : 14.01.2020
Date of Pronouncement : 22.02.2021

O R D E R

Per Rajesh Kumar, Accountant Member:

The above titled cross appeals have been preferred against the order dated 27.03.2019 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment years 2010-11, 2011-12 & 2013-14.

ITA No.3717/M/2019

2. The issue raised in ground No.1 to 3 by the Revenue is against the deletion of Rs.4,63,00,000/- by Ld. CIT(A) as made by the AO towards the amount/surplus received by the assessee upon retirement from the partnership firm.

3. The facts in brief are that the assessee filed return of income on 30.09.2013 declaring income of Rs.20,32,542/-. Thereafter, the case of the assessee was selected for scrutiny under CASS and statutory notices were duly issued and served upon the assessee. During the course of assessment proceedings the AO observed that assessee was partner in Innovative Construction Company, Pune in terms of deed of partnership dated 21.12.2006. The assessee retired from the partnership on 08.08.2012 and received an amount of Rs.4,63,00,000/-. The assessee reduced the said money received from the partnership in the computation of total income while filing the return of income on the ground that upon retirement from the firm there is no transfer of assets and the amount received is a capital receipt which is not liable to tax. The AO, however, not convinced with the reply of the assessee, issued show cause notice dated 11.03.2016 as to why the said amount received from the partnership concern should not be

treated as income of the assessee which was replied by the assessee vide letter dated 21.03.2016 which is reproduced by the AO in para 4.3 of the assessment order. The AO observed that at the time of becoming partner the assessee had invested by way of capital a sum of Rs.5,37,00,000/- in the partnership whereas upon retirement the assessee got an amount of Rs.10 crores comprising Rs.5,37,00,000/- towards capital to be paid within 3 months from the date of retirement and the balance was to be paid within 12 months from the date of retirement. The AO came to the conclusion that assessee has sold the goodwill which is enjoyed by him by virtue of being partner in the said firm and thus it is a transfer within the meaning of section 2(47) of the Act and finally added the surplus as long term capital gain in the assessment framed under section 143(3) of the Act dated 26.03.2016.

4. In the appellate proceedings, the Ld. CIT(A) allowed the appeal of the assessee by holding and observing as under:

> "3.1.3 These grounds pertain to addition of Rs. 4,63,00,000/- made by Assessing officer having treated the money received on retirement from partnership firm, as long term capital gain, I find that the A.O. has discussed this issue at para 4 of her order. The appellant contended vehemently before the assessing officer that the sum received on retirement as partner from partnership firm, is not transfer of any capital assets as defined u/s 2 (47) of the IT Act, therefore, not taxable in the hands of the appellant. The appellant also relied upon various judicial decisions , such as, the CIT, Pune vs Riyaz Sheikh (Bombay- HC), Tribhuvandas G Patel vs CIT (SC), CIT vs R Lingmallu Raghukumar (SC), Prashant Joshi vs ITO (Bombay -HC) etc. However, on the other hand, the AO relied on Shevantibhai C Mehta (ITAT - Pune bench) and drew the conclusion that the retirement amount was taxable as long term capital gain.
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> 3.1.4 The facts, in brief, are that the appellant was a partner in the firm, namely, Innovative Construction Company, Pune w.e.f. 21/12/2006. It retired from the said firm with effect from 08/08/2012, as per the retirement deed. As per the deed, it was mutually agreed between the firm and retiring partner to pay a sum of Rs.10 crore to the appellant. While completing the assessment u/s 143(3) of the Act, an addition as long terms capital gain, in respect of the aforesaid amount, was made by the AO. The stand of the assessee right from assessment stage is that there is no transfer of capital asset and hence, no capital gain chargeable to tax arises at all.

However, the AO did not accept the contention of the assessee and made the addition as long term capital gain.

3.1.5 As stated, the AO has placed reliance upon the decision of the Pune Bench in Shevantibhai C Mehta vs ITO, 83 TTJ 542, Pune and on another decision in N.A. Mody vs. CIT (1986) 162 ITR 420 and has decided against the appellant company.

The issue before me is about taxability of amount received by the assessee on retirement from the partnership firm. In reaching the decision on this issue, I find guidance from the ratio of following judgements as are being discussed here under

In the recent judgement of PCIT vs. R.F. Nangrani HUF (93 Taxmann.com 302), the Hon'ble jurisdictional Bombay high court, on identical facts, has dealt with the issue after considering the cases relied upon and has decided in favour of assessee. It is pertinent to mention here that the decision of Mumbai Tribunal in the said case was affirmed by Hon'ble jurisdictional Bombay High Court. The relevant portion from the order dated 10th December 2014 of the Mumbai Tribunal Bench is reproduced here under:

> "2.5. In the light of the above, more specifically, when the issue has been settled by the Hon'ble jurisdictional High Court, we find merit in the appeal of the assessee. The Hon'ble Apex Court, as discussed by the Hon'ble jurisdictional High Court in the aforesaid case also, in CIT vs. R. Lingamallu Rajkumar (2001), 247 ITR 801, held that amounts received on retirement by a partner is not subject to capital gains tax. Our view is also fortified by the decision by the Coordinate Bench in ACIT vs. Shri N. Prasad, Executive Chairman, Secunderabad (ITA No.1200/Hyd/2010) order dated 27/01/2014.
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> 2.6. However, the Hon'ble Karnataka High Court in CITvs Dynamic Enterprises, while interpreting section 45(4) of the Act held that in case of distribution of capital asset on the dissolution of the firm, there is a transfer of capital asset by the firm in favour of a person resulting profit are gains shall be chargeable to tax as income of the firm.' However, in view of this decision from Hon'ble Apex Court, we are of the view that in case of retirement of a partner, the amount so received, cannot be brought to tax. Our view is further fortified by the decision from Chalasani Venkateswara Rao vs. ITO (25 Taxman.com 378)(AP). The divisionfBench of Hon'ble Andhra Pradesh High court in L. Raghu Kumar followed the decision of the Hon'ble Gujarat High Court in CIT vs. Mohan Bhai Pama Bhai (1973) 91 ITR 393 (Guj.) has held that no transfer is involved when a retiring partner receives at the time of retirement from the firm, his share in the partnership asset either in cash or any other asset. The ratio laid down in P.H. Patel (171 ITR 128) wherein it was held that when a partner retires from a partnership taking his share of partnership interest, there is no element of transfer of interest in the partnership asset by the retiring partner. Therefore, considering the totality of facts and the circumstances by applying the ratio laid down by Hon'ble jurisdictional High Court in the case of Riyaz A. Shekh, which is binding on us, we reverse the order of the Id. Commissioner of Income tax (Appeals). Thus, appeal of the assessee is allowed."

This is note-worthy here to mention that against the aforesaid Tribunal order, the Department preferred appeal before the Hon'ble jurisdictional High Court, wherein vide order dated 18/04/2018 in the case of very same assessee (2018) 93 taxmann.Com 302 (Bombay - HC), the Hon'ble High Court held as under:

> IT: Amount received by retiring partner on retirement from firm on account of goodwill will not be subjected to tax as capital gains in his hands
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> [2018] 93 taxmann.com 302 (Bombay)
> HIGH COURT OF BOMBAY
> Principal Commissioner of Income-tax-26 Mumbai
> V.
> R.F. Nangrani HUF*
> M.S. SANKLECHA AND SANDEEP K. SHINDE, JJ.
> IT APPEAL NO. 33 OF 2016+
> APRIL 18, 2018
>
> Section 45 of the Income-tax Act, 1961 - Capital gains -Chargeable as (Firm/partner, in case of) -.Assessment year 2009-10 - Whether amount received by retiring partner on retirement from firm on account of goodwill will not be subjected to tax as capital gains in his hands - Held, yes [Para 3] [In favour of assessee]
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> CASES REFERRED TO
> ……
> ……..
> ……

3.1.6. ……..
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3.1.7. ……..
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3.1.8. In the light of the above decisions, more specifically, when the issue has been settled by the Hon'ble jurisdictional Bombay High Court itself, it can be said that the surplus received on retirement from partnership firm is not taxable u/s 45, as there is no "transfer" u/s 2(47) and when there is no transfer, there in no question of any capital gain arising to the appellant. In view of the above facts and circumstances of the case as well as judicial pronouncements referred and relied above by me and also certain judicial pronouncement relied upon by the appellant in its written submission which has been produced above, addition made by the AO under the heading long term capital gain cannot be sustained and therefore, the AO is directed to delete the addition of Rs. 4,63,00,000/- made as long term capital gain. This ground of appeal is, therefore, allowed.

GROUND ALLOWED"

While passing the order the Ld. CIT(A) relied on the decision of Hon'ble Supreme Court and also the jurisdictional High Court besides relying on the decision of other judicial forums and thus allowed the appeal of the assessee.

5. We have heard the rival submissions of both the parties and perused the material on record. The undisputed facts are that assessee became partner in the firm namely M/s. Innovative Construction Corporation vide partnership deed dated 21.12.2006 by investing a sum of Rs.5,37,00,000/- as his capital contribution in the firm. Thereafter, the assessee got retired from the said firm on 08.08.2012 and was given Rs.10 crores as full and final settlement of all his claims in the firm. Thus the assessee received a surplus Rs.4,63,00,000/- over and above the amount invested in the firm. According to the AO there is a transfer of goodwill of the firm when a partner retires from the firm as per the provisions of section 2(47) of the Act and therefore the said surplus is taxable as capital gain under section 45 of the Act. However, the Ld. CIT(A) after following the decision of Hon'ble Bombay High Court in the cases of PCIT vs. R.F. Nangrani HUF (2018) 93 taxman.com 302 (Bom), ITO vs. Prashant S. Joshi (2010) 189 Taxman 1 (Bom), CIT vs. Riyaz A. Sheikh (2014) 41 taxmann.com 455 (Bom), ITO vs. Shri Rajnish M. Bhandari (2012) 7 TMI 934- ITAT Pune, CIT vs. Mohanbhai Pamabhai (1973) 91 ITR 393 (Guj) & ACIT vs. Mohanbhai Pamabhai (1987) 165 ITR 166 (SC) has decided the issue in favour of the assessee by passing a very detailed and reasoned order. In view of these facts and circumstances we are inclined to uphold the order of Ld. CIT(A) as the Ld. CIT(A) has rightly held that amount received by the partner upon retirement does not result into any transfer of assets (goodwill) and therefore not

liable for capital gain tax under section 45 of the Act. In all the above decisions it has been held that upon retirement of a partner from the firm any amount received by the partner over and above his investment will not be subjected to capital gain tax in the hands of the partner. Similarly, Hon'ble Bombay High Court in the case of CIT vs. Mohanbhai Pamabhai (supra) has laid down the same ratio which has been affirmed by the Hon'ble Supreme Court in the case of ACIT vs. Mohanbhai Pamabhai as reported in (1987) 165 ITR 166 (SC). We are therefore inclined to uphold the order of Ld. CIT(A) on this issue and the ground No.1 to 3 raised by the Revenue are dismissed.

6. The issue raised in ground No.4 to 6 by the Revenue is against the deletion of Rs.1,40,00,000/- by Ld. CIT(A) as added by the AO towards deemed dividend under section 2(22)(e) of the Act.

7. The facts in brief are that the AO during the course of assessment proceedings noticed that assessee has received a loan of Rs.1,77,79,758/- from M/s. Multiventure Agro and Infrastructure Pvt. Ltd. The AO also observed from the details filed by the assessee that M/s. Bay Tree Agro Firms Pvt. Ltd. is a shareholder in the lender company holding 1,63,000 shares which comes to 48.66% of the total shareholdings. M/s. Bay Tree Agro Firms Pvt. Ltd. is also a shareholder in the assessee company holding 10,500 shares being 41.44% of the total shareholdings. The AO also noted that M/s. Multiventure Agro and Infrastructure Pvt. Ltd. is having accumulated profit of Rs.8,44,37,813/- on 31.03.2013 and therefore the money advanced by the said company to the assessee to the tune of Rs.1,77,79,758/- is covered by the provision of section 2(22)(e)

of the Act and should be taxed as deemed dividend. Accordingly, a show cause notice was issued on 11.03.2016 as to why the same should not be treated as deemed dividend within the meaning of section 2(22)(e) of the Act and added to the income of the assessee which was replied by the assessee vide written submission dated 21.03.2016 which is reproduced by the AO in para 6.3 of the assessment order. The assessee submitted before the AO that the said money was received by the assessee for acquiring rights in shares and properties on behalf of M/s. Multiventure Agro and Infrastructure Pvt. Ltd. and the assessee is acting as agent and facilitator. The assessee submitted that under the terms of advance it was to purchase share investments and property of certain companies after carrying out the due diligence and regulatory clearances the said properties were to be handed over to M/s. Multiventure Agro and Infrastructure Pvt. Ltd., however, the assessee could not carry out the said work due to several regulatory and other title issues and refunded a sum of Rs.90 lacs out of the said money received by the assessee. It is pertinent to state that Rs.37,79,758/- was coming from the earlier years and only Rs.1,40,00,000/- was advanced by the said company during the year and thus only Rs.50 lakhs remains to be refunded. The assessee submitted that since this is advance taken by the assessee out of business and commercial considerations, the same can not be taxed as deemed dividend within the meaning of section 2(22)(e) of the Act. The submissions and contentions of the assessee did not find favour with the AO and the AO added a sum of Rs.1,40,00,000/- received by the assessee during the year from M/s. Multiventure Agro and Infrastructure Pvt. Ltd. as deemed dividend.

8. In the appellate proceedings, the Ld. CIT(A) allowed the appeal of the assessee after taking into consideration the detailed arguments and submissions made by the assessee which are extracted by the Ld. CIT(A) in para 3.2.2 by observing and holding as under:

> "3.2,3 This ground pertains to addition of Rs. 1,40,00,000/- made by Assessing officer under u/s 2 (22) (e) as deemed dividend. I find that the A.O. has discussed this issue at para 6 of his order. The facts in brief, are that the appellant company during the impugned year received in total sum of Rs. 1,77,79,758/- from company M/s Multiventure Agro Infrastructure Pvt. Ltd. Out of the total sum Rs. 1,77,79,758/, the amount of Rs. 39,79,758- was the opening balance which was receivable from M/s Multiventure Agro Infrastructure Pvt Ltd and the balance of Rs. 1,40,00,OOO/-is advance received by the appellant for business purpose out of which the appellant has returned of Rs. 90,00,000/-- during the year and the balance payable by the appellant was Rs. 50,00,000/- to the M/s Multiventure Agro infrastructure pvt Ltd.. The AO noticed that there were common shareholders in the in both the appellant company and M/s Multiventure Agro & Infrastructure Pvt Ltd (MAIPL) having shareholding 41.44 % (10,500 shares) and 48.66% (1,63,000 shares) respectively in the both companies and therefore the sum of Rs. 1,40,00,000/-received as business advance from MAIPL was added as dividend u/s 2(22)(e) of the IT Act 1961 in the hands of appellant.
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> 3.2.4 The appellant contended that the company has received the said amount as advance for the purpose of acquiring certain Rights in shares and properties as agent and on behalf of the Multiventure Agro and Infrastructure Pvt. Ltd. Under the terms of advance our client was required to purchase shares investments and properties of certain companies, carry out due diligence, obtain title and other Regulatory clearance and hand over the said assets to Multiventure Agro and Infrastructure Pvt. Ltd. On completion of due diligence and obtaining all Regulatory clearances. The appellant could not carry out the said work due to Regulatory and Title issues and hence refunded Rs. 90,00,000/- from Rs. 1,40,00,000/- received as advance from the said company and balance of rs. 50,00,000/- shown as closing balance as on 31.03.2013 in the books of accounts, further the appellant plead that it was not a shareholder in M/s Multiventure Agro infrastructure pvt Ltd (MAIPL) and therefore provision of the section 2 (22) (e) of the IT Act cannot be invoked in the hands of the appellant. In other words, the contention of the appellant is that the first condition to be satisfied for invoking provision of section 2(22)(e) of the Act was that appellant should be a shareholder in the company which had given loan. The appellant had relied various judicial judgement the same has been narrated in the above paragraphs.
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> 3.2.5 The issue before me is whether provision of section 2 (22) (e) is applicable in the case of common shareholders or the lender has to be the shareholder of the company. The appellant has pleaded that since it was not a direct shareholder in M/s Multiventure Agro infrastructure pvt Ltd (MAIPL), therefore, the provisions of section 2 (22) (e) of the IT Act cannot be invoked in the hands of the appellant. In

other words, the main contention of the appellant is that the first and foremost condition to be satisfied for invoking provisions of section 2(22)(e) of the Act was that appellant should be **a DIRECT** shareholder in the company which had given loan or advances. The appellant has relied various judicial decisions, some of which have been narrated in the above paragraphs.

3.2.6. The issue before me is, therefore, whether provisions of section 2 (22) (e) are applicable even in the case of common shareholders or, whether the recipient has to be a direct shareholder of the lending company before these provisions are invoked ! The Assessing Officer has held that since shareholding pattern of both the appellant company and the lender company are largely common, it could attract the provisions of section 2(22)(e), i.e. deemed dividend. Here, one thing is to be noted that the other elements of deemed dividend are not being debated here, as the main grouse of the appellant basically is that it is not a registered shareholder at all, as is mandatory under the provisions of section 2(22)(e). So, the main issue actually boils down to the jurisdiction of the AO in invoking provisions of section 2(22)(e). The appellant says that it is not a registered shareholder of the lender company or the registered partner of the lending firm, so, there is no question of invoking deemed dividend provisions. Hence, once this aspect is settled, there is no requirement of going into other elements of deemed dividend as to whether they are present or not. This is also to be noted here that these facts are also not in dispute that the appellant company is not *directly* a shareholder in the lending company . The case of the AO is only this that since there are common shareholders in both the lending and borrowing concerns, it can be interpreted to mean that the borrowing company is *actually* a beneficial shareholder in the lending company. So, the AO's stand is interpretative rather than very explicit. It does not follow straight from the section as such. So, the question is - is her interpretation legally valid ! To be more specific, has it stood the test of judicial scrutiny ! Let us see.

3.2.7 ……..

> **In the case of ACIT vs. Bhaumik Colour (P.) Ltd. [2009] 118 ITD 1 (MUM.-ITAT) (Special Bench)** .....
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> **In the recent judgment DCIT vs. GEBBS Healthcare Solutions (P.) Ltd. [2017] 82 taxmann.com 333 (Mumbai - Trib.) it was held that**
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> **In the very recent judgment given by the ACIT vs. Microfinish Valves (P.) Ltd. [2018] 100 taxmann.com 146 (Bangalore - Trib.),**
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> **In the case of DCIT vs. Neha Home Builders (P.) Ltd. (2018) 98 taxmann.com 465 (Mumbai – Trib.),**
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In the case of DCIT vs. Gilbarco Veeder Root India (P.) Ltd. (2018) 96 taxmann.com 262 (Mumbai – Trib.), ...
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In the case of CIT vs. Universal Medicare (P.) Ltd. (2010) 190 Taxmann 144 (Bombay–HC), ...
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In the case of CIT vs. N.S.N. Jewellers (P.) Ltd. (2015) 57 taxmann.com 113 (Bombay –HC), ...
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3.2.8 Now, moving still further, i note that this issue stands virtually pre-empted a judgement of no less than the Hon'ble Supreme Court of India in the case of CIT Vs Madhur Housing and Development Company, 401 ITR 152, in which case the Apex Court has held that the deemed dividend was basically a legal fiction. That, the concept of legal fiction does not extend to the term shareholder and could not be further extended for broadening the concept of shareholders. The Apex Court has further held that the circular no 495 dated 22/09/1987, of CBDT was not binding on the High Court, and, that, although there were persons having substantial interest in the assessee company and the company which gave the loan, the assessee company not being a direct shareholder of the company which gave the loan , the loan was not assessable as deemed dividend in the hands of the assessee. The Supreme Court dismissed the appeals of the revenue. It upheld the Delhi High Court decision in CIT Vs Ankitech Pvt Ltd 340 ITR 14 in toto saying that they agree completely.

3.2.9. ……..
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3.2.10. Now, it is found that this instant case of the appellant falls within the four corners of the judgement reproduced above. Respectfully following the decision of Hon'ble Supreme Court and Ld Delhi High Court, I direct the Assessing officer to delete the addition of Rs.1,40,00,000- made on account of deemed dividend u/s 2(22)(e) of the Act as the appellant company is not a registered and legal shareholder in the lender company which is a mandatory condition for invoking provisions of deemed dividend, as per the order of Hon'ble Supreme Court as discussed above. So, the question of applicability of provisions of deemed dividend does not arise at all in this case. This ground of appeal is therefore allowed.

GROUNDS ALLOWED"

9. We have heard the rival submissions of both the parties and perused the material on record as placed before us. We find

that in this case the assessee has taken advance of Rs.1,77,79,758/- from M/s. Multiventure Agro and Infrastructure Pvt. Ltd. comprising Rs.37,79,358/- as opening balance coming from earlier years and Rs.1,40,00,000/- advance taken during the year. The said company had accumulated profits of Rs.8,44,37,813/- as on 31.03.2013. Another company M/s. Bay Tree Agro Firms Pvt. Ltd. is a common shareholder holding 48.66% in M/s. Multiventure Agro and Infrastructure Pvt. Ltd. shares and also 41.66% shares in the assessee company. According to the assessee the advance was given out of business and commercial considerations in order to procure investments and properties on behalf of M/s. Multiventure Agro and Infrastructure Pvt. Ltd. after due diligence and obtaining necessary clearances from the government authorities which could materialise. The AO added the same as deemed dividend within the meaning of section 2(22)(e) of the Act on the ground that assessee has not filed any contract or proof to the effect that this was taken out of business considerations and added Rs.1,40,00,000/- received during the year as deemed dividend under section 2(22)(e) of the Act. The Ld. CIT(A) deleted the disallowance by holding that the assessee can not be regarded as beneficial owner of the shares in M/s. Multiventure Agro and Infrastructure Pvt. Ltd. in view of the fact that there is a common shareholder in both the assessees as well as M/s. Multiventure Agro and Infrastructure Pvt. Ltd. who holds substantially shareholdings in both the concerns. The Ld. CIT(A) relied on the aforesaid decision in the case of CIT vs. Madhur Housing and Development Co. (supra) while passing the order wherein the Hon'ble Supreme Court has held that deemed dividend was basically a legal fiction which can not be

stretched and extended for broadening the concept of shareholders. Hon'ble Apex Court also held that circular No.495 dated 22.09.1987 of CBDT was not binding on the High Court and that although there were persons having substantial interest in the assessee company and the company which gave loan, the assessee company was not being a direct shareholder of the company which gave the loan, the loan was not assessable as deemed income in the hands of assessee and thus Hon'ble Supreme Court dismissed the appeal of the Revenue. We also note that in the case of CIT vs. Ankitech Pvt. Ltd. (2012) 340 ITR 14 (Del), the decision of the Hon'ble Delhi High Court on the similar issue which was affirmed by Hon'ble Supreme Court, the court has held as under:

> "According to section 2(22)(e) of the Income-tax Act, 1961, the following conditions are to be satisfied : (i) the payer company must be a closely held company ; (ii) it applies to any sum paid by way of loan or advance during the year to the following persons : (a) a shareholder holding at least 10 of the voting power in the payer company ; (b) a company in which such shareholder has at least 20 per cent. Of the voting power ; (c) a concern (other than company) in which such shareholder has at least 20 per cent. interest ; (iii) the payer company has accumulated profits on the date of any such payment and the payment is out of accumulated profits ; (iv) the payment of loan or advance is not in the course of ordinary business activities. By a deeming provision it is the definition of dividend which is enlarged. The legal fiction does not extend to "shareholder". The fiction is not to be extended further for broadening the concept of shareholders. Circular No.495, dated September 22, 1987, issued by Central Board of Direct Taxes is not binding on the High Court.
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> During the assessment proceedings, the Assessing Officer noticed that the assessee-company had received advances of Rs.6,32,72,265 by way of book entry from a company, JGPL and the shareholders having substantial interest in the assessee-company also had 10 per cent. of the voting power in JGPL. The Assessing Officer was of the view that as the two Guptas were members holding substantial interest in JGPL which had provided loans and advances to the assessee-company and these very persons had substantial interest in the assessee-company, for the purpose of section 2(22)(e) of the Act the amount received by the assessee from JGPL which constituted "advances and loans" would be treated as deemed dividend within the meaning of section 2(22)(e) of the Act and added the amount to the income of the assessee. The Tribunal deleted the addition. On appeal to the High Court:

Held, dismissing the appeals, that the Tribunal was correct in law in deleting the addition of Rs.6,32,72,265 made by the Assessing Officer in the hands of the assessee-company under section 2(22)(e)."

10. We therefore respectfully following the decision of the Hon'ble Supreme Court and Hon'ble Delhi High Court uphold the order of Ld. CIT(A) which has been passed after following the decision of the Hon'ble Apex Court and Hon'ble Delhi High Court besides various other decisions of co-ordinate benches of the Tribunal that the provisions of section 2(22)(e) of the Act can not be invoked where the assessee is not a shareholder in the company which has advanced the loan. In the present case, the assessee is not holding any share in the M/s. Multiventure Agro and Infrastructure Pvt. Ltd. Therefore, the addition was rightly deleted by the Ld. CIT(A). Accordingly, grounds No.4 to 6 are dismissed.

11. Ground No.7 & 8 are general in nature and needs no adjudication. Accordingly, the appeal of the Revenue is dismissed.

ITA No.3718/M/2019 A.Y.2013-14

12. The issue raised in various grounds of appeal by the Revenue is against the deletion of addition of Rs.2,50,00,000/- by Ld. CIT(A) as made by the AO on account of deemed dividend under section 2(22)(e) of the Act.

13. The facts in brief are that the assessee has taken a loan of Rs.2,65,00,000/- from M/s. Multiventure Agro and Infrastructure Pvt. Ltd. The AO noted that M/s. Bay Tree Agro Firms Pvt. Ltd. is a common shareholder on the assessee as well as on the above company who lent money to the assessee as the said company was holding 48.66% in the lender company as

well as 43.86% in the assessee company. The AO also noted that M/s. Multiventure Agro and Infrastructure Pvt. Ltd. is having accumulated profit of Rs.8,44,37,813/- on 31.03.2013 and accordingly came to conclusion that the loan advanced to the assessee of Rs.2,65,00,000/- should be assessed under section 2(22)(e) of the Act. Since the facts in the present case are similar to one as decided by us in ITA No.3717/M/2019 A.Y. 2013-14 in ground Nos.4 to 6 wherein we have upheld the order of Ld. CIT(A) by dismissing the appeal of the Revenue. Therefore, our finding in ground Nos.4 to 6 of ITA No.3717/M/2019 A.Y. 2013-14 would, mutatis mutandis, apply to this appeal as well. Accordingly, the appeal of the Revenue is dismissed.

ITA No.3716/M/2019 A.Y.2011-12

14. The issue raised in ground No.1 is against the deletion of addition of Rs.96,000/- by Ld. CIT(A) as made by the AO under section 68 of the Act on account of addition to unsecured loan by treating the same as cash credit under section 68 of the Act.

15. The AO during the course of assessment proceedings observed that there is an increase of Rs.96,000/- in the unsecured loans. The AO also noted that in A.Y. 2008-09 the enquiry was conducted into the genuineness of the unsecured loans and the same were added to the income of the assessee by treating the same as bogus and non genuine according to the AO. The assessee submitted before the AO that increase of Rs.96,000/- in unsecured loans represented the interest capitalized qua the loans taken in earlier years. However, the AO was not satisfied with the explanation of the assessee and issued show cause notice as to why the same should not be

treated as unexplained cash credit and be added to the total income of the assessee which was replied by the assessee vide written submissions dated 21.03.2016 by submitting therein that the assessee has not raised any loan in A.Y. 2008-09 and in fact these loans were received in A.Y. 2006-07 and 2007-08 and during the year, the assessee has only made provisions for interest @ 12% on outstanding loans. The assessee submitted that all the necessary documents were furnished in A.Y. 2008-09 to prove that these loans were genuine and therefore the assessment of the assessee has been wrongly reopened by issuing notice under section 148 of the Act, however, the AO rejected the contentions of the assessee and treated the same as unexplained cash credit reasoning that the assessee has not discharged the onus and added to the income of the assessee.

16. In the above proceedings, the Ld. CIT(A) allowed the appeal of the assessee on this ground deleting the addition of Rs.96,000/- by taking into consideration the reply of the assessee by observing and holding as under:

> "3.1.3 This ground pertains to addition of Rs. 96,000/- made by Assessing officer u/s 68 of the IT. Act. I find that the A.O. has discussed this issue at para 10 of her order. The appellant contended before the assessing officer that no new unsecured loans were received in the AY 2011-12.But, that, they had received it in AY 2006-07 and 2007-08. During the current year, the appellant company had made provision of interest @ 12% on outstanding loans only. The assessing officer has not discussed any of the arguments given by the appellant on this issue and nor she has commented on why she was not satisfied with the claim of the appellant that no fresh amounts were received in the AY 2011-12. The assessing officer has only contended that the entire loans were added in AY 2008-09 and thereafter, she has concluded that the increase in the opening and closing balance of loans of Rs.96,000/- is bogus and has treated the same as unexplained cash credit u/s 68 of the IT Act 1961. The appellant had contended that the loans which were added in AY 2008-09 by the learned assessing officer have since been deleted by the Learned CIT (Appeals), but in vain.
>
> 3.1.4 In the instant case, I find that the assessing officer has applied the provisions of Section 68 in the most mechanical manner, not bringing anything on record to disprove the contention of the appellant that no fresh credit/ amounts were received in AY 2011-12 but that only opening balances were appearing in the balance sheet and whatever increase in opening and closing balance, are just

provision of interest made on loans. Therefore, in view of these facts and circumstances of the case, the assessing officer is directed to delete the addition of Rs. 96,000/- made u/s 68 of the IT Act. This ground of appeal is, therefore, allowed."

17. After hearing both the parties and perusing the material on record including the impugned order, we find that during the year the assessee has not raised any unsecured loans but provided interest @ 12% which comes to Rs.96,000/- which is the only increase in the unsecured loans. These loans were taken by the assessee in 2006-07 & 2007-08. The issue of raising of unsecured loans have been verified by the AO during assessment proceedings of A.Y. 2008-09 when the assessee filed all the necessary supporting evidences before the AO but AO added the same to the income of the assessee under section 68 of the Act, however, the said addition has been deleted by the Ld. CIT(A). We note that assessee has not raised any fresh loan during the year under consideration. Therefore, we do not find any infirmity or anomaly in the order of Ld. CIT(A) and accordingly we uphold the same. Consequently, the ground No.1 raised by the Revenue is dismissed.

18. The issue raised in grounds No.2 & 3 is against the deletion of Rs.5,10,00,000/- by Ld. CIT(A) as made by the AO on account of receipt of share capital/share premium. The facts in brief are that during the course of assessment proceedings the AO noticed that assessee has raised share application/share premium from 8 parties and called upon the assessee to file the details of the investors such as name, addresses, PAN numbers and confirmations etc. along with proof of payments. The assessee filed before the AO all the necessary evidences and the details of share application money received is incorporated and appended in para 9.1 of the assessment order. The AO also

issued notice under section 133(6) of the Act to the investors to verify the genuineness, however, in several cases the notices were returned unserved and in only one case M/s. Next Technology Pvt. Ltd. which is a group concern of the assessee's reply was received. Accordingly, a show cause notice was issued to the assessee as to why the share application money raised from 7 parties aggregating to Rs.5,10,00,000/- should not be treated as unexplained cash credit under section 68 of the Act. The assessee replied the show cause notice vide written submissions dated 21.03.2016 which is reproduced by the AO in para 9.5 of the assessment order. The AO finally, not convinced with the reply of the assessee, added the entire amount of share application money raised from 7 parties of Rs.5,10,00,000/- to the income of the assessee by treating the same as unexplained cash credit under section 68.

19. In the appellate proceedings, the Ld. CIT(A) allowed the appeal of the assessee after taking into consideration the reply of the assessee by observing and holding as under :

> "3.2.12 I have analysed the documents filed by the appellant in respect of share applicants. On perusal of the above documents in respect of alleged share applicants, it is clearly seen that:
>
> i) The share application money has been received and repaid through banking channel.
> ii) Whole of the money received have been repaid without even allotting the shares.
> iii) If the intention was to bring unaccounted money into system and make it white money, then, the appellant would not have returned money again through banking channels with heavy interest.
> iv) The appellant had paid interest on repayment and also TDS has been deducted in each case.
>
> 3.2.13 In reaching the decision on this issue, I find guidance from the ratio of the following judgements. These are as under:
>
> It was pointed out in the case of H.R Mehta vs. AC1T, Mumbai (2016) 72 taxmann.com 110 (Bombay - HC), that the repayment of money with interest is a decisive factor in determining whether the money taken was to

be treated as genuine as well. If re-payment is not being disturbed by the AO, he has to accept the receipt of money also as genuine only.The relevant extract of the case is reproduced as under:

> 16. In the instant case although the appellant assessee has called upon us to draw an inference that the burden shifted to the revenue in the present case once it was established that the payments were made and repaid by cheque we need not hasten and adopt that view after having given our thought to various issues raised and the decisions cited by Mr.Tralshawalla and finding that on a very fundamental aspect, the revenue was not justified in making addition at the time of reassessment without having first given the assessee an opportunity to cross examine the deponent on the statements relied upon by the ACIT. Quite apart from denial of an opportunity of cross examination, the revenue did not even provide the material on the basis of which the department sought to conclude that the loan was a bogus transaction.
>
> 17. In our view in the light of the fact that the monies were advanced apparently by the account payee cheque and was repaid vide account payee cheque, the least that the revenue should have done was to grant an opportunity to the assessee to meet the case against him by providing the material sought to be used against assessee in arriving before passing the order of reassessment This not having been done, the denial of such opportunity goes to root of the matter and strikes at the very foundation of the reassessment and therefore renders the orders passed by the CIT (A) and the Tribunal vulnerable. In our view, the assessee was bound to be provided with the material used against him apart from being permitting him to cross examine the deponents. Despite the request dated 15th February, 1996 seeking an opportunity to cross examine the deponent and furnish the assessee with copies of statement and disclose material, these were denied to him. In this view of the matter, we are inclined to allow the appeal on this very issue.
>
> 18. Once we take this view it is not necessary to consider the second question as to whether or not the Tribunal had erred in law in holding that the amendment to Section 147(3) with effect from 1st April, 1989 were applicable to reassessment proceedings against the appellant in respect of assessment year 1983-84. This issue can be considered in an appropriate case and need not detain us any further. Mr. Tralshawala had relied upon the decision in Ranch! Handloom Emporium (supra) which held that the Direct Tax Laws (Amendment) Act, 1987 came into force from 1st April, 1989. The case before that Court related to assessment year 1988-89 and the relevant accounting year being 9th July, 1986 to 27th June, 1987 and hence the Court held that there was no doubt that the assessment in that year would be governed by the unamended provisions. The applicability of the amended provisions need not be gone into by us in the present case since we are of the view that on very first

question, we are inclined to hold against the revenue and in favour of the assessee.

In the above decision, it was held by the jurisdictional Bombay High Court that since loan was advanced and repaid vide account payee cheques, and appellant once prime facie had established thebonafide of the loan transactions, it was for the revenue to establish that it was not bonafide.

In the case of AyachiChandrashekharNarsangjivs. CIT[2014] 42 Taxmann.com 251 (Gujarat-HC), the decision given is precisely on this issue only. In this judgement, the Hon'ble Gujarat High Court has clearly held that where the loans were taken and thereafter repaid through banking channels and if the repayment is accepted by the department as genuine, then, the receipt of loans should also be taken as genuine. The relevant extract of the case is reproduced as under:

> "Being aggrieved and dissatisfied with the order passed by the CIT(A) in deleting the addition of Rs.1,45,00,000/- made by the Assessing Officer under Section 68 of the Income-tax Act on the ground that the loan taken from Shri Ishwar Adwani was not explained satisfactorily, the revenue preferred appeal before the ITAT and by impugned judgment and order, ITAT dismissed the appeal preferred by the revenue confirming the order passed by the CIT(A) deleting the aforesaid addition. Being aggrieved and dissatisfied with the impugned judgment and order passed by the ITAT, the revenue has preferred the present Tax Appeal with the aforesaid substantial question of law;
>
> 5. Heard Shri Pranav Desai, learned Counsel appearing on behalf of the revenue. The only contention on behalf of the revenue is that on the last day of passing the order, communication dated 22/12/2008 of the assessee along with the confirmation letter of Shri Ishwar Adwani confirming the loan/advance of Rs.1,45,00,000/- given to the assessee, was produced before the Assessing Officer i.e. on the day the Assessing Officer passed the order and thereafter the same was reproduced before the CIT(A) and the CIT(A) considered the same, the CIT(A) ought to have remanded the matter to enable the Assessing Officer to hold further inquiry and, therefore, it is requested to admit/allow the present Tax Appeal.
> 6. Having heard Shri Pranav Desai, learned Counsel appearing on behalf of the revenue and on perusal of the order passed by the CIT(A) confirmed by the ITAT, it appears that CIT(A) was satisfied with respect to the genuineness of the transaction and creditworthiness of Shri Ishwar Adwani and, therefore, deleted the addition of Rs.1,45,00,000/- made by the Assessing Officer It is required to be noted that as such an amount of Rs.1,00,00,000/-vide cheque no. 102110 and an amount ofRs.60 lakh vide cheque no. 102111 was given to the assessee and out of the total loan of Rs.1.60 crore, Rs.15 lakh vide cheque no. 196107 was repaid and, therefore, an amount of Rs.1,45,00,000/- remained outstanding to be paid to Shri Ishwar Adwani. It has also come on record that the said loan

> amount s been repaid by the assessee to Shri Ishwar Adwani in the immediate next financial year and the Department has accepted the repayment of loan without probing into it. In the aforesaid facts and circumstances of the case, when the ITAT has held that the matter is not required to be remanded as no other view would be possible, we see no reason to interfere with the impugned order passed by the ITAT. No question of law, much less substantial question of law arises in the present Tax Appeal. Hence, the present Tax Appeal deserves to be dismissed and is accordingly dismissed.

In the instant case, it was held that that where the department had accepted repayment of loan in subsequent year, no addition was to be made in current year on account of cash credit.

3.2.14 The facts of the both the cases are similar to the appellant's case, as in both the cases, the assessee had repaid the amount received by bank channels which were remaining outstanding in the books of account of the assessee and the department had accepted the repayment of loan without probing into the same. It was held that the addition u/s 68 was not sustainable. ln our case also, the appellant company has repaid the entire share application money received from alt the seven parties, and the department has accepted the repayment without probing in to the same, hence, this case also deserves the same treatment.

3.2.14 Following are some more important decisions in this regard:

The Jurisdictional High Court in the case of CIT vs. Creative World Telefilms Ltd (2011) 333 ITR 100 (Bom) has held that when the assessee had given the details of name and address of the shareholder, their PAN/GIR Number and had also given cheque number, name of bank, and the AO did nothing except issuing summons which were ultimately returned back with an endorsement "Not Traceable", Tribunal was justified in deleting the addition of cash credit in respect of share application money.

3.2.15 The Hon'ble Jurisdictional High Court in the case of CIT v Gagandeep Infrastructure Pvt Ltd (ITA 1613 of 2014 dated 20.03.2017) has held that the Supreme Court decision in CIT v Lovely Exports P Ltd (317 ITR 218) is applicable for all Assessment Years prior to AY 2013-14. In the Supreme Court decision in Lovely Exports P Ltd (supra), the Hon'ble Supreme Court has held that if the amounts have been subscribed by bogus shareholders, it is for the Revenue to proceed against such shareholders by reopening their assessments. This being the law of the land, it must be applied to the assessee's case.lt is true that the AO observed that the companies had no recent AGM and bank statement showed deposit prior to the payment to the appellant. But, all these deposits are by cheque only and are variously bank loans, payments from business parties etc etc. On the contrary, during the assessment proceedings, the Assessing Officer did not do his duty in issuing notice u/s 133(6) of the Act to any of the subscribers. The assessee was not given a chance to discharge the burden of proof u/s 68 of the Act.

3.2.16 The Hon'ble Bombay High Court decision of CIT Vs Orchid Industries Ltd (ITXA 1433 of 2014) is in the same context of bogus share application money. In this case, a survey was conducted u/s 133A of the Income Tax Act, 1961 on 24.11.2004. In the assessment order passed u/s 143(3) dated 29.12.2006, an addition of Rs. 95,00,000/- was made in respect of share capital and share premium received from the seven parties on the basis of enquiry made by ADIT (Inv) - Unit IV, Kolkatta as the identity and credit worthiness of the parties and genuineness of the transaction could not be proved. An appeal was filed before CIT(A) against the aforesaid addition made in the assessment order. During the appeal proceedings, it was argued that no proper opportunity was given to the assessee to produce the parties even though the parties were ready to appear before the authorities. Therefore, considering this request of the assessee, the matter was remanded back to the assessing officer with a direction to give one more opportunity to the assessee to produce the parties. However, even during the course of remand report proceedings which lasted for almost two years, the parties could not be produced in spite of several opportunities given by the assessing officer. Therefore, the addition of Rs. 95,00,000/- was confirmed by the CIT(A) vide his order dated 17.06.2011. On further appeal, the appeal was allowed by Hon'ble ITAT on the ground that all the relevant documentary evidences have been produced and thus, the genuineness of the transaction and identity and credit worthiness of the parties has been established. Thus, the addition of Rs.95,00,000/- was deleted by Hon'ble ITAT vide its order dated 07.02.2014.

The Department filed an appeal to Hon'ble Bombay High Court raising the following Questions of Law:

> Whether on the facts and in the circumstances of the case and in law, orders of the Tribunal was perverse in deleting the addition of Rs.95,00,000/- made u/s. 68 of the Act, relying only on the documentary evidence produced by the Respondent Company while ignoring the key factor that these entities were not traceable at their given addresses?
>
> Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in not appreciating the observations made by the Delhi High Court in Nova Promoters and Finlease Pvt. Ltd. 18 Taxman.com 217 wherein the Court has observed that cases of this type cannot be decided only on the basis of documentary evidences above and there is need to take into account the surrounding circumstances?
>
> The Tribunal ought to have taken note of the fact that the assessee was not able to produce even a single party before the AO despite agreeing before the CIT(A) that it will produce all parties before the AO during Remand proceedings."

The Bombay High Court observed that the assessee had produced the documents such as PAN, confirmation, bank statement, allotment letters, financial statements. The Balance Sheets show significant funds to

invest in shares of the assessee. The Hon'ble Bombay High Court held that considering the voluminous documentary evidence, only because those persons had not appeared before the Id Assessing Officer would not negate the case of the assessee. The Hon'ble Bombay High Court held as under:

> "The Tribunal has considered that the Assessee has produced on record the documents to establish the genuineness of the party such as PAN of all the creditors along with the Confirmation, their bank statements showing payment of share application money. It was also observed by the Tribunal that the Assessee has a/so produced the entire record regarding issuance of shares i.e. allotment of shares to these parties, their share application forms, allotment letters and share certificates, so also the books of account.
>
> The balance sheet and profit and loss account of these persons discloses that these persons had sufficient funds in their accounts for investing in the shares of the Assessee. In view of these voluminous documentary evidence, only because those persons had not appeared before the Assessing Officer would not negate the case of the Assessee. The judgment in case of Gagandeep Infrastructure (P.) Ltd. (supra) would be applicable in the facts and circumstances of the present case."

In the case of Orchid Industries P Ltd (supra), the AO had issued 133(6) notices to the parties. Despite the fact that the parties did not appear before the AO, the Hon'ble Bombay High Court have held that the transaction was genuine as the assessee produced voluminous documentary evidence.

3.2.17 Recently, the Hon'ble Mumbai ITAT in the case of Arceli Realty Ltd v ITO (ITA 6492/M/2016), has followed the decision of jurisdictional High Court in the case of Gagandeep Infrastructure P Ltd. The issue involved therein was also related to share application money accepted by the assessee from Pravin Jain Group of companies and the information in this regard had been received by the AO from the DGIT (Inv) Mumbai. In that case also, the assessee had submitted the supporting documentary evidences such as copy of ITR, Balance Sheet and bank statement of the investor companies, Board Resolution, confirmation, ROC return etc.

In this case, the Hon'ble ITAT held that "The assessee duly furnished the proof of identity like PAN, bank account details from the bank, other relevant material, genuineness of the transaction, payment through banking channel and even the source of source, therefore, the assessee has proved the conditions laid down u/s 68 of the Act. It is also noted that in spite of repeated request, the Id AO did not provide opportunity to cross examine the concerned persons and even the relevant information and allegation, if any, made therein, which has been used against the assessee, was not provided to the assessee. At this stage, we add here that mere information is not enough rather it has to be substantiated with facts. The information may and may not be correct. For fastening the liability upon anybody, the Department has to provide the authenticity of the information to the person against whom such information is used. The principle of natural justice, demands that without confronting the assessee of such evidence, if any, or the information, no addition can be made. Even otherwise, as per Article 265 of the

Constitution only legitimate taxes have to be levied and collected. In our humble opinion, the assessee has duly discharged the onus caste upon it, therefore, respectfully following the decisions of Hon'ble Courts, we reverse the order of the Id CIT(A), resultantly, this ground of the assessee is allowed."

3. 2. 18 The issue regarding additions u/s.68 on share application money has been considered by various Hon'ble Courts. Some of the relevant findings of Courts are considered as under:

i. CIT Vs. Gangeshwari Metal P. Ltd. 361 ITR 10 (Delhi)

The Hon'ble High Court of Delhi has held that the genuineness of the transactions is established as the transactions are routed through banking channels. It was seen that the share application money was received through a/c payee cheques, detail of which had been filed by the assessee by filing the copy of the bank a/c of the share applicants. Thus where the return of income was filed by the creditors of the assessee and was accepted by the AO nad payments were through a/c payee cheques the genuineness of the transaction cannot be doubted. The revenue could not prove that the money received by the appellant in the form of share application has come from its own sources. No evidences regarding this have been brought on record by the AO.

In CIT Vs. Divine Leasing & Finance Ltd. 299 ITR 268

the Hon'ble Delhi High Court held that burden of proof can seldom be discharged the hilt by the assessee. If the A.O. harbours doubts of the legitimacy of any subscription he is empowered, rather duty bound, to carry out thorough investigations. But if the A.O. fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the company. If relevant details of address and identity of the subscribers are furnished to the department alongwith copies of the shareholders register, share application forms, share transfer register etc. it would constitute acceptable proof or explanation by the assessee.

iii. In Hindustan Inks & Resins Ltd. vs. Dy. C.I.T. 60 DTR 0018 (2011)

the Hon'ble Gujarat High Court has held as under:

"From the concurrent findings recorded by the authorities below, it is apparent that none of the parties have recorded any findings to the effect that the identity of the depositors had not been established by the assessee. The case of the respondent is that the assessee has failed to explain the source of such cash as well as creditworthiness of the deposits. It is not the case of the revenue that the subscribers are bogus, the case of the revenue is that the source of such cash as well as creditworthiness of the depositors has not been explained. In the circumstances, the department is free to proceed to reopen the individual assessments of the deposits named by the assessee, however, under no circumstances, can the amount

of share capital be regarded as the undisclosed income of the assessee."

iv. In CIT Vs. K.C. Fibres Ltd. in IT Appeal No.701 of 2009

the Hon'ble Delhi High Court held that in so far as assessing company is concerned, it is not disputed that money was paid to it, towards the aforesaid share application money, by means of cheques. It is not for the assessing company to probe as to the source from where DP collected the aforesaid money. It was for the AO, in these circumstances to inquire into the affairs of DP which is an independent company in as much as no finding is arrived at by the AO that the two companies are umbrella companies or have any relationship with each other.

v. In CIT Vs. STL Extrusion (P) Ltd. 333 ITR 269

the Hon'ble Madhya Pradesh High Court held that though it is the duty of the assessee to establish the genuineness of the credits but in the present case the assessee has duly established the identity and source of credits. The Tribunal has also held that once the identity and source of the subscribers of the shares is established no addition can be made u/s.68. The assessee having duly furnished the name, age, address, date of filing the application of shares, number of shares of each subscriber there was no justification for the AO for making the impugned addition because once the existence of the investors / share subscribers is proved, onus shifts on the revenue to establish that either the share applicants are bogus or the impugned money belongs to the assessee itself. After filing of the affidavits of the said subscriber the appellant at no stage of the proceedings sought any opportunity to rebut the said affidavits.

vi. In CIT Vs. Prayag Hospital & Research IT Appeal No.917 of 2010

the Hon'ble Delhi High Court held that shareholders of the assessee company having appeared before the AO and furnished affidavits along with supporting documents confirming their investment in the assessee, identity of the creditors is established and therefore, addition cannot be made in the hands of the assessee.

vii. In CIT Vs. TDI Marketing (P) Ltd. IT Appeal No.340 of 2009

the Hon'ble Delhi High Court held that assessee company having furnished complete details of shareholders name, addresses, PAN and bankers and they having confirmed the investment and the AO having not given his specific comments on his enquiries pertaining to them except for nine shareholders, addition u/s.68 cannot be sustained.

viii. In CIT vs. Gangour Investment Ltd. (2011)335 ITR 359

the Hon'ble High Court of Delhi held that assessee company having filed the subscription forms of the investors, including TT Ltd., a group company, containing details and information with respect to their addresses

as well as PAN, thereby establishing their identity and also supplied a copy of the statement of bank accounts of TT Ltd., it has discharged its onus in respect of the veracity of the transaction and therefore, the addition u/s.68 made by the AO in respect of the impugned investment made by TT Ltd. has been rightly deleted.

3.2.19 Thus, concludingly, it has to be said that the appellant has done everything in its power to prove the genuineness of the transactions assrequired to prove the satisfactory nature of Share Capital/loan transaction. In these circumstances, the onus had clearly shifted to the AO in view of the fact of re-payment of money with interest. If the AO was not satisfied with even this, she was duty bound to specify what more material he wanted to appellant to furnish. The AO never asked for any further material. This leads to the inescapable conclusion that the AO could not think of any further material to ask for and proceeded to reject the appellant's claims, relying upon the information/material, which he never even brought to the notice of the appellant for any proper rebuttal. The unequivocal conclusion is that the impugned share application money received from the impugned parties, have to be treated as explained satisfactorily. No cogent material has been adduced by the AO to show that share application money was unexplained and/ or, why the re-payment of the same was done. In fact, the appellant company has returned the share application money along with heavy interest to the parties concerned. If there was any intention of the appellant to bring the undisclosed money in the books through share application, then, why the appellant shall return the money to the parties even with interest ! Therefore, the impugned addition made under the Section 68 fails on several counts - (1) reliance on evidence that is totally inadequate, (2) failure to recognize the satisfactory nature of the explanation 7 evidence tendered by the appellant to explain the transaction, and (3) lastly, failure to adduce any independent finding while conducting the re-assessment proceedings. Hence the impugned addition cannot be sustained.

3.2.20 In view of the above facts and circumstances of the case as well as judicial pronouncements referred and relied above by me and also certain judicial pronouncement relied upon by the appellant in its written submissions which have been produced above, addition made by the AO under the heading share capital /share application money cannot be sustained and therefore, the AO is directed to delete the addition of Rs. 5,10,00,000/- made u/s 68 of the IT Act. This ground of appeal is, therefore, allowed.

GROUND ALLOWED"

20. The Ld. CIT(A) while deciding the case of the assessee gave a finding that assessee has filed all the necessary evidences before the AO comprising confirmations from shareholders, PAN cards, IT acknowledgement of shareholders, share application forms disclosing mode of payment, number of shares subscribed, share premium, bank details and board resolution of the shareholder companies authorizing the investment in

equity shares of the assessee. The Ld. CIT(A) also noted that all the 7 shareholders were not issued shares and as per the terms the assessee has repaid back the application money along with interest @ 12% on which TDS has been deducted and deposited with the government treasury. The Ld. CIT(A) has given a very detailed finding in para 3.2.3 to 3.2.18 in deciding the appeal of the assessee. Ld. CIT(A) has discussed the investorwise history and also the sources of investments of the investors as contained in para No.3.2.9. The Ld. CIT(A) has followed the decision of jurisdictional High Court in the case of H.R Mehta vs. AC1T, Mumbai (2016) 72 taxmann.com 110 (Bom) wherein it has been held that repayment of money with interest is a decisive factor in determining whether the money taken was to be treated as genuine. If the repayment is not being disturbed by the AO, he has to accept the receipt of money also as genuine. The Hon'ble Bombay High Court has held that where the money receipt has been repaid vide account payee cheques the assessee has prima-facie established the bonafides of loan transactions, no addition is warranted. Similarly, the Ld. CIT(A) has followed the decision of Hon'ble Bombay High Court in the case of CIT vs. Creative World Telefilm (2011) 333 ITR 100 (Bom.), CIT vs. Gagandeep Infrastructure Pvt. Ltd. ITA No.1613 of 2014 dated 20.03.2017, CIT vs. Gangeshwari Metal Pvt. Ltd. 361 ITR 10 (Del.), CIT vs. Divine Leasing & Finance Ltd. 299 ITR 268 Delhi HC and various other decisions as referred to in para 3.2.14 of the appellate order.

21. We have heard the rival submissions of both the parties and perused the material on record including the decision of the Ld. CIT(A). We find that in this case the assessee has raised share application money from 8 parties. The AO added

Rs.5,10,00,000/- as unexplained credit in respect of 7 parties whereas 8th party which is a sister concern of the assessee has been left out and has been accepted by the AO. We note that in this case the assessee has raised money through banking channel and furnished all the necessary evidences comprising confirmations from the investors, PAN numbers, ITR acknowledgements, annual accounts, board resolutions of the subscribing companies, share application forms and also the bank details. We also note that these investors were not allotted shares during the year and their money was repaid along with interest of 12% per annum. We further note that the assessee has deducted TDS from the interest paid to the investors and deposited the same in the government treasury. In this background we have perused the order of Ld. CIT(A) and also the various decisions cited by the Ld. CIT(A) while allowing the appeal of the assessee which included the decision of various High Courts including Hon'ble Bombay High Court and other co-ordinate benches of the Tribunal. We, therefore, do not find any reason to deviate from the findings of Ld. CIT(A) as the Ld. CIT(A) has considered all the aspects of the money raised by the assessee and also the various evidences filed vis-à-vis the ratio laid down in the decisions as discussed hereinabove. Accordingly, the ground Nos.2 & 3 are dismissed.

22. The appeal of the Revenue is dismissed.

ITA No.3715/M/2019 A.Y. 2010-11

23. The issue raised in ground No.1 is against the deletion of addition of Rs.9,90,000/- by Ld. CIT(A) as made by the AO under section 68 of the Act on account of unsecured loans.

24. The issue raised in ground No.1 is identical to one as decided by us in ground No.1 in ITA No.3716/M/2019 A.Y. 2011-12 wherein we have upheld the order of Ld. CIT(A). In the instant case also the issue is identical qua the interest provisions of Rs.9,90,000/- in respect of loans raised in earlier years and there is no addition to the unsecured loans during the current year as the assessee has not borrowed any money during the current assessment year. Accordingly, our finding on ground No.1 in ITA No.3716/M/2019 A.Y. 2011-12 would, mutatis mutandis, apply to ground No.1 in ITA No.3715/M/2019 A.Y. 2010-11.The ground no. 1 is dismissed.

25. The issue raised in ground No.2 is against the deletion of addition of Rs.1,40,00,000 by Ld. CIT(A) by restricting the addition to Rs.95 lakhs as made by the AO of Rs.2,35,00,000/- under section 68 of the Act.

26. The issue raised in ground No.2 & 3 is identical to one as decided by us in ground No.2 & 3 in ITA No.3716/M/2019 A.Y. 2011-12 wherein we have upheld the order of Ld. CIT(A) deleting the addition of Rs.5,01,00,000/- as made by the AO under section 68 of the Act towards share capital/share application money. Therefore, our finding in ground Nos.2 & 3 of ITA No.3716/M/2019 A.Y. 2011-12 would, mutatis mutandis, apply to ground No.2 & 3 of ITA No.3715/M/2019 A.Y. 2010-11. Accordingly, the ground No.2 & 3 are dismissed.

27. In the result, the appeal of the Revenue is dismissed.

ITA No.4882/M/2019 A.Y. 2010-11 (Assessee's appeal)

28. In ground no. 1 the assessee has challenged the order of CIT(A) upholding the jurisdiction of the AO to re-open the assessment under section 147 r.w.s. 148 of the Act. At the time of hearing the ld AR did not press this ground and therefore same is dismissed as not pressed.

29. In ground no. 2 the assessee has challenged the part confirmation of the addition to the tune of Rs.95,00,000/- by Ld. CIT(A) as against the addition made by the AO on account of share application money/share capital under section 68 of the Act. In this case, we have already upheld the order of Ld. CIT(A) wherein the Ld. CIT(A) has deleted the addition of Rs.1,40,00,000/- by following our decision in ITA No.3716/M/2019 A.Y. 2011-12 on ground No.2 & 3. However, the facts qua the addition sustained by Ld. CIT(A) of Rs.95,00,000/- are not same. The only difference we notice is that in those cases where we have upheld the order of Ld. CIT(A) the assessee has repaid the share application money along with the interest whereas in this case the repayment has not been made.

30. The facts in brief are that during the course of assessment proceedings the AO noticed that assessee has raised share application money from six parties aggregating to Rs.2,35,00,000/- and called upon the assessee to furnish the necessary details and evidences in order to prove the genuineness of the same. The AO also issued notice under section 133(6) of the Act to these investors, however, the same were returned unserved. The assessee produced before the AO the evidences comprising confirmations, ITRs, acknowledgments, share application forms, board resolutions

and payments through banking channels, however, AO was not satisfied with the genuineness of this share application money and added the same to the income of the assessee.

31. In the appellate proceedings, the Ld. CIT(A) partly allowed the appeal of the assessee to the extent of Rs.1,40,00,000/- during the year which has been repaid by the assessee during the year along with the interest of 12%, however, sustained the addition in respect of 5 shareholders to the tune of Rs. 95,00,000/- as mentioned from Sr.No. 1 to 5 in para 9.1 of the assessment order to whom the shares were allotted by the assessee. The Ld. CIT(A) while partly sustaining the addition relied on two decisions namely NRI Iron and Steel 103 TM.com 48 SC and ITO vs. Synergy Finlease Pvt. Ltd. ITA No.4778/Del/2013 and thus justified the addition to the tune of Rs. 95,00,000/- which has been under challenge before us.

32. We have heard the rival submissions of both the parties and perused the material on record. We find that the only distinguishable facts qua the addition sustained by Ld. CIT(A) of Rs.95,00,000/- from 5 share applicants as mentioned in para 9.1 at Sl. No.1 to 5 are that in these cases the shares were allotted by the assessee as partly paid up and thus the full payment was not made by the applicants. The balance call money due from these shareholder was not paid despite various reminders and follow ups by the assessee. Ultimately the assessee forfeited the money already paid up of Rs. 95,00,000/- by these investors. These share applicants were M/S Desire Vincom Pvt Ltd., M/S Nightangle Vyapar Pvt Ltd. ,M/S Chin Purni Commerce Pvt Ltd., M/S Chandra mukhi Investment Advisory pvt Ltd. and M/S Wellplan Viocom Pvt Ltd. The

undisputed facts are that the assessee has filed all the documents namely confirmations of the investors, their PAN card, ITRs, share application forms, number of shares subscribed, share premium and proofs of receipt through banking channel with the AO to prove the identities and creditworthiness of the investors and genuineness of these investments. The ld CIT(A) has confirmed the addition only on the ground that in these cases the assessee has not repaid the money but forfeited the same. The ld CIT(A) has discussed in detail the each investor in para 3.2.19 of the appellate order. The only reason cited by the ld CIT(A) for confirming this amount is that the income of the investors is very meager. We have also examined the financials qua these investors and find that they have the requisite resources to invest in the assessee company. We find merit in the contentions of the ld AR that the forfeiture of amount already paid on partly paid up shares is a capital receipt as the same has not accrued from normal business activities of the assessee. Besides the decisions relied upon by the ld CIT(A) are distinguishable on facts and are not applicable to the present facts. The case of the assessee is also squarely covered by the decision of DCIT(OSD), Cir-4Vs Mahalaxmi Rubtech Ltd. ITA No. 1190/Mum/Ahd/2014 order dated 06.03.2017 and Sunita Gupta Share Broker Ltd Vs ACIT ITA No. 4188/Del/2010 order dated 7.12.2011. The operative para in the case of DCIT(OSD), Cir-4 Vs Mahalaxmi Rubtech Ltd(Supra) is reproduced below:

> "6. We have heard the contentions of ld. Departmental Representative and gone through the records placed before us as well as the decision of the Co-ordinate Bench, Ahmedabad in the case of DCIT(OSD) vs. Brijlaxmi Leasing & Finance Ltd.(supra). Solitary grievance of the Revenue through this appeal is against the order of ld. Commissioner of Income Tax(A) deleting the addition of Rs.94.80 lacs by

treating the amount received on account of forfeiture of share application money by way of issue of share warrants as capital receipts as against ld. Assessing Officer 's order treating it to be revenue receipt. We observe that there is no dispute from the side of Revenue to the established fact that assessee received the application money of Rs.94.80 lacs for technical textile project as per Security Exchange Board of India and Bombay Stock Exchange guidelines and with the necessary approval for issuing share warrants. This sum of Rs.94.80 lacs has been shown in the audited balance sheet under the head "share-holders fund." As the shares were to be allotted before 24.2.2009 but the share warrant applicants failed to give the balance amount, the warrant application money had been forfeited during the relevant year.

6.1 We further observe that similar issue dealing with similar facts relating to forfeiture of share application money to be treated as capital receipt or revenue receipt came up before the Co-ordinate Bench, Ahmedabad in the case of DCIT(OSD) vs. Brijlaxmi Leasing & Finance Ltd. (supra) and Revenue's appeal was dismissed by observing as follows :-

> "7. We have heard the rival submissions and perused the orders of the lower authorities and the material available on record. In the instant case the assessee was to receive call money in respect of share as per the terms of prospectus and the allotment letters, but the same were not received from some of the shareholders. In this case, the share application money was forfeited as per the terms of the prospectus. The above facts are not in dispute. The short question which fall for our consideration is whether the above forfeiture amount is taxable under the provisions of Income-tax Act, 1961 or not. The learned DR vehemently placed reliance on the decision of the Hon'ble Supreme Court in the case of T.V. Sundaram Iyengar & Sons Ltd. (supra) for his contention that forfeited amount is taxable as revenue receipt. However, we find that the facts of the case that were before the Hon'ble Supreme Court are distinguishable from the facts before us. In the instant case no security deposit or advance received for performance of the contract was forfeited. In fact, the amount received was against issue of shares and issue of shares is not the business of the assessee. The same cannot be treated as receipt in the normal course of the business of the assessee which is engaged in financing and leasing business. Further, the assessee has also not credited the forfeited amount in its profit & loss account but in contradistinction to that it has credited the same in capital reserve account. In the above facts, in our cons idered opinion the decision of the Tribunal in the case of Prism Cement Ltd. (supra) is more applicable which was rendered by the Tribunal after duly considering the aforesaid decision of the Hon'ble Supreme Court in the case of T.V. Sundaram Iyengar & Sons Ltd. (supra). The Tribunal in the said case has held as under :
>
> > "15. Thus, the earnest money or an advance amount received on account of issuance of NCDs, if forfeited on account of non-payment of call money, the loan liability would only convert into a capital receipt. It would not assume a character of revenue receipt or business receipt because NCDs were not issued in the course of regular business of the asses see as evident from the facts of the case. Assessee's main business is of cement and it was in the process of set up of cement manufacturing plant at Satna during the

impugned assessment year. In these circumstances, we are constrained to hold that the amount received by the assessee in lieu of issuance of NCDs which were forfeited later, on account of non-payment of call money assumes a character of capital receipt which earlier was shown as a loan liability in the books of account of the assessee. If we consider this receipt to be a business receipt even then it would not be taxable to tax under the provisions of section 41(1) of the Act, inasmuch as there was no allowance or deduction of this liability in the earlier years."

In view of the above, respectfully following the aforesaid decision of the Mumbai Bench of the Tribunal we find no reason to interfere with the order of the learned CIT(A). It is confirmed and the ground of appeal of the revenue is dismissed."

7. Respectfully following the decision of the Co-ordinate Bench in the above case, we find that the facts dealt in this case are similar to those in the case of assessee and ld. Commissioner of Income Tax(A) has allowed assessee's appeal in a right perspective by treating the amount of Rs.94.80 lacs received as share application money for issuing of share warrants as capital receipt and not revenue receipt as it was not earned from regular business activities carried on by the assessee. We, therefore, find no reason to interfere with the order of ld. Commissioner of Income Tax(A) and uphold the same. Accordingly the ground of revenue is dismissed."

In view of these facts and the decision of the coordinate bench of the tribunal we hold that the money forfeited by the assessee of Rs. 95,00,000/- can not be added under section 68 of the Act. Accordingly we set aside the order of CIT(A) and direct the AO to delete the addition. Resultantly, the appeal of the assessee is allowed.

33. In the result, the appeals of the Revenue are dismissed and the appeal of the assessee is allowed.

Order pronounced in the open court on 22.02.2021.

Sd/-	**Sd/-**
(Amarjit Singh)	**(Rajesh Kumar)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated: 22.02.2021.

* 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.