

आयकर अपीलिय अधिकरण, 'डी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री जी. मंजुनाथ, लेखा सदस्य के समक्ष

**BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA Nos.:1002/CHNY/2018 & 743/CHNY/2015

निर्धारण वर्ष / Assessment Years: 2012-13 & 2011-12

Late Shri Naren Rajan,
(Rep. by Legal Heir
Smt. Padmini Rajan),
131, Race Course Road,
Coimbatore - 641 018.

The ACIT,
v. Corporate Circle - 2,
Coimbatore.

PAN: ACDPR 5207K

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

&

आयकर अपील सं./ITA No.:1161/CHNY/2018

निर्धारण वर्ष / Assessment Year: 2012-13

The ACIT,
Corporate Circle - 2,
63-A, Race Course Road,
Coimbatore.

Late Shri Naren Rajan,
v. **(Rep. by Legal Heir**
Smt. Padmini Rajan),
131, Race Course Road,
Coimbatore - 641 018.

PAN: ACDPR 5207K

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

निर्धारिती की ओर से/Assessee by

: Shri K.R. Vasudevan, Advocate &
Shri G.Baskar, Advocate

राजस्व की ओर से /Revenue by

: Shri G. Srinivasa Rao, CIT

सुनवाई की तारीख/Date of Hearing

: 06.07.2021

घोषणा की तारीख/Date of Pronouncement

: 09.08.2021

आदेश /O R D E R**Per G Manjunatha, AM:**

These two appeals filed by the assessee and one appeal filed by the Revenue are directed against separate orders of learned Commissioner of Income Tax (Appeals), Coimbatore, dated 03.02.2015 & 29.01.2018 and pertains to assessment years 2011-12 & 2012-13. Since facts are identical and issues are common, for the sake of convenience, these appeals are heard together and are being disposed off, by this consolidated order.

ITA No.743/Chny/2015

2. The assessee has raised the following grounds of appeal:-

“1.1. The order of the Commissioner of Income-Tax (Appeals) is wrong, illegal and totally opposed to facts and is liable to be reversed.

1.2. The Commissioner of Income-Tax (Appeals) went wrong in disposing of the appeal in a summary manner without considering the facts of the case and the submissions made before him in the proper perspective.

2.1 The Commissioner of Income-Tax (Appeals) went wrong in confirming the action of the Assessing Officer in bringing to tax a sum of Rs.69,56,522 as deemed dividends.

2.2 The Commissioner of Income-Tax (Appeals) having found that the amount had been paid by the Company Tristar Accommodations Pvt Ltd for acquiring the property, erred in stating that the Company has paid more than what was agreed.

2.3 The Commissioner of Income-Tax (Appeals) ought to have also seen that the Assessing Officer is wrong in artificially splitting a normal business transaction the transaction into two.

2.4 The Commissioner of Income-Tax (Appeals) erred in not considering the evidences filed in support of the claim; but had confirmed the addition on assumptions.

3.1 The Commissioner of Income-Tax (Appeals) went wrong in confirming the action of the Assessing Officer in bringing to tax a sum of Rs.90 Lakhs being the amounts paid by the Company towards the Joint Venture agreement as deemed dividends.

3.2 The Commissioner of Income-Tax (Appeals) went wrong in observing that the business connection could not be established.

3.3 The Commissioner of Income-Tax (Appeals) went wrong in further observing that what was paid by the Company is only a loan to the assessee.

3.4 The Commissioner of Income-Tax (Appeals) went wrong in deciding the issue on irrelevant considerations.”

3. The brief facts of the case are that the assessee is an individual, derived income from house property, income from business and income from other sources, filed his return of income for the assessment year 2011-12 on 30.09.2011, declaring income of Rs.62,75,257/-. The case was selected for scrutiny and during the course of assessment proceeding, the AO noticed that the assessee is Proprietor of M/s. Tristar Consultancy Services, had received a sum of Rs.2,50,00,000/- from M/s. Tristar Accommodation Ltd., a company in which, he is the Director and

holding 77% of the share capital. The AO further noted that on scrutiny of the balance sheet of the company, it was noticed that said amount has been shown under the head 'loans and advances'. The AO further noted that out Rs. 2,50,00,000/-, a sum of Rs.1,60,00,000/- paid to M/s.Tristar Consultancy Services as advance for purchases and further, a sum of Rs.90,00,000/- paid to Shri Naren Rajan for land advance. In order to ascertain nature of payments and also to examine whether said payments are hit by provisions of section 2(22)(e) of the Income Tax Act, 1961 (hereinafter the 'Act'), the AO called upon the assessee to furnish necessary evidences including nature of payments and purpose for which said advances are given to the assessee. In response, the assessee submitted that M/s. Tristar Accommodation Ltd., is engaged in the business of real estate development, was in the process of improving its rental income had given advance to Shri Naren Rajan, Proprietor of M/s. Tristar Consultancy Services for purchase of 20 independent villas to be constructed by the firm. The assessee further stated that the company has paid a sum of Rs.90,00,000/- to Shri Naren Rajan, as advance for joint development of his land at Vedapatti. Since, both transactions are routine business transactions, same cannot be treated as loans and advances which is hit by provisions of section 2(22)(e) of the Act.

4. The AO, however was not convinced with the explanation furnished by the assessee and according to him, although the assessee has submitted agreement copies between M/s. Tristar Accommodation Ltd., and Shri Naren Rajan for both transactions, but on scrutiny of agreement between the parties, it was noticed that both agreements are signed by Shri Naren Rajan, one in the capacity of Proprietor of a firm and another in the capacity as a Director of the company. Further, although agreement is for purchase of property, but nothing has been mentioned about payment of consideration for purchase or property. Therefore, he opined that since no payment schedule was agreed upon between the parties, he has imputed his own estimation and accordingly, agreed consideration of Rs.5.2 crores for purchase of 20 villas has been divided by 69 months (the total period of agreement) and arrived at a monthly equal installment of Rs.7,53,623/-. The AO further computed total installments payable on each year and worked out amount to be paid as per agreement at Rs.90,43,476/- for assessment years 2009-10 to 2014-15 each and determined excess amount paid over and above installments payable for purchase of property. Since, the assessee has paid a sum of Rs.1,60,00,000/-, he opined that it has paid excess consideration for purchase of property over and above actual installments payable

for Rs.90,43,476/- and thus, excess payment of Rs.69,56,524/- has been treated as deemed dividend within the meaning of section 2(22)(e) of the Act.

5. As regards advance paid to Shri Naren Rajan for joint development of property, he has rejected the explanation of the assessee and brought said advance as 'loans and advances' within the meaning of section 2(22)(e) of the Act, on the ground that so called joint development agreement is an afterthought to cover-up loans and advances given to the Director, who is holding more than 10% beneficial interest in the company and further to overcome the provisions of section 2(22)(e) of the Act and hence, he opined that advances given to Shri Naren Rajan is nothing but loans and advances, which comes u/s.2(22)(e) of the Act and accordingly, made additions u/s.2(22)(e) of the Act.

6. Being aggrieved by the assessment order, the assessee preferred an appeal before the CIT (A). Before the Id.CIT (A), the assessee has reiterated his submissions made before the AO and contented that two transactions between the assessee and the Company, M/s Tristar Accommodation Limited are normal business transactions which are given for the purpose of purchase of 20 villas

from M/s. Tristar Consultancy Services, a firm developing villas. The assessee further contended that company has paid a sum of Rs.90,00,000/- as advance for joint development of property owned by Shri Naren Rajan, for which necessary joint development agreement copy was furnished before the AO. The AO never disputed the fact that both transactions are normal commercial transactions between the parties, but, he has imputed his own views and estimated amount payable as per agreement between the parties and worked out excess payment by suspicion, on the ground that the assessee has paid lump sum payment over and above actual payment required to be made for the relevant period, without appreciating the fact that once a particular transaction is considered to be a normal commercial transaction, the AO has no rule to say, how and when payments need to be made.

7. The CIT(A) after considering relevant submissions of the assessee and also taken note of various facts brought out by the AO held that advance taken from M/s Tristar Accommodation Limited for sale of 20 Villas is loan and advance as defined u/s 2(22)(e) of the Act, and hence, there is no error in reasons given by the AO to bring said advance within the ambit of section 2(22)(e) of the Act. The Id. CIT(A) has analyzed agreement between the parties and

held that as seen from details of comparative statement for similar sales to others and their cost of the property till date of their possession, in comparison with cost of the property to M/s.Tristar Accommodation Ltd., clearly show that there is no much difference between the cost per unit for the bookings made on similar dates. He, further observed that from the comparative statement, the date of possession by other purchasers was 31-03-2011, while the registration of the property was completed much earlier. Therefore, he opined that there is no error in the findings recorded by the AO to treat excess payment of Rs.69,56,522/- as deemed dividend u/s.2(22)(e) of the Act. The relevant findings of the CIT(A) are as under:-

"7. As submitted by the Authorized Representative, I had gone through the comparative cost per villa for the selected purchases. As seen from the details of comparative statement for similar sales to others and their cost of the property possessk1n comparison with the cost of the property to N/s. Tristar Accommodations Ltd. clearly show that there was not much difference in the cost per unit for the bookings made on similar dates. As observed from the comparative statement, the date of possession by other purchasers was 31.03.2011, while the registration of the property was completed much earlier. Coming to the villas purchased by MIs. Tristar Accommodations Limited, the villas have not been handed over to MIs. Tristar Accommodations Limited, till date. The Authorized Representative submitted that the date of possession expected is 30.04.2015. In this case, it is actually more costlier for M/s. Tristar Accommodations Limited when compared to others. On calculation of interest from the date of payment to the date of possession, M/s.Tristar Accommodations Limited is purchasing the villas at higher rate. There was no significant advantage from the excess payment made to M/s.Tristar Accommodations Limited. In the case of others, the possession was given on 31.03.2011 and till date M/s.Tristar

Accommodations Limited is not in possession of the property to realize rental income. It is also not clear whether villas belong to M/s. Tristar Accommodation Ltd. have been constructed or not. Hence, it is a dear case of payment made by M/s. Tristar Accommodations Limited to the Proprietary Concern of Shri Naren Rajen, M/s.Tristar Consultancy Services attracting provisions of Section 2(22)(e) of the Income Tax Act, 1961. As seen from the details discussed in the assessment order, the company has advanced an amount of Rs.69,56,522/- more than what is agreed. I therefore agree with the Assessing Officer that the excess payment of Rs.69,56,522/- is an independent benefit to the assessee and rightly considered as deemed dividend by the Assessing Officer under the provision of Section 2(22)(e) of the Income Tax Act, 1961. The grounds of appeal are DISMISSED."

8. As regards, advance paid to Shri Naren Rajan, for joint development of property, the CIT(A) observed that the AR could not establish that there was any business connection in paying advance of Rs.90,00,000/- to Shri Naren Rajan. As stated by the AO, it is only a loan provided to Shri Naren Rajen in the name of security deposit for joint development of property. Therefore, he opined that even this payment was hit by the provisions of section of 2(22)(e) of the Act and hence, rejected arguments of the assessee and confirmed additions made by the AO. The Relevant findings of the Id. CIT(A) are as under:-

" 10. I have gone through the submissions made by the appellant and also the order of the Assessing Officer. As seen from the details submitted by the Authorized Representative, the land was not converted in the Revenue Records and hence there was no approval for the project. The Joint Development Agreement Was entered on 05.04.2008 between M/s. Tristar Accommodations Limited and the appellant Shri Naren Rajen. Till date there was no progress in the project. The company, MIs. Tristar Accommodations Limited has given an advance of Rs.90 Lakhs to Shri Naren Rajen. The

Authorized Representative could not establish that there was any business connection in paying an advance of Rs.90 Lakhs to. Shri Naren Rajen. As stated by the Assessing Officer, it is only a loan provided to Shri Naren Rajen in the name of security deposit in the Joint Development Agreement. On going through facts, it is observed that the Assessing Officer has rightly brought to tax by treating the advance as deemed dividend as per Section 2(22)(e) of the Income Tax Act, 1961. This ground of appeal is DISMISSED”

9. The Id. AR for the assessee submitted that the Id.CIT(A) has erred in confirming the findings of the Id.AO in bringing into tax, a sum of Rs.69,56,522/- as deemed dividend u/s 2(22)(e) without appreciating the fact that the AO had categorically admitted the fact that said payment is a normal business transaction between parties, but has estimated payment on suspicion and surmises manner without any base. The Id.AR further submitted that the assessee has filed all evidences including Memorandum of Understanding (MoU) between M/s.Tristar Accommodation Ltd., and M/s. Tristar Consultancy Services, as per which the company has agreed to purchase 20 villas, for which a sum of Rs.1,60,00,000/- has been paid as advance for purchase. The assessee had also explained reasons for making lump sum payment and demonstrated with evidences that it had derived price benefit by making advance payment. The AO has accepted the fact but imputed his own idea and estimated payments required to be made for relevant

assessment year by considering total agreed consideration and divided by number of months required to complete the property, ignoring the fact that there is no such arrangement between the parties. The Id.AR further submitted that as regards advances paid to Shri Naren Rajan for joint development of property, it was an admitted fact that Shri Naren Rajan was owner of 50 cents of land at Vedapatti, Coimbatore and company had entered into an agreement for joint development of property. It is also not in dispute that the assessee is into the business of real estate development. The AO having accepted the fact that said transaction is clearly a normal commercial transaction between the parties has failed to recognize the commercial decisions taken by the parties. The AR further submitted that the AO had imputed his own ideas and held that joint development agreement entered into by the company with M/s. Naren Rajan is a self-serving document, which cannot be relied upon. In this regard, he has relied upon the Circular No.19 of 2017 dated 12.06.2017 issued by the CBDT and the decision of ITAT, Chennai in ITA No.3374/CHNY/2019 in the case of Shri M. Kiran Kumar.

10. The Id. DR on the other hand supporting order of the Id.CIT(A) submitted that the AO as well as the Id.CIT(A) has brought out clear

facts that the transactions between the assessee and Shri Naren Rajan is nothing but loans and advances, which is hit by provisions of section 2(22)(e) of the Act. Therefore, it cannot be said that the transactions between the parties are normal business transactions. He further submitted that as regards Rs.90,00,000/- advance paid for joint development of property at Vedapatti, although the assessee claims that it has entered into joint development agreement for development of property but facts on record reveals that said land was not even classified or converted in the Revenue records and further has not got approval from the concerned authorities. Further, Shri Naren Rajan has agreed to repay the advances. Therefore, it could be very easily said that said transaction is nothing but a loan transaction, which comes under the provisions of section 2(22)(e) of the Act. The AO as well as the Id.CIT(A) have brought out clear facts to the effect that transactions are in the nature of loans and advances which is hit by provisions of section 2(22)(e) of the Act and hence, there is no reason to deviate from the reasons given by the Id.CIT(A) to confirm additions made towards loans and advances u/s 2(22)(e) of the Act.

11. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. We

have also gone through various case laws cited by both sides. The provisions of section 2(22)(e) of the Act, deals with the cases where "any payment by a company, not being a company in which public are not substantially interested, of any sum by way of loan or advances to a shareholder, being a person who is the beneficial owner of the shares, holding not less than 10% of the voting rights or to any concern in which shareholder is a member then such payment shall be treated as deemed dividend. From the plain reading of provision of section 2(22)(e) of the Act, it is very clear that any payment by a company by way of loans or advances to a shareholder or to any concern in which such shareholder is a member holding not less than 10% of the voting rights shall be treated as deemed dividend u/s.2(22)(e) of the Act. Therefore, in order to bring any payment within the ambit of section 2(22)(e) of the Act, then any payments to a shareholder should be in the nature of loans or advances. The term 'loans or advances' has not been defined u/s. 2(22)(e) of the Act. But in normal meaning 'loans and advances' means any sum paid by a person to another person with or without any interest or security. Therefore, in order to verify whether payment made by a Company to its shareholder is in the nature of loans or advances which is hit by provisions of section 2(22)(e) of the Act or not is to be seen on the basis of nature of

transactions between the parties. Further, it is a well settled principle of law that any payment by a company in the normal course of its business to a director / shareholder in which shareholder is a member or partner does not come under the ambit of provisions of section 2(22)(e) of the Act. In fact, the Central Board of Direct Taxes had issued a Circular No.19 of 2017 dated 12.06.2017 and has accepted judicial pronouncements made in this regard in respect of normal trade advance and clarified that trade advance which are in the nature of commercial transactions would not fall within the ambit of the word advance u/s. 2(22)(e) of the Act. The Board while issuing a Circular has considered number of decisions rendered by various High Courts including decision of Hon'ble Delhi High Court in the case of CIT vs. Creative Dyeing & Printing Pvt. Ltd.,(supra) where it was held that advances made by a company to a sister company and adjusted against the dues for job work done by the sister concern, is in the nature of business transactions would not fall within the definition of deemed dividend u/s.2(22)(e) of the Act.

12. In this legal background, if we examine the facts of the present case, we find that the assessee, in the capacity of proprietor of M/s. Tristar Consultancy Services had received a sum of

Rs.1,60,00,000/- from M/s Tristar Accommodation Limited, a Company in which the assessee is a director, for purchase of 20 villas. The said payment has been received in terms of a MOU between the parties specifying terms of agreement including consideration payable for purchase of villas. The AO has not disputed the fact that assessee has entered into an agreement with M/s Tristar Accommodation Limited for sale of villas. He, further admitted that transaction between the parties is business transaction, however, he has disputed payment made by the assessee in light of MOU between the parties and has determined excess payment over and above payment required to be made for purchase of villas and thus, opined that Company has paid excess amount of Rs.69,56,522/-. The AO has given his own reasons for estimation of installments to be payable and further excess amount paid for the relevant period. We have gone through workings given by the AO to determine excess payment of Rs.69,56,522/- and we do not ourselves in agreement with reasons given by the AO, for the simple reason that the AO has imputed his own idea of schedule of payment for purchase of property on the basis of period of agreement and arrived at monthly equal installments to be payable and thus estimated total amount to be paid as per agreement for the relevant period and then compared with the amount paid by the

assessee to determine the excess amount paid for the year, even though, the agreement between the parties does not specify anything about installments payable for purchase of villas. Further, the excess amount determined by the AO is purely on estimation basis. From the above it is clear that the AO has exceeded his authority and determined terms of agreement between the parties, on his own, even though it is the domain of the parties to agreement. In this case, the AO without any plausible reasons, has estimated equal installments based on his own estimation and treated amount paid in normal course of business as 'loans and advances' to bring the same within the ambit of section 2(22)(e) of the Act.

13. As regards, advance payment of Rs.90,00,000/- to Shri Naren Rajan, for joint development of property owned by him, we find that the AO has not disputed the fact that Shri Naren Rajan is owner of the property. The AO has also not disputed the fact that Shri Naren Rajan was engaged in developing a project in proprietary concern M/s. Tristar Consultancy Services. The only reason given by the AO to treat said advance as 'loans and advance' is that Shri Naren Rajan has signed for both the parties, as Proprietor of M/s.Tristar Consultancy Services and Managing Director of M/s. Tristar

Accommodations Limited, without understanding the legal position that there is nothing wrong in single person becoming a proprietor of a concern which is doing real estate development business and managing director of a company, which is also into similar or different business. In this case, Shri Naren Rajan is engaged in the business of real estate development under proprietorship concern M/s. Tristar Consultancy Services, whereas the company M/s. Tristar Accommodation Ltd., is engaged in the business of development of property and letting it for rental income. The AO has also not disputed the fact that the assessee has paid security deposit for joint development of the property. But, not accepted explanation of the assessee for simple reason that development of property was not taken place. We have gone through reason given by the AO and explanation of the assessee on this point and we find that the property could not be developed immediately due to some procedural issues of getting approvals from concerned authorities. It is common in any business and more particularly in real estate business the project could not be taken immediately for various reasons. But, on that ground itself genuine transaction between the parties cannot be doubted. In this, both parties upon realized fact that the project could not be taken up, has cancelled agreement and the assessee has agreed to repay security deposit taken from the

Company. But, for that reason alone, normal trade advances cannot be considered as loan or advance which comes under section 2(22)(e) of the Act. Therefore, we are of the considered view that once having accepted the fact that advances paid to Shri Naren Rajan is in normal business transaction for development of property under Joint Development Agreement, then there is no reason for the AO to suspect / doubt said transaction by suspicion or surmises without any reason, there being that said transaction is not a commercial transaction.

14. Coming back to case laws relied upon by the assessee. The assessee has relied upon plethora of judicial precedents, including decision of the Hon'ble Delhi High Court in the case of CIT vs. Raj Kumar [2009] 318 ITR 462. The relevant case laws cited by the Id. AR for the assessee are as under:-

“a. The Hon'ble Delhi High Court in the case of CIT Vs Raj Kumar [2009] 318 ITR 462, held that “if the payments are made by such a company to even its shareholder having substantial interest but if those payments are the result of business transactions between the parties, then such payments cannot be treated as loan or advance and the money so received cannot be treated as deemed dividend within the meaning of section 2(22)(e) of the IT Act.”

b. The Hon'ble Mumbai High Court in the case of CIT Vs Nagindas M.Kapadia 177 ITR 393 (Bom) has held that "advance received to purchase material for the purpose executing the job work entrusted to

the assessee is a trade advance and will not fall within the ambit of section 2(22)(e)."

c. The Hon'ble Delhi High Court in the case of CIT Vs Ambassador Travels P Ltd in [2009] 318 ITR 376 (Del) held that "the business transaction entered into by the assessee could not be treated as "loans" or "advances" within the meaning of section 2(22)(e)."

d. The Hon'ble Delhi High court in the case of CIT vs Arvind Kumar Jain in ITA no 589 of 2011 held that ('the payments made were the result of trading transactions between the parties and the amount given was not to be treated as 'loan' or 'advance' for the purpose of invoking the provisions of section 2(22)(e) of the Income Tax Act.

iv) The Hon'ble Calcutta High Court in the case of Pradip Kumar Malhotra vs. CIT in [2011] 338 ITR 538 (Cal) held as under: "the phrase "by way of advance or loan" appearing in sub-clause (e) must be construed to mean those advances or loans which a shareholder enjoys for simply on account of being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent, of the voting power ; but if such loan or advance is given to such shareholder as a consequence of any further consideration which is beneficial to the company received from such a shareholder, in such case, such advance or loan cannot be said to a deemed dividend within the meaning of the Act.

Thus, for gratuitous loan or advance given by a company to those classes of shareholders would come within the purview if section 2(22) but not to the cases where the loan or advance is given in return to an advantage conferred upon the company by such shareholder."

15. The assessee has relied upon the decision of ITAT, Chennai Benches in the case of Shri M. Kiran Kumar vs. CIT in ITA No.3374/CHNY/2019. The Tribunal had considered an identical issue in light of payments made by a company to shareholder holding more than 10% beneficial interest in company and after considering

relevant facts and also by following certain judicial precedents including Circular No.19 of 2017 issued by the CBDT dated 12.06.2017 held that commercial transactions between a company and shareholder does not attract provisions of section 2(22)(e) of the Act. The relevant findings of the Tribunal are as under:-

“8.6 We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. The provisions of section 2(22)(e) of the Act, deals with the cases where “Any payment by a company, not being a company in which public are not substantially interested, of any sum by way of loan or advance to a shareholder, being a person who is the beneficial owner of the shares, holding not less than 10% of the voting rights or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest, then same shall be treated as deemed dividend. From the plain reading of provision of section 2(22)(e) of the Act, it is clear that any payment by a company by way of loans or advances to a shareholder or to any concern in which such shareholder is a member or partner holding not less than 10% of the voting rights shall be treated as deemed dividend u/s.2(22)(e) of the Act. It is a well settled principle of law by the decision of various courts that any payment by a company in the normal course of its business to a related concern in which shareholder is a member or partner does not come under the ambit of provisions of section 2(22)(e) of the Act. In fact, the Central Board of Direct Taxes in its Circular No.19 of 2017 dated 12.06.2017 had examined the issue and issued directions to its field officers while examining the issue of deemed dividend u/s.2(22)(e) of the Act, in light of the decisions of various courts and clarified that trade advance which are in the nature of commercial transactions would not fall within the ambit of the word advance u/s.2(22)(e) of the Act.

8.7 In this legal background, if we examine the facts of the present case as brought out by the Id.AO and the Id.CIT(A), we find that the

AO has treated a sum of Rs.76,19,00,000/-, which is the cumulative credit balance in the books of M/s. AK Exports due to M/s. Infinity Jewellers and M/s. Mariyam Creations as deemed dividend u/s.2(22)(e) of the Act. As, we have already noted in previous paragraphs, M/s. AK Exports is an independent proprietorship concern of the assessee and engaged in purchase and sale of gold and bullion from various parties and sells to LJM as a captive jewellery unit, for which it had received payments for sale of gold and gold ornaments. Similarly, M/s. Infinity Jewellers and M/s. Mariyam Creations are two third parties from whom M/s. AK Exports purchases gold and gold ornaments for which it has pending payments against purchase of goods. Based on the above transactions, the Assessing Officer has propounded the theory of circuitous transactions among the concerns for diverting profit of LJM in the guise of payment for purchase and sales and ultimately the same has been rerouted to the company as share application money. The AO, to arrive at such conclusion has given his own reasons including the capacity of two partnership firms and their business model including the places from where they operate their business.

8.8 We have given our thoughtful considerations to the reasons given by the AO to reach to a conclusion that cumulative credit balance in the books of M/s. AK Exports due to M/s. Infinity Jewellers and M/s. Mariyam Creations, as diversion of funds from LJM and found that the AO has propounded a theory of circuitous transactions purely on conjectures and surmises, moreover without their being proper appreciation of facts. We further noted that both concerns are carrying out their business independently and are regularly filing VAT returns not only that they have also income tax assessee's and filed return of income for the respective assessment years. In fact, these facts are not disputed by the AO. But, objection of the AO is that these concerns operate in a small place with no wherewithal to conduct business of such huge volume and also that there are no personnel employed by them for achieving these huge turnover. We ourselves do not subscribe to the reasons given by the AO, for the simple reason that what is dealt by these two concerns is

gold and gold jewellery, whose value is high compared to the mass and weight of any other merchandise that the AO conceives of. It is not uncommon that huge volumes could be achieved when transaction in a few kilograms of primary gold or the gold ornaments. As clarified by the Id.AR for the assessee, in places like Mumbai, where there is a place constraint with small place, huge turnover in thousands of crores are achieved. Therefore, for this reason, the conclusion arrived at by the AO that these are not commercial transactions but circuitous transactions carried through group firms for diverting funds of the company to the Director is incorrect and unfounded under law.

8.9 We further noted that one another point made out by the AO is that there is no testing facility available for both these concerns. We find that the reason given by the AO is not acceptable because there is no requirement of having testing facility by each and every buyer and seller of gold and gold jewellery. Further, hall marking for 916 purity is done at the testing centre which is separate and certification is done by them. Purchase and sale of gold and gold ornaments by these two concerns is only after hall mark certification issued by the testing centre. Therefore, there is no necessity for testing by the assessee when purchase and sale of gold ornaments are already tested from a separate testing laboratory. Therefore, in our considered view, it is illogical for the AO to expect the testing facilities by the assessee or the two concerns M/s. Infinity Jewellers and M/s. Mariyam Creations.

8.10 The other reasons given by the AO to arrive at a conclusion that amount due in the books of M/s. AK Exports to two concerns is diverting of funds from LJM are that the company has funded a sum of Rs.36 crores to M/s. Infinity Jewellers and M/s. Mariyam Creations. The assessee has placed account copies of the concerns M/s. Infinity Jewellers and M/s. Mariyam Creations in the books of LJM. From the above, it could be seen that it is a continuing account, where huge purchase and sales inter se these concerns. Thus, it is very clear that it has a commercial transaction and account is running accounts. Further, the account copy of M/s. Mariyam

Creations in the books of LJM for the period 01.04.2014 to 31.03.2015 is placed on record as per which the closing balance is only a sum of Rs.26.11 crores, whereas the AO has considered deemed dividend from this concern at Rs.46.18 crores. Thus, from the above, it is very clear that the AO's action is founded on suspicions and surmises and without reference to actual facts and figures. We further noted that the account copy of LJM in the books of M/s. AK Exports is placed on record at pages 89 to 173 of paper-book. It could be seen that the total credits / debits in this account for the period of Rs.810 crores. There are huge purchases as well as sales effected to LJM. The transaction between the assessee and LJM are also pure commercial transactions. Thus, even assuming for the sake of arguments that the amounts had been paid directly by LJM to M/s. AK Exports, still it would only be a commercial transaction outside the scope of deemed dividend as explained by the CBDT in Circular No.19 of 2017 dated 12.06.2017. Therefore, we are of the considered view that the AO as well as the CIT(A) were erred in arriving at a conclusion that commercial transactions between these concerns are circuitous transactions for diverting funds of the company to the assessee to cover up source for share application money invested in the company.

8.11 We further noted that the AO himself accepted that amount received from M/s. Infinity Jewellers and M/s. Mariyam Creations had been invested by the assessee in the share capital / share application money of LJM. Thus, the money received from two concerns has not gone out for any benefit of the assessee. In fact, the money has been enjoyed by the company itself. Therefore, on this count also the addition made u/s.2(22)(e) of the Act, is not sustainable under law. Therefore, in our considered view, the AO has made addition only based on the formulated theory that the assessee avails the benefit in the nature of loans and advances in the capacity of shareholder. In order to consider any payment under the provisions of section 2(22)(e) of the Act, the first and foremost limb is that there should be some benefit arising out of the said transactions to the shareholder. In the present case, there is no personal benefit at all to

the assessee. The AO himself accepts the fact that the funds were utilized during the course of business and therefore, this transaction at any point did not get out of the business circle at all. The provisions of section 2(22)(e) of the Act, is a deeming provision and should be construed strictly. It is an established fact that the said transaction took place during the course of business and there being no personal/individual benefit accrued to the assessee and hence section 2(22)(e) of the Act cannot be invoked. Had it been the case of the AO that the assessee had directly borrowed loans and advances from the company to his proprietorship concern, then the AO could have invoked the provisions of section 2(22)(e) of the Act. In this case, as rightly observed by the AO, the assessee has indirectly borrowed the funds of M/s. Infinity Jewellers and M/s. Mariyam Creations and that allegation of indirect benefit is only a formulative theory of circuitous transactions without there being any evidence to prove that these transactions are loans and advances giving benefit to the shareholder. Therefore, we are of the considered view that the AO as well as the CIT(A) were completely erred in coming to the conclusion that amount due in the books of M/s. AK Exports to M/s. Infinity Jewellers and M/s. Mariyam Creations is diversion of funds from LJM to the assessee and such transactions comes under the purview of deemed dividend u/s.2(22)(e) of the Act.

8.12 The assessee has relied upon plethora of judicial judgments in support of his arguments. The case law relied upon by the assessee are discussed as under:-

- a) The Calcutta High Court in the case of Pradip Kumar Maihotra Vs CIT — 15 Taxmann.com 66 laid down factors for testing the transactions for applicability of Sec.2(22)(e) of the Act at Para 10;

10. After hearing the learned counsel for the parties and after going through the aforesaid provisions of the Act, we are of the opinion that the phrase “by way of advance or loan” appearing in sub-cl. (e) must be construed to mean those advances or loans which a shareholder enjoys for simply on account of being a person who is the beneficial owner of

shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power; but if such loan or advance is given to such shareholder as a consequence of any further consideration which is beneficial to the company received from such a shareholder, in such case, such advance or loan cannot be said to a deemed dividend within the meaning of the Act. Thus, for gratuitous loan or advance given by a company to those classes of shareholders ou1a,n iinthe purwewo7s 2(22) but not to the cases where the loan or advance is given in return to an advantage conferred upon the company by such shareholder”.

b) Following the above rationale, the Calcutta High Court in the case of CIT Vs Gayatri Chakraborty — 407 ITR 730, at Para 7 held;

“7. Law on this point is clear. In the event transactions between a shareholder and a company in which the public are not substantially interested and the former has substantial stake, create mutual benefits and obligations, then the provision of treating any sum received by the shareholder out of accumulated profits as deemed dividend would not apply. The company in the instant case fits the description conceived in the aforesaid provision to come within the ambit of Section 2(22)(e) of the Act. The controversy which falls for determination is whether the sum received by the assessee formed part of running current account giving rise to mutual obligations or the payment formed one-way traffic, assuming the character of loan or advance out of accumulated profit”. A Co-ordinate Bench of this Court in the case of Pradip Kumar Maihotra V. CIT (2011) 15 taxmann.com 66/203 Taxman 110/338 ITR 538(Cal) has laid down the factors for testing the transactions between a company and its shareholder in the light of the aforesaid provision :—”....

C) The Kerala High Court in the case of CIT Vs Malayala Manorama Co. Ltd — 405 ITR 595, at Para 25 held;

“25. From the above discussion, it is quite evident that the amounts under the disputed heads were being received by the Assessee from its Subsidiary Company only as part of regular business transactions, which was being accounted properly. The change in circumstance, as to the distribution of dailies/publications in the Gulf, causing the same to be transported through the Agent directly from Trivandrum to the Gulf, [instead of forwarding the same to Bombay, where the registered office of the Subsidiary Company is situated and then to have it transported from Mumbai to the Gulf, for distribution in the Gulf] was resulted because of the starting of direct flights from Trivandrum to Gulf, as pointed out by the Assessee. It was in this regard, that advance deposits were also effected by the Subsidiary Company and payments were being effected directly by the Assessee to the clearing and forwarding agent of the Subsidiary Company at Trivandrum, as per their instructions, which were being properly accounted. The payments effected by the Subsidiary Company and received by the Assessee, were as part of the regular business transactions and applying the law laid down in the judicial precedents cited above, it could not have been treated as ‘loan’ or ‘advances’, so as to make the disputed amounts as “deemed dividend”, as defined under Section 2(22)(e) of the Act. We are of the view that there is absolutely no basis for the challenge raised by the Revenue, with reference to the deduction under Section 80Q of the Act and the assessment, taking it as a “deemed dividend” under Section 2(22)(e) of the Act. The common question involved in the above cases is answered accordingly.

d) The Karnataka High Court in the case of CCIT Vs Sarva Equity (P) Ltd — 225 Taxmann 172 at Para 17 held;

“17. Section 2(22)(e) of the Act is designed to strike balance, i.e., advance or loan to a shareholder and that the word shareholder can mean only a registered shareholder. A beneficial owner of shares whose name does not appear in the Register of shareholders of the Company cannot be stated to be a shareholder. He may be beneficially entitled to

the share but he is certainly not a shareholder. In other words, it is only the person whose name is entered in the Register of the shareholders of the Company as the holder of the shares who can be said to be a shareholder qua Company and not the person beneficially entitled to the shares. We are therefore, of the view that it is only where a loan is advanced by the Company to the registered shareholder and the other conditions set out in Section 2(22)(e) of the Act are satisfied, that amount of loan would be liable to be regarded as deemed dividend within the meaning of this section.

e) The Indore bench of the tribunal in Asian Business Connections (P) Ltd Vs. DCIT - 101 Taxmann.com 455, relying on the various decisions at Paras 36, 37 held at Para 39, which is extracted below;

“36. Similarly in the case of CIT v. Creative Dyeing & Printing (P.) Ltd. 120091 184 taxmann.com 483/318 ITR 476 (Delhi) Hon’ble High Court held “that the section 2(22)(e) can be applied to ‘loans or advances’ simplicitor and not to those transaction carried out in the course of business as such. In the course of carrying of business transaction between the company and the stockholder the company may be required to give advance in mutual interest. There is no legal bar in having such transaction. What is to be ascertained is what is the purpose of such advance. If the amount is given as an advance simplicitor or as such per se without any further application, receiving such advance may be treated as “deemed dividend” but if it is otherwise, the amount given cannot be branded as advance within the meaning of deemed dividend u/s. 2(22)(e). By granting advance if the business purpose of the company is served and which is not the sum, which it otherwise would have distributed as dividend, cannot be brought within the deeming provision of treating such Advance as deemed dividend”.

37. Hon’ble Kolkata High Court in the case of Gayatri Chakraborty (supra) has held that “law on this point is clear in the event transaction between a shareholder and a company

in which the public were not substantially interested and the former had substantial stake, create mutual benefits and obligations, then the provision of treating any sum received by the shareholder out of accumulated profits as deemed dividend would not apply”.

39. In the light of the above judicial proceedings we observe that the revenue authorities should invoke provisions of Section 2(22)(e) of the Act only in case when loans and advances are given to substantial shareholder in the garb of avoiding dividend distribution tax or with the intention to not to share the dividend with the non substantial shareholders. The statute has clearly identified various types of situations about the payments which are to be included in the category of dividend and has also excluded the payments under the circumstances where payments are given for business purposes, or as enumerated in the provision itself, then the deemed dividend provision should not be applied. Revenue authorities should refrain from using the provisions of Section 2(22)(e) of the Act as a tool for maximising the tax collection rather they should use the powers to keep a check of such distribution of accumulated reserves which are not for the ordinary course of business and are intentionally entered into for the benefit of substantial shareholders having more than 10% voting right without any clear indication of receiving the amount back to avoid the dividend distribution tax.

8.13 Coming back to the case laws relied upon by the Id. senior standing counsel for the Revenue. The Id. Counsel has relied upon the decision of the Jurisdictional High Court of Madras in the case of Bhagavathy Velan reported in [2019] 106 taxmann.com 67. We have gone through the case law relied upon by the Id. Counsel and found that the facts of this case is altogether different from the facts of present case, where the assessee was substantial shareholder of the company and the company has sold flat to the assessee and major portion of price remains unpaid at the end of the previous year. Under those facts, the Hon'ble High Court came to the conclusion that amount due to the company as an advance to the director falling

within the mischief of section 2(22)(e) of the Act. In this case, the concern in which assessee is a proprietor is engaged in the business of buying and selling goods and has continuous transactions with the assessee company in the normal course of business. Therefore, we are of the considered view that the case law relied upon by the Id.DR is distinguishable on facts and hence not applicable to the facts of the present case.

8.14 In this view of the matter and considering facts and circumstances of this case and also by following the case laws discussed herein above, we are of the considered view that commercial transactions in the books of M/s. AK Exports due to M/s. Infinity Jewellers and M/s. Mariyam Creations cannot be considered as indirect borrowing from LJM to treat the same as deemed dividend u/s.2(22)(e) of the Act. Hence, we direct the Id.AO to delete the addition made towards deemed dividend u/s.2(22)(e) of the Act.”

16. Coming back to case laws relied upon by the Id. DR. The Id. DR has relied upon certain judicial precedents including decision of Hon'ble Supreme Court in the case of Miss P. Sarada vs. CIT reported in 229 ITR 444. We have gone through various case laws relied upon by the Revenue and find that, none of the case laws relied upon by the Id. DR dealt with the issue of normal trade advances / commercial transactions between company and shareholder. In fact, in all case laws relied upon by the Revenue, the issue was whether loans and advances given to a shareholder holding beneficial interest is coming within the ambit of provisions of section 2(22)(e) of the Act or not. In the given facts and

circumstances of the case, the Hon'ble Courts held that advance made by a company to shareholder would have to be treated as deemed dividend with the meaning of section 2(22)(e) of the Act.

17. In this case, there is no dispute with regard to fact that two transactions between the assessee Shri Naren Rajan and Company are normal trade advances / commercial transactions. In fact, the AO has categorically accepted that two transactions are normal commercial transactions. Therefore, we are of the considered view that once a particular transaction is considered as normal commercial transaction, then the question of application of provisions of section 2(22)(e) of the Act does not arise. The CIT(A) without appreciating the facts, has confirmed additions made by the AO. Hence, we set aside the order of the Id.CIT(A) and direct the AO to delete additions made towards deemed dividend u/s.2(22)(e) of the Act towards advance received from M/s Tristar Accommodation Limited for purchase of villas and payment made as security deposit for Joint Development Agreement.

18. In the result, the appeal filed by the assessee is allowed.

ITA Nos.1002 & 1161/CHNY/2018

19. The first issue that came up for our consideration from Ground No.2 of assessee appeal is disallowance of provision made for construction cost of balance flats not handed over to land owner for Rs.4,76,00,000/-. The facts with regard to impugned dispute are that the assessee is into real estate business and under his proprietorship concern M/s.Tristar Consultancy Services, the assessee had entered into a Joint Development Agreement (JDA) dated 18.01.2006 with his sister Smt. Seshu Rajan for development of land measuring 19.65 acres. As per the JDA between the parties, the assessee has agreed to build and handover 30 villas approximately admeasuring about 2000 sq.ft., each, out of the total units to be developed by the assessee in the project named 'TRILOK', which was to be undertaken on the 19.65 acres of land. However, upon completion of Phase-I of the project on an extent of 10.86 acres of land, the assessee had only handed over 13 villas to land owner as her share of consideration and balance units of phase-I were either sold or capitalized in its books for deriving rental income. Since, the assessee has not honoured the conditions of JDA dated 18.01.2006, a supplementary agreement was entered into between the assessee and Smt. Seshu Rajan on 12.03.2012, wherein it was mutually agreed that the assessee would

compensate Smt. Seshu Rajan for delay in handing over of balance 17 villas at the rate of construction cost of Rs.1,000/-per sq.ft., for land admeasuring 47,600 sq.ft., in which the 17 villas ought to have been built. In terms of supplementary agreement between the parties, the assessee had made provision for construction cost of Rs.4,76,00,000/- in his books of account at the rate of Rs.1,000/- per sq.ft., for 47,600 sq.ft., land, which was payable to Smt. Seshu Rajan towards balance 17 villas still deliverable, which includes compensation for delay also. Further, it was also agreed that the land portion on which 48 row houses were built instead of 17 villas which ought to have been built, Rs.1,20,00,000/- would be paid by the assessee to Smt. Seshu Rajan.

20. The AO has not accepted the explanation of the assessee and according to him, although the assessee has agreed to give 30 villas in Phase-I for consideration of 19.86 acres land being developed by them, but he is yet to develop remaining 8.79 acres and hence, the provision made for construction cost towards villas to be built on remaining portion of land cannot be considered as ascertained liability which is accrued for the relevant period. The AO further was of the opinion that Phase-II could not be commenced due to approval from local authorities and further the person executing the

earlier project is also no more now. He further observed that supplementary agreement is on a project which does not exist and does not have an approval on that date and hence, provision made towards probable construction cost of 17 villas in land admeasuring 47,600 sq.ft., is nothing but a contingent liability which cannot be said to be ascertained during the relevant financial year. Therefore, the AO has disallowed provision made in books of accounts for Rs. 4,76,00,000/- and added to income of the assessee.

21. The Id.AR for the assessee submitted that the Id.CIT(A) has erred in confirming disallowance of the claim of deduction made on account of provision for cost of construction of balance 17 villas to the tune of Rs.4,76,00,000/- on the ground that it was unascertained liability and the quantum cannot be ascertained at this stage without appreciating the fact that as per the supplementary agreement between parties dated 20.03.2012, it is crystal clear that land owner does not want the assessee to start Phase-II of the project unless 30 villas, which she ought to have received within 3 years (but not received even after 6 years), is handed over to her. Therefore, as on the date of supplementary agreement, which falls under the financial year 2011-12, the liability towards 17 villas was accrued and hence, the assessee has made

provision for construction cost of 17 villas by taking scientific method on the basis of 'TRILOK' project, as per which each villa is built in a land admeasuring 2000 sq.ft., land and total area of 17 villas works out to 47,600 sq.ft. Further, the assessee has estimated cost of construction of Rs.1,000/- per sq.ft., on the basis of cost of construction required to be incurred for the project which is once again based on past experience and present obligation. Therefore, it is incorrect to say that liability was not accrued for the relevant financial year and further it is unascertained liability. He further submitted that the AO has accepted the fact that as per the JDA, the assessee shall hand over 30 villas in exchange of 19.86 acres land, but could hand over only 13 villas within the stipulated time. The balance 17 villas could not be given to the land owner because remaining villas were either sold or capitalized in the books of the assessee for deriving rental income. Therefore, to compensate cost of 17 villas, the assessee has entered into a supplementary agreement and agreed to pay a sum of Rs.4,76,00,000/- for which the land owner has agreed and such agreement was entered into on 20.03.2012 and hence, on the day when the agreement was signed, the liability towards cost of 17 villas was accrued and hence, it can be said that it is unascertained

liability. In this regard, he relied upon the following judicial precedents:-

- i. Hon'ble Supreme Court in the case of M/s. Calcutta Company Limited vs. CIT (1959) 37 ITR 1
- ii. Hon'ble Supreme Court in the case of M/s. Bharat Earth Movers vs. CIT (2000) 245 ITR 428
- iii. ITAT, Chennai in the case of F.F.E. Minerals India Private Limited vs. JCIT (2004) 84 TTJ Chennai 907
- iv. ITAT, Vishakapatnam in the case of ACIT vs. KCP Limited in I.T.A.Nos.449/Viz/2016 and 244/Viz/2018
- v. ITAT, Ahmedabad in the case of ACIT vs Gayathri Construction in I.T.A.No.736/Ahd/2016

22. The Id. DR on the other hand strongly supporting order of the Id.CIT (A) submitted that it is an admitted fact that the assessee has not honoured terms of agreement of JDA dated 18.01.2006, for which he has agreed to pay compensation to land owner and such compensation was agreed on the basis of development of remaining portion of 8.7 acres land. However, the remaining portion of land was not having necessary approval from concerned authorities for development of the project. Therefore, provisions made for cost of construction of 17 villas to be built on land, which is not having necessary approval as on the date of supplementary agreement cannot be considered as ascertained liability, which is accrued for the relevant year. The Id.CIT(A) has given various reasons to come to the conclusion that provision made in the books of account is only

unascertained liability, which is not accrued for the relevant assessment year. Hence, there is no merit in the arguments of the assessee that liability is ascertained for the relevant assessment year.

23. We have heard both the parties, perused materials available on record and gone through orders of the authorities below along with various case laws cited by the Id.AR for the assessee. The facts borne out from records clearly indicate that as per JDA dated 18.01.2006, the assessee has agreed to develop and handover 30 villas, each approximately admeasuring about 2,000 sq.ft., out of the total units to be developed by the assessee in the project 'TRILOK' on the land owned by Smt. Seshu Rajan admeasuring 19.65 acres of land. The assessee has developed land in two phases, as per which out of 19.65 acres of land, the assessee has completed Phase-I of the project on an extent of 10.86 acres of land. As per agreement, the assessee agreed to handover 30 villas within 3 years from the date of agreement. However, he could handover only 13 villas in first phase of the project. The remaining land could not be developed within the agreed time of 3 years. Therefore, a supplementary agreement was entered into between assessee and Smt. Seshu Rajan on 12.03.2012 and mutually agreed

that assessee would compensate Smt. Seshu Rajan for delay in handing over of balance 17 villas at the rate of construction cost of Rs.1,000 per sq.ft., for land admeasuring 47,600 sq.ft., in which 17 villas ought to have been built by the assessee.

24. The fact, that assessee shall handover 30 villas in exchange of 19.86 acres land in terms of JDA between the parties is not disputed by the AO as well as the CIT(A). In fact, both authorities had accepted the fact that as per the JDA between the parties, the assessee shall handover 30 villas, but could handover only 13 villas up to the end of the financial year 2011-12. It was an admitted fact that parties have entered into a supplementary agreement dated 20.03.2012 and mutually agreed to settle the dispute by taking a consideration of Rs.4,76,00,000/- in lieu of 17 villas to be handed over to the land owner. The only dispute the AO as well as Id.CIT(A) made was that Phase-II could not be commenced due to approval from local authorities and when the project itself was not commenced, the question of accrual of liability towards 17 villas does not arise for the relevant financial year.

25. We have given our thoughtful consideration to the facts brought out by the Assessing Officer, in light of arguments

advanced by the Id.AR for the assessee and we do not ourselves subscribe to the reasons given by the AO as well as the CIT(A) to disallow provision created in books of accounts for cost of construction of 17 villas to be given to the land owner in terms of JDA and supplementary agreement, because from the supplementary agreement dated 20.03.2012, it is crystal clear that Smt. Seshu Rajan, land owner does not want the assessee to start Phase-II of the project unless, 30 villas which she ought to have received within 3 years is handed over to her. Therefore, the assessee in order to continue his project had entered into a supplementary agreement with land owner and mutually agreed to pay a compensation for delay in handing over 17 villas and also cost of construction of 17 villas to the land owner and estimated cost of construction of 17 villas. As per agreement, both parties have agreed to settle the dispute for an amount of Rs.4,76,00,000/- which has been arrived at on the basis of cost of construction of 17 villas and such cost has been arrived by taking a sum of Rs.1,000/- per sq.ft., on 47,600 sq.ft., of land. Further, as per terms and conditions of supplementary agreement, agreed consideration of Rs.4,76,00,000/- is inclusive of compensation for delay caused by the assessee. Further, the above cost is inevitable and without incurring the same, the assessee cannot proceed further to develop

Phase-II of the project in the remaining portion of land. Therefore, it is incorrect to say that above arrangement for consideration payable to Smt. Seshu Rajan towards 17 villas to be handed over by the assessee out of Phase-I of the project 'TRILOK' is not ascertained liability. Since, supplementary agreement was entered on 20.03.2012, which falls within the financial year 2011-12, the provision of Rs.4,76,00,000/- was crystallized / ascertained liability for assessment year 2012-13 and hence, we are of the considered view the AO as well as the Id.CIT(A) were completely erred in holding that said liability is not ascertained for the relevant assessment year.

26. Coming back to the observations of the AO in light of completion of Phase-I of the project and non-commencement of Phase-II in remaining portion of the land. We find that it was never agreed by the parties, that the project was developed in two separate phases. All that was mutually decided in the JDA was that the assessee would develop the project on 19.65 acres of land belonging to the land owner in lieu of handing over 30 villas to Smt. Seshu Rajan. Further, supplementary agreement has to be read along with earlier JDA between the assessee and landowner, wherein it is an undisputed fact that Phase-I of the project carried

out by the assessee has been completed. Therefore, the allegation that supplementary agreement is on a project which does not exist is baseless. Further, it is irrelevant whether the person executing the earlier project is alive, as long as the commitment towards the other party to the JDA is honoured by legal heirs of the deceased. The legal heirs have honoured the assessee's commitment under the JDA. Therefore, the allegation that the assessee has not honoured the terms of JDA is not valid. In this regard, assessee has placed on record the affidavit sworn by Smt. Seshu Rajan confirming honoring of commitment. Since, the other party to the JDA has accepted to settle her final dues of balance 17 villas under a new set of terms and conditions, the commencement of Phase-II of the project is not relevant as there are no villas to be settled out of Phase-II now. Further, as per the JDA dated 18.01.2006, the assessee has to handover 30 villas within 3 years from the date of JDA, and if such date is considered then the assessee ought to have handed over the villas on or before 17.01.2009. Since, there was a delay in executing the project, both the parties have agreed to settle the dispute and hence entered into a supplementary agreement on 20.03.2012, as per which, the land owner has agreed to take a sum of Rs.4,76,00,000/- in lieu of 17 villas, which ought to have been given to her within 3 years from the date of JDA and

hence, we are of the considered view that liability towards cost of construction of 17 villas has been accrued to the assessee, when both the parties have entered into supplementary agreement on 20.03.2012. Since, the date of supplementary agreement falls within financial year 2011-12, the liability of Rs.4,76,00,000/- was definitely ascertained and accrued for assessment year 2012-13.

27. Coming back to case laws relied upon by the Id AR for the assessee. The Id. AR for the assessee has relied upon the following judicial precedents in support of his argument:-

“i. The Hon,ble Supreme Court in the case of M/s. Calcutta Company Limited vs. CIT (1959) 37 ITR 1 held as follows –

"If that undertaking imported any liability on the appellant the liability had already accrued on the dates of the deeds of sale, though that liability was to be discharged at a future date. It was thus an accrued. liability and the estimated expenditure which would be incurred in discharging the same could very well be deducted from the profits and gains of the business.”

ii. The Hon'ble Supreme Court in the case of M/s. Bharat Earth Movers vs. CIT (2000) 245 ITR 428 held as follows –

"The law is settled: if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied the liability is not a contingent one. The liability is in praesenti though it will be discharged at a future date. It does not make any difference if, the future date on which the liability shall have to be discharged is not certain.”

iii. The Hon'ble ITAT, Chennai in the case of F.F.E. Minerals India private Limited vs. JCIT (2004) 84 TTJ Chennai 907 held as follows –

Since the liability has arisen and is crystallised as a result of binding contract between the parties the same is allowable as held by the Hon'ble Supreme Court reported in *Calcutta co. Ltd. v. CIT* (1959) 37 ITR 1 (SC) and *Bharat Earth-Movers v. CIT* (2000) 245 ITR 428 (SC) as well as the decision of the Special Bench reported in 35 ITR 18 [(sic)--(1990) 34 ITD 50 (Hyd)(SB) (supra)] and (1992) 43 ITD 527 (Mad) (supra) and as conceded by the Department before the jurisdictional High court in (2003) 130 Taxman 400 (Mad) (supra).

iv. The Hon'ble ITAT, Vishakapatnam in the case of *ACIT vs. KCP Limited* in I.T.A.Nos.449/Viz/2016 and 244/Viz/2018 Assessment Year: 2011-12 and 2012-13) has held that the liquidated damages for delay supply of materials as per the contract terms is allowable as business deduction.

v. Similar view has been held by Hon'ble ITAT, Ahmedabad in the case of *ACIT vs Gayathri Construction* in I.T.A.No.736/Ahd/2016 Assessment Year: 2003-04) that liquidated damages for delayed completion of contract is allowable as deduction”

28. In this view of the matter and by following various judicial precedents including decision of the Hon'ble Supreme Court in the case of *M/s. Bharat Earth Movers vs. CIT*, [2000] 245 ITR 428, we are of the considered view that provision made for cost of construction of 17 villas amounting to Rs.4,76,00,000/- is ascertained liability which accrued for relevant assessment year. Hence, we direct the AO to allow provisions created in the books of accounts for assessment year 2012-13.

29. The next issue that came up for our consideration from Ground No.3 of assessee appeal is addition made u/s.2(22)(e) of the Act for Rs.4,14,56,524/- towards advance received from M/s.Tristar

Accommodation Ltd. The fact with regard to the impugned dispute are that the assessee has received advance of Rs.5,05,00,000/- from M/s. Tristar Accommodation Ltd. The said advance was towards sale of 8 villas in his project 'TRILOK' for which a MOU dated 18.04.2011 was entered into between the assessee and M/s. Tristar Accommodation Ltd. The sale consideration as per the MOU amounted to Rs.5,60,00,000/-. The AO has treated advance received from M/s. Tristar Accommodation Ltd., as deemed dividend u/s.2(22)(e) of the Act, on the ground that said advance is nothing but loan and advances which is hit by provisions of section 2(22)(e) of the Act. The AO has disbelieved MOU between the parties and according to him, said agreement was a subsequent act to disguise the payment of advance. The AO further was of the opinion that as on the date of MOU dated 18.04.2011, the assessee had sold all the villas constructed in Phase-I of the project and hence, he was of the opinion that supplementary agreement dated 20.03.2012 is a sham, and therefore, advance has been treated as loan and advances within the meaning of section 2(22)(e) of the Act. It was the contention of the assessee before the AO as well as the Id.CIT(A) that advance was given for purchase of 8 villas and said fact was never in dispute. The only allegation by the AO was that a lump sum advance was paid by M/s. Tristar Accommodation Ltd., when

there is no villas are ready for selling. But, fact remains that as on the date of entering into MOU as on 18.04.2011, the assessee had 13 unsold villas and he was under the honest belief that he could sell out of this 13 villas, 8 villas in the name of M/s. Tristar Accommodation Ltd. Therefore, it is incorrect on the part of the AO as well as the CIT(A) to allege that supplementary agreement was a sham to overcome advances given to the assessee.

30. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. Admittedly, advance received from M/s. Tristar Accommodation Ltd., was for the purpose of purchase of villas. This fact has not been disputed by the AO. The AO has categorically admitted that the assessee has entered into a MOU for sale of villas to M/s. Tristar Accommodation Ltd. The AO has considered advance given for purchase of Villas u/s.2(22)(e) of the Act, as deemed dividend only for the reason that the assessee has paid upfront payment and hence, he has estimated installment payment for each year and determined excess amount for the relevant period. Thus, he has considered excess payment as loans and advances and brought to tax u/s.2(22)(e) of the Act. We have gone through reasons given by the AO for treating advance paid to the assessee by M/s. Tristar

Accommodation Ltd., for purchase of villas u/s.2(22)(e) of the Act and we ourselves do not subscribe to the reasons given by the AO for the simple reason that once having accepted the fact that transactions between the assessee and the company was a normal commercial transaction, then there is no reason for the AO to bring said payment within the ambit of section 2(22)(e) of the Act, as deemed dividend. It is a well settled principle of law that normal commercial transactions between the shareholder and the company are outside the scope of section 2(22)(e) of the Act. This fact has been clarified by the CBDT in its Circular No.19 of 2017 dated 12.06.2017, where it was categorically stated that trade advances / normal commercial transactions are outside the scope of section 2(22)(e) of the Act. Therefore, we are of the considered view that the AO as well as the Id.CIT(A) were erred in treating advances received by the assessee from M/s. Tristar Accommodation Ltd., as deemed dividend u/s.2(22)(e) of the Act. We, further take support from the order of ITAT, Chennai Benches in assessee's own case for assessment year 2011-12 in ITA No.743/CHNY/2015, where under identical set of facts we hold that normal commercial transactions cannot be brought to tax u/s.2(22)(e) of the Act. In this case, the facts are *pari materia* with facts already considered by the Tribunal for earlier years. Therefore, consistent with view taken by the

Co-ordinate Bench in assessee's own case for earlier assessment year 2011-12, we are of the considered view that advance received by the assessee from M/s. Tristar Accommodation Ltd., for sale of villas cannot be treated as deemed dividend u/s.2(22)(e) of the Act. Hence, we direct the AO to delete addition made towards deemed dividend u/s.2(22)(e) of the Act.

31. The next issue that came up for our consideration from Ground No.5 of assessee appeal and Ground No. 3 & 6 of Revenue appeal is unexplained cash credit. The facts borne out from record indicate that the assessee has made cash deposit in Indusind Bank Account No.: 0021-430129-001 and HDFC Bank Account No.: 003110001999571. During the course of assessment proceedings, the assessee was asked to explain source of cash deposit in two savings bank accounts. In response, the assessee filed a letter dated 27.03.2015, and explained source by filing cash flow statement. As per which, the assessee has explained cash deposit into bank accounts, out of, cash withdrawal from two savings bank account itself in earlier occasion, cash withdrawal from M/s. Tristar Consultancy Services and further from land advance paid in earlier years, received during assessment year 2012-13. The AO however was not convinced with cash flow statement filed by the assessee

explaining source of cash deposit into two bank accounts and according to him, cash withdrawn in same bank accounts in earlier occasion was used to deposit in term deposit in HDFC Bank account on same dates. Therefore, he has not considered cash withdrawal in earlier occasions as source to explain subsequent cash deposits in both savings bank accounts. The AO has also not considered land advance paid and received back in cash during the year, on the ground that the assessee has not furnished copy of agreement for land advance given in earlier occasion and the name and address of person to whom said land advance was given. Therefore, he has reworked cash flow statement furnished by the assessee and arrived at shortage of cash balance on the date when cash is deposited into two bank accounts and worked out a sum of Rs.2,92,84,500/- as peak credit and made addition u/s.69 of the Act.

32. The assessee has challenged addition made by the AO before the Id. CIT(A). The CIT(A), after considering cash flow statement filed by the assessee, has accepted negative cash balance arrived at on particular date at Rs.51,85,645/- after considering cash withdrawn from same bank accounts in earlier occasions, drawings from M/s. Tristar Consultancy Services and cash balance of the proprietary concerns viz., M/s. Tristar Consultancy Services and

M/s. Dejavu Real Estate Division. However, not accepted explanation of the assessee with regard to land advance received back in cash amounting to Rs.20,00,000/- on 15.04.2011, Rs.10,00,000/- received on 30.09.2011 and Rs.95,00,000/- received on 20.02.2012, on the ground that even at the remand proceedings, the assessee has not established the nature of transactions. Therefore, out of total additions of Rs.2,92,84,500/-, the CIT(A) has accepted source to the extent of Rs.1,15,98,855/- and balance amount of Rs.1,76,85,645/- has been confirmed. Aggrieved by the CIT(A), the assessee as well as Revenue are in appeal before us.

33. The Id.AR for the assessee submitted that the Id.CIT(A) has erred in not accepting source of cash deposits in bank accounts, explained out of land advance received back in cash during the year to the extent of Rs.1,25,00,000/-, without appreciating the fact the land advance opening balance has come down from Rs.7.59 crores to Rs.6.45 crores for the subject assessment year, which resulted in cash receipt of Rs.1.14 crores by the end of assessment year 2012-13. The Id.AR further submitted that the assessee is in the business of real estate, has paid advance to various parties for development of land, but due to his sudden death, the legal heirs are finding it

difficult in tracing the whereabouts of the person to whom advance was paid and obtaining confirmation from said parties. Therefore, merely for the reason that no confirmation has been filed, additions cannot be made when the assessee has explained source, out of advance received back as per his books of accounts.

34. The Id. DR on the other hand submitted that the Id. CIT (A) has erred in accepting explanation of the assessee to the extent of source for cash, out of cash withdrawal from same bank accounts in earlier occasions, drawings from his proprietary concerns, without appreciating the fact that cash withdrawn in earlier occasions are used for making fixed deposits in same bank accounts. The Id. DR further submitted that the AO has brought out clear facts to the effect that two cash withdrawals from same bank accounts were used on the same date and the assessee has not able to prove availability of cash from withdrawals. Therefore, it is incorrect on the part of the Id. CIT(A) to allow benefit to the assessee to explain source out of cash withdrawals.

35. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. Admittedly, the assessee has filed a cash flow statement explaining

the source for cash deposits into two savings bank accounts maintained at Indusind Bank and HDFC Bank. The assessee had explained source for cash deposits, out of cash withdrawals from previous occasions from same bank account, drawings from proprietary concern and land advance paid in earlier years and received back in current year as source for cash deposits. The assessee has arrived at a negative cash balance of Rs.51,85,645/- and accepted that there is no source for cash deposit to the extent of Rs.51,85,645/-. Even before us, no evidence has been filed to explain negative cash balance. Therefore, the additions made by the AO to the extent of Rs.51,85,645/- is upheld. As regards source explained out of cash withdrawn from earlier occasions and drawings from M/s. Tristar Consultancy Services, the assessee has filed necessary evidences before the CIT(A) and on the basis of such evidences, the CIT(A) has accepted the source for cash deposits, as per which the assessee has explained source out of drawings from M/s. Tristar Consultancy Services. Therefore, once there is a source in the form of drawings from proprietary concerns, the same needs to be accepted unless the AO demonstrated that said withdrawals from proprietary concern was used elsewhere either for expenses or investments. Therefore, explanation of the assessee that cash deposits out of cash drawings from proprietary concern is accepted.

As regards, source of cash deposit out of land advance received back in cash amounting to Rs.1,25,00,000/-, it is an admitted fact that in respect of land advance received back in cash, the assessee has not filed any evidences including confirmation from the parties indicating their name, address and PAN number to establish genuineness of the transaction. Therefore, we are of the considered view that the findings recorded by the Id.CIT(A) to the extent of land advance received in cash cannot be faulted with and hence, we are inclined to uphold the findings of the CIT(A) and confirm addition made by the CIT(A) towards land advance received in cash of Rs.1,25,00,000/-.

36. The assessee has challenged addition made u/s.69 of the Act as unexplained investment amounting to Rs.3,40,00,000/- treating term deposits made in HDFC bank. The Id.AR for the assessee at the time of hearing submitted that the assessee has got relief from the AO in rectification proceedings u/s.154 of the Act and hence, he does not want to press ground No.4, challenging addition made u/s.69 of the Act. Hence, Ground No.4 of the assessee is dismissed as 'not pressed'.

37. The next issue that came up for our consideration from Ground Nos. 2 & 4 of Revenue appeal is deleting disallowance of bad debts of Rs.37,40,415/-.

38. The assessee was carrying on the business in the name and style M/s. Mobile Gourmet, which supplied food packets to M/s. Paramount Airways Private Limited. The supply of food packets was on credit basis and there had been regular outstanding receivable from them. M/s. Paramount Airways Pvt. Ltd., has closed its operations and hence, its last outstanding balance of Rs.37,40,415/- has been written-off as bad debt, since it could not be recovered from them. The AO has disallowed bad debts written off expenses on the ground that catering business was closed down three years ago and the bad debts of a business that has been closed down cannot be claimed against other business income and hence, disallowed the claim of 'bad debts' to the total income.

39. On appeal, the Id.CIT(A) has deleted addition made by the AO by holding that when receivables was written off as 'bad debts' in the books of accounts of the assessee, conditions stipulated for written off as envisaged under provisions of section 36(1)(vii) of the Act are satisfied and hence the same needs to be allowed.

40. The Id. DR submitted that the Id.CIT(A) has erred in deleting disallowance of bad debts without appreciating the fact that bad debts claimed pertains to business which was closed down three years ago and the same has been claimed against income from other business.

41. The Id.AR for the assessee on the other hand supporting order of the Id.CIT(A) submitted that the conditions for claiming bad debts in the books of accounts is stipulated u/s.36(1)(vii) r.w.s. 36(2) of the Act and the assessee has fully complied with the provisions. Therefore, whether bad debt pertains to business which was closed or it pertains to business currently carrying on by the assessee is not relevant. As long as debt is arisen out of business of the assessee and the same has been written off in the books of accounts, then same needs to be allowed as deduction.

42. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. As per provisions of section 36(1)(vii) r.w.s 36(2) of the Act, the only condition for claiming of bad debts is that said bad debt should have been taken into account in computing the income of the assessee of

the previous year in which the amount of debt is written off or on an earlier previous year and further said debt should be written off in the books of accounts of the assessee. In this case, the Id.CIT(A) has recorded categorical finding that bad debts written off towards amount receivable from M/s. Paramount Airways Pvt. Ltd., was offered to tax in earlier assessment year and assessee has further written off said debt in the books of accounts for the impugned assessment year, because the same was irrecoverable. We find that the conditions for claim of bad debts as stipulated u/s.36(1)(vii) r.w.s. 36(2) of the Act has been complied with and hence, it is irrelevant whether debt pertains to business which was closed in earlier year or it pertains to business in continuation during the year in which said debt was written off. As long as debt was written off in the books of accounts of the assessee, the same needs to be allowed as deduction. This proposition is supported by the decision of Hon'ble High Court of Madras in the case of CIT v. M/s. Rajini Investment Private Limited, TCA No.912 of 2009 dated 05.10.2009, where it was clearly held that merely because the money lending business was subsequently discontinued, that is in the subsequent accounting year relating to assessment year, it cannot be held that the assessee was disentitled to claim such deduction. Therefore, we are of the considered view that there is

no error in the findings recorded by the Id.CIT(A) to delete addition made towards disallowance of bad debts and hence, we are inclined to uphold findings of the Id.CIT(A) and reject ground taken by the Revenue.

43. The next issue that came up for our consideration from Ground Nos.3 & 5 of Revenue appeal is capitalization of land for project expenses amounting to Rs.75,00,000/-. During the financial year relevant to assessment year 2012-13, the assessee has completed Phase-I of real estate project called 'TRILOK' developed by him under a Joint Development Agreement (JDA) with the land owner. In this regard, he has debited construction related expenses to his profit & loss account under the head 'Project related expenses'. The assessee has retained 48 row houses out of total houses constructed in the project to earn rental income. Hence, the cost of 48 row houses was capitalized in his books of accounts as 'fixed asset'. However, the proportionate land value of 48 row houses was not capitalized in books of accounts, because the assessee was not entitled to land, since it was yet to be transferred by the land owner. The AO has made addition towards cost of land relating to 48 row houses amounting to Rs.75,00,000/- on the ground that the assessee has already obtained Power of Attorney in the name of his

mother and is executing sale deed for land to the buyers. The AO further noted that the assessee should have registered these lands through the power of attorney to his name and without doing so, the assessee cannot claim that land owner has not registered land to his name, when he has already built 48 row houses and admitting rental income. Therefore, Rs.75,00,000/- was capitalized and added to the total income. On appeal, the Id.CIT(A) deleted the additions made by the AO by holding that land was never purchased and the AO was wrong in capitalizing cost of land in the books of accounts of the assessee.

44. The Id. DR submitted that the Id.CIT(A) was erred in allowing the claim of capitalization of land for project expenses without appreciating the fact that the assessee has got power of attorney in the name of his mother and also executing sale deed for buyers. The Id. DR further submitted that when the assessee has capitalized cost of construction of row houses, related cost of land of row houses also needs to be capitalized. In this case, although the assessee has capitalized cost of construction of row houses but failed to capitalize cost of land, even though said land was already in possession of the assessee and hence, the Id.CIT(A) without

appreciating these evidences has simply deleted addition made by the AO and hence, his order should be reversed.

45. The Id.AR on the other hand strongly supporting order of the Id.CIT(A) submitted that lands on which 48 row houses have been built were never purchased from land owner and further those row houses was intended for sale to outsider but the same has been let out on rent till the assessee finds buyer. The land owner has not transferred proportionate undivided share in relation to 48 row houses. The assessee has not paid any consideration to land owner towards cost of land, which was intended for sale to third party. Therefore, the CIT(A) after considering the facts has rightly held that cost of land cannot be capitalized in the books of accounts of the assessee.

46. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. Admittedly, lands on which 48 row houses have been built were in pursuance of Joint Development Agreement with Smt. Seshu Rajan. The lands on which row houses have been built were never purchased from the land owner. Further, the assessee has incurred cost of construction of 48 row houses and debited under the head

direct project expenses into profit & loss account. Since the row houses are retained to earn rental income, cost of building of 48 row houses was capitalized in his books of accounts as fixed assets. Since, land was in pursuant to JDA and assessee has not paid any consideration for land, the question of capitalization of cost of land of 48 row houses does not arise. Therefore, under these facts and circumstances, we are of the considered view that since the lands were never purchased by the assessee nor any consideration was paid with respect to sale, the question of capitalization of said cost does not arise. Notwithstanding to the above, it is also noteworthy to observe that cost of land was never claimed in profit & loss account as expenses and thus, capitalization of such cost of land to the fixed asset is a revenue neutral expenses, because no evidence was brought on record to establish the fact that the assessee has paid consideration for purchase of land. The CIT(A) after considering relevant facts, has rightly deleted addition made by the AO. Hence, we are inclined to uphold the findings of CIT(A) and reject ground taken by the Revenue.

47. In the result, the appeal filed by the assessee for assessment year 2012-13 is partly allowed and appeal filed by the Revenue for assessment year 2012-13 is dismissed.

48. As a result, the appeals filed by the assessee for the assessment year 2011-12 in ITA No.743/CHNY/2015 is allowed & for the assessment year 2012-13 in ITA No.1002/CHNY/2018 is partly allowed and the appeal filed by the Revenue for assessment year 2012-13 in ITA No.1161/CHNY/2018 is dismissed.

Order pronounced in the court on 9th August, 2021 at Chennai.

(महावीर सिंह)
(MAHAVIR SINGH)
उपाध्यक्ष /VICE PRESIDENT

(जी. मंजुनाथ)
(G. MANJUNATHA)
लेखा सदस्य /ACCOUNTANT MEMBER

चेन्नई/Chennai,
दिनांक/Dated, the 9th August, 2021

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|------------------------|-------------------------|------------------------------|
| 1. निर्धारिती/Assessee | 2. राजस्व/Revenue | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त /CIT | 5. विभागीय प्रतिनिधि/DR | 6. गार्ड फाईल/GF. |