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

BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI RAVISH SOOD, JUDICIAL MEMBER

ITA No.4007/M/2019
Assessment Year: 2008-09

Shri Yogesh Mehra, Flat No.201, Hare Krishna Society, North South Road No.8, Vile Parle (W), Mumbai-400 009 **PAN: AAAPM6139N**	Vs.	DCIT, C.C.- 3(1), Air India Building, Nariman Point, Mumbai - 400021
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Ritu Kamal Kishor, A.R.
Revenue by : Shri T.S. Khalsa, D.R.

Date of Hearing : 13.07.2021
Date of Pronouncement : 27.07.2021

O R D E R

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 29.03.2019 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2008-09.

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

"1. On the facts and in the circumstances of the appellant's case and in law the Ld. CIT(A) erred in confirming AO's action of making addition u/s. 2(22)(e) despite the fact that during the course of search no incriminating material or evidence was found relating to deemed dividend and as on the date of search no assessment or reassessment was pending for the AY 2008-09 that could be abated.
2. On the facts and in the circumstances of the appellant's case and in law the Ld. CIT(A) erred in not adjudicating the issue that the appellant held only 14.29% shares in Vish Wind Infrastructure Limited prior to 22.05.2010 despite the fact all the relevant material was available before the Ld. CIT(A).
3. On the facts and in the circumstances of the appellant's case and in law the Ld. CIT(A) erred in not adjudicating the ground relating to AO's action in considering the commercial and business transaction between EIL and group companies which

were undertaken by EIL for the purpose of carrying on its business as payment by way of loans and advances for the purpose of section 2(22)(e).

4. On the facts and in the circumstances of the appellant's case and in law the Ld. CIT(A) erred in directing the AO to verify the ledger accounts of WWIL/EIL in the books of 4 related concerns for ascertaining the claim of appellant that there are no actual payments made/received and only journal entries were passed and if found correct delete the addition of Rs. 15,24,893/- on account of deemed dividend made by the AO in respect of transaction between WWIL/EIL with 4 related companies despite the fact that the ledger accounts were available before the AO during the course of assessment proceedings and the same were also filed before the Ld. CIT(A) instead of deleting the addition of Rs.15,24,893/- made by the AO.

5. On the facts and in the circumstances of the appellant's case and in law the Ld. CIT(A) erred in directing the AO to verify the claim of appellant that prior to 22.05.2010, the appellant was holding only 14.29% stake in Vish Wind Infrastructure Ltd. and if found correct, not to consider the transaction entered into in the relevant year between M/s. WWIL/EIL and M/s. VWIL for the purpose of applicability of provisions of section 2(22)(e) despite the fact that evidences relating to shareholding of the appellant prior to 22.05.2010 was available before the Ld. CIT(A) instead of deleting the addition of Rs. 95,87,842/- made by the AO.

6. The appellant craves leave to add to, alter, amend and /or delete all or any of the foregoing grounds of appeal.

7. The appellant prays before the Hon'ble Tribunal to delete the addition made by the AO by invoking the provisions of section 2(22)(e) in the absence of any incriminating material relating to the same was found during the course of search."

3. The issue raised in ground No.1 is against the order of Ld. CIT(A) upholding the assessment framed under section 143(3) read with section 153A of the Act by ignoring the fact that no incriminating material was found and seized during the course of search action and therefore no addition can be made in absence of any seized incriminating material as the assessment has attained finality and was unabated on the date of search.

4. The facts in brief are that the search action under section 132 of the Act was carried out on 14.03.2013 by DDIT (Inv.), Unit 4, Mumbai at private offices, site office, residence of main persons of M/s. Enercon (India) Ltd. now known as M/s. Wind World India Ltd. and other related companies promoted by Mr. Yogesh Jogendranath Mehra and Mr. Ajay Mehra. The assessee was also covered under the said search. Consequent to the

search a notice under section 153A of the Act dated 28.01.2014 was issued and duly served upon the assessee which was complied with by the assessee by filing the return of income on 11.08.2014 declaring total income at Rs.1,08,67,617/-. The AO noted that search team during the course of search operation has noticed that loans and advances have been given by M/s. Wind World India Ltd. to the associated concerns of the group and these were in the nature of deemed dividend within the meaning of section 2(22)(e) of the Act. The AO noted that M/s. Wind World India Ltd. has given advances to M/s. Vish Wind Infrastructure Ltd. Rs.95,87,842/-, M/s. Enercon Wind Farms (Kerala) P Ltd. Rs.20,500/-, M/s. Enercon Wind Farms (Maharashtra) P Ltd. Rs. 10,21,417/-, M/s. Enercon Wind Farms (Tamil Nadu) P Ltd. Rs.4,96,476/- and M/s. Enercon Wind Farms (Gujrat) P Ltd. Rs.4,500 /-. The aggregate amount of these loans and advances came to Rs.1,11,30,735 /-. During the search it was revealed that the assessee and his mother held equity shares in M/s. Wind World India Ltd. of more than 10% and more than 20% in other related companies as stated above. The AO came to conclusion that since the M/s. Wind World India Ltd. has accumulated profits in the form of reserve and surplus and the assessee has shareholdings as stated above, therefore, the provisions of section 2(22)(e) of the Act are attracted. Accordingly issued a show cause notice to the assessee which was replied by the assessee by submitting that the money advanced by M/s. Wind World India Ltd. to various related entities was out of commercial consideration and expediency. The assessee submitted that these advances were given for purchase of land as the business of the assessee is to

set up wind mills for its customers. It was submitted that due to land Ceiling Act in various States the land can not be purchased in the name of single entity and hence the purchase of land in the name of group companies is done. It was submitted that these advances were in the nature of business advances by the assessee to carry on and to expand its business by installing more and more wind mills smoothly and efficiently. Therefore these advances were given for genuine business requirements and commercial transactions and could not be treated as deemed dividend in terms of section 2(22)(e) of the Act. However, the submissions of the assessee did not find favour with the AO and he treated the advances of Rs.1,11,30,735/- as deemed dividend under section 2(22)(e) of the Act and added the same to the income of the assessee by framing the assessment under section 143(3) read with 153A vide order dated 28.06.2017.

5. At the outset the ld counsel of the assessee submitted that the issue involved in the present appeal is squarely covered by the decision of the coordinate bench in assessee own case ITA No.4006/M/2019 A.Y. 2007-08 and therefore the appeal of the assessee may be decided accordingly following the said decision.

6. After hearing both the sides and perusing the order of the coordinate bench in ITA No. No.4006/M/2019 A.Y. 2007-08, we find that the similar issue is decided by the coordinate bench in assessee own case the operative part whereof is extracted below:

> "8. We have heard the rival submissions of both the parties and perused the material on record including the orders of authorities below and various decisions cited before us. It is undisputed that during the course of search proceedings on the assessee no incriminating materials were found in respect of the assessee

except the copies of assessee ledger accounts which are part of books of accounts and statement recorded during the search action u/s 132(4) of the Act. In the instant case, the assessee filed the original return of income under section 139(1) of the Act on 30.07.2007 whereas the search was conducted under section 132(1) of the Act on14.03.2013 almost after more than five years. Thus the assessment has attained finality on the date of search meaning thereby that it has not abated on the date of search. It is also a settled position of law that any addition in a non abated assessment year can only be made on the basis of incriminating material found during the course of search and not otherwise. We find that during the course of search no such incriminating material was found by the search team. We have also perused the order of Ld. CIT(A) wherein Ld. CIT(A) has noted that the addition made by the AO was based upon incriminating in the form of statement recorded during search action under section 132(4) of the Act and the facts collected during the search from books of accounts that the M/s. Wind World India Ltd. which has advanced some loans to the related entities thereby attracting the provisions of section 2(22)(e) of the Act as the assessee held more than 10% shareholding in M/s. Wind World India Ltd. and more than 20% in those companies to which the loans were advanced. The issue before us whether the statement recorded during search u/s 132(4) of the Act or extracts of books of accounts maintained by the assessee constitute incriminating materials found during search or not. We have perused the facts on records and after analyzing them in the light of various decisions of tribunal, we opine that such materials/evidences can not be said to be found during the course of search. We further find merits in the contentions of the assessee that materials has to be found during search and it has to be incriminating. Therefore, we are not in agreement with the conclusion drawn by the Ld. CIT(A) on this issue. In our considered opinion, the findings of the ld CIT(A) that statement recorded during search constitutes incriminating material is also not correct as the same can not be said to be found during the course of search but is recorded to elicit more information/explanation of the searched person on the incriminating documents/gold/jewellery found during search. Therefore after perusing the material on record and considering rival contentions and also the decisions cited before us, we are of the considered view that a statement recorded during the course of search can not be considered an incriminating material in order to make addition in an unabated assessment year. The case of the assessee is supported by the decision of the co-ordinate bench of the Tribunal in the case of DCIT vs. Shivali Mahajan & others (supra). The relevant paras are reproduced below:

> "3……. During the course of search, statement of Shri Lalit Mahajan i.e., the assessee in appeal No.5590/Del/2015 was recorded, in which, he admitted of cash investment by him and other family members in respect of booking of space in Indirapuram Habitat Centre……
> 4. ……..
> 7. Learned DR, on the other hand, stated that during the course of search of Aerens Group who is the builder and developer of Indirapuram Habitat Centre…….. That the statement under Section 132(4) has a legal sanctity and that by itself constitutes an evidenceand addition can be made on the basis of assessee's statement……
> 8. ……..

9. We have carefully considered the arguments of both the sides and perused the material placed before us. After considering the facts of thecase and the rival submissions, we find that in these appeals, following two questions arise for our consideration :

(i) Whether any material found in the search of any other person than the assessee in appeal can be considered in the assessment under Section 153A of the assessee.

(ii) Whether the addition can be made only on the basis of statement given by the assessee during the course of search.

…….

16 Now, coming to question No.2, we find that this issue is also covered by the decision of Hon'ble Jurisdictional High Court in the case of Harjeev Aggarwal (supra) and Best Infrastructure (India) (P.) Ltd. (supra). In the case of Harjeev Aggarwal (supra), Hon'ble Jurisdictional High Court considered the evidentiary value of the statement recorded during the course of search. The relevant portion is paragraph 19, 20 & 24, which are reproduced below for ready reference :-…….

17. Thus, Hon'ble Jurisdictional High Court has held “The words “evidence found as a result of search” would not take within its sweep statements recorded during search and seizure operations”. Their Lordships further observed “However, such statements on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the AO to make a block assessment merely because any admission was made by the assessee during search operation”. In paragraph 24, their Lordships have mentioned about the prevailing practice of extracting statement by exerting undue influence or coercion by the search party. Though the above decision in the case of Harjeev Aggarwal is with reference to the meaning of undisclosed income u/s 158BB of the Income-tax Act, however, in our opinion, the above observation of Hon'ble Jurisdictional High Court would be squarely applicable while considering the evidentiary value of the statement while making the assessment u/s 153A

18. In the case of Best Infrastructure (India) (P.) Ltd. (supra), Hon'ble Jurisdictional High Court reiterated in paragraph 38 “Fifthly, statements recorded under Section 132(4) of the Act do not by themselves constitute incriminating material as has been explained by this Court in Harjeev Aggarwal”.

9. Therefore, on the issue of statement recorded u/s 132(4) of the Act being incriminating material, we are not in agreement with the conclusion drawn by the Ld. CIT(A). In our considered view the statement recorded under section 132(4) of the Act can not be considered as incriminating material found in the course of search. Besides it is a settled legal position that in an assessment framed under section 153A of the Act which is unabated on the date of search, no addition can be made without incriminating seized materials. The case of the assessee is covered by the following decisions:

a) In CIT v. Continental Warehousing Corporation (Nhava Sheva) Ltd. (2016) 374 ITR 645 (Bom)(HC) wherein it was held that no addition can be made in respect of assessments which have become final if no incriminating material is found during search.

b) In CIT v. Gurinder Singh Bawa [2017] 79 taxmann.com 398 (Bom) where it was held that where no incriminating material was found during course of the search, entire proceedings under section 153A of the Act were without jurisdiction.

c) In CIT v. Deepak Kumar Agarwal [2017] 86 taxmann.com 3 (Bom) wherein it was held that Assessment under section 153A of the Act can be made only on basis of incriminating material found in search under section 132 of the Act and only income related to incriminating documents found during search can be considered in the assessment.

d) The ITAT Special Bench in the case of All Cargo Global Logistics Ltd. v. DCIT [2012] 18 ITR(T) 106 (Mum) (SB) (Page 1-20 of PB - II) (Para 7 at page 16) it was held that in case of assessments which do not abate pursuant to issue of notice under section 153A, in addition to income that has already been assessed, assessment will be made on basis of incriminating material found in course of search but not produced in course of original assessment and undisclosed income or property discovered in course of search.

10. In view of the above facts and circumstances of the case and various decisions as discussed above, we are inclined to set aside the order of Ld. CIT(A) on this issue and direct the AO to delete the addition as AO has no jurisdiction to make the addition. The ground No.1 is allowed.

11. By virtue of ground no. 2 to 5, the assessee has challenged the order of CIT(A) in partly upholding the addition to the extent of Rs. 2,95,38,019/-.

12. The facts qua the loans and advances given by M/s. Wind World India Ltd. have already been discussed in the ground no 1 and are not being repeated here. After hearing the rival parties and perusing the material on records, we find that even on merits, the assessee has a very strong case in his favour. We note that these loans and advances were given out of commercial considerations and expediency. The Wind Word (India) Ltd. is engaged in the business of installing wind Mills and sales thereof. In order to install the windmills it needs land. The Wind Word (India) Ltd. purchases land in the name of these related companies in order to overcome the land ceiling conditions imposed by Land Ceiling Act in vogue in various States. For the said purpose, The Wind Word (India) Ltd. advances loans to these companies and thereafter the necessary adjustments are made upon purchase of land. We note that the Wind Word (India) Ltd. has to buy land in the name of related entities/companies and it is only that purpose the loans were advanced to the related companies. In our opinion the money was advanced out of business and commercial consideration and therefore not covered by the provisions of section 2(22)(e) of the Act. The case of the assessee is supported by

the following decisions namely (i) Chandrashekhar Maruti vs. ACIT ITA No.5410/Mum/2012 47 CCH 0783, 183 TTJ 0459, (ii). Ackruti City Ltd. vs. DCIT [ITA No. 4869/Mum/2009(iii)CIT vs. Suraj Dev Dada [(2014) 46 taxmann.com 402 (Punjab & Haryana)]. In the case of Chandrasekhar Maruti vs. ACIT (supra) the co-ordinate bench of the Tribunal has held that where there is a running account between the two sister concerns wherein there is a continuous exchange of transactions and the account was squared up during the year, no part of the said amounts could be treated as being attributed to the shareholders. We find that in the case of the assessee, the facts are exactly same as the funds were transferred to various entities inter se out of commercial expediency in order to purchase land in the name of these entities in various states in view of the Land Ceiling Act in vogue in those states. As the installation of windmills and sales thereof is the business of the assessee and the necessary adjustments are made after purchase of land by these entities and therefore the advancing of loans is out of business and commercial consideration. Similarly, in the case of Akruti City Ltd. vs. DCIT (supra) the identical issue was decided in favour of the assessee by holding that financial transactions out of business expediency between two sister concerns can not be called as loans or advances for the purpose of invoking section 2(22)(e) of the Act. The same view as held by the Hon'ble High Court of Punjab & Haryana in the case of CIT vs. Suraj Dev Dada (supra) wherein it has been held that it will be a travesty of law to apply the provision of section 2(22)(e) of the Act where the assessee had running account with the company with whom the assessee advanced money to the company as and when required for the purpose of business and also in real sense the assessee has not derived any benefit from the funds of the company. The issue is also clarified by CBDT in its circular No.19/2017 dated 12.06.2017 wherein it has been clarified that trade advances in the nature of commercial transactions would not fall within the ambit of words "loans/advances within the meaning of section 2(22)(e) of the Act. Considering the facts and circumstances of the case in the light of various decisions as discussed above, we are of the considered view that the money advanced is used for the purpose of business of the former and therefore can not a loan/deposit to be treated as deemed dividend. Accordingly, we are not in agreement with the conclusion drawn by the Ld. CIT(A) on this issue. Thus we are inclined to set aside the order of Ld. CIT(A) and direct the AO to delete the addition.

13. In the result, the appeal of the assessee is allowed."

7. Since the facts of the case before us are materially same vis-à-vis the facts of the case decided by the coordinate bench, we are inclined to set aside the order of ld CIT(A) and direct the AO to delete the addition on account of deemed dividend.

8. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 27.07.2021.

Sd/-	**Sd/-**
(Ravish Sood)	**(Rajesh Kumar)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated: 27.07.2021.

* 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.