

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH: BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA No.1373/Bang/2012
Assessment Year: 2006-07

Deputy Commissioner of Income-tax Circle 11(3) Bangalore	Vs.	Shri Jagadish N. Hinduja No.7 & 12, Industrial Suburb Tumkur Road Yeshwanthpur Bangalore 560 022 PAN No.AACPH7291Q
APPELLANT		RESPONDENT

ITA No.1374/Bang/2012
Assessment Year: 2006-07

Deputy Commissioner of Income-tax Circle 11(3) Bangalore	Vs.	Shri Sumir J. Hinduja No.7 & 12, Industrial Suburb Tumkur Road Yeshwanthpur Bangalore 560 022 PAN No.AAEPH5197H
APPELLANT		RESPONDENT

C.O. No.48/Bang/2013 (Arising out of ITA No.1373/Bang/2012) Assessment Year: 2006-07
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Shri Jagadish N. Hinduja	Vs.	DCIT, Circl-11(3),Bangalore
APPELLANT		RESPONDENT

C.O. No.49/Bang/2013 (Arising out of ITA No.1374/Bang/2012) Assessment Year: 2006-07
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Shri Sumir J. Hinduja	Vs.	DCIT, Circl-11(3),Bangalore
APPELLANT		RESPONDENT

Appellant by	:	Shri Susan Dolores George, D.R.
Respondent by	:	Shri Ashok A Kulkarni, A.R.

Date of Hearing	:	24.06.2022
Date of Pronouncement	:	22.07.2022

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

These appeals by revenue and COs by assessee are directed against the order of CIT(A) Bengaluru dated 16.7.2012. Since common issues are involved in these appeals and COs, we will extract the grounds in ITA No.1373/Bang/2012 & CO 48/Bang/2013 as follows:-

ITA No.1373/Bang/2012 (Grounds)

- 1. The CIT(A) has erred in holding that the amount of Rs. 6,85,00,000/- received as loan from M/s Gokaldas Images Pvt. Ltd. by the assessee cannot be considered as deemed dividend u/s 2(22)(e) of the Act without appreciating the fact that the assessee is the Managing Director of the said company and that he is holding equity shares and the General Ledger Report relating to the said company pertaining to "Loans to Directors" under the group name "Loans and Advances" for the period 1.4.2005 to 31.3.2006 gave the details of certain debits in the accounts of M/s Gokaldas Images Pvt. Ltd. wherein it has treated a total sum of Rs. 12,28,57,400/- as loans to its directors during the relevant period and out of the said loans, Rs. 6,85,00,000/- concerned to assessee when it had reserves and surplus to the extent of Rs. 84,35,220753 and Rs. 76,67,73,895/- as on 31.3.2006 and 31.3.2005 respectively and the extent of Rs. 81,80,40,613/- and Rs. 70,12,91,755/- as on 31.3.2006 and 21.3.2005 respectively.*
- 2. The CIT(A) has failed to appreciate that the financial transactions made through cheque payments and through journal entries clearly show that there is really an outgoing of money from the company to the benefit of shareholder and it attracts the provisions of section 2(22)(e) of I.T. Act.*
- 3. The learned CIT(A) erred in allowing relief to the assessee without appreciating that the user of the sum paid by a company to a shareholder or to any concern to which such shareholder is a member, by the shareholder or the company is immaterial for the purpose of section 2(22)(e) and that the balance sheet of the company establishes that the assessee owes the money to the company and therefore it is a loan, whether paid to him directly or indirectly.*

CO No.48/Bang/2013 (Grounds)

1. *“The order of the CIT (Appeals) in some respects is opposed to law and facts of the case.*
 2. *The learned Commissioner was in error in holding that the assumption of jurisdiction U/s 147 and the issue of notice U/s 148 were in accordance with law.*
 3. *It should have been appreciated that the Assessing Officer is to restrict himself totally to the recorded reasons and reasons alone for testing the validity of action U/s 147 and he cannot to travel beyond it to any extent and for justifying action U/s 147 he cannot fall back upon even material that may be available on record but not finding expression in the recording.*
 4. *It should have been appreciated that there was no reference in the recording to the letter and extracts allegedly obtained from the ACIT, Circle - 11(4) in the recorded reasons and the contents thereof cannot be relied upon to support the assumption of jurisdiction U/s 147.*
 5. *It should have been further appreciated that the letter dated 26th June 2009 of the ACIT, Circle-11(4), Bangalore, only forwarded the copy of the ledger accounts of loans to Directors in the books of M/s. Hinduja Investments Private Limited and such ledger extractsand even such extract in the books of M/s. Gokuldas Images Private Limited did not show that any money was lent to the assessee as such.”*
2. Originally department came in appeal in respect of these two assesseees before this Tribunal and assesseees filed Cross Objections. These are disposed by the Tribunal vide order dated 12.8.2016, allowing the appeals of the revenue and dismissing the COs filed by the assesseees. Against this, the assesseees carried on the appeals before the Hon’ble High Court. Hon’ble High Court vide judgement

in ITA No.7/17 & 9/19 dated 3.8.2021 remitted the issue to the file of the Tribunal with the following directions:-

5. We have considered the submissions made on both sides and have perused the record. When a loan is advanced by a company to a registered share holder and other conditions mentioned in Section 2(22)(e) of the Act having been satisfied, the amount of loan has to be treated as deemed dividend within the meaning of Section 2(22)(e) of the Act. The Commissioner of Income Tax (Appeals), in its order dated 16.07.2012, held as under:

"4.6. The said financial transaction narrated above does not constitute loan or advance for the purpose of section 2(22)(e) of the Act. The said transaction, even though considered as a loan in the books of account, cannot be considered for the purpose of section 2(22)(e) as there was no individual or personal benefit to the shareholder taking the loan or advance. The AO in his order explained the transaction in the assessment order very elaborately but there is no material available on record to prove the point that the said loan to the Directors had resulted in any personal benefit to the appellant, either directly or indirectly. In fact, the said transactions were meant for the business purpose, strengthening the company on a better financial footing and freeing it from existing possible obligations flowing from its past dealings. To this objective, the above transactions were entered into by the appellant with M/s GIPL. In the instant case, the loans were given by M/s GIPL to the Directors not for the personal benefit of loanee i.e. appellant but for the benefit of the lender i.e. M/s. GPIL to improve the financial strength. The arguments of the appellant are acceptable in this regard. In this context, the appellant relied on the following decisions in his submission".

6. The Tribunal has held as under:

"19.1 The CIT(A) deleted the addition of deemed dividend simply accepting the submissions made by the assessee. The CIT(A) had not gone into the substance of the transactions as explained by the assessee himself. The vital fact which escaped the attention of the CIT(A) is that the money of the company in which the assessee is substantially interested, had gone to the concern in which the assessee substantially interested i.e. PI. It is undisputed fact that the assessee, -- along with his family members, is 100% shareholder in M/s.

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Personality Ltd., Any payment made by a company to a shareholder or concern in which he has substantial interest, is also covered by clause (e) of sub-sec.(22) of section 2. The existence of pre-conditions for invoking the provisions of sec.2(22)(e) to tax as deemed dividend in the hands of shareholder are not in dispute. Therefore, we are not going into the issues. The only aspect to be examined herein is payment made by GIP Ltd., to M/s. Personality Ltd., is taxable in the hands of shareholder. The payments made to PL are transferred as 'loan to directors in the books of GIP Ltd'. The purpose of making payment to M/s. Personality Ltd., was stated to be (i) Rs.5 crores was paid for discharging of its bank loan obligation so as to free GIP Ltd., from this guarantee obligation (ii) An amount of Rs.5.5 crores was paid initially as consideration. for buying the trade brand of M/s. Personality Ltd., but subsequently transferred to HIP Ltd. in which the assessee is substantially interested and these amounts were subsequently transferred to the directors. The provisions of section 2(22)(e) are clearly attracted even if payment is made to a concern in which shareholder is having substantial interest or any payment made by such company on behalf of shareholder or for individual benefit of such _shareholder. Even accepting for argument sake, the submission of the assessee that the loan to shareholder is only by way of book entry does not involve any payment, still provisions of sec.2(22)(e) are attracted when payment is made by a company to any concern in which the shareholder has substantial interest having regard to the plain provisions of sec.2(22)(e) of the Act.

21. From a mere perusal of the above clauses it is clear that the director i.e. the assessee is entitled to interest-free loan of Rs.10 crores from GIP Ltd., and the same is repayable over a period of 10 years without any interest. There is no stipulation as to the manner in which the said loan of Rs.10 crores should be utilized by the assessee-company. Further, there is no stipulation in the said agreement that the loan amount should be utilized only for the purpose of discharging the loan obligations of M/s. Personality Ltd. There is no evidence on record to show that this loan was to be utilized only for purpose of business of the company or in any other manner. Therefore, these facts go to prove that these amounts were advanced as gratuitous loan to the shareholders. The provisions of section 2(22)(e) are squarely applicable."

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“7. However, the Tribunal while recording the aforesaid finding and while reversing the finding recorded by the Commissioner of Income Tax (Appeals), has not taken into account the ledger report, certificates issued by a standard chartered bank, books entries as well as the provisions of the agreements dated 22.11.2005 and 24.12.2005. Since the issue with regard to applicability of Section 2(22)(e) of the Act requires factual adjudication, the order dated 12.8.2016 passed by the Tribunal is quashed and the matter is remitted to the Tribunal for decision afresh after taking into account the material available on record. It is therefore not necessary for us to answer the substantial questions of law.”

3. Hence, these are appeals listed for fresh hearing before this Tribunal. First, we will take up the CO No.48/Bang/2013.

4. Facts of the case are that the assessee was the Director of M/s Gokaldas Images Pvt. Ltd., Bangalore [in short M/s GIPL]. The AO received information from the ACIT, Circle-11(4), Bangalore by a letter dated 26/6/2009 that the appellant had received loan from M/s GIPL and the same was required to be examined for the purpose of deemed dividend u/s 2(22)(e) of the Act. On receipt of the said information, the AO found that the appellant received a loan from the said company and reopened the assessment u/s 147 of the Act by issuing a notice u/s 148 on 12/3/2010 for the AY 2006-07 by recording the following reasons:

"On verification of records in the case of M/s Gokuldas Images Private Limited it is observed from the General Ledger Report for the period 1.4.2005 to 31.3.2006 that M/s Gokuldas Images Pvt. Ltd. has given a Loan of Rs.6,85,00,000/- to Shri Jagadish N. Hinduja who is one of the Director of the Company and is the beneficial owner of the shareholding not Less than 10% of the voting power at any time during the previous year relevant to A.Ys. 2006-07. As Mr. Jagadish Hinduja is holding 27.23% of beneficial ownership of the share and has received Loan of Rs.6,85,00,000/- from the company in which he is a Director, the same was required to be declared in the return of income as deemed dividend as per the provisions of Sec. 2(22)(e) of the Income-tax Act, 1961. There is a failure to do so on the part of the assessee which has resulted in understatement of income of

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Rs.6.85 crores. I therefore have reason to believe that the income chargeable to tax has escaped assessment within the meaning of Sec. 147 of the Income-tax Act, 1961."

4.1 In response to the said notice, the appellant filed a reply dated 12/4/2010 stating that he had already filed the return of income on 31/7/2006 vide acknowledgement No.1401204939 and wanted to know the reasons for the issue of notice u/s 148 of the Act. The appellant filed a further letter on 21/4/2010 objecting to the assumption of jurisdiction u/s 147 of the Act by the AO and reiterated the request for reasons recorded for the same. The appellant also filed a return under protest while filing the said letter. The AO furnished the recorded reasons to the appellant by letter dated 21/5/2010. The appellant objected to the assumption of jurisdiction u/s 147 of the Act by detailed submissions dated 11/8/2010. Before going into the appellant's objections, the background facts of the case are very much relevant, which are explained below:

4.2 The appellant is a Director of M/s GIPL. M/s GIPL, its promoters and 3 more new investors had entered into an agreement called 'Share Subscription and Share Holders' Agreements' dated 22/11/2005 under which substantial capital had to be injected by the investors. The investors are stated to have imposed certain conditions in the agreement, which were clarified in another agreement dated 24/12/2005 between the promoters and M/s GIPL. As per this, M/s GIPL had to dissociate itself towards improving its financial health, stability and free itself from any liabilities and commitments that might expose it because of its relations with its associate concerns. In view of this, it was laid down that certain funds would be made available to the promoters,

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which had to be used for the specific purpose with a condition that it shall be used only for the specified purposes for improving the financial health of M/s GIPL. These funds were made by way of payments to the affiliates by drawing bank instruments etc. in their name while debiting the loans to Directors Account later through adjustment entries so that the debit figured in an account called 'Loans to Directors.' Accordingly, a sum of about Rs.10.5 crores was utilized by the promoters in this regard. It is in this context that the AO received the information from ACIT, Circle-11(4) and assumed the jurisdiction u/s 147 of the Act. The assumption of jurisdiction by the AO was seriously objected to by the detailed submissions by their letter dated 11/8/2010, which are mentioned in brief below:

(a) Recorded reasons did not show whether the original return has been disposed of in any manner and what were the decisions there.

(b) The recorded reasons did not invoke any of the clauses under the explanation to Sec.147.

(c) There was no valid information on the basis of which any reasonable belief could be formulated to hold that any income of the assessee had escaped assessment.

(d) In the absence of any reference to the presence for accumulated profits in the recorded reasons no reasonable belief could be formed of any dividend U/s 2(22)(e) which had escaped assessment.

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(e) To justify action U/s 147 travel beyond the reasons recorded U/s 148(2) is not permissible.

(f) The mere opinion of the Assistant Commissioner of Income Tax, Circle 11(4), that there should be necessary verification about the applicability of Sec.2(22)(e) to the assessee in view of certain loans from M/s Gokuldas Images Pvt. Ltd (GI) could not be the basis for invoking Sec.2(22)(e) and action U/s 147.

(g) Assuming without admitting that there was information regarding lending of money by GI to the appellant, as stated in the recorded reasons, still such lending on the material placed before the A.O. Was in the course of business and as per the decisions of Delhi High Court in 318 ITR 476 (Departmental SLP dismissed) there was no case for invoking Sec.2(22)(e).

(h) Even otherwise there was no lending to the assessee as such as could be gathered from whatever material was available in the recorded reasons and the reference to the General Ledger Report adverted to in the recorded reasons do not at all show that any money was lent to the assessee by GI."

4.3 The AO rejected the submissions of the appellant and justified the assumption of jurisdiction u/s 147/148 of the Act and the relevant portion of the AO's order is extracted below:

"I - Assumption of Jurisdiction u/s 147

At the outset, I propose to deal with the assessee's objections in the matter of assumption of jurisdiction u/s 147 and issue of notice u/s

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148 for the assessment year 2006-07. I have gone through various replies, concerning to the issue of notice, u/s 148 filed by the assessee, so far. The assessee has highlighted, in his objections, that at the time of issue of notice, u/s 148, there is no material in possession of the department to show that the assessee had obtained a Loan of Rs.6,85,00,000/- from Gokaldas Images Pvt. Ltd., and that in the absence of material finding place in the recording u/s 148(2) re opening cannot be justified, in his case, for the assessment year 2006-07.

2. Regarding the objections for the assumption of jurisdiction, u/s 147, for the assessment year 2006-07, it is not the assessee's case that he do not come within the jurisdiction of the DCIT, Circle 11(3), Bangalore, for his income tax assessment purposes. In fact, records show that the assessee has requested, on 26.12.2008, itself before the ACIT Circle 14(1), Bangalore, for the transfer of his assessment records to Range 11, Bangalore, on the ground that he is the full time Director of Gokaldas Images Private Limited, Bangalore, and is drawing remuneration from the said company and therefore he is required to file his individual returns in Range 11 where the said company is assessed to tax. Next, coming to the provisions of Law concerning to sections 147 and 148 of the Income tax Act, 1961, here again, it is not the case of the assessee that there is no recording of reasons. In fact, it has been acknowledged by the assessee "that there is recording of reasons by the Assessing Officer and the said recordings have been made available to him, on his request. Therefore, records clearly show that the requirements of Sec. 148(2) have been duly complied with by the department. Apart from the above, the notice issued, u/s 148, is not silent on any aspect which is crucial to test the validity of the recording of reasons vice-versa the assumption of jurisdiction u/s 147 and therefore the same do not vitiate the reopening of the assessment.

3. The provisions of Sec. 148 clearly mention that the said notice could be issued for making the assessment, reassessment or re-computation, u/s 147. Hence, the notice, u/s 148, is not meant for only for re-assessment or re-computation. It is undisputed Legal position that the provisions of Sec. 147 is specifically meant to bring to tax 'income escaping assessment' in an assessment, reassessment or re computation. However, for availing and invoking the provisions of Sec. 147, the Assessing Officer should have 'reason to believe' that the income has escaped assessment. The provisions of Sec. 147 also authorizes the Assessing Officer to assess or reassess, not only such income in respect of which the Assessing Officer had reason to believe, at the time of issue of notice u/s 148 but also any other income chargeable to tax which has escaped assessment and which comes to the notice of the

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Assessing Officer. Subsequently, in the course of the proceedings u/s 147 Explanation 3 to Sec. 147 is very clear on this issue. But, where an assessment u/s 143(3) or 147 has already been made for the relevant assessment year, action u/s 147 is permissible only in cases where there is failure on the part of the assessee to make a return u/s 139 or in response to a notice issued u/s 142(2) or Sec. :48 Ordinance fully and truly all material facts necessary for his assessment for the relevant asst. year. However, in cases where the relevant asst. year in respect of which action u/s 147 is invoked is within the period of four years from the end of the relevant asst. year for the issue of notice u/s 148, there is no need to go into and fulfil the condition that there is failure on the part of the assessee to make a return u/s 139 or in response to a notice issued u/s 142(1) or Sec. 148 or to disclose fully and truly all material facts necessary for the assessment for the relevant asst. year. In the assessee's case, the relevant asst. year is 2006-07 and the period of four years from the end of the asst. year commences only after 1.4.2011 for fulfilling such a condition in the matter of issue of notice u/s 148. Admittedly, the notice u/s 148 has already been issued and served, on 15.03.2010, for the asst. year 2006-07 and the same is for the purpose of assessment as is clear from the notice itself."

5. Against this assessee went in appeal before Ld. CIT(A). Ld. CIT(A) confirmed the reopening of assessment by observing as under:-

"The other objection of the appellant that the letter of the ACIT, C-11(4), Bangalore states that the issue of section 2(22)(e) of the Act has to be examined in the hands of the Directors and does not give any factual finding about the loans to the appellant by the M/s GIPL. It is also objected that a need to further examine cannot be a ground for reopening. The AO having received the information regarding the transactions of the appellant with the said company, the only option available with him was to take recourse to action u/s 147 of the Act since he had sufficient material in this regard as already mentioned above. The assessment year under consideration is AY 2006-07 and there was no time limit to issue notice u/s 143(2) of the Act for making a scrutiny by the time he received a letter dated 26/6/2010 from the ACIT, C-11(4). Further, the matter cannot be considered u/s 154 of the Act. Therefore, in the interest of revenue, the AO has resorted to the possible action u/s 147 of the Act in accordance with the provisions of the said section. The appellant also argued that the AO did not mention anything about the original return filed for the AY 2006-07 by the appellant in the reasons recorded. There is no stipulation under the Act, more specifically u/s 147 of the Act, that there should be a mention about the filing of the return of income or otherwise by the appellant. It is enough if the requirements of section 147 of the Act are met while recording the reasons. Therefore, the objection

of the appellant that there was omission to mention about the original return filed by M/s GIPL and treatment thereof is not at all valid. The appellant also submits that the examination of the general ledger report does not indicate any lending to the appellant and it was only a book adjustment by way of journal entries. As already stated, the AO was having sufficient material to come to the conclusion after analysing the general ledger report of M/5 GIPL for the relevant period and corroborated with other materials already mentioned coupled with verification of record, was enough to come to the conclusion that there was loan advanced to the appellant.

3.11 The appellant also stated that the AO cannot travel in any manner beyond what is expressed in the recorded reasons when it is challenged u/s 147/148 of the Act. The appellant also relied on various decisions in support of his stand. I have gone through the decisions and it is true that the AO cannot travel beyond what is recorded as reasons for reopening the assessment. However, nothing prevents the AO from referring to the available records and other materials before recording the reasons. This has already been elaborated in the earlier paragraphs and the AO has not justified his action u/s 147 of the Act with any external material in this regard. Further it is seen from the various decisions relied on by the appellant that one of the main issues considered therein was the failure on the part of the appellant so as to enable the AO to assume jurisdiction. However, in the present case, there is no need to prove the failure on the part of the appellant to assume jurisdiction u/s 147 of the Act as the reopening is done within the period 4 years from the end of the assessment year. Therefore, these decisions do not apply to the present case and the AO has dealt with in his remand report in this regard.

3.10 The appellant also took recourse to the provisions of RTI to seek more information regarding whether the AO was having sufficient information to come to the conclusion that he availed a loan from M/S GIPL for the period under consideration. It is the strong belief of the appellant that the AO was having no material before him for any reasonable belief. A reasonable belief has to be examined in an objective manner and not from the view of the appellant. In view of the above discussion, I am of the considered opinion that the AO was having sufficient material before him for a reasonable and honest belief to the effect that the appellant had a loan transaction in the books of MIS GIPL. It may not be out of place to mention here that the detailed verification carried out at the time of reassessment proceedings finally revealed that there were book adjustments in the names of Shri Jagadish N. Hinduja and Shri Sumir J. Hinduja regarding the loan transaction, which were shown as loans to Directors in the books of the said company. Thus the prima facie belief formed by the AO ultimately proved the point that there were debit entries in the names of these two Directors in the books of the company. It is a different matter

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whether such debit or would, in strict sense, amount to deemed dividend 2(22)(e) or otherwise and the same has been dealt separately in the order. I, therefore, hold that the AO had sufficient reason to believe that the income of the appellant had escaped assessment and he was justified in taking action taken by him u/s 147 of the Act to reopen the appellant's assessment for the assessment year 2006-07 by issue of a notice u/s 148 of the Act."

6. Against this assessee filed CO before us in both the appeals.
7. The Ld. A.R. submitted as follows:-

Validity of Notice u/s 148 to be tested based on reasons alone:

7.1 The validity of the Notice u/s 148 ought to be tested on the basis of reasons recorded for reopening and formation of belief by the AO. The AO cannot travel beyond reasons recorded for the purpose of assumption of jurisdiction. The reasons recorded cannot be supplemented or substituted. In other words, the validity of the reassessment proceedings should be judged on the touch stone of the reasons recorded, and is to be confined to the recorded reasons.

No reference to the name of the Assessee:

7.2 The reasons recorded for reopening, specifically the ledger extract relied by the AO do not contain the name of the Assessee, it has a mere reference to Directors of M/s. GIPL. The same cannot be a basis for reopening. It is very important to note that even in the Schedule forming part of the Financial Statements, the name of the Directors are not mentioned, whereas it is stated as loan to Directors.

Communication from counterparts:

7.3 The AO initiated proceedings u/s 147 of the Act, relying on a letter dated 26.06.2009 received from the Assistant Commissioner of Income Tax, Circle 11(4), Bengaluru, who had opined that the issue of Section 2(22)(e) being applicable may be examined. The AO merely proceeded with the issuance of Notice u/s 148 of the Act and did not actually examine the applicability of Section 2(22)(e) of the Act with respect to the material available on record. In other words, the proceedings were initiated mechanically placing reliance on certain inference drawn by ACIT, Circle 11(4), Bengaluru.

No formation of belief:

7.4 The reasons recorded do not cause any prudent person to believe that income escaped assessment to tax. The material available with the AO at the time of recording reasons was not sufficient enough to infer that any loan was advanced to the Assessee, and hence there was no factual foundation for recording reasons u/s 147 of the Act. The General Ledger report for the period 01.04.2005 to 31.03.2006 pertaining to M/s. GIPLon which the case of the AO rests, does not give any information about the particular amount of loan that was advanced to the Assessee, including the reason and commercial rationale behind such transaction. The above contention of the appellant finds support from the decision of the Bombay High Court in Indivest Pte Ltd. Vs Addl. Director of Income Tax and another report in 350 ITR 120. The ratio of the decision is to be found at Page 130 of ITR Volume 350, as under:

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"The validity of the notice reopening the assessment under section 148 has to be determined on the basis of the reasons which are disclosed to the assessee. Those reasons constitute the foundation of the action initiated by the Assessing Officer of reopening the assessment. Those reasons cannot be supplemented or improved upon subsequently."

7.5 It is submitted that the above contention of the appellant is not rebutted by the Department.

7.6 The reasons recorded do not indicate that the amount received as loan from M/s. GIPL is taxable as deemed dividend in the hands of the Assessee.

7.7 The ld. A.R. submitted that there was no escapement of income in the form of deemed dividend in the hands of these two assesses as such the A.O cannot invoke the provisions of s.147 of the Act and he placed reliance on the following decisions:

(i) Hon'ble Bombay High Court in the case of M/s. Indivest Pte Ltd. vs. Addl. DIT and others reported in 350 ITR 120 (Bom) at 129 and 130 where in it was held as under:-

"The Assessing officer has power to reopen an assessment, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. The validity of the notice reopening the assessment under section 148 of the Income-tax Act, 1961, has to be determined on the basis of the reasons which are disclosed to the assessee. Those reasons constitute the foundation of the action initiated by the Assessing Officer of reopening the assessment. Those reasons cannot be supplemented or improved upon subsequently."

(ii) Hon'ble Apex Court in the case of CIT vs. Kelvinator of India Ltd. reported in 320 ITR 561 at 564 wherein it was held as under:-

"On going through the changes, quoted above, made to s the Act, we find that, prior to the Direct Tax Laws (Amendment) reopening could be done under the above two conditions and the said conditions alone conferred jurisdiction on the Assessing make a back assessment, but in section 147 of the Act (with effect April, 1989), they are given a go-by and only one condition has viz., that where the Assessing Officer has reason to believe that escaped assessment, confers jurisdiction to reopen the assessment fore, post-1st April, 1989, power to reopen is much wider. H needs to give a schematic interpretation to the words "reason to failing which, we are afraid, section 147 would give arbitrary po% Assessing Officer to reopen assessments on the basis of "mere opinion", which cannot be per se reason to reopen. We must also, mind the conceptual difference between power to review and reassess. The Assessing Officer has no power to review ; he has the to reassess. But reassessment has to be based on fulfilment of cert2 conditions and if the concept of, "change of opinion" is removed, imp tended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the cow? "change of opinion" as an in-built test to check abuse of power Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer.-power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets from the changes made to section 147 of the Act, as quoted her Under the Direct Tax Laws (Amendment) Act, 1987, Parliament deleted the words "reason to believe" but also inserted the word in section 147 of the Act:However, on receipt of representations companies against omission of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the d that it would vest arbitrary powers in the Assessing Officer. We e hereinbelow the relevant portion of Circular No. 549 dated October 1989 ([1990] 182 ITR (St.) 1, 29), which reads as follows :

"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in section 147.—A number of representations were received against the omission of the words 'reason to believe' from section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression 'has

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reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same."

8. On the other hand, Ld. D.R. submitted that the reasons recorded by the AO were based on tangible information received from the AO of M/s Hinduja Investments Pvt. Ltd. (M/s. HIPL) in which the assessee is substantially interested. The provisions of section 147 of the Act have been duly complied with as underlined by both the CIT(A) and the Tribunal as well as the Standing Counsel before the Hon'ble High Court. These arguments are reiterated and it is urged that the Hon'ble Bench may again uphold the validity of the reassessment proceedings. He relied on the following case laws:

8.1 (1) *Raymond Woollen Mills vs ITO 236 ITR 34*: Wherein held that whether there was prima facie some material on the basis of which Department could reopen is relevant.

8.2 (2) *Rajesh Jhaveri Stockbrokers 291 ITR 500 (SC)*: Reason to believe cannot be read to mean that the AO should have finally ascertained the fact by legal evidence or conclusion. Relevant material on which a reasonable person could have formed a requisite belief.

8.3 (3) *Phoolchand Bajranglal vs ITO 69 taxmann 627 (SC)* . wherein held that the ITO may start reassessment proceedings either because some fresh facts come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts.

8.4 (4) *Nova Promoters and Finance Ltd. (2012) 18 taxmann.com 217 (Delhi)* Prima facie belief of AO that income escaped assessment

is enough at the stage of reopening and merits of the matter are not relevant.

8.5 In view of the foregoing facts, Ld. D.R. stated that the order Assessing Officer may be upheld.

Finding on reopening:-

9. We have heard the rival submissions and perused the materials available on record. The A.O. recorded the reasons for reopening as follows:-

"On verification of records in the case of M/s Gokuldas Images Private Limited it is observed from the General Ledger Report for the period 1.4.2005 to 31.3.2006 that M/s Gokuldas Images Pvt. Ltd. has given a Loan of Rs.6,85,00,000/- to Shri Jagadish N. Hinduja who is one of the Director of the Company and is the beneficial owner of the shareholding not Less than 10% of the voting power at any time during the previous year relevant to A.Ys. 2006-07. As Mr. Jagadish Hinduja is holding 27.23% of beneficial ownership of the share and has received Loan of Rs.6,85,00,000/- from the company in which he is a Director, the same was required to be declared in the return of income as deemed dividend as per the provisions of Sec. 2(22)(e) of the Income-tax Act, 1961. There is a failure to do so on the part of the assessee which has resulted in understatement of income of Rs.6.85 crores. I therefore have reason to believe that the income chargeable to tax has escaped assessment within the meaning of Sec. 147 of the Income-tax Act, 1961."

9.1 Based on the above findings of the Ld. AO issued notice u/s 148 of the Act for the assessment year 2006-07 in the case of both the assessee herein. In response to this notice, the assessee informed to the AO that the return filed on 31.10.2006 to be treated as return filed in response to notice issued u/s 148 of the Act.

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9.2 Now the contention of the Ld. A.R. is that there is no information available with the AO so as to reopen the concluded assessment. However, we find that the AO has *records in the case of M/s Gokaldas Images Private Limited it is observed from the General Ledger Report for the period 1.4.2005 to 31.3.2006 that M/s Gokaldas Images Pvt. Ltd. has given a Loan of Rs.6,85,00,000/- to Shri Jagadish N. Hinduja who is one of the Director of the Company and is the beneficial owner of the shareholding not Less than 10% of the voting power at any time during the previous year relevant to A.Ys. 2006-07. As Mr. JagadishHinduja is holding 27.23% of beneficial ownership of the share and has received Loan of Rs.6,85,00,000/- from the company in which he is a Director.* On examination of these records in these cases, assessments were reopened u/s 147 of the Act and notice u/s 148 of the Act has been validly issued to these two assessees. In this cases, information available with the AO in the form of assessment records of M/s. GIPL with regard to advance of loan by M/s. GIPL to these two assessees.

9.3 In our opinion, at the time of issuing notice u/s 148 of the Act, the AO “has reason to believe” that income chargeable to tax has escaped assessment. As per this section 147 of the Act if the AO “has reason to believe” that income chargeable to tax has escaped assessment, he could reopen the assessment. The term “has reason to believe” is wider enough to cover various circumstances including the information, material under assessment. In the present case, on receipt of information from the

Central Circle, initiated reassessment proceedings after recording the reasons for reopening the assessment. In our opinion, the reopening of assessment is valid as argued by Ld. D.R.

9.4 Further, Hon'ble Supreme Court in the case of ACIT Vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd. (291 ITR 500), wherein held as follows:-

"16. Section 147 authorizes and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in Central Provinces Manganese Ore Co. Ltd. v. ITO [1991] 191 ITR 662, for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue, of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction ITO v. Selected Dairies & Coal Co. (P.) Ltd. [1996] 217 ITR 597 (SC); Raymond Woollen Mills Ltd. v. ITO [1999] 236 ITR 34 (SC).

17. The scope and effect of section 147 as substituted with effect from 1-4-1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clauses (a) and (h) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under section 147(a) two conditions were required to

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be satisfied firstly the Assessing Officer must have reason to believe that income profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either (i) omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under section 148 read with section 147(a). But under the substituted section 147 existence of only the first condition suffices. In other words if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is however to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147. The case at hand is covered by the main provision and not the proviso."

9.5 Being so, in our opinion, the above grounds with regard to reopening of assessment have no merit and are fully covered against assessee by the judgement of Hon'ble Supreme Court cited (supra). Accordingly, all the above grounds of assessee relating to opening are dismissed.

10. In the result, both the COs 48 & 49/Bang/2013 are dismissed.

ITA No.1373& 1374/Bang/2012:-

Income by way of Deemed dividend:

11. Facts of the case are that during the course of verification of records and the material available in the case of Gokuldas Images Pvt. Ltd. , a closely held company, assessed in this circle, it was noticed from the General Ledger Report, relating to the said company, pertaining to "Loans to Directors" under the group name "Loans and Advances" for the period 1.4.2005 to 31.3.2006, which gave the details of certain debits in the accounts of said closely held company

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it has treated , in its accounts, a total sum of Rs.12,28,57,400/- as Loans to its Directors, during the period relevant to assessment year 2006-07. Out of the said Loans, Rs. 6,85,00,000 concerned to the assessee. The records of the said closely held company also show that the said company had reserves and surplus to the extent of Rs.84,35,22,753 and Rs.72,67,73,895 as on 31.3.2006 and 31.3.2005 respectively. The breakup of the said reserves and surplus available show that it included surplus of profit to the extent of Rs.81,80,40,613 and Rs.70,12,91,755 as on 31.3.2006 and 31.3.2005 respectively.

11.1 It is an admitted fact that the assessee, is the full time Director of M/s. Gokaldas Images Private Limited, Bangalore, and is drawing remuneration from the said company. Similarly, it is an admitted fact that the assessee is also one of the beneficial owner of shares of M/s Gokaldas Images Pvt Ltd., as the records of the said company, clearly show that the assessee is holding 27.230/0 of equity shares of the said company.

11.2 Now, the term "income" for the purposes of Income tax Act, 1961 has been defined u/s 2(24) of the I.T. Act, 1961. It is clear from Sec.2(24), that the said definition is an inclusive one and it includes "dividend" among various other items of income. Here, the term "dividend" has also been defined u/s 2(22) of the IT. Act, 1961 and the said definition is again an inclusive one and it includes among various other items mentioned in Sec.2(22), the following specifically mentioned as 2(22)(e) of the Act:

"Any payment by a company , not being a company in which the public are substantially interested of any sum (whether representing a part of the assets of the company or otherwise) made after the 31st day of May, 1987, by way of advance or Loan to a shareholder 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 percent of the voting power, or to any concern in which such shareholder is

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a member; or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern) or any payment by any such shareholder, to the extent to which the company In either case possess accumulated profits."

11.3 However, sub-clauses (i) to (v) of Sec.2(22), excludes certain items under the said deeming provisions. Hence, as per the provisions of Sec.2(22)(iii), the deemed dividend, being any advance or Loan made to a shareholder (or, to the concern in which the share holder is a member or a partner and in which he has a substantial interest) by a company in the ordinary course of its business, where the Lending of money is a substantial part of the business of the company is excluded from the mischief of Legal fiction created by Sec.2(22).

11.4 In this matter, the expressions used in Sec. 2(22)(e) such as "accumulated profits" "concern and" a person deemed to have a substantial interest in a concern" have been clearly explained through explanations to the said section and thereby giving no room for any ambiguity in understanding the said expressions.

11.5 In this connection, it has been considered necessary to bring out the correct Legal position relevant to the assessment year 2006-07. As a result of the amendment made in Sec.2(22)(e) of the Act by the Finance Act, 1987, the scope of the provisions of Sec.2(22)(e) of the Act has been widened w.e.f. 1988. Hence, for and from the assessment year 1988-89 section 2(22)(e) of the Act shall have application, on fulfillment of all other conditions, in respect to any payment made after 31.5.1987, by a closely held company, of any sum by way of advance or Loan to:

- (a) a shareholder, who is the beneficial owner of shares holding not Less than 10% of the voting power or (b) any

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concern (as defined in Expln. 3(a) to Sec. 2(22) in which such shareholder is a member or a partner and in which he has a substantial interest.

Therefore, before bringing to tax any amount under the provisions of Sec. 2(22)(e), as deemed dividend, it requires to find out whether the conditions mentioned in Sec. 2(22)(e) have been fulfilled or not. On this issue, it is relevant to consider the undisputed Legal position that four classes • of payments are contemplated for the application of Sec.2(22)(e) of the Act. They are (1) an advance (2) a Loan (3) any payment on behalf of a shareholder and (4) any payment for the individual benefit of a share holder. (1) & (2) above denote payment to the share holder direct and (3) & (4) refer to payments to persons other than shareholder but for the benefit of the shareholder. Therefore, it is not always necessary that the payment should be direct to the shareholder. Here, other ingredients required for invoking the provisions of Sec.2(22)(e) of the Act are:

(a) The company which making the payment should be a closely held company

(b) The shareholder who receives the payment or the benefit must be a beneficial owner of the said company (i.e., holding shares not Less than 10% of the voting power)

(c) There must be accumulated profits in the case of the company making the said payment and

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(d) Deemed fiction is applicable only to the extent of accumulate profits possessed by the closely held company'

11.6 In the case of the assessee, during the course of initiation of action u/s 147 of the Act and also during the course of assessment proceedings, the assessee has filed various replies to the communications issued to him and has filed his objections and has made certain claims, through his various replies, cited in the earlier paragraphs of this order. I have gone through all the communications and replies received from the assessee in the matter of taxability of deemed dividend in his case. Various points and claims made by the assessee are:

i) That the promoters of M/s. Gokaldas Images Pvt. Ltd. were contemplating a public issue to enlarge the capital base of the company through participation by outsiders through investment who in fact could afford to inject sizeable capital which would result in the expansion of the business of the company

ii) That an agreement caned "Share Subscription and Share Holders Agreement", dated 22.11.2005, was entered into with three investors who were to pump in a huge amount of money (i.e.Rs.44,72,01,000/-) by way of cumulative compulsorily convertible preference share capital which was much Larger than the actual existing share

iii) That as per the agreement, dated 22.11.2005, the company had received towards share capital a sum of Rs. 44,72,01,000. and the investors imposed various conditions while bringing in such huge amount which were binding on M/s. GIPL and it had necessarily to comply with them.

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iv) That the investors were desirous of securing their investments, the profitability of the company and disassociation to the extent possible of M/s. Gokaldas Images Pvt Ltd., from its various affiliates / group concerns

v) That any disbursement made and steps taken in consonance with the conditions in the agreement would naturally be in the course of business and to promote the purpose of business which is a vital factor.

11.7 In order to examine the claims made by the assessee following documents were specifically called for by the AO:

a) Copy of the "Share Subscription and Share Holders Agreement dated 22.11.2005

b) Copy of the "Share Purchase Agreement dated 24.12. 2005" drawn up for the purpose of disbursement of the Loan to the promoters

c) Copy of the document dated 1.4.2005 in support of the claim of the assessee with regard to the financial transaction s concerning to Rs.10.5 crores

d) Copy of the relevant entries In the concerned bank pass books with regard to the Loan transaction of the Personality Ltd.,

e) Full details and the amounts pumped in by the investors and the ratio of the said amount with reference to the actual existing share capital of the company along with supporting evidence.

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f) The relevant account extracts as appearing in the book s of. Gokaldas Images, Gokaldas Intimates wear Pvt. Ltd., and M/s. Hinduja Investments Pvt. Ltd., with regard to investment in shares of Rs. 1,35,00,000

g) The relevant account extracts as appearing in the books of Gokuldas Images, the account of the concerned directors with regard to the sale of guest house at Coonoor 'Rs.43,57,400).

h) In respect of payments made by Gokuldas Images to Personality Limited, the corresponding voucher entries / bank statements of M/s. GIPL.

i) Copy of General Ledger Report from 1.4.2005 to 31.3.2006 under the head " General Ledger -Loans to Directors" in the group name "Loans and advances" as appearing in the books of M/s. Gokaldas Images Pvt. Ltd., along with explanation in respect of various entries therein.

11.8 The various documents and replies, so far, received from the assessee have been gone into and they have been carefully considered. Here, it is clear from the said replies, received from the assessee, that it. is not the assessee's case that the various ingredients, that are referred to at para 3 above, are not applicable to him and that they have not been fulfilled in his case, in order to invoke the provisions of Sec.2(22)(e) of the Act. But, the only contention of the assessee is that the various financial transactions, under consideration, that have been carried out by the Gokuldas Images Private Limited, do not attract the provisions of Sec.2(22)(e). As per the claim of the assessee the nature of entries made in the books of Gokuldas Images Pvt. Ltd., do not constitute either Loan or advance by the Gokuldas Images Pvt. Ltd., Bangalore, to the assessee, for the

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purposes 'of Sec 2(22)(e) of the Act. It is also the claim of the assessee that even though the effect of the financial transactions, under consideration, done by the Gokuldas Images Pvt. Ltd., is treated by the said company as "Loan / advance" to its Director, they do not constitute "Loan / advance" to the assessee as they were carried out with the object of expanding the business activity of the said Gokuldas Images Pvt. Ltd., Bangalore. Therefore, in the view of the assessee, treatment of said financial transactions, as loans to the Directors by the M/s. GIPL should not be considered to fall within the scope of the said term "Loans and advance" appearing in Sec.2(22)(e) 3f the Income tax Act,1961.

11.9 The above claim of the assessee is not acceptable under Law on the facts of this case. Two financial transactions carried out by the M/s. GIPL concerning to the assessee are relevant in this case. They are discussed hereunder keeping in view the explanation given by the assessee in respect of the said transactions. The first financial transaction concerning to the assessee Copy of the General Ledger Report in the case of M/s. GIPL, for the period 1.4.2005 to 31.3.2006, under the Ledger name "Loan to Director" and under the group name "Loans Advances" clearly show that there is a debit entry of Rs.5,50,00,000 being the amount paid to Personality Weekender and transferred to Loan to its Managing Director, Sri. Jagadish. N. Hinduja. This entry is appearing, on account of a journal en try passed by M/s. GIPL, in its books, treating the amount of Rs.1,35,00,000 as Loan to its Managing Director, Shri. Jagadish N. Hinduja.

11.10 Copy of the confirmation, from Canara Bank, Avenue Road Branch, Bangalore, filed by the assessee, on 9.12.2010, towards. payments made to Personality Limited, for the period 1.4.2005 to 31.3.2006, show that the bank has acknowledged receipt of various cheques (in all 31 in number) on different dates (2.4.2005 to

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31.12.2005) during the year towards Bank a/c 50471, in all amounting to Rs.5,50,00,000/- which have been passed by the Bank. all the above cheque payments have been made by the M/s. GIPL, a closely held company on behalf of its Director (Shri. Jagadish N. Hinduja).

11.11 In this matter, it has been explained by the assessee that Personality Ltd., owned and enjoyed two brand names "CHIESSKING" and "BESTSELLER" for readymade garment products. These had become popular brands in India. M/s. GIPL had an idea to expand the domestic market before the share purchase agreement and had entered into an agreement, on 1.4 .2005 with Personality Ltd, under which it has proposed to buy the brand names for its use for a total consideration of Rs. 5.5 crores. Towards this M/s. GIPL had already issued cheques towards payment by the date of the agreement for sums amounting to Rs. 5.5 crores. Under the share purchase agreement and as per the agreement under clause- 3 thereof M/s. GIPL, had to essentially concentrate on export business and it had to delink itself from its group companies and free itself from any existing and possible obligations arising from its borrowings. There was already an existing agreement to buy the brand names. The moneys had been paid to Personality Ltd., to get out of this Liability, M/s. GIPL utilized the medium of M/s Hinduja Investment Pvt Ltd., among other things was to buy these twobrand names from M/s. Personality Ltd., for the purpose of purchase of brand names stood transferred in the books of M/S. GIPL as "Loans to Directors" and debit to Personality Ltd., ceased to that extent. Correspondingly, in the books of M/s. Hinduja Investments Pvt. Ltd., the accounts of the promoters were credited by an amount of Rs.5.5 crores.

11.12 From the above financial transaction, the nature of which is not disputed, it is clear that the assessee got the benefit of

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credit to the extent of Rs.5.5 crores in the books of Hinduja Investments Pvt. Ltd., a company, where the assessee has beneficial interest by holding 50% shares in the said company. Here, it is relevant to mention that the assessee has clearly confirmed in his Letter dated 17.10.2008 that he has given an unsecured advance of Rs.6,85,00,000 to M/s Hinduja Investment Pvt. Ltd., as on 31.3.2006 and the amount of Rs.5,50,00,000, under consideration forms part of the said Rs.6,85,00,000. Corresponding to this financial transaction, the assessee's account with M/s. GIPL has been debited by Rs.5,50,00,000 in the books of M/s. GIPL and the M/s. GIPL has clearly treated the said financial transaction as a Loan to the assessee, who is a director of the company having beneficial interest in the company. Even with regard to the point brought out by the assessee that the M/s. GIPL had made payments to Personality Ltd., in terms of earlier arrangements with it and it wanted to get disassociate with the said arrangement, is not going to come as the aid of the assessee, particularly, when he is having beneficial interest with the said Personality Ltd., as well (an associate concern) and the provisions of Sec.2(22)(e) refer to not only payments to shareholders but also payments to persons other than shareholder where it is for the benefit of the shareholder. As already mentioned earlier it is not always necessary that the payment should be direct to the shareholder once the other ingredients are fulfilled. Here, the assessee cannot dispute, on facts and material available on records, that the following other ingredients necessary for invoking the provisions of Sec.2(22)(e) of the Act are not fulfilled.

1. The company which is making the payment should be a closely held company.

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2. The shareholder who receives the payment or the benefit must be a beneficial owner of the said company (i.e., holding shares not Less than 10% of the voting power)
3. There must be accumulated profits in the case of the company making the said payment and
4. Deemed fiction is applicable only to the extent of accumulate profits possessed by the closely held company

The second financial transaction concerning to the assessee:

11.13 Copy of the General Ledger Report in the case of M/s. GIPL, for the period 1.4.2005 to 31.3.2006, under the Ledger name "Loan to Director" and under the group name "Loans Advances" clearly show that there is a debit entry of Rs.1,35,00,000 being sale proceed of its investment (viz., GIWPL shares). This entry is appearing, on account of a journal entry passed by M/s. GIPL, in its books, treating the amount of Rs.1,35,00,000 as Loan to its Managing Director, Shri. Jagadish N. Hinduja.

11.14 In this matter, it has been explained by the assessee that pursuant to share purchase agreement, M/s. GIPL disinvested its share holdings in GIWPL for Rs 1.35 crores by sale to M/s Hinduja Investments Pvt. Ltd., This amount was due by M/s. HIPL to M/s. GIPL. Consistent with the stipulation in the share purchase agreement the dues from HILP were shown as dues under the caption "Loans to Directors", appropriate entries being made correspondingly in the books of M/s. HILPL crediting the accounts of Directors.

11.15 From the above financial transaction, the nature of which is not disputed, it is clear that the assessee got the benefit of credit to the extent of Rs.1.35 crores in the books of Hinduja Investments Pvt. Ltd., a company, where the assessee has beneficial interest by holding

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50% shares in the said company. Here, it is relevant to mention that the assessee has clearly confirmed in his Letter dated 17.10.2008 that he has given an unsecured advance of Rs.6,85,00,000 to M/s Hinduja Investment Pvt. Ltd., as on 31.3.2006 and the amount of RS.1,35,00,000, under consideration forms part of the said Rs.,6,85,00,000. Corresponding to this financial transaction, the assessee's account with M/s. GIPL has been debited by RS.1,35,00,0000 in the books of M/s. GIPL and the M/S. GIPL has clearly treated the said financial transaction as Loan to the assessee, who is a director of the company having beneficial interest in the company.

11.16 Even with regard to the point brought out by the assessee that consistent with the stipulation in the share purchase agreement and in pursuant to share purchase agreement, M/s. GIPL disinvested its share holdings in GIWPL for Rs 1.35 crores, by sale to M/s Hinduja Investments Pvt. Ltd. , in terms of earlier arrangements with it and that this amount was due by HIPL to M/s. GIPL, this point is not going to come as the aid of the assessee, particularly, when the M/s. GIPL has received the sale proceeds of Rs 1,35 ,00,000 from HIPL through the assessee and that the assessee as thereby become a debtor in the books of the M/s. GIPL. The assessee as derived benefit in the books of HIPL by way of getting a credit entry to the extent of Rs.1,35,00,000. Here, the assessee cannot dispute, on facts and material available on records, that the following other ingredients necessary for invoking the provisions of Sec.2(22)(e) are not fulfilled.

- 1.The company which is making the payment should be a closely held company

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- 2.The shareholder who receives the payment or the benefit must be a beneficial owner of the said company (i.e., holding shares not Less than 10% of the voting power)
- 3 .There must be accumulated profits in the case of the company making the said payment and
- 4.Deemed fiction is applicable only to the extent of accumulate profits possessed by the closely held company
5. Apart from the above, following undisputed factual position will have to be considered for the purposes of taking a decision on the assessee's claim.
6. At the outset, the accounts of the Hinduja Investment Pvt. Ltd., as on 31.3.2806, clearly show that it is a closely held company with only two are holders holding 50% shares (total value 1,00,000), commenced during the year, with totaloperative expenses of Rs.13,472. The said two shareholders are none other than the assessee and his son Sri. Sumir J. Hinduja. To this company, the said two share holders have advanced Rs.6,85,00,000 and Rs.5,00,00,000 respectively out of financial transactions they made with M/s. GIPL (again a closely held company wherein they are beneficial shares holders). The said company has its only investment of Rs. 1,35,00,000/- (other than the Application Money Rs.3,00,00,000/- pending allotment) being the cost price of GIWPL shares purchased by them during the year which was earlier held by M/s. GIPL which they sold it to them. It has advanced Rs.5,00,00,000 to its creditors and has liability by way of bank overdraft of Rs 2,99,10,000 (apart from its others liabilities of Rs.5612). This clearly indicate that the promoters

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of new M/s. GIPL are still associated with M/s. Hinduja Investment Pvt. Ltd., another associate concern of the promoters and they have really not totally divested with their financial commitments etc., as claimed by them. On going through the documents supplied following undisputed factual position is seen.

a)The date of "share subscription and share holders agreement" dated 22.11.2005

b) Parties to the said agreement are: IIML, IESWT and IL&FS WT the three investors The M/s. GIPL, a closely held company and the three directors of M/s. GIPL, who have substantial interest in M/s. GIPL.

c) IIML, IESWT and IL&FSWT (the three investors) get only preference shares of 4472 of the total value Rs.4,47,20,000/- and they have to pay premium separately.

d)Return of allotment, as per Companies Act,1958, indicates that nominal amount of only Rs.4,47,20,000 is payable in cash by the three investors in respect of compulsorily convertible preference shares of 4472 allotted to them and of course, this is apart from the amount of premium payable on shares at Rs.40, 24, 80, 000/-.

e)The agreement dated 24.12.2005 of the promoters of M/s. GIPL with the investors indicate that the date of investment was 12.12.2005 and not anytime earlier.

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f) Even after allotment of 4472 preference shares to the investors, the promoters continue to hold 88,36,418 shares and they remain the beneficial share holders of M/s. GIPL.

g) Even after the new arrangements, the beneficiaries are only the promoters as they receive large amounts of share premium to their credit.

h) As seen from the bank certificate, the various dates of payment of Rs.5,50,00,000/-by M/s. GIPL to Personality, wherein the assessee is beneficial share holder, commence on 2.4.2005 and they are all much prior to 12.12.2005 (the date of investment by the investors) and hence the M/s. GIPL had made payments out of their or funds prior to the date of "share purchase and shareholders agreement"

11.17 The A.O observed the decision cited by the assessee in the case of **318 ITR 476 (Del)** is not the decision of the Jurisdictional High Court and it is not binding in this charge. Similarly, just dismissal of the- SLP, in the said case (**328 ITR (ST)10**) will not alter the Legal position unless there is a finding of the Supreme Court, on merits, of the issue involved. Here, it is relevant to mention that specific explanations have been provided under the Act, in sub clauses (i) to (v) of u/s 2 (22)(e) of the Act, and none of them specify circumstances claimed by the assessee (that the transactions done through book entries concerning to business interest) to be excluded from the ambit of Sec. 2(22)(e) of the Act.

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11.18 On these facts, in this case, the financial transactions made through cheque payments and through journal entries, as explained by the assessee clearly show that there is really an outgoing of money from the company to the benefit of shareholder and it attracts the provisions of Sec. 2(22)(e) of the Act. In fact, in the case of CIT Vs P. Sarada 154 ITR 387(Mad), even the excess withdrawals made by the assessee, a substantial share holder of a closely held company, from that company were held to be treated as Loan or advance by the company to the assessee so as to attract the deeming provisions of section 2(22)(e) of the Act. This decision of the Madras High Court has been affirmed by the Supreme Court in Miss P. SaradaVsCIT 229 ITR 444, at 448, 449(SC). Therefore, Ld. CIT(A) accepting the claim of the assessee in this regard held that there is deemed dividend to the assessee, during the year, to the extent of Rs.5,50,00,000 crores, on account of this financial transaction and the accounting entries passed by the M/s. GIPL, in its books, which have been duly audited u/s 44 AB and the audit report do not refer to any corrections, to the entries made in the books of M/s. GIPL.

11.19 Under these circumstances, the A.O observed that the provisions of Sec.2(22)(e) of the Act are clearly attracted to the facts of this case in respect of the two financial transactions discussed above. The amount involved in the said two financial transactions are brought to tax under the head "deemed dividend". The two sums of Rs. 5,50,00,000/- and Rs.1,35,00,000/- (total Rs.6,85,00,000) is added to the total income declared under the head other sources.

12. Against this, assessee went in appeal before CIT(A). The Ld. CIT(A) observed that as per the books of account of M/s. GIPL, which is a closely held company, there were certain

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debits under the head 'Loans to Directors' amounting to Rs.12,28,57,400/- during the period also found that there were surplus profits during the years 31/3/2005 and 31/3/2006 and the appellant is also a beneficial owner in the said company holding 27.23% of equity shares. In view of this, the AO was of the opinion that all the conditions stipulated in the section are fulfilled in this case and accordingly treated the amount of Rs.6,85,00,000/- as deemed dividend u/s 2(22)(e) of the Act in the hands of the appellant. It is the argument of the appellant that there was no lending by way of cheque/cash payments to the Directors in any of the transactions leading to the total debit in the Directors' Account in the books of M/s. GIPL standing on 31/3/2006 at Rs.12,28,57,400/-. It was further submitted that an amount of Rs.5 crores was directly paid to M/s Personality Ltd. and the amount of Rs.5.5 crores was an adjustment entry. In view of this, it was argued that there is no lending or advancing within the meaning of section 2(22)(e) of the Act. It is also submitted that nothing went into the pockets of the Directors from out of the reserves/accumulated profits and all these entries in the books are explained to the AO, stating that there was no personal benefit to the appellant out of this transaction.

12.1 The Ld.CIT(A) observed with regard to the debit entry of Rs.5.5 crores paid on account of payment made to Personality Ltd., it was transferred to the account as loan to the Directors. There is no dispute about the factual position of this transaction. This amount of Rs.5.5 crores was paid to Personality Ltd. to get out of the liability and M/s GIPL utilized the medium of M/s. Hinduja Investments Pvt. Ltd.&M/s.Personality Ltd. to get out of the liability and M/s GIPL utilized the medium of M/s. Hinduja Investments Pvt. Ltd. to buy the brand names. It is the contention

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of the AO that the appellant had confirmed in his letter dated 17/10/2008 that he had given an advance of Rs.6,85,00,000/- to M/s Hinduja Investments Pvt. Ltd. as on 31/3/2006 and the amount of Rs.5.5, crores mentioned above forms part of the said unsecured advance. In view of this, the AO concluded that the said financial transaction, which resulted in a debit in the name of the appellant in the books of M/s GIPL, is a loan transaction. Therefore, he was held liable to pay tax u/s 2(22)(e) of the Act. It was also argued by the AO that, once the other ingredients are fulfilled, it is liable to tax u/s 2(22)(e) of the Act. Similarly, the AO also concluded that the debit entry of Rs.1,35,00,000/- being the sale proceeds of shares would also constitute loan to the appellant. In view of this, it is concluded by the AO that the appellant has derived benefits in the books of M/s HIPL. On the other hand, the appellant argued that the payments were made to enable its affiliates to free themselves from certain liabilities which might have repercussions on M/s GIPL, which the investor wanted to avoid and free M/s GIPL from any liabilities arising out of its investments in the affiliates. It was also explained that this procedure of debiting to Directors' account to secure the recovery of the amounts was laid out as the company/investors felt that recourse to Directors for recovery when such contingency arose would be easier than to proceed against the affiliates. It is contended that, at no time, the appellant get either from M/s GIPL or its concerned affiliates any part of these funds to be used and enjoyed by himself apart from the entries in the manner indicated in their submissions. Therefore, it is argued that the entries in the books do not constitute a loan to the Director to be considered as deemed dividend u/s 2(22)(e) of the Act.

12.2 The said financial transaction narrated above does not constitute loan or advance for the purpose of section 2(22)(e) of the Act. The said transaction, even though considered as a loan in the books of account, cannot be considered for the purpose of section 2(22)(e) as there was no individual or personal benefit to the shareholder taking the loan or advance. The AO in his order explained the transaction in the assessment order very elaborately but there is no material available on record to prove the point that the said loan to the Directors had resulted in any personal benefit to the appellant, either directly or indirectly. In fact, the said transactions were meant for the business purpose, strengthening the company on a better financial footing and freeing it from existing possible obligations flowing from its past dealings. To this objective, the above transactions were entered into by the appellant with M/s GIPL. In the instant case, the loans were given by M/s GIPL to the Directors not for the personal benefit of loanee i.e. appellant but for the benefit of the lender i.e. M/s GIPL to improve the financial strength. The arguments of the appellant are acceptable in this regard. In this context, the appellant relied on the following decisions in his submissions:

- 1) CIT Vs. Rajkumar 318 ITR 462 (Delhi HC)
- 2) CIT Vs. Creative Dying and Printing (P) Ltd. 318 ITR 476 (Delhi HC)
- 3) Pradip Kumar Malhotra Vs. CIT 338 ITR 538 (Calcutta HC)
- 4) CIT Vs. Gurbachanlal 339 ITR 157 (Delhi HC)

12.3 The Hon'ble HC of Delhi in the case of CIT Vs. Rajkumar 318 ITR 462 mentioned above explained the meaning of 'loan/advance' provided in section 2(22)(e) of the Act. It has been

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held that trade advances which are in the money transacted to give effect to a commercial transaction would not fall within the ambit of provisions of section 2(22)(e) of the Act, In the case of CIT Vs. Creative Dying and Printing Pvt.Ltd. (318 ITR 476), the Hon'ble HC of Delhi clearly held that an advance given for a commercial purpose to its sister concern is not a deemed dividend u/s 2(22)(e) of the Act. In the case of Pradip Kumar Malhotra Vs. CIT (338 ITR 538), the Hon'ble HC of Calcutta held that the phrase by way of advance or loan' appearing in sub-cl. (e) of cl. (2) of s. 2 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 be deemed dividend within the meaning of the Act. Thus, gratuitous loan or advance given by a company to those classes of shareholders would come within the purview of s. 2(22) but not the cases where the loan or advance is given in return to an advantage conferred upon the company by such shareholder. Therefore, Ld. CIT(A) of the opinion that the amount of Rs.6,85,00,000/- cannot be treated as deemed dividend u/s 2(22)(e) of the Act in the hands of the assessee.

12.4 In the case of Shri Sumir J. Hinduja, the amount brought to tax by the AO as deemed dividend u/s 2(22)(e) of the Act on the same ground as those given by him in the case of Shri Jagadish N. Hinduja was Rs.5,00,00,000/-/- For the same reasons as have been given in disposing of the appeal of Shri Jagadish N. Hinduja,

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he held that the AO was justified in reopening the assessment u/s 147 of the Act by issue of a notice u/s 148 of the Act but he is not justified in bringing to tax the sum of Rs.5,00,00,000/- u/s 2(22)(e) of the Act and, therefore, Ld. CIT(A) deleted the said addition.

13. Before us Ld. D.R. stated that the common issue in both appeals is the addition made u/s 2(22)(e) of the loans given to the assesseees who were Managing Director and Full-time Director respectively in M/s. Gokaldas Images Pvt. Ltd.

13.1 She submitted that in the case of Jagadish Hinduja, there are two transactions totaling Rs.6.85 crores whereas in the case of SumirHinduja, the loan amount is Rs.5.0 crores. The AO noted that the General ledger report of M/s. GIPL for the period 1.4.2005 to 31.3.2006 under the ledger name 'Loan to Director' and under group name 'Loans Advances' showed debit entry of Rs.5.5 crores paid to Personality Weekender transferred to loan to MD i.e. Shri Jagadish Hinduja. Likewise, there was a debit entry of Rs.5.0 crores paid to Personality Weekender transferred to loan to the Director i.e. ShriSumirHinduja. The assessee's explanation is that the loans were received only for the purposes of business. Per the assesseees, Rs. 5 crores was utilized to discharge bank loan of M/s. Personality Ltd. for which M/s. GIPL had given a corporate guarantee while Rs. 5.5 crores was utilized to purchase the brands CHERSKING and BESTSELLER for which GIRL had entered into the agreement with Personality Ltd. on 1.4.2005. Subsequently, GIRL entered into a Share Subscription and Shareholders agreement dated 22.11.2005 between three investors, M/s. GIPL and its promoters, including the assesseees. As per this agreement, a sum of Rs. 10 crores was to be

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provided to the promoters as interest-free loan and M/s. GIPL had to delink itself from group companies and free itself from existing obligations. The assessees have claimed that it was obligatory for them to utilize the loans to achieve the above objectives.

13.2 The factual matrix is that M/s. GIPL used another group company M/s.Hinduja Investment Pvt. Ltd., in which Shri Jagadish Hinduja and Shri Sumir Hinduja held 50% shares each, to buy the brands and the brand names stood transferred in the books of GIRL as 'loans to Directors' and the debit to Personality Ltd. ceased to that extent (Personality ceased to be a creditor).

13.3 Shri Jagadish Hinduja had given a declaration dated 17.10.2008 that he had given unsecured advance of Rs.6.85 crores to M/s. HIPL as on 31.3.2006 and Rs. 5.5 crores was part of that amount. He had also given another loan of Rs. 1.35 crores to M/s. HIPL, and this amount was used by HIPL to purchase the shares of another group company, M/s. Gokaldas Intimate Wear Pvt. Ltd. (GIWPL) from M/s. GIPL. Likewise, ShriSumirHinduja had also given an unsecured advance of Rs. 5 crores to HIPL as per a similar declaration by him.

13.4 The assessees have contended that there was no lending by way of cheque/cash payment to the Directors in any of the transactions and that the promoters were effectively and contractually barred from utilizing loans for any personal benefit. However, it is to be noted that. as a result of the above transactions, Shri Jagadish Hinduja and Shri Sumir Hinduja received a direct benefit since the brands became the property of M/s. HIPL, in which the assessees are the major shareholders.

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M/s. HIPL also got the shares of M/s. GIWPL. The narration in the books of M/s. GIPL also show that the payments to Personality Ltd. were on behalf of the Directors. Since there was a benefit to the assesseees, the provisions of section 2(22)(e) of the Act come into play. It is important to note that the assesseees were promoters of all the three entities, M/s. GIPL, Personality Ltd. and HIPL and therefore the case is squarely covered by provisions of section 2(22)(e) of the Act. The transactions were between closely-held and related companies in which there is a common shareholding. The ITAT in its order dated 12/08/2016 has correctly noted that the provisions of section 2(22)(e) are attracted when payment is made by a company to any concern in which the shareholder has a substantial interest even if the transaction is by way of book entry only.

13.5 The assesseees have relied upon *Rajkumar 313 ITR 462* and *Creative Dying and Printing 318 ITR 476* wherein it was held that advances given for commercial purpose would not attract the provisions of section 2(22)(e) of the Act. As regards this contention of the assesseees that the loans given pursuant to the Share Subscription and Shareholders' Agreement were for business purposes and therefore outside the ambit of Section 2(22)(e), the following points may kindly be noted:

- The agreement between M/s. GIPL and Personality Ltd to purchase the brands from Personality Ltd. was dated 1.4.2005, much before the which was dated 22.11.2005. The payments by M/S. GIPL to Personality Ltd. were made well before that date out of its own funds. The financial transactions made through cheque payments and through journal entries show that there is an outgoing of money from the company to the benefit of the shareholder.

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- As per the SSA dated 22.11.2005, the promoters were to enter into an agreement with the company prior to disbursement of the loan of Rs. 10 crores. However, this agreement was entered into only on 24.12.2005, whereas the date of investment was 12.12.2005. By this time payments to Personality Ltd. by M/s. GIPL had already been made though the journal entries were passed only on 27.12.2005 and 31.3.2006. Given this chronology of events, the agreement dated 24.12.2005 was more of a post-facto arrangement to make the loan of Rs 10 crores to the assessee appear as being for business purposes. The ITAT has correctly noted that this was a self-serving document.
- Further, as per paras 4 to 8 of the agreement between the company and the promoters dated 24.12.2005, the promoters had the discretion to make changes to the disbursement of loan. The ITAT has already pointed out that no evidence of the loan having been utilized for the business purposes had been provided. That situation continues.
- Also, the promoters were to produce a certificate from a Chartered Accountant in support of the disbursement of Rs. 10 crores loan, which has so far not been produced in any proceeding).

13.6 The Hon'ble High Court had observed that the Tribunal has not taken into account the ledger report, certificates issued by Standard Chartered bank, book entries as well as the provisions of the agreements dated 22.11.2005 and 24.12.2005. However, it is respectfully submitted that the ITAT had gone into the agreements as well as the ledger account as can be seen from paras-17, 19 to 21 of the order. The book entries show that there was a loan given to the

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assessee in the books of the company and as per the agreement, this loan was repayable even though it was interest-free. Hence it was not an advance for business purposes but a loan that was repayable. Accordingly, the provisions of section 2(22)(e) of the Act are applicable.

14. Ld. A.R. submitted that the assessee is a Director and shareholder holding 23.76% shares in M/s. Gokaldas Images Private Limited ('M/s. GIPL'). The assessee along with other Directors and shareholders of M/s. GIPL and M/s. GIPL entered into a Share Subscription and Shareholders Agreement ("SSSA") dated 22.11.2005 with an Investor for infusion of funds into M/s. GIPL. M/s. GIPL stood as- a guarantor had investments and other business transactions with its associate concerns. The new investor had insisted that M/s. GIPL should disassociate itself from the activities stated in broad terms, M/s. GIPL was to disassociate itself from its affiliates reducing the exposure to risk of M/s. GIPL which might be faced by it and which the new investors were intent on avoiding obligations and liabilities of all associate concerns and restrict itself only to the export activities. The material terms of the SSSA read as under:

"3. SOURCE AND USE OF FUNDS

Clause 3.2

The Company shall provide the Promoters with an interest free unsecured loan of Rs. 10,00,00,000/- (Rupees Ten Crores) on or after the Completion Date. Such Loan shall be repayable by the Promoters at the earliest of (a) an IPO of the Company, or (b) 4 (Four) years from the Completion Date. The Company and the Promoters shall enter into an agreement in this regard prior to disbursement, in the form and manner agreed by the Promoters and Investor in writing. No requirement of Investor consent for this loan will be required pursuant to Schedule 7.

6. CONDITIONS PRECEDENT AND SUBSEQUENT

Clause 6.3

Conditions Subsequent

The Promoters shall undertake the repayment/ adjustment as a consequence of the Scheme of Consolidation/Merger as specified in Schedule 14, of all outstanding loans due from Affiliates of the Promoters to the Company as specified in Schedule 15, in accordance with the terms of the relevant loans and in no circumstances beyond 24 (Twenty Four) months from the date of Completion."

(emphasis supplied)"

14.1 It is pertinent to note that under the SSSA condition subsequent for making the funds invested by the investors, M/s. GIPL group was obliged to demerge two existing export units namely, American Shirts and outdoor clothing (having 200 machines and 300 machines respectively) were demerged from M/s. Personality Ltd., and merged with M/s. GIPL giving more export business to enhance the value of the company. This was implemented.

14.2 The aforesaid terms of the SSSA make it abundantly clear that the loan sought to be given to the Assessee Directors of M/s. GIPL was for business purpose and the undertaking of the Promoters to the new Investor, in pursuance of the infusion of funds. No part of the proceeds of loan was intended for or actually received for the personal benefit of the Assessee.

14.3 In pursuance of Clause 3.2 of the SSSA which required that the Promoters of M/s. GIPL (including the Assessee) were to enter into an agreement with M/s. GIPL prior to the disbursement of the loan, the Assessee along with other Directors/ shareholders collectively entered into an Agreement

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with M/s. GIPL and the Investors dated 24.12.2005. The said agreement outlines the background, purpose and ultimate objective for the grant of loans to Directors, including the terms of repayment thereof. The material terms of the Agreement are stated below:

Recitals - Page 2 and 3

"B. The SSSA was entered to broaden stimulate and expand the activities of the company particularly in respect of exports and placing it on a sound financial footing by making it an independent self-sustaining, viable enterprise unhampered by unnecessary links and associations, while securing as far as possible the stake of the investors in the company without which the proposed expansion could not have come about."

(emphasis supplied)

"C. It is understood and intended by the investors and the promoters that the said loans shall be used for effectuating the various stipulations, covenants and obligations cast on the company under the SSSA to subserve and promote the objectives behind the investment by the investors in the company including the financial health of the company, reducing its risks existing or that may arise, facilitation and enablement of the company free itself from any contractual or similar obligations particularly with reference to its relations and dealings with its various affiliates that might possibly impede directly and indirectly such underlying objectives and matters incidental thereto.

..... ")

(emphasis supplied)

Clause 4

"4. Without prejudice to the generalities of the stipulations behind the sanctioning of the loan for promoters in the larger business interest of the company, specifically, the utilization of the loans may be for taking appropriate steps towards:

- a) Project expansion***
- b) High cost debt repayment/ Working Capital***

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c) *The earliest release of the company from its guarantees given by it for the loans and advances enjoyed by its associates namely Personality Limited and Gokaldas Intimatewear Private Limited.*

d) *The release of the company from its obligation to Acquire the Trade Marks from Personality Limited vide Agreement dated 01.04.2005 between the Company and Personality Limited.*

ii) *Release from any other liability which in view of the promoters is more pressing in the interests of the business of the company while ensuring to avoid any collateral damage."*

(emphasis supplied)

Clause 5

"5. It is agreed between the parties that it will be the discretion of the promoters to make changes in the manner of the disbursement of the loan so as it ensures for the benefit of the company with a view to placing it on a more firm financial footing and is in broad conformity with the intended purposes and the conditions imposed on it in the SSSA."

(emphasis supplied)

"6. Accordingly the promoters may direct the disbursement of the whole or any part of the loan to any of its affiliates/ group concerns so long as these powers are exercised to subserve the intend and purposes behind the making available of these funds to them under the SSSA."

(emphasis supplied)

It is very important to note that eventually the Directors have repaid the loan to M/S. GIPL.

15. We have heard the rival submissions and perused the materials available on record. In this case, the AO invoked the provisions of section 2(22)(e) of the Act to the tune of Rs.6.85 crores in the case of Shri Jagadish Hinduja and a sum of Rs.5 crores in the case of Sumir J. Hinduja. The contention of the Ld. A.R. is that this amount has been received by these assesseees on account business exigencies and it cannot be considered as deemed

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dividend in terms of section 2(22)(e) of the Act. For this purpose, he relied on the Share Subscription and Shareholder's Agreement dated 22.11.2005. M/s. Gokuldas Images Pvt. Ltd. ("GIPL") entered into a trade mark agreement dated 1.4.2005 with M/s. Personality Ltd. ("PL") for acquisition of trade mark "CHIERSKING" and "BESSELLER" pertain to readymade garment products which were popular brands in India. It was essentially the idea of M/S. GIPL to enter into domestic market segment by acquiring these brands and thereby gain the market advantage. According to the Ld. A.R., payment of Rs.5.5 crores pursuant to agreement was already made by M/s. GIPL to M/s. PL. Thereafter, pursuant to the terms of Shares Subscription and Shareholders Agreement ("SSSA") dated 22.11.2005 entered into between these two assesseees with 3 directors namely (1) Mr. Jagdish N. Hinduja (2) Reshma J. Hinduja and (3) Sumir Hinduja, shareholders of M/s. GIPL and M/s. GIPL with the investors, M/s. GIPL had to essentially concentrate on export business and was required to do de-linked duties from any domestic operations and any existing/possible obligations arising from its business transactions with its group companies in pursuance of clause 3.2 of the SSSA which require that the promoters of M/s. GIPL were to enter into an agreement with M/s. GIPL prior to the disbursement of the loan, the respondent along with other directors/shareholders collectively entered into an agreement with M/s. GIPL and the investors. The said agreement outlines the background, purpose and ultimate objective of the grant of loans to directors, including the terms of repayment thereto. For better understanding, we reproduce the relevant clauses herein below:-

"Clause

3.2 The Company shall provide the Promoters with an interest free unsecured loan of Rs. 10,00,00,000/- (Rupees Ten Crores) on or after the Completion Date. Such Loans shall

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be repayable by the Promoters at the earliest of (a) an IPO of the Company, or (b) 4 (Four) years from the Completion Date. The Company and the Promoters shall enter into an agreement in this regard prior to disbursement, in the form and manner agreed by the Promoters and Investor in writing. No requirement of Investor consent for this loan will be required pursuant to Schedule 7.

.....
.....

Conditions Precedent and Subsequent

Clause 6.3

The Promoters shall undertake the repayment/adjustment as a consequence of the Scheme of Consolidation/Merger as specified in Schedule 14, of all outstanding loans due from Affiliates of the Promoters to the Company as specified in Schedule 15, in accordance with the terms of the relevant loans and in no circumstances beyond 24 (Twenty Four) from the date of completion."

15.1 Schedule 14 & 15 of agreement dated 22/11/2005 placed at pages 81 to 82 of assessee's Paper Book which reads as follows:

SCHEDULE 14

SCHEME OF CONSOLIDATION/MERGER

1. Conversion of Privately owned Immovable Asset into Joint ownership with Gokaldas Images Private Limited (GIPL)

Entities involved: Karthik Enterprises (a Partnership Firm), GIPL and GIWPL

Steps Involved

Target dates

Karthik Enterprises converts into a Private Limited Company (KEPL) 31.12.2005

Revaluation of the Property to reflect the Fair Market Value (Estimated to be approx.. in the range of 31.12.2005

GIPL invests Rs.8 Crores in Shares of KEPL at a premium 31.01.2006

KEPL in turn invests in GIPL Rs.8 Crores at a Premium 31.01.2006

The Premium in GIPL will be utilized to write down the 31.03.2006

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*diminution in the value of the investment in GIWPL on
obtaining the Approval from the High Court*

SCHEDULE 15

**OUTSTANDING LOANS DUE FROM AFFILIATES PROMOTERS TO
COMPANY AS AT 31.03.2005**

<i>Particulars</i>	<i>Amount</i>	
	<i>(Rs. In lakhs)</i>	
GOKALDAS IMAGES PRIVATE LIMITED		
<i>Affiliates (Unsecured) Merging with Gokaldas Images Private Ltd.:</i>		
- Catalogue Clothing	8.72	
- Garment Impex	(26.59)	
- Hi Images	246.96	
- Performance Clothing	98.68	
- Professional Clothing	156.76	
- Sri Venkateshwara Garments	159.01	
- Peronality Limited – Export Units	2,762.44	3,405.98
AS/ODC**		
STAND ALONE AFFILIATES:		
- Karthik Enterprises*	110.65	
- Gokaldas Intimatewear Private Limited***	60.45	171.10

Note:

**Represents Rental deposits which is refundable at the end of lease*

*** Rs.1200 lakhs has been repaid during July and August, 2005*

**** As on date, Gokaldas Images Private Ltd. has to pay Gokaldas Intimatewear
Private Limited, an amount of Rs.185 lakhs*

16. Now, we go through the agreement entered on 24.12.2005 consequent to share subscription and shareholder's agreement dated 22.11.2005 which is as follows:

ANNEXURE-F' (184)

ISSUED BY STATE BANK OF MYSORE ON BEHALF OF GOVERNMENT OF KARNATAKA
CD/1 288884
certified that a sum of Rs. 100/- (Rupees one hundred only) has been paid towards Karnataka Stamp duty.
By Smt. Gokaldas Images Pvt. Ltd.
d/w of
Name YESHWANTPUR-4191
date 24 DEC 2005 - 24 DEC 2005
Proper Officer's SS Number

AGREEMENT

This agreement ("Agreement") is made this 24th day of December, 2005 ("Effective Date"), between:

GOKALDAS IMAGES PRIVATE LIMITED a Private Limited Company incorporated under the provisions of the Companies Act, 1956 and having its registered office at No. 7 and 12, Industrial Suburb, II Stage, Yeshwantpur, Bangalore - 560 022 (hereinafter referred to as the "Company" which expression shall, unless it be repugnant to the context or meaning thereof be deemed to include its successors and permitted assigns) on the one part;

And

Mr.Jagadish N Hinduja, S/o Mr.Naraindas H. Hinduja, aged about 60 years, residing at No.203, Pooja, Sankey Road, Upper Palace Orchards, Bangalore - 560 080

Mrs.Pushpa J Hinduja W/o Mr.Jagadish N Hinduja aged about 60 years, residing at No.203, Pooja, Sankey Road, Upper Palace Orchards, Bangalore - 560 080;

Mr.Sumir J Hinduja S/o Mr.Jagadish N Hinduja aged about 36 years, residing at No.203, Pooja, Sankey Road, Upper Palace Orchards, Bangalore - 560 080

(hereinafter collectively referred to as the "Promoters" which expression shall, unless if be repugnant to the context or meaning thereof be deemed to include their successors and permitted assigns) on the other.

For Gokaldas Images Pvt. Ltd.
Director / Authorised Signatory

Pushpa J Hinduja

(185)
WHERE AS :

A. (1) IL&FS PRIVATE EQUITY TRUST through its scheme THE LEVERAGE INDIA FUND, a trust registered under the provisions of the Indian Trust Act, 1882, which is a venture capital fund registered under the provisions of the Securities and Exchange Board of India (Venture Capital Funds) Regulations, 1996, whose Trustee is IL&FS Trust Company Limited having its registered office at IL&FS Financial Centre, C- 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai 400 051 acting for the purposes of this Agreement through its Investment Manager, IL&FS Investment Managers Limited, a company incorporated under the provisions of the Companies Act, 1956 and having its Registered Office at IL&FS Financial Centre, C-22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai 400 051 ("IIML")

(2) IVC EMPLOYEES WELFARE TRUST which is a trust under the Indian Trusts Act having its office at IL&FS Financial Centre, C-22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai 400 051 ("IEWT") which term shall unless repugnant to the context and meaning thereof be deemed to mean and include its successors in interest and permitted assigns); AND

(3) IL&FS EMPLOYEES WELFARE TRUST which is a trust under the Indian Trusts Act having its office at IL&FS Financial Centre, C-22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai 400 051 ("IL&FS EWT").

(hereinafter collectively referred to as the Investors)

had entered into a single SHARE SUBSCRIPTION AND SHAREHOLDERS AGREEMENT (SSSA) on 22nd November 2005 with the promoters and the Company as per which the investors had agreed to invest in the aggregate towards Share Capital in the Company a sum of Rs. 44,72,01,000/- on certain terms and conditions detailed in that agreement read with its schedules under the said agreement and accordingly invested on 12th December 2005. One of the stipulations was that the Company will utilise a part of its proceeds of such investment in the manner indicated in Clause 3.1 of the SSSA, as per which inter alia a sum of Rs. 10 Crores was to be provided as "Loan to Promoters".

B The SSSA was entered to broaden stimulate and expand the activities of the company particularly in respect of exports and placing it on a sound financial footing by making it an independent self sustaining, viable enterprise unhampered by unnecessary links and associations, while securing as far as possible the stake of the investors in the company without which the proposed expansion could not have come about.

For Gokaldas Images Pvt. Ltd.

Director / Authorised Signatory

Jagadish N. Hinduja

Pushpa T Hinduja

[Signature]

- C. It is understood and intended by the investors and the promoters that the said loans shall be used for effectuating the various stipulations, covenants and obligations cast on the company under the SSSA to subserve and promote the objectives behind the investment by the investors in the company including the financial health of the company, reducing its risks existing or that may arise, facilitation and enablement of the company to free itself from any contractual or similar obligations particularly with reference to its relations and dealings with its various affiliates that might possibly impede directly and indirectly such underlying objectives and matters incidental thereto.

THIS AGREEMENT WITNESSETH AS FOLLOWS:

1. The Company shall on investment by the investor extend a loan of Rs 10 Crores (Rupees Ten crores) to the promoters.
2. The loan shall be free of interest; it will be unsecured but the promoters will execute a Pronote respectively, if necessary in favour of the company for the amount of the loan.
3. The loan shall be repaid until the earlier of,
 - a) on an IPO/listing of the Shares of the Company on a Recognised Stock Exchange; or
 - b) 10 (Ten) years from the completion date.
4. Without prejudice to the generalities of the stipulations behind the sanctioning of the loan for promoters in the larger business interest of the company, specifically, the utilization of the loans may be for taking appropriate steps towards:
 - a) Project expansion
 - b) High cost debt repayment/Working Capital
 - c) The earliest release of the company from its guarantees given by it for the loans and advances enjoyed by its associates namely Personality Limited and Gokaldas Intimatewear Private Limited.
 - d) i) The release of the company from its obligation to Acquire the Trade Marks from Personality Limited vide Agreement dated 01.04.2005 between the Company and Personality Limited.
ii) Release from any other liability which in view of the promoters is more pressing in the interests of the business of the company while ensuring to avoid any collateral damage.

For Gokaldas Images Pvt. Ltd.

[Signature]
Director / Authorised Signatory

[Signature]

[Signature]
Pushpa T Hinduja

[Signature]

5. It is agreed between the parties that it will be the discretion of the promoters to make changes in the manner of the disbursement of the loan so as it ensures for the benefit of the company with a view to placing it on a more firm financial footing and is in broad conformity with the intended purposes and the conditions imposed on it in the SSSA.
6. Accordingly the promoters may direct the disbursement of the whole or any part of the loan to any of its affiliates/group concerns so long as these powers are exercised to subserve the intend and purposes behind the making available of these funds to them under the SSSA.

17. In the light of above, we have carefully gone through the impugned agreement dated 22.11.2005 i.e. share subscription and shareholder agreement along with agreement dated 24.12.2005. As per Schedule 14 and 15 of Schedule of agreement dated 22.11.2005, there was a condition on Gokuldas Images Private Limited (M/s. GIPL) laid down by investors to demerge two existing export units viz American Shirts and Outdoor Clothing from Personality Limited and merge the same with M/s. GIPL so as to increase the export business and enhance the value of the company. It is also mentioned in Clause 3.2 that the promoters have to close loans and advances within Group Companies for which a sum of Rs. 10 crores unsecured loan has been earmarked to be given as loan to the directors to close the same. As per agreement dated 24.12.2005 as mentioned above the said amount received by the directors from M/S. GIPL to be used by the directors for effectuating the various stipulations, covenants and obligations cast on the company under the SSSA to subserve and promote and the objectives behind the investment by the investors in the company including the financial health of the company, reducing the risk existing or that may arise etc. and the utilization of the said Rs. 10 crores is governed by the agreement dated 24.12.2005. The said loan has been utilized by these assesses not for their personal benefit and the amount has not been paid to their personal account, instead the said amount has been directly paid by M/S. GIPL to the loan account with Standard Chartered Bank. This has been evident by the confirmation letter issued by the Standard Chartered Bank, which reads as follows:-

Standard
Chartered 

~~ANNEXURE 4~~

To,
The Chief Financial Officer,
Gokaldas Intimatewear Pvt Ltd,
Yeshwanthpur, Bangalore.

Date: 23.01.2006

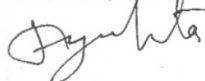
Dear Sir,

Reg: Facilities sanctioned to Gokaldas Intimatewear Pvt Ltd

Pls refer to our renewal cum enhancement sanction letter dated 18th January 2006. We hereby confirm the waiver of Corporate Guarantee of M/s Gokaldas Images Pvt Ltd for all the facilities extended to Gokaldas Intimatewear Pvt Ltd. The same is subject to creation of pari passu charge on the fixed assets of GIWPL within 30 days from the date of disbursal.

All other terms & conditions mentioned in the sanction letter dated 18th January 2006 remain unchanged.

For Standard Chartered Bank



(Authorised Signatory)

Standard Chartered Bank
Client Relationships, Wholesale Banking
6th Floor, West Wing, Raheja Towers
26, M.G. Road
Bangalore - 560 001, India

Tel (91-80) 2532 5368/2559 9825
Fax (91-80) 2559 9255

Incorporated in England with limited liability by Royal Charter 1853 Reference Number ZC18
The Principal Office of the Company is situated in the U.K.



Date : 3rd June, 2011

CERTIFICATE

This is to certify and affirm that on the clearing of the dues the Corporate Guarantee executed by M/s. Gokaldas Images Private Limited in our favour for the facilities extended to M/s. Personality Limited was released on 21.05.2007.

For STANDARD CHARTERED BANK

A handwritten signature in dark ink, appearing to be "V. V. V.", written over a horizontal line.

Authorised Signatory.

Standard Chartered Bank
Middle Market - OCC, Wholesale Banking
6th Floor, West Wing, Raheja Towers
26, M.G. Road
Bangalore - 560 001, India

Tel (91-80) 6450 1993 / 6450 1994
Fax (91-80) 2559 9255

Incorporated in England with limited liability by Royal Charter 1853 Reference Number ZC18
The Principal Office of the Company is situated in the U.K.

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18. Further, the following entry has been made in the books of account of M/s. GIPL towards advancing of this impugned amount as below:-

M/s. Gokaldas Images Private Ltd., Bengaluru

Accounting Details

<i>Sl.No.</i>	<i>Description</i>	<i>Debit(Rs.)</i>	<i>Credit(Rs.)</i>
1.	<i>Personality Ltd. (Debited to loan to Directors To Canara Bank</i>	5,50,00,000	
			5,50,00,000
	<i>(Being the amount paid to Personality Ltd., on various dates for the Trade Mark purpose)</i>		
2.	<i>Personality Ltd. (Standard Chartered Bank A/c) (Debited to loan to Directors) To HSBC</i>	5,00,00,000	
			5,00,00,000
	<i>(Being the amount paid to Personality Ltd. for release of Guarantee given by the company)</i>		

Sd/- 4.6.2022

(Ashok. A. Kulkarni)

19. As seen from the letter issued by the Standard Chartered Bank as reproduced above, the corporate guarantee given by M/s. GIPL was no more continued and the liability of M/s Gokaldas Images with Standard Chartered Bank has been closed. Thus, the assessee has ensured the end utilization of the impugned amount for the purpose for which it has given and it is the admitted fact.

20. In other words, it is an admitted fact that the loan granted to the assesses, in turn the same fund has been used to discharge the corporate guarantee provided by M/s. Gokaldas Images Pvt. Ltd. to M/s. Personality Ltd. and the agreement to purchase a trade mark which is mentioned in the agreement dated 25.12.2005. The

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reading of the agreement dated 24.12.2005 makes it clear that these assesses have no discretionary power to use that fund as per their wish. As discussed earlier, the said amount of Rs. 10 crores has been used to clear off the loan in the name of M/s. Personality Ltd where M/s. GIPL was the guarantor for the said loan and the loan has been cleared. This is evidenced by the confirmation letter issued by the Standard chartered Bank. The amount received by assessee not at all account to the personal benefit of the assessee in turn it was credited to the loan accounts with Standard Chartered Bank as per journal entry at paper book page no 188 and 190.

21. From the above statements it is clear the amount received from M/s. GIPL has been used by these two assesses paid to loan account of Personality Ltd. for the purpose of discharge of the corporate guarantee and there was no personal benefit derived to these two assesseees.

21.1 We have also examined the agreement dated 24.12.2005 which has been entered into as per Clause 3.2 of the Shareholders Agreement dated 25.11.2005 as per which promoters M/s GIPL to enter into an agreement prior to the disbursement of the said loan. The Clause B, C, 4, 5, 6 which outlines the background , purpose and ultimate objective for the grant of loans to directors , including the terms of repayment thereof. It is clear from the above agreement dated 24.12.2005 that the purpose of the loan granted to these assesses was not for the personal benefit of these directors but for the benefit of M/s GIPL who were under the obligation to perform certain conditions agreed with the investor. The release of corporate guarantee provided by M/s GIPL to M/s Personality Ltd and the agreement to purchase the trademark are mentioned in the agreement dated 25.12.2005. Hence , the usage of funds by these assesses was prescribed by M/s GIPL based on the business

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interest and these assesses have no voice in the utilization of the funds provided by M/s GIPL. In fact, the impugned funds never received by these two assesses directly instead it went to the Standard Chartered Bank Account on behalf of M/s personality Ltd to close the loan and the loan of M/s Personality Ltd with Standard Chartered Bank has been closed and to this effect the Standard Chartered Bank issued the no due certificate dated 03.06.2011 stating that release of corporate guarantee execute by M/s GIPL in favour of M/s Personality Ltd with effect from 21.05.2007.

22. Now we will examine the above documents in the light of below mentioned case laws:-

- i. In the case of Smt. Jamuna Vernekar Vs. Deputy Commissioner of Income-tax the Hon'ble High Court of Karnataka in its judgement reported in (2021) 432 ITR 146 held as under:-

“Under section 2(22)(e) of the Income-tax Act, 1961, it is only where a loan is advanced by a company to a registered shareholder and the other conditions as set out in section 2(22)(e) are satisfied, that the amount of loan would be liable to be treated as deemed dividend within the meaning of section 2(22)(e) of the Act. The purpose of insertion of sub-clause (e) of clause (22) of section 2 of the Act was to bring within the tax net accumulated profits which are distributed by closely held companies to their shareholders in the form of loans to avoid payment of dividend distribution tax under section 115-0 of the Act. Loans or advances given to shareholders or to a concern would not normally qualify as dividend and only where such loan or advance is given to a shareholder as a consequence of any further consideration received from such a shareholder which is beneficial to the company, can such advance or loan be said not to be deemed dividend within the meaning of the provision. The word "loan" means anything lent, especially money on interest whereas, deposit means a sum of money paid to secure an article or service. Therefore, deposit is not covered by section 2(22)(e).

Held that the assessee received a certain sum from the company which was subsequently adjusted against the security deposit. The

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assessee constructed a building with the money. The sum so paid had been adjusted towards security deposit which was evident from the books of the company and therefore, the deposit was outside the purview of section 2(22)(e) of the Act. The sum amounted to a trade advance which was recovered from rentals during the usual course of business. The trade advances arose during the usual course of business and were not for the individual benefit of the assessee. The Commissioner (Appeals) had also held that under the commercial transactions, the assessee had given prime property and after construction the company was benefited as the building after construction was let out to the company at a much lower rate than the market price and therefore, the transaction in question was a commercial transaction and was outside the purview of section 2(22)(e)."

ii. In the case of CIT Vs. Raj Kumar the Hon'ble Delhi High Court in its judgement reported in (2009) 318 ITR 462 held as under:

"The purpose of insertion of sub-clause € to section 2(6A) in the 1922 act was to bring within the tax net monies paid by closely held companies to their principal shareholders in the guise of loans and advances to avoid payment of tax. Therefore, sub-clause (e) of section 2(22) of the 1961 Act, which is in parimateria with sub-clause (e) of section 2(6A) of the 1922 Act, plainly seeks to bring within the tax net, accumulated profits which are distributed by closely held companies to its shareholders in the form of loans. The purpose being that persons who manage such closely held companies should not arrange their affairs in a manner that they assist the share holders in avoiding the payment of taxes by having these companies pay or distribute, what would legitimately be dividend in the hands of the shareholders' money in the form of an advance or loan. The word "advance" has to be read in conjunction with the word "loan". Usually attributes of a loan are that it involves the positive act of lending coupled with acceptance by the other side of the money as loan: it generally carries interest and there is an obligation of repayment. On the other hand, in its widest meaning the term "advance" may or may not include lending. The word "advance" if not found in the company of or in conjunction with a word "loan" may or may not include the obligation of repayment. If it does, then it would be a loan. Thus, arises the conundrum as to what meaning one would attribute to the term "advance". The rule of conjunction which answers would attribute to the term "advance". The rule of conjunction which answers this conundrum is noscitur a sociis. The rule has been explained both by the Privy Council in the case of Angus Robertson V. George Day (1879) 5 AC 63 by observing "it is legitimate rule of construction to construe words in an Act of Parliament with

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reference to words found in immediate connection with them” and the Supreme Court in the case of Rohit Pulp and Paper Mills Ltd. v. Collector of Central Excise, AIR 1991 SC 754 and State of Bombay v. Hospital Mazdoor Sabha, AIR 1960 SC 610. The principles with regard to the applicability of the rule of construction are briefly as follows: (i) does the term in issue have more than one meaning attributed to it, i.e. based on the setting or the context one could apply the answer or wider meaning; (ii) are the words or terms used found in a group totally “dissimilar” or is there a “common thread” running through them; (iii) the purpose behind inserting of the term. In the instant case (i) the term “advance” has undoubtedly more than one meaning depending on the context in which it is used; (ii) both the terms, that is, “advance” or “loan” are related to the accumulated profits of the company; and (iii) the purpose behind the insertion of the term “advance” was to bring within the tax net payments made in the guise of loan to shareholders by companies in which they have a substantial interest so as to avoid payment of tax by the shareholders. The word “advance” which appears in the company of the word :loan” could only mean such advance which carries with it an obligation of repayment. Trade advances which are in the nature of money transacted to give effect to a commercial transaction would not fall within the ambit of the provision of section 2(22)(e) of the Act.”

- iii. In the case of Pradip Kumar Malhotra Vs. CIT, the Hon’ble Calcutta High Court in its judgement reported in (2011) 338 ITR 538 held as under:-

“The phrase “by way of advance or loan” appearing in sub-clause (e) section 2(22) of the Income-tax Act, 1961, must be construed to mean diet advances or loans which a shareholder enjoys simply on account of k person who is the beneficial owner of shares (not being shares entitled fixed rate of dividend whether with or without a right to participate in ern: holding not less than ten per cent. of the voting power ; but if such lama advance is given to such shareholder as a consequence of any further as.-sideration which is beneficial to the company received from such a shareholder, in such case, such advance or loan cannot be said to be d dividend within the meaning of the Act. Thus, gratuitous loan or advisor given by a company to those classes of shareholders would come within purview of section 2(22) but not cases where the loan or advance is given in return to an advantage conferred upon the company by such shareholder.

The assessee had substantial shareholding in a private company. The assessee permitted his immovable property to be mortgaged to the

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bank enabling the company to take the benefit of loan and in spite of request of assessee the company was unable to release the property from mortgage. Consequently, the board of directors of the company passed a resolution authorizing the assessee to obtain from the company interest free deposit of Rs. 50 lakhs as and when required. During the previous year relevant to assessment year 1999-2000, the assessee obtained from the company a sum of Rs.20,75,000 by way of security deposit. Out of the amount, a sum of Rs.20 lakhs was subsequently returned by the assessee to the company. In the assessment made for 1999-2000 the Assessing Officer added the sum of Rs.20,75,000 as deemed dividend. This was upheld by the Tribunal. One appeal to the High Court:

Held, allowing the appeal, that for retaining the benefit of loan availed of from the bank if decision was taken to give advance to the assessee such decision was not to give gratuitous advance to its shareholder but to protect the business interest of the company. The sum of Rs.20,75,000 could not be treated as deemed dividend."

- iv. In the case of CIT Vs. Ankitech P. Ltd., the Hon'ble Delhi High Court in its judgement reported in (2012) 340 ITR 14 held as under:-

"According to section 2(22)(e) of the Income-tax Act, 1961, the following conditions are to be satisfied : (i) the payer company must be a closely company ; (ii) it applies to any sum paid by way of loan or advance during the year to the following persons : (a) a shareholder holding at least 10 per cent. of voting power in the payer company ; (b) a company in which such share has at least 20 per cent. of the voting power ; (c) a concern (other than company) in which such shareholder has at least 20 per cent. interest ; (iii) payer company has accumulated profits on the date of any such payment the payment is out of accumulated profits ; (iv) the payment of loan advance is not in the course of ordinary business activities. By a deeming provision it is the definition of dividend which is enlarged. The legal fiction does not extend to "shareholder". The fiction is not to be extended further broadening the concept of shareholders. Circular No. 495, dated Sept 22, 1987, issued by Central Board of Direct Taxes is not binding on the Court.

During the assessment proceedings, the Assessing Officer noticed that assessee-company had received advances of Rs. 6,32,72,265 by way of entry from a company, JGPL and the shareholders having substantial interest in the assessee-company also had 10 per cent. of the voting power in JGPL. The Assessing Officer was of the view that as the two Guptas were members holding substantial interest in JGPL which had provided loans and advances to the assessee-company and these

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very persons had substantial interest in the assessee-company, for the purpose of section 2(22)(e) of the Act the amount received by the assessee from JGPL which constituted "advances and loan" would be treated as deemed dividend within the meaning of section 2(22)(e) of the Act and added the amount to the income of the assessee. The Tribunal deleted the addition. On appeal to the High Court:

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

23. Further, in ITA No. 322/12 the Hon'ble Karnataka High Court in the case of The CCIT v. M/s Sarva Equity Pvt. Ltd vide order dated 8.01.2014 held as under:

"4. We have heard learned counsel for the parties and with their consent the appeals were taken up for final disposal at the stage of admission, on the substantial questions of law formulated by us with the assistance of learned counsel for the parties.

5. Though the revenue has formulated the substantial questions of law in the memorandum of the appeal, learned counsel for the parties have agreed that the substantial question of law that falls for our consideration is whether, on the facts and in the circumstances of the case, the Assessing Officer in law, was justified in treating the advance/loan paid to the assessee of Rs.9,56,48,107/- as deemed dividend under [Section 2\(22\)\(e\)](#) of the Act and that the advance/loan paid to the respondent-assessee, who was and is not a shareholder of M/s.Ittina Properties (P) Limited, is covered by the word "dividend" as contained in [Section 2\(22\)\(e\)](#) of the Act? It is made clear that the question was formulated by us even before commencement of the arguments and then the learned counsel for the parties, by consent, were heard for final disposal at the stage of admission.

6. The questions that arise in these appeals for our consideration are against the fact that Rs.9,56,48,027/-, Rs.9,34,849/- and Rs.8,385/- for the assessment years 2006-07 to 2007-08 respectively were advanced by M/s.Ittina to the respondent-assessee, as contended by the revenue and therefore, liable to be taxed being deemed dividend under [Section 2\(22\)\(e\)](#) of the Act. The respondent-assessee has disputed payment/advancement of these amounts as dividend and according to them, these amounts were paid as advance by M/s.Ittina to the respondent-assessee as routine business transactions. What we propose to examine is whether these

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amounts, paid by M/s.Ittina, as loan/advance to the respondent-assessee, could be treated as deemed dividend.

7. *Mr.E.S.IndraKumar, learned Senior Advocate appearing for the appellant-revenue at the outset submitted that one Sri I.Mahabaleshwarappa and his family members were directors and shareholders of M/s. M/s.Ittina so also of the respondent-assessee and they were having substantial share holding in both the companies. In view thereof, he submitted that though the respondent-assessee was not a shareholder of M/s.Ittina still it is liable to be held as shareholder within the meaning of [Section 2\(22\)\(e\)](#) of the Act and liable to be taxed as contemplated under the second limb of [Section 2\(22\)\(e\)](#) of the Act. In support of his contention, he placed reliance upon the Circular dated 22nd September 1987 bearing Circular No.495.*

8. *On the other hand, Mr.A.Shankar, learned counsel appearing for the respondent-assessee invited our attention to the judgments of the Bombay High Court in CIT Vs. Universal Medicare Private Limited, [2010] 324 ITR 263 (Bom.), the judgment of Delhi High Court in [Commissioner of Income Tax vs. MCC Marketing Private Limited](#), [2012] 343 ITR 350 (Delhi) and in [C.I.T. vs. Ankitech P. Ltd.](#) [2012] 340 ITR 14 (Delhi) to contend that since the respondent-assessee was and is not a shareholder of M/s.Ittina from which it has received monies, which are in the nature of loan or advances, are not covered by the definition of the word "dividend" as contained in [Section 2\(22\)\(e\)](#) of the Act.*

9. *There does not appear to be any dispute that the amounts, as aforementioned, were advanced by M/s.Ittina to the respondent-assessee during the relevant assessment years. Admittedly, the respondent-assessee was not a shareholder of M/s.Ittina at any point of time. It is true that the Directors and share holders of both the companies, are members of one and the same family and they have substantial holding in M/s.Ittina and respondent-company. Whether that by itself, is sufficient to treat the amounts advanced as deemed dividend within the meaning of [Section 2\(22\)\(e\)](#) of the Act is the question that falls for our consideration.*

10. *The Bombay High Court in Universal Medicare Private Limited (supra) was dealing with some what similar situation. The questions framed by the Bombay High Court in Universal Medicare read thus:*

"1. Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal, in law, was right in deleting the addition of Rs.35 lakhs treated as deemed dividend under [section](#)

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2(22)(e) of the Income- tax Act, 1961, by stating that since the transactions are not reflected in the books of account, it cannot be treated as deemed dividend?

2. Whether, on the facts and in the circumstances of the case, the Tribunal in law, was right in holding that the Assessing Officer has not established that the money was advanced for the benefit of any shareholder and the same has to be taxed in the hands of such shareholder who obtained the benefit and not in the hands of the assessee-company, following the ratio of the decision in the case of Asst. CIT v. Bhaumik Colour P. Limited(2009) 313 ITR (AT) 146 (Mumbai); 27 SOT 270 (SB)?"

10.1. While dealing with this question the Bombay High Court after considering the scheme of Section 2(22)(e) of the Act observed thus:

"However, even on the second aspect which has weighed with the Tribunal, we are of the view that the construction which has been placed on the provisions of section 2(22)(e) is correct. Section 2(22)(e) defines the ambit of the expression "dividend". All payments by way of dividend have to be taxed in the hands of the recipient of the dividend namely the shareholder. The effect of section 2(22) is to provide an inclusive definition of the expression "dividend". Clause(e) expands the nature of payments which can be classified as a dividend. Clause(e) of section 2(22) includes a payment made by the company in which the public are not substantially interested by way of an advance or loan to a shareholder or to any concern of which such shareholder is a member or partner, subject to the fulfillment of the requirements which are spelt out in the provision. Similarly, a payment made by a company on behalf, or for the individual benefit, of any such shareholder is treated by clause (e) to be included in the expression "dividend". Consequently, the effect of clause (e) of section 2(22) is to broaden the ambit of the expression "dividend" by including certain payments which the company has made by way of a loan or advance or payments made on behalf of or for the individual benefit of a shareholder. The definition does not alter the legal position that dividend has to be taxed in the hands of the shareholder. Consequently in the present case the payment, even assuming that it was a dividend, would have to be taxed not in the hands of the assessee but in the hands of the shareholder. The Tribunal was, in the circumstances, justified in coming to the conclusion that, in any event, the payment could not be taxed in the hands of the assessee. We may in concluding note that the basis on which the assessee is sought to be taxed in the present case in respect of the amount of Rs.32,00,000/- is that there was a dividend under section 2(22)(e) and no other basis has been suggested in the order of the Assessing Officer."

(emphasis supplied)

11. The Delhi High Court in MCC Marketing Pvt. Ltd.

(supra) also considered almost similar questions and in the light of the judgment of the Division Bench of the very High Court in *CIT Vs. Ankitech P. Ltd.* held that the Assessing Officer erred in invoking the provisions of [Section 2\(22\)\(e\)](#) of the Act mainly because the Director of the Company was holding more than 20% shares in both the donor and donee companies. It would be advantageous to reproduce the observations made by the Division Bench of the Delhi High Court in *Ankitech P. Ltd.* (*supra*) which read thus:

"The intention behind enacting the provisions of [section 2\(22\)\(e\)](#) is that closely held companies (i.e., companies in which public are not substantially interested), which are controlled by a group of members, even though the company has accumulated profits would not distribute such profit as dividend because if so distributed the dividend income would become taxable in the hands of the shareholders. Instead of distributing accumulated profits as dividend, companies distribute them as loan or advances to shareholders or to concern in which such shareholders have substantial interest or make any payment on behalf of or for the individual benefit of such shareholder. In such an event, by the deeming provisions, such payment by the company is treated as dividend. The intention behind the provisions of [section 2\(22\)\(e\)](#) of the Act is to tax dividend in the hands of shareholders. The deeming provisions as it applies to the case of loans or advances by a company to a concern in which its shareholder has substantial interest, is based on the presumption that the loans or advances would ultimately be made available to the shareholders of the company giving the loan or advance.

Further, it is an admitted case that under normal circumstances, such a loan or advance given to the shareholders or to a concern, would not qualify as dividend. It has been made so by legal fiction created under [section 2\(22\)\(e\)](#) of the Act. We have to keep in mind that this legal provision relates to 'dividend'. Thus, by a deeming provision, it is the definition of dividend which is enlarged. Legal fiction does not extend to 'shareholder'. When we keep in mind this aspect, the conclusion would be obvious, viz., loan or advance given under the conditions specified under [section 2\(22\)\(e\)](#) of the Act would also be treated as dividend. The fiction has to stop here and is not to be extended further for broadening the concept of shareholders by way of legal fiction. It is a common case that any company is supposed to distribute the profits in the form of dividend

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to its shareholders/members and such dividend cannot be given to non-members. The second category specified under [section 2\(22\)\(e\)](#) of the Act, viz., a concern (like the assessee herein), which is given the loan or advance is admittedly not a shareholder/member of the payer company. Therefore, under no circumstance, it could be treated as shareholder/member receiving dividend. If the intention of the Legislature was to tax such loan or advance as deemed dividend at the hands of 'deeming shareholder', then the Legislature would have inserted deeming provision in respect of shareholder as well, that has not happened. Most of the arguments of the learned counsel for the Revenue would stand answered, once we look into the matter from this perspective."

(emphasis supplied) 11.1 Further, we would like to quote the following observations made in paragraphs-27 and 28 from the Judgment of the Delhi High Court in Ankitech P. Ltd. (supra), which read thus:

".....The courts have held that if the amounts advanced are for business transactions between the parties, such payment would not fall within the deeming dividend under [Section 2\(22\)\(e\)](#) of the Act. In so far as reliance upon Circular No.495, dated September 22, 1987, issued by the Central Board of Direct Taxes is concerned, we are inclined to agree with the observations of the Mumbai Bench decision in Bhaumik Colour (P) Ltd. [2009] 313 ITR (AT) 146 (Mumbai) [SB] that such observations are not binding on the Courts. Once it is found that such loan or advance cannot be treated as deemed dividend at the hands of such a concern which is not a shareholder, and that, according to us, is the correct legal position, such a circular would be of no avail."

11.2. Our attention was also invited to another judgment of the Supreme Court in [KeshavjiRavji and Co., -vs- Commissioner of Income-Tax](#) (1990) 183 ITR 1. The relevant observations in the said judgment read thus:

"The Tribunal, much less the High Court, is an authority under the Act. The circulars do not bind them. But the benefits of such circulars to assesseees have been held to be permissible even though the circulars might have departed from the strict tenor of the statutory provision and mitigated the rigour of the law. But that is not the same thing as saying that such circulars would either have a binding effect in the interpretation of the provision itself or that the Tribunal and the High Court are supposed to interpret the law in the light of the circular."

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12. The Delhi High Court in *National Travel Services (supra)* though was considering the provisions of [Section 2\(22\)\(e\)](#) of the Act, what fell for its consideration was whether the assessee-firm could be treated as a shareholder having purchased shares through its partners in the company which had paid the loans or was it necessary that the shareholder had to be a registered shareholder. After considering the relevant provisions and several judgments, the Delhi High Court in paragraph 19 observed thus:

".....Whether the assessee firm can be treated as a shareholder having purchased shares through its partners in the company which has paid the loans or is it necessary that a shareholder has to be a 'registered shareholder'. If the contention of the assessee is accepted, in no case a partnership firm can come within the mischief of [Section 2\(22\)\(e\)](#) of the Act because of the reason that shares would be purchased by the firm in the name of its partners as the firm is not having any separate entity of its own. With the name of the partner entering into the register of members of the company as shareholder, the said partner shall be the 'shareholder' in the records of the company but not the beneficial owner as 'beneficial owner' is the partnership firm. This would mean that the loan or advance given by the company would never be treated as deemed dividend either in the hands of the partners or in the hands of partnership firm. In this way the very purpose for which this provision was enacted would get defeated. The object behind this provision is succinctly stated in the Circular No.495 of and 22 September, 1987 particularly in the Explanatory Notes to [Finance Act, 1987](#) when this provision was amended."

12.1. The question that the Delhi High Court was considering in the said judgment read thus:

"(1) To attract the first limb of [Section 2\(22\)\(e\)](#) of the Act, is it necessary that the person who has received the advance or loan is a shareholder and also beneficial owner. To put it otherwise, whether both the conditions are required to be satisfied will depend upon the interpretation to be given to the words "being a person who is a beneficial owner of shares..." which was inserted by amendment in the aforesaid provision carried out by the [Finance Act, 1987](#) w.e.f. 1st April, 1988.

(2) Whether the assessee who is a partnership firm can be treated as 'shareholder' because of the reason that it has purchased the shares in the name of the two partners."

13. It would be relevant to look into the provisions contained in [Section 2\(22\)\(e\)](#) of the Act, which reads thus:

"Dividend" includes

"(e) any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) made after the 31st day of May, 1987, by way of advance or loan to a shareholder, 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, or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits."

14. As observed by the Bombay High Court in Universal Medicare, Clause(e) of [Section 22](#) is not artistically worded. This clause can be divided into three parts/has three limbs, as follows:

Any payment by a Company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the Company or otherwise) made after 31st May 1987 by way of advance or loan: i) to a shareholder, 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 percent of the voting power; ii) or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest (hereinafter in this clause referred to as the said concern); and iii) or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits.

15. The remaining part of provision is not material for the purpose of this appeal. By providing an inclusive definition of the expression "dividend", Clause (e) of [Section 2\(22\)](#) of the Act brings within its purview attempts which may not ordinarily constitute the payment of dividend. Parliament has expanded the ambit of the expression "dividend" by providing an inclusive definition.

16. In the present case, we are concerned with the second limb of [Section 2\(22\)\(e\)](#) of the Act namely, to any concern, like the respondent-assessee, in which such shareholder is a member or a partner and in which he has a substantial interest. The respondent assessee is admittedly not a shareholder of M/s.Ittina. It is not even the case of the assessee that it is a shareholder of M/s.Ittina, though, shareholders of the respondent- assessee and M/s.Ittina are

common and/or members of the same family. In this backdrop when we look at the provisions contained in [Section 2\(22\)\(e\)](#) of the Act, the intendment of the Legislature is clear, which means to tax dividend in the hands of shareholders. The deeming provisions, as observed by Delhi High Court, as it applies to the case of loans/advances by a Company to a concern in which its shareholders have substantial interest, is based on the presumption that the loans or advances would ultimately be made available to the shareholders of the Company giving the loan or advances. Loan or advance given to the shareholders or to a concern, under normal circumstances would not qualify as dividend, but it is so made by legal fiction created under [Section 2\(22\)\(e\)](#) of the Act. Thus, the definition of dividend has been enlarged, and that loan or advances given under the conditions specified under this provision would also be treated as dividend. The fiction, however, is not to be extended for enlarging the concept of shareholders. Dividend is to be given by any company, to its shareholders. Thus, in the second category under [Section 2\(22\)\(e\)](#) of the Act, loan or advances given to a concern, like the assessee in the present case, which is admittedly not a shareholder of the payee company, under no circumstances, could be treated as shareholder receiving dividend. As observed by Delhi High Court, if the intention of the Legislature was to tax such loan or advance as deemed dividend at the hands of deeming shareholder, then the legislature would have inserted deeming provision in respect of shareholder as well. The legislature has not done so.

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.

18. We do not find any reason to take a view other than the one taken by the Delhi and Bombay High Courts in the aforementioned

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judgments nor could the Senior counsel appearing for the revenue persuaded us to take differing view. In the circumstances, we find no reason to interfere with the concurrent finding of facts recorded by the two authorities below namely the Appellate Authority and the Tribunal. In the circumstances, we answer the question as formulated by us in favour of the respondent- assessee and against the revenue.

19. Before we part, we observe that it is always open to the revenue to take corrective measure, if any, by treating this as deemed income at the hands of the shareholders by following the due procedure as contemplated by law and in accordance with law. We are so observing, because otherwise it would amount to escapement of income at the hands of those shareholders..

23.1 As seen from the above judgments , if any amount has been advanced by the company in which public are not substantially interested, either to shareholder holding more than 10% voting power or to any concern in which such shareholder has substantial interest would be regarded as deemed dividend. However, if such payment is on account of business expediency, such payments cannot be considered as deemed dividend.

24. Further, it is to be noted that the circular no 19 of 2017 wherein CBDT dated 12th June 2017 clarified as follows:

Circular No. 19/2017

F.No.279/Misc./140/2015/ITJ
Government of India
Ministry of Finance
Central Board of Direct Taxes

New Delhi, Dated 12th June, 2017

Sub: Settled View on section 2(22)(e) of the Income Tax Act, trade advances -reg.

Section 2(22) clause (e) of the Income Tax Act, 1961 (the Act) provides that "dividend" includes any payment by a company, not being a company in which the public are substantially interested, of any sum by way of *advance* or *loan* to a shareholder, 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, or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern) or *any payment* by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits.

2. The Board has observed that some Courts in the recent past have held that trade advances in the nature of commercial transactions would not fall within the ambit of the provisions of section 2(22) (e) of the Act. Such views have attained finality.

2.1 Some illustrations/examples of trade advances/commercial transactions held to be not covered under section 2(22) (e) of the Act are as follows:

- i. Advances were made by a company to a sister concern and adjusted against the dues for job work done by the sister concern. It was held that amounts advanced for business transactions do not to fall within the definition of deemed dividend under section 2(22) (e) of the Act. (CIT vs. Creative Dyeing & Printing Pvt. Ltd.¹, Delhi High Court).
- ii. Advance was made by a company to its shareholder to install plant and machinery at the shareholder's premises to enable him to do job work for the company so that the company could fulfil an export order. It was held that as the assessee proved business expediency, the advance was not covered by section 2(22)(e) of the Act. (CIT vs Amrik Singh, P&H High Court)².
- iii. A floating security deposit was given by a company to its sister concern against the use of electricity generators belonging to the sister concern. The company utilised gas available to it from GAIL to generate electricity and supplied it to the sister concern at concessional rates. It was held that the security deposit made by the

¹ [NJRS] 2009-LL-0922-2, ITA No. 250 of 2009

² [NJRS] 2015-LL-0429-5, ITA No. 347 of 2013

N Bansal
12/06/17

company to its sister concern was a business transaction arising in the normal course of business between two concerns and the transaction did not attract section 2(22) (e) of the Act. (CIT, Agra vs Atul Engineering Udyog, Allahabad High Court)³

3. In view of the above it is, a settled position that trade advances, which are in the nature of commercial transactions would not fall within the ambit of the word 'advance' in section 2(22)(e) of the Act. Accordingly, henceforth, appeals may not be filed on this ground by Officers of the Department and those already filed, in Courts/Tribunals may be withdrawn/not pressed upon.

4. The above may be brought to the notice of all concerned.

5. Hindi version follows.

NBansal
(Neetika Bansal) 12/06/17

Deputy Secretary to Government of India

Copy to:-

25. As seen from the above to reduce litigation, the CBDT, *vide* Circular no. 19/ 2017 dated 12 June, 2017, has recognized the view propounded in various rulings and clarified that trade advances, which are in the nature of commercial transactions, would not fall within the ambit of the deeming provisions of section 2(22)(e) of the Act.

26. While recognizing this position as being the settled view of the matter, few illustrations of trade advances/ commercial transactions, based on past rulings, have been mentioned in the CBDT Circular, which are as follows:

- Advances made by a company to a sister concern and adjusted against the dues for job work done by the sister concern.

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- Advances made by a company to its shareholder to install plant and machinery at the shareholder's premises to enable him to do job work for the company to enable the company to fulfil an export order.
- Floating security deposit given by a company to its sister concern for use of electricity generators to supply electricity at concessional rates to the sister concern

27. It has also been instructed that appeals may not be filed by the department on this ground and those already filed may be withdrawn/not pressed.

28. Thus in the present case M/s. GIPL entered into agreement dated 25.11.2005 with these assesses under which these two persons has to ensure that M/s. GIPL would takeover to export oriented units from Personality Limited and also free itself from the obligation trademark from Personality Limited as per agreement dated 01.04.2005 for which this amount has been paid and these are book entries paid directly to the borrower and not gone to the account of these assessee and they have no right to use this fund. This transaction is nothing but commercial transaction in normal business circumstances and cannot be construed as deemed dividend.

29. As per section 2(22)(e) of the Act, as discussed in the above judgement, Section 2(22)(e) of the Act could be invoked in the following circumstances:-

- a) It applies only on advance or loans given by company.
- b) For applicability of section 2(22)(e) of the Act, there must be a payment by way of advance or loan.

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- c) Shareholding in lender company and substantial interest in borrowed company to be checked at the time of advancement of loan.
- d) For the purpose of section 2(22)(e) of the Act, shareholder means beneficial owner of shares.
- e) Section 2(22)(e) of the Act is not applicable in case of commercial transaction.
- f) Amount received for providing corporate guarantee under deemed dividend u/s 2(22)(e) of the Act.
- g) Section 2(22)(e) of the Act will not apply to an advance or loan made to a shareholder or a concern (in which shareholder has substantial interest) by a company in ordinary course of its business where lending of money is a substantial part of the business of the company.

30. If we view the facts of the present case, in the light of above concepts, it is sure that M/s. GIPL paid said amount to these two assesseees not for their personal benefit. On the other hand, it has been paid to discharge corporate guarantee provided by M/s. Gokaldas Images Pvt. Ltd. to M/s. Personality Ltd. Agreement to purchase the trade mark is as mentioned in the agreement dated 25.12.2005. Being so, the usage of the fund by this assessee was specified by M/s. GIPL based on its business interest. Further, these two assesseees have no right to use the said sum at their discretion and they are bound to be directed by these two agreements cited (supra). As such, it cannot be considered as they have derived any personal benefit from the amount issued from this M/s. GIPL. As such, though they are directors having substantial interest in this company M/s. GIPL, it cannot be considered as deemed dividend as discussed in earlier para. Further, the evidence filed by the assessee in the form of Standard Chartered

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Certificate also make it sure that they have not used the said sum for their personal benefit and they used the said sum to release the corporate guarantee given by M/s. GIPL in favour of M/s. Personality Ltd. on 21.5.2007. Further, we have also gone through the accounts produced before us and which are book entries which show the factual position that amount debited to the Director's account represent the funds deployed by M/s. Gokaldas Images Pvt. Ltd. for the purpose mentioned above as clearly recorded by Ld. CIT(A) that this money was not available to the assessee and they are governed by the agreements dated 22.11.2005 & 25.12.2005 and they used the fund as per condition laid down in these two agreements and it cannot be construed as dividend in the hands of the present assessee. The amount received by these two directors from M/S GIPL is on account of commercial transaction, which is nothing but a commercial expediency and the Ld A.O cannot sit in the chair of the assessee and cannot decide what assessee has to do in given circumstance of a case. Accordingly, we are of the opinion that Ld. CIT(A) is justified in deleting the addition made on account of deemed dividend in these two cases. Accordingly, the order of Ld. CIT(A) on this issue is confirmed and both the appeals of the revenue are dismissed.

31. In the result, appeals filed by the revenue and COs filed by the assessee are dismissed.

Order pronounced in the open court on 22nd Jul, 2022

Sd/-
(Beena Pillai)
Judicial Member

Sd/-
(Chandra Poojari)
Accountant Member

Bangalore,
Dated 22nd Jul, 2022.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

**Asst. Registrar,
ITAT, Bangalore.**