IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E": NEW DELHI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No. 1172/DEL/2016
[Assessment Year: 2011-12

Addl. CIT, Range-2, Meerut.	Vs	Prasandi Builders (P) Ltd., Opp. Apex College, NH-58, Bye Pass Road, Meerut. C/o Mehra & Co., CAs, 7, Rajeshwari Palace, Near Commissioner Residence, Civil Lines, Meerut-259991. PAN- AAACP8262G

AND

ITA No. 634/DEL/2016
[Assessment Year: 2011-12

Prasandi Builders (P) Ltd., C/o Mehra & Co., CAs, 7, Rajeshwari Palace, Near Commissioner Residence, Civil Lines, Meerut-259991. PAN- AAACP8262G	Vs	Addl. CIT, Range-2, Meerut.
APPELLANT		**RESPONDENT**
Assessee represented by		**Sh. K. sampath, Adv. & Sh. V. Rajkumar, Adv.**
Department represented by		**Sh. Jeetender Chand, Sr. DR**
Date of hearing		**18.10.2022**
Date of pronouncement		**15.11.2022**

O R D E R

PER KUL BHARAT, JM:

These cross appeals, by the assessee and the Revenue, are directed against the order of the learned Commissioner of Income-tax (Appeals), Meerut, dated 14.12.2015, pertaining to the assessment year 2011-12.

2. The facts giving rise to the present appeals are that in this case the assessee filed its return of income on 30.09.2011 declaring a total income of Rs. 5,62,080/-. The case of the assessee was picked up for scrutiny assessment and the assessment u/s 143(3) of the Income-tax Act, 1961 (in short "the Act"), was framed vide order dated 24.03.2014. The Assessing Officer while framing the assessment made various additions on account of share application money of Rs. 68,00,000/-; un-secured loans of Rs. 1,90,83,800/-; u/s 2(22)(e) out of deemed dividend Rs. 7,00,000/-; and income from other sources as per the disclosure of the assessee interest received from Era Landmark at Rs. 23,22,500/-. However, as per the total rent received from Era Landmarks comes to Rs. 27,22,500/-, therefore, the Assessing Officer added the difference of Rs. 4,00,000/- as income of the assessee. Apart from that the Assessing Officer also made addition of agriculture income of Rs. 28,250/-.

3. Aggrieved against this the assessee preferred appeal before the learned CIT(Appeals), who after considering the submissions, partly allowed the appeal. Therefore the learned CIT(Appeals) confirmed the addition in respect of dividend income, difference in interest income of Rs. 4,00,000/-. Further, in respect of unsecured

loans the learned CIT(Appeals) partly gave relief to the assessee. Therefore by deleted the opening balance of Rs. 1,40,35,000/- and out of the remaining addition of Rs. 50,48,800/- the learned CIT(Appeals) confirmed the addition at Rs. 13,98,800/-. The learned CIT(Appeals) also deleted the addition of Rs. 68,00,000/-. Aggrieved against this order both the assessee and the Revenue are in appeal.

4. First we take up the Revenue's appeal in ITA no. 1172/Del/2016. The Revenue has raised following grounds of appeal:

> *"1. Whether in the facts and circumstances of the case, the Id. Commissioner of Income tax (Appeals) has erred in law and fact in deleting the addition of Rs. 68,00,000/- made by the A.O. by treating the share application money received by the assessee company as unexplained credit u/s 68 of the I.T. Act, 1961, ignoring the fact that the assessee could not offer any satisfactory explanation regarding the nature and source of this so called share application money.*
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> *2. Whether in the facts and circumstances of the case, the Id. Commissioner of Income tax (Appeals) has erred in law and fact in deleting the addition of Rs. 68,00,000/- made by the A.O. towards share application money when he has himself mentioned in his appellate order that the objections raised by the assessee regarding amended provisions of section 68 relevant* to *share capital are applicable from A.Y. 2013-14 meaning thereby that the CIT(A) himself was doubtful of the authenticity of the alleged share application money received by the* \ *assessee company from its Director.*
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> *3. Whether in the facts and circumstances of the case, the Id. Commissioner of Income tax (Appeals) has erred in law and fact in deleting the addition of Rs. 1,40,35,000/- and Rs. 36,50,000/- made by the A.O. on account of disallowance of advances against SAPR (Secured Advance against Property Rights) and customers at credit respectively ignoring the fact that the in keeping with the provisions of revised International Accounting Standard (IAS-11), the profits on the basis of actual sales are required to be shown and the assessee has no choice to declare its profits on a project till the final sale consideration has been received. It is pertinent to mention here that the assessee has itself during the course of appellate proceedings submitted that it is not giving any contracts for construction and the provisions of IAS-11 are applicable on construction contracts and not on sales whereas on the contrary, the assessee is a real estate developer who is executing construction projects.*

4. Whether in the facts and circumstances of the case, the order of the Id. Commissioner of Income tax (Appeals) may be set aside and that of the A.O. be restored.

5. That the appellant craves leave to add, modify and / or delete any ground(s) of appeal."

5. Apropos ground nos. 1 & 2, learned DR relied on the finding of the Assessing officer and submitted that the learned CIT(Appeals) was not justified in deleting the addition. He contended that the Assessing officer has given a finding on fact that the assessee could not offer any satisfactory explanation regarding source of payment of Rs. 68,00,000/- towards share application money made by Shri Vijay Pal Yadav.

6. On the contrary, learned counsel for the assessee submitted that the learned CIT(Appeals) has examined the issue thoroughly and has given a finding that it was admitted fact in the assessment order confirmation, bank statement and ITR of the Managing Director from whom the share capital had been received was duly filed. It was further pointed out that there was no cash deposit in the bank account of the share holder, which was source of capital investment.

7. We have heard the rival contentions and perused the material available on record. We find that the learned CIT(Appeals) has given a finding on fact that the assessee ahs duly filed the requisite evidences and there was no cash deposit before making investment. Hence, in the light of the precedents relied upon by the learned CIT(Appeals), we do not see any good reason to interfere in the finding of the learned CIT(Appeals) and the same is affirmed. Ground nos. 1 & 2 of the Revenue's appeal are dismissed.

8. Ground no. 3 is against deleting the addition of Rs. 1,40,35,000/- and Rs. 36,50,000/- made by the Assessing officer on account of disallowance of advances against secured advance against property rights.

9. Learned DR supported and relied upon the assessment order and submitted that the Assessing Officer had made addition on the basis that as per International Accounting Standard (IAS-11), the profit on the basis of actual sales are required to be shown and the assessee had no choice to declare its profit on a project till the final sale consideration has been received. Therefore, the Assessing Officer was justified in making the addition.

10. On the contrary, learned counsel for the assessee submitted that the Assessing officer grossly erred in observing that IAS-11 would be applicable. However, it was categorically stated that section 145 & 145A are applicable. It was submitted before the learned CIT(Appeals) that the assessee was following project completion method since the beginning and that could not be changed. He submitted that the learned CIT(Appeals) ought to have deleted the entire addition.

11. We have heard rival submissions and perused the material available on record. We find that the learned CIT(Appeals) has decided the issue by observing as under:

> *"5.2 The Facts of the issue, case laws cited by appellant is considered.*
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> *At pages 171-173 of the Assessment record there is a complete party wise list of Unsecured loans which are in effect, in the nature of advance against (SAPR-Secured Advance Property Right) and customer credit, the list is given complete details of PAN No. opening balance as on 01.04.2010, addition made the during the year, repayment made the during the year and the closing balance as on 31.03.2011 the list gives party wise details of amount received and repayment made if any. The net total of this chart is Rs. 1,90,83,800/- which the AO Treated as un explained credit and added. From the close examination of the chart filed by*

the assessee during assessment as well as appeal proceedings it is seen that advances against SAPR opening amount was 1,41,60,000/- the addition during the year was 2,50,000/- and repayment was 3,75,000/- the net amount then being 1,40,35,000/-. The AO without examining the facts has added this balance amount out of this amount 1,41,60,000/- could not have been added in the first place as it represented the opening balance pertaining to earlier years. The Only amount that could have been examined was the fresh receipt of 2,50,000/- received from one customer Shri Satya Prakash Gupta the details of his form for registration of plot the copy of the receipt showing this cheque no. 221581 dated 01.08.2010 drawn on SBI Ganga Nagar Meerut has been examined along with copy of bank account from where this amount was deposited for the purchase of plot. The AO completely misread the facts and never called for or examined the specific evidence. The amount is fully explainable and no adverse inference can be drawn above the fresh receipt of 2,50,000/-. The AO also did not examine the aspect of repayment 3,75,000/-.

In view of the above discussion the net loans to the extent out of opening balance cannot be considered and added in this year. 2.5 lacs received during the year is fully explained and also cannot be added to the income of the assessee.

Now coming to balance amount of 50,48,800/- which was in effect Customer at credit and reflected specific payments for purchase of property which have also been added by the AO as unexplained credit u/s 68. At page no. 172 of the assessment folder there is complete party wise details of the Customer at credit the A.O chose not to examine the said details and simply chose to add the entire amount of 50,48,800/- which has also been highlighted in the submissions made and is discussed above.

Only Rs. 2.50 lacs received during year can be examined on merits on the basis of documents / confirmation / bank statement etc. furnished by the assessee.

In view of loans being out of opening balances of 1,40,35,000/- are hereby deleted on this sole ground that they are opening balances, the other contentions of the assessee becomes only of academic nature, hence, need not be adjudicated.

With regard to 50,48,800/- it was noticed during appeal that the Ld. Counsel was filing evidence in the form of purchase deeds etc. Which he submitted that he had given this evidence before the AO but it was evident from the examination of the file that the AO had not considered this evidence and with one fell stroke added customer credit of 50,48,800/-Considering this position it was thought that this matter he remanded to the AO for examination. Thus vide letter dated 06.10.2015 the matter was sent to AO for fresh examination alongwith copy of evidence with reference to addition of 50.48.800/-.

5.3 In response the AO sent the following report

"…. In this regard, it is submitted that as directed by your good self, I have examined die evidences with respect to customer at credit amounting to Rs. 50,48,800/- and has also made enquiries. Notice u/s 133(6) of the I.T. Act, 1961 was issued on 12.10.2015 to the following parties.

Sl. No.	*Particulars*	*CI Bal as on 31.03.2011*	*Remarks*
01	*Mr. Kapil Mudgal*	*17,00,000*	*No reply received till date.*
02	*Mr. Rajender Kumar Agarwal*	*1,00,000*	*No reply received till date.*
03	*Mr. Anurag*	*1,00,000*	*Notice received unserved from postal authorities. Remarks-Left.*
04	*Mr. Sanjeev Rathi*	*1,70,000*	*Notice received unserved from postal authorities. Remarks-No such person at given address.*
05	*Mrs. Renu Rastogi*	*35,000*	*Notice received unserved from postal authorities.*
06	*Mrs. Shashi*	*4,40,000*	*No reply received till date.*
07	*Mr. V.K. Choudhary*	*3,91,800*	*No reply received till date.*
08	*M/s Golden Printers*	*40,000*	*No reply received till date.*
09	*M/s Shri Ram Building Materials*	*1,17,000*	*Notice received unserved from postal authorities. Remarks-Left*
10	*Mr. Naved Ahmed*	*1,50,000*	*Notice received unserved from postal authorities. Remarks-Incomplete address*
11	*Dr. Vikas Saini & Brajveer Singh*	*9,50,000*	*No reply received till date.*
12	*Smt. Usha Kiran*	*9,00,000*	*Reply Received*
	Total	*50,48,800*	

3. From the above table, it is clear that out of 12 notices to parties, 06 notices have been received back as the concerned party has left the given address, 05 parties has not given reply till date and remaining 01 party has confirmed payment of Rs. 9,00,000/- to the assessee company during the F.Y. 2010-11. From the above, it may be concluded that customer at credit being shown by the assessee company is not a genuine one.

5. From the above table, it is clear that out of 13 notices to the parties, 11 notices have been received back as the concerned party has left the given address, 01 party has submitted that he has paid Rs. 10,00,000 during the F.Y. 2009-10 and remaining 01 party has confirmed payment of Rs. 26,00,000/- as against Rs. 32,00,000/- being shown by die assessee company. From the above table, it can be concluded that the assessee company is showing the sale at much higher price than the actual price paid by die concerned parties and difference of

the price i.e. Rs. 30,80,000/- is the unaccounted income of the assessee company from the other source, where assessee furnish inaccurate particulars of their receipts, being shown in its books of account as income from sale of flats.

6. With regard to submission of additional evidence under Rule-46A of the Income Tax Rules, 1962, it is submitted that the assessee shall not be entitled to produce any evidence before die Id. CIT(A) which were not produced during the course of assessment proceedings before the A.O. except in specific circumstances. From the perusal of die assessment record, it has been seen diat die AO has provided ample opportunity to die assessee to produce the documents and replies in support of their claim.

7. As sufficient opportunity was given to the assessee company to file the necessary details, but the assessee company failed to file necessary details during the assessment proceedings, the assessee company is not entided to produce addidon evidence under rule 46A of the I.T. Rules, 1962 as ample opportunity was given to the assessee company and addition made by my predecessor in the instant case is liable to be confirmed ".

The copy of the report was handed over to the counsel for a rejoinder which was submitted on 23.11.2015 consequent upon the examination of rejoinder the matter was examined by calling for the assessment folder on 11.12.2015.

5.4 In the submission dated 23.11.2015 the AR stated are as under:

Serial no. 3 to 10(Rs. 13,98,800/-) are amounts received from 8 persons as advance for the purchase of plots at Rajpura project. These amounts have been adjusted in the next years. They are not at the places from where they gave advance to the assessee company. The assessee has applied to the banker to find out the correct address from the banker of the depositor. The bank has been closed due the Dewali holidays and it will take more time as the matter is old and the data is transferred to the service branch. The total amount is Rs. 13,98,800/-. The assessee may be given one more opportunity as it will take about a month to trace these 8 persons.

5.5 From the perusal of the above facts it is evident that more than sufficient opportunity was provided to the appellant to bring forth all possible evidence so as to establish the bona fide of these persons who have given customer credit. The matter was remanded in 6th October, 2015 the AO sent his remand report on 27th October, 2015 and the AR filed his rejoinder on 23.11.2015. The AR was fully aware of the issue and despite having got so much time up to 11.12.2015, the AR failed to bring on record any credible evidence with regard to creditor listed at serial 3 to 10 of the remand report. The AO also at his hand has made an effort to

enquire about these persons.

In the above mentioned cases neither the AR nor the AO got any response from these sundry creditors. The onus was squarely on the appellant to bring forth evidence and prove the genuineness of transactions with these persons. The appellant has admittedly has failed in doing so and has compelled me with no option but took confirm addition of Rs. 13,98,800/- out of total credit of Rs. 50,48,800/-.

With regard to balance amount of customer credit of Rs. 36,50.000/- this customer credit pertains to the following four parties:

i.	*Kapil Mudgal*	*Rs. 17,00,000/-*
ii.	*Rajender Kuniar Agarwai*	*Rs. 1,00,000/-*
iii.	*Brijveer Singh*	*Rs. 9,50,000/-*
iv.	*Smt. Usha Kiran*	*Rs. 9,00,000/-*

With regard to Kapil mudgal the AR claimed during appeal proceedings that the property transaction has been finalized and copy of sale deed was file during assessment proceedings. The AO in his remand report stated that there was no compliance to notice u/s 133(6) during the remand proceedings. The AO ought to have considered the evidence on record in the form of sale deed and could have verified the transaction from the Sub-Registrar office where the creditor would have appeared personally for the registry of the sale deed as that has been filed as evidence during the assessment proceedings. The AO also did not either during assessment or during remand proceedings got any inquiry done through the inspector or summoned the creditor. Merely because the creditor who has now nothing to do with the appellant does not appear is not sufficient cause to draw adverse inference in the matter when there is countervailing circumstantial evidence in the form of sale deed which is backed with transaction that have been done through banking channels. In this regard the judgment of Allahabad High Court is very material:

CIT vs. Jagdish Prasad Tewari [220 Taxman 0141]. The Head Note of the said judgment is as under:-

"Accounts- Sundry creditors - addition - validity - assessee engaged in manufacturing of fabric and sale had shown sundry creditors - notice sent by AO to creditors were received back - AO made addition- CIT (A) deleted addition - Tribunal confirmed deletion - held, only few creditors had not sent confirmation but fact remained that they had received payment through cheque which were dully reflected in books of accounts of assessee - AO had not verified same in books of recipients and made addition by adopting short cut method - creditworthiness and genuineness was proved beyond doubt and observes by CIT(A) and confirmed by tribunal - C1T(A) has co-terminus powers with power of A.O. - Appellate authority has all powers which original authority has, subject to

condition / restriction, if any, prescribed by law as per ratio laid down in case of Jute corporation of India Ltd. vs. CIT, 187 ITR 688, 693 (SC) — in present case concurrent findings were given by both by appellate authorities and in absence of any adverse material, same was confirmed".

Further with regard to other three parties

i.	*Rajender Kumar Agarwal*	*Rs. 1,00,000/-*
ii.	*Brijveer Singh*	*Rs. 9,50,000/-*
iii.	*Smt. Usha Kiran*	*Rs. 9,00,000/-*

In these three cases the AO vide his report dated 27.10.2015 had reported that no reply was received. However, on 11.12.2015 the assessment folder was called for and it was noticed that at page no. 450 to 459 of the assessment record there is confirmation of account of Rajendra Kumar Agarwal along with copy of ITR dated 03.11.2015 which has been received in the office of Asstt. Commissioner of Income-tax, Circle-2 on 09.11.2015.
Further at page no. 425 to 427 there is confirmation of Brijveer Singh along with copy of ITR the confirmation is dated 28.10.2015 and was received in the office of AC1T, Circle-2, on 03.1 1.2015 confirming the transaction. The above mentioned two confirmations have been received by the AO as explained above but the matter was not brought to the notice of CIT(A) by the AO and had the record not been called there would have been miscarriage of justice on these two counts.

Also, at page no. 326 to 355 there is confirmation of account by Smt. Usha Kiran who has filed copy of ITR, sale deed, PAN card and bank statements evidencing the transaction with the appellant. This confirmation has not been adversely commented upon by the AO in his remand report.

It is also noticed from the perusal of the remand report that the AO travelled beyond the scope of the matter remanded and made inquiries into certain credit amounts, from the perusal of the submissions given before AO it is noticed that certain creditors having opening balances have also been given 133(6) notices. The list as given in the remand report is as under along with the response of the AR who filed supplementary response on 04.12.2015:

Sl No.	Particulars	Payment received as per Assessee Company	Payment as per sale deed	Difference	Payment given as per party confirmation	AR's Reply
01	Dr. Navneet Goyal	30,00,000	18,70,000	11,30,000	Notice received	Balance payment for

					unserved from postal authorities. Remarks- left.	extra work as the deed shows flat unfinished.
02	Dr. Vandana Sharma	21,01,000	18,01,000	3,00,000	Notice received unserved from postal authorities. Remarks- left.	-do-
03	Miss Taru Garg	30,000	-	-	Notice received unserved from postal authorities. Remarks- left.	Opening Balance does not pertains to this year
04	Sh. Basant Kumar Rastogi	24,06,000	18,06,000	4,00,000	Notice received unserved from postal authorities. Remarks- left.	Balance payment for extra work as the deed shows flat unfinished.
05	Mr. Neeraj Kumar Dureja	10,00,000	-	-	Notice received unserved from postal authorities. Remarks- left.	Opening Balance does not pertains to this year
06	Mrs. Rachna Agarwal	21,00,000	20,00,000	1,00,000	Notice received unserved from postal authorities. Remarks- left	Balance payment for extra work as the deed shows flat unfinished.
07	Sh. Dhani Ram	19,20,000	19,20,000	-	-	Amounts match as deed shows

						finished flat
08	Sh. Lalit Joshi	19,00,000	19,00,000	-	Notice received unserved from postal authorities. Remarks- left	The person only bought unfinished flat and did not ask it to be finished.
09	Sh. Pran Nath Bhatia	15,00,000	-	-	Notice received unserved from postal authorities. Remarks- left	Opening Balance does not pertains to this year
10	Sh. S. Gurunath & P.K. Gurunath	32,00,000	26,00,000	6,00,000	Paid Rs. 26,00,000/- only.	Balance payment for extra work as the deed shows flat unfinished.
11	Sh. Tanuj Garg	12,00,000	12,00,000	-	Notice received unserved from postal authorities. Remarks- left	Amounts match as deed shows finished flat
12	Smt. Kiran & Gauri Shanker	19,00,000	19,00,000	-	Notice received unserved from postal authorities. Remarks- left	Amounts match as deed shows finished flat
13	Smt. Prabha Rani & Satish Chandra Aron	36,60,000	33,10,100	5,50,000	Notice received unserved from postal authorities. Remarks- left	We have been informed that confirmation has been set to AO*

14	Smt. Rajni Sharma	22,76,000	22,76,000	-	Notice received unserved from postal authorities. Remarks- left	The person only bought unfinished flat and did not ask it to be finished.
	Total			30,80,000		

Clearly the AO has on his own volition has made certain inquiry which has been clarified by the AR in his response. It is evident that in some cases there was an unfinished flat as per the sale deed and the purchaser paid extra amount for its finishing and in some cases the amounts in the sale deed and copy of account tally where the finished flat is being sold. In some cases the amount is only an opening balance which has no bearing on this year. In the case of Guru Nath placed at serial no. 10 it is noticed from the examination of assessment record that while the registry is of 26 lacs for the unfinished flat and 6 lacs have been paid by cheque by the purchaser for finishing the flat. The confirmation received by the AO is of 26 lacs only in view of these facts the AO ought to have inquired further from the creditor as the additional payment of 6 lacs is through the banking channel. In this regard the case of CIT vs. Jagdish Prasad Tewari [220 Taxman 0141], All is very relevant.

Thus out of customer credit of 50,48,800/- which was added to the income of the assessee in the assessment proceedings 13,98,800/- for reasons elaborated above is hereby confirmed and balance amount of Rs. 36,50,000/- is hereby deleted."

12. We find that while deleting the addition, the learned CIT(Appeals) has given a finding on fact that net total amount received was Rs. 1,90,83,800/- which the Assessing Officer treated as unexplained credit and made addition of the same. He noted that the advance against SAPR opening amount was Rs. 1,41,60,000/-; addition during the year was Rs. 2,50,000/- and repayment was Rs. 3,75,000/-, the net amount being Rs. 1,40,35,000/-. Assessing Officer without examining the fact has added this amount. This amount could not have been added in the first place as it represented the opening balance

pertaining to earlier years. This finding of the learned CIT(Appeals) that the amount of Rs. 1,40,35,000/- represented the advance of earlier year is not rebutted by the Revenue. Therefore, we do not see any reason to disturb the finding of the learned CIT(Appeals). The same is hereby affirmed.

13. Now coming to the remaining deletion of addition, learned CIT(Appeals) has given a finding on fact that in some cases there was an unfinished flat as per sale-deed and purchaser paid extra amount for its finishing and in some cases the amounts in the sale-deed and copy of account tally where the finished flat is being sold. The Revenue has not brought any material to rebut this finding of the learned CIT(Appeals). The same is hereby affirmed. Thus, ground no. 3 of the Revenue's appeal is dismissed.

14. Ground nos. 4 & 5 of the Revenue's appeal are general in nature and need no separate adjudication.

15. Appeal of the Revenue is dismissed.

16. Now coming to the appeal of the assessee, the assessee has raised following grounds of appeal:

> "1. THAT ON THE FACTS AND CIRCUMSTANCES OF THE CASE THE LEARNED COMMISSIONER OF INCOME TAX, APPEALS , MEERUT ERRED IN LAW BY NOT GRANTING OPPORTUNITY TO THE ASSESSEE FOR TRACING THE EIGHT PERSONS WHO HAD DEPOSITED Rs.13,98,000/- WITH THE ASSESSEE AS ADAVNCE FOR THE PURCHASE OF PLOTS. THE CONFIRMATION SO MADE BY THE LD COMMISSIONER OF INCOME TAX (APPEALS) NEEDS TO BE DLETED AS NO OPPORTUNITY AS REQUESTED BY THE ASSESSEE FOR TRACING THE EIGHT PERSONS WAS GIVEN WHICH IS AGAINST THE MORAL PRINCIPLES LAW AND OF JUSTICE.
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> 2. THAT ON THE FACTS AND CIRCUMSTANCES OF THE CASE THE LEARNED COMMISSIONER OF INCOME TAX, APPEALS , MEERUT ERRED IN LAW BY TREATING LOAN OF RS.7,00,000/- TO A NON SHAREHOLDER AS DEEMED DIVIDEND. THE LOAN FROM PRASANDI BIOTECH PARK PVT LTD OF RS.7,00,000/- WAS A ROUTINE LOAN AND THE ASSESSEE COMPANY IS NOT A SHAREHOLDER, THUS THE ADDITION SO CONFIRMED BY THE LD. COMMISSIONER OF INCOME TAX (APPEALS) NEEDS TO BE DELETED.

3. THE ASSESSEE RESERVES ALL RIGHTS TO ADD/MODIFY ANY OF THE GROUNDS OF APPEAL FOR THE SAKE OF JUSTICE AND REQUESTS FOR THE ACCEPTANCE OF RETURNED INCOME AS DECLARED BY THE ASSESEE."

17. Ground no. 1 is against sustaining the addition of Rs. 13,98,000/- being the advance for the purchase of plots. Learned counsel for the assessee submitted that the Assessing Officer made addition on the basis that as per IAS-11 the assessee was required to declare profits on actual sale. He contended that IAS-11 is not applicable in the case of the assessee. He contended that the authorities below have grossly erred in making the addition. He submitted that the authorities below failed to appreciate the fact that no effort was made by the Assessing Officer or by the learned CIT(Appeals) to verify the claim of the assessee. Moreover, IAS-11 would not be applicable in the facts and circumstances of the present case.

18. On the contrary, learned DR supported the orders of the authorities below and submitted that as per IAS-11, assessee was required to declare profit on actual sale.

19. We have heard rival submissions and perused the material on record. Undisputedly, the Assessing Officer made addition purely on the basis that as IAS-11 the assessee was required to book profit on the sales so made. However, in remand proceedings the Assessing officer had made certain inquiries. The learned CIT(Appeals), therefore, considering the totality of the facts sustained the impugned addition. In our considered view the Assessing Officer ought to have made further efforts to verify whether the payments received by the assessee are genuine. Non response from the customers would not be a definite conclusion that money was not an advance. Under the

facts and circumstances of the present case we are of the considered view that the assessee had discharged the preliminary onus by filing the addresses of the customers. Therefore, in the light of the binding precedence the impugned addition deserves to be deleted. Hence, ground no. 1 of the assessee's appeal is allowed.

20. Ground no. 2 is against sustaining the addition of Rs. 7,00,000/-. It is contended that the learned CIT(Appeals0 committed an error by treating loan of Rs. 7,00,000/- to a non shareholder as deemed dividend. It is contended that loan from Prasandi Biotech Park Pvt. Ltd. of Rs. 7,00,000/- was a routine loan and the assessee company is not a shareholder. The addition so confirmed by the learned CIT(Appeals) requires to be deleted.

21. On the contrary, learned DR opposed the submissions and supported the orders of the authorities below.

22. We have heard rival submissions and perused the material on record. We find that the learned CIT(Appeals) has decided the issue by observing as under:

> ***"6. Deemed dividend u/s 2(22)(e)***
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> *The AO has also made the addition of Rs. 7,00,000 as deemed dividend the facts of the case are that, Parsandi Biotech Private Limited (a sister concern of assessee company) had advanced a sum of Rs. 7,00,000/- to assessee company. Mr. Vijay Pal Yadav is Managing director of the assessee company and holding 74.70% share of Parsandi BIO tech private Limited and 42.69% of assessee company.*
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> *In the course of assessment proceedings of Prasandi Biotech Park (P) Ltd. for A.Y. 2011-12, a sister concern of the assessee it was seen that the assessee had received a loan of Rs. 7.0 lakhs from the said company. The shareholders of Prasandi Biotech Park (P) Ltd. include Sh. Vijay Pal Yadav who holds 74.70% of its shares and also holds 42.69% of the share capital of the assessee Prasandi Builders Pvt. Ltd. Prasandi Biotech Park (P) Ltd also had adequate accumulated*

profits during AY 11-12 and therefore the assessee was provided opportunity vide order sheet noting dated 2.5/2/2014 to explain why the same should not be added back as deemed dividend u/s 2(22) (e).

6.1 In response the assessee filed written submission dated 14/03/2014 before the AO during assessment proceedings which is as under:-

> *"The assessee is in receipt of your letter dated 25th of February, 2014 received on 12th of March, 2014 whereby your honor want to tax an advance given by the Company Messrs Prasandi Biotech Park Pvt Ltd, Meerut to the company being Rs. 7.0 Lack on two different dates.*
>
> *The company Messrs Prasandi Builders Pvt Ltd is not a shareholder and thus no contravention has taken place. The advance given by Prasandi Biotech Park Pvt Ltd. was for the business needs and is not a loan. The term loan and advance have been defined separately. The section 2(22)(e) of the IT Act, 1961.*
>
> *The advance given is the business needs as the Land Purchase is the main object for both the companies and the advance is for purchase of land.*
>
> *Trade advances which are in the nature of money transacted to give effect to a commercial transactions would not fall within the ambit of the provisions of Section 2(22)(e) of the Income Tax Act, 1961 The advance given has been returned back and cannot be treated as deemed dividend. The said section 2 (22)(e)(riall of the IT Act also prohibits any advance given to the share holder in the ordinary course of its business, where lending of money is a substantial part of the business of the company and is not dividend. In the said case the assessee company is not even a share holder and is only a sister company. Shri Vijay Pal Yadav is the common shareholder but has not taken any benefit from the advance from Prasandi Biotech Park Pvt. Ltd. The advance for the development of Land received by the assessee company cannot be treated as Loan. This is a business transaction and is out of the reach of the section 2(22)(e) of the IT Act.*
>
> *Transactions is normal course of Business cannot be treated as loans or advance and cannot be taxable as deemed dividend. The assessee company had received the advance from Prasandi Biotech Park Pvt Ltd. for the development of site and the same was a business advance. The copy of account alongwith the copy of request is enclosed.*
>
> *We hope by the above your honor is satisfied and would do the needful and drop the proceedings for taxing the business advance as deemed dividend."*

The above reply has been perused but the assessee's submissions cannot be accepted due to the following reasons:-

1. A's per the provisions of S 2(22)(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 die assets of die company or odierwise)[1]1made after die 31 St day ofMay, 1987, by way of advance or loan to a shareholder, ;being a person who is die beneficial owner of shares (not being shares end fed 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 r eferred to as the said concern)] or any payment by any such company on behalf or for the individual bene ft, of any such shareholder, to die extent to which the company in either case possesses accumulated profits

2. Therefore, the assessee's argument that M/s Prasandi Builders is not a shareholder does not hold any ground since section 2(22)(e) covers all payments made not only to a shareholder but also to any concern in which he has a substantial interest. In the instant case Sh. Vijay Pal Yadav, 74.70% shareholder in Prasandi Biotech Park (P) Ltd has a 42.69% share in Prasandi Builders (P) Ltd. Prasandi Biotech Park (P) Ltd. also had adequate accumulated profits during AY 2011-12 and therefore loans/ advances paid by Prasandi Biotech Park (P) Ltd to the assessee namely Prasandi Builders(P) Ltd fall squarely within the ambit of S2(22)(e).

3. Another objection raised by the assessee is that S2(22)(e) prohibits the taxation of any advance given to the shareholder in the ordinary course of its business where lending of money is a substantial part of die business of the company . This is clearly not applicable to loans given by M/s Prasandi Biotech Park (P) Ltd which is a real estate development company.

4. The assessee also objects that the advance given was a trade advance being for purchase oi land and hence was a commercial transaction to he excluded from (lie purview of S2(22)(e). In this context the assessee has submitted copy of letter written by Smt. Sunita Yadav, Director of Prsasandi Biotech Park (P) Ltd to Prasandi Builders (P) Ltd which is reproduced below –

5. "The company is enclosing a cheque for Rs. 6,00,000/- on account as an advance for the site development expenses at village Murlipur for which the discussions we had with your Manager. If the terms are not

suitable, the amount he refunded hack bv 30th November, 2011. The total amount would he paid by 31st March, 2012."

6. This is letter is not supported by any specific details/documentary evidence such as copy of agreement/exact location and description of site for development of which advance was paid. No evidence was also furnished about reasons for cancellation due to which the advance was refunded. No details are also mentioned about the advance of Rs.1.0 lakh given by Parsandi Biotech Park (P) Ltd on 20/09/2010. In view of the above this letter written by Smt Sunita yadav who is a Director in both Parsandi Builders (P) Ltd and Parsandi Biotech Park (P) Ltd is nothing but a self-serving statement. Therefore the amount of Rs 7.0 lakhs received as advance from Prasandi Biotech Park (P) Ltd, sister concern of the assessee is added to total income as deemed dividend u/s 2(22)(e)

*6.2 During appeal proceedings, appellant has not filed any documents to establish its submission, and has simply gone on to repeat the same story that was given in assessment proceedings. The Case laws cited by assessee have also been considered . It is undisputed fact that the assessee company had received Rs. 7 lac from Parsandi Biotech private Limited as advance. The BusitiessmfiT*5rsancfid3toTech private Limited is that of developers and not as a finance company, hence it cannot be treated as normal business advance. Section 2(22)(e) is clearly applicable on the case of assessee company.*

Assessee also placed the reliance on Allahabad High Court judgment in the case of Shashi Pal Agarwal v. CIT (2015) 370 ITR 720 w herein it has been held that Section 2(22) of the Income-tax Act, 1961 - Deemed dividend (Loans and advances to shareholders/Money lending business) - Assessment year 2007-08 - Assessee, holding more than 10 per cent of equity capital of two private limited companies, received loans and advances from said companies - Whether since lending of money was not part of business of lending companies and there was no organized course of activity involving dealing with anyone else except assessee, amount of loans and advances received by assessee would be treated as deemed dividend under section 2(22)€ - Held, yes [para 9] [In favour of revenue]

The above case law is in favour of revenue and not in favour of assessee.-S Further on the issue of law is very clear. In the instant case Assessee Company had received a sum of Rs. 7 Lacs from Parsandi Biotech Private Limited as loan. Money Lending is not the business of Parsandi Biotech private Limited. Mr. Vi jay Pal Yadav is the common shareholder and also the controlling director in both the companies having substantial interest as provided u/s 2(22)(e) of the Act. AR also tried to mislead the department by saying that loan was taken by director and not the company, while copy of ledger account filed

by AR clearly shows that loan was in the name of assessee company. AO has rightly made the additions.

Considering the above, addition of Rs. 7 Lacs under section 2(22)(e) of the Act is hereby confirmed."

23. The contention of the assessee is that provisions of section 2(22)(e) of the Act would not be applicable on account of the fact that assessee company is not a share holder and the loan was given in a routine manner. However, the learned CIT(Appeals) has given a finding on fact that Mr. Vijay Pal Yadav is the common share holder and controlling director. During the course of hearing learned counsel for the assessee placed reliance on the judgment of Hon'ble Delhi High Court rendered in the case of CIT Vs. Ankitech P. Ltd. (2012) 340 ITR 14(Del.), wherein the Hon'ble high Court has held as under:

"It is thus clear from the aforesaid pronouncement of the hon'ble Supreme Court that to attract the first limb of the provisions of section 2(22) (e) the payment must be to a person who is a registered holder of shares. As already mentioned the condition under the 1922 Act and the 1961 Act regarding the payee being a shareholder remains the same and it is the condition that such shareholder should be beneficial owner of the shares and the percentage of voting power that such shareholder should hold that has been prescribed as an additional condition under the 1961 Act. The word 'shareholder' alone existed in the definition of dividend in the 1922 Act. The expression 'shareholder' has been interpreted under the 1922 Act to mean a registered shareholder. This expression 'shareholder' found in the 1961 Act has to be, therefore, construed as applying only to registered shareholder. It is a principle of interpretation of statutes that where once certain words in an Act have received a judicial construction in one of the superior courts, and the Legislature has repeated them in a subsequent statute, the Legislature must be taken to have used them according to the meaning which a court of competent jurisdiction has given them.

In the 1961 Act, the word 'shareholder' is followed by the following words 'being a person who is the beneficial owner of shares'. This expression used in section 2(22) (e), both in the 1961 Act and in the amended provisions with effect from April 1, 1988, only qualifies the word 'shareholder' and does not in any way

alter the position that the shareholder has to be a registered shareholder. These provisions also do not substitute the aforesaid requirement to a requirement of merely holding a beneficial interest in the shares without being a registered holder of shares. The expression 'being' is a present participle. A participle is a word which is partly a verb and partly an adjective. In section 2(22) (e), the present participle 'being' is used to describe the noun 'shareholder[7] like an adjective. The expression 'being a person who is the beneficial owner of shares' is, therefore, a further requirement before a shareholder can be said to fall within the parameters of section 2(22) (e) of the Act. In the 1961 Act, section 2(22)(e) imposes a further condition that the shareholder has also to be 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. It is not possible to accept the contention of the learned Departmental representative that under the 1961 Act there is no requirement of a shareholder being a registered holder and that even a beneficial ownership of shares would be sufficient.

The expression 'shareholder being a person who is the beneficial owner of shares' referred to in the first limb of section 2(22) (e) refers to both a registered shareholder and beneficial shareholder. If a person is a registered shareholder but not the beneficial then the provision of section 2(22) (e) will not apply. Similarly, if a person is a beneficial shareholder but not a registered shareholder then also the first limb of the provisions of section 2(22)(e) will not apply."

46 In view of the above, this appeal is also dismissed.

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47 In this case, apart from the fact that the assessee is not a shareholder and, therefore, the loan and advance given to the assessee is not treated as deemed dividend under section 2(22) (e) of the Act, we find that the Commissioner of Income-tax (Appeals) had given additional ground for non applicability of the said provision. In this case, the assessee had taken a loan of Rs. 1.40 crore from M/s. Teletube Electronics Ltd., which was treated as deemed dividend by the Assessing Officer on the ground that the shareholders of M/s. Teletube Electronics Ltd. had a substantial interest in the assessee. Admittedly, the assessee is not a shareholder of M/s. Teletube Electronics Ltd. The shareholding pattern of the two companies as on Mar5ch 31, 2002, which is concerned financial year, was as under:

Shareholders	*TEL (lender company)*	*Roxy (borrower company/ appellant)*
Roxy Investment Pvt.	*1.8%*	*Nil*
CEA Consultant Pvt. Ltd. (CEA)	*22.08%*	*17.06%*
SW Consultant Pvt. Ltd. (SW) (100% subsidiary of CEA)	*Nil*	*24.58%*
Kaura Properties Pvt. Ltd.	*36.59%*	*11.28%*
Others	*39.53%*	*47.08%*
Total	100%	100%

48 It is clear from the above that no shareholder individually holds more than 10 per cent, shares. The following observations of the Commissioner of Income-tax (Appeals) are to be taken note of :

"It is not disputed that the appellant holds only 1.8 per cent, shares in M/s. Teletube Electronics Ltd., the question is whether the appellant on the strength of shares of M/s. Teletube Electronics Ltd. held by M/s. CEA Consultants P. Ltd. can be said to be the beneficial owner of 10 per cent, of the voting power. It is not in dispute those shares of Teletube Electronics Ltd. held by the appellant and M/s. CEA Consultants P. Ltd. are registered in their respective names. It in turn implies that both the appellant and M/s. CEA Consultants P. Ltd. are independently exercising their voting rights.

13. Under the existing provisions of section 2(22) (e), payment made by way of advance or loan to a shareholder having 'substantial interest' in the company was treated as deemed dividend. The shareholder having substantial interest as per the provision of clause (32) of section 2 of the Act, was the one carrying not less than 20 per cent, voting power. In other words, earlier section 2(22)(e) was applicable to shareholders having substantial interest in the company and the benchmark of the substantial interest was 20 per cent, of the voting power. By the Finance Act, 1987, this benchmark of substantial interest was done away with. It is important to note here that section 2(32) defining the expression 'person who has substantial interest in the company' was not amended. Therefore, to widen the scope of section 2(22)(e), it was necessary to provide for the category of shareholders to whom the section would apply and it was provided by inserting the words 'a shareholder, being a person who is beneficial owner of shares holding not less than 10 per cent, of the voting power[7]. The concept of 'voting power' was in built on the provisions of section 2(22)(e) as it existed prior to the 1987 amendment. The insertion of the words 'beneficial owner of shares holding not less than 10 per cent, of the voting power[7] to '10 per cent, of the voting power'.

A beneficial owner of shares cannot exercise voting power because to

exercise the right to vote his/her name must appear in the register of members. In this view of the matter, it will not be correct to say that the ratio laid down by the hon'ble Supreme Court in Rameshwarlal Sanwarmal *v.* CIT *[1980] 122 ITR 1 (SC) that word 'shareholder[7] in section 2(22)(e) is no more applicable.*

Moreover, since the purpose of section 2(22)(e), as stated in Circular No. 495, dated September 22, 1987, is to tax the distribution of profits to shareholders, where the same is distributed not by way of dividend but by way of loan or advances, therefore, the view that the word 'shareholder[7] has been used as 'registered shareholder' cannot be found fault with. Any other view would be against the very spirit of section 2(22)(e) of Income-tax Act. The condition of 10 per cent of the voting power is to be seen qua the shareholder; otherwise, the condition would be of no relevance."

49 Though the appeal has to fail on the ground that the assessee cannot be taxed as it is not a shareholder in m/s. Teletube Electronics ltd., even on the aforesaid ground, i.e., it was not having 10/20 per cent shareholding in M/s. Teletube Electronics ltd., non-applicability of section 2(22)(e) of the Act is apparent."

Respectfully following the same, we hereby direct the Assessing Officer to delete the addition.

24. In the result appeal of Revenue in ITA no. 1172/Del/2016 is dismissed and the appeal of assessee in ITA no. 634/Del/2016 is partly allowed.

Order pronounced in open court on 15th Nov. 2022.

Sd/-	**Sd/-**
(NARENDRA KUMAR BILLAIYA)	**(KUL BHARAT)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MP

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI