



**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK
(Through virtual hearing)**

**BEFORE S/SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND RAJESH KUMAR, ACCOUNTANT MEMBER**

ITA No.97/CTK/2023

Assessment Year : 2018-19

Om Shree Realcon Pvt Ltd., Plot No.418, Forest Park, Bhubaneswar.	Vs.	Pr. CIT- Bhubaneswar-1
PAN/GIR No.AABCO 3118 P		
(Appellant)	..	(Respondent)

Assessee by : Shri S.K.Sarangji, CA
Revenue by : Shri M.K.Gautam, Pr. CIT (OSD)

Date of Hearing : 28 /06/2023
Date of Pronouncement : 28 /06/2023

ORDER

Per Bench

This is an appeal filed by the assessee against the order passed u/s.263 of the Act by the Id Pr.CIT-Bhubaneswar-1 dated 27.3.2023 in Appeal No. ITBA/REV/F/REV5/2022-23/1051381275(1) for the assessment year 2018-19.

2. Shri S.K.Sarangji, CA appeared for the assessee and Shri M.K.Gautam, Ld. PCIT (OSD) appeared for the revenue.

3. It was submitted by Id AR that the original assessment order in the case of the assessee came to be completed u/s.143(3) r.w.s 143(3A) & 143(3B) of the Income Tax Act, 1961 on 29.1.2021 accepting the returned income. It was the submission that the assessment was 'e' assessment. It was the submission that the Pr. CIT invoked his powers u/s.263 of the Act in respect of the said assessment order on three issues viz (i) deemed dividend in respect of amount of Rs.10,10,00,000/- received by the assessee. The loans were received from one M/s. Premier Vyappar Pvt Ltd., to an extent of Rs.85,00,000/-, from Om Shree Logistics Pvt Ltd., of Rs.2,00,00,000/-, from Kedarnath Tie-up Pvt Ltd., to an extent of Rs.1,05,00,000/- and from the Director Shri Sangram Keshari Nayak to an extent of Rs.6,02,00,000/-. The Id A.R. drew our attention to page 5 of the order of the Pr. CIT in para 3.8, wherein, the break-up has been shown. It was the submission that the second issue was in respect of unsecured loans received by the assessee to an extent of Rs.10.10 crores, which is again the same amount which has been treated as deemed dividend. The third issue is an investment in immovable property to an extent of Rs.10.70 crores for which the said loan of Rs.10.10 had been taken. The issue of investment in the immovable property was dropped.

4. The only issues under consideration is an issue of deemed dividend and the non-application of provisions of section 68 in respect of loans taken from the said three companies and the Director. In regard to issue of

deemed dividend, it was submitted by Id AR that perusal of para 3.8 of the order of the Pr. CIT itself showed that the assessee is not the shareholder in any of the three companies from whom the loans have been taken. It was the submission that the primary condition for invoking the provisions of section 2(22)(e) of the Act itself was not applicable insofar as the assessee was not the shareholder nor was the assessee beneficial owner of the shares. Further, the assessee company did not in any way have substantial interest in any of three companies much less any interest in any of three companies from whom the loan had been taken. It was the submission that on perusal of page 21 of the order the Ld. PCIT clearly showed that the assessee company was not a shareholder though admittedly two of the directors of the assessee company were shareholders in the lending company. It was the submission that in view of the decision of the Hon'ble Jurisdictional High Court of Orissa in the case of Mahimananda Mishra vs ACIT (2023) 147 taxmann.com 521 (Orissa), wherein, the Hon'ble High Court has categorically upheld the principles that the deemed dividend paid by a company was to be taxed in the hands of individual who held shares in that company and not in the hands of firm in which said individual/shareholder was a partner would apply. It was the submission that as the provisions of section 2(22)(e) had no applicability to the facts of the present case, it cannot be said that the assessment order originally passed on 29.1.2021 was erroneous and prejudicial to the interest

of the revenue on this issue. In regard to second issue being the non-application of provisions of section 68 of the Act in respect of the unsecured loans taken by the assessee, it was submitted that these loans were the same amounts which have been treated by the Pr. CIT as being liable for deemed dividend. It was the submission that these loans had been specifically examined by the Assessing Officer in the course of 'e' assessment. Ld AR drew our attention to page 37 of the paper book, which was a copy of the notice issued u/s.142(1) and query No.5 in e questionnaire thereon, which reads as follows:

ANNEXURE

Sir your company's case is selected for complete scrutiny through CASS for following Reasons

BE12.04: Inflow of funds in an entity consistently showing loss before Depreciation

IN01.04: Large investment in property (Form 26QB) as compared to total income

With respect to your income for the year under consideration, kindly submit the below specified details:

1. Copy of Computation of income for A.Y.2018-19 and Final Accounts
2. Detailed note on during F.Y.2017-18.
3. Detailed address of Br offices, site offices etc.
4. Details of various , loan accounts including deposits, loan accounts in the following format, along with bank/loan statement (if not already furnished) for the period F.Y.2017-18 and Bank reconciliation statements wherever necessary.

Sr.No.	Name of the bank	Branch	Type of a/c	A./c No.

5. Details of unsecured loans(including squared-up loans in the following format alongwith Confirmation letters in respect of unsecured loans along with copy of ROI of the lender for A.Y.201 8-1 9:.

Sr.No.	Name & complete address of the lender	Opening balance	Credits during the year	Payments/ Debits during the year	Balance as on 31.3.2018

6. Copy of challan in respect of payment of TDS of Rs. 98,87,343t- shown payable in the Balance Sheet.

7. Details of immovable properties purchased during F.Y.2017-18 in following format along with copy of purchase deed (if not already furnished)

Sr.No.	Description of the immovable property	Date of acquisition	Cost of acquisition	Sources of acquisition with documentary evidence

8. Names of Directors of the company and copies of returns of income filed by them for AY 2018-19.

9. Copy of Memorandum of Association and Articles of Association of the company.

10. Copy of Form 26AS and reconciliation of details as per Form 26AS and as per profit & loss account, wherever necessary.

11. Copy of TDS return filed for relevant period alongwith copy of TDS entry register.

12. Ledger –advance for land, other current assets, interest, architect fees.

13. Project-wise detail of break up of salary *& wages debited to P&L a/c. following format.

14. Please give the details of additions made in the income tax assessments in the last three years and present status thereof.

Failure to comply this notice, necessary penalty u/s 272A(1)(d) will be levied and your assessment will be completed on the basis of material available on record.

5. Ld AR drew our attention to pages 41 to 44 of the paper book, which was the reply to the issues specifically reply to query No.5 which reads as follows:

Before the Assessing Officer, National e-assessment centre, Delhi, Income Tax Department, Ministry of Finance, Govt. Of india

In the matter of : Om Shree Realcon Pvt Ltd.,
Plot No.418, Sahid Nagar, Bhubaneswar-7.

Pan: AABCO 3118 P
Assessment year: 2018-19

Sub: Compliance to the notice and furnishing documents.

Ref: Notice under sub-section (1) of Section 142 of the Income tax act, 1961 bearing No.ITBA/ASTY/F/142(1)/2020-21/10239975357(1) dated 21.1.2021

Ref: Notice No.ITBA./ast?f/14291)/2020-21/1028790904(1) DATED 1.12.2020.

Sir,

Enclosed please find attached the supporting documents on the asked issues in support of our return of income

1. Copy of computation of income for A.Y. 2018-19 and final accounts : Attached Annexure-A Page No.A1 -A14
2. Detailed note on business activities: Carried out during FY 17-18 : Real Estate Business Land acquired. No Further activities
3. Detailed address of principal place of Business and branch offices,site office : Plot No.418,Sahid Nagar, BBSR-7
4. Details of various bank accounts including deposits, loan accounts in the following format, alongwith bank/loan account statement (if not already furnished) for the period F.Y. 2017-18 and bank re-

conciliation statements where ever necessary-bank statement attached as per Annexure –B (page No.B1 – B3)

Sr.No.	Name of the bank	Branch	Type of a/c.	A.c No.
1.	A\axis bank Ltd.	Bhubaneswar	Current	910020021114241

5. Details of unsecured loans (including squared up loans in the following format alongwith confirmation letters in respect of unsecured loans alongwith copy of ROI of the lender for A.Y. 2018-19 as per Annexure-C (Page No.1 to 4)

Sr. No.	Name & complete address of the lender	Opening balance (Rs.0)	Credits during the year (Rs.)	Payments/debits during the year (Rs.)	Balance as on 31.3.2018 (Rs.)
1.	Sangram Keshari Nayak, Promoter Director, Plot No.117/653, Satya Nagar, BBSR	50,000	6,20,00,000 (Rate of int. nil)	Nil	6,20,50,000
2.	Kedarnath Tie-up Pvt ltd., Poddar Court, GateNo.4, 2 nd floor, Room No.10,18, Rabindra Saranik Kolkata	NIL	1,05,43,890/- (Principal-1,05,00,000/- - interest @10%-48,767/- Less:Tds-4,877/-)	NIL	1,05,43,890/-
3.	OM Shree Logistics Pvt. Limited, Plot No.23, VIP Area IRC Village, Nayapalli, Bhubaneswasr-751015	NIL	2,00,83,836/- (Principal-2,00,00,000/- - Interest @10%-93,151/- Less: Tds-9315/-)	NIL	2,00,83,836/-
4.	Premier Vyapaar Pvt Limited, Poddar Court, Gate No.4, 2 nd Floor, Room No.10,18- Rabindra Sarani,	NIL	86,99,355/- (Principal -85,00,000/- Interest @10%-2,21,506/- Less: Tds-	20,00,000/-	66,99,355/-

Kolkata	22,151/-
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6. Copy of challan in respect of payment of TDS of Rs.98,87,343/- shown payable in the Balance Sheet as per Annexure-D (Page No. 1 to 9).

Sl No.	Challan No	Date of Payment	Challan Amount in (Rs)	Interest in (Rs)	Total Challan Amount in (Rs)
01	41466	06.04.2018	50,000/-		50,000/-
02	41547	06.04.2018	1,00,000/-		1,00,000/-
03	44080	06.04.2018	50,000/-		50,000/-
04	44047	06.04.2018	1,75,000/-		1,75,000/-
05	00013	07.04.2018	20,39,400/-	1,22,364/-	21,61,764/-
06	00014	07.04.2018	62,00,600/-		62,00,600/-
07	00013	25.04.2018	3,05,910/-	18,356/-	3,24,266/-
08	00012	25.04.2018	9,30,090/-		9,30,090/-
09	00015	27.04.2018	36,343/-		36,343/-
Grand Total			98,87,343/-		

7. Details of immovable properties purchased during F.Y. 2017-18 in following format along with copy of purchase deed (if not already furnished).

Purchase Deed already furnished on Dated- 07.10.2020 as per Annexure-E (Page No.E-1 To E-18).

Sl No.	Description of the Immovable Property	Date of Acquisition	Cost of Acquisition	Sources of acquisition with documentary evidence
01	GA Department Drawing Plot No-08, Forest Park, Bhubaneswar, Khurda, Odisha Drawing No.C-3363, measuring area 90' X 120'=10800 Sqft corresponding to settlement Khata No-209, which further corresponding to Mutation Khata No 368, Revenue Plot No-1153, Area Ac 0.246 decimals.	20.03.2018	Rs 10,00,00,000/- Stamp Duty- 3,00,000/- & Registration Expenses-RS 67,00,000/- Grand Total- Rs 10,70,00,000/-	Purchase Deed Vide No-1081803253. Payments made within period from 08.11.2017 to 16.03.2018 as per enclosed Statement. Annexure-F (Page No.-1)

8. Names of Directors of the company and copies of returns of income filed by them for A.Y.2018-19.

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|----|-----------------------|--|
| 1) | Sangram Keshari Nayak | : Copy of IT Return along with computation of income Enclosed as per Annexure-G (Page No.G-1 To G-2). |
| 2) | Tapan Kumar Raypritam | : Copy of IT Return along with computation of income Enclosed as per Annexure-G (Page No.G-3 To G-5). |
| 3) | Tarun Kumar Barik | : Copy of IT Return along with computation of income Enclosed as per Annexure-G (Page No.G-6 To G-7). |

9. Copy of Memorandum of Association and Articles of Association of the company. : Memorandum of Association and Articles of Associations is enclosed.(Annexure-H)

10. Copy of Form 26AS and reconciliation of details as per Form 26AS and as per Profit & Loss account, where ever necessary. : Copy of Form 26 AS Attached as per Annexure-I (Page No.I -1To I- 5).



11. Copy of TDS return filed for relevant period along with copy of TDS entry register. : TDS Return Copy as well as TDS Ledger for the FY 2017-18 is enclosed as per Annexure-J (page No.J-1 To J-3).
12. Ledger-Advance for land, Building, Other Current assets, Interest, Architect Fees. : Ledger Copy is Enclosed as per Annexure-K (Page No K-1 To K-8.).
13. Project-wise detail of Break-up of Salary & Wages debited to P & L a/c I following format. : No Project expenditure made during the year.
14. The details of additions made in the Income tax assessments in the last three years and present status given bellow. : No Addition made in the Income Tax assessments in the last three years.

Place: Bhubaneswar
Dt: 14/12/2020



Yours Faithfully
For OM Shree Realcon (P) Limited
For OM Shree Realcon (P) Ltd.
Sangram Keshari Nayak
Sangram Keshari Nayak
Director

6. He further drew our attention to page 46 of the paper book, which was the further enquiry by the AO in the course of 'e' assessment, wherein, details of the persons who have given the assessee unsecured loans were called for as follows:

ANNEXURE

Sir your company's case is selected for complete scrutiny through CASS for following reasons:

BE 12.04: Inflow of funds in an entity consistency showing loss before depreciation.

IN01.04: Large investment in property (Form 26QB) as compared to total income.

On going through the submission made by you to the notice u/s. 142(1) dated 1.12.2020, it is seen that the following details are not yet furnished by you.

1. Copies of returns of income for A.Y. 2018-19 of persons/concerns who have given you unsecured loans.

You are further requested to furnish copies of bank statements of lenders of loan for the period in which the said loans were advanced by them to you.

You are requested to furnish the above details by 25.1.2021

Failure to comply this notice, necessary penalty u/s 272A(1)(d) will be levied and your assessment will be completed on the basis of material available on record.

Reply of the assessee are placed at pages 47 & 48 of the paper book as under:

To

The ACIT, National e-assessment centre,
Delhi.

Assessee: Om Shree Realcon Pvt Ltd.,
418, Sahid Nagar, Bhubaneswar-7.

Pan: AABCO 3118 P
Assessment year: 2018-19

Sub : Compliance to notice and furnishing of documents
Ref: : Notice under section (1) of section 142 of the income tax Act, 1961 bearing No.ITBA/AST/F/142(1)/2020-21/1029975357(1) dated 21.1.2021.

In connection with scrutiny assessment, assessee submits as under:

- i) Enclosed copies of returns of income and computation of income for a.y. 2018-19 of the following persons/concerns who have given unsecured loans to our company during the relevant/previous year.

Sr. No	Name of the person/concern	Date	Amount receipts in Rs.	Amount of payments in Rs.
1.	Premier Vyapaar Pvt Ltd.	27.11.2017 2.1.2018 13.3.2018 14.3.2018	25,00,000 60,00,000 - -	5,00,000 15,00,000
2.	Om Shree Logistics Pvt Ltd.	15.3.2018 16.3.2018	2,00,00,000 5,00,000	- -
3.	Kedarnath Tie up Pvt ltd.	15.3.2018 16.3.2018	1,00,00,000	-
4.	Mr Sangram Keshari Nayak	8.11.2017 29.12.2017 20.2.2018 20.2.2018	1,50,00,000 1,20,00,000 2,70,00,000 80,00,000	
		Total	10,10,00,000	20,00,000

- ii) Copy of bank statements, as authenticated by the concerned bankers, of lenders of loan for the relevant period in which the said loans were advanced to the company.

SR.No.	Name of the person/concerns	Bank Name
1.	Premier Vyapaar pvt Ltd.	Axis Bank ltd. ICICI Bank Ltd.
2.	Om Shree Logistics Pvt Ltd.	ICICI Bank Ltd
3.	Kedarnath Tie up Pvt ltd.	Axis Bank ltd
4.	Mr Sangram Keshari Nayak	ICICI Bank Ltd Axis Bank ltd

Kindly acknowledge the above supporting documents for your perusal and necessary action."

7. It was the submission that the issue of unsecured loans having been completely examined in e-assessment and no error having been found, it is not permissible for the Pr. CIT to enter into the issues which have been examined at length by the Assessing Officer in the course of e-assessment. It was the submission that the Assessing Officer having already considered the issue and taken a possible view and not made any addition, it cannot be said that the assessment order is erroneous and prejudicial to the interest of the revenue. It was the prayer that the order u/s.263 is liable to be quashed.

8. In reply, d Pr. CIT(OSD) has filed written submission, as under:

The assessee company has filed the present appeal against the revision order dated 27.03.2023 passed by the Pr. CIT-1, Bhubaneswar. Kindly refer to the assessment order u/s.143(3) passed by the A.O. on 29.01.2021 (pages-42 & 43 of papers enclosed with the Form No. 36). It must be noted here that said assessment order is totally cryptic and non-speaking one.

2. The first issue in this appeal relates to deemed dividend u/s.2(22)(e) of the Act. A reference may be made to page-37 of the paper book filed by the Id. AR of the assessee company which is a questionnaire issued by the A.O. It is crystal clear that no question was asked by the concerned A.O. about the provisions of section 2(22)(e) of the Act. A reference may be made to page-41 of the paper book filed by the Id. AR of the assessee which is a reply filed by the assessee. **Hence it is case of no inquiry.**

3. The fiction of deemed dividend is not restricted to the beneficial owner of shares only but it is also extended to any concern also in which such shareholder is a member, or a partner and in which he has a substantial interest.

The loans and advances as mentioned in section 2(22)(e) of the Act shall include any type of loans or advances including Inter Corporate Deposits (ICD) but not trade advances.

4. Kindly refer to para-3.8 on page-5 and page-21 of the revision order wherein the requisite details of shareholders in the assessee company and lending company are given. It is clear that directors of the assessee company were having equity shares exceeding 20% in Om Shree Realcon (P.) Ltd. (substantial interest) and also held 10% equity shares in lending companies.

5. The lending companies were neither banking companies nor NBFCs. These companies were also not engaged in any money lending business as per section 2(13)(i) of Money Lending Act. Hence these lending companies had distributed their accumulated profits to their substantial shareholders in the guise of loans either to utilize their idle surplus income or to escape DDT for purchase of immovable property by the assessee company. The assessee was required to pay interest @ 10% on such loans.

6. Before the Pr. CIT-1, Bhubaneswar, the ld. AR of the assessee company simply stated that it had availed loans from three companies in the ordinary course of business and paid interest on it after deducting TDS. **The Hon'ble Bombay High Court in the case of Walchand & Co. vs. CIT (100 ITR 598)** held as under

" By its objects clause the trust company was, inter alia, authorised to advance or loan moneys on security of shares, stocks, etc., and also to receive moneys on deposit, interest or otherwise and to lend moneys to other persons with or without security and on such terms as it was expedient and in particular to customers and all other persons having dealings with it. Under the exception contained in sub-clause (ii) any advance or loan made to a shareholder 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 not included within the definition of the word "dividend", but in the present case, notwithstanding such being one of the objects of the trust company, it is not established that giving of loan or advance was in the ordinary course of business of the trust company or whether lending of money is a substantial part of its business. So the

exception contained in sub-clause (ii) is not available to the assessee in the present case. Thus, in our opinion, the Tribunal was right in taking the view that the sum of Rs. 1,62,264 should be regarded as dividend in the hands of the assessee for the relevant assessment year."

7. Before the Pr. CIT-1, Bhubaneswar, the ld. AR of the assessee company relied on Circular No.19 of 2017 issued by CBDT (page-25 of the revision order) but no evidence was adduced to prove that the alleged loans were trade advances.

8. The Hon'ble Mumbai ITAT in the case of Namita V. Samant vs. CIT (72 taxmann.com 206) on the issue of deemed dividend has upheld revision proceedings u/s.263 of the Act by holding as under:

" 4.1 The issue under reference, we may at the outset clarify, was not at all examined by the Assessing Officer (AO) in the assessment proceedings. His order is, thus, erroneous in-so-far it is prejudicial to the interests of the Revenue on the ground of non-application of mind and failure to make proper enquiry (refer, inter alia, Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83/109 Taxman 66 (SC); Toyota Motor Corpn. v. CIT [2008] 306 ITR 52/173 Taxman 458 (SC); Gee Vee Enterprises v. Addl. CIT [1975] 99 ITR 375 (Delhi); and Rajalakshmi Mills Ltd. v. ITO [2009] 121 ITD 343 (Chd.) (SB)). So, however, the ld. CIT, the competent authority, has given a definite direction to the AO to frame fresh assessment, setting aside that made in the first instance, in terms of his directions, i.e., of the loan/s amount being assessable as deemed dividend u/s. 2(22)(e) in the assessee's hands, so that it is a decision on merits as well; the AO having no scope for (different) adjudication. In other words, it is incumbent on us to, therefore, issue a decision on merits of the issue as well.

4.3 Having transversed the settled law, we may consider the arguments raised by the assessee before us, i.e., in light of the obtaining facts of the case. Clearly, there is no dispute *qua* the primary facts, which are admitted, and there is, accordingly, satisfaction of the conditions for the application of the provision. The assessee's contention with regard to the loan being repaid during the year - the opening and closing balance (at Rs. 88 lacs and Rs. 60 lakhs for YIEPL and YCPL respectively) being the same, or of interest having been

charged to YBPL, the payee company, would be of no moment in view of the decisions in Navnit Lal C. Jhaveri (supra) and Tarulata Shyam (supra). Then, it is said that the opening balance is to be excluded. Sure enough, it is only the sums received during the relevant year that could be charged as deemed dividend for that year. So however, we find that the amount, reckoned by the ld. CIT at Rs. 182 lacs and Rs. 10 lacs for YIEPL and YCPL respectively, is only without considering the opening balance, i.e., represents only the amounts paid during the year, and toward which we have perused the copies of account of both the payer (lender) and the payee (borrower) companies (PB pgs. 1-5/also refer table at para 2 above).

Then it is said that the amounts lent are actually inter-corporate deposits (ICDs). **No evidence toward the same has been brought on record or led at any stage, with the ld. AR failing even to explain the essential difference between the two, i.e., loan or advance *per se* and an ICD.** The copies of accounts of the payee and the payer companies in the books of each other, adverted to earlier, as well as the final accounts of the three companies (for the relevant year), clearly reflect the same as 'unsecured loans', which answer the description of a 'loan', as generally understood, being not defined under the Act. Reference in this context may also be made to Shital Kumar Vij v. Asstt. CIT [IT Appeal No. 406 (Asr.) of 2009, dated 20-9-2012], wherein the Tribunal refers to the dictionary (Black Law's) meaning of the word (at para 7.1). Two, the lending companies are not in the business of lending of money. In fact, the accounts are in the nature of running accounts, with amounts being both paid and received; the payee (lender)-company having a debit (negative) balance in the accounts of the payer-companies at all material times. That is, there is nothing to show that the sums given are ICDs; to the contrary, there is material to show that they are not, but only loans or, in any case, advances. Rather, as it would appear to us, the defining attribute/s of ICDs, i.e., in contradistinction to loans and advances, having not been explained, ICDs are only a species of loans and advances. The law states 'any loan or advance', so that it would mean just that, i.e., a loan or advance of any nature. The argument with regard to inter-corporate deposits (ICDs) is under the circumstances misconceived and untenable, both on facts and in law.

The main thrust of the assessee's arguments, relying on the decision in Mukundray K. Shah (supra), was that whenever a loan or advance is given, the benefit clause of the provision is to be satisfied, i.e., in all cases where the provision is to be applied. We find this plea to be in complete disregard of the clear provision, which casts the extension of 'benefit' as a separate limb (i.e., as one of the three independent prerequisite conditions for the application of the provision), which has not been invoked in the present case, as well as the decisions by the Apex Court in Navnit Lal C. Jhaveri (supra) and Tarulata Shyam (supra). As a mere reading of the provision, language of which is clear and unambiguous, suggests and, in any case, upon a fair look and reading thereof, the provision is triggered where:

- (a) a loan or advance is given by a company (in which the public is not substantially interested) to a shareholder who beneficially owns shares therein to the extent not less than 10% of the voting power therein; or
- (b) a loan or advance is given by such a company to any concern in which such shareholder has substantial interest (explained as entitling him to a beneficial interest in 20% of its income); or
- (c) any payment is made by such a company on behalf of, or for the benefit of, such a shareholder.

The loan or advance or payment is, under such circumstances, to be deemed as dividend to the extent the paying company has accumulated profits, the exception being where the lending company is in the business of money lending. We have already noted satisfaction of all the required conditions in the present case, as well as of the lending companies being not in the money lending business, so that exceptions to the provision are excluded. It is clearly limb (b) *supra* that is attracted in the present case, and which does not provide for a further requirement to show that the monies were intended for the benefit of such shareholder. There is nothing in the decision to suggest such a benefit being required to be shown in all cases. In the facts of that case, it was limb (c) *supra* that was applied. The assessee-respondent in Mukundray K. Shah (supra) did not in fact have substantial interest in both the concerns, MKF and MKI, so that limb (b) could not, in any case, be applied. In fact, the assessment in that case was of

'undisclosed income', on the basis of a diary seized in search, and which revealed the source of funds invested by the assessee in bonds, tracing the source thereof (on the basis of the said diary) to two concerns, and which had been, in turn, released funds by the payer company in which (the assessee) had substantial interest. It was on that basis that the provision of section 2(22)(e) became applicable, and which was upheld by the Hon'ble Court. The reliance on the said decision is, thus, completely misplaced.

The Hon'ble Court after noting some precedents held that where the loan or advance is given in return to an advantage conferred upon the company by such shareholder, as where it is given as a trade advance as a consideration for the goods received or for purchase of a capital asset which would benefit the company advancing the loan, it would fall outside the ambit of 'loan' or 'advance' as contemplated u/s. 2(22)(e). We are unable to see as to how the said decision assists the assessee's case which, as afore-stated, is a case of loan (or advance) *per se*. The aspect of charge of interest (on loan or advance) has already been considered by the Apex Court as irrelevant, and which, being charged in the instant case itself proves the loan (advance) to be not a trade advance. Rather, where the advance is in the course of a commercial transaction between the advancing and the advance-company, it is not a loan or advance proper for it to be regarded as a loan or advance u/s. 2(22)(e).

5. In view of the foregoing, we find no infirmity in the impugned order, made relying on the decisions in Universal Medicare (P.) Ltd. (supra) and Bhaumik Colour (P.) Ltd. (supra), nor has any been brought to our notice. We may further add that our decision is also in harmony with the law as explained in Walchand & Co. Ltd. v. CIT [1975] 100 ITR 598 (Bom.) (where the loan was for a short period of 23 days) and CIT v. P.K. Badiani [1970] 76 ITR 369 (Bom.) (providing for a notional reduction in the accumulated profits on repayment of loan/advance), also noted with approval in Tarulata Shyam (supra). The assessee has, we may add, placed a number of decisions by the Tribunal on file, to some of which reference was also made during hearing. We have decided the appeal on the basis of the clear provision of law, and as further explained and understood by the Apex Court, meeting the arguments advanced and distinguishing the decision by the said court on which reliance is sought to be placed before us.

We do not therefore consider it necessary to encumber this order any further by discussing those decisions. Suffice to say that we have perused the same, finding our decision as not inconsistent therewith and, further, consistent with the law as explained by the Apex Court as well as the Hon'ble Jurisdictional High Court per their judicially binding decisions. We decide accordingly, and the assessee fails.

6. In the result, the assessee's appeal is dismissed."

9. In the case of CIT vs. Nalwa Investments Ltd. (11 taxmann.com 98), the assessee was a non-banking finance company engaged in business of investment in shares, securities, other debt instruments and financing loans and providing guarantees. The income of assessee comprised of receipts from interest on loans and securities, professional income as well as dividend income and entire income was shown under head 'Income from business and profession'. The Assessing Officer treated dividend income as income from other sources but at same time allowed business losses of earlier years to be set-off against said dividend income as well. The Commissioner, while exercising powers under section 263, set aside order of Assessing Officer on ground that Assessing Officer had failed to examine nature of investments on which dividend was earned and to conduct required enquiry as regards application of provisions of section 72 of the Income Tax Act. On appeal, Tribunal quashed the revision order on the ground that view of Assessing Officer was a plausible view and it could not be said that Assessing Officer had not applied his mind. It was held by the Hon'ble Delhi High Court that when Assessing Officer had not applied his mind to issue as to whether dividend income could be given character of business income for purpose of set-off, question of there being a plausible view did not arise and, therefore, Tribunal was not justified in quashing order of Commissioner on that ground. The observations of the Hon'ble Delhi High Court are reproduced as under:

"13. So far so good. But the relevant question, which is the core one and led CIT to pass the order under section 263, of the Act is as to whether the Assessing Officer applied his mind to the issue as to whether the dividend income could be given the character of business income for the purpose of set off. We have already taken note of the order of the Assessing Officer. He recorded that even a dividend income in question

was shown as business income by the assessee. The Assessing Officer did not agree with the same, as in the previous years this income was shown as dividend income. After saying so, the Assessing Officer straightaway allowed the set off of this income against the carry forward losses. The assessment order is totally silent and there is no discussion as to how this dividend income was to be given the character of business income for the purpose of set off under section 72 of the Act. It was for this reason that the CIT held that the Assessing Officer had not conducted any inquiry. The Tribunal, instead of appreciating these facts, went into the merits of the issue which the Assessing Officer is supposed to deal with. It addressed the question as to whether dividend income could be given the character of business income and then observed that the view taken by the Assessing Officer was plausible without appreciating that the Assessing Officer had not even taken any view on this issue, it could not be said that the Assessing Officer had not applied his mind. The entire reading of the assessment order clearly demonstrates that no such view is taken at all by the Assessing Officer on this aspect. It is intriguing, in the circumstances, as to from where the Tribunal came to the conclusion that the view taken by the Assessing Officer was plausible or that the Assessing Officer had applied his mind.

14. The Tribunal failed to appreciate the limited scope of appeal before it, viz., the validity of the order passed by the CIT exercising his revisionary power under section 263 of the Act. Order of the CIT clearly revealed that he had applied his mind on the relevant aspect and had rightly noticed that the character of the said income was not investigated by the Assessing Officer. This is highlighted by the CIT in Para 7 of the order passed by him, which is already extracted above. Therein, the CIT recorded that the Assessing Officer had failed to conduct the required enquiry and also had failed in application of the provisions of section 72(1) of the I.T. Act. This rendered order passed by the Assessing Officer erroneous and prejudicial to the interest of Revenue to that extent. The Tribunal was, thus, supposed to adjudge the validity of such an order and not to go beyond when the challenge before it was limited to the said order passed by CIT in exercising the powers under section 263 of the Act.

15. Mr. Ajay Vohra, learned counsel appearing for the assessee argued that when the view taken by the Assessing Officer was plausible one, it was not proper for the CIT in exercise of his revisionary jurisdiction to interfere with that order and referred to the judgment of the Punjab and Haryana High Court in the case of CIT v. Max India Ltd. [2004] 268 ITR 128 which is approved by the Supreme Court in the case of CIT v. Max India Ltd. [2007] 295 ITR 282 / [2008] 166 Taxman 188 . However, this argument based on the aforesaid judgment is of no avail in the facts of the present case when it is found that the Assessing Officer had not examined the issue at all and therefore, question of there being a plausible view does not arise.

16. We, thus, answer the question formulated above, in favour of the Revenue and against the assessee, as a result, the impugned order passed by the Tribunal is set aside."

10. The second issue pertains to unsecured loans taken from Kedarnath Tie Up Pvt. Ltd. In this case, the ld. AR of the assessee has filed confirmation from said lender. However the financial capacity of said lender was not examined by the A.O. The lender company failed to explain the source of advancing loans to the extent of Rs.47,85,265/- to the assessee company. The Pr. CIT has demonstrated in para-7.2.3 (d) on page-32 of revision order as to how sources of loan to the extent of Rs.47,85,265/- remained unexplained. **The loan agreement and details of securities pledged have also not been placed on record.**

11. **The Hon'ble Kolkata High Court held in the case of CIT vs. Maithan International (56 taxmann.com 283) (para-11 & 12)** that where Assessing Officer while accepting genuineness of loan taken by assessee from various creditors, did not take into consideration creditworthiness of lenders, mere examination of their bank statements or letter of confirmation was not enough and, therefore, impugned revisional order passed by Commissioner setting aside assessment u/s.263 was to be upheld. The observations of the Hon'ble High Court are reproduced as under:

"11. When payment by cheque does not establish the creditworthiness of the lender, mere examination of the pass-book or the bank statement or the letter of confirmation or the balance sheet of the lender is also not enough. The

inspector appointed by the Assessing Officer did not go beyond the aforesaid documents. Therefore, it cannot be disputed that the view formed by the CIT that in none of the reports, he has commented upon the issue of creditworthiness i.e. whether these parties had sufficient means to advance such huge loans is not without basis. It is well established that credits allegedly based on loan from parties, who are not possessed of sufficient means cannot be accepted as genuine. **The Assessing Officer was required to make proper investigation to determine whether the money was really lent by the third party or it has come out of the resources of the assessee himself. The source of the apparent source is a relevant enquiry. That, the Assessing Officer has failed to apply his mind to all aspects of the case is therefore self-evident. Such non-application of mind constituted passing of an erroneous order which is also prejudicial to the interest of revenue. If any further authority is required reference may be made to the judgment of the Apex Court in the case of Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83/109 Taxman 66.**

12. The particulars appearing from paragraph-9, quoted above, of the judgment of CIT have not been disputed nor the factual aspects appearing from paragraph-10 of the judgment of the CIT have been disputed. **We are, as such, of the opinion that CIT had reasons to hold that creditworthiness of the alleged lenders was not enquired into. Mere examination of the bank pass book, profit and loss account and balance sheet, as we already have indicated, is not enough.** When the requisite enquiry was not made, the order is bound to be erroneous and prejudicial to the interest of the revenue. The learned Tribunal proceeded on the theory that it was not a case of no enquiry; that no doubt is true, but that is not enough. If the relevant enquiry was not made it may in appropriate cases amount to no enquiry and may also be a case of non-application of mind. "

12. **The Hon'ble Supreme Court in the case of Pr. CIT vs. N R A Steel & Iron (P.) Ltd. (103 taxmann.com 48) held that merely because assessee company had filed all primary evidence, it could not be said that onus on assessee to establish creditworthiness of investor companies stood discharged.** In para-12(ii) of the decision, the Hon'ble Supreme Court held that the enquiries revealed that the investor companies had filed returns for a negligible taxable income,

which would show that the investors did not have the financial capacity to invest funds ranging between Rs.90,00,000/- to Rs.95,00,000/- in the Assessment Year 2009-10, for purchase of shares at such a high premium. **The present case is on a similar footing since the amount of loan involved is Rs.1.05 crores and Kedarnath Tie Up Pvt. Ltd. had shown income of Rs.8,61,950/- in its return of income for A.Y. 2018-19.**

13. **It was held by the Hon'ble Gujarat High Court in the case of Manoj Kumar Saraf vs. ITO (45 taxmann.com 63)** that where even though assessee took unsecured loan through cheques, yet he could not establish identity and creditworthiness of lenders, the amount of loan was rightly added by the Assessing Officer to assessee's taxable income under section 68. The Hon'ble High Court held in para-5 as under:

"5. We are, however, of the opinion that the revenue authorities as well as the Tribunal have examined the evidence on record and come to the conclusions which do not give rise to question of law. It may that the transactions being through cheques, the genuineness thereof was established by the assessee. **However, two additional requirements of the identity of the creditors and their creditworthiness yet remained to be established. The authorities found that the assessee did not provide sufficient evidence in this respect.** In case of *Sumati Dayal v. CIT* [1995] 214 ITR 801/80 Taxman 89 (SC) the Apex Court held that regarding cash credit, burden is on the assessee to prove that the amounts credited did not represent his income. It was observed that in view of section 68 of the Act, where any sum is found credited in the books of the assessee for any previous year, it may be charged to income tax as the income of the assessee of that previous year if the explanation offered by the assessee about the nature and source thereof is not satisfactory".

14. **The Hon'ble Delhi High Court in the case of Siddharth Exports vs. ACIT (112 taxmann.com 193)** held that where the assessee received unsecured loan from a person outside India but failed to produce relevant documents to prove identity and creditworthiness of creditor and genuineness of transaction either before Assessing Officer or before Commissioner (Appeals), certain documents produced by assessee during instant appeal before High Court under section 260A could not be accepted and therefore, impugned addition made under

section 68 in respect of said loan was justified. The Hon'ble Delhi High Court held in paras-18 & 19 as under:

"18. The next question that arises for consideration is whether the appellant has raised any substantial question of law. The transaction is sought to be proved by producing the bank statement of Ms. Jasmine Kochhar Kapoor. **The assessee has strongly relied upon the fact that since the creditor has been identified by way of her copy of passport, PAN No. etc, the initial onus of proof has been discharged.** The appellant strongly contends that since it had discharged the onus on production of the relevant documents, the onus shifted on the Respondent and if the Assessing Officer had any doubt, he could have carried out independent inquiry. Section 68 of the Income Tax Act, raises a presumption whenever unexplained credits are found in the books of account of the assessee. Indisputably, the credit entries stand in the name of the assessee himself. Thus the burden is undoubtedly on him to prove, satisfactorily, the nature and source of these entries and to show that they do not constitute a part of income liable to tax. **There can also be no doubt that the onus is always shifting and oscillates and this burden on the assessee can shift on to the Revenue. However, such a situation can arise only if the initial or primary onus is discharged by the assessee.** It is, therefore, first necessary to examine whether the assessee has been able to discharge the initial onus of proving the unexplained cash credit.

19. Law casts an obligation on the the assessee to establish by cogent evidence the genuineness of the transaction, identity of the creditors and the credit- worthiness of the creditor, to the satisfaction of the Assessing officer, so as to discharge the initial onus under Section 68 of the Act. It is for the assessee to prove by credible evidence that the transactions are genuine, since the facts are exclusively in the assessee's knowledge. It is the assessee who has entered into the transaction and thus, the person with whom he has transacted is known to him. In this regard, it would be apposite to refer to the recent judgment of the Supreme Court in the case of Pr. CIT v. NRA Iron & Steel (P.) Ltd. [2019] 103 taxmann.com 48/262 Taxman 74/412 ITR 161 wherein it was held that the Assessing Officer is duty bound to investigate the credit-worthiness of the creditor/subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders. If the enquiries

and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established. In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the Act.

21. The plea of the Appellant that on filing of the bank statement and PAN details, the burden stood discharged or that it shifted on to the revenue is tenuous and is not correct. The credit worthiness of the transaction cannot be said to be proved merely on the strength of the bank statement or identity of the creditor. The assessee did not produce the income tax return of the lender or any confirmation. The purported confirmation has been found to be only a copy of unsigned account of the creditor. **The source of funds has also not been explained.** The judgment relied upon by the appellant - Mod Creations (P.) Ltd. (supra) is distinguishable on facts and circumstances, as in the said case, there was sufficient material on record including the tax returns, an affidavit stating the source of funds and an affidavit confirming that monies have been advanced to the assessee to prove the credit worthiness of the creditors and the genuineness of the transaction. In the current case, however, the assessee has failed to produce the tax returns of the creditor or any other material to show the creditworthiness. Thus, the credit worthiness and the genuineness of the transaction cannot be said to have been proved so as to shift the onus on the revenue. **The stand of the appellant that since the alleged transaction is made through normal banking channels, it is sufficient to prove the genuineness of the transaction and the credit worthiness of the creditor, cannot be accepted.** The identity as well as the credit worthiness of the creditor must be proved. The credit reflected in the bank account of Ms. Jasmine Kochhar Kapoor, is not explained, as a result her credit worthiness is not proved".

15. The Hon'ble Delhi High Court in the case of Toby Consultants (P.) Ltd. vs. CIT(324 ITR 338) held that where assessee-company had shown in books unsecured loans of Rs. 2.68 crores and Rs. 2.45 crores from its two directors and it was explained that money belonged to its own entity and was routed through directors and Tribunal found that directors who advanced loan were admittedly not at all men of means for advancing such huge amount of loan amounting to about

Rs. 5 crores and secondly that assessee even for taking such huge amount of loan did not want to pay any interest for which creditors also agreed, the Tribunal had rightly, arrived at a finding of fact, on analysis of all relevant material on record, that genuineness of transaction had not been established and assessee had failed to independently prove the same. The Hon'ble High Court held that the Tribunal had observed that it was humanly improbable that a person merely knowing another person for a long period, even though having very good relation, would advance such huge amount of loan free of interest for a indefinite period, merely for investing in a company, that too not in their name but in the name of that person, who could legally claim the recovery of the same from the assessee company, as undisputedly the debt still remained undischarged. It was further held that the assessee had not succeeded in proving the genuineness of the transaction as it was improbable when the test of human probabilities was applied to the surrounding circumstances of the case in entirety. Thus, the assessee, having failed to test of human probabilities, was unable to prove the genuineness of the loan transaction, so, in view of the ratio of the decisions (supra) relied upon the learned Departmental representative for the Revenue it is held that in view of the provisions of section 68, since the genuineness of the transaction has not been proved by the assessee, the impugned amount found credited in the name of Shri P. N. Jain and Ms. Urvashi Jain in the books of the assessee in the year under consideration is to be charged to income-tax as the income of the assessee for that year and hence the impugned addition made/sustained by the tax authorities below under section 68 of the Income-tax Act are upheld. Hence, impugned addition was held to be justified.

In view of above facts, the appeal of the assessee is required to be dismissed.”

9. Ld PR. CIT (OSD) also placed reliance on the decision of the Hon'ble Delhi High Court in the case of CIT vs Nalwa Investments Ltd. (2011) 11 taxmann.com 98 (Delhi) to submit that where the Commissioner has clearly applied his mind and has rightly noticed the character of the said income have not been investigated by the

Assessing officer, then the Tribunal could not and must not enter into the order u/s.263 of the Act. He further placed reliance on the decision of the Co-ordinate Benches of Mumbai Tribunal in the case of Namita V Samt vs CIT (2016) 72 taxmann.com 206 (Mum-Trib) to submit that in respect of issue of deemed dividend, the loans or advances given by a company to any concern, in which the shareholders have substantial interest is liable to be assessed as deemed dividend. It was the submission that the assessee company was a company in which the share holders have substantial interest and the company is liable to be assessed in respect of deemed dividend.

10. We have considered the rival submissions. A perusal of the order passed u/s.263 of the Act shows that the issue of deemed dividend and the issue of unsecured loans in respect of which the Pr. CIT has taken a stand that the provisions of section 68 should be considered shows that both the issues are in fact same amount received from the same assessee's. The impugned assessee has received from three companies mentioned earlier and its director. The Pr. CIT on one hand says that the loans taken from three companies is to be treated as deemed dividend in the hands of the assessee. On the other hand, pr. CIT has taken the stand that the amounts received from three companies and the Director of the

assessee company are unsubstantiated and is liable to be treated as unexplained income in the hands of the assessee. Admittedly, two stands of the Pr. CIT are contradictory to each other. It is not possible to take the stand that a particular amount is loan for the purpose of deemed dividend and the said amount is also the unexplained income of the assessee.

11. Coming to the issue of deemed dividend, it is an admitted fact that the assessee company is not a shareholder in any of the three companies from whom the assessee has received the loans. This was also very much available before the Pr. CIT. It was within the knowledge of the Pr. CIT and his order also is categorical in mentioning that the common shareholders are holding the substantial interest. This is evident from pages 25,26 and 27 of the order of the Pr. CIT. The Pr. CIT has also extracted the provisions of section 2(22) (e) and its interpretation in pages 18 & 19 of his order. In pages 21, the Pr. CIT has also extracted the names of the Directors and their shareholdings. Thus clearly, the assessee company is not a shareholder in any of the lending companies and in view of the principles laid down by the Hon'ble Jurisdictional High Court in the case of Mahimananda Mishra (supra), the deemed dividend cannot be assessed in the hands of the impugned assessee company. Thus

clearly, the order of the Pr. CIT on this issue is erroneous on facts and in law and on this ground, the issue stands quashed.

12. The decision relied upon by Id Pr. CIT(OSD) in the case of Namita V Samant (supra) is in fact in favour of the assessee insofar as the deemed dividend has been assessed in that case in the hands of the shareholder and not in the hands of the recipient company.

13. Coming to the alleged unexplained investments, the Pr. CIT himself having accepted the factum of the loans from three companies and the Director for the purpose of proposing the addition of deemed dividend itself counters the proposed revision on the loans holding the same as unexplained cash credit. In any case, a perusal of the notice issued u/s.142(1) of the Act by the National e-assessment center, Delhi and the replies thereto clearly shows that the issue of unsecured loans have been examined at depth by the Assessing Officer. Here, what is to be understood is that what has been done is not a physical assessment but e-assessment. The details have been called for from the assessee and the details have been submitted by the assessee, same has been examined on multiple points in the course of assessment as the assessment is e-assessment and no addition has been proposed in the assessment order. Just because the assessment order is cryptic assessment order, the assessee cannot be faulted for the same

insofar as what is written in the assessment order is beyond the control of the assessee. The e-assessment has been done on the basis of the SOP issued by the revenue. All that can be seen is whether the details have been called for and the issue has been examined. A perusal of the notice u/s./142(1) shows that the first notice was issued on 1.12.2020. The reply was given on 14.12.2020. Further clarification was on 21.10.2021 and the assessee has responded to that also vide letter dated 23.1.2021. Thus, clearly this has also been examined at depth by the Assessing Officer in the e-assessment proceedings and no addition has been proposed which means that one plausible view has been taken. Once a plausible view has been taken, it cannot be made subject matter of revision u/s.263 unless it is specifically shown to be erroneous which has caused prejudice to the revenue and this has not been done in the order of Pr. CIT. This being so, on this issue also, the order of Pr. CIT is unsustainable and stands quashed.

14. The decision relied by Id Pr. CIT(OSD) in the case of Nalwa Investments Ltd (supra) shows that in that case, the Assessing Officer had not given any findings on the issue in the assessment order. However, the Tribunal had taken a stand that the view had been taken by the Assessing Officer was a plausible view and the AO had applied his mind. In that case, the Assessing Officer had also

not conducted any enquiry on the issue. It is under that circumstances, the Hon'ble High Court had held that the Tribunal was supposed to adjudge the validity of such an order and not to go beyond when the challenge before it was limited to the said order passed by the CIT, in exercise of his power u/s.263 of the Act. The facts in the present case are totally different insofar as one of the issue being the issue of deemed dividend has no applicability in the assessee's case and in respect of second issue, being the unsecured loans, the AO in e-assessment proceedings has called for and examined the issue and has taken a conscious view and had not proposed any addition in the assessment order. Thus, the said decision has no bearing on the facts here. This being so, the order passed u/s.263 is found to be unsubstantiated and consequently, stands quashed.

15. In the result, appeal of the assessee stands allowed.

Order dictated and pronounced in the open court on 28/06/2023.

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

sd/-
(George Mathan)
JUDICIAL MEMBER

Cuttack; Dated 28/06/2023
B.K.Parida, SPS (OS)

Copy of the Order forwarded to :

1. The Appellant : Om Shree Realcon Pvt Ltd.,
Plot No.8, Forest Park, Bhubaneswar
2. The Respondent: Pr. CIT- Bhubaneswar-1
3. The CIT(A)-1, Bhubaneswar
4. DR, ITAT, Cuttack
5. Guard file.
//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack