

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

**SHRI B.R. BASKARAN, ACCOUNTANT MEMBER  
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 720/MUM/2023  
(Assessment Year: 2013-14)**

**Global Business Conexxtions  
Private Limited,**

FB 38-39, Mansarovar Complex,  
7 No Stop Shivaji Nagar,  
Bhopal - 462016  
[PAN: AAECG0819J]

.....

**Appellant**

**Assistant Commissioner/Deputy  
Commissioner of Income Tax  
5(3), Mumbai**

Room No. 1906, 19<sup>th</sup> Floor,  
Air India Building, Nariman Point,  
Mumbai - 400021

Vs

.....

**Respondent**

**Appearance**

For the Appellant/Assessee : Shri Jitendra Singh  
For the Respondent/Department : Dr. Kishor Dhule

**Date** : 28.06.2023  
Conclusion of hearing : 22.09.2023  
Pronouncement of order

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**ORDER**

**Per Rahul Chaudhary, Judicial Member:**

1. By way of the present appeal the Appellant has challenged the order, dated 12/01/2023, passed by the Ld. Commissioner of Income Tax (Appeals)-53, Mumbai [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2013-14, whereby the Ld. CIT(A) had dismissed the appeal of the Assessee against the Assessment Order, dated 28/12/2018, passed under Section 143(3) read with Section 147 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. The Appellant has raised following grounds of appeal:

1. "General Ground

*That on the facts and in the circumstances of the case and in law, the Assessment Order under section 143(3) r.w.s. 147 of the Income tax Act, 1961 (the Act) passed by Learned Deputy Commissioner of Income Tax 1(1) - Bhopal (Ld. AO) is erroneous and bad in law.*

2. Reopening of Assessment

*On the facts and circumstances of the case as well as in law, the Learned CIT(A) has erred in confirming the action of the Ld. AO in reopening the assessment proceedings on the basis of documents and information which were already available with the AO at the time of completion of original assessment. The appellant humbly prays that the reassessment proceedings being without jurisdiction and bad in law, should be quashed.*

3. Deemed Dividend

*On the facts and circumstances of the case as well as in law, the Learned CIT(A) has erred in confirming the action of the Ld. AO in making an addition of INR 11,83,73,433 u/s 2(22)(e) of the Act without appreciating that as per the provisions of section 2(22)(e) of the Act, the loans and advances are considered as dividend only in the hands of the shareholder. Since the appellant is not a shareholder of Advantage Overseas Private Limited, provisions of section 2(22)(e) of the Act are not applicable. The appellant humbly prays to grant relief to the appellant from the addition under section 2(22)(e) of the Act.*

4. *The appellant craves leave to add, alter, and supplement any ground or grounds, if necessary at the time of hearing of the appeal."*

3. The relevant facts in brief are that the Assessing Officer found that Advantage Overseas Pvt. Ltd (for short 'AOPL' or 'the Lender') had advanced loan of INR 95.16 Crores to the Assessee. 85% shareholding of the Lender/AOPL and 80% shareholding of the borrower/Appellant was held by Asian Business Connections Pvt. Ltd. The Assessing Officer was of the view that the provision under

Section 2(22)(e) of the Act would be attracted and the loan of INR 95.16 Crores received by the Assessee from AOPL should have been taxed as deemed dividend in the hands of the Assessee under the provision of section 2(22)(e) of the Act. Since the aforesaid income had escaped assessment while framing assessment under Section 143(3) of the Act, reassessment proceedings under Section 147 of the Act were initiated against the Appellant.

4. During the re-assessment proceedings, in response to the show cause notice issued by the Assessing Officer, the Assessee filed reply stating that the borrower/Assessee was not a shareholder of the Lender/AOPL, therefore, the provisions of Section 2(22)(e) of the Act could not be attracted to tax loan amount in the hands of the Assessee. The Assessing Officer, not being convinced, made addition of INR 11,83,73,433/- treating the same as deemed dividend under Section 2(22)(e) of the Act vide order, dated 28/12/2018, passed under Section 143(3) read with Section 147 of the Act.
5. Being aggrieved, the Appellant preferred appeal against the Assessment Order before the CIT(A) challenging the validity of reassessment proceedings as well as the addition of INR 11,83,73,433/- made under Section 2(22)(e) of the Act. The CIT(A) dismissed the appeal vide order, dated 12/01/2023. The CIT(A) rejected the challenge to validity of reassessment proceedings concluding that reassessment proceedings were not initiated merely on review of the material already on record the details of ownership of M/s Asia Business Connection Pvt. Ltd. and information related to accumulated reserve and surplus and other particulars did not form part of the assessment records and constituted fresh tangible material. In the original assessment proceedings no question related to applicability of provisions of Section 2(22)(e) of the Act were

raised or examined. The CIT(A) placed reliance on the judgment of the Hon'ble Supreme Court in the case of CIT Vs. P.V.S. Beedis Pvt. Ltd. (237 ITR 13) wherein it was held that reassessment proceedings can be initiated in case of factual error or omission pointed out by the audit party. As regards non-disposal of the objections to reopening of assessment the CIT(A) noted that the objections were filed at the very far end of the assessment proceedings on 22/12/2018 whereas the reasons recorded were provided to the Appellant on 21/05/2018. Therefore, the Assessing Officer cannot be flouted for concluding that the Appellant had waived his right to file objections on expiry of a reasonable time. As regards addition of INR 11,83,73,433/- under Section 2(22)(e) of the Act, the CIT(A) confirmed the addition made by the Assessing Officer on merits by placing reliance on the explanatory memorandum to the amendments made to Section 2(22)(e) of the Act by way of Finance Act, 1988. While holding so the CIT(A) observed that the issue whether in case a company which satisfies the provisions of Section 2(22)(e) of the Act the principle of deemed dividend can be invoked even though such company is not shareholder has not been settled and the same is pending before the larger Bench of the Hon'ble Supreme Court.

6. Being aggrieved by the order dated 12/01/2023, passed by the CIT(A) the Appellant is now in appeal before the Tribunal on the grounds reproduced in paragraph 2 above. Ground No. 1 is general in nature, Ground No. 2 challenges the validity of reassessment proceedings and Ground No. 3 challenges the addition of INR 11,83,73,443/- made under Section 2(22)(e) of the Act on merits.
7. The Ld. Authorised Representative for the Appellant appearing before us submitted that the issue raised in the present appeal stands

decided in favour of the Appellant by placing reliance of the following decision/judgments:

- CIT Vs Madhur Housing and Development Co.[Civil Appeal No.3961 of 2013](SC) reported in 2018 93 taxmann.com 502 (SC)
- CIT Vs Universal Medicare Pvt Ltd (190 Taxman 194) (Bom. HC)
- CIT Vs Ankitech Pvt Ltd (11 Taxmann.com 100) (Delhi HC)
- CIT Vs Hotel Hilltop (ITA No. 25 of 2005) (Rajasthan HC)
- CIT Vs Bhaumik Colors Pvt Ltd (118 ITD 1) (Mumbai ITAT SB)

8. Per Contra, the Learned Departmental Representative submitted that the provisions of Section 2(22)(e) of the Act would be attracted even in a case where the lender and the borrower have a common shareholder. In this regard, reliance was placed by the Learned Departmental Representative on Circular No. 495 dated 22/09/1987 issued by Central Board of Direct Taxes (CBDT). Further, the Learned Departmental Representative also placed reliance on the following judgments:

- National Travel Services Vs CIT: 89 Taxmann.com 332 (SC)
- PCIT Vs. Gladder Ceramics Ltd. (Gujarat HC) [(2021) 127 taxmann.com 820]

9. The Learned Departmental Representative supported the order passed by the CIT(A) and filed written submission dated 04/07/2023, in addition of the oral submission made during the course of hearing. The Ld. Departmental Representative also placed reliance on paragraph 5.3.3 of the order passed by the CIT(A) to support the contention that the deemed dividend income could be taxed in the hands of a non-shareholder receiving loan. The relevant extract of the aforesaid paragraph 5.3.3 read as under:

*"5.3.3 In para 14, ....*

*The judgment of the Hon'ble Supreme Court can also be looked at by taking a hypothetical example. Lets say Co. A lends a sum of Rs. 10 crs. To Co.B. The shareholding of Co.A is as under:*

X - 30%  
Y - 50%  
Z - 20%

*In Co.B shareholding is as under:*

X - 40%  
Y - 35%  
Z - 25%

*In the above scenario, how much can be taxed in the hands of each of X, Y & Z? It cannot be Rs. 10 crs. In the hands of X, Y & Z each. It can be taxed only once in the hands of B Ltd. This also evident from the provisions of Sec. 2(22)(e)."*

10. We have considered the rival submission, perusal the material on record and examined the position in law.
11. The reassessment proceedings were initiated against the Appellant on the ground that income liable to tax in the hands of the Appellant as deemed dividend under Section 2(22)(e) of the Act had escaped assessment. The Assessing Officer made addition of INR 11,83,73,433/- under Section 2(22)(e) of the Act which was confirmed by the CIT(A).
12. The contention of the Appellant in appeal before us is that the issue raised in the present appeal is squarely covered in favour of the Appellant by the judgment of Hon'ble Delhi High Court in the case of Ankitech Pvt. Ltd. (supra) and the judgment of the Hon'ble Supreme Court in the case of Madhur Housing & Development Company (supra).
13. We note that in the case of **Ankitech Pvt. Ltd.** (supra), the Hon'ble Delhi High Court had held that the deemed dividend as per the provisions contained in Section 2(22)(e) of the Act cannot be invoked to tax loan amount as being dividend merely because the lender and

the borrower have common shareholder. The relevant extract of the aforesaid judgment read as under:

*"21. We have seriously deliberated on the aforesaid arguments advanced by the counsels for the revenue.*

*22. Insofar as the provisions of section 2(22)(e) are concerned, we have already extracted this provision and taken note of the conditions/requisites which are to be established for making provision applicable. In CIT v. C.P. Sarathy Mudaliar [1972] 83 ITR 170, the Supreme Court had traced out the assessee of this provision in the following manner :*

*"Any payment by a company, not being a company in which the public are substantially interest, of any sum (whether as representing a part of the assets of the company or otherwise) made after 31-5-19987 by way of advance or loan.*

*First limb*

- (a) to a shareholder, being a person who is the beneficial 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,*

*Second limb*

- (b) or to my concern in which, such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern)*

*Third limb*

- (c) or any payment by any such company on behalf, or for the individual benefit, or any such shareholder, to the extent to which the company in either case possesses accumulated profits."*

*23. It is rightly pointed out by the Bombay High Court in Universal Medicare (P.) Ltd.'s case (supra) that section 2(22)(e) of the Act is not artistically worded. Be as it may, we may reiterate that as per this provision, the following conditions are to be satisfied :*

- "(1) The payer company must be a closely held company.*  
*(2) It applies to any sum paid by way of loan or advance during the year to the following persons :*

- (a) A shareholder holding at least 10 of voting power in the payer company.
  - (b) A company in which such shareholder has at least 20 per cent of the voting power.
  - (c) A concern (other than company) in which such shareholder has at least 20 per cent interest.
- (3) The payer company has accumulated profits on the date of any such payment and the payment is out of accumulated profits.
- (4) The payment of loan or advance is not in course of ordinary business activities."

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

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

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

26. *In a case like this, the recipient would be a shareholder by way of deeming provision. It is not correct on the part of the revenue to argue that if this position is taken, then the income 'is not taxed at the hands of the recipient'. Such an argument based on the scheme of the Act as projected by the learned counsels for the revenue on the basis of sections 4, 5, 8, 14 and 56 of the Act would be of no avail. Simple answer to this argument is that such loan or advance, in the first place, is not an income. Such a loan or advance has to be returned by the recipient to the company, which has given the loan or advance.*

27. *Precisely, for this very reason, the Courts have held that if the amounts advanced are for business transactions between the parties, such payment would not fall within the deeming dividend under section 2(22)(e) of the Act.*

28. *Insofar as reliance upon Circular No. 495, dated 22-9-1997 issued by Central Board of Direct Taxes is concerned, we are inclined to agree with the observations of the Mumbai Bench decision in Bhaumik Colour (P.) Ltd.'s case (supra) that such observations are not binding on the Courts. Once it is found that such loan or advance cannot be treated as deemed dividend at the hands of such a concern which is not a shareholder, and that according to us is the correct legal position, such a circular would be of no avail.*

29. *No doubt, the legal fiction/deemed provision created by the Legislature has to be taken to 'logical conclusion' as held in Andaleeb Sehgal's case (supra). The revenue wants the deeming provision to be extended which is illogical and attempt is to create a real legal fiction, which is not created by the Legislature. We say at the cost of repetition that the definition of shareholder is not enlarged by any fiction.*

30. Before we part with, some comments are to be necessarily made by us. As pointed out above, it is not in dispute that the conditions stipulated in section 2(22)(e) of the Act treating the loan and advance as deemed dividend are established in these cases. Therefore, it would always be open to the revenue to take corrective measure by treating this dividend income at the hands of the shareholders and tax them accordingly. As otherwise, it would amount to escapement of income at the hands of those shareholders.

31. We may also point out here that when these appeals along with other appeals were heard, some appeals were listed and the tax effect of which was less than Rs. 10 lakhs and those were dismissed on that ground. Had those appeals been decided on merits, still the assessee would have succeeded. At the same time, in those cases, we would not like the shareholders to go scot free and therefore, even in those cases, it would be permissible for the revenue to take remedial steps by roping in the shareholder(s) and tax the deemed dividend at their hands.

32. We, thus, answer the questions in favour of the assessee and against the revenue, as a result, these appeals are dismissed.”

14. The above judgment of the Hon’ble Delhi High Court was upheld by the Hon’ble Supreme Court in the case of **Madhur Housing & Development Company** (supra) by holding as under:

*“The impugned judgment and order dated 11-5-2011 has relied upon a judgment of the same date by a Division Bench of the High Court of Delhi in ITA No. 462 of 2009.*

*Having perused the judgment and having heard arguments, we are of the view that the judgment is a detailed judgment going into Section 2(22)(e) of the Income-tax Act which arises at the correct construction of the said Section. We do not wish to add anything to the judgment except to say that we agree therewith.*

*These appeals are disposed of accordingly.”*

15. On the other hand, the submissions advance on behalf of the Revenue are based upon the reasoning given by the Hon’ble Supreme Court in the case of **National Travel Services** (supra) while making a reference to a larger bench which read as under:

"8. The effect of these two judgments is clearly to hold that before Section 2(6A) (e) of the 1922 Act can be attracted, the "shareholder" referred to in the said provision must be a shareholder whose name is on the register of members of the Company. When the Income Tax Act, 1961 came into force and repealed the 1922 Act, the definition of "dividend" contained in Section 2(22)(e) was as follows:—

*"Section 2. Definition - In this Act, unless the context otherwise requires,—*

*(22) "dividend" includes—*

*(e) any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) by way of advance or loan to a shareholder, being a person who has a substantial interest in the company or any payment by any such company on behalf or for the individual benefits, of any such shareholder, to the extent to which the company in either case possesses accumulated profits;"*

9. A cursory look at the aforesaid definition would go to show that the shareholder referred to in the aforesaid provision would continue to be a shareholder who is on the register of members of the Company with one additional feature, namely, that such shareholder should be a person who has a substantial interest in the Company. Admittedly, the aforesaid additional feature would make no difference to the position of law laid down in the aforesaid two decisions.

10. In 1988, however, this definition was amended to read as follows:—

*'Section 2. Definition - In this Act, unless the context otherwise requires,—*

*(22) "dividend" includes-*

*(e) any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) made after the 31st day of May 1987, by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten percent of the voting power, or to any concern in which such shareholder is a member or a partner and in which*

*he has a substantial interest (hereafter in this clause referred to as the said concern), or any payment by any such company on behalf or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits*

*Explanation 2. - the expression "accumulated profits", in sub-clauses (a), (b), (d) and (e), shall include all profits of the company up to the date of distribution or payment referred to in those sub-clauses, and in sub-clause (c) shall include all profits of the company up to the date of liquidation, (but shall not, where the liquidation is consequent on the compulsory acquisition of its undertaking by the Government or a corporation owned or controlled by the Government under any law for the time being in force, include any profits of the company prior to three successive previous years immediately preceding the previous year in which such acquisition took place;*

*Explanation 3. - For the purposes of this clause,-*

- (a) "concern" means a Hindu undivided family, or a firm or an association of persons or a body of individuals or a company;*
- (b) a person shall be deemed to have a substantial interest in a concern, other than a company, if he is, at any time during the previous year, beneficially entitled to not less than twenty per cent of the income of such concern;'*

11. *The Explanatory memorandum to the amendment thus made reads as follows:—*

*"With the deletion of Section 104 to 109 there was a likelihood of closely held companies not distributing their profits to shareholders by way of dividends but by way of loans or advances so that these are not taxed in the hands of the shareholders. To forestall this manipulation, sub-clause (e) of clause (22) of Section 2 has been suitably amended. Under the existing provisions, payments by way of loans or advance to shareholders having substantial interest in a company to the extent to which the company possesses accumulated profits is treated as dividend. The shareholders having substantial interest are those who have a shareholding carrying not less than 20 per cent voting power as per the provisions of clause (32) of Section*

*2. The amendment of the definition extends its application to payments made (i) to a shareholder holding not less than 10 per cent of the voting power, or (ii) to a concern in which the shareholder has substantial interest. "Concern" as per the newly inserted Explanation 3 (a) to Section 2 (22) means a HUF or a firm or an association of persons or a body of individuals or a company. A shareholder having a substantial interest in a concern as per part (b) of Explanation 3 is deemed to be one who is beneficially entitled to not less than 20 per cent of the income of such concern.*

*10.3 The new provisions would, therefore, be applicable in a case where a shareholder has 10 per cent or more of the equity capital. Further, deemed dividend would be taxed in the hands of a concern where all the following conditions are satisfied:—*

- (i) where the company makes the payment by way of loans or advances to a concern;*
- (ii) where a member or a partner of the concern holds 10 per cent of the voting power in the company; and*
- (iii) where the member or partner of the concern is also beneficially entitled to 20 per cent of the income of such concern.*

*With a view to avoid the hardship in cases where advances or loans have already been given, the new provisions have been made applicable only in cases where loans or advances are given after 31st May, 1987.*

*These amendments will apply in relation to assessment year 1988-89 and subsequent years."*

*12. A reading of the amended definition would indicate that, after 31.05.1987, a "shareholder" is now a person who is the beneficial owner of shares holding not less than 10% of the voting power of the Company. Also, a new category has been added to the definition by introducing concerns in which such shareholder is a member or partner and in which he has a substantial interest. Explanation (3) of the amended provision states that "concern" means Hindu Undivided Family, firm, association of persons, body of individuals, or a Company and further goes on to state that a person shall be deemed to have a substantial interest in a concern other than a Company if he is, at any time during the previous year, beneficially entitled to not less than 20% of the income of such concern.*

13. *Shri Ujjwal A. Rana, learned advocate, appearing on behalf of the appellants, has argued before us that a judgment had been delivered by the very Division Bench in another case CIT v. Ankitech (P.) Ltd.[2011] 199 Taxman 341/11 taxmann.com 100/[2012] 340 ITR 14 (Delhi). The same Division Bench had arrived at a conclusion, following other judgments of other Courts and Tribunals, that the expression "shareholder" would continue to mean a registered shareholder even after the amendment, and that, this being the case, it is clear that the impugned judgment has taken an about turn and has sought to distinguish the earlier judgment when it was squarely applicable. He has also placed before us an order dated 05.10.2017 passed in Civil Appeal No. 3961 of 2013 [CIT v. Madhur Housing & Development Co.] in which this Court has expressly affirmed the reasoning of the aforesaid earlier judgment. In his view, therefore, this judgment ought to have been followed, and if it had been followed, it is clear that the firm, not being a registered shareholder, could not possibly be a person to whom Section 2(22)(e) would apply.*

14. *As opposed to this, Shri Guru Krishnakumar, learned senior advocate, appearing on behalf of the Revenue, has sought to support the impugned judgment by pointing out that the impugned judgment itself has made a distinction between the facts in Ankitech (P.) Ltd. (supra) and in the present case. According to him, the impugned judgment has reference only to the second limb of the amended definition, namely, to the limb which deals with any concern in which such shareholder is a member and not to the first limb, which deals with a shareholder being a person who is the beneficial owner of shares. According to him, therefore, the Division Bench rightly sidestepped the decision in Ankitech (P.) Ltd. (supra) and correctly arrived at the conclusions to the two questions raised.*

15. *This then brings us to the Division Bench judgment in the present case. In para 17, after referring to various judgments referred to by us hereinabove, the Division Bench posed two questions to be answered by it as follows:-*

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

April, 1988.

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

*16. It answered the first question by stating that the expression "being a person who is a beneficial owner of shares" would be in addition to the shareholder first being a registered shareholder of the Company. The Division Bench then states that, therefore, in order to attract Section 2(22)(e) both conditions have to be satisfied. So far as the second question is concerned, the Division Bench went on to state that a partnership firm can be treated as a shareholder but that it is not necessary that it has to be a registered shareholder.*

*17. We are of the view that it is very difficult to accept the reasoning of the Division Bench. It is not enough to say that Ankitech's case refers to the second limb of the amended definition, whereas the present case refers to the first limb, for the simple reason that the word "shareholder" in both limbs would mean exactly the same thing. This is for the reason that the expression "such shareholder" in the second limb would show that it refers to a person who is a "shareholder" in the first limb.*

*18. This being the case, we are of the view that the whole object of the amended provision would be stultified if the Division Bench judgment were to be followed. Ankitech's case (supra), in stating that no change was made by introducing the deeming fiction insofar as the expression "shareholder" is concerned is, according to us, wrongly decided. The whole object of the provision is clear from the Explanatory memorandum and the literal language of the newly inserted definition clause which is to get over the two judgments of this Court referred to hereinabove. This is why "shareholder" now, post amendment, has only to be a person who is the beneficial owner of shares. One cannot be a registered owner and beneficial owner in the sense of a beneficiary of a trust or otherwise at the same time. It is clear therefore that the moment there is a shareholder, who need not necessarily be a member of the Company on its register, who is the beneficial owner of shares, the Section gets attracted without more. To state, therefore, that two conditions have to be satisfied, namely, that the shareholder must first be a registered shareholder and thereafter, also be a beneficial owner is not only mutually contradictory but is plainly incorrect. Also, what is important is the addition, by way of amendment, of such beneficial owner holding not*

less than 10% of voting power. This is another indicator that the amendment speaks only of a beneficial shareholder who can compel the registered owner to vote in a particular way, as has been held in a catena of decisions starting from Mathalone v. Bombay Life Assurance Co. Ltd. [1954] SCR 117.

19. This being the case, we are prima facie of the view that the Ankitech (P.) Ltd. case (supra) itself requires to be reconsidered, and this being so, without going into other questions that may arise, including whether the facts of the present case would fit the second limb of the amended definition clause, we place these appeals before the Hon'ble Chief Justice of India in order to constitute an appropriate Bench of three learned Judges in order to have a relook at the entire question.

20. Ordered accordingly". (Emphasis Supplied)

16. In our view, till the law laid down by the Hon'ble Delhi High Court in the case of Ankitech Pvt. Ltd. (supra) and the Hon'ble Supreme Court in the case of Madhur Housing & Development Company (supra) is overturned by the Hon'ble Supreme Court, the same would continued to hold good. We note that the Assessing Officer has, while making addition of INR 11,83,73,433/- under Section 2(22)(e) of the Act, in the Assessment Order, dated 28/12/2018, made the following observations:

"8. The AR has relied on the judgment of Hon'ble Supreme Court in the case of CIT vs Madhur Housing and Development Company in which it has been held that dividend is to be taxed in the hands of the shareholder. Therefore, the AR concluded that since the assessee is not a shareholder of Advantage Overseas Pvt. Ltd., therefore, provisions of deemed dividend u/s 2(22)(e) are not applicable in the case of the assessee.

9. However, in the civil appeal nos. 2068-2071 of 2012, vide order dated Jan 18,2018, the Hon'ble Supreme Court in its order held that Ankitech judgement requires to be reconsidered and therefore, the appeals were place before the Hon'ble Chief Justice of India in order to constitute an appropriate Bench of three learned judges in order to have a look at the entire question.

10. *Therefore, in view of the above, the judgement relied upon by the AR has not yet been finally decided by the Hon'ble Supreme Court. The facts of the case in the case of the assessee are identical to the facts of the case of Ankitech Private Limited.*

11. Therefore, to protect the interest of revenue, Rs. 11,83,73,433/- is added in the hands of the assessee u/s 2(22) (e) of the Act on account of deemed dividend as the assessee has received loans from Advantage Overseas Pvt. Ltd and the shareholder in the assessee company is also substantial shareholder in the Advantage Overseas Pvt Ltd. and also the issue has not attained finality in view of reference of judgment in the case of Ankitech Private Limited to a larger bench." (Emphasis Supplied)

17. On perusal of above, it can be seen that the Assessing Officer made the addition under Section 2(22)(e) of the Act in the hands of the Appellant to protect the interest of Revenue since in the case of National Travel Services (supra), the Hon'ble Supreme Court has referred the issue of interpretation of term 'shareholder' used in Section 2(22)(e) of the Act to the larger bench. The CIT(A) has also confirmed the addition made by the Assessing Officer under Section 2(22)(e) of the Act on merits observing that the issue has not yet attained finality by placing reliance upon the judgment of the Hon'ble Supreme Court in the case of Gopal & Sons (HUF) Vs. CIT, Kolkata- XI : (2017) 391 ITR 1. Thus, both, Assessing Officer and the CIT(A) have kept the issue alive in view of the facts that according to Assessing Officer/CIT(A) the legal issue arising in the facts of the present case relating to interpretation of provisions of Section 2(22)(e) of the Act has not yet attained finality. As on date the law laid down by the Hon'ble Delhi High Court in the case of Ankitech Pvt. Ltd. (supra) and the Hon'ble Supreme Court in the case of Madhur Housing & Development Company (supra) continues to hold the field.
18. Given the above legal position, we delete the addition of deemed

dividend of INR 11,83,73,433/- made in the hands of the Appellant as the same could not have been brought to tax in the hands of the Appellant as deemed dividend as per the judgment of the Hon'ble Delhi High Court in the case of Ankitech Pvt. Ltd. (supra) which was confirmed by the Hon'ble Supreme Court in the case of Madhur Housing & Development Company (supra) since the Appellant/borrower was not a shareholder of the Lender/AOPL. Further, since there is no escapement of income, the validity of reassessment proceedings initiated under Section 147 of the Act cannot be sustained. Accordingly, the addition of INR 11,83,73,433/- as deemed dividend under the provisions of Section 2(22)(e) of the Act is deleted and the order dated 28/12/2018, passed under Section 143(3) read with Section 147 of the Act is quashed. The Revenue would be at liberty to take recourse as available under law in terms of paragraph 30 of the judgment of the Hon'ble Delhi High Court in the case of Ankitech Pvt. Ltd. (supra) reproduced in paragraph 13 above.

19. Before parting we would like to observe that the as regards the other contentions raised by the Appellant challenging the validity of reassessment proceedings are concerned, we do not find any infirmity in the order passed by CIT(A) rejecting the same since the finding returned by the CIT(A) that (a) fresh tangible material regarding shareholding of the Appellant and AOPL was available with the Assessing Officer and (b) that the Appellant filed objections at the fag end of the assessment proceedings have not been controverted in the appellate proceedings before us.
20. In view of the above, Ground No. 1 to 3 raised by the Appellant are allowed.

21. In result, the present appeal preferred by the Assessee is allowed.

Order pronounced on 22.09.2023.

**Sd/-**  
**(B.R. Baskaran)**  
**Accountant Member**

**Sd/-**  
**(Rahul Chaudhary)**  
**Judicial Member**

मुंबई Mumbai; दिनांक Dated : 22.09.2023  
*Alindra, PS*

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT,  
Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai