IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH: BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SHRI KESHAV DUBEY, JUDICIAL MEMBER

ITA No.1169/Bang/2023
Assessment Year: 2010-11

Valdel Investments Private Limited 2/1, Embassy Vogue, Palace Road Vasanthanagar Bengaluru 560 052 Karnataka **PAN NO : AACCV3079R**	**Vs.**	DCIT Central Circle-1(2) Bangalore
APPELLANT		**RESPONDENT**

Appellant by	:	Shri V. Narendra Sharma, A.R.
Respondent by	:	Shri V. Parithivel, D.R.

Date of Hearing	:	09.05.2024
Date of Pronouncement	:	20.05.2024

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal by assessee is directed against order of CIT(A) for the assessment year 2010-11 dated 31.10.2023. The assessee has raised following grounds of appeal:

1. *The order of the Income Tax Officer in so far as it is against the appellant is opposed to law facts equity weight of evidence facts and circumstances of the case.*

2. *The Order of re-assessment passed u/s. 147 r.w.s. 143(3) of the Act is bad in law and void ab initio as the mandatory conditions to invoke the provision of section 147 did not exist and thereby issuing notice u/s. 148 was not correct, consequently order passed under section 250 by the hon'ble commissioner of income tax [Appeals] upholding the same is bad in law under the facts and circumstances of the case.*

3. *The reasons recorded by the assessee at most may be considered as reasons to suspect and under no stretch of imagination the same can be construed as reasons to believe which is basic ingredient for a valid assumption of jurisdiction for reopening u/s. 147.*

4. *The Appellant denies itself liable to be assessed the total taxable income of the appellant at Rs. 2,52,15,270/- as against the total taxable income declared in Return filed with the I. T. Department of Rs. 92,15,265/-.*

5. *The learned Commissioner of Income tax [Appeals] is not justified in not considering the intention of law and facts in bringing to tax a sum of Rs. 1,60,00,000/- as deemed dividend by invoking the provisions of Section 2(22)(e) of the Act, under the facts and circumstances of the law.*

6. *Without prejudice, the learned Commissioner of Income tax [Appeals] is not justified in not considering the fact that from the deposit received by the Appellant has not derived any individual benefit and thus is not a gracious receipt. The said amount would attract the provisions of Section 2(22)(e) if it was a gracious receipt.*

7. *The learned Commissioner of Income tax [Appeals] is not justified in considering the fact that VEC is a company which is regularly declaring dividends and the Appellant has received Rs. 84,70,000/- during the A.Y. under consideration and hence the amount received as deposit is not substitution of dividend.*

8. *The learned Commissioner of Income tax [Appeals] is not justified in not considering the fact that the amount received by the Appellant from VEC is in the nature of Inter Corporate Deposit and not in the nature of Loans and Advances under the facts and circumstances of the case.*

9. *The learned Commissioner of Income tax [Appeals] is not justified in considering the Inter Corporate Deposit of Rs. 1.6 crores received by the Appellant from VEC as Deemed Dividend u/s 2(22)(e) and making an addition of the same to total taxable income under the facts and circumstances of the case.*

10. *Without prejudice, the Learned Commissioner of Income tax [Appeals] is not justified to tax Rs. 1.6 crores received by the Appellant and not Rs. 1 crore as Rs.0.60 crore was returned as further deposit was not required.*

11. *The learned Commissioner of Income tax [Appeals] is not justified in considering that the tax on deemed dividend is liable to be paid by the receiver of the amount and not the Company advancing the amount.*

12. *The Appellant denies itself liable to be charged interest under section 234A, 234B and 234C of the Income-Tax Act, 1961 under the facts and circumstances of the case. Further the calculation of interest u/s. 234 B of the Act is not in accordance with law since the rate, method of calculation, quantum is not discernable from the Order of assessment on the facts and circumstances of the case. The rate, period and on what quantum the interest has been levied are not in accordance with law.*

Further, if at all any interest to be charged, the same should be in accordance with the provisions of section 234B(3) of the Act.

13. *The Appellant craves leave to add, alter, delete, substitute, or modify any of the grounds urged above.*

14. *In the view of the above and other grounds that may be urged at the time of the hearing of the appeal, the Appellant prays that the appeal may be allowed in the interest of justice and equity.*

2. Facts of the case are that the assessee is a Private Limited Company registered with the Registrar of Companies, Karnataka, under the Companies Act, 1956. Assessee is an Investment Company which has invested in various subsidiaries and associated companies. Assessee is regularly filing its Return of Income and is assessed with the Deputy Commissioner of Income Tax, Circle — For the Assessment year 2010-11, the assessee filed a return of Income on October 15th, 2010 declaring total income of Rs. 92,15,265/- under the regular provisions of the Act. During the course of scrutiny proceedings in the case of the subsidiary of the assessee i.e. M/s. Valdel Engineers & Constructors Pvt. Ltd. ("VEC"), the breakup of loans and advances was given which included loan of Rs. 1.6 crores given to the Assessee company, i.e M/s. Valdel Investments Pvt. Ltd. The Assessee is the shareholder to the extent of 46.54% in case of VEC. The AO noted that the Assessee had not offered any income as deemed dividend in the return of income filed. The case of the Assessee for AY 2010-11 was reopened by issuance of notice u/s. 148 of the Act dated 12/05/2014. Pursuant to the notice issued u/s. 148 of the Act the Assessee filed a letter dated 10.06.2014 in compliance with the notice issued u/s. 148 with a request to treat the original return of Income filed w/s. 139(1) dated 15.10.2010, as the return filed in response to the notice issued u/s. 148. Order was passed u/s 147 r.w.s 143(3) of the Act in the case of the Assessee on 26.02.2015.

2.1 In the order u/s 147 r.w.s 143(3) the AO held that the receipt of such loan by the assessee is in nature of deemed dividend covered by the provision of Sec. 2(22)(e) of the Act based on the following facts:

a. M/s. Valdel Engineers and Constructors Private Limited is a Company in which the public are not substantially interested.

b. M/S. Valdel Engineers and Constructors Private Limited has advanced loan to the Assessee Company.

c. The Assessee Company is beneficial owner of shares holding 46.54% of shares in Vadel Engineers and Constructors Private Limited.

d. M/s. Valdel Engineers & Constructors Private Limited possesses accumulated profits of Rs. 29,43,82,184/- as on 31.03.2010.

2.2 The learned Assessing Officer completed the assessment u/s 147 r.w.s. 143(3) by making an addition of Rs. 1,60,00,000/- (i.e., the disallowance u/s 2(22)(e)) to the returned income under the regular provisions of the Act and determined the total taxable Income under the regular provisions of the Act at Rs.2,52,15,270/-, the total tax payable as Rs.1,05,86,831/- and raised a demand of Rs.78,36,760/-. Against this assessee went in appeal before ld. CIT(A) who has confirmed the order of ld. AO. Once again assessee is in appeal before us by way of above grounds.

3. The ld. A.R. submitted that the assessee received a sum of Rs.1,60,00,000/- from M/s. Valdel Engineers and Constructors Private Limited as follow:

Date	Loan given	Loan repaid	Balance
08.05.2009	1,00,00,000		
31.12.2009	60,00,000		
08.01.2010		60,00,000	1,00,00,000

3.1 Further, it was submitted that out of the above, Rs.60 lakhs was paid back within a span of 8 days which is a temporary loan that won't attract the provisions of section 2(22)(e) of the Act. The balance amount of loan is at Rs.1 Crore were taken for interest on which assessee duly paid the interest @ 15% p.a. He drew our attention to the paper book page 45 showing the summary of deposit for loan ledger in the books of assessee from 1st May, 2009 to 31st May, 2012, wherein the assessee duly paid the interest to M/s. Valdel Engineers and Constructors Private Limited. Thus, it was submitted that the assessee, in real sense did not derive any benefit from that company so as to apply the provisions of section 2(22)(e) of the Act. He submitted that the phrase mentioned in section 2(22)(e) of the Act "by way of advance or loan" appearing in this section must be considered to mean those advances or loans, who is shareholder enjoys for simply on account of being a partner, who is the beneficial owner of shares, but if such loan or advance is given to such shareholder as a consequence of any further consideration, which is beneficial to the company, received from such shareholder, in such a case, such advance or loan cannot be treated as a deemed dividend within the meaning of section 2(22)(e) of the Act. In this regard, he relied on the following judgements:

a) Judgement of Hon'ble Karnataka High Court in the case of Smt. Jamuna Vernekar Vs. DCIT in ITA No.43 of 2013 dated 10.2.2021.
b) Judgement of Hon'ble Karnataka High Court in the case of Sri N.S. Narendra in ITA No.92 of 2015 dated 29.6.2021.
c) Judgement of Hon'ble Calcutta High Court, Special Jurisdiction (Income-tax) in the case of Pradip Kumar Malhotra Vs. CIT reported in 338 ITR 538.

3.2 He relied on the decision of the Hon'ble Jurisdictional High Court in the case of Bagmane Constructions (P.) Ltd. (2015) 57 taxmann.com 120 (Karn.) wherein it was held as under:

> *"Apart from Mukundan K. Shah (supra), the assessee places reliance on Bagmane Constructions (P.) Ltd. (supra). The question of law that arises for and considered by the Hon'ble Court was:*
>
> *"Whether any payment by a company by way of advance or loan to a shareholder or to any concern made u/s. 2(22)(e) of the Income Tax Act, 1961, to the extent to which the company possessed the accumulated profits includes a trade advance and constitutes deemed dividend?".*
>
> *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) We are unable to see as to how the said decision assists the assessee's case which, as afire-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)."*

3.3 The ld. A.R. further placed reliance on the decision of the Hon'ble High Court of Delhi in the case of Baidya Nath Plastic Industries (P) Ltd Vs K. L. Anand, ITO,113 Taxmann 412., which is reproduced as follows:

> *"16. Further, the hon'ble high court of Delhi. in the case of Baidya Nath Plastic Industries (P) Ltd Vs K. L. Anand, ITO, has differentiated between a Loan and a deposit for the purpose of deciding the applicability of section 269T. However, the parity of reasoning can be derived from said judgment for Section also. The relevant extract has been reproduced below:*
>
> *"4……..The distinction between the loan and the deposit is that in the case of the former, it is ordinarily the duty of the debtor to seek out the creditor and to repay the money according to the agreement and in the case of the latter it is generally the duty of the depositor to go to the bank or to the depositee, as the case may be, and make a demand for it.....*

5. It may also be noted that while articles 19 and 21 of the Limitation Act, 1963, fix the period within which suit for recovery of loan can be filed, article 22 deals with the period of limitation for suit for money. On account of deposit. The starting period of limitation under articles 19 and 21, on the one hand, and article 22, on the other. are different. Under articles 19 and 21, the cause of action in the case of money lent arises from the date of loan. whereas under article 22 the cause of action in the case of a deposit arises from the date of demand. Therefore, it is necessary to distinguish a deposit from a mere loan."

3.4 Further, he submitted that non-gratuitous loan or advance given by a company to the class of shareholders mentioned in section 2(22)(e) of the Act would not come within the provisions of this section and in the present case, loans or advances given in return to an advantage conferred upon the company by assessee. Hence, assessee is out of the purview of the section 2(22)(e) of the Act.

3.5 The ld. A.R. drew our attention to the assessee's submissions before the ld. CIT(A) as follows:

19. Further, the Assessee would also like to submit the difference between the terms "Loan" and "Deposit and explore the meaning of "Deposit" which has not been defined in the Section 2(22)(e) by placing reliance on the decision in Oriental Insurance Co. Ltd. v. Dy. CIT (2004) 89 ITD 520 DELHI) it held:

11 'loans' and 'deposits' are not mutually exclusive terms in as much as (i) both are debts repayable; (ii) in both the cases, money passes from one hand 10 another; (iii) in both the cases, there is relationship of debtor and creditor; (iv) there is a liability 10 return the money depending upon the terms and conditions between the parties. Still there is fine distinction between the two. In the case of deposit, it is made at the instance of the depositor whereas a loan is given at the instance of the borrower for his use with or without compensation. Consequently, a deposit is repayable only on demand by the deposit without the debtor having to seek out the creditor, while in the case of a loan, the obligation to repay is forthwith incurred (though the obligation may have to be discharged in future) and the borrower must seek out the lender to repay the loan.

Even the legislature has made distinction between these two terms. Limitation Act prescribes the different period of limitation, i.e., three years from the date when the loan is made while in the case of deposit, it is three years from the date when the demand is made. Even the Income Tax Act, 1961, has made distinction between these two terms. Section 269SS prohibits acceptance of loan or deposit in cash exceeding the prescribed

limit. Section 269T prohibits the repayment of deposit in cash exceeding the prescribed limit. It is apparent from these provisions that repayment of loan in cash is not prohibited. Consequently, no penalty is leviable under section 271E where repayment of loan is made in cash. On the other hand, penalty is leviable under section 271E if deposit is repaid in cash exceeding the prescribed limit. Thus, it is apparent from these provisions that even the legislature recognizes the distinction between the loan and the deposit. "

4. The ld. D.R. submitted that assessee has received above loan of Rs.1.6 Crores and Rs.60 lakhs has been returned within short span of 8 days and balance amount has been lying with the assessee and the assessee derived the advantage from M/s. Valdel Engineers and Constructors Private Limited, therefore, the amount advanced to the assessee to be treated as deemed dividend.

4.1 He submitted that it is the view of the assessee that the amounts advanced to it by VEC are gratuitous in nature, since interest is charged @15%pa by VEC, Assessee has conferred advantage to VEC and therefore the amounts advanced to the Assessee are not in the nature of deemed dividend. However, he submitted that the Hon'ble Supreme Court, in the cases of Navnit Lal C. Javeri v. K.K. Sen, Appellate Asst. CIT [1965] 56 ITR 198 (SC) and Smt. Shyam v. CIT [1977] 108 ITR 345 dealing with the issued of deemed dividend, held that the aspect of charge of interest is irrelevant. Thus, he submitted that the reliance of the Assessee on the decision in the case of Bagmane Constructions P Ltd (supra) does not support the case of the Assessee.

4.2 He submitted that in the instant case, the money advanced by VEC is in the nature of loan, since as per Assessee's own submission, interest @15% pa, has been paid to VEC. Therefore, the amounts received by the Assessee are in the nature of deemed dividend. Further he submitted that it is also a fact that in the instant case the amounts advanced by VEC are not in the nature of consideration for goods received or for purchase of capital asset, which would indirectly benefit the company advancing the loan and

therefore the amounts received by the Assessee cannot be treated as trade advance, since they are in the nature of loan.

4.3 The ld. D.R. submitted that the decision of the Hon'ble High Court of Delhi in the case of Baidya Nath Plastic Industries (P) Ltd. (Supra) is on the issue of applicability of Sec. 269T and therefore the reliance placed by ld. A.R. is misplaced.

4.4 He further submitted that assessee relied upon the decision of Delhi High Court in the case of Oriental Insurance Co. Ltd. Vs. CIT (2004) 89 ITD 520 (Delhi), which in turn relied upon the decision of Hon'ble High Court in the case of Baidya Nath Plastic Industries (P) Ltd Vs K. L. Anand, ITO cited (supra) and therefore, reliance upon this decision, does not help the case of the assessee.

4.5 The ld. D.R. submitted that Assessee also has claimed that since an amount of Rs. 60 lakhs have been returned to VEC, the entire sum of Rs. 1.6 crores as deemed dividend is not cored and only the amount of Rs.1 crore may be treated as deemed dividend. However as per the provisions of Section 2(22)(e), as soon as loan is advanced to shareholder by closely held company from accumulated profits, the statutory fiction u/s 2(22)(e) becomes operative and such loan is deemed to be dividend. Such loan does not cease to be deemed dividend on account of any subsequent event. Even if the loan is repaid by the shareholder in the same previous year, the statutory fiction arising at the time of giving loan by the company does not cease to be operative. Such a loan would be taxed as deemed dividend even if repaid in the same previous year. He submitted that in the case of Tarulata Shyam v. CIT [19771 108 1TR 345 (SC) the Hon’ble Supreme court held that under section 2(22) of the Act, the liability to tax attaches to any amount taken as loan by the shareholder from a controlled company to the extent it possesses accumulated profits at the moment the loan is borrowed and it is immaterial whether the loan is repaid before the end of the accounting year.

4.6 He drawn reference to the decision of Hon'ble Mumbai Tribunal in the case of Assistant Commissioner of Income-tax, Mumbai v. Jasubhai Engineering (P.) Ltd. [2020] 118 taxmann.com 430 (Mumbai - Trib.). The assessee in this case was engaged in business of manufacturing of engineering goods, had beneficial shareholding in a company. It had taken inter-corporate deposit from said company and claimed that since said deposit was to be repaid before end of relevant year, it could not be treated as loan. He submitted that the Tribunal held that even though assessee claimed it as inter corporate deposit, it was short term loan enjoyed by assessee and, hence, provision of section 2(22)(e) was clearly attracted. It further held that any credit or advantage taken by persons having substantial interest will attract provision of section 2(22)(e) and it does not matter whether it is repaid within same year.

4.7 He submitted that in the case of Principal CIT v. Gladder Ceramics Ltd [2021] 127 taxmann.com 820 (Gujarat), it was held that Section 2(22)(e) is applicable to assessee recipient of loans and advances, not to the company which made the payment. The loan or advance will be taxable under section 2(22)(e) in the hands of the recipient shareholder who has substantial shareholding in the payer company, in the hands of the payer-company. The assessee in its submission has also stated that dividend under Section 2(22)(e) cannot be charged in the hands of the payee. Legal arguments have been taken by the assessee that in view of section 115O, dividend cannot be taxed in the hand of the individual. However, he submitted that this position taken by the Assessee is not acceptable.

4.8 He submitted that the Assessee has placed reliance on CBDT Circular No.7 of 2003. However, this circular is not applicable to the case of the deemed dividend under section.2(22)(e) of the Act. Para.no.58 of the Circular clarifies the additional income tax in respect of the amount of dividend declared, distributed or paid under subsection (1) of section. 115O of the Act. Here the question

is not of the taxability of the dividend as envisaged in section 115O but with regard to the deemed dividend, which has been excluded from the purview of section 115O of the Act by inserting an explanation to the chapter itself.

4.9 Considering the above, he submitted that the addition made by the Assessing Officer under section.2(22)(e) of the Act is to be upheld and the issues raised by the assessee be dismissed.

5. We have heard the rival submissions and perused the materials available on record. We find that ld. AO has made addition on account of loans and advances received by assessee from M/s. Valdel Engineers and Constructors Private Limited at Rs.1.6 Crores. The assessee has received first Rs.60 lakhs on 31.12.2009 and returned the same on 6.1.2010. This is a temporary accommodation taken by the assessee from M/s. Valdel Engineers and Constructors Private Limited.

5.1 First, we will decide the first loan of Rs.60 lakhs. This loan has been taken by assessee on 31.12.2009 and repaid the same within 8 days i.e. 8.1.2010. The contention of the assessee's counsel is that this is a temporary accommodation squared off within 8 days. According to the ld. A.R., it won't fall under the purview of section 2(22)(e) of the Act as this is not a "Loan".

5.2 Section 2(22)(e) of the Act stipulates that any payment by a company, not being a company in which the public is 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 share-holder, being a person who is the beneficial owner of the shares, holding not less than 10% voting power shall be deemed as dividend in the hands of the shareholder. Section 2(22)(e) creates a fiction providing certain circumstances under which certain kinds of payments made to the persons specified therein are to be treated as deemed dividend income. As per the 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% of the voting power.
   (c) A concern (other than company) in which such shareholder has at least 20% of interest.
3. The payment of loan or advance is not in the course of ordinary business activity.

5.3 Further, this temporary accommodation received by the assessee can neither be treated as a loan or advance for the purpose of section 2(22)(e) of the Act. A loan is granted for temporary use of money or temporary accommodation without any agreement. In the instant case, such basic feature, such characteristic, a loan transaction conspicuous by their absence. Therefore, temporary accommodation cannot be considered as a loan. As such, section 2(22)(e) of the Act cannot be applied on this accommodation of Rs.60 lakhs for 8 days cannot be considered as a deemed dividend u/s 2(22)(e) of the Act. For this purpose, we place reliance on the decision of Cochin Bench in the case of DCIT Vs. N. Rajagopal (152 ITD 884), wherein held as follows:

> *"34. Section 2(22)(e) enacted a deeming fiction whereby the scope and ambit of the word "dividend" has been enlarged to bring within its sweep certain payments made by a company as per the situations enumerated in Section 2(22)(e). It is a settled-rule of interpretation of a fiction that the Court should ascertain for what purpose the fiction is created and after ascertaining the purpose, the Court has to assume all facts which are incidental to the giving effect to that fiction. Such a deeming fiction would not be given a wider meaning than what it purports to do. The provision would necessarily be accorded, strict interpretation and the ambit of the fiction would not be pressed beyond its true limits.*

35. Section 2(22)(e) has not been enacted to stifle normal business transaction carried out during the course of business. It not obviously brings within its limited purview collection of debts from customers so to ensure the speedy recovery of trade debts. The section, by indicating a deeming faction, would being within its sweep any payment by a company "by way of advance or loan to shareholder….. to any concern in which such shareholder is a member and in which he has a substantial interest". The basic issue to be examined is whether credit balances in the accounts can be construed as "advance" or "loan" by these companies. In so far as other ingredients as required to be fulfilled under section 2(22)(e) are concerned, there is no dispute raised in appellate proceedings.

36. The amount received by the assessee can neither be treated as loan or advance for the purpose of section 2(22)(e). A loan is granted for temporary use of money or temporary accommodation. In the instant case, such basic features which characteristics, a loan transaction are conspicuous by their absence. Therefore, the amount, in the instant case, cannot be construed as a loan."

5.4 Further, in case of Gurbinder Singh Vs. ACIT (161 ITD 256) (Chennai) wherein it was held as under:

"9. Sec. 2(22)(e) enacted a deeming fiction whereby the scope and ambit of the word "dividend" has been enlarged to bring within its sweep certain payments made by a company as per the situations enumerated in S.2(22)(e). It is a settled-rule of interpretation of a fiction that the Court should ascertain for what purpose the fiction is created and after ascertaining the purpose, the Court has to assume all facts which are incidental to the giving effect to that fiction. Such a deeming fiction would not be given a wider meaning than what it purports to do. The provision would necessarily be accorded, strict interpretation and the ambit of the fiction would not be pressed beyond its true limits. Sec. 2(22)(e) has not been enacted to stifle normal business transaction carried out during the course of business. The section, by indicating a deeming faction, 'would bring within its sweep any payment by a company "by way of advance or loan to shareholder .... to any concern in which such shareholder is a member and in which he has a substantial interest." The basic issue to be examined in the present case is whether debit balances in the accounts can be construed as "advance" or "loan" by these companies. In so far as other ingredients as required to be fulfilled under S. 2(22)(e) are concerned, there is no dispute raised before us.

10. In so far debit balance in the name of director in the books of account of the assessee to be considered as deemed dividend. In view of the binding decision of jurisdictional High Court in the case of Sunil Kapoor(supra) wherein observed that any amount paid to the assessee by the company during the relevant year, loan amount repaid by the

assessee in a same year should be deemed to be construed as "dividend" for all purposes. Further it is noted by the Jurisdictional High Court in that case that while computing the deemed dividend one has to be considered the payments made by the assessee to the company. Hence it is observed by the Court that each debit will have to be individually considered because it may or may not be a loan. The AO is, therefore, directed to verify the each debit entry on the aforesaid loan and treat only the excess amount of debit in the books of accounts of the company as a deemed dividend u/s.2(22)(e) of the Act. In other words, only those net amounts which reflected the debit side of the books of accounts of the assessee falling under the definition of the loans and advances, is with regard to these assessees in the relevant assessment years will be entitled to be taken as a deemed dividend. In other words, the AO has to compute the day to day debit balance of these assessees in the books of accounts and thereafter the AO has to arrive at average yearly balance of the debit in the books of account of each company and compare with it, accumulated profit in respect of each company and lower of these to be considered as deemed dividend in the hands of present assessee. With this observation, we remit the issue to the file of AO for fresh consideration."

5.5 Accordingly, this addition of Rs.60 lakhs deserves to be deleted and decided in favour of assessee.

5.6 With regard to loan of Rs.1 Crore, the contention of the assessee is that this loan is not free of interest and assessee paid interest at 15% p.a. As such, such loan cannot be considered as gratuitous loan availed by the assessee. Hence, section 2(22)(e) of the Act cannot be applied.

5.7 Hon'ble Calcutta High Court in the case of Pradip Kumar Malhotra (2011) 338 ITR 538, while dealing with clause (e) of section 2(22) of the Act has held that if loan or advance is given to a shareholder as a consequence of any further consideration which is beneficial to the company received from such a shareholder, in such case, such advance or loan cannot be said to a deemed dividend within the meaning of the Act. The relevant observation of the Hon'ble Court reads as under:

"10. After hearing the learned counsel for the parties and after going through the aforesaid provisions of the Act, we are of the opinion that the phrase "by way of advance or loan" appearing in sub-clause (e) must be construed to mean those advances or loans which a shareholder enjoys for simply on account of being a person who is the

beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent. of the voting power ; but if such loan or advance is given to such shareholder as a consequence of any further consideration which is beneficial to the company received from such a shareholder, in such case, such advance or loan cannot be said to a deemed dividend within the meaning of the Act. Thus, for gratuitous loan or advance given by a company to those classes of shareholders would come within the purview of section 2(22) but not to the cases where the loan or advance is given in return to an advantage conferred upon the company by such shareholder." (Emphasis supplied)

5.8 We further find that Hon'ble Karnataka High Court in the case of CIT vs. N.S. Narendra [2021] 129 taxmann.com 335 (Kar) after considering various decisions cited therein has held that gratuitous loan or advance given by a company to the classes of shareholders specified therein would come within the purview of section 2(22) but not to the cases where the loan or advance is given in return to an advantage conferred upon the company by such shareholder. The intention behind the provisions of section 2(22)(e) of the Act is to tax dividend in the hands of shareholders.

5.9 Thus, the ratio of the various decisions rendered by the Hon'ble High Courts is that provisions of Section 2(22)(e) of the Act comes into play only if the advance or loan paid by the company is for individual benefit of the assessee or the alleged business transaction is a mere smoke screen to cover a benefit obtained by an assessee from the company in which he is a shareholder, without any business expediency.

5.10 In the present case also, assessee stated that the assessee has paid interest to M/s. Valdel Engineers and Constructors Private Limited at Rs.1 Crore @ 15% p.a. and also filed the relevant details. In our opinion, if the assessee borrowed the money and paid interest on it, it is a commercial transaction which would not fall within the purview of section 2(22)(e) of the Act and CBDT Circular No.19 of 2017 dated 12.6.2017, wherein stated that commercial transaction

would not fall within the ambit of the word "advance" in section 2(22)(e) of the Act. However, the ld. AO has not examined relevant details, which needs to be examined at the end of ld. AO. In view of this, we are setting aside this issue of addition of Rs.1 Crore to the file of ld. AO to examine the same afresh after giving an opportunity of hearing to the assessee.

6. In the result, appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 20th May, 2024

Sd/-	**Sd/-**
(Keshav Dubey)	**(Chandra Poojari)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 20th May, 2024.
VG/SPS

Copy to:

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

By order

Asst. Registrar,
ITAT, Bangalore.