

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "F", NEW DELHI  
BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER  
AND  
SHRI O.P. KANT, ACCOUNTANT MEMBER

	I.T.A. No. 5722/DEL/2011 (AY. 2008-09) AND I.T.A. NO. 996/DEL/2014 (AY 2008-09)	
SH. PRADEEP SINGH, A-13A, GREEN PARK MAIN, NEW DELHI - 110 016 (PAN: ABIPS8126Q)	VS.	ACIT, RANGE-24, NEW DELHI
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>

Assessee by : Sh. CS Aggarwal, Sr. Adv. & Sh.  
RP Mall, Adv.  
Department by : Sh. FR Meena, Sr. DR

**Date of Hearing : 10-08-2016**  
**Date of Order : 19-08-2016**

**ORDER**

**PER H.S. SIDHU, JM**

Assessee has filed these two Appeals against the separate Orders dated 5.10.2011 and 13.1.2014 respectively passed by the Ld. Commissioner of Income Tax (Appeals)—XXIII, New Delhi pertaining to assessment year 2008-09. Since these appeals pertain to quantum addition and penalty for the same assessment year, hence, the appeals were heard together and are being disposed of by this common order for the sake of

convenience. We are dealing with first with quantum addition raised in ITA No. 5722/Del/2011 (AY 2008-09).

2. The Grounds raised in ITA No. 5722/Del/2011 (AY 2008-09) read as under:

*"1. That the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in sustaining an aggregate addition of Rs. 40,61,517/- as deemed income u/s 2(22)(e) of the Income Tax Act.*

*2. In doing so he has failed to appreciate that the amounts received by the assessee was neither advances or the loan, but was mere advances in the nature of deposit made by the three companies for their business requirement, which deposits were made by them, in order to enable them to participate in the project (undertaken by the assessee) between the assessee and Landmark Apartments Pvt.Ltd.*

*3. That the learned authorities have failed to appreciate that it is not any and every sum received by a share holder from a company of which he is a share holder could be brought to tax and treated as a deemed dividend within the meaning of section 2(2)(e) of the Act, even when the amount is advanced by the company with the share holder for the purpose of their business.*

*That the findings recorded by the CIT(A) in his order that the companies namely M/s PPSL, M/s PMMPL and M/s SEPL had no apparent business transaction is highly misconceived and is contrary to factual matrix available on record and supported by memorandum of understanding as well as resolution passed by the assessee companies before making the advances by way of deposits of the amounts with the assessee for the purposes of their business.*

*4. That the learned Commissioner of Income Tax (Appeals) has further erred in sustaining a disallowance of Rs. 4,08,800/- being the business loss suffered by the assessee in the course of his Real Estate Business. The findings that it represented the amount of loss suffered represent capital loss is erroneous both on facts and in law.*

*It is therefore prayed that the additions sustained to the total income of the assessee company be directed to be reduced by sums of Rs. 40,61,517/- and Rs. 4,08,800/- and it be further held that the interest levied and sustained under section 234B of the Act of a sum of Rs. 92,18,211/- is not leviable."*

2.1 The grounds raised in ITA No. 996/Del/2014 (AY 2008-09) read as under:-

"1 That the learned Commissioner of Income Tax, (Appeals), New Delhi has erred both in law and on facts in sustaining penalty of Rs. 14,75,850/- u/s 271(1)(c) of the Act on the following additions/disallowances made in the order of assessment:

<b>Sr. No.</b>	<b>Particulars of additions/disallowances</b>	<b>Amount (Rs.)</b>
i)	<i>Disallowance of business loss on sale of land by holding the same as capital loss</i>	<i>2,93,070</i>
ii)	<i>Addition on account of deemed dividend in respect of transactions with M/s Prama Projects Solutions (P) Ltd.</i>	<i>22,28,293/-</i>
iii)	<i>Addition on account of deemed dividend in respect of transactions with M/s Prama Marketing Pvt. Ltd.</i>	<i>17,00,000/-</i>
iv)	<i>Addition on account of deemed dividend in respect of transactions with M/s Sanyog Estate Pvt. Ltd.</i>	<i>73,224/-</i>
v)	<i>Disallowance out of legal and professional expenses</i>	<i>38,500/-</i>
	<i>Total</i>	<i>43,33,087/-</i>

1.1 That since there was no satisfaction recorded in respect of additions aggregating to Rs. 43,33,087/- in the order of assessment u/s 143(3) of the Act, the penalty levied and sustained is per se without jurisdiction.

1.2 That the learned Commissioner of Income Tax, (Appeals) has failed to appreciate that it was not a case where any fact had been incorrectly disclosed by assessee but was a case where a conclusion which was not in agreement with the claim of the assessee was arrived in the order of

*assessment and hence there could be no valid basis to hold that assessee is liable for penalty u/s 271(1)(c) of the Act.*

*1.3 That the finding that "the AO has effectively demolished the appellant's argument that the said additions/disallowances totaling Rs. 43,33,088/- were allowable business expenses given the facts and circumstances of the case" is not based on correct appreciation of facts and circumstances of the appellant and therefore unsustainable.*

*1.4 That furthermore the specific finding recorded by the learned Commissioner of Income Tax, (Appeals) the learned Assessing officer while holding that loss of Rs. 4,08,800/- represents capital loss and not business loss has clearly brought out "that the contention of the appellant that this piece of land was purchased by him from Smt. Kesar Devi for his clients M/s Selene Construction Pvt. Ltd. And M/s Juventus Estates Pvt. Ltd. Was false" is also incorrect, contrary to facts and any case could not have been made a basis to sustain the penalty in the light of the settled judicial position that no penalty under section 271(1)(c) of the Act is leviable for holding the loss as capital loss instead of business loss declared by the appellant.*

*2. That the learned Commissioner of Income Tax, (Appeals) has further erred in law and on facts in not holding that order of penalty dated 25.03.2013 is barred by limitation and therefore deserves to be quashed as such.*

*It is therefore prayed that the penalty levied of Rs. 14,75,850/- u/s 271(1)(c) of the Act and sustained by the learned Commissioner of Income Tax, (Appeals) may kindly be deleted. It be further held that the order of penalty dated 25.03.2013 was barred by limitation and not in accordance with law and appeal of the appellant may kindly be allowed."*

3. The brief facts of the case are that assessee is an individual and derive income from salary, business of real estate, capital gain, house property, other sources and agriculture. For the year under consideration, assessee has filed the return of income on 29.09.2008 declaring an income of Rs. 35,13,02,662/-. In this case return of income of the assessee for the instant assessment year was taken up for scrutiny and notice under section 143(2) of the Act dated 5.8.2009 was issued which has been received by the assessee on 24.09.2009. Thereafter a general questionnaire was issued u/s 142(1) of the Act on 18.01.2010. During the course of the course of the

assessment proceedings, assessee on the basis of the advice of the expert, suo moto decided to withdraw the claim of expenses of Rs 13 Crore for the instant assessment year and accordingly it filed a letter dated 26.08.2010 wherein it prayed that the expenses claimed in AY 2008-09 of Rs. 13 crores be treated as withdrawn, and returned income be kindly increased by including the said sum. After going through the records, AO has completed the assessment u/s. 143(3) of the I.T. Act vide his order dated 26.11.2010 and made the various additions.

4. Against the assessment order dated 26.11.2010, assessee appealed before the Ld. CIT(A), who vide impugned order dated 05.10.2011 has partially upheld the additions made in the order of assessment and partly allowed the appeal of the assessee.

5. Aggrieved with the aforesaid order of the Ld. CIT(A), assessee is in appeal before the Tribunal.

6. Ld. Counsel of the assessee in support of his contention has filed the Written Synopsis. For the sake of convenience, we are reproducing the same as under:

**2. Addition made by the learned AO and sustained by the learned CIT(A) of a sum of Rs. 40,61,517/- by invoking section 2(22)(e) of the Act: (Ground No. 1-3)**

*2.1 In so far as the first issue is concerned, the learned A.O. has held that the amounts received by the assessee and credited in the accounts of the respective companies named above represents loan and is thus a deemed dividend within the meaning of section 2(2)(e) of the Income Tax Act.*

*2.2 That apart from the sequence of events (enclosed as Annexure-A), the facts in brief in respect of the said issue is stated as under:*

*2.3 The assessee is admittedly engaged in the business of development of Real Estate. (Page 25). That the assessee is a shareholder of following*

three companies and had substantial interest in the aforesaid companies within the meaning of section 2(22)(e) of the Income Tax Act.

- (i) Prama Project Solution Pvt. Ltd.
- (ii) Prama Marketing Pvt. Ltd.
- (iii) M/s Sanyog Estate Pvt. Ltd.

2.4 During the instant year, the aforesaid three companies had advanced sums to the assessee in the course of the business which was credited to the respective accounts in the books of the assessee. The amounts advanced by the aforesaid three companies are as under:

<b>S.No.</b>	<b>Name of the company from which advance was received in the regular course of business</b>	<b>Sum advanced in the regular course of business</b>	<b>Addition made u/s 2(22)(e) only to the extent of the accumulated profits.</b>
i.	Prama Project Solution Pvt. Ltd.	Rs. 39,50,000	Rs. 22,28,293
ii.	Prama Marketing Pvt. Ltd.	Rs. 18,60,000	Rs. 18,60,000
iii.	M/s Sanyog Estate Pvt. Ltd.	Rs. 5,00,000	Rs. 73,224
Total addition made by invoking section 2(22)(e)			Rs. 40,61,517/-

2.5 It is submitted that before providing the aforesaid advances, the companies had entered into MOU with the assessee stipulating the purpose for which advances were made to the assessee:

<b>Date</b>	<b>MOU between</b>	<b>Pages of PB</b>	<b>Purpose of MOU</b>
24.05.2007	Assessee and M/s Prama Project Solution Pvt. Ltd.	104 - 106	For investing surplus funds into a project which would be a good source of earning with reasonable returns.
24.05.2007	Assessee and M/s Prama Marketing Pvt. Ltd.	119 - 121	For investing surplus funds into a project which would be a good source of earning with reasonable returns.
24.05.2007	Assessee and M/s Sanyog Estate Pvt. Ltd.	144-146	For acquiring a commercial space for establishing business center and is looking out for a property suitable for a business center in

			<i>New Delhi/Gurgaon in commercial location.</i>
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2.6 It would be seen from the aforesaid MOUs with M/s Prama Project Solution Pvt. Ltd. and M/s Prama Marketing Pvt. Ltd. that the assessee had entered into an agreement with M/s Landmark Apartments Pvt. Ltd. for investing sufficient surplus funds into a project which would be a good source of earning reasonable returns and thus as the assessee was finding difficulty/alone to invest such large capital and was looking out for another investor to join hands, as such, the aforesaid companies had agreed to join hands with assessee and agreed to make investment in the project and it was for the aforesaid purpose aforesaid companies has advanced the sum of Rs. 39,50,000/- and Rs. 18,60,000 respectively.

2.7 That the assessee had further submitted that, the assessee had entered into a Memorandum of Understanding on 20.01.2007 with M/s Landmark Apartments Pvt. Ltd. to join hand to establish I.T. Park/Call Centre as a project and it was stated in the agreement with M/s Landmark Apartments Pvt. Ltd. that assessee has sufficient funds available with him and has the capacity to arrange funds from other sources including foreign investors and were desirous to deploy the same for the project. That M/s Prama Project Solution Pvt. Ltd. and M/s Prama Marketing Pvt. Ltd. had advanced sums to the assessee to make investment in the aforesaid project. However, as the aforesaid project had since not fortified, it requested Landmark Apartments Pvt. Ltd. to refund the amount invested by the assessee which was refunded by M/s Landmark Apartments Pvt. Ltd. on 07.05.2009 (**page 199**).

2.8 Further, from the perusal of the MOU between assessee and M/s Sanyog Estate Pvt. Ltd. placed at **pages 144-146** of PB, it would be seen that sum of Rs. 5,00,000/- has been advanced to the assessee to search out a place in New Delhi/Gurgaon for opening a business centre in commercial location and the price of the property should not exceed Rs. 1,00,00,000/- i.e. sum of Rs. 5,00,000/- advanced was for the purpose of giving advance for the purchase of the business centre.

2.9 The aforesaid facts clearly demonstrate that the amounts received by the assessee from the aforesaid companies were commercial advances made by such of the companies and were not loan per-se so as to bring the same within the meaning of deemed dividend as per the provisions of section 2(22)(e) of the Act.

3. That during the course of the assessment proceedings, appellant contended that the amounts received were not loan per-se and the amounts were received from the aforesaid companies during the course of business on their behalf and as such, such advances received is outside the ambit of section 2(22)(e) of the Act. In support the aforesaid submission, that the amount received by assessee is business advance and is not a loan, the assessee had furnished the following evidence:

- (i) In respect of the credit in the account of **M/s Prama Project Solution Pvt. Ltd:**
  - a. Copy of Memorandum of Understanding (MOU) executed on 24.05.2007 (**pages 104 – 106**).
  - b. Copy of the account of M/s Prama Project Solution Pvt. Ltd. in the books of assessee (**Page 107**).
  - c. Copy of the Auditors Report alongwith audited Balance Sheet as on 31.03.2007 (**Pages 108-110**).
- (ii) In respect of **M/s Prama Marketing Pvt. Ltd:**
  - a. Copy of Memorandum of Understanding (MOU) executed on 24.05.2007 (**pages 119 -121**);
  - b. Copy of the account of M/s Prama Marketing Pvt. Ltd. in the books of assessee (**Page 122**).
  - c. Copy of the Auditors Report alongwith audited Balance Sheet as on 31.03.2007 (**Pages 123-134**).
  - d. Copy of the Auditors Report alongwith audited Balance Sheet as on 31.03.2008 (**Pages 135-143**).
- (iii) Similarly in respect of **M/s Sanyog Estates Pvt. Ltd.:**
  - a. Copy of Memorandum of Understanding (MOU) executed on 24.05.2007 (**pages 144 – 146**);
  - b. Copy of the account of M/s Sanyog Estates Pvt. Ltd. in the books of assessee (**Page 147**).
  - c. Shareholding pattern of M/s Sanyog Estates Pvt. Ltd. (Page 148)
  - d. Copy of the Auditors Report alongwith audited Balance Sheet as on 31.03.2007 (**Pages 149-158**).
  - e. Copy of the Auditors Report alongwith audited Balance Sheet as on 31.03.2008 (**Pages 159-164**).

4. The A.O. however despite the aforesaid contentions rejected the submission of the assessee on the ground that, MOU was general in nature, and same has no legal value as it is neither registered nor notarized. He has further held that apart from the aforesaid transactions, no business transaction has undertaken between the assessee and such companies, as such, he held that such transaction cannot be held to be business and hence

*he made the addition by invoking section 2(22)(e) of the Act to the extent of the accumulated profits by such companies.*

*5. The Finding of the learned AO while holding that sum received is deemed dividend in respect of sum received from aforesaid three companies are as under:*

*5.1 The learned AO has rejected the claim of the assessee in the case of M/s Sanyog Estates Pvt. Ltd. on the ground that, "in fact on examining the balance sheet of the assessee for subsequent year i.e. F.Y. 2008-09 it is seen that the above amount still remains in the hands of the assessee and no business transaction has been carried out by the assessee and M/s Sanyog Estate Pvt. Ltd. Accordingly, in this case also the plea that the above advance was part of the business deal is devoid of any basis. On examining the balance sheet of M/s Sanyog Estate Pvt. Ltd., it is seen that the company has accumulated profits to the tune of Rs. 73,224/- only. Accordingly, the deemed dividend u/s 2(22)(e) is computed to the extent of accumulated profits amounting to Rs. 73,224/- and the said amount is added to the total income of the assessee".*

*5.2 In the case of M/s Prama Marketing Pvt. Ltd. the same has been rejected on the ground that, "here also the only argument which has been advanced by the assessee during the course of these proceedings is that the transactions were a part of business transaction with M/s Prama Marketing Pvt. Ltd. As part of submission on 26.10.2010, the assessee has filed a copy of memorandum of understanding dated 24.05.2007 with M/s Prama Marketing Pvt. Ltd. in whchi 50% shareholding each is held by the assessee and has verified. On behalf of M/s Prama Marketing Pvt. Ltd. Smt. Mamta Singh wife of the assessee has signed the MOU. The MOU provides that M/s Prama Marketing Pvt. Ltd. will make investment in real estate projects out of the sufficient surplus funds from the assessee. The terms of the MOU are totally general in nature and there is no specific transaction which is mentioned herein. The MOU has no legal value as it is not registered or notarized and is therefore a plain piece of paper which does not add any legal credence to the claim of the assessee. As can also be seen from the copies of accounts which are produced above there is not a single transaction between the assessee and M/s Prama Marketing Pvt. Ltd. apart from the give and take of the said loan of the advances. As such the claim of the assessee that this is the business deal lacks basis entirely."*

*5.3 In the case of M/s Prama Project Solution Pvt. Ltd. the A.O. held that, "the MOU provides that M/s PPSPL will make investment in real estate*

*projects out of the sufficient surplus funds from the assessee. The terms of the MOU are totally general in nature and there is no specific transaction which is mentioned herein. The MOU has no legal value as it is no registered or notarized and is therefore a plain piece of paper which does not add any legal credence to the claim of the assessee. As can also be seen from the copy of accounts which has been produced above that there is not a single transaction between the assessee and M/s PPSPL apart from the give and take of the said loan/advances which further establishes no such business transaction took place later also. As such the claim of the assessee that this is a business deal lacks basis entirely and judicial decision cited by the assessee (Smt. Nigam Chawla vs. ITO, 28 SOT 503) is not only distinguishable on facts but is also not applicable in this case on principle.*

*On examining the Balance sheet of M/s PPSPL as on 31.03.2008, it is seen that there was accumulated profits to the extent of Rs. 22,28,293/- and accordingly the deemed dividend u/s 2(22)(e) is computed to the extent of accumulated profits amounting to Rs. 22,28,293/- and the said amount is added to the total income of the assessee."*

*6. It is submitted that aforesaid finding of the learned AO has been arbitrarily upheld by the learned CIT(A) without appreciating the factual substratum of the case. In fact the finding of the A.O. that no business transaction had been undertaken by the assessee was upon overlooking the facts on record i.e. the assessee had entered into a development transaction on 20.01.2007 with Landmark Apartments Pvt. Ltd. which was also stated in the Memorandum of Understanding entered between the assessee and the aforesaid two creditor companies (see page 105 and 120 of Paper book).*

*7. At the outset it is submitted that the amount advanced by the three companies were not loan taken by the assessee but were advances made by the such companies in the normal course of business as such, the provisions of section 2(22)(e) of the Act have no application. The claim of the appellant that the amount credited in the books of account was by way of advance which cannot be characterised as loan, has been rejected on mere assumption and in disregard of the fact that such companies had contributed the amount for the project undertake by the assessee with Landmark Apartments Pvt. Ltd. It is submitted that, in the instant case, the learned A.O. has failed to comprehend that the amount received was an advance but not a loan. He has also failed to comprehend that, had it been a case of loan interest would have normally been paid or charged by the company who had allegedly advanced the loan. It is submitted that sum received by the assessee from such companies was advance and was supported by the documents which establish that the amount received was on account of*

*commercial consideration. It is well settled rule of law that the nature of receipt is to be seen at the time of receipt of the money and in the absence of any evidence to the contrary, that the amount received had not been received for a commercial transaction, the A.O. was not justified in holding that the amount received were deemed dividend within the meaning of section 2(22)(e) of the Act.*

8. *The appellant submits that the Hon'ble Delhi High Court in the case of **CIT vs. Raj Kumar** reported in 318 ITR 462, has taken a view on the interpretation of section 2(22)(e) of the Income Tax Act that, every advance is not a loan when received by a shareholder and cannot be treated to be deemed dividend. In the aforesaid judgment, Hon'ble High Court at page 483 has held as under:*

*"This court in Raj Kumar's case extensively referred to the report of the Taxation Enquiry Commission and the speech of the Finance Minister in the Budget while introducing the Finance Bill. Ultimately, this court in the said judgment held as under (page 473):*

*"A bare reading of the recommendations of the Commission and the speech of the then Finance Minister would show that the purpose of the insertion of sub-clause (e) to section 2(6A) in the 1922 Act was to bring within the tax net monies paid by closely held companies to their principal shareholders in the guise of loans and advances to avoid payment of tax.*

*Therefore, if the said background is kept in mind, it is clear that sub-clause (e) of section 2(22) of the Act, which is in parimateria with sub-clause (e) of section 2(6A) of the 1922 Act, plainly seeks to bring within the tax net accumulated profits which are distributed by closely held companies to its shareholders in the form of loans. The purpose being that persons who manage such closely held companies should not arrange their affairs in the manner that they assist the shareholders in avoiding the payment of taxes by having these companies pay or distribute, what would legitimately be dividend in the hands of the shareholders, money in the form of an advance or loan.*

*If this purpose is kept in mind then, in our view, the word 'advance' has to be read in conjunction with the word 'loan'. Usually attributes of a loan are that it involves positive act of lending coupled with acceptance by the other side of the money as loan: it generally carries an interest and there is an obligation of repayment. On the other hand, in its widest meaning of term 'advance' may or may not include lending. The word 'advance' if not found in the company of or in conjunction with a word 'loan' may or may not include the obligation of repayment. If it does, then it would be a loan. Thus, arises the conundrum as to what meaning one would attribute to the term*

'advance'. The rule of construction to our minds which answers this conundrum is *noscitur a sociis*. The said rule has been explained both by the Privy Council in the case of *Angus Robertson vs. George Day* [1879] 5 AC 63 by observing 'it is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them' and our Supreme Court in the case of *Rohit Pulp and Paper Mills Ltd. vs. Collector of Central Excise*, AIR 1991 SC 754 and *State of Bombay vs. Hospital Mazdoor Sabha*, AIR 1960 SC 610".

9. Same view has been taken in the following judicial pronouncements:

- a. **CIT vs Ambassador Travels (P) Ltd. HC (Delhi)** 173 Taxman 407
- b. **CIT vs Raj Kumar HC (Delhi)** 181 Taxman 155
- c. **CIT vs Creative Dyeing and Printing (P) Ltd. HC (Delhi)** 184 Taxman 483
- d. **CIT vs Sunil Sethi ITA 569/2009 HC (Delhi)**
- e. **CIT vs Arvind Kumar Jain ITA 589 of 2011 (30 September 2011)**
- f. **CIT vs. International Land Development Pvt. Ltd. 1296/2011 & 1297/2011 dated 02.02.2012 HC (Delhi)**
- g. **Atul Mittal** in ITA No. 3863/Del/2002 (ITAT Del).
- h. **Nigam Chawala** 2009 28 SOT 503

10. It is further submitted that from the perusal of the documents and books of accounts produced during the course of assessment, it would be seen that the entries in the books of accounts did not reflect the sum received as a loan and no efforts were made by the learned AO to make any enquiry from the such companies about the nature of the advances made by them on the respective dates and thus the revenue failed to discharge its burden in rebuttal to the evidence furnished by the assessee. It is submitted that while making the aforesaid addition, the evidence furnished by the assessee has been rejected on arbitrary grounds. In the face of the documentary evidence, the claim of the assessee could not have been rejected without any positive and tangible material to rebut the same. The findings of the learned A.O. and CIT(A) both are based on mere conjectures, unsupported by any evidence without prejudice, no adverse findings could have been recorded by the authorities based on mere suspicion. It is settled law that, **no addition can be made on the basis of surmises, suspicion and conjectures**. Reliance for this proposition is placed on **37 ITR 271 (SC) Uma Charan Shaw & Bros. Co. v. CIT**. It has been further held in the following cases that **suspicion howsoever strong cannot take the place of proof**:

- i) **26 ITR 775 (SC) at 782 (SC) Dhakeswari Cotton Mills Ltd. vs. CIT**

*'As regards the second contention, we are in entire agreement with the learned Solicitor General when he says that the ITO is not fettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a Court of law, but there the agreement ends; because it is equally clear that in making the assessment under sub-s. (3) of s. 23 of the Act, the ITO is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment under s. 23(3).*

ii) **37 ITR 151(SC) Omar Salay Mohammad Sait v CIT**

*The conclusions reached by the Tribunal should not be coloured by any irrelevant considerations or matters of prejudice and if there are any circumstances which required to be explained by the assessee, the assessee should be given an opportunity of doing so. On no account whatever should the Tribunal base its findings on suspicious, conjectures or surmises nor should it act on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions, conjectures or surmises and if it does anything of the sort, its findings, even though on questions of fact, will be liable to be set aside by this Court.*

iii) **26 ITR 736 (SC) Dhirajlal Girdharilal v CIT, Bombay**

*When a Court of fact acts on material, partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the Court was affected by the irrelevant material used by it in arriving at its finding. Such a finding is vitiated because of the use of inadmissible material*

iv) **37 ITR 288 (SC) Lal Chand Bhagat Ambica Ram v CIT**

*The Tribunal in arriving at the conclusion it did in the present case indulged in suspicions, conjectures and surmises and acted without any evidence or upon a view of the facts which could not reasonably be entertained or the facts found were such that no person acting judicially and properly instructed as to the relevant law could have found, or the finding was, in other words, perverse and the Court is entitled to interfere.*

v) **AIR 1977 SC 796 Krishnand vs. State of Madhya Pradesh**

vi) **AIR 1974 SC 171 Jayadayal Poddar vs. Mst Bibi Hazra**

vii) **242 ITR 133 (Ker CIT vs. K. Mahim Udma**

11. In the instant case it would be seen that the learned A.O. has completely erred in holding that the amount was received by the assessee as loan, despite the fact that necessary evidence to support that the amount was advanced to the assessee by the company in which it was the shareholder was supported by the documentary evidence namely the MOUs. No explanation was sought by the A.O. or any effort was made by the A.O. to disprove the evidence furnished by the assessee. It is further submitted that, there can be no denying of the fact that the assessee did discharge its onus when it led the necessary evidence in the form of MOUs. However, the burden thereafter lay on the revenue to disprove the evidence placed on record by the assessee (**CIT V Genesis Commet (P) Ltd reported in 163 Taxman 482 (Del)**). In the absence of rebutting the evidence furnished by the assessee, the learned A.O. went wrong in concluding that the amount received by the assessee was a loan and was not a sum advanced by the companies for commercial dealing i.e. to make them enable to participate in the project undertaken by the assessee on his own behalf and also for the benefit of participators.

Re: Business loss of Rs. 4,08,000/-

12. Apart from the aforesaid, learned AO has also made a disallowance of Rs. 4,08,000/- in respect of the loss on sale of land at Pawala Khushpur. It is submitted that assessee in the course of its business has purchased a land for Rs. 65,62,500/- in August, 2007 and same was sold in December, 2007 at a loss of Rs. 4,08,800/- and such loss was claimed in the P&L Account. Aforesaid loss was disallowed on the ground that such sale and purchase of land is not business transaction but is investment of the assessee and hence is a capital loss. Aforesaid order of the learned AO has been upheld by the learned CIT(A).

13. It is most respectfully submitted that in the instant case, learned AO/CIT(A) both have neither disputed the genuineness of the loss nor has disputed the fact that the assessee is engaged in Real Estate business, however, on arbitrary assumption it was held that aforesaid property was purchased as investment, as such, the loss on sale of land is capital loss. It is submitted that instant addition has been made purely on suspicion and no basis whatsoever has been given for assuming that such land was purchased as investment and not for the purpose of business. It is submitted that aforesaid land was purchased during the course of its business as such, loss incurred on the sale of land is business loss and same cannot be disallowed by holding it to be capital loss.

7. On the contrary, Ld. DR relied upon the order passed by the Ld. First Appellate Authority and Assessing Officer and stated that the Appeal filed by the Assessee may be dismissed.

8. We have heard both the parties and perused the relevant records available with us, especially the orders passed by the revenue authorities alongwith the Written Synopsis filed by the assessee as well as the case laws cited by him, as aforesaid.

8.1 Ground No. 1-3 relate to the addition made by the AO and sustained by the CIT(A) of a sum of Rs. 40,61,517/- by invoking section 2(22)(e) of the Act. From the perusal of the orders of the AO & CIT(A), paper book and written submissions filed by the assessee, it is evident that assessee has entered into a memorandum of understanding on 20.01.2007 with M/s Landmark Apartments Pvt. Ltd. to establish I.T. Park/call centre and under the aforesaid MOU assessee has undertaken to arrange funds. As such, on 24.05.2007, assessee has entered in to MOU with M/s Prama Project Solution Pvt. Ltd. and M/s Prama Marketing Pvt. Ltd. to invest into M/s Landmark Apartments Pvt. Ltd. and it was also agreed between them that the profit on the joint investment in M/s Landmark Apartments Pvt. Ltd. will be shared in the ratio of the investment. As such, aforesaid companies had advanced their surplus funds for making investment in the M/s Landmark Apartments Pvt. Ltd. However, AO held that the sum advanced by such companies are deemed dividend and not business transaction on the ground that MOU has no legal value and even the MOU is neither registered nor notorised. The aforesaid finding has been upheld by the CIT(A). We are of the opinion that the findings of the authorities below is unsustainable as from the terms of the MOU it was clear that such companies have joined hands with the assessee for making investment in M/s Landmark Apartments Pvt. Ltd and it has also been agreed that profit arising from the investment

would be shared in the proportion of the investment. That merely because the MOU was not registered or not notarised or transaction did not fructify, does not mean that advance was not for the purpose of business. AO also went wrong in holding that MOU has no legal value as it is settled law that even the oral contract are binding. In the instant case, terms of the understanding are clearly stipulated and under the such terms sums have been advanced to the assessee. This understanding cannot be ignored. In fact it is not in dispute that under the MOU dated 20.01.2007 with M/s Landmark Apartments Pvt. Ltd., assessee has made investment with such company and since the venture did not materialize as such, such invested by the assessee has finally been returned. Hence in such circumstances, we hold that the such advanced by such companies were clearly for the purpose of the business and purely on commercial consideration and hence such sums cannot be termed as deemed dividend.

8.2 Further in respect of sum advanced by M/s Sanyog Estate Pvt. Ltd., it is seen that aforesaid company has also entered into an MOU with the assessee for searching out a place in New Delhi/Gurgaon for opening a business centre in commercial location for a price not exceeding Rs. 1 crore and sum of Rs. 5 lac was given to the assessee as advance for the purchase of the property. However, AO held that apart from this transaction, assessee has not entered with any other transaction with such company. This finding of the AO has been upheld by the CIT(A). We are of the opinion that the findings of the authorities below is unsustainable as from the terms of the MOU it was clear that sum has been advanced to the assessee for searching out a place in New Delhi/Gurgaon for opening a business centre in commercial location and merely because during the year, assessee has not been able to search the space, it does warrant any adverse inference against the assessee. In view thereof, it is held that the sum advanced by M/s Sanyog Estate Pvt. Ltd is for the purpose of the business and purely on

commercial consideration and hence such sums cannot be termed as deemed dividend.

8.3 That the High Court of Delhi in the case of CIT vs. Ambassador Travels (P.) Ltd. reported in [2009] 318 ITR 376 (Delhi) has held that if the transactions are normal business transactions, which were carried out during the course of the relevant previous year, they cannot be described as advances or loans, which form a distinct category of financial transactions and therefore the provisions of section 2(22)(e) of the Act were not at all applicable. Similarly in the case of CIT vs. Raj Kumar reported in [2009] 318 ITR 462 High Court of Delhi has held that the word 'advance' which appears in the company of the word 'loan' could only mean such advance which carries with it an obligation of repayment. Trade advance which are in the nature of money transacted to give effect to a commercial transactions would not, fall within the ambit of the provisions of section 2(22)(e) of the Act. Same view has been taken in the following judgments which has been relied by the assessee:

- a. CIT vs Creative Dyeing and Printing (P) Ltd. HC (Delhi)184 Taxman 483
- b. CIT vs Sunil Sethi ITA 569/2009 HC (Delhi)
- c. CIT vs Arvind Kumar Jain ITA 589 of 2011 (30 September 2011)
- d. CIT vs. International Land Development Pvt. Ltd. 1296/2011 & 1297/2011 dated 02.02.2012 HC (Delhi)
- e. Atul Mittal in ITA No. 3863/Del/2002 (ITAT Del).
- f. Nigam Chawala 2009 28 SOT 503

8.4 That since in the instant case, sum advanced to the assessee by the aforesaid three companies were purely on commercial consideration and was business advance as such, same cannot be treated as deemed dividend u/s

2(22)(e) of the Act, hence we hold that authorities below are not right in treating the aforesaid sums as deemed dividend. The AO is accordingly directed to delete the addition. Thus, ground no. 1-3 are allowed.

8.5 Ground no. 4 is regarding disallowing the business loss of Rs. 4,08,800/- by holding the same to be as short term capital loss. In respect of the aforesaid grounds of appeal it has been submitted by assessee that since the assessee has entered into agreement with M/s Selene Constructions Pvt. Ltd. And M/s Juventus Estates Pvt. Ltd. for acquiring land on their behalf in sector 103 and 104 of Gurgaon for group housing, as such, in order to acquire land, in August 2007 it purchased land in revenue estate of village Pawala Khusrupur, Gurgaon for a sum of Rs. 65,62,500/- and also incurred other expenditure of Rs. 4,08,800/- hence, total expenditure incurred for the purchase of land was Rs. 69,71,300/-. Aforesaid land was situated in sector 106 which is adjoining to sector 103 and 104, and assessee believed that it would be able to buy more land on behalf of such companies adjoining to this land. However, since assessee could not get further land in this sector and other land which were ultimately acquired by the assessee for the aforesaid companies were in other sectors as such, this land was not taken by the aforesaid companies and hence the assessee has to sell this land. This land was sold in December, 2007 for a loss of Rs. 4,08,800/-. As the land was acquired for the purpose of business and not as investment, as such loss suffered on the sale of land was debited in the

profit and loss account as business loss. This loss has been disallowed by the AO by holding that the purchase of this land was not part of business or linked to the deal with the M/s Selene Constructions Pvt. Ltd. And M/s Juventus Estates Pvt. Ltd. And this finding of the AO was also confirmed by the CIT(A), however CIT(A) has allowed the setoff of the same with short term capital gains of Rs. 1,15,730/-. The aforesaid finding of the AO and CIT(A) is unjustified and does not deserve acceptance as admittedly assessee is in the business of real estate and infact it has also entered into M/s Selene Constructions Pvt. Ltd. And M/s Juventus Estates Pvt. Ltd. for acquiring land on their behalf. As such, one thing is more than apparent that the assessee is in the business of sale and purchase of land. Further, the aforesaid land was acquired by the assessee for the purpose of its business and it had not acquired such land for the purpose of investment, hence evenif it is assumed that land in this sector was not part of the deal with such companies, it would not alter the nature of transaction from business to investment. It is settled law that nature of transaction has to be seen at the time of purchase and if at the time of purchase, intention was to earn profit then it would be business transaction and if the property is purchased for the purpose of holding the same then the same would be investment. In the instant case, intention of the asseesse at the time of purchase was clearly to earn profit and hence loss arising from the sale of the land was clearly business loss and not short term capital loss and hence the AO is

accordingly directed to delete the addition. Thus, ground no. 4 is allowed. In view of the above, the finding of the AO/CIT(A) is deleted and appeal of the assessee is allowed.

**ITA NO. 996/DEL/2014 (AY 2008-09)**

9. Since we have already decided the ITA No. 5722/Del/2011 (AY 2008-09) in favour of the assessee in Quantum Appeal, as aforesaid and deleted the additions in dispute, hence, the penalty arises therefrom which is in dispute will not survive. Accordingly, we set aside the orders of the authorities below and delete the penalty in dispute and allow the Appeal filed by the Assessee.

10. In the result, both the Appeals filed by the Assessee stand allowed.

Order pronounced in the Open Court on 19/08/2016.

Sd/-

**[O.P. KANT]**  
**ACCOUNTANT MEMBER**

*Date 19/08/2016*

**"SRBHATNAGAR"**  
**Copy forwarded to: -**

1. Appellant
2. Respondent
3. CIT
4. CIT (A)
5. DR, ITAT

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Sd/-

**[H.S. SIDHU]**  
**JUDICIAL MEMBER**

By Order,

Assistant Registrar,  
ITAT, Delhi Benches