आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'B' अहमदाबाद।

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, AHMEDABAD

BEFORE SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER
AND
SHRI T.R. SENTHIL KUMAR, JUDICIAL MEMBER

ITA No.2105/Ahd/2015
With
Cross Objection No.: 174/Ahd/2015
Assessment Year :2010-11

DCIT, Cir.1(1)(1) Ahmedabad.	Vs	Aaryavart Infrastructure P. Ltd. FF-17A, Pariseema Complex Above J & K Bank C.G. Road, Ahmedabad. PAN : AADCA 4844 Q

(Applicant)		(Responent)

Assesseeby :	Shri Aseem L. Thakkar, AR
Revenue by :	Shri Sudhendu Das, CIT-DR

सुनवाई की तारीख/**Date of Hearing : 06/03/2023**
घोषणा की तारीख /**Date of Pronouncement: 05/06/2023**

आदेश/O R D E R

PER ANNAPURNA GUPTA, ACCOUNTANT MEMBER

The present appeal has been filed by the Revenue against order passed by the Ld.Commissioner of Income-Tax(Appeals)-1, Ahmedabad (hereinafter referred to as "ld.CIT(A)") dated 10.04.2015under section 250(6) of the Income Tax Act, 1961 ("the Act" for short) pertaining to Assessment Year 2010-11. Thereafter the assessee has also filed cross objection bearing CO No.174/Ahd/2015. Both of them are being disposed of by this common order.

2. The Revenue in its appeal has raised the following grounds:

i) The ld.CIT(A) has erred in law and on facts in deleting the addition made u/s.68 of the Act at Rs.1,31,50,000/-

ii) The ld.CIT(A) has erred in law and on facts in deleting the addition made u/s.2(22)(e) under section 68 of the Act.

iii) The ld.CIT(A) has erred in law and on facts in deleting the addition made at Rs.1,52,10,011/- being 25% of labour and transportation charges.

iv) The ld.CIT(A) has erred in law and on facts in partly deleting the addition made at Rs.10,00,000/- on account of short term capital gains.

While the assessee in the CO has raised the following grounds:

i) *The learned Commissioner of Income Tax (Appeals) has erred in holding that the addition made u/s.2(22)(e) of the I. T. Act, 1961 should have been of Rs.37,78,000/- while deleting the addition made by the Assessing Officer of Rs.130264245/- and allowing the appeal for statistical purpose.*

ii) *The learned Commissioner of Income Tax (Appeals) has erred in confirming the disallowance of 10,00,000/- out of disallowance made by the Assessing Officer of Rs.1,52,10,011/- for labour charges and transportation charges.*

3. As transpires from the orders of the authority below, during the assessment proceedings, the AO made addition to the income of the assessee on account of the following:

i)	Short term capital gain	Rs. 10,00,000/-
ii)	Unexplained unsecured loan	Rs. 1,31,50,000/-
iii)	Deemed dividend u/s.2(22)(e)	Rs.13,02,64,245/-
iv)	Labour and transport charges	Rs. 1,52,10,011/-

Thusresulting in total addition of Rs.15,96,24,256/- to the returned income of assessee of Rs.49,01,290/-, resulting in the income being assessed at Rs. Rs.16,45,25,546/-. Out of the above additions made, the additions in respect of unsecured loans, labour charges and transportation charges and short term capital gains were made by the AO in the absence of proper and sufficient evidences being filed by the assessee to substantiate its claim.While with respect to the addition made on account of deemed dividend,

the AO applied the provision of law in this regard to the facts of the case and made addition to the income of the assessee.

4. During appellate proceedings before the Ld.CIT(A), the assessee demonstrated that the AO had misappreciated and not considered evidences filed by the assessee in the correct light and further filed fresh evidences before the ld.CIT(A) with respect to all the above claims. The evidences,filed as additional evidences which the ld.CIT(A) after confronting the same to the AO as per Rule 46 of the Income Tax Rules,were admitted for adjudication. Further after obtaining comments from the AO on the additional evidences furnished by the assessee, the ld.CIT(A) adjudicated all the issues before him, deleting all the additions made by the AO, except for labour and transport charges, which he restricted to the extent of Rs.10,00,000/-. While adjudicating the issue of deemed dividend, the ld.CIT(A) held that as per the provision of law, the loans and advances given to the assessee by related parties could be treated as deemed dividend only to the extent of reserves and surplus available with them, and accordingly taking note of reserves and surplus with the said party, he held that the addition in any case could not have been exceed Rs.37,78,000/-. However, thereafter, taking note of the legal position of the law, with respect to the issue of taxability of deemed dividend in the hands of the shareholder alone and applying the decision of jurisdictional High Court, the ld.CIT(A) deleted the entire addition made on account of deemed dividend as per section 2(22)(e) of the Act, noting the fact that the assessee was not a shareholder of the concerns making the loans/advance.

5. Aggrieved by the same, the Department has come in appeal before us while the assessee has filed CO in the Department's appeal as noted above.

6. Taking up first the Revenue's appeal in **ITA No.2105/Ahd/2015,** ground(i) raised relates to the deletion of addition made under section 68 of the Act of Rs.1,31,50,000/-.

8 The facts relating to the issue and finding of the ld.CIT(A) are at para-(B) of the order, as under:

> *"(B) Ground No. 2 is against the addition of Rs. 1,31,50,000/- u/s. 6.8 of the Act for unsecured loan from M/s Pushparaj Corporation. The A.O in the-impugned order called for the details with contra account and confirmation in respect of unsecured loan accepted by appellant. The appellant furnished such details for most of the parties as recorded by A.O. in the impugned order. In reference to M/s Pusparaj Corporation and Chandraben S. Gandhi, A.O. observed that as per tax audit report, at Ann.4 of the report where detail about name, address, PAN, amount etc. are mentioned of the parties from whom loans were accepted by appellant during previous year, these two names are not there. Further it was observed by A.O. that PAN of M/s Pusparaj corporation was not there. It is therefore despite a confirmation was given by appellant, the A.O. treated Rs.1,31,50,000/- received from M/s Pushparaj Corporation as not supported by PAN hence all the three ingredient viz identity, genuineness; and credit worthiness is not substantiated. The appellant contended in appeal that no objection for M/s Pushparaj Corporation name not there inAnn.4 in tax audit report was taken by A.O. when contra account &confirmation was submitted on 21.03.13 with copy of Bank statement of appellant reflecting* receipt of such money through cheque. No. show cause was issued. The A.O. without application of proper mind made addition of Rs. 1,31,50,000/- in haste though the contra account so submitted clearly reflect that on account of cancellation of one cheque of Rs. 30,00,000/-, the effective amount received / credited of Rs. 1,01,50,000/-. In reference to discrepancy of reconciliation of Rs. 98,41,000/- appearing in the book of appellant with Rs. 95,32,000/- as contra account, it was submitted that plotmaintenance cheque of Rs. 3,09,000/- was settled in next year by M/s| Puspaiaj Corporation for which copy of account, Bank statement were produced along with contra account & confirmation with PAN in appealproceedings. This being additional evidences, the A.O. was sent this withspecific requirement of remand report (as discussed above at para 4G). The A.O. given a sketchy remand report without any verification. It is contended that appellant though submitted contra account with confirmation for A.Y. 10-11 & A.Y. 11-12 but appellant failed to submit Bank statement of M/s Pushparaj Corporation and appellant therefore failed to prove the credit worthiness. Again a doubt was raised about why M/s Pushparaj Corporation was missed by tax auditor. The rebuttal to remand report is already discussed at para 4(I) above.*
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> *I am inclined with appellant. The appellant's audited financial accounts are by same tax auditor who had done tax audit u/s. 44AB of the Act. Under the schedule D of the balance sheet with the heading "unsecured loans from share holders& others" he included name of M/s Pushparaj Corporation reflecting Rs. 98,41,000/-. It is therefore without any inquiry from tax*

^auditor, appellant cannot be held guilty or under suspicion for such by tax auditor. The appellant submitted contra account andconfirmation of M/s Pashparaj Corporation when such details were called by A.O.. This detaifclearly reflect that an amount of Rs.1,01,50,000/- was accepted by appellant during previous year on different dates from M/s Pushparaj Corporation. This contra account and confirmation was having the addreass of the party as 501/Agarwal Complex, Nr. Choice Restaurant, Swastik Char Rasta, Navrangpura, Ahmedabad. This confirmation also has the details of date, cheque no., amount through which appellant received money. These cheques (excluding the cheque no. 448546 of Rs. 30,00,000/- dt. 29.03.10 which got cancelled) were found credited in thebank statement of appellant. It is therefore, the only deficiency was that ofnon availability of PAN. As against this when appellant submitted suchdetails in appeal proceedings, the A.O. has not done any inquiry about whether M/s Pushparaj corporation file the return of income or not and neither M/s Pushparaj Corporation summoned or inquiry made. It is in this) regard, I am inclined with appellant that once contra account with confirmation of any party including address & PAN is filed from whom any money is accepted through cheque then it discharged its onus as casted u/s 68 of the Act. The appellant in rejoinder to remand report relied on various case laws, the ratio are directly applicable to the facts of appellant case. Hon'ble Gujarat high Court in the case of CIT vs. RanchodJivabhalNakhava (Tax appeal No. 50 of 2011 judgment order dt. 20/03/2012) (2012) 21 taxmann.com 1591 (Gujarat) held that (as per head notes)

"Section 68 of the income tax Act, 1961-cash credits asstt. year 06-07 – whether once assessee has established that he was taken money by way of account payee cheques from lender who are all income tax assessee whose PAN have been disclosed initial burden u/s 68 is discharged and then, it is Assessing officer's duty to ascertain from Assessing officer of those lenders, whether in their respective have shown existence of such amount of money and have farthershown that those amount of money had been lent to assessee - Held yes –whetherif A.O. of those creditors are satisfied with explanation given by creditors asregards those transactions reflected in account of creditors — Held yes - whether ifbeforeverifyingsuch fact from A.O. of lenders of assessee, A.O. decides to examine lenders and ask assessee to further prove genuineness and creditworthiness of transaction, it would be against principles laid down u/s 68 -Held yes." The ratio of this judgment of jurisdictional high court is very clear and if applied to the facts of the appellant, Then the conclusion arrived at by A.O. will be unsustainable and addition so made will become unwarranted". It is got verified that M/s Pushparaj Corporation, PAN: AAJFP5519Q filed its return of income for A.Y. 09-10 to A.Y. 11-12 on 29.09.09, 28.09.10 and 27.09.11 respectively declaring therein total income of Rs. 788080, Rs 1655710, and Rs. 2399020 respectively. It is therefore ratio of Hon'ble Gujarat High Court is clearly applicable. Both as far as identity and credit worthiness is established in view of PAN, return of income filed. Hon'ble ITAT Ahmedabad in the case of Shri Ankit Maheshwari Vs. ACIT Cir-2 surat in ITA No. 3556/Ahd/2008 & ITA No. 3655/Ahd/2008 examined in details various aspects related to section 68 of the Act and after considering various propositions in respect of lenders with that of appellant submission held in favor of appellant that once contra account with confirmation are filed with PAN and other details like status of latest return of income, Bank statement

etc. Then there is no case for addition u/s 68 of the Act. As per established legal proposition the borrower need not to prove source of the source or credit worthiness of sub creditor. The appellant sufficiently explained about the difference of final balance in the form of plot maintenance charge of Rs.3,09,000/-. It is therefore A.O. is justified in making addition of Rs.1,31,50,000/- which is factually noti.e. the same should have been of Rs. 10,15,000/- and alsonot sustainable as per legal proposition of law. The AO is directed to delete the addition so made of Rs.1,31,50,000/-. The appellant gets relief accordingly. This ground is allowed."

9. As is evident from the above, addition of Rs.1,31,50,000/- made by the AO under section 68 of the Act pertained to unsecured loans taken from one M/s.Pushparaj Corporation, the addition being made for the reason that the assessee was unable to discharge the onus of proving the genuineness of the transactions interms of section 68 of the Act.

10. On going through order of the ld.CIT(A), we find that he had deleted the addition, noting the fact that, the assessee had duly discharged onus of proving the genuineness of the unsecured loans taken from Pushparaj Corporation by filing confirmation of the said party, given all details of the cheques, through the amounts have been received and filing copy of bank statement reflecting the receipt of cheques in the same. He has also noted that the assessee furnished address of the said party, as also PAN of the said party. The ld.CIT(A) further noted that the AO had found no infirmity in the above details submitted by the assessee i.e. in the information filed by the assessee or the details of the said party filed by the assessee, as also, the details of transaction of unsecured loans taken by the assessee. On the contrary, he noted that the despite all information in the possession of the AO, he chose not to make any further inquiries regarding genuineness of the transaction. He noted that the AO frivolously emphasised the fact of non-reporting of this transaction by the tax auditor in the audit report. The ld.CIT(A) found this fact of the impugned transaction not being reported by

the tax auditor as of no consequence, because the transaction, he noted was duly reflected in the financial statement of the assessee i.e. balance sheet of the assessee, which was also audited by the same auditor, who had conducted tax audit. Therefore, non-reporting of the transaction in the tax audit report could be an error and had no implication on the fact of receipt of unsecured loans by the assessee from the aforesaid party, he held.

The ld.DR was unable to controvert the factual finding of the ld.CIT(A) before us, nor was he able to demonstrate as to when all the relevant documents, as noted by the assessee being confirmation, copy of bank statement of the assessee, PAN of the party giving unsecured loans, were all filed by the assessee and no infirmity was found in the same by the AO, why the transaction still be held to be not genuine .

11. In view of the above, we see no reason to interfere in the order of the ld.CIT(A) deleting the addition of Rs.1,31,50,000/- under section 68 of the Act being unsecured loans taken by the assessee from one M/s.Pushparaj Corporation.

Ground No.(i) is dismissed.

12. Ground No.(ii) relates to the issue of addition made to the income of the assessee as deemed dividend as per the provisions of section 2(22)(e) of the Act, which was deleted in appeal by the ld.CIT(A).

13. The finding of the ld.CIT(A) relating to the issue at para-C of the order is as under:

> *"(C) Ground No. 3 is against the addition of Rs. 130264245/- u/s 2(22)(e)of the Act on account of loan taken from Aryavart Commodities*

of Rs. 1428000/- and from M/s Anmol Tradeline P. Ltd. of Rs. 128836245/- . The A.O. in the impugned order noted that as per tax audit report in form 3CD at Ann. 4 (detailed, in impugned order), the appellant received loan of Rs. 1428000/- from M/s Aryavart Commodities P. Ltd. arid of Rs. 12,88,36,245/- from M/s Anmol Tradeline Pvt. Ltd.. It was also observed that share holders of appellant company has substantial interest in these two company. The A.O. invoked provision' of section 2(22)(e) of the Act, rejecting appellant's contention that appellant company is not share holder in any of these two company. The details of share holding of Shri Shailesh J. Bhatt and Shri Suresh U. Gadhecha if considered in appellant company as well as in these two companies, then both of them independently has substantial interest in appellant company i.e. more than 20% share holding, while Siri Shailesh J. Bhatt has more than 20% interest in M/s Aryavart Commodities P. Ltd. while Shri Suresh U. Gadecha has more than 50% interest in M/s Anmol Tradeline P. Ltd. The A.O. after detailing provision of section 2(22)(e) of the Act, invoked the ratio of Hon'ble Delhi High Court order in the case of CIT Vs. National Travel Services (2012) 347 ITR 305 and held that appellant company being beneficial share holder hence loans accepted of Rs. 130264245/(128836245+1428000) is added as deemed divided.

The appellant in appeal proceedings submitted the annual report of all these companies i.e. appellant, M/s Aryavrat Commodities Pvt. Ltd. and M/s Anmol Tradeline Pvt. Ltd. to substantiate that none of the company is share holder in other company. The appellant then relied on Hon'ble Gujarat High Court order in the case of Daisy Packers Pvt. Ltd. (supra) to contend that provisions of section 2(22)(e) of the Act are not applicable to beneficial share holders.

As far as facts are concerned, the same can be summarized as M/s Anmol Trade line Pvt. Ltd.(PAN: AADCA4837D) for A.Y. 10-11 filed its return of income on 24/09/2010 at ITO wd. 1(1) Ahmedabad. The schedule 'C' of the audited balance sheet under the head "unsecured loan" further under sub head "A. Inter corporate deposit" reflect that appellant had given Rs.54876971/- as on 31.03.09 relevant to A.Y. 09-10 but during impugned previous year, this amount is NIL. At Sch. 'G' under the head 'Loan & Advances' no such amount of loan of Rs. 128836345/- is mentioned claimed to be given to appellant. At Sch. J under the head of "creditor for Purchase" an amount of Rs. 12605009/- is mentioned against the name of appellant. The tax audit report by M/s A.K. Shah & Associates dt. 18.08.10 in the form 3CD as against the cl. 24(a) in Ann. 4 given details of unsecured loan accepted. At Ann. 4 it is mentioned that M/s Anmol Trade line Pvt. Ltd. accepted loan of Rs. 180059653/- from appellant during previous year and repaid Rs.112777673/- with maximum outstanding balance of Rs. 110335015/-. in reference to cl.18 in respect of payment made to person specified u/s 40A(2)(b) of the Act, as per Ann.2, there are no transaction mentioned in the name of appellant. The total reserve & surplus in the audited balance sheet was of Rs. 2350000/- as per schedule B both as on 31/03/09 as well as on 31/03/2010. As per annual return filed the companies Act (1 of 1956) schedule V - Part II out of total shares of 450000, Shri Sureshbhai U. Gadhecha holds 249000 i.e. 55.33% as on 31.09.2010. The appellant submitted a contra account which reflect an opening debit balance of Rs.54876971/'-. This is a mixed account which has transaction

of purchase as well as of loans and advances. The closing balance of Rs. 12605009. The Tax Auditor in Form No.3CD segregated he transaction f taken and repaid by this party to appellant.

(ii) M/s.Aryavart commodities P. Ltd. (PAN : AAECA7330G) for A.Y.2010-11 filed its return of income on 24.09.2010 with ITO, wd 1(1) Ahmedabad As per audited financial accounts, at schedule 'C' under the head unsecured loans, there is no amount or loan from appellant. At sch. H under the head loan of advanes& deposits given there is no name featuring of appellant i.e. No advanes or loans given to appellant. As per tax audit report by M/s. A.K. Shah & Associates in form 3CD dt.06/09/2010 at cl. 18 for the details of payment to parties covered u/s.40A(2)(b) of the Act, appellant's name is not appearing. At cl. 24(a) for the details of loan accepted during previous •Ann. 2, there is no name of appellant. In the details of debtors Sundry Creditors (Sch.J) there is no name of appellant. The audited financial accounts reflects under Sch.B that Reserve & Surpluses got incrased from Rs.37001463/- as on 31/3/09 to Rs.39236173/- as on 31/3/2010.

The Annnual Return for the companies Act(T of 1956) in Sch.V-Part II reflect total 3354000 nos. of shares, Shri SurehbhaiK.Soni held 30.20 % share and Shri Shailesh J.Bhatt hold 655000 i.e. re as on 31.09.10.

(iii) appellant filed return of income on 11/10/10 with ITO wd.1(1) . The tax audit report by M/s A.K. Shah & Associate in Form 18 under Ann.-3 given details of transaction made with parties 40A(2)(b) of the Act. The said Annexure, does not reflect the name of M/s Anmol Tradeline Pvt. Ltd. as well as of M/s Aryavrat commodities Pvt. Ltd. In the same report at cl. 24(a) under Ann. 4 given details of loan & advances received during previous yearr This annexure -4 is detailed by A.O. in impugned order but for the sake of repetition, the appellant accepted Rs. 1428000/- from M/s Aryavrat Commodities P. Ltd. while Rsl 128836245/- from M/s Anmol Trade line Pvt. Ltd. both these parties repaid Rs. 1428000/- and Rs. 81701245/- during previous year respectively. The maximum amount outstanding in the case of M/s Aryavrat Commodities P. Ltd. is Rs. 5,00,000/- while in the case of M/s Anmol Tradelind Pvt. Ltd. it is Rs. 47031991/-. The account of M/s Aaryavrat Commodities P. Ltd. is squared up during impugned previous-year respectively. As per audited financial accounts, under Sch.D No unsecured loans were reflected as received from these two parties. Under the Sch.G for Debtors, schedule H for Advances give to Supplies there is no name of these two parties. Under other schedule i.e. schedule J for deposit, schedule M for sundry creditors, schedule N for other current liabilities & provisions, and schedule O for Advances received from customers, no entry of these two parties is there.

From the above verification following conclusions can be drawn.

(i) Loan accepted of Rs.1428000 from M/s. Aryavart commodities Pvt. during previous year by appellant was repaid during previous year itself hence not appearing in the audited financial accounts of M/s. ACPL as well as of appellant. The Reserve & surplus in the books of M/s. ACPL is of Rs. 37001463/- as on 31/03/2009 while Rs. 39236173 as on 31/03/2010 It is therefore, if A.O's contentions are accepted, addition u/s.2(22)(e) the Act

of Rs. 1428000 being less than surplus & reserve accumulated profit available can be made irrespective of fact that same loan is repaid.

(ii) Loan accepted of Rs. 128836245 and repaid of Rs.81701245 during previous year from M/s. Anmol Tradeline Pvt.Ltd. (ATPL) with tax auditor mentioning that account is not required up. This fact is not supported by the audited financial result of corresponding year, where no such loan & advance if any is reflected by M/s. ATPL. Further loan & advances of Rs. 12605009/- as reflected by appellant being given to M/s. ATPL is reflected by M/s. ATPL as creditor for purchases and not as loan & advances. The financial account of M/s. ATPL reflect that as against the opening balance as on 01/04/2009 of Rs. 54876971/- under the head ICD accepted from appellant, as on 31/03/2010 no such deposit exist. Further, if A.O. contention of acceptance of loan of Rs.128836245 is taken correct, then the addition u/s.2(22)(e) of the Act are limited by the reserve & surplus available (accumulated profit available) which is Rs. 2350000 only.

I am partly inclined with A.O. In reference to any such issue about credit of entry in such related account for consideration of deemed dividend us. 2(22)(e) of the Act, Hon'ble Supreme Court in the case of Miss P. Sarada Vs. CIT 1998 VII, SITC 398 in civil appeal no. 649(NT) of 1987. order dt. 09/12/97 is important. The Hon'ble Supreme Court held that

> *" The legal fiction came into play as soon as the monies were paid by the company to the appellant. The assessee must be deemed to have received dividends on the dates on which she withdraw the aforesaid amounts of money from the company. The loan or advance taken from the company may have been ultimately repaid or adjusted, but that will not alter the fact that the assessee, in the eye of law, had received dividend from the company during the relevant accounting period."*

It is therefore, irrespective of fact that whether such loan was repaid or not, soon as such account is credited and utilized by appellant, the revisions of section 2(22)(e) of the Act are applicable. But, I am not inclined with A.O. that entire amount of loans so accepted will be added u/s. 2(22)(e) of the Act. As per provision of section 2(22)(e) of the Act, such addition as deemed dividend is limited to accumulated profit available as reserve & surplus. In the case of appellant, such reserve & surplus is therefore of Rs. 3778000(1428000+2350000) and therefore the addition of Rs. 128836345 in the case of M/s. ATPL is not justified as per the provision of law. This gives a part relief to appellant of Rs. 126486345(128836345-23500000).

Now coming to the legal preposition. I am inclined with AO that Hon'ble Delhi high court in the case of C.I.T. vs National Travel Services (2012) 347 ITR 305 after considering ratio of its own order in the case of CIT Vs. AnkitechP.Ltd. (2011) as well as Hon'ble ITAT Mumbai order in the case of BhaumikColours (P) Ltd. considered such Board circular no. 495 of 24/09/1987 being Explanatory notes to Finance Act 1987 where at para 10.3 of this circular it is clearly mentioned.

"10.3 The new provisions would, therefore, be applicable in a case where a share holder has 10% 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 make the payment by way of loans or advances to a concern."

With due regards to various case laws relied on by appellant, this proposition as considered by Hon'ble Delhi high Court is not considered by such appellate authorities. It is true that question before high Court this case of National Travel Services was related to share holding in the name of partners of firm to whom company advanced loan. But when explanatory notes are very clear and unambiguous and At para 20 & 21 of us case, Hon'ble Delhi High Court considered the interpretation of such deeming provision, there is no scope of any relief to appellant. The appellant during the course of appeal proceeding relied on Hon'ble Gujarat high court order in the case of C.I.T.-1 vs Daisy Packeres P. Ltd. in tax appeal 212 of 2010 order dt. 18/03/2012 where in Hon'ble high court considered following facts & held.

"This tax appeal has been filed by Revenue challenging the order of the Tribunal and this Court had admitted the appeal on the following question of law.

" Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in reversing the order of CIT(A) and thereby deleting the addition made on account of deemed dividend u/s.2(22)(e) of the Act on inter-corporate deposits?"

2.0 The brief facts are that the assessee filed return of income for the Assessment Year 2000-01 declaring a loss of Rs.4,22,792/-. The return was processed under Section 143(i)(a) of the Income Tax Act, 1961 (for short 'the Act') and income of the assessee was declared under Section 115JA of the Act. Thereafter the case was reopened under Section 147 of the Act which was served on the assessee. The case of the department was that the Amigo Brushes Pvt. Ltd. had a total surplus of Rs.70 lacs as on 3ist March 1999 and it has advanced a loan to the assessee to the tune of Rs.25 lacs. Whereas the assessee contended that he received deposit from Amigo Brushes Pvt. Ltd. and Daisy Packers Pvt. Ltd. was not a shareholder in Amigo Brushes Pvt. Ltd. The Assessing Officer by his order dated 30th September 2004 rejected the claim of the assessee and treated the deposits as loan and consequently deemed to be a deemed dividend under Section 2(22)(e) of the Act and accordingly computed the tax. The assessee filed appeal which was dismissed by CIT(A) on nth May 2006. The assessee filed Second Appeal which has been allowed by the Tribunal on 5th June 3009 and the Tribunal has hold that it was not the case of the deemed dividend and it was the case of the deposits. The Tribunal further recorded finding that it was not a loan given by Amigo Brushes Pvt Ltd, to the assessee company and it was inter-corporate deposits. However, we need not go into various questions raised by learned counsel for the parties as admittedly the assessee was not shareholder in the Amigo Brushes Pvt. Ltd. The Division Bench of this Court in Commissioner of Income Tax vs Ankitach(P) Ltd. (2012) 340 ITR 14) The Delhi High Court has held that if the assessee company does not hold a share in other company from which it had received

deposit then it cannot be treated to be a deemed dividend under Section 2(22)(e)of the 'Act. In view of this admitted position that assessee is not a shareholder in Amigo Brushes Pvt. Ltd. and therefore, the deposit received by the assessee of Rs.25 lacs from Amigo Brushes Pvt Ltd. was an inter-corporate deposit and not a deemed dividend and, therefore, though this aspect has not been considered by the Tribunal but since the order of the Tribunal can be supported by another legal reason on the admitted facts, we need not send the matter back.

3.0 For the aforesaid reasons, we are of the considered opinion that substantial question of law formulated by the Division Bench is to be answered in affirmative against the assessee in favour of the department.

The appellant also relied on Hon'ble Bombay high court in the case of C.I.T. central IV vs. Jignesh P. Shah (IT Appeal No. 197 of 2013 order dtd. 20/01/2015) where in Hon'ble high court following the ratio of CIT vs. Impact containers P. Ltd. 367 ITR 346 wherein it was held that section 2(22)(e) of the Act cannot be applied / invoked where the assessee is not a share holder of the lending company, held in favour of assessee. Hon'ble Bombay High Court following Supreme Court judgment in the case of CIT vs. Vatika Township 2015 (1)SCC 1 held that

> *"Thus on strict interpretation of section 2(22)(e) of the Act, unless the Respondent - Assessee is the share holder of the company lending him money, no occasion to apply it can arise." The appellant also relied on Hon'ble Karnataka high court in the case of Sarva Equity P. Ltd. (2014) 214 taxmann.com 28(Karnataka) wherein on this issue, ratio of Hon'ble Delhi high court in the case of National Travels Services (supra) was considered but held in favor of assessee.*

It is therefore, the question of legal binding of ratio of Hon'ble Jurisdictional high court comes into picture. Other Hon'ble high court also held in favors of assessee on the issue that provisions of section 2(22)(e) of the Act is applicable to loan & advance transaction between a company and registered share holder and not beneficial share holder. Though, as discussed above, the basic objective as per board circular No.495 dt.22/09/2008 as considered and interpreted by Hon'ble Delhi high Court in the case of National Travels Services (supra) were not considered but the Hon'ble jurisdictional high court is binding on lower appellate It is therefore following ratio of Hon'ble Gujarat high court in the case of Daisy Packeres Ltd. (supra), the A.O. is not justified in invoking provisions of section 2(22)(e) of the Act. Though the additions were made of Rs.130264245/- which should have been be of RS.3778000/-, the A.O. s directed to delete the addition so made of Rs, 130264245/-. The appellant gets relief accordingly. This ground is treated as allowed for statistical purpose.

14. As is evident from the order of the ld.CIT(A), the AO treated the following loans & advances, totalling in all Rs.13,02,64,245/- received by the assessee-company as deemed dividend in terms of section 2(22)(e) of the Act:

Name of entity advancing the loan & advance	Amount
Aryavart Commodities P.Ltd.	Rs.14,28,000/-
Anmol Tradeline P.Ltd.	Rs.12,88,36,245/-

The AO held, the aforesaid loans & advances received by the assessee to qualify as deemed dividend noting that it fulfilled the criteria laid down in the said section viz. 2(22)(e) of the Act, qualifying as received by a concern in which, shareholder of more than 10% holding of the company granting loans & advances, had substantial holding, i.e the assessee and the concerns giving loans had common substantial shareholders. As per the AO, the second limb of section 2(22)(e) of the Act was qualified in the present case, which is as under:

> *.....*
> *2(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 per cent of the voting power, or* ***to any concern in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause 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 ;*

15. The fact as per the AO, which lead to this finding, being that two shareholders of the assessee-company having substantial shareholding in the assessee-company i.e. Shailesh J. Bhatt and Shri Sureshbhai U. Gadhecha, held more than 10% shares in the company which had advanced the aforestated loans and advances

being 20.77% and 30.20% respectively in Anmol Tradeline P.Ltd. and Aryavrat Commodities P.Ltd resp.

16. Based on the above facts, the AO held that the loans & advances totaling in all of Rs.13,02,64,245/- received by the assessee-company from the aforesaid two entities viz. Aryavrat Commodities P.Ltd. and Anmol Tradeline P.Ltd. qualified as deemed dividend in the hands of the assessee-company in terms of section 2(22) (e) of the Act, and accordingly, he subjected the same to tax in the hands of the assessee.

17. The ld.CIT(A), went through the facts of the case relating to the issue before him, and found that the fact of common substantial shareholder of the assessee-company and aforesaid two companies to be correct, but at the same time, he noted that the accumulated Reserves &Surplus available for distribution in Anmol Tradeline P.Ltd. was only to the extent of Rs.23,50,000/- while in the case of Aryavrat Commodities P.Ltd., he noted, there was sufficient reserves & surplus to the tune ofRs.3,92,36,173/- He accordingly held that while the entire amount of Rs.14,28,000/- advanced by Aryavrat Commodities P.Ltd to the assessee-company would qualify as deemed dividend,with respect to Anmol Tradeline P.Ltd., the ld.CIT(A) noted that in the absence of sufficient available accumulated reserves & surplus, the loans & advances given by Anmol Tradeline P.Ltd. would not qualify as deemed dividend in entirety and had to be restricted to the accumulated reserves & surplus i.e. Rs.23,50,000/-. He therefore held that out of the total amount of Rs.13,02,64,245/- held by the AO to qualify as deemed dividend, only an amount of Rs.37,78,000 (Rs.14,28,000/- plus Rs.23,50,000) would so qualify, being limited to the extent of accumulated reserves & surplus in the said companies. The

ld.CIT(A) thereafter dealt with the contention of the assessee that in any case since the assessee-company was not shareholder in either of the two concerns granting loans & advances, it could not be taxed in the hands of the assessee-company. The ld.CIT(A) noted various decisions of the Hon'ble High Courts including that of jurisdictional High Court in the case of CIT Vs. Daisy Packers P.Ltd. in Tax AppealNo.212 of 2010 order dated 18.3.2012 and the decision of Hon'ble Bombay High Court in the case of CIT Vs. Jignesh P. Shah, ITA No.197 of 2013 order dated 20.01.2015 holding that deemed dividend was taxable in the hands of the shareholders alone. He also noted the decision of the Hon'ble Delhi High Court in the case of CIT Vs. National Travel Services, (2012) 347 ITR 305, and noted that the said decision took a contrary view. Taking note of the two contrary views on the issue, theld.CIT(A) noted that the decision of jurisdictional High Court being binding, he accordingly applied the said decision to the present case, and held that the assessee not being shareholder in two companies, giving loans & advances, which qualified as deemed dividend as per section 2(22)(e) of the Act,; the said amount could not be held to be taxable in the hands of the assessee.

18. Before us, the fact of the amount of loans & advances received by the assessee company from two entities i.e. Aryavrat Commodities P.Ltd. and Anmol Tradeline P.Ltd., amounting in all of Rs.13,02,64,245/-, qualifying as "deemed dividend" in terms of section 2(22)(e) on account of fulfilling the criterion laid down in the second limb of section 2(22)(e) of the Act is not disputed. There is no dispute vis-à-vis the fact that the shareholder of the assessee-company having substantial interest in it, also had substantial interest in the two companies, which in turn advanced the impugned loans & advances to it. Therefore, in terms of section 2(22)(e) of the

Act, treating the loans & advances received by concerns, in which shareholders of the company giving loans & advances had substantial interest, qualified as "deemed dividend".

19. The only dispute therefore before us is, whether the amount would be taxable in the hands of the assessee-concern which surely is not a shareholder in two entities which had granted loans & advances; with the ld.CIT(A) taking a view in favour of the assessee following the decision of jurisdictional High Court, while the Revenue contesting it otherwise.

20. On the legal proposition applied by the ld.CIT(A),while deleting the addition made on deemed dividend in the hands of the assessee, that the deemed dividend is taxable only in the hands of the shareholder, relying upon various decision of the High Courts including Hon'ble jurisdictional High Court, We find that much water has flown since the said decisions,relied upon by the ld.CIT(A), were passed by the Hon'ble High Courts, the issues having travelled upto the Hon'ble Apex Court since then. Taking cognizance of the same, we shall proceed to adjudicate the issue before us.

21. At the cost of repetition, we reiterate that the issue for consideration before us is restricted to determining whether deemed dividend treated as such in terms provisions of section 2(22)(e) of the Act is taxable in the hands of persons who are not shareholders of the company which has given loans &advances treated as deemed dividend.

As noted by the ld.CIT(A) also, this identical issue came up before the Hon'ble Delhi High Court in the group cases, with lead case being CIT Vs. Ankitech P.Ltd. (2012) 340 ITR 14 wherein the Hon'ble High Court, after analyzing the provision of law in this

regard, considering the legislative history of the provision right from the 1922 Act when identical provision was contained in section 2(6A)(e) of the said Act, and the judicial interpretation of the said provision contained in both the Acts, held that the intention of the Legislature in introducing the concept of "deemed dividend" under section 2(22)(e) of the Act was always to tax the same in the hands of the shareholder and even after the amendment made to the said section by treating the loans & advances received by concerns in which such shareholders had substantial shareholding, the purport and the intent had remained the same. Relevant findings of the Hon'ble court at para 24 of the order is as under:

> *"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."*

It further held that the deeming fiction envisaged in section 2(22)(e) of the Act is only with respect to dividend and its scope therefore cannot be enlarged to extend to shareholders also. And for this reason also it held that the deemed dividend could not be taxed in the hands of non shareholders. Relevant portion of the order at para 25 is as under:

> *"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."

22. This issue again came up before the Hon'ble Delhi High Court in the case of CIT vs Madhur Housing & Development Company in ITA No.721/2011 dated 12-05-2011, wherein the Hon'ble High Court reiterated the proposition laid down in CIT Vs. AnkitechP.Ltd. (supra) that the deemed dividend is taxable only in the hands of shareholder. Thereafter, in the case of CIT Vs. National Travel Services (2012) 347 ITR 305 (Del), the matter which came up before the Hon'ble Delhi High Court for interpretation of the provisions of section 2(22)(e) of the Act was whether the term "shareholder" used insection 2(22)(e) of the Act would mean both a registered and beneficial shareholder.. This issue arose on account of the section referring to "payments made by way of loans and advance *to shareholders being person who is beneficial owner of shares".* The fact situation leading to the issue cropping up was that in the said case the partners had invested in a company in their individual names on behalf of the partnership firm and partnership firm in turn had received loans from the said company. The assessee had contended that it has been categorically held in the case of CIT Vs.

Ankitech P.Ltd. (supra) that the assessee had to fulfill the criteria of being both registered and beneficial shareholder for being hit by the provisions of section 2(22)(e) of the Act. The Hon'ble High Court rejected this contention and held that for the purpose of section 2(22)(e) of the Act it is not necessary that it has to be a registered shareholder and being a beneficial shareholder would suffice.

23. The Hon'ble Delhi High Court decision both in Madhur Housing (supra) and National Travel Services (supra) was challenged before the Hon'ble Apex Court. In the case of Madhur Housing(supra), the Revenues appeal was dismissed by the Hon'ble Apex Court holding that Hon'ble Delhi High Court had arrived at a correct construction of section 2(22)(e) of the Act.The said judgment is reported in Commissioner of Income Tax vs Madhur Housing & Development Co.(2018) 93 taxmann.com 502(SC) and the order reads 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.*

24. Against the decision of the Hon'ble Delhi High Court in the case of National Travel Services (supra), the assessee carried the matter in appeal before the Hon'ble Supreme Court, where the Hon'ble Apex Court concurred with the view taken by the Hon'ble Delhi High Court, but at the same time, it noted observations made by the Hon'ble Delhi High Court in the case of CIT Vs. AnkitechP.Ltd. (supra), which judgment was affirmed by the Hon'ble apex court,to the effect that the term "shareholder" used in the

section referred to both a registered and beneficial shareholder,were incorrect.And finding them contrary to its view in CIT Vs. National Travel Services (supra), therefore it referred the matter to Larger Bench.Para 12-20 of the order is as under:

> *"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."

25. When the matter came up before the Larger Bench of the Supreme Court, it was dismissed as theassessee had settled the dispute under the Vivad se vishwas scheme. The said order is reported in National Travel Services vs Commissioner of Income Tax (2021) 111 CCH 0227 ISSC.

Therefore, the judicial interpretation on the issue of taxability of "deemed dividend" in the hands of non-shareholders, we find is that majority High Courts including the jurisdictional High Court decision noted by the Ld.CIT(A) in Daisy Packers(supra) have held that deemed dividend cannot be taxed in the hands of non-shareholders.

26. The decision of Hon'ble Delhi High Court in the case of CIT Vs. National Travel Services was based on a totally different aspect of section 2(22)(e) of the Act, whether shareholders receiving loans & advances needed to be both registered and beneficial shareholders. The issue before the Hon'ble Delhi High Court in the said case was not with respect to the loans received by a concern in which the said shareholder had substantial shareholdings. Therefore, vis-à-vis this issue of taxation of deemed dividend in the hands of the concern, who are not shareholders of the company, giving loans & advances, we hold, it is settled in favour of the assessee to the effect that it could not be subjected to tax in the hands of the concerns which are not shareholders of the company making the loans & advances, which qualify as "deemed dividend". Decision in the case of CIT Vs.

National Travel Services (supra) referred by the ld.CIT(A) has no applicability to the issue in hand.

27. In view of the above, applying this proposition of law to the facts of the present case, which are not disputed before us, that the assessee who had received advances from the said two concerns, was not a shareholder of these concerns, therefore, even though the advances qualified as deemed dividend in terms of section 2(22)(e) of the Act, they cannot be taxed in the hands of the assessee. Thus, order of the ld.CIT(A) deleting the addition made on account of deemed dividend is accordingly upheld.

Ground No.(ii) raised by the Revenue is rejected.

28. Ground no.(iii) raised by the Revenue, relates to the issue of addition made by the AO of expenses relating to labour and transportation charges amounting to Rs.1,52,10,011/-, which was deleted by the Ld.CIT(A).

29. The relevant facts and the finding of the ld.CIT(A) relating to the issue is contained in para (D) of his order and is as under:

> *"(D) Ground No. 4 is against the disallowance of Rs.1,52,10,011/- being 25% of the labour charges and transport charges The A.O. in the impugned order called for complete details with TDS compliances ofRs.5,92,65,684/- and Rs.15,74,362/- as claimed (debited in P&L a/c. by appellant being labour charges and Transportation charges. The A.O. in the absence of any details disallowed 25% of such expenses. In appeal appellant, contended that it submitted copy of ledger accounts vide letter dt. 21.03.13 and it was held by A.O. that no bills / vouchers produced though it was conveyed that the same will be produced as and when asked for it was also contended that details related to TDS were already got verified by A.O. These bills vouchers were produced in appeal. The A.O. contended that A.O made adhoc disallowances despite the fact that appellant book of accounts are audited and tax auditors not qualified such report. The AO has not pointed out any specific discrepancy before disallowances. As discussed at para 4(D), 4(E), 4(F) and 4(a) that these bills & vouchers were treated as additional evidences and send for the remand report from A.O.*

The A.O. in his remand report (discussed at para 4H above) mentioned that on random checking most of the bills//vouchers are neither signed by payee nor bears any serial number hence self serving evidence. The appellant in rejoinder contended that complete details of addresses, signature, PAN etc. are available and bill are available for most of the expenditure In some of the vouchers, since appellant is executing works at remote places in Madhya Pradesh, Gujarat etc., local labour is engaged and same is unorganized sector, abstracts are mentioned in such vouchers detailing name of site, name of contractor if there, nature of work performed, running bill etc,. It was further contended that after preparation of such bills, the same were got verified and approved by site engineer and contractor and since accountant and the director are not available on such site, their signature are not there. In most of the cases payments are by cheques after deduction of TDS The appellant contended that even the remand report A.O, has not pointed out any specific discrepancy.

I am partly inclined with appellant. The A.O. without pacific verification and without pointing out" any specific defect made such allowances and even in remand report supported such disallowance at rate of 25%. The A.O. has not rejected books of account on one hand, while disallowed such huge expenditure on the other hand. Appellant's books of accounts are audited and such result is accepted by A.O. No adverse remark is there in tax audit report for maintenance of proper bill & vouchers or for deduction of TDS As against this, I am also inclined that for executing civil contract at remote places with local labour, such vouchers are bound to be there and required to be accepted. I have perused such details, bills & vouchers and I am inclined that most of payments are through cheques after deduction of TDS. Some of the observations from such verification are as follows:

To the expenses of Rs.17306343/- related to labour charges at chhatishgarh, payment is made to M/s MITI Hires through cheques after deduction of IDS, The address & PAN of M/s MITI Hires is also available.

(ii) For the expenses of Rs. 5332729 related to labour charges atKharaghocie payment is through cheque after deduction of TDS to M/s. Shree Lolvai Construction whose address & PAN is available.

(iii) for the expenses of Rs. 4740723/- to M/s PukrajShivram Chaudhary, the payment is through cheque after deduction of TDS and details of Address, PAN is available.

(iv) For the expenses of Rs. 7998653/- for labour at Thara, most of the payment (more than 95%) is through cheque after deduction of TDS to the parties whose address and PAN are available.

(v) For the expenses of Rs.7647446/-- for labour at Vijapur, most of the payment (more than 95%) is through cheque after deduction of TDS to the parties whose address and PAN are available.

(vi) For the expense of Rs. 4057296/- forlabour at SLPK 2&5 thepayment is through cheque to M/s Shivlal M. Sorathia after deduction ofTDS and his address & PAN is available.

(vii) In the case of transportation, in most of the cases payments arethrough cheque to parties whose address and PAN are available.

(viii) As far as discrepancy is concerned, appellant failed to submitcomplete bills/vouchers. In respect of labour charges of Rs.59265684, thebills& vouchers of different parties for different sites with aggregating to Rs.1,00,00,000(about) and in respect of transportation out of total amount of Rs. 1574362, bills/vouchers of about Rs. 2175000 were not submitted.

In respect of legal preposition for admitting such voucher as admissible evidence, Hon'ble Gujarat High Court in the case of ITO Wd 1(2) Vs; Hylam Securities & Finance Pvt. Ltd.(2009) 178 taxmann 317 allowed such handmade vouchers as admissible evidences in view of peculiar circumstances of executing work at remote area with unorganized labour. But thetne question remained for verification of expenses claimed for which there are no bills & vouchers. In view of appellant's audited books of accounts onone hand, and such deficiency of not submitting bills & vouchers of Rs. 1.05 crore (10000000+475000) on other hand, disallowances of 10% i.e. about Rs. 1000000/- will meet the justice to both hand for leakages through such payments in cash in small denomination, it is therefore, the A.O is directed to- allow the balance expenses and delete the addition of Rs.14210011 (15210011-1000000). The appellant gets part relief This ground is partly allowed."

30. A perusal of the above reveals that the assessee debited an amount of Rs.5,92,65,684/- on account of labour charges and Rs.15,74,362/- on account of transportation charges. In the absence of any details submitted by the assessee, the AO disallowed 25% of such expenses resulting in disallowance of Rs.1,52,10,011/-.

31. Before the ld.CIT(A) the assessee contended that the ledger accounts of these expenses were produced before the AO and the assessee had undertaken to produce its books also. The same were produced again before the ld.CIT(A) and it was also pointed out to him that the auditors had not pointed out any discrepancy with respect to these expenses claimed by the assessee. Copies of all relevant bills and vouchers were also produced. The evidences so filed by the assessee were sent to the AO for remand report who mentioned that on random checking of the same they were found to be neither signed by the payee nor bore any serial number, and they

were only self-serving evidences. The assessee countered by stating that the complete details of names &addresses and PAN etc. were filed and since the assessee was executing the work in remote premises with local labours in the unrecognized sector, name of site and name of contractors were mentioned in the bills and after preparation of the bills, they were verified and approved by the site engineers. It was also pointed out that in most of the cases payments were made by cheque after deducting TDS. The ld.CIT(A) himself perused all the bills and vouchers and found that most of the payments were made by cheque after deduction of TDS. His specific observation from such verification also finds mention in his order. He also agreed with the assessee that the AO without pointing out any specific defect had made the disallowance and he also noted that though the AO had disallowed huge expenses, he had not rejected books of the assessee; but at the same time, noting that the assessee had failed to submit bills and vouchers pertaining to these expenses aggregating around Rs.1 crore, he upheld disallowance with respect to these bills and vouchers to the extent of 10% of the same amounting to Rs.10,00,000/-.

32. The ld.CIT(A), we find, has passed a detailed speaking order on the issue and has gone through bills and vouchers of expenses and verified that most of the payments were made through cheques and TDS also deducted therein. He also noted that the AO had not pointed out any specific infirmity in the documents submitted by the assessee but had only made general observations.

The ld.DR was unable to controvert the factual finding of the ld.CIT(A) as above.

33. In view of the same, we are not inclined to interfere in the order of the ld.CIT(A) deleting the disallowance of labour and transportation expenses to the tune of Rs.1,42,10,011/-.

Ground no.(iii) is dismissed.

34. Ground no.(iv)relates to the deletion of addition of Rs.10 lacs made on account of short term capital gain. The facts and finding of the ld.CIT(A) in this regard are at para-(E) page no.40- of his order as under:

> *"(E) Ground No.5 is against the addition of Rs.10 lacs for the alleged short term capital gain over & above the short term capital loss shown by appellant of Rs.71,380/-. As noted by AO in the impugned order that since appellant has not submitted sale agreement in respect of transaction of purchase of land at Goraj Village for Rs.3071380/- on7/10/2009 and sale of such land on 19/3/2010 for Rs.3000000/- thereby incurring short term capital loss of Rs.71380/-, the AO without considering and analyzing index-2 as submitted by appellant, based on reasoning of asstt. Order on similar issue for A.Y.08-09, made adhoc addition of Rs.10 lcas. The appellant in appeal submitted such sale deed which was subjected to remand report.*
>
> *The A.O. in the remand report put general comments and raised apprehension about why appellant incurred loss in such deals in one month and in the absence of return of income concerned parties, held that such deed is non-genuine. The A.O. has not made any inquiry in this regard. The appellant in rejoinder contended that such addition is on estimate made or assumptions in the nature of conjectures without any basis. Both purchase and sale were claimed to be made on more than Jantri value and it is not that appellant sold the land below stamp duty value. The details of sellers as well as purchasers are available in purchase as well as sale deed which were not got verified by A.O.*
>
> *I am inclined with appellant that in view of Regd. Purchase & sale deed of land which has details of parties i.e. seller as well as purchaser with PAN and nature of payment, in the absence of the fact that such transacted value is not less than stamp*

duty value or prevailing Jantri value, such estimated adhoc disallowances is neither justified nor sustainable. The A.O. is directed to delete such addition and allow short term capital loss of Rs.71380/-. The appellant gets relief accordingly. This ground is allowed."

35. A perusal of the above reveals that the assessee had returned short term capital loss of Rs.71,380/- on account of transaction of sale of land owned by the assessee during the impugned year, which was shown to be purchased for Rs.30,71,380/- and sold for a consideration of Rs.30,00,000/-, the purchase having been made on 7.10.2009 and the sale on 19.3.2010, thus incurring a short term loss. The AO noted that the assessee had not submitted sale agreement in respect of the said transaction, and noting that similar issue had arisen in the case of the assessee for Asst.Year 2008-09 also, wherein the assessee had shown loss from sale of property, however, later on it was found that actually the assessee had earned substantial gain, therefore, based on this finding in Asst.Year 2008-09 and in the absence of any evidences furnished by the assessee for the sale of land during the impugned year, the AO added an amount of Rs.10 lakhs over and above the loss returned by the AO on an *adhoc* basis.

36. The order of the ld.CIT(A) reveals that during appellate proceedings, the assessee submitted copy of the sale deed and the AO's comments were sought on the same ,to which , we find, the Ld.CIT(A) has noted that the AO made no adverse comment with respect to the sale deed in his remand report, but only raised apprehension as to why the assessee incurred loss in such a deal in one month. The ld.CIT(A), we find, has also noted that both the purchases and sales were made on values more than the *jantri* value and the details of seller and purchaser were available in the purchase and sale deed, but the AO did not verify the transaction.

Taking note of the same, the ld.CIT(A) held that the disallowance made by the AO was not sustainable since all documentary evidences substantiating the transaction were furnished by the assessee, which were not doubted by the AO and the disallowance made by the AO was a mere *adhoc* disallowance.

The ld.DR was unable to controvert the factual finding of the ld.CIT(A) as above, before us.

37. In view of the same, we see no reason to interfere in the order of the ld.CIT(A) deleting the addition of Rs.10,00,000/- on account of short term capital gains.

Ground no.(iv) raised by the Revenue is dismissed.

38. In effect the appeal of the Revenue is dismissed.

39. Now we take up cross-objection filed by the assessee in **CO No.174/Ahd/2015.**

40. By groundno.1, the assessee is aggrieved by order of theld.CIT(A) in restricting the addition made on deemed dividend in terms of provisions of section 2(22)(e) of the Act of Rs.37,78,000/- allowing appeal for statistical purpose.

41. We have discussed and dealt with in detail the ground raised by the Revenue on the issue of deemed dividend taxed in thehands of the assessee to the tune of Rs.13.02 crores in the appeal of the Revenue in ITA No.2105/Ahd/2015. Undisputedly, the ld.CIT(A) had deleted the entire addition noting judicial proposition that the amount could not be taxed in the hands of the non-shareholdersand we have upheld the order of the ld.CIT(A) on this aspect. Therefore, the entire addition stands deleted in the hands of the assessee, and there remains no grievance of the assessee.

At the same time noting that the assessee is aggrieved by the finding of the ld.CIT(A) that the addition in any case if tenable, is tobe restricted to the extent of Rs.37,80,000/-, this is without prejudice to the finding of the ld.CIT(A) that the entire addition needs to be deleted. The finding of theld.CIT(A) restricting the addition to the aforesaid extent was based on his findingof fact that the available accumulated reserves with the companies making loans & advances, which was treated as deemed dividend, were to this extent only i.e. Rs.37.78 lakhs only. The ld.counsel for the assessee has been unable to controvert this factual finding of the ld.CIT(A). Therefore, considering the provision of law contained in section 2(22)(e) of the Act treating the deemed dividedonaccount of loans & advances made to the extent of accumulated reserves only, and considering the factual position in the present case, which has remaineduncontroverted before us, we see no infirmity in the finding of the ld.CIT(A) that the addition in any case under section 2(22)(e) of the Act could not have been exceeded Rs.37,78,000/-. Therefore, ground no.1 raised by the assessee in its CO is rejected.

42. By Ground no.2, the assessee is aggrieved by restriction of disallowance of labour and transportation charges to the extent of Rs.10 lakhs. We have reproduced the entire order of the ld.CIT(A) on this issue at para-28-33 of our order above. We have also noted that the ld.CIT(A) had appreciated all the evidences filed by the assessee, and gave a finding, that to the tuneof Rs.1 crores of this expenditure, the assessee had failed to file any evidences, and accordingly, he had restricted the disallowance to the extent of 10% on such expenses.

The ld.counsel for the assessee has been unable to controvert the finding of the ld.CIT(A) and we therefore, we hold that the ld.CIT(A) has been fair enough to restrict the disallowance to 10% of unsubstantiated labour and transportation charges, and there is no merit in the ground no.2 raised by the assessee before us. Thus, ground no.2 stands dismissed.

43. In the result, the appeal of the Revenue and the CO of the assessee, both are dismissed.

Order pronounced in the Court on 5th June, 2023 at Ahmedabad.

Sd/-	**Sd/-**
(T.R. SENTHIL KUMAR)	**(ANNAPURNA GUPTA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad,dated 5/06/2023