

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ, "ए" चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, 'A' CHANDIGARH

श्री संजय गर्ग, न्यायिकसदस्य एवं श्रीमती अन्नपूर्णा गुप्ता, लेखा सदस्य
BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER AND
Ms. ANNAPURNA GUPTA, ACCOUNTANT MEMBER

आयकरअपीलसं./ITA No. 170/CHD/2018

निर्धारणवर्ष / Assessment Year : 2013-14

The ACIT, Circle-6, Ludhiana	बनाम	Shri Gurdeep Singh, Pakhawal Road, Near Pul Jawaddi, Ludhiana
स्थायीलेखासं./PAN NO: ANCPS3929D		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारितकीओरसे/Assessee by : Shri Ashwani Kumar, CA
राजस्वकीओरसे/ Revenue by : Smt. C. Chandrakanta, CIT DR

सुनवाईकीतारीख/Date of Hearing : 27.02.2020
उदघोषणाकीतारीख/Date of Pronouncement : 26.06.2020

आदेश/Order

Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the Revenue against the order dated 02.11.2017 of the Commissioner of Income Tax (Appeals)-3, Ludhiana [hereinafter referred to as 'CIT (A)'].

2. The Revenue in this appeal has taken following grounds of appeal:-

1. Whether on the facts and circumstances of the case and in law, the Commissioner of Income Tax (Appeals) was justified in deleting the addition of Rs. 12,24,72,654/- made

by the Assessing Officer under section 2(22)(e) of the Income Tax Act by holding that the assessee was not having beneficial interest in the advance recipient Company after 08.05.2012 particularly when no prudential man will transfer its share without receiving the full sale consideration thereof ?

2. *Whether on the facts and circumstances of the case and in law, the Commissioner of Income Tax (Appeals) was justified in deleting the addition of Rs.12,24,72,654/- made by the Assessing Officer under section 2(22)(e) of the Income Tax Act by holding that the assessee was not having beneficial interest in the advance recipient Company after 08.05.2012 particularly when the transferee Company has neither shown such shares as asset and unpaid sale consideration to the assessee as liability in its balance sheet for FY ending on 31.03.2013 nor any specific mention in this regard in the notes of account of the relevant year of the transferee Company ?*
3. *Whether on the facts and circumstances of the case and in law, the Commissioner of Income Tax (Appeals) was justified in deleting the addition of Rs.12,24,72,654/- made by the Assessing Officer under section 2(22)(e) of the Income Tax Act in view of the Supreme Court ruling referring the decision of its division bench to larger bench for reconsideration of its decision in the case of Ankitech ?*
4. *Whether on the facts and circumstances of the case and in law, the Commissioner of Income Tax (Appeals) was justified in deleting the addition of Rs.12,24,72,654/- made by the Assessing Officer under section 2(22)(e) of the Income Tax Act by holding that the said advance is for commercial expediency particularly when the law does not discriminate the advances and loans on the basis of chargeability of interest thereon ?*

5. That the order of the Commissioner of Income Tax (Appeals) be set aside and that of the Assessing Officer be resorted to.

6. That the appellant craves leave to add or amend any ground of appeal before it is finally disposed off.

3. A perusal of the above grounds of appeal reveal that the revenue in this appeal has challenged the action of the CIT(A) in deleting the additions made by the Assessing Officer (in short 'AO') into the income of the assessee of deemed dividend u/s 2(22) (e) of the Income Tax Act, 1961 (in short 'the Act'). The brief facts of the case are that the assessee filed his return of income for the assessment year 2013-14 on 31.03.2014, declaring a total taxable income of Rs. 4,04,74,160/-. However, the assessment was completed u/s 143(3) of the income Tax Act, 1961 (in short 'the Act') vide order dated 31.03.2016 at an income of Rs. 16,29,46,814/- by the Assessing Officer (AO) making the addition of Rs. 12,24,72,654/- on account of the deemed dividend in the hand of the assessee under the provisions of section 2(22)(e) of the Act. During the course of assessment proceedings it was noticed by the Ld. AO that the assessee was having shareholding in the following companies:-

1. Creative Cable Network Pvt. Ltd. - 99.60%
2. Jujhar Constructions and Travels Pvt. Ltd. - 99%

The AO further noted that both of these companies were closely held companies in which the assessee was having more than 10%

shareholding. It was pointed out by the AO that M/s Creative Cable Network Pvt. Ltd. had advanced, unsecured loan to M/s Jujhar Constructions and Travels Pvt. Ltd., to the extent of Rs. 17,67,23,500/-. The Ld. A.O. show caused the assessee, as to why the amount of loan advanced to the extent of accumulated profits not to be held as deemed dividend as envisaged by section 2(22)(e) of the Income Tax Act, 1961 and taxed under 'Income from other sources' u/s 56 in the hands of assessee as he was having substantial shareholding in both the transacting companies.

In response to the same, the assessee vide letter dated 16.03.2016 submitted that during the year 2012-13 he had transferred his entire shareholdings in Creative Cables Pvt Ltd except one share to M/s Jujhar Constructions and Travels Pvt. Ltd. Hence, only one share was owned by the assessee in M/s Creative Cables Ltd out of the total Share of 25000 which was less than 10% of the total shares and rest of 24999 shares of the company were transferred to M/s Jujhar Construction Pvt. Ltd.(in short 'JCPTL"). Thus, the company M/s Creative Cable Network Pvt. Ltd. was subsidiary of M/s Jujhar Constructions and Travels Pvt. Ltd. and thus any financial transactions between the holding company and subsidiary company was out of the purview of Section 2(22)(e) of the Income Tax Act.

Further, the assessee submitted that the group companies had provided the Inter Corporate Deposits for funding its Short term/long

term business requirements. It was also submitted that the Creative Cable and Jujhar Advertisers had provided ICD of Rs. 18.67 crores to the JCTPL. The JCTPL had already given an amount of ₹. 38.56 crores as on 1.04.2012 to GS Majestic Development Pvt. Ltd. (GMDPL) and JCTPL had further advanced a sum of Rs. 8.07 to crores to GMDPL and used balance funds for business purposes and no individual benefit had been derived by the assessee.

4. However, the Assessing Officer did not agree with the above submissions of the assessee and rejected the plea of share transfer by the assessee holding the same as an afterthought transaction since the return with the Registrar was filed late and further concluded that advanced sum by CCNPL to JCTPL could not be treated as ICD on the following counts:-

- That the huge amounts are standing as opening Balance and where ICD has a particular character that it is for short duration and interest rates are charged on the same, which in the present case was not there. Rather, the interest has been transferred to A/c of JCTPL which is paid to India Infoline Ltd.
- It is pertinent to mention here that the nature of ICD is such that it is given out of surplus and not by taking loan. Nevertheless, the loan from M/s India Infoline was raised and extended to M/s Jujhar Construction Pvt. Ltd.
- That the assessee failed to prove the nature of business for which the trade advances were made.

The Assessing Officer accordingly did not accept the transaction of transfer of shares during the year under consideration by holding the same as afterthought transaction. The Assessing Officer further stated that the amount of Rs. 17,67,23,500/- was loan advanced by M/s Creative Cable Network Pvt Ltd. to M/s Jujhar Construction and Travels Pvt Ltd. and since the assessee was a substantial shareholder in both the Closely held Companies and, thereby, she concluded that the provisions of section 2(22)(e) were applicable in the case of the Assessee. So, she made the addition of Rs. 12,24,72,654/- (to the extent of accumulated profits of M/s Creative Cable Network Pvt Ltd.) in the hands of the Assessee as deemed dividend in hand of assessee.

5. The Ld. CIT(A), however, deleted the additions so made by the Assessing Officer observing as under:-

“4. I have carefully gone through the order of the Assessing Officer and detailed submissions of the assessee on number of hearings and the issue is with regard to the "deemed dividend" arising on account of advances given by 'Creative Cable Network Pvt. Ltd.' (in short "CCNPL") to Jujhar Construction & Travel Pvt. Ltd. (in short "JCTPL") . I have also carefully considered several case laws relied upon by the assessing officer as well as the appellant during the course of assessment proceedings and appellate proceedings as well. I have also carefully referred to the remand report submitted by the assessing officer as the assessing officer has only relied upon the original assessment order and has not added any other factor, to contradict the detailed arguments of the appellant filed at the time of appellate proceedings. The Assessing Officer had applied the provisions of section 2(22)(e), since according to the Assessing Officer, Sh. Gurdeep Singh was beneficial owner of the shares holding more than 10% shares in both the companies i.e. CCNPL and JCTPL as well.

During the course of assessment proceedings, when the assessee was confronted with the issue of deemed dividend, he stated that he ceased to have substantial shareholding of CCNPL and JCTPL w.e.f 8th May 2012 and also filed the copy of annual return on the portal of "Ministry of Corporate Affairs" with the Registrar of Companies, Chandigarh. As per the annual return for the year 2012-2013, relevant to Assessment Year 2013-2014, the share holding of CCNPL is being held by JCTPL to the extent of 24999 shares, out of total 25000 shares of the Company and the assessee Gurdeep Singh is holding only one share. Thus, according to assessee, the provisions of deemed dividend are not applicable, since the Assessee has far less shares then required for the applicability of deeming provisions i.e. U/s 2(22)(e) of the Act. The Assessing Officer did not believe this transaction of sale and transfer of shares of CCNPL by Sh. Gurdeep Singh in favour of JCTPL as she had observed that the return to the "Registrar of Companies" was filed after show cause notice issued by her and also that consideration for the transfer of shares was partly remitted during financial year 2012-2013, and then the balance consideration was paid in Financial Year 2013-2014. The contention of the assessee has been that the transfer of shares is substantiated by the documentary evidence as per record of the "Registrar of Companies", who is the only authority to whom the intimation regarding the transfer of shares is required to be given and as per record of the ROC, the effective date of transfer of share is May 8, 2012 and, thus, it has been argued vehemently by the counsel of the assessee that during the relevant year i.e. F.Y. 2012-2013, Sh. Gurdeep Singh was not having beneficial shareholding holding in CCNPL to the extent of minimum 10% of shares. It has been further argued in regard to the late intimation to "Registrar of Companies", by the assessee that one can file belated return with the ROC and, if the annual return is late as in the case of assessee, then the same can be filed along with "late fee" as applicable as was done by assessee and, as such, for all intents and purposes, it is valid original annual return and has to be relied upon and is legally enforceable document in the Court of Law. The assessee has relied upon the judgment of ITAT Chandigarh Bench in the case of "Rajdeep Builders" Vs ACIT in ITA No. 666/CHD/2010, order dated 27.04.2012 and stressed that only one 'annual return' for the financial year 2012-13 was filed with the ROC and no case has been made out by the Assessing Officer and further, it was not a revised annual return. Reliance was also placed on the judgment of Hon'ble Supreme Court in the case of Motor and General Store as reported in 66 ITR 692.'

4.1 I have gone through the above said arguments and contentions of the Assessing Officer as per assessment order and it is observed that, though, the return intimating the sale of shares had been filed late with the ROC, but that is a documentary evidence, which, cannot be brushed aside, because the

department of ROC comes under the "Ministry of Corporate Affairs", which regulates the working of all the companies in India and this is a legally enforceable document which establishes the share holding pattern of the Company.

4.2 Besides, as held by the Hon'ble Chandigarh Bench of the ITAT, in the case of "Rajdeep Builders" that direct documentary shall prevail over the oral evidence and also in the another judgment of Hon'ble Supreme Court in the case of M/s Motor & General Store as cited "supra" where it has been held that statutorily the parties have to reduce a certain transaction into writing it is not open to Court or any authority to permit oral evidence to be adduced by the parties or to entitle them to go behind the statements made in the document. Income tax Authorities are under the ordinary law."

4.3 Further, there is force in the arguments of the Ld. AR of the assessee that the share transfer deed, which is a legal instrument of shares was asked to be produced and which was submitted in original to the Assessing Officer and which had been impounded by the Assessing Officer and I find no adverse comments on the same by the Assessing Officer, except that the signature of the witness have not been appended on that. However, there are valid signatures of transferor as well as transferee and which has not been denied by the Assessing Officer. Thus, there is ample force in the argument of the assessee that, since no doubt has been made by the Assessing Officer about the genuineness of share transfer deed as well as signature of the transferor or transferee, except that there are no signature of the witness. This is only a procedural mistake and will not effect the legal validity of the transfer deed. It is on this strength of the valid transfer deed, coupled with the fact that the amount of consideration have already been remitted by the transferee to the transferor and, thus, it is legally enforceable document and cannot be brushed aside.

4.4 Further, I find that besides the above, the Assessing Officer has noted certain other inconsistency in the above said arguments of the sale of shares by Sh. Gurdeep Singh in May 2012 viz-a-viz that the above said arrangement of transfer of shares has not been reflected properly in the balance sheet of the corresponding companies i.e. CCNPL and JCTPL and also nothing has been mentioned in the "notes on accounts" either. This is only a doubt or suspicion, but at the same time, the documentary evidences which have been placed before me and the Assessing Officer in the shape of "annual return" filed on portal of "Ministry of Corporate Affairs", share transfer deed, passing on of consideration of shares in the Financial Year 2012-2013 and 2013-2014, through proper banking channel, much before the start of the assessment proceedings, cannot be lost sight off. It is also not the case of the

Assessing Officer that the documents in the shape of original share transfer deed and the Annual Returns "duly certified true copy" of the ROC are false or fabricated and thus once the authenticity of such legal documents is not under doubt then the transaction and facts represented by those documents has to be accepted and cannot be challenged or brushed aside by the AO merely on the fact that she believes it to be a transaction to circumvent the law or there are presentation errors either in the accounts of the financial statements of the assessee/ his group companies.

4.5 During the course of proceedings before me, which lasted few months, the case was discussed on number of hearings and it has been argued that the case of the Assessee for Assessment Year 2014-2015 was also under scrutiny by the Assessing Officer, Circle-VI, Ludhiana in which, he had raised same issue of deemed dividend relating to the substantial interest as in the case for Assessment Year 2013-2014 under appeal and the Assessee had filed detailed reply (Copy of which has been filed before me placed in the file) and there again copy of the annual return for Financial Year 2012-2013 and 2013-2014 as filed to the ROC, had been filed and by considering the above said evidences on record, no addition on account of "deemed dividend" have been made and for that copy of the assessment order for Assessment Year 2014-2015 u/s 143(3) has been filed before me. Thus, on the same facts and circumstances, the Assessing Officer now has accepted the transfer of shares as reflected in the annual return as filed before the ROC and based on such submissions, no adverse view have been taken.

4.6 In view of the above said factual facts and circumstances, which are borne out from the record, it is true that suspicion, howsoever, strong, it may be, cannot take the shape of evidence and no addition can be made on the basis of doubt or suspicion as held by the jurisdictional High Court i.e. Punjab & Haryana High Court in the case of CIT Vs. Ram Narain Goel as reported in 224 ITR 180 and, further, since one Central Govt, department i.e. Registrar of Companies, Ministry of Corporation Affairs, having accepted the transfer of shares and part payment had been made in financial year 2012-13 and 2013-14, which proves that the payments for sale of shares had been received by Sh. Gurdeep Singh through normal banking channels and it cannot be said to be afterthought, because the scrutiny assessment for Assessment Year 2013-2014 was started in financial year 2014-15 and concluded in March 2015 and, therefore, after considering the totality of the facts and circumstances, it is held that since Sh. Gurdeep Singh was not having beneficial share holding of minimum 10%, since the shares stood transferred in May 2012, as accepted by the Assessing Officer while framing the assessment for Assessment Year 2014-2015 and also for Assessment

Year 2015-16, no addition of the deemed dividend u/s 2 (22)(e) is called for on account of above said factual facts and circumstances.

4.7 Further, the assessee on the strength of share transfer, which is evident by the valid transfer deed and passing on of the consideration, has relied upon the judgment of Chennai Bench of the ITAT in the case of Farida Holdings Pvt. Ltd.(as cited supra), which judgment has, later on, been confirmed by the Madras High Court in ITA No. 892 of 2015, in which, it has been held that any loan and advance by the subsidiary to holding company does not come in the ambit of deemed income u/s 2(22)(e). The facts of this judgment are identical to the facts in the present case in the sense that 99.9% shares of CCNPL are held by JCTPL , by which the CCNPL becomes the subsidiary of JCTPL and funds transferred by subsidiary to holding does not come under the purview of deemed dividend u/s 2 (22)(e).

4.8 The another issue which has been argued before me is that interest has been paid by M/s Jujhar Construction and Travels Pvt Ltd. To M/s Creative Cable Network Pvt Ltd. The Appellant has repeatedly vide his submissions has argued that when there is involvement of some consideration, the issue of deemed dividend does not arise. The appellant has given the following specific additional submissions on this issue:

"Now in a latest land mark judgment by Income Tax Appellate Tribunal Kolkata"C" bench, Kolkata vide its order dated 11.03.2016 reported at ITA No. 1817/Kol/2009 Assessment Year 2006-07 has pronounced that" When the Company was compensated by way of interest on loan taken the assessee shareholder in real sense did not derive any benefit from the funds of the Company so as to attract the provisions of deemed dividend under section 2(22)(e) of the Income Tax Act, 1961. Thus Tribunal has observed that " Loans & Advances given on interest not deemed dividend u/s 2(22)(e) as the shareholder do not derive any benefit from the funds of the Company. The same fact has also been established in case of Pradip Kumar Malhotra reported in 338 ITR 538 cited by the Ld Counsel for the assessee. It was held by the Hon Kolkata High Court that the phrase by way of advance or loan appearing in section 2(22)(e) must be construed to mean those advance or loans which a shareholder enjoys for simply on account of being a partner, who is the beneficial owner of shares, but if such loan or advance is given to such shareholder as consequence of any further consideration, which is beneficial to the company, received from such shareholder, in such case such advance or

loan cannot be said to be deemed dividend within the meaning of the Act. It was held that gratuitous loan or advance given by a Company to those classes of shareholders thus would come within the purview of section 2(22)(e) but not the cases where the loan or advance is given in return to an advantage conferred upon the Company by such shareholder. In the case of ACIT-Vs M/s Zenon (India) Pvt. Ltd, a loan taken by the assessee was treated by the Assessing Officer as deemed dividend under section 2(22)(e), but the Ld. CIT (Appeal) did not approve the action of the Assessing Officer after having noticed that interest at the rate of 9% per annum was paid by the assessee on such loan, which according to him, was a consideration received from her shareholders, which was beneficial to the Company and order of the Ld. CIT (Appeal) giving relief to the assessee was upheld by the Tribunal vide its order dated 29/06/2015 passed in ITA No. 1124/KOU2012 by relying on the decision of the Hon'ble Calcutta High Court in the case of Pradip Kumar Malhotra (supra). Keeping in view the said decision of the Hon ble Calcutta High Court which has been followed by the Coordinate Bench of this Tribunal in the case of M/s Zenon (India) Pvt. Ltd (supra), we hold that the addition made by the Assessing Officer and sustained by the Ld. CIT (Appeals) under section 2(22)(e) on account of loan received by the assessee from M/s Surya Business Pvt. Ltd on which consideration in the form of interest was paid by the assessee to the benefit of the Company is not sustainable. We therefore delete the same and allow Grounds No. 1 & 2 of the assessee's appeal."

4.9 The above fact has not been disputed by the AO. It is a matter of fact that interest has been paid by JCTPL to CCNPL. The said issue has duly been met by the Kolkata Bench in the case of **Smt Sangita Jain vs ITO in ITA No. 1817/Kol/2009 and ACIT vs M/s Zenon (India) Pvt Ltd. In ITA No. 1124/Kol/2012**. In the said cases, the Judgment of the Hon'ble Calcutta High Court in the case of Pardip Kumar Malhotra as reported in 338 ITR 538 has been followed. So, it is clear that if loan or advance is given to such shareholder as a consequence of any further consideration, which is beneficial to the Company, received from such shareholder, in such case, such advance or loan cannot be said to deemed dividend within the meaning of the Act.

4.10 The another issue which has been argued vehemently before me is that, besides the above said contention that the assessee did not have

beneficial substantial share holding in the company, which is required to qualify for the purposes of taking the recourse of section 2(22)(e), it has been argued by way of written submission and orally also that the provisions of section 2 (22)(e) are not applicable in view of the following facts:-

- a) The transaction is in the nature of commercial expediency and do not fall under the category of Deemed dividend u/sec 2(22)(e) of the Act.
- b) No personal benefit of the Assessee is involved in the entire transaction.
- c) Provisions of section 2(22)(e) are not applicable only for the sole reason that the shareholding is common.
- d) Even the amount is not given as interest free to M/s Jujhar Construction and Travels Pvt Ltd.
- e) The amount is given purely in the nature of inter corporate deposits and thus it cannot come under the category of deemed dividend.
- f) The relationship between the two Companies is that of Holding and Subsidiary and thus provisions of section 2(22)(e) are not applicable.
- g) M/s Creative Cable Network Pvt Ltd. is also into the business of money lending as substantial funds of the Company are given to group Companies as interest funds.
- h) The amount has ultimately been invested in the share application money of the Company namely M/s G. S Majestic Developers P Ltd.

4.11 The brief facts of the case are that all the three companies CCNPL, JCTPL and G.S. Majestic Developers Pvt. Ltd. are involved in this transaction. Both CCNPL and JCTPL invested funds in GSMPL as share application money. Apart from this, CCNPL has also advanced money to JCTPL for further investment in GSMPL. All the funds, whether given by CCNPL & JCTPL directly or indirectly to GSMDPL have been utilized for construction of commercial building owned by the group company GSMPJ. All the three companies are, thus, group companies and since May 2012, both CCNPL as well GSMPL are subsidiary to JCTPL. The chart showing the source of investment as well as total investment made by GSMDPL has

already been reproduced above as per written submission of the assessee and which is not disputed, since these are the figures as drawn from the balance sheet of the respective companies and, incidentally, the case of CCTPL and JCTPL was under scrutiny by the same Assessing Officer for the same Assessment year and which has been decided and no adverse view has been taken in this regard. It has further been argued that, now, it is established fact that these are group companies and no personal benefit have been involved viz-a-viz assessee, because ultimately all the funds have been utilized for the construction of commercial building by one of the group company and, thus, the amount was for commercial expediency and once it is a commercial expediency, it does not fall under the category of deemed dividend. The assessee has vehemently relied upon the judgment of the Jurisdictional High Court in the case of M/s Bright Enterprises Pvt. Ltd. reported in 381 ITR 107 and, though, this judgment is on 36(1)(iii), but the central idea of funds transfer within the group companies due to business & commercial expediency has been accepted by Hon'ble High Court and held as under:-

"When a holding company invests amounts for the purpose of the business of its subsidiary, it must of necessity be held to be an expense on account of commercial expediency. A financial benefit of any nature derived by the subsidiary on account of the amounts advanced to it by the holding company would not merely indirectly but directly benefit its holding company. In the case before us, the subsidiary had to be funded to a large extent for otherwise it would not have survived. If it had not survived and had gone into liquidation, the appellant would have suffered directly on account of an erosion of its entire investment in the subsidiary. In this case, the financial assistance was not only prudent but of utmost necessity for without it the subsidiary would have suffered grave financial prejudice."

4.12 Similarly, the reliance by the assessee on the judgment of Hero Cycles Pvt. Ltd. , S.A. Builders, Lakra Brothers and others is quoted above are quite apt. The assessee has also relied upon the judgment of M/s Bagmane Construction Pvt. Ltd. and which case is also of 2 (22)(e) and in that case, there are similar facts and in which, it has been held as under:-

"As a result of globalization during the recent past, various giant infrastructure projects have sprung up and many are in the pipeline. Multi- various activities are involved in promoting these giant projects. All these activities collectively strive to complete the projects. Each activity is distinct in

character. For each activity, different kinds of commercial agreements and technical agreements are required. The financial structure of every activity differs. *The risk and reward involved in every activity also differs. In order to meet such complex constraints, the flagship company/the promoter may create various distinct entities being special utility vehicles (SUV) to deal in each of these activities independently. The promoter along with these SUV jointly works to complete the over-all project. In such situation, funds being the bloodline for all these entities flow from one entity to the other. Such transfer of funds arising out of commercial expediency may not be in the nature of advances or loan in all circumstances."*

4.13 The appellant's detailed submissions by way of comparative chart of the various issue raised by the Assessing Officer and the assessee's submission have been reproduced in the body of the order and have been taken into consideration, which proves the case of the assessee. Further, the reliance by the assessee on the judgment of AR Magnatic Pvt. Ltd. of Hon'ble Delhi Court as reported in 220 Taxman 209 and CIT vs Ankitech P. Ltd. & Ors as reported in 340 ITR 0014 has been relied upon by the assessee for the proposition that even if for the sake of argument, the transfer of shares by Sh. Gurdeep Singh to JCTPL is not taken into consideration even then, no addition on account of deemed dividend can be made. In the above said judgment, it has been held as under :-

"It is the definition of dividend which is enlarged by the deeming provision of s. 2(22)(e) and not that of "shareholder" and, therefore, a concern which is given loan or advance by a company cannot be treated as shareholder/member of the latter simply because a shareholder of the lender company holding voting power of 10 per cent or more therein has substantial interest in such concern, and such loan or advance cannot be treated as deemed dividend under s. 2(22) (e) at the hands of such a concern."

4.14 The appellant argument given at the time of appellate proceedings from time to time have been considered carefully. After careful consideration of the facts in the latest decisions as relied upon by the appellant in support of its contention one thing which has emerged and cannot be denied that the whole exercise has been done

in order to support the one of the major group company that the amount has ultimately been received by M/s G.S Majestic Developers Private Limited which was in need of funds to complete its big project of construction of a mall. The amount is given purely in the nature of inter corporate deposits and thus it cannot come under the category of deemed dividend. Irrespective of the status of the Company whether it is subsidiary or not subsidiary, the very transfer of amount from the group companies for the business purpose which has not resulted into any violation of section 2(22)(e) of the Income Tax Act, 1961. In the present case one of the group company has transferred the funds to a Company which has further transferred the same to the other group Company which used the same for the construction of a building used by the group companies. The major factor which has emerged is that no personal/individual benefit to the assessee accrued with the above transaction. M/s G.S Majestic Developers Private Limited was not having any regular income to be eligible for the raising the finance due to non-operations. So one of the group company which is having the regular income and have satisfactory finance track record has helped the other group Company. So the Company which was eligible for credit facilities and has sufficient funds (own and borrowed) has transferred the same to another group company which acted as conduit pipe to transfer the same to the end user company. This fact also can not be ignored that the company which raised the funds have also transferred the interest to the other company to whom the funds were transferred. **Even the amount is not given as interest free to M/s Jujhar Construction and Travels Pvt Ltd.** In the case of the Assessee, it is a matter of fact that the amount has not been given as free of cost by M/s Creative Cable Network Pvt Ltd. to M/s Jujhar Construction and Travels Pvt Ltd. The Company has received an amount of Rs. 1,00,11,847/- during the year under consideration as interest income. So in no way the transaction in question can be termed as deemed dividend in the case of the Assessee. Reliance in this regard is being placed upon the following latest Judgment wherein it has been held that when there is passing of some consideration in the form of interest then it cannot be said that any benefit has been received: **Smt. Sangita Jain vs ITO in ITA No. 1817/Kol/2009 vide order dated 11.03.2016.**

The amount has ultimately been invested in the share application money of the Company namely M/s G. S Majestic Developers P Ltd. The assessee has vehemently argued and which has also substance in considering that the amount has ultimately been received by M/s G.S Majestic Developers Private Limited from M/s

Jujhar Construction and Travels Pvt Ltd and the same has been shown as share application money received by the Company. The share application money or share application advance is distinct from 'loan or advance'. Although share application money is one kind of advance given with the intention to obtain the allotment of shares/equity/preference shares etc, such advances are innately different from the normal loan or advances specified both in section 269SS or 2(22)(e) of the Act.

While considering all these arguments it is held that the transaction is at nature of commercial expediency and when the transaction is in the nature of commercial expediency and do not fall under the category of Deemed dividend u/sec 2(22)(e) of the Act. It is also to be kept in mind the argument of the appellant that ultimately that No individual benefit of the Assessee is involved in the entire transaction. Therefore Provisions of section 2(22)(e) are not applicable only for the sole reason that the shareholding is common. It is also important fact to consideration that even the amount is not given as interest free to M/s Jujhar Construction and Travels Pvt. Ltd Accordingly it is held that the amount is given purely in the nature of inter corporate deposits and thus it cannot come under the category of deemed dividend. The relationship between the two Companies is that of Holding and Subsidiary and thus provisions of section 2(22)(e) are not applicable. M/s Creative Cable Network Pvt Ltd. is also into the business of money lending as substantial funds of the Company are given to group Companies as interest funds. In all the arguments as reiterated from time to time at the time of appellate proceedings but major factor which is come prominently is that the amount has been invested by the one group Company in the other group Company only on account of commercial expediency. It has already been stated that the a Commercial Building project was undergoing in the name of one of the group concerns namely M/s G.S Majestic Developers Pvt Ltd and it was the need of hour to give financial support to it as otherwise the whole group would have suffered huge financial losses. A detailed chart clearly explaining the above said fact has already been filed by the appellant , wherein it has been made clear that the total investment in M/s G.S Majestic Developers Pvt Ltd. is Rs. 112.25 cr and out of the same Rs. 90.70cr has been funded from the group Companies. From the perusal of the said chart it is also clear that the funds amounting to Rs. 90.70cr have been funded by the following group Companies:

Amount funded by M/s Jujhar Construction

and Transport Pvt Ltd.	-	46.64cr
Amount funded by Creative Cable Network -		24.10 cr
Amount funded by Other Group Companies -		19.96 cr

It has also been made clear that out of the total funds as contributed by M/s Jujhar Construction and Transport Pvt Ltd., an amount of Rs. 18.08cr has been received by M/s JCTPL from M/s Creative Cable Network. The chart as submitted earlier clarifies each and everything. It can also be seen from the said chart that M/s G.S Majestic has been able to get funds from the Banks only to the tune of Rs. 19.93cr. It has also been stated earlier that M/s G.S Majestic was not able to procure any loan from the initial years of its project i.e in the year ending 31.03.2011 and 31.03.2012 and even in the year 2013 the Company has able to procure only a meager amount of loan keeping in mind the huge investment. I find considerable weightage in the argument of the appellant that had M/s G.S Majestic not got financial help from the other group Companies the following issues must have been emerged:

- a) M/s G.S Majestic could not have completed the project even on the current date.
- b) The commitments as made with the various parties for letting the building would not have been fulfilled on time.
- c) The whole project would have stopped as the Company was not getting any financial help from the Banks. The banks were not giving any sort of loan to the Company as the same was in the business of real estate and moreover it was a new Company.
- d) The Company also had to get permissions from various departments of the Government in time in order to bring its project in working condition.
- e. The Company has incurred around 150cr of amount as on date in the said project. Now, the Company has started earning the rental income but even the said rental income is not sufficient to meet the interest on the total amount of Rs. 150cr. So, even if the entire project was financed by the Banking Institutions, the same was not viable and the financial help from the group Companies was required in any case.

Thus, I find that it was a commercially expedient transaction, necessitated by business requirements wherein funds were given by CCNPL to JCTPL and on which, the interest has also been paid by JCTPL to CCNPL and this fact has been acknowledged by the Assessing Officer in the assessment order itself at page-38. Therefore, in view of the totality of the facts and circumstances, the transaction being in the nature of commercial expediency and further these are inter group deposits among group companies and interest have been charged and no personal benefit of the assessee is involved in the entire transaction, because ultimately the funds have been invested in the implementation of commercial project in the name of G.S. Majestic Developers Pvt. Ltd. and but because of these funds, the project of the group company would not have seen the light of the day. This view is further fortified by the recent **Circular of the CBDT in Circular No. 19/2017 dated 12.06.2017** wherein the CBDT has observed that the trade advances in the nature of commercial transactions between group entities would be outside the ambit of Section 2(22)(e). It has been further strengthened by the decision of jurisdictional Hon Punjab & Haryana High Court in case of CIT vs Amrik Singh that in case of tangible business expediency has been established, Section 2(22)(e) can't be invoked.

4.15 During the course of appellate proceedings the appellant vehemently reiterated that, in the subsequent years the assessing officer Assessing Officer after examining all such facts, passed an order u/s 143(3) of the Income tax Act for the A.Y. 2014-15 has chosen not to make addition of deemed dividend on the basis of evidence furnished. On the same facts and circumstances, the Assessing has chosen not to make addition of deemed dividend on the basis of evidence furnished. This fact substantiate the claim of the appellart given at the time of appellate proceedings that the transactions as carried out during the assessment year is nothing but transaction is in the nature of commercial expediency and no personal benefit is involved in the entire transaction

4.16 So, in nutshell, I am of the view that the appellant is not the beneficial shareholder of minimum 10%, since the shares stood transferred in May 2012, as accepted by Assessing Officer while framing the assessment for AY 2014-15 and AY 2015-16. Even if for the sake of argument, the second view is taken and the transfer of the shareholding is not considered, the case of the Appellant is strong on account of issues like the amount is not given as interest free to M/s JCTPL, the transaction is in the nature of commercial expediency and

no personal benefit is involved in the entire transaction and, thus, it is held that even on this account, it is not case of deemed dividend either and the addition as made by the Assessing Officer by invoking the provisions of section 2(22)(e) is deleted on this issue as well.”

6. Being aggrieved by the above action of the CIT(A) in deleting the additions so made by the Assessing Officer, the Revenue has come in appeal before us.

7. We have heard the rival contentions of the Ld. Authorized Representatives of both the parties and gone through the record. In this case, when the assessee was confronted by the AO with the issue of deemed dividend, he stated that he ceased to have substantial shareholding of CCNPL w.e.f. 8th May 2012. He also filed the copy of annual return filed with the Registrar of Companies, Chandigarh. As per the annual return for the year 2012-2013, relevant to Assessment Year 2013-2014, the share holding of CCNPL had been held by JCTPL to the extent of 24999 shares, out of total 25000 shares of the Company and the assessee Gurdeep Singh was holding only one share. It was therefore pleaded that since the assessee was not having substantial share holding in CCNPL, hence, the provisions of deemed dividend were not applicable. However, the assessing Officer rejected the above contention of the assessee observing that the return with the “Registrar of Companies” was filed after the show cause notice issued by her and also that consideration for the transfer of shares was partly remitted

during financial year 2012-2013 and that the balance consideration was paid in Financial Year 2013-2014. However, Ld. CIT(A) has decided the issue in favour of the assessee observing that the transfer of shares was substantiated by the documentary evidence as per record of the "Registrar of Companies", which was the only authority to whom the intimation regarding the transfer of shares was required to be given and as per record of the ROC, the effective date of transfer of shares was May 8, 2012. The assessee had submitted before him that one could file belated return with the ROC and, if the annual return was late as in the case of assessee, then the same could be filed along with "late fee" as applicable, as was done by assessee and, as such, for all intents and purposes, it was a valid original annual return and legally enforceable document. The Ld. CIT(A), admitting the above submissions of the assessee, has observed that though, the return intimating the sale of shares had been filed late with the ROC, however, since the same was accepted by the ROC along with late fee as per rules, hence the same was legally valid and enforceable document which could not be brushed aside. The Ld. CIT(A) has further observed that the share transfer deed was furnished by the assessee in original to the Assessing Officer and which had been impounded by the Assessing Officer and that no adverse comments on the same were recorded by the Assessing Officer, except that the signature of the witness had not been appended on that. However, there were valid signatures of transferor as well as transferee.

The Ld. CIT(A), therefore, held that since no doubt had been made by the Assessing Officer about the genuineness of share transfer deed as well as signature of the transferor or transferee, except that there were no signature of the witness, which did not affect the legal validity of the transfer deed, hence on the strength of the valid transfer deed, coupled with the fact that the amount of consideration had already been remitted by the transferee to the transferor, the legally enforceable document could not be discarded on the basis of mere suspicion of the AO of the same being the result of an afterthought. The Ld. CIT(A) has further observed that though, the AO has pointed out certain inconsistencies such as that the above transfer of shares had not been reflected properly in the balance sheet of companies and that there was no mention about it in the "notes on accounts" also, yet, the documentary evidences in the shape of "annual return" filed on portal of "Ministry of Corporate Affairs", share transfer deed, passing on of consideration of shares in the Financial Years 2012-2013 and 2013-2014, through proper banking channel, much before the start of the assessment proceedings, could not be lightly rejected. That it was also not the case of the AO that these documents were false or fabricated. He therefore, held that once the authenticity of such legal documents was not under doubt then the transaction and facts represented by those documents had to be accepted and could not be brushed aside by the AO on the basis of mere suspicion only. The Ld. CIT(A) further noted that even in the case of

the Assessee for Assessment Year 2014-2015, wherein, the AO had raised same issue of deemed dividend and there again copy of the annual return for Financial Year 2012-2013 and 2013-2014 as filed to the ROC, had been filed and by considering the above said evidences on record, the AO accepted the plea of the assessee and hence, no addition on account of "deemed dividend" had been made by the AO in subsequent years 2014-15 and 2015-16. The Ld. CIT(A), therefore, has observed that in the light of the above discussed facts and circumstances, which are borne out from the record, the mere suspicion, howsoever, strong, it may be, cannot take the shape of evidence and no addition can be made on the basis of doubt or suspicion. He in this respect has relied upon the decision of the jurisdictional Punjab & Haryana High Court in the case of 'CIT Vs. Ram Narain Goel' as reported in 224 ITR 180. The Ld. CIT(A), therefore, concluded that the assessee was not having substantial share holding in the CCNPL and further that 99.9% shares of CCNPL were held by JCTPL, by which the CCNPL had become the subsidiary of JCTPL and funds transferred by subsidiary to holding did not come under the purview of deemed dividend u/s 2 (22)(e).

8. However, the Id. DR, before us, has reiterated that since the annual return of share holder was belatedly filed with the Registrar of Companies, though, regularized by the ROC as per rules on deposit of

late fee, however, from the above facts it appears that the said action was an after thought action by the assessee to circumvent the provisions of section 2(22)(e) of the Act. We have considered the above contention of the Id. DR. Before further deliberating on this issue, we deem it appropriate to reproduce here the relevant provisions of section 2(22) (e) of the Income Tax Act:-

“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;”

The intention behind enacting provisions of section 2(22) (e) are 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. As per the provisions of section 2(22)(e) of the Act, such a deemed dividend is taxed in the hands of shareholder. 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 loan or advances would ultimately be made available to the shareholders of the company giving the loan or advance. Section 2(22)(e) of the Act, therefore, does not talk about the dividend actually declared or received. The dividend taken note of by this provision is a deemed dividend and not a real dividend. For certain purposes, the Legislature has deemed such a loan as 'dividend' and the effect of such deeming provision is that there is no option to the shareholder to say that it is a mere loan and not his actual income. If it is proved that a loan has been given out of the accumulated profits of the company to the shareholders having substantial interest in the company or to any other concern in which such a shareholder has also substantial share holding, then as per the provisions of section 2(22) (e) of the Act, there will be a presumption that such loan has been given for the benefit of the shareholder and hence, is taxable in the hands of such a shareholder. It has been made so by legal fiction created under section 2(22)(e) of the Act read with section 56 of the Act.

9. The words “deem” or “fiction” or irrebuttable presumption have not been defined in the Income Tax Act. For better understanding of the statutory presumptions and legal/deeming fictions, we deem it appropriate to refer to the relevant provisions of The Indian Evidence Act, 1872. Though the provisions of the Evidence Act are not strictly applicable to the procedures of this Tribunal as envisaged under the Income Tax Act, 1961, but the principles underlying the provisions of Evidence Act do constitute valuable guides. Section 4 of the Evidence Act, read as under:-

“4. “May presume”.—Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it. “Shall presume”.—Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved. “Conclusive proof”.—When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.”

(emphasis supplied)

The Conclusive Presumptions/proofs can be considered as one of the strongest presumptions. With regards to Conclusive proofs, the law has absolute power and shall not allow any proofs contrary to the presumption. The general definition of Conclusive Proof is a condition when one fact is established beyond doubt, then the other facts or conditions become conclusive proof of another as declared under the

relevant provision. Legal fictions compel to believe the existence of an artificial state of facts which may be contrary to the real state of facts. When a fiction is created by law, it is not open to anybody to plead or argue that the artificial state of facts created by law is not true. The basic purpose of a deeming provision is an assumption that something is true even though it may be untrue. It creates a presumption that accepts something as fact without the benefit of evidence and further the legal consequences of such facts have to follow accordingly. Under such circumstances, when on the proof of one fact, which, in the case in hand is fact of advancement of loan to the share holder or to the concern in which such a share holder is having substantial share holding, the other fact that such a loan is a diversion of the accumulated profits of the company for the benefit of such a shareholder, hence income of the share holder, is to be assumed automatically. For raising such an irrebuttable presumption, the first set of facts which are deemed to be conclusive proof of the other, i.e. regarding the advancement of loan to shareholder or to the concern in which such a share holder has substantial interest has to be proved strictly and beyond reasonable doubt and such first limb of the facts cannot be assumed or presumed merely on the basis of suspicion, howsoever strong it may be.

10. Now, in this case in the given facts and circumstances, the Revenue could not establish beyond doubt that the assessee was having substantial interest in CCNPL on the date of advancement of loan by

CCNPL to JCTPL. On the other hand, the Ld. CIT(A) has specifically observed that as per the annual return filed with the Registrar of Companies, which is a legal and valid document as per law, the assessee was holder of only one share in CCPNL and the other shares stood transferred to the JCTPL. The Ld. CIT(A) has noted that it is the mere suspicion of the AO that the assessee was having substantial share holding in the CCNPL on the date of transaction. As discussed above, to apply a deeming fiction, the first set of facts is to be proved beyond doubt and the deeming fiction cannot be applied on the basis of assumption, presumption or suspicion about the first set of facts. The Ld. CIT(A) also rightly noted that as per record of "Registrar of Companies", the effective date of transfer of shares was May 8, 2012. That one can file belated return with the ROC along with "late fee" as applicable, as was done by assessee and since the same was accepted by the ROC, hence, for all intents and purposes, the effective date of transaction will be the date as mentioned in the return. Since, the revenue could not rebut the above stated facts beyond reasonable doubt, hence, the Ld. CIT(A), in our view, has rightly declined to apply the deeming provisions of section 2(22) (e) of the Act in the set of facts and circumstances of the case. Moreover, it has also been observed by the Ld. CIT(A) that in the subsequent assessment years AY 2014-15 and even AY 2015-16, in the scrutiny assessments carried out u/s 143(3) of

the Act, the AO has accepted the very transaction of shares effected in May 2012.

In view of this, we do not find any infirmity in the order of the CIT(A) on this issue and the same is upheld .

In the result, the appeal of the Revenue is hereby dismissed.

Order could not be pronounced earlier due to non-functioning of the Bench on account of curfew / lockdown in the wake of Covid-19 Pandemic.

Order pronounced on 26.06.2020.

Sd/-

(अन्नपूर्णा गुप्ता / ANNAPURNA GUPTA)

लेखा सदस्य/ Accountant Member

Sd/-

(संजय गर्ग / SANJAY GARG)

न्यायिक सदस्य/ Judicial Member

Dated : 26.06.2020

“आर.के.”

आदेशकीप्रतिलिपिअग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त/ CIT
4. आयकरआयुक्त (अपील)/ The CIT(A)
5. विभागीयप्रतिनिधि, आयकरअपीलीयआधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्डफाईल/ Guard File

