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IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, KOLKATA

BEFORE DR. MANISH BORAD, HON’BLE ACCOUNTANT MEMBER
&
SHRI SONJOY SARMA, HON’BLE JUDICIAL MEMBER

I.T.A. No. 116/Kol/2023
Assessment Year: 2013-14
I.T.A. No. 117/Kol/2023
Assessment Year: 2014-15
I.T.A. No. 118/Kol/2023
Assessment Year: 2016-17
I.T.A. No. 119/Kol/2023
Assessment Year: 2017-18

Apeejay Pvt. Ltd. Apeejay House 15, Park Street Kolkata - 700016 [PAN : AADCA1160F]	Vs	D.C.I.T., Circle-8(1), Kolkata
□□□□□□ / (Assessee)		यथ / (Respondent)

Assessee by :	Shri Manish Tiwari, FCA
Revenue by :	Shri Subhrajyoti Bhattacharjee, CIT D/R

□□□□□□ □ □□□□□/Date of Hearing : 25/05/2023
□□□□□ □ □□□□□ /Date of Pronouncement: 10/08/2023

□□□□/O R D E R

PER DR. MANISH BORAD, ACCOUNTANT MEMBER :

This is an appeal preferred by the assessee against the separate but identical orders of the National Faceless Appeal Centre, Delhi (hereinafter referred to as the ld. CIT(A)"], passed u/s 250 of the Income-tax Act, 1961 (hereinafter the 'Act'), even dated 19/12/2023 for the Assessment Year 2013-14, 2014-15, 2016-17, 2017-18.

2. As the issues involved in all these appeals are identical and pertains to same assessee, they were heard together and are being disposed off by way of this common order.

3. The assessee has raised the following grounds of appeal:-

Assessment Year : 2013-14

"1. That on the facts and in the circumstances of the case, Ld. CIT(A) erred in confirming the further disallowance made by AO amounting to Rs. 16,73,473/- u/s 14A read with Rule 8D over such disallowance already offered by the appellant in its computation of income.

2. a) That on the facts and in the circumstances of the case, Ld. CIT(A) erred in confirming the action of AO who rejected the explanation of the appellant against the applicability of the provisions of section 2(22) (e) of Income Tax Act, 1961.

b) That on the facts and in the circumstances of the case, Ld. CIT(A) erred in in confirming the action of AO who considered loan of Rs. 21,92,55,967/- received from M/s. Apeejay Tea Ltd. as deemed dividend within the meaning of section 2(22)(e) of Income Tax Act, 1961.

3. That the appellant craves leave to add, alter, adduce or amend any ground on or at the time of hearing of the appeal."

Assessment Year : 2014-15

1. That on the facts and in the circumstances of the case, Ld. CIT(A) erred in confirming the further disallowance made by AO amounting to Rs. 18,00,595/- u/s 14A read with Rule 8D over such disallowance already offered by the appellant in its computation of income.

2. a) That on the facts and in the circumstances of the case, Ld. CIT(A) erred in confirming the action of AO who rejected the explanation of the appellant against the applicability of the provisions of section 2(22) (e) of Income Tax Act, 1961.

b) That on the facts and in the circumstances of the case, Ld. CIT(A) erred in in confirming the action of AO who considered loan of Rs. 47,07,00,000/-

received from M/s. Apeejay Tea Ltd. as deemed dividend within the meaning of section 2(22)(e) of Income Tax Act, 1961.

3. That on the facts and in the circumstances of the case, Ld. CIT(A) erred in confirming the action of AO who made addition of Rs. 27,126/- for so-called delayed deposit of employees contribution to PF u/s 2(24)(x) read with section 36(1)(va) of Income Tax Act, 1961.

4. That the appellant craves leave to add, alter, adduce or amend any ground on or at the time of hearing of the appeal."

Assessment Year : 2016-17

1. That on the facts and in the circumstances of the case, Ld. CIT(A) erred in confirming the further disallowance made by AO amounting to Rs. 65,23,307/- u/s 14A read with Rule 8D over such disallowance already offered by the appellant in its computation of income.

2. a) That on the facts and in the circumstances of the case, Ld. CIT(A) erred in confirming the action of AO who rejected the explanation of the appellant against the applicability of the provisions of section 2(22) (e) of Income Tax Act, 1961.

b) That on the facts and in the circumstances of the case, Ld. CIT(A) erred in in confirming the action of AO who considered loan of Rs. 5,15,00,000/- received from M/s. Apeejay Tea Ltd. as deemed dividend within the meaning of section 2(22)(e) of Income Tax Act, 1961.

3. That on the facts and in the circumstances of the case, Ld. CIT(A) erred in confirming the action of AO who made addition of Rs. 53,507/- for socalled delayed deposit of employees contribution to PF u/s 2(24)(x) read with section 36(1)(va) of Income Tax Act, 1961.

4. That on the facts and in the circumstances of the case, Ld. CIT(A) erred in confirming the action of AO who proceeded on erroneous belief and misconception of law in disallowing interest on income tax and service tax of Rs. 4,23,358/-.

5. That the appellant craves leave to add, alter, adduce or amend any ground on or at the time of hearing of the appeal."

<u>Assessment Year : 2017-18</u>

1. a) That on the facts and in the circumstances of the case, Ld. CIT(A) erred in confirming the action of AO who rejected the explanation of the appellant against the applicability of the provisions of section 2(22) (e) of Income Tax Act, 1961.

b) That on the facts and in the circumstances of the case, Ld. CIT(A) erred in in confirming the action of AO who considered loan of Rs. 1,15,00,000/- received from M/s. Apeejay Tea Ltd. as deemed dividend within the meaning of section 2(22)(e) of Income Tax Act, 1961.

2. That on the facts and in the circumstances of the case, Ld. CIT(A) erred in confirming the further disallowance made by AO amounting to Rs. 1,40,266/- u/s 14A read with Rule 8D over such disallowance already offered by the appellant in its computation of income.

3. That on the facts and in the circumstances of the case, Ld. CIT(A) erred in confirming the action of AO who proceeded on erroneous belief and misconception of law in disallowing interest on delayed deposit of TDS for Rs. 91,306/-.

4. That on the facts and in the circumstances of the case, Ld. CIT(A) erred in confirming the action of AO who made addition of Rs. 34,631/- for so-called delayed deposit of employees contribution to PF u/s 2(24)(x) read with section 36(1)(va) of Income Tax Act, 1961.

5. . That the appellant craves leave to add, alter, adduce or amend any ground on or at the time of hearing of the appeal."

4. For the purpose of adjudication we take up the facts for AY 201314 and the same are that the assessee is a private limited company engaged in the business of operating of business centres and letting out. It e-filed its return for AY 2013-14 on 28/09/2013 declaring income of Rs.4,38,82,870/-. Case selected for scrutiny through CASS followed by issuance of notice under section 143(2) and 142(1) of the Act. The major issues for consideration by the assessing officer were with regard to disallowance under section 14A of the Act as well as deemed dividend under section 2 (22)(e) of the Act. The ld. AO observed that during the year assessee company has received a sum of Rs. 21,92,55,967/- from another group concern Apeejay Tea Limited. The ld. AO further noticed that

both the companies, namely, assessee company i.e., Apeejay Pvt. Ltd. and Apeejay Tea Limited, have a common shareholder, namely, Kathua Steel Works Pvt. Ltd., holding shares at 58.64% in Apeejay Tea Limited and 99.96% in the assessee company. Since accumulated profits for distribution in the books of Apeejay Tea Limited, were to the tune of Rs. 239.33 Crores, the ld. Assessing Officer invoked the provisions of section 2(22)(e) of the Act. Though the assessee stated that addition for deemed dividend can be made only in the hands of the shareholder and assessee not being a shareholder, addition for deemed dividend is uncalled for, but the ld.

Assessing Officer was not satisfied and he made the addition in the hands of the assessee as deemed dividend.

5. As far as the disallowance under section 14A of the Act is concerned, the ld. AO after considering the disallowance suo moto offered by the assessee further made interest disallowance under Rule 8D(2)(ii) as well as disallowance under Rule 8D(2)(iii) of the Income Tax Rules, 1962 (hereinafter the 'Rules') @ 0.5% of the average value of investment. Along with other minor disallowances, income of the assessee assessed at Rs.26,51,61,720/-. We further notice that for the

AY 2014-15, 2016-17 and 2017-18, almost identical additions/adjustments towards deemed dividend under section 2(22)(e) of the Act and disallowance under section 14A of the Act and minor other disallowances were made and the same can be deciphered from the following chart:-

Issues	AY 2013-14	AY 2014-15	AY 2016-17	AY 2017-18
Disallowance u/s 14A	16,73,473	18,00,595	65,23,307	1,40,266
Deemed Dividend u/s 2(22)(e)	21,92,55,967	47,07,00,000	5,15,00,000	1,15,00,000
PF and ESI u/s 2(24)(x)	-	27,126	53,507	34,631
Disallowance of Interest on IT, ST & TDS	-	-	4,23,358	91,306

6. Aggrieved the assessee preferred appeal before the ld. CIT(A) but failed to succeed on the issues, which are in challenge before us. 7. So far as the main issue relating to deemed dividend under section 2(22)(e) of the Act is concerned, the ld. CIT(A), confirmed the

view taken by the AO that second limb of section 2(22)(e) of the Act, is applicable, since there is a common substantial shareholder between the two parties.

8. Aggrieved the assessee is now in appeal before this Tribunal.

9. The first common issue for our consideration is the disallowance under section 14A of the Act made under Rule 8D(2)(ii) and 8D(2)(iii) of the Rules. At the outset, the ld. Counsel for the assessee submitted that interest disallowance under Rule 8D(2)(ii) of the Rules, is uncalled for since the assessee has sufficient interest free funds available for making the investments in the equity shares. Placing reliance on the judgement of the Hon'ble Bombay High Court in the case of CIT vs. Reliance Utilities & Power Ltd. reported in [2009] 313 ITR 340 (Bombay) and HDFC Bank

Ltd. 376 ITR 553, it is contended that interest disallowance is uncalled for in all the impugned four Assessment Years.

9.1. So far as the disallowance under Rule 8D(2)(iii) of the Rules is concerned it was claimed that as regards Assessment Years 2013-14, the disallowance made by the Assessing Officer at Rs.2,42,350/-, the same may be confirmed. As regards Assessment Year 2017-18, it is claimed that the ld. Assessing Officer failed to consider that the assessee has suo moto disallowance of Rs. 4,45,692/- under section 14A of the Act as against Rs.1,40,266/- computed by the ld. Assessing

Officer. But as regards Assessment Year 2014-15 & 2016-17, placing reliance on the decision of this Tribunal in the case of REI Agro Ltd , Kolkata vs DCIT in ITA No. 1331 / Kol / 2011 dated 19.6.2013 reported in (2013) 35 taxmann.com 404 (Kolkata-Trib.), submitted that the matter may be remitted back to the Assessing Officer for calculating the average value of investment under Rule 8D(2)(iii), which fetches exempt income and only on such investments, calculation of 0.5% can be made and the remaining disallowance may be deleted.

10. The ld. D/R, on the other hand vehemently argued supporting the orders of the lower authorities.

11. We have heard rival contentions and perused the material placed before us. Assessee is aggrieved with the disallowance under section 14A of the

Act confirmed by the ld. CIT(A). We notice that the impugned disallowance consists of two amounts, one is the interest disallowance under Rule 8D(2)(ii) and other is expenditure disallowance under Rule 8D(2)(iii) r.w.s. 14A of the Act. So far as the interest disallowance is concerned, the ld. Counsel for the assessee has referred to the interest free funds available with the companies in the form of shareholder funds which includes equity share capital and accumulated reserve and surplus available for investment in the equity shares. For Assessment Year 2013-14, we notice that the accumulated interest free funds as on 31/03/2013 are to the tune of Rs.

37,41,34,279/-against which investments are only at Rs. 4,45,95,408/-. Similar is the situation for the remaining assessment years wherein also the interest free funds available with the assessee company in the form of shareholder funds is almost 9 to 10 times of the investments held by the assessee in the equity shares. It is an admitted fact that there is no finding of the revenue authorities at any stage indicating specifically that interest bearing funds have been applied for the purpose of making investments. In absence of any such finding, we find that the judgement of the Hon'ble Bombay High Court in the case of Reliance Utilities & Power Ltd. (supra), are squarely applicable on the facts of the present case and, therefore, on account of sufficient availability of interest free funds, we find no merit in the finding of the ld. AO making interest disallowance under Rule 8D(2)(ii) of the Rules. Thus, the finding of the ld. CIT(A) is set aside and

disallowance made under Rule 8D(2)(ii) for the impugned assessment years are hereby deleted.

12. As far as the remaining disallowance under Rule 8D(2)(iii) is concerned for AY 2013-14, the ld. Counsel for the assessee has not challenged the said disallowance of Rs.2,22,977/- and, therefore, the same is confirmed.

12.1. So far as Assessment Year 2014-15, is concerned, we notice that ld. Assessing Officer has made a disallowance under Rule 8D(2)(iii) at

Rs. 5,01,386/- and the same has been calculated taking the average investment figure at Rs.10.03 Crores, whereas as per the details filed in the paper book, the correct figure is Rs. 5,93,89,491/- which is the investment fetching exempt income and taking this correct figure, the disallowance under Rule 8D(2)(iii) will work out to Rs. 2,96,947/- and the same is hereby confirmed.

13. For Assessment Year 2016-17, we notice that the ld. Assessing Officer has calculated the sum @ 0.5% of the average investment at

Rs.10.23 Crores, whereas the actual average value of investment is Rs. 4,41,09,065/- and, therefore, the correct amount of disallowance shall work out to Rs. 2,20,545/- and the same is hereby confirmed.

13.3. For Assessment Year 2017-18, Assessing Officer made total disallowance of Rs.1,40,266/- whereas assessee has suo-moto disallowed a sum of Rs.4,45,692/- and has mentioned in the audit report and ld. Assessing Officer

has failed to take note of the said disallowance. It means that the ld. Assessing Officer has not complied with the provisions of Section 14A of the Act of recording satisfaction before applying Rule 8D of the Rules. On this ground itself the disallowance made under section 14A r.w.r. 8D, for Assessment Year 2017-18 is deleted.

14. Now, we take up the issue of addition towards deemed dividend under section 2(22)(e) of the Act, for the sum received by the assessee

company from another group company, namely, Apeejay Tea Limited. The basis for making the impugned addition by the revenue authorities is that both the assessee company as well as Apeejay Tea Limited have a common shareholder having substantial interest and since Apeejay Tea Limited has substantial accumulated reserves and surplus available for distribution, the sum received by the assessee in the impugned assessment years has been added as deemed dividend under section 2(22)(e) of the Act.

14.1. The said addition has been challenged by the assessee before the ld. CIT(A), but assessee failed to get any relief and now the assessee is in appeal before this Tribunal for all the impugned assessment years challenging the common issue of addition for deemed dividend u/s 2(22)(e) of the Act.

15. The ld. Counsel for the assessee referring to the written submission placed before the lower authorities for all the impugned assessment years, further took us through the relevant provisions of Section 2(22)(e) of the Act and

the three limbs provided therein and then stated that the Hon'ble Special Bench of ITAT in the case of ACIT vs. Bhaumik Colour Pvt. Ltd. [118 ITD 1 (MUM)], has been held that deemed dividend can be assessed only in the hands of the person who is a shareholder of the lender company and not in the hands of any other person. Based on this ratio laid down by the Hon'ble Special

Bench of ITAT in the case of Bhaumik Colour Pvt. Ltd. (supra), the ld. Counsel for the assessee submitted that the assessee is not a shareholder in Apeejay Tea Ltd., and, therefore, addition under section 2(22)(e) of the Act is uncalled for in the hands of the assessee.

Further reliance was placed on the following decisions:-

- Mahimananda Mishra Vs ACIT [147 Taxmann.com 521]
- CIT Vs MCC Marketing Pvt Ltd [343 ITR 350 (Del- HC)]
- CIT VS Sharman Woolen Mills Ltd [204 Taxman 82 (P & H HC)
- CIT VS Navyug Promoters Pvt Ltd. [203 Taxman 618 (Del-HC)
- CIT VS Ankitech Pvt Ltd. [340 ITR 14 (Del-HC)]
- CIT Vs Narmina Trade Investments Pvt Ltd [2017] 81 Tacmxnn.com 129
- CIT VS Hotel Hiltop [313 ITR 116 (Raj-HC)]
- DCIT 1(1)(2), Mumbai Vs Gilbarco Veeder Root India (P) Ltd 96 Taxmann.com 263].

16. The counsel has also referred to the decision of jurisdictional Kolkata High Court in the case of PCIT-3, Kolkata Vs. Rungta Properties (P) Ltd. dated 08.05.2017 reported in 403 ITR 234 wherein it was held that Revenue was not justified in treating sums reflected in books of assessee as loan from a company as deemed dividend in assessee's hands as same was to be taxed in hands of common shareholder as per section 2(22)(e). Based on the aforesaid decisions, the A/R pleaded

that action of AO as well as CIT(A) is bad in law and the addition must be deleted.

16.1. The Ld. Counsel also stated that these loans were not gracious loan which were enjoyed by the assessee without any interest. From the ledger account Ld. Counsel pointed out that the assessee has paid interest of Rs. 52,60,315/- for the said assessment year and the said loan was used for meeting the regular working capital requirement of the assessee company and therefore, in view of the fact that assessee has paid interest on loan from group company Apeejay Tea Ltd. which is not a gracious loan the amount in question could not be regarded as deemed dividend.

17. On the other hand, the ld. D/R vehemently argued supporting the order of the lower authorities and stated that Kathua Steel Works Pvt. Ltd., is a common substantial shareholder in both the companies i.e., in the company giving the loan and in the assessee company receiving the loan and, therefore, is directly hit by the provisions of section 2(22)(e) of the

Act. Further reference was made to the finding of the ld. CIT(A) which reads as follows:-

"9. Ground no. 02 & 03 are in respect of addition of Rs. 21,92,55,967/- made by the Assessing Officer on account of deemed dividend u/s. 2(22)(e) of the Act. The concept of Deemed Dividend is embedded in Section 2(22)(e) of the Income-tax Act, 1961 and was also embedded in section 2(6A)(e) of the Indian Income-tax Act, 1922. In nutshell, the concept envisages taxing certain payments made by closely held companies by way of loans or advances to certain shareholders of the company or to the concerns/companies in which they have substantial interest. Whenever any payment is made by way of loan or advance,

the recipient of the loan or advance will be liable to be taxed on this amount as a dividend, to the extent to which the company has accumulated profits, under the deeming provisions of section 2(22).

9.1 However, w.e.f. from A.Y 2019-20, the company giving such loan or advances shall be liable to pay tax, that is, dividend distributed tax 30% and not the recipient. Although such loan or advance may have been given for genuine business purposes and even if the paying company may have received back the loan amount. Thus, the section deems certain payments as dividend income which is not income under ordinary commercial parlance. Therefore, the name Deemed dividend.

9.2 The concept of deeming certain payments or loans or advances to substantial shareholders as income was introduced with the object of curbing tax evasion. Up to 31-51997 dividend was taxed in the hands of the recipient of the dividend. However, many closely held companies never declared any dividend and accumulated profits in the company itself. Since no dividend was declared the same could not be taxed. However, the companies did give loans or advances to substantial shareholders or to their concerns/companies who presumably enjoyed these funds but were not liable to pay any tax on the same as the amounts were loans or advances liable to be returned. These amounts of loans or advances are sought to be taxed as dividend by section 2(22)(e) of the Act by way of a deeming fiction.

9.3

Taxation of dividend under Income-tax Act, 1961 has undergone substantial changes in recent times. Effective from 1-6-1997 the scheme of taxation of dividend has been modified and is different from the old scheme. The essence of the old scheme was that the recipient of the dividend income was liable to pay the income-tax on the same, subject to certain exemptions. The new scheme essentially makes the dividend tax-free (section 10(34) of the Act) in the hands of the recipient (except cases covered under section 2(22(e)of the Act) and the dividend paying company

has been made liable to pay tax on the amount of dividend declared, distributed or paid by it (Section 115-0 of the Act). This tax is over and above the corporate income-tax which a company would normally pay. Recently there has been changes in the provision of section 2(22)(e), now the loans and advances given by the closely held company which is treated as deemed income will be liable to Dividend Distribution Tax and the company will pay tax @ 30% on such amount.

9.4 Section 2 (22)

Section 2(22) has 5 clauses (a), (b), (c), (d) and (e) which specify various types of distributions and payments as dividend. Clauses (a), (b), (c) and (d) mainly cover cases of distributions which entail release of assets or create liabilities. While clause (e) covers cases of payments by way of loans or advances and which is the clause mainly dealing with deemed dividend as it is commonly understood and has been dealt with in this article.

In Kantilal Manilal v.CIT [1961] 41 ITR 275(SC) the Supreme court held that Section 2(22) deals with various types of cases and creates a fiction by which certain receipts or parts thereof are treated as dividend for the purpose of levy of Income-tax .

In CIT v. Martin Burn Ltd., (1982)136 ITR 805(cal) the Calcutta High court held that Under section 2(22) certain amounts which are actually not distributed are also brought within the net of dividends. Therefore, that section must receive a strict interpretation.

Section 2(22)(e) has been held to be constitutionally valid in Navnitlal C. Javeri v. K.K.Sen, AAC [1965]56 ITR 198 (SC).

Section 2(22) starts with the words" Dividend includes " Thus, the definition of dividend is inclusive and not exhaustive.

9.5 Section 2(22)(e) reads as

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

Beneficial owner of not less than 10% of the voting power

It is not the registered shareholder but the beneficial owner of the shares'who is covered by the section 2(22)(e). Also, the shareholding as on the date of the loan has to be considered.

Concern in which Substantial interest

Section 2(32) of the Act states that a "person who has a substantial interest in the company" in relation to a company, means 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, carrying not less than twenty percent of the voting power."

As per Explanation 3(b) to Section 2(22) a person shall be deemed to have a substantial interest in a concern, other than a company, if he is, at any time during the previous year, beneficially entitled to not less than twenty percent of the income of such concern.

9.6 The plain reading of the provisions of section 2(22)(e) and other definitions of beneficial ownership as reproduced above would indicate that there are two limbs in the section 2(2)(e) which attracts the provisions of Deemed dividend, the same can be illustrated as below:

i) If a privately held company extends loan to a such a shareholder who do not have less than 10 % of beneficial ownership of share in that company, then such loan will be treated as Deemed dividend in the hands of such share holder to whom loan is given.

ii) Also, if a privately held company extend loan to a concern in which such share holder (having not have less than 10 % of beneficial ownership of share in that company) holds substantial interest.

9.7 In order to illustrate the issue at hand in a better way, let us presume that there exist three privately held companies namely "A", "B" and "C" with the following arrangements: -

a) "C" is having a beneficial ownership of shareholding in "A" of 58.64 %.

b) "C" is having a beneficial ownership of shareholding in "B" of 99.96 %.

c) "B" is not having any shareholding in "A"

Now with these arrangements the provisions of section 2(22)(e), as per two of its limbs, will get attracted in the following situation: -

(i) If the company "A" extends loan to "C" then "C" being the direct beneficial shareholder, the provisions of section 2(22)(e) will get attracted by virtue of first limb of the section.

(ii) Also, if the company "A" extend loan to "B" than "B" being the concern in which "C" is having substantial interest, even then the provisions of section 2(22)(e) attracted by virtue of second limb of the section.

9.8 Now if we simply replace the hypothetically presumed companies namely "A", "B" and "C" by the companies namely "Appejay Tea Ltd.", "Appejay Pvt. Ltd." and "KathuerSteel

Works Ltd.", then the situation will turn identical to the situation discussed above under para no. 9.7*.

9.9 Hence, it is clear that if the company namely "Appejay Tea Ltd." extends loan to "Appejay Pvt. Ltd." then "Appejay Pvt. Ltd." being the concern in which "Kathua Steel Works Ltd.", is having substantial interest, then the provisions of section 2(22)(e) will get attracted by virtue of second limb of the section.

9.10.The appellant has filed a detailed submission which has been reported under para no. 07 of this order and has also relied upon various case laws. The main line of their argument is that the provisions of section 2(22)(e) are not applicable because "Appejay Pvt. Ltd." is not a direct shareholder of "Appejay Tea Ltd.". The argument of the appellant holds good as far as the limb one (as discussed above) of section 2(22)(e) is concerned. However, from the Assessment Order it is apparent that the AO has invoked the second limb of section 2(22)(e), on which the appellant is conveniently silent.

9.11 In view of the facts discussed above, I do not find any infirmity on the stand taken by the AO and the addition made on account of Deemed dividend uphold. Accordingly, the Ground No. 02 & 03 of the appeal are dismissed.

10 Ground no. 04 is general in nature and not need to adjudication.

11 The appeal of the appellant is dismissed and order passed under section 250 read with section 251 of the Act."

18. We have heard rival contentions, perused the material placed before us as well as the case-laws and decisions relied upon by the ld. Counsel for the assessee. The issue for consideration is as to whether ld. CIT(A) erred in confirming the action of the assessing officer in making addition in the hands of the assessee towards deemed dividend under section 2(22)(e) of the Act. The uncontroverted facts placed before us are as follows:-

1) assessee is a private limited company and has received the alleged sum as loan from its group concern M/s Apeejay Tea Limited, during the years under appeal.

2) assessee company is not a shareholder of M/s. Apeejay Tea Limited and similarly M/s. Apeejay Tea Limited, is not a shareholder in the equity of the assessee company.

3) Apeejay Tea Limited has sufficient accumulated profits available for distribution as dividend.

3) the concern, namely, Kathua Steel Works Pvt. Ltd., is a common shareholder having 58.64% shareholding in Apeejay Tea Ltd. and

99.96% in Apeejay Pvt. Ltd.

Apeejay Pvt. Ltd.

19. Now, the revenue authorities had invoked section 2 (22)(e) of the Act and made the addition of deemed dividend in the hands of the assessee on the ground that since Kathua Steel Works Pvt. Ltd., is a common shareholder in both the companies and the alleged sum has been received by the assessee company on behalf of its substantial shareholder. Now whether this action of the revenue authorities is justified or not needs to be considered.

20. Since section 2(22)(e) of the Act has a direct bearing on the facts of this case the same is extracted for ready reference:-

“Section 2(22)(e) "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

Explanation-3 to Section 2(22)(e) is as follows: -

"Explanation-3: For the purpose of this clause-

(a) "concern" means a Hindu Undivided Family, or a firm or an association of persons or a body of individuals or a company;

(b) A person shall be deemed to have a substantial interest in a concern, other than a company, if he is, at any time during the previous year, beneficially entitled to not less than twenty percent of the income of such concern;"

21. From perusal of the above, one important term mentioned in the above provision is "substantial interest" and Section 2(32) defines, who is a person having substantial interest in the company, and the same reads as follows:-

"(32) person who has a substantial interest in the company" [15], in relation to a company, means 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, carrying not less than twenty per cent of the voting power ;"

22. Before moving further to go through the legal jurisprudence on the invocation of section 2(22)(e) of the Act, under similar set of facts, we need to understand the basic objective behind introduction of section 2(22)(e) of the Act which is given under the definition of dividend provided under

section 2(22) of the Act. Whenever a company earns profit, the cumulative profits can be either retained for the purpose of making further investments in the fixed assets and/or for the purpose of increasing the business of the concern and/or for the purpose of distributing as dividends to its shareholders. Now, distributing of dividend attracts dividend distribution tax and if the company wants to distribute dividends to its shareholders then the same has to be done at par to all the shareholders and the company cannot distinguish between the shareholders of which some are closely related to it/management or substantial shareholder and, therefore, if the dividend is declared it has to be given to all the shareholders. Now in case the company does not want to distribute

dividend but wants to give such funds to its shareholders having substantial interest in it then the same can be done only by way of giving loans or advances or by any other mode of payment which is not taxable in the hands of the recipient. Now, in order to check such type of transactions, section 2(22)(e) of the Act, has been brought into the Act.

23. Further on going through Section 2(22)(e) of the Act, we find that there are three limbs and if the case of the assessee falls under any of the three limbs and the company giving loan/advance has accumulated profits for distribution then subject to that sum, the addition for deemed dividend can be made and these three limbs, read as follows:-

"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 31-5-1987, by way of advance or loan

First limb

(a) 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,

Second limb

(b) 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)

Third limb

(c) 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.”

24. Now, so far as going through the above three limbs, we notice that so far as the first limb is concerned, the same is applicable to a shareholder of the company who gives such loan or advance and the shareholder is a beneficial owner of the shares as mentioned in the provisions of Section 2(22)(e) of the Act. Third limb applies in a case where payments are made by such company for individual benefit any such shareholder.

24.1. Now, so far as the second limb is concerned, where a concern in which such shareholder as referred in the first limb is a member or a partner having substantial interest receives loan/advance from a company in which also such shareholder is a beneficial owner as referred in Section 2(22)(e) of the Act, then Section 2(22)(e) of the Act can be invoked.

24.2. Now, one thing common in all the three limbs reading it in consonance with the provisions of Section

2(22)(e) of the Act, in our humble understanding, only indicates that the addition can be made in the hands of the shareholder, if any of the three conditions are fulfilled. Therefore, so far as the first limb is concerned, the payment is directly received by such shareholder but in the remaining two limbs if any such transaction takes place then the deemed dividend needs to be added in the hands of the shareholder.

25. Now, in the instant case it remains an admitted fact that the assessee company who has received the alleged funds is neither a shareholder in Apeejay Tea Ltd. nor Apeejay Tea Ltd., is a shareholder in the assessee company. The beneficial shareholder in this case is Kathua Steel Works Pvt. Ltd., holding shares at 58.64% in Apeejay Tea Limited and 99.96% in the assessee company. Now, examining these facts in the line of our discussion u/s 2(22)(e) of the Act, the beneficial owner of the shares is Kathua Steel Works Pvt. Ltd., and all the three limbs mentioned in Section 2(22)(e) of the Act, if needs to be attracted then the same can only be in the case of Kathua Steel Works Pvt. Ltd..

26. The first decision that we would like to refer to examine the alleged transactions and to support our view is that of the Hon'ble Special Bench of ITAT in the case of Bhaumick Colour Pvt. Ltd. (supra), wherein it has been held as follows:-

"34. We are of the view that the provisions of section 2(22)(e) does not spell out as to whether the income has to be taxed in the hands of the shareholder or the concern (non-shareholder). The provisions are ambiguous. It is therefore necessary to examine the intention behind enacting the provisions of section 2(22)(e) of the Act.

35. 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 became 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) is to tax dividend 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. The intention of the Legislature is therefore to tax dividend only in the hands of the shareholder and not in the hands of the concern.

36. The basis of bringing in the amendment to section 2(22)(e) of the Act by the Finance Act, 1987 with effect from 1-4-1988 is to ensure that persons who control the affairs of a company as well as that of a firm can have the payment made to a concern from the company and the person who can control the affairs of the concern can draw the same from the concern instead of the company directly making payment to the shareholder as dividend. The source of power to control the affairs of the company and the concern is the basis on which these provisions have been made. It is therefore proper to construe those provisions as contemplating a charge to tax in the hands of the shareholder and not in the hands of a non-shareholder viz., concern. A loan or advance received by a concern is not in the nature of income. In other words there is a deemed accrual of income even under section 5(1)(b) in the hands of the shareholder only and not in the hands of the payee, viz., non-shareholder (Concern). Section 5(1)(a) contemplates that the receipt or deemed receipt should be in the nature of income. Therefore the deeming fiction can be applied only in the hands of the shareholder and not the non-shareholder, viz., the concern.

37. The definition of 'Dividend' under section 2(22)(e) of the Act is an inclusive definition. Such inclusive definition enlarges the meaning of the term "Dividend" according to its ordinary and natural meaning to include even a loan or advance. Any loan or advance cannot be dividend according to its ordinary and natural meaning. The ordinary and natural meaning of the term 'dividend' would be a share in profits to an investor in the share capital of a limited company. To the extent the meaning of the word "Dividend" is extended to loans and advances to a shareholder or to a concern in which a shareholder is substantially interested deeming them as dividend in the hands of a shareholder the ordinary and natural meaning of the word "Dividend" is altered. To this extent the definition of the term "Dividend" can be said to operate. If the definition of "Dividend" is extended to a loan or advance to a non-shareholder the ordinary and natural meaning of the word dividend is taken away. In the light of the intention behind the provisions of section 2(22)(e) and in the absence of indication in section 2(22)(e) to extend the legal fiction to a case of loan or advance to a non-shareholder also, we are of the view that

loan or advance to a non-shareholder cannot be taxed as deemed dividend in the hands of a non-shareholder.

26.1. The aforesaid view has since been approved in several decisions rendered by Hon'ble High Court of Bombay and Delhi in the case of CIT Vs. Universal Medicare Pvt. Ltd., 324 ITR 263 (Bom) and CIT Vs. Ankitech Pvt. Ltd. & others 340 ITR 14 (Del.). The Hon'ble Supreme Court in CIT Vs. Madhur Housing and Development company in Civil Appeal No.3961 of 2013 judgement dated 5.10.2017, wherein the Hon'ble Supreme Court confirmed the view taken by the Hon'ble Delhi High Court in the case of CIT Vs. Ankitech Pvt. Ltd. & others 340 ITR 14 (Del). Reliance is also placed upon the decision of Hon'ble Bombay High Court in the case of CIT Vs Jignesh (P) Shah reported in 372 ITR 392 where the adverse order passed by following the judgment passed by the Hon'ble Apex Court in the case of CIT Vs. Vatika Township (P) Ltd. reported in 367 ITR 466 was followed. It is relevant to mention that in this case the Hon'ble Apex Court has been pleased to make following observations: -

"On this interpretation of sec 2(22)(e) of the Act, unless the appellant is the shareholder of the company lending him money, no occasion to apply can arise."

27. Now, let us examine the other case-laws relied upon by the

assessee:-

Orissa High Court.
Mahimananda Mishra Vs ACIT [147 Taxmann.com 521]

Deemed dividend paid by a company was to be taxed in hands of individual who held shares in that company and not in hands of firm in which said individual/shareholder was a partner.

Section 2(22) of the Income-tax Act, 1961 Deemed dividend (In case of a partner) - Assessment year 2011-12 Assessee, partnership firm, had four partners One of partners of firm, namely, MM was also director at company OSL where it held 36.95 per cent shares - During year, OSL gave assessee an unsecured loan of which certain amount was in cash - Assessing Officer was of view that said loan was deemed dividend in hands of assessee firm and, thus, added same to its income - Whether as per section 2(22)(e) deemed dividend was to be taxed in hands of individual shareholder and not firm in which said shareholder was a partner Held, yes Whether, thus, deemed dividend was to be taxed in hands of MM who was shareholder in OSL in his individual capacity and not in hands of assessee-firm and, accordingly. impugned addition was to be deleted.

Delhi High Court.
CIT Vs MCC Marketing Pvt Ltd [343 ITR 350 (Del- HC)]

Where assessee-company received unsecured loan from its sister- concern and one 'A' was holding more than 20 per cent shares in both sister-concern and assesseecompany, provisions of section 2(22)(e) were not attracted in assessee's case.

Section 2(22) of the Income-tax Act, 1961 Deemed dividend - Assessment year 2006-07 - Assessee, a private limited company, received a certain amount as unsecured loan from its sister concern by name MIPL - Assessing Officer having noticed that one A was holding more than 20 per cent shares in both MIPL and assessee-company invoked provisions of section 2(22)(e) and made addition of aforesaid amount to income of assessee Whether in view of judgment of Delhi High Court rendered in case of CIT v. Ankitech (P) Ltd. [2011] 199 Taxman 341 / 11 taxmann.com 100,

provisions of section 2(22)(e) were not attracted in instant case Held, yes - Whether, therefore, impugned addition made by Assessing Officer under section 2(22)(e) was not justified - Held, yes.

Punjab & Haryana High Court.
CIT VS Sharman Woolen Mills Ltd [204 Taxman 82 (P & H HC11

Where assessee-company was not shareholder of lending company, loan advanced by lending company could not be treated as deemed dividend under section 2(22)(e)

in hands of assessee- company on ground that shareholders of both companies were same.

Section 2(22) of the Income-tax Act, 1961 Deemed dividend Company 'A' advanced unsecured loan to assessee-company Assessing Officer added amount of loan in assessee's income as deemed dividend under section 2(22)(e) on ground that shareholders of lending company and that of assessee were same and, therefore, unsecured loan advanced by lending company to assessee was in fact loan to its shareholders - On appeal, Tribunal deleted addition holding that in terms of section 2(22)(e) dividend income is assessable only in hands of shareholders of lending company and since assessee was not a shareholder of lending company amount of loan could not be assessed in hands of assessee in terms of section 2(22)(e) - Whether, on facts, Tribunal had taken correct decision - Held, yes.

Delhi High Court.
CIT VS Navyug Promoters Pvt Ltd. [203 Taxman 618 (Del-HC)

An assessee who is not a shareholder of company, from which he received a loan or an advance, cannot be treated as being covered by definition of word 'dividend' as provided in section 2(22)(e).

Section 2(22) of the Income-tax Act, 1961 Deemed dividend - Assessment year 2006-07 - Whether an assessee who is not a shareholder of company, from which he received a loan or an advance, cannot be treated as being covered by definition of word 'dividend' as provided in section 2(22)(e) - Held, yes - Assessee- company took certain loan from two companies - Assessing Officer was of view that said loan was to be added to assesee's income as deemed dividend under section 2(22)(e) Whether since assessee-company was not a shareholder holding required percentage of shares

in any of two companies, impugned addition made by Assessing Officer was to be set aside - Held, yes.

Delhi High Court
CIT VS Ankitech Pvt Ltd. [340 ITR 14 (Del-HC)].

Section 2(22) of the Income-tax Act, 1961 Deemed dividend - Whether legal fiction created under section 2(22)(e) enlarges definition of dividend only; legal fiction is not to be extended further for broadening concept of shareholders - Held, yes -

Whether any company is supposed to distribute profits in form of dividend to its shareholders/members and such dividend cannot be given to non- members - Held, yes - Whether second category that is specified in section 2(22)(e) is a concern in which shareholder of payer company has at least 20 per cent of voting power and loan or advance under this category is given admittedly not to a shareholder/member of payer company and, therefore, under no circumstances, it can be treated as shareholder/member receiving dividend Held, yes Whether, however, in a case where conditions stipulated in section 2(22)(e) treating loan and advance as deemed dividend are established, revenue can treat dividend income at hands of shareholders and tax them accordingly - Held, yes

Whether where loans and advances are given in normal course of business and transaction in question benefits both payer and payee companies, provisions of section 2(22)(e) cannot be invoked - Held, yes.

Circulars and Notifications: CBDT Circular No. 495, dated 22-09-1997.

Mumbai High Court. CIT Vs Narmina Trade Investments Pvt Ltd
[2017] 81 Tacmxnn.com 129.

Section 2(22) of the Income-tax Act, 1961 Deemed dividend (Loans or advances to share-holders) - Assessment year 2007-08 - Where assessee was not shareholder of company advancing loan to it, amount of loan could not be treated as deemed dividend in its hands.

Rajasthan High Court
CIT VS Hotel Hiltop [313 ITR 116 (Raj-HC)]

Where assessee-firm had received an advance from a company and it was assessee's partners who were shareholders in said company and not assesseefirm, such an advance could not be taxed as deemed dividend in hands of assessee-firm.

Section 2(22) of the Income-tax Act, 1961 Deemed dividend - Assessee-firm had received certain amount as an advance from a company under an agreement to handover management of firm's hotel to said company -

Partners of assessee-firm were also shareholders in said company Assessing Officer treated said amount received by assessee-firm as deemed dividend under section 2(22)(e) in hands of assessee and assessed same to tax- Whether it was not assessee-firm which was shown to be shareholder of company but in fact it was its partners who were holding more than requisite amount of shareholding in company and were having requisite interest in firm - Held, yes - Whether, therefore, aforesaid amount received by assessee would not be deemed dividend in hands of assessee-firm, rather it would obviously be deemed dividend in hands of individuals (partners), on whose behalf, or on whose individual benefit, being such shareholders, amount was paid by company to concern - Held, yes.

28. Now, in light of the above judgments and decisions, we observe that addition for deemed dividend can be made only in the hands of the shareholder of the lending company and since assessee is not a shareholder being a beneficial owner of shares holding not less than 10% of the voting power in the lending company, namely, Apeejay Tea Limited., Section 2(22)(e) of the Act cannot be invoked in the case of assessee in appeal before us. Irrespective of this fact that the assessee being not a shareholder in Apeejay Tea Ltd. and section 2(22)(e) of the Act is not applicable on the assessee, we also notice from

the copy of ledger account that the sum given by Apeejay Tea Ltd., is a loan in the regular course of business on which the assessee is giving the interest regularly, deducting tax at source, the interest income is duly offered to tax on the maximum rate by Apeejay Tea Ltd., and there are regular transactions of inflow and outflow of funds between the two, which truly characterize it as part of regular business transaction.

29. Before us, the ld. Counsel for the assessee apart from the above decisions, also placed reliance on the decision of the co-ordinate bench of the ITAT in the case of DCIT 1(1)(2), Mumbai Vs Gilbarco Veeder Root India (P) Ltd 96 Taxmann.com 263 stating it to be squarely applicable in favour of the assessee. From perusal of the said decision, we notice that the issued raised in this decision verbatim similar to the one raised in the instant appeal and the loans was received by a concern which was not a shareholder in the lender company but there was a common shareholder having substantial interest in both the lender company as well as the receiver company and, the Co-ordinate Bench after considering the settled judicial precedents held that the addition for deemed dividend u/s 2(22)(e) of the Act can be made only in the hands of the shareholder. The finding of the Tribunal reads as follows:-

> "10. We have considered this aspect of the matter as also the provisions of Sec. 2(22)(e) of the Act. Shorn of other details, Sec. 2(22)(e) of the Act covers within its sweep three categories of payments. Firstly, the payment by way of loan or advance to a shareholder; secondly, payment to any concern in which such shareholder is a member or a partner; and, thirdly, any payment made on behalf of or for the individual benefit of any such shareholder. Ostensibly, assessee-recipient is not a shareholder in the payer company, i.e. Portescap and, therefore, it is not covered by the first category

of payment. In fact, it is the second category which is sought to be invoked by the Assessing Officer. No doubt, there is a common shareholder, both in the assessee-company and Portescap, and even if we were to assume that the amount received by the assessee-company is for the benefit of the stated aforesaid common shareholder, yet, it could only be assessed in the hands of such registered shareholder and not in the hands of the assessee- company. This proposition has been relied upon by CIT(A) to delete the addition, and which is well supported by the judgments of the Hon'ble Bombay High Court in the case of Universal

Medicare (P.) Ltd. (supra), Impact Containers (supra) and NSN Jewellers (P) Ltd. (supra). Thus, we find no justifiable ground to interfere in the conclusion drawn by the CIT(A).

11. So far as the reliance placed by the Revenue on the judgment of the Hon'ble Supreme Court in the case of Gopal and Sons (HUF) (supra) is concerned, the same, in our view, is quite inapplicable to the facts of the present case. Firstly, the assessee before the Hon'ble Supreme Court was a HUF and the issue was as to whether the loans and advances received by the HUF could be treated as 'deemed dividend' within the meaning of Sec. 2(22)(e) of the Act. Notably, in the case before the Hon'ble Supreme Court, the payment was made by the company to the HUF and the shares in the company were held by the karta of the HUF. It is in this context that the Hon'ble Supreme Court upheld the addition in the hands of the HUF as factually the HUF was the beneficial shareholder. The fact-situation in the case before us stands on an entirely different footing inasmuch as the assesseerecipient of money is neither the registered nor the beneficial shareholder of the payer company, i.e. Portescap. Ostensibly, the common registered as well as beneficial shareholder of assessee-company and Portescap is Kollmorgen and not the assessee-company. Therefore, the decision of the Hon'ble Supreme Court in the case of Gopal and Sons (HUF) (supra) is inapplicable to the facts of the present case. In fact, the learned representative for the respondent-assessee has correctly placed reliance on the judgment of the Hon'ble Madras High Court in the case of M/s. Ennore Cargo Container Terminal P. Ltd. (supra), which has been rendered in a somewhat identical situation. In order to elaborate the point, the following discussion in the judgment of the Hon'ble Madras High Court, which is reproduced hereinafter, would show that in the present circumstances before us, the ratio of the decision of the Hon'ble Supreme Court in the case of Gopal and Sons (HUF) (supra) is not attracted :-

> "4.2 The Revenue seeks to assess as income the capital advance received by the assessee-company from Indev Logistics Pvt. Ltd. on the ground that it is deemed dividend received by the assessee-company for the benefit of the registered shareholder. For this purpose, the provisions of Section 2(22)(e) of the Income-tax Act, 1961 (in short 'the Act') is sought to be relied upon. The

Tribunal has rejected the said contention of the Revenue, principally, on the ground that deemed dividend can only be assessed in the hands of the registered shareholder for whose benefit the money was advanced.

4.3 As indicated above, there is no dispute that the assessee did receive capital advance from Indev Logistics Pvt. Ltd. There is also no dispute that there are common shareholders both in the assessee-company and Indev

Logistics Pvt. Ltd. Therefore, quite correctly, as noted by the Tribunal, though, the advance received by the assessee company may have been for the benefit of the aforementioned registered shareholders, it could only be assessed in the hands of those registered shareholders and not in the hands of the assessee-company.

4.4 In our view, on a plain reading of the provisions of Section 2 (22)(e) of the Act, no other conclusion can be reached. As a matter of fact, a Division Bench of this Court, in the case of Commissioner of Income Tax vs. Printwave Services P. Ltd., (2015) 373 ITR 665 (Mad.), has reached a somewhat similar conclusion.

5. Mr. Senthil Kumar, however, contends to the contrary and relies upon the judgment of the Supreme Court in Gopal and Sons (HUF) vs. Commissioner of Income-tax, Kolkata-XI, (2017) 77 taxmann.com 71 (SC).

5.1 In our view, the question of law considered by the Supreme Court in the case of Gopal and Sons (supra) was different from the issue which arises in the present matter. The question of law which the Supreme Court was called upon to consider was whether loans and advances received by a HUF could be deemed as a dividend within the meaning of Section 2(22)(e) of the Act. The assessee in that case was the HUF and the payment in question was made to the HUF. The shares were held by the Karta of the HUF. It is in this context that the Supreme Court came to the conclusion that HUF was the beneficial shareholder.

5.2 In the instant case, however, both the registered and beneficial shareholders are two individuals and not the assessee-company. Therefore, in our view, the judgment of the Supreme Court does not rule on the issue which has come up for consideration in the instant matter."

12. Thus, in view of the aforesaid discussion, we hereby affirm the decision of CIT(A) and Revenue fails in its appeal.

13. In the result, appeal of the Revenue is dismissed."

30. Under these given facts and circumstances, and respectfully following the ratio laid down in the decisions and judgments rendered in cases of Bhaumik Colour Pvt. Ltd. (supra), DCIT 1(1)(2), Mumbai Vs Gilbarco Veeder Root India (P) Ltd 96 Taxmann.com 263 as well as CIT Vs. Vatika Township (P) Ltd. reported in 367 ITR 466, since undisputedly the

assessee is not a shareholder in Apeejay Tea Ltd., which has given loan/advance to assessee, therefore, the assessee does not fall under any of the limbs provided under section 2(22)(e) of the Act, and the same cannot be invoked in the hands of the assessee. We, thus setaside the finding of the ld. CIT(A) and delete the addition of Rs.21,92,55,967/- for AY 2013-14, Rs. 47,07,00,000/- for AY 2014-15, Rs. 5,15,00,000/- for AY 2016-17 and Rs.1,15,00,000/- for AY 2017-18 made under section 2(22)(e) of the Act and allow these common grounds of appeal raised by the assessee against the addition made u/s 2(22)(e) of the Act.

31. The next common issue for our consideration is disallowance u/s 2(24)(x) of the Act at Rs. 27,126/- and at Rs. 53,507/- for Assessment Years 2014-15 & 2016-17 respectively;

32. It is an admitted fact that the disallowance u/s 2(24)(x) of the Act was made on account of delayed deposit of employees' contribution to PF/ESI i.e. after the due date as provided under the respective welfare enactments. This issue is no more res integra in view of the judgment of the Hon'ble Supreme Court in Checkmate Services Pvt. Ltd. Vs. CIT (2022) 143 taxmann.com 178 (SC) dated 12.10.2022 wherein it has been held that "deduction u/s 36(1)(va)

in respect of delayed deposit of amount collected towards employees' contribution to PF/ESI cannot be claimed even though deposited within the due date of filing of

return of income read with Section 43B of the Income-tax Act, 1961. Therefore, the amounts are liable to be added as income in the hands of the assessee, the disallowance so made are confirmed and the grounds raised by the assessee are dismissed.

33. Now, we are left with the common issue for Assessment Year 2016-17 & 2017-18, regarding disallowance on account of interest on delay deposit of TDS and interest of delay payment of service tax of Rs. 4,23,358/- and Rs.91,306/- respectively.

34. We notice that the issue of interest on delay deposit of TDS has been extensively dealt with by the Co-ordinate Bench of this Tribunal in the case of M/s Premier Irrigation Adritec (P) Ltd. vs. ACIT, Circle11(1), Kolkata in I.T.A. No.387/Kol/2021; Assessment Year: 2014-15, order dt. 20/01/2023, wherein the Tribunal has held that interest payment on delayed deposit of income tax, whether TDS or otherwise is not an allowable expenditure.

35. Respectfully following the decision of the Tribunal, the disallowance of interest on delayed deposit of TDS stands confirmed. So far as the interest on delayed payment of Service tax is concerned, we notice that the same is

allowable in view of the ratio laid down by the Hon'ble Apex Court in the case of Lachmandas Mathuradas v.

Commissioner of Income-tax reported in [2002] 254 ITR 799 (SC).

36. Since the bifurcation of the alleged disallowance is not available on record, we direct the Assessing Officer to carry out the necessary exercise for which the assessee shall provide the related documents and then shall confirm the disallowance for the interest on delay in deposit of TDS and allow the interest paid on delay in deposit of service tax. Accordingly, this issue raised for Assessment Year 2016-17 and 2017-18, is partly allowed for statistical purposes.

32. In the result, appeals of the assessee for Assessment Year 2013-14 & 2014-15 are partly allowed and appeals for Assessment Year 2016-17 & 2017-18 are partly allowed for statistical purposes.

Order pronounced in the Court on 10th August, 2023 at Kolkata.

Sd/- Sd/-

(SONJOY SARMA) (DR. MANISH BORAD)
JUDICIAL MEMBER ACCOUNTANT MEMBER

Kolkata, Dated 10/08/2023 *SC
SrPs

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