

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI G BENCH, MUMBAI**

Before Shri D.K. Agarwal and Shri Pramod Kumar

ITA No. 4090/Mum/08
Assessment year : 2004-05

<i>Income Tax Officer Wd.4(1)(2) R.No.636, 6th Flr., Aayakar Bhavan, M.K. Rd., Mumbai - 400 020.</i>	Vs.	<i>GSB Capital Markets Ltd. 815, 8th Flr., Stock Exchange Tower, Dalal Street, Mumbai - 400 023.</i>
(Appellant)		(Respondent)

ITA No. 3483/Mum/08
Assessment year : 2004-05

<i>GSB Capital Markets Ltd. 815, 8th Flr., Stock Exchange Tower, Dalal Street, Mumbai - 400 023.</i>	Vs.	<i>Income Tax Officer Wd.4(1)(2) R.No.636, 6th Flr., Aayakar Bhavan, M.K. Rd., Mumbai - 400 020.</i>
(Appellant)		(Respondent)

ITA No. 3007/Mum/09
Assessment year : 2005-06

<i>DCIT 4(1), R.No.640, 6th Flr., Aayakar Bhavan, M.K. Rd., Mumbai - 400 020.</i>	Vs.	<i>GSB Capital Markets Ltd. 815, 8th Flr., Stock Exchange Tower, Dalal Street, Mumbai - 400 023.</i>
(Appellant)		(Respondent)

ITA No. 1826/Mum/09
Assessment year : 2005-06

<i>GSB Capital Markets Ltd. 815, 8th Flr., Stock Exchange Tower, Dalal Street, Mumbai - 400 023.</i>	Vs.	<i>DCIT 4(1) R.No.640, 6th Floor., Aayakar Bhavan, M.K. Rd., Mumbai - 400 020.</i>
(Appellant)		(Respondent)

Appellant by : Shri Vipul B. Joshi/ Sameer G. Dalal.
Respondent by : Shri Abani Kanta Nayak (D.R.)

O R D E R

Per Pramod Kumar:

1. These are appeals call into question correctness of CIT(A)'s order dated 28th March, 2008 and 12th February, 2009 for the Assessment Years 2004-05 & 2005-06, respectively. As these appeals were heard together and pertain to the same assessee, these appeals are being disposed of by this consolidated order.

Assessment Year: 2004-05:

2. In ground Nos. 1 to 5 of Revenue's appeal, the Assessing Officer has raised the following grievances:

"1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in allowing the bad debts written off by the assessee in the case of Shri Sayarmal Doshi ignoring the fact that the assessee was not able to produce the vacation order inspite of the attachment properties of Shri Sayarmal Doshi.

2. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in allowing the bad debts in respect of Shri Rajendra Mishra without reciting the reasons of non recovery of the amount inspite the arbitration award being favour of the assessee.

3. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in allowing the bad debts amount of Rs 346035/- in respect of M/s. M.M. Finvestrade (P) Ltd. without even examining the consent decree and ascertaining the reasons for non-recovery.

4. On the facts and in the circumstances of the case and in law, the learned CIT(A) failed to appreciate that the assessee company has not established that the bad debts have become bad and has also not established that the loss has crystallized during the Assessment Year 2004-05.

5. *On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in allowing the bad debts u/s.36(1)(vii), inspite of the fact that the assessee did not fulfil the conditions laid down u/s.36(2) of the I.T. Act, 1961 as noted by the Assessing Officer."*

3. In an interconnected ground of appeal, the assessee has raised the following grievances:

4. *The learned CIT(A) grossly erred in law as well as on the facts and circumstances after holding and confirming that the amount of Rs 12,92,123/- due from the three debtors have become not recoverable and become bad but failed to in concluding that the same is allowable as business loss u/s.28 of the I.T. Act, 1961 ."*

4. The material facts are like this. During the course of assessment proceedings, the Assessing Officer noticed that the assessee has claimed bad debts of Rs 12,92,123/-. These bad debts represented unrecovered dues from Sayaram Doshi (Rs 8,09,603/-), Rajendra Mishra (Rs 1,36,484/-) and M.M. Finvestrade Pvt. Ltd. (Rs 3,46,035/-). It was also noted that arbitrator awards were in favour of the assessee in respect of all these debtors and that the assessee had also made efforts to obtain decree in respect of Sayaram Doshi, but yet monies could not be recovered. There was no dispute, however, that amounts were written off in the books of accounts. On these facts, the Assessing Officer disallowed the claim of bad debts by holding that neither the amount has become actually bad, nor the assessee has established that requirements of section 36(2) have been complied in it. While doing so the Assessing Officer, inter alia, observed as follows:

"5.14 It appears that the assessee has classified the said debt as bad debt only for the reason that it has not received any payments. But the assessee has not brought out any thing on record to justify the basis of that belief that debt is bad debt as to what efforts were made to make recovery. In action on the part of the assessee cannot be reason or bass for belief of bad debt. Hence, the assessee has failed to justify its claim that the debt with regard to the said debtor is a bad debt which is a primary requirement u/s.36(1)(vii). In the facts and circumstances stated above, it is held that claim of bad debt is not established.

5.15 *The assessee has not established that the amount of brokerage has been considered as income in the corresponding year. Without prejudice, the part of the debt even if considered as part of income since the debt has not been established to be bad debt and assessee does not fulfil the requirement of provisions of section 36(2) of the I.T. Act, 1961. Hence the amount of ` 12,92,123/- is disallowed u/s.36(1)(vii) r.w.s. 36(2) of the I.T. Act, 1961 and added to the total income."*

5. The Assessing Officer also rejected the claim of business loss. Though, for the reasons we will set out in a short while, it is not really necessary to go any further into that aspect of the matter.

6. Aggrieved, assessee carried the matter in appeal before the CIT(A). Learned CIT(A) upheld the contentions of the assessee and, after analysing facts of assessee's case, concluded as follows:

"5.9 In view of the above, it is held that:-

a) Explanation to section 37 is not applicable;

b) The amounts due from the 3 parties have become not recoverable and have become bad;

c) The deduction u/s.36(1)(vii) is to be allowed subject to fulfil the conditions of section 36(2).

d) On being demonstrated by the appellant that the amounts claimed as bad debt has been taken for computation for total income of any previous year, the Assessing Officer shall allow the amounts of bad debts accordingly."

7. Aggrieved by the stand so taken by the CIT(A), both the parties are in appeal before us. The Assessing Officer is aggrieved that the CIT(A) held the bad debts to be allowable in principle, while the assessee is aggrieved that the CIT(A) did not adjudicate on assessee in alternative plea of claim being admissible also on the ground that it is in the nature of business loss.

8. Having heard the rival contentions, we see no reasons to interfere in the matter. It is so far the reason that, as agreed by learned representatives, the issue in appeal is how squarely covered in favour of the assessee by Hon'ble Supreme Court's judgment in the case of TRF Ltd. vs CIT 323 ITR 397 (SC). As regards learned DR's suggestion that the matter should be remitted to the file of the Assessing Officer so as to verify compliance with section 36(2), we have noted that CIT(A) has himself directed that the Assessing Officer has to allow deduction for bad debts only after he is satisfied that conditions of section 36(2) are satisfied. The directions given by the CIT(A) are quite justified and need no interference. As for learned counsel's prayer for adjudication on alternate plea, we see no substance in this request either once main plea itself is upheld, as is the position in this case, alternative plea is rendered infructuous and purely academic. This is no need to adjudicate on the same.

9. Ground Nos.1 to 5 of the Assessing Officer and ground No.4 of the assessee are thus dismissed.

10. Ground Nos. 6 & 7 in Assessing Officer's appeal are general in nature and do not call for any adjudication.

11. **In the result, appeal filed by the Assessing Officer is dismissed.**

12. Coming back to assessee's appeal ground No.1 in assessee's appeal is as follows:

"1 The learned CIT(A) grossly erred in law as well as on the facts and circumstances in holding and confirming the action of the Assessing Officer in disallowing the claim on depreciation on Bombay Stock Exchange Card amounting to Rs 32,81,250/-."

13. Learned counsel does not press the above ground of appeal, and, accordingly, the same is dismissed for want of prosecution.

14. Ground No.1 is thus dismissed.

15. In ground No.2 the assessee has raised the following grievances:

"1 The learned CIT(A) grossly erred in law as well as on the facts and circumstances in holding and confirming the action of the Assessing Officer in restricting the disallowance of interest expenditure claim at Rs 1,30,480/- u/s.40A(2)(a) as against the explanation of the Assessee that no element of borrowed fund utilized for financing the trade concerning to specified persons and appellant company have sufficient fund where no interest cost is incurred and from such available fund amount are standing to debt of such persons and amount have been recovered subsequently, therefore no part of the interest expenditure is to be disallowed."

16. To adjudicate on these grievances, only a few material facts need to be taken note of. During the course of assessment proceedings, the Assessing Officer disallowed Rs 4,90,072/- on account of interest paid by observing as follows:

"4.10 Analysis of the Over Draft Account: The assessee is having an overdraft account No.CD7163 with Bank of India Stock Exchange Branch, Mumbai. The assessee submitted a copy of the said Bank statement for the relevant previous year. The closing balance as per bank statement is Rs 14,84,555.80 Dr. The balance sheet shows a credit balance of Rs 51,29,938/- and assessee has filed a bank reconciliation statement. The balances fluctuate from debit balance to credit balance an vice versa through out the year. The peak debit balance is Rs 4,53,50,151/- on 17.12.2003. The assessee has already stated that it is paying interest of Rs 10,19,1448.

4.11 A summary of the comparative status of the three accounts is given below:

Date	O/D Account	Ramakant Biyani	GSB Share Custodian Services Ltd.	Co-relation factor = $\frac{(C+D)}{B}$ %
04.04.2003	25,17,702.01 Dr	42,28,514 Dr (peak debit)	45,41,619.22 Dr	348 %
12.12.2003	4,53,50,151 Dr (peak debit)	33,20,747.84 Dr	50,87,802 Dr	18%
16.01.2004 A	2,03,91,638.11 Dr	32,13,559.05 Dr	1,58,48,651 Dr (peak debit)	93%
31.03.2004	14,04,555.80 Dr	12,72,479.21 Dr	73,25,094.11 Dr	612 %

analysis of the above data shows that there is a direct co-relation between the overdraft in the bank accounts and the

debit balance in the account of the above said persons specified u/s.40A(2)(b) inasmuch as the assessee has net debit balance in Overdraft account on all the dates of peak debit and at the same time has debit balance in the accounts of the said persons. The last column gives the percentage of debit balances of said debtors to the overdraft account and it also shows that there is a wide fluctuation thereof.

4.12 The assessee would have avoided the interest burden on the unsecured loan had it recovered the amount from the said debtors who also happen to be persons specified u/s.40A(2)(b) of the I.T. Act, 1961. It is apparent the assessee has allowed the aforesaid benefit to these persons solely on the ground that they are directors and associate concern. Further the claim that such persons contribute to the business is of no significance that the brokerage earned from these persons is a mere Rs 79,102/- which constitutes only 1.08% of the brokerage. Hence, the provisions of sec.40A(2)(a) r.w.s. 36(1)(iii) are attracted.

4.13 An assessee with liquidity cannot claim that it can give interest free facilities to the said persons and others and then borrow funds from the bank on interest for business purposes. Such borrowings will not be for business purposes, but for supplementing the cash diverted by the assessee in the form of financing the share transactions of the aforesaid persons without any benefit to it inasmuch as the assessee has earned a mere 1.08% of the total brokerage. Therefore, the assessee is not the beneficiary of the transactions made by such persons.

4.14 In view of the above facts and circumstances, the quantum of interest which is excessive and unreasonable, is computed taking into consideration the ratio of debit balance in the account of said persons and peak debit balance in the overdraft account as detailed below:

$$\begin{aligned}
 &= \frac{\text{Peak debit balance in the a/c of Ramakant Biyani} \\
 &\quad \text{and GSB Share Custodian Services Ltd.}}{\text{Peak debit balance in the overdraft account}} \times \text{Interest} \\
 &= \frac{\text{Rs } 42,28,514 + \text{Rs } 1,58,48,651}{\text{Rs } 4,53,50,151} \times \text{Rs } 11,06,971 \\
 &= \frac{\text{Rs } 2,00,77,165}{\text{Rs } 4,53,50,151} \times \text{Rs } 11,06,971 \\
 &= \text{Rs } 4,90,072/-
 \end{aligned}$$

The assessee has incurred interest liability of Rs 11,06,971/- on account of OD facility and interest bearing unsecured loans. As seen above, an amount of Rs 4,90,072/- is attributable to transactions carried on by the Director and associate concern. Hence, the amount of Rs 4,90,072/- is considered as not incurred for business purposes and

disallowed u/s.36(1)(iii). Since, it has already been discussed that the funds have been utilised for the benefit of persons specified u/s.40A(2)(b) of the I.T. Act, 1961, the amount of Rs 4,90,072/- is also considered as interest borne by the assessee and corresponds to the unreasonable and excessive benefits allowed to the said persons. Hence the amount is also disallowed u/s.40A(2)(a) of the I.T. Act, 1961.

17. In short thus, the Assessing Officer disallowed interest on the ground that interest bearing funds were used for non business purposes. The stand so taken by the Id DIT(A) was confirmed in appeal by the CIT(A), the assessee is aggrieved and is in appeal before us.

18. Having heard the rival contention and having perused the material on record, we are inclined to uphold the plea of the assessee for mere reasons than one. Firstly, as learned counsel rightly contends, what has been termed as diversion of funds by the Assessing Officer is not correct inasmuch as a plain look at the ledger account shows the sister concern's dues are commercial dues, on account of sales and purchases, and not on account of diversion funds. Even assuming that borrowed funds are blocked in these dues payable by sister concern; the funds are used in business only. The funds so blocked in dues on account of business transactions cannot be said to have been diverted for non business purposes. That apart, in any event, the assessee had sufficient non interest bearing funds for in excess of monies recoverable from sister concerns, and, following the principles laid down by Hon'ble Jurisdictional High Court in CIT vs. Reliance Utilities and Power Ltd. (313 ITR 340), the interest disallowance could not have been made. In view of these discussions, and bearing in mind entirety of the case, we uphold the plea of the assessee and direct the Assessing Officer to delete impugned disallowances.

19. Ground No.2 is thus allowed.

20. In ground No. 3, the assessee has raised the following grievance:

“3.The learned CIT(A) grossly erred in law as well as on the facts and circumstances in holding an confirming the action of Assessing Officer in confirming the disallowance of interest payable to DEBI on SEBI Fees u/s.43B provided for an claimed by the assessee on accrual basis and be allowed on the year of payment, without accepting the explanation of the assessee that such amount of interest is not covered u/s.43B and therefore such amount as provided for and claimed by the assessee is to be allowed and necessary relief be allowed.”

21. The only grievance presented by the learned counsel, in this regard, is that directions be issued in the Assessment Year 2005-06 that the deduction be allowed on permanent basis. It is pointed out that despite direction of the CIT(A), the Assessing Officer has not yet allowed the deductions in Assessment Year 2005-06 as well. It is submitted that we should give direction while disposing of 2005-06 for allowing deduction.

22. We see no substance in the plea. Once the CIT(A) has issued appropriate directions, which are not challenged on merits and unless we are *in seisin* of appeal effect proceedings, it is not for us to interfere in the matter.

23. Ground No.3 is thus dismissed.

24. Ground No.4 is already dealt above while dealing with interconnected grievances of Assessing Officer. The same is, for the reasons set out earlier in the order, dismissed

25. In the result, assessee's appeal is partly allowed. To sum up, while the appeal of the assessee is partly allowed in the terms indicated above, the appeal filed by the Assessing Officer is dismissed.

Assessment Year: 2005-06

26. Ground No.1 of revenue's appeal relates to deletion of sundry balances written off.

27. The Assessing Officer noticed that the assessee has debited an amount of ₹.8,707 as sundry balances written off. Before the Assessing Officer, the assessee could not furnish any details the reasons of written off. Therefore, the Assessing Officer was of the view that the sundry balances written off pertains to bad debt and conditions of section 36(1) (vii) and 36(2) were not fulfilled and, therefore, the claim was disallowed and added back to the total income of the assessee. Aggrieved, the assessee carried the matter in appeal before the CIT(A), which was allowed by the CIT (A) on the ground that the amount takes place in normal course of business and is incidental to the business. Aggrieved, the Assessing officer is in appeal before us.

28. Having heard the rival contentions and having perused the material on record, we see no reason to interfere with the order of the CIT(A) considering the fact that the amount written off is very small and is incidental to the business. We, accordingly, uphold the order of the CIT(A). This ground is thus dismissed.

29. Ground Nos.2 & 3 of Revenue's appeal pertain to loss on account of purchase and sale of mutual fund.

30. Briefly stated the relevant material facts are like this. In the course of assessment proceedings, the Assessing Officer noticed that the assessee has purchased mutual fund of ₹.1,05,00,000 and sold the same at ₹.85,96,065 resulting into a net loss of ₹.19,03,935 and such loss has been set off against delivery based share trading income. It was in this backdrop that the Assessing Officer observed that the transaction of mutual fund cannot be carried out in the open market and has to be purchased and sold through mutual fund only. It was also observed that there were hardly one or two transactions of sale or purchase of mutual fund during the year and thus it cannot be treated as business transaction. Accordingly, set off of losses of

mutual fund of ₹.19,03,935 was denied by the AO. Aggrieved, the assessee carried the matter in appeal before the CIT(A).

31. Before the CIT(A), it was submitted by the assessee that non-delivery based transaction is a speculative transaction within the meaning of section 43(5) but even the delivery transaction is to be treated as speculative transaction within the meaning of Explanation to Section 73. Having noted this, the CIT (A) granted relief by observing that there is no finding regarding applicability of Explanation to Section 73 and that in any event Explanation to Section 73 is applicable to both the situations i.e. in which the assessee incurs loss or profit. He, thus, concluded that the profits from non-delivery based share trading is a speculation profit and the loss from delivery based share trading, which is a speculation loss in view of Explanation to Section 73 and, accordingly, such loss is required to be set off against the profit. Aggrieved, the revenue is in appeal before us.

32. We have heard the rival contentions, perused the material on record and duly considered the factual matrix of the case as also the applicable legal position.

33. We find that there is no discussion by the Assessing Officer at any stage regarding application of Explanation to Section 73 to the facts of this case. In any event, whether there is a loss or profit in the business in shares and securities, as per provisions of Explanation to Section 73, these are to be treated as belonging to speculation business. In other words, the profit arising on sale and purchase of shares, even if these are delivery based transaction will be treated as belonging to speculation business within the meaning of Explanation to Section 73. Hon'ble Bombay High Court, in the case of CIT Vs Lokmat Newspapers Pvt Ltd (322 ITR 43), has held that irrespective of whether or not the profits on sale of shares arose from delivery based trading or non delivery based trading, as long as assessee is hit by Explanation to Section 73, the entire profits will be deemed to be speculation profits and, accordingly, losses from non delivery based

activity will also be eligible for set off against profits from delivery based transactions as well. Their Lordships have noted “**the submission of the revenue is that a loss which arises on account of a transaction of the sale and purchase of shares would constitute a loss from a speculation business for the purposes of the Explanation. But, that the profit which arises from a transaction involving the actual delivery of shares would not constitute a profit for the purposes of sub-sections (1) and (2) of section 73 in respect of which a set off can be granted**”, which has been rejected unequivocally by Their Lordships by observing as follows :

To accept the submission of the revenue would be to introduce a restriction into the scope and ambit of the deeming fiction which is created by the *Explanation* to section 73, which is not contemplated by Parliament. Once a deeming fiction is created by law, it must be given full and free effect, of course, in relation to the ambit within which it is intended to operate. The deeming fiction created by the *Explanation* to section 73 defines when an assessee is to be deemed to be carrying on a speculation business for the purposes of the section. The deeming fiction is, therefore, one which arises specifically in the context of the provisions of section 73 and is confined to that purpose alone. The *Explanation* stipulates that where an assessee is a company whose business consists in any part of the purchase and sale of shares of other Companies, it shall be deemed to be carrying on a speculation business to the extent to which the business consists of purchase and sale of such shares. Whether or not it is a profit or loss that has resulted from carrying on such business, is a consideration which is alien to the meaning of what constitutes a speculation business by the *Explanation* to section 73. Once an assessee is deemed to be carrying on a speculation business for the purpose of section 73, any loss computed in respect of that speculation business, can be set off only against the profits and gains of an other speculation business. Similarly, for the purposes of sub-section (2), the loss in respect of a speculation business which has not been set off either in whole or in part, can be carried forward and can be set off against profits and gains “of any

speculation business". The expression "any speculation business" means a speculation business of the assessee in respect of which profits and gains for the assessment year in question have arisen and there is no justification to restrict the content of that speculation business where profits have arisen by excluding a business involving actual delivery of shares. No such restriction is found in the *Explanation*. To impose one is a legislative function. In other words, once the assessee is carrying on a speculation business and the profits and gains have arisen from that business during the course of the assessment year, the assessee is entitled to set off the losses carried forward from a speculation business arising out of a previous assessment year.

34. In view of above discussion and bearing in mind the entirety of the case, we see no reason to interfere to the conclusions arrived by the CIT (A) and, accordingly, confirm the same.

35. This ground is thus dismissed.

36. Ground Nos.4 to 9 read as under:

"4. On the facts and in the circumstances of the case and in law, the Id CIT (A) erred in deleting the disallowance of ₹.1.81 lakhs made in respect of D-mat charges, without realizing the fact that these were composite charges alongwith transaction charges for professional and technical services rendered by the exchange to its members and the assessee has failed to deduct TDS thereon.

5. On the facts and in the circumstances of the case and in law, the Id CIT (A) erred in ignoring the fact that these services are exclusive in nature in as much they can only be availed by member of Stock Exchange.

6. On the facts and in the circumstances of the case and in law, the Id CIT (A) erred in accepting the argument that these are mere reimbursements when the position in law is very clear that determining an income component in a specific payment and then deducting TDS would render the entire concept of withholding tax difficult to apply and that TDS has to be deducted on gross payments.

7. On the facts and in the circumstances of the case and in law, the Id CIT (A) erred in ignoring the facts that use of technology and

algorithmic based programs have converted an erstwhile physical market into a digitally operated market.

8. On the facts and in the circumstances of the case and in law, the Id CIT (A) erred in ignoring the fact that the services rendered by the brokers are not standard services but services that has been developed to car to the needs of the broker community to facilitate trading.

9. On the facts and in the circumstances of the case and in law, the Id CIT (A) has overlooked the fact that the brokers have in subsequent years themselves started deducting the TDS on such payments and that there is no reason to give a different treatment in this year.”

37. Learned Representatives agree that the issue raised in Ground Nos.4 to 9 is covered by the decision of Mumbai Tribunal in the case of DCIT vs. Angel Broking ltd (35 SOT 457). Respectfully following the same, we decline to interfere with the order of the CIT (A). This ground is thus dismissed.

38. In the result, appeal of the revenue is dismissed.

39. Ground No.1 of the assessee's appeal relates to depreciation on Bombay Stock Exchange Card of ₹.24,60,938. This ground was not pressed, therefore, same is dismissed as not pressed.

40. In Second Ground of appeal, the assessee has raised the following grievance:

“The Id CIT(A) grossly erred in law as well as on the facts and circumstances in holding and confirming the action of AO in holding a sum of ₹.48,87,150 as loan and advances for debts due under regular business activity of shares transaction from a company where assessee is having shareholding exceeding 25% as deemed dividend income by invoking the provisions of section 2(22) (e) of the I.T.Act, 1961 which is not justified hence it is required to be deleted.’

41. The relevant material facts are as follows. During the course of assessment proceedings, it was noted by the AO that following remark was given in the audit report:

“Advances in the nature of loan(interest free) taken from company under the same management is as under:

GSB Securities Pvt.Ltd., ₹.Nil(P.Y ₹. Nil) and Maximum amount due at a time during the year ₹.92,80,861.74 (P.F.Rs.16,00,000.00)”

42. The Assessing Officer also noted that the assessee held 25.90% of shareholding of GSB Securities Pvt Ltd., and, that the above transaction was covered by the scope of deemed dividend under section 2(22)(e) of the Act. The assessee's explanation that the transaction with GSB Securities were in the nature of business transactions, and, accordingly, not hit by section 2(22)(e) was rejected. It was so done mainly on the ground that auditor has termed the same, as evident from note no.15 to notes to Accounts in Schedule J, as loan transaction. The Assessing officer also noted that the GSB Securities had sufficient accumulated reserves and surplus so as to attract the above loan as deemed dividend. An addition of ₹.48,87,150 was accordingly made to the returned income. Aggrieved, the assessee carried the matter in appeal before the CIT (A) but without any success.

43. The assessee is not satisfied and is in further appeal before us.

44. We have heard the rival contentions, perused the material on record and duly considered the factual matrix of the case as also the applicable legal position.

45. We find that the authorities below have treated the assessee's transaction with GSP Securities as loan transaction primarily on the ground that it was so treated by the auditors in their remark. However, neither there any such mention in the auditor's remark nor is there any doubt, after perusing the ledger account with GSB securities, that all these transactions on account of which the balance was shown in the name of GSP securities and the assessee in the nature of business transaction of shares. There is no dispute on the fundamental legal provision that it is only when payment is made "by way of advance or loan to a shareholder" that the provisions of section 2(22)(e) are attracted. Not only that there is no payment in the present case as transactions are in respect of purchase of shares and securities, and amounts due to the assessee are reflected by net of such debits, the transactions are not in the nature of payments for loans and

advances. We have perused the ledger account of GSB Securities and we are satisfied that there are no payments by way of loans and advances to the assessee. In fact, we did ask the learned Departmental Representative, during the course of hearing, to point out such payments by way of loans and advances to the assessee, and even he could not identify such transactions. His plea was that even dues on account of sales should be covered by section 2(220(e)), but this plea is clearly contrary to unambiguous legal provisions. The very foundation of the impugned addition is therefore devoid of legally sustainable merits inasmuch as what has been treated as loan transaction by the authorities below is clearly business transaction in nature. We, therefore, deem it fit and proper to uphold the grievance of the assessee and direct the Assessing Officer to delete the impugned addition.

46. This ground is thus allowed.

47. In the result, appeal of the assessee is partly allowed.

Order pronounced today on this 27th day of April, 2011.

Sd/-
(D.K. AGARWAL)
JUDICIAL MEMBER

Sd/-
(PRAMOD KUMAR.)
ACCOUNTANT MEMBER

Mumbai; April 27, 2011

parida

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By Order

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