आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCH 'B', JAIPUR

श्री विजय पाल रॉव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM AND SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 517/JP/2019
निर्धारण वर्ष/Assessment Year : 2010-11.

Shravan Choudhary, 82, Dhuleshwar Garden, Opp. PMG Office, Ajmer Road, Jaipur.	बनाम Vs.	Assistant Commissioner of Income Tax, Circle-5, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN No. ABIPC 7810 K		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Siddharth Ranka &
Shri Saurav Harsh (Advocates)

राजस्व की ओर से/ Revenue by: Shri B.K. Gupta (CIT)

सुनवाई की तारीख/ Date of Hearing : 30.07.2019.
घोषणा की तारीख/ Date of Pronouncement : 07/08/2019.

आदेश/ ORDER

PER VIJAY PAL RAO, JM :

This appeal by the assessee is directed against the order dated 29th March, 2019 of ld. CIT (A)-2, Jaipur for the assessment year 2010-11. The assessee has raised the following grounds :-

" 1. That in the facts and in circumstances of the case and in law the ld. Lower authority grossly erred in initiating the reassessment proceedings u/s 148 of the Act.

1.1. That the ld. Lower authorities grossly erred in ignoring the facts that the notice u/s 148 of the Act was issued without proper sanction, without any reason to believe, without any application of mind and the entire proceedings of reassessment deserved to have been quashed.

2. That in the facts and in circumstances of the case and in law ld. Lower authority grossly erred in making addition of Rs. 7,48,07,150/- as deemed dividend u/s 2(22)(e) of the Act.

3. The appellant craves leave to add, alter, modify or amend any ground on or before the date of hearing."

Ground No. 1 and 1.1 are regarding validity of initiation of reassessment proceedings under section 147/148 of the IT Act.

2. The ld. Counsel for the assessee has challenged the initiation of proceedings for reopening of the assessment on various grounds. The first contention raised by the ld. Counsel for the assessee is regarding non compliance of the directions of the Hon'ble Supreme Court in case of GKN Driveshaft India Ltd. vs. ITO, 259 ITR 19 (SC) as well as various High Courts while disposing off the objection raised by the assessee against the notice issued under section 148 of the Act and, therefore, the order passed by the AO under section 147 read with section 143(3) without giving the sufficient time to the assessee to challenge the said order of disposing off the objection. The final reassessment order passed by the AO is bad in law and deserves to be quashed. The ld. Counsel for the assessee has relied upon the decision of Hon'ble Bombay High Court in case of Asian Paints Ltd. vs. DCIT, 308 ITR 195 (Bom) as well as decision in case of Bharat Jayantilal Patel vs. Union of India, 378 ITR 596 (Bom.) and contended that the AO should have allowed four weeks time to the assessee to seek legal remedy after rejection of objections of the assessee but no such time was granted to the assessee by the AO before passing the reassessment order in question. Therefore, the said order is bad in law. He has also relied upon the decision dated 30th August, 2018 of Delhi Benches of the Tribunal in case of Smt. Kamlesh Goel vs. ITO in ITA no. 5730/Del/2017. Thus the

ld. Counsel has submitted that the impugned reassessment order deserves to be quashed as it has violated the directions given by the Hon'ble Supreme Court as well as Hon'ble High Courts while disposing off the objection of the assessee raised against notice under section 148 of the IT Act.

3. On the other hand, the ld. D/R has submitted that the AO has disposed off the objection of the assessee without any delay and within the shortest possible time. Therefore, when there is no delay on the part of the AO in disposing off the objection and the reassessment order was to be passed before 31st December, 2017 as it was time barring, therefore, after disposing off the objection vide order dated 07.12.2017 the AO has passed the impugned reassessment order on 22nd December, 2017. The ld. D/R has thus contended that the assessee filed the objection against the notice issued under section 148 only on 4th December, 2017 which was disposed off by the AO on 7th December, 2017 within three days from the date of filing of objection. Therefore, in this case there is no violation of directions of the Hon'ble Supreme Court in case of GKN Driveshafts (India) Ltd. vs. ITO (supra) as well as the other decisions as relied upon by the ld. Counsel for the assessee.

4. We have considered the rival submissions as well as the relevant material on record. In this case the notice under section 148 was issued by the AO on 9th March, 2017. In response to the said notice, the assessee filed return of income at Rs. 6,24,44,930/- on 25th April, 2017. The AO supplied the reasons recorded for reopening of the assessment to the assessee vide letter dated 18.05.2017. Thus it is clear that there was no delay on the part of the AO to supply the reasons recorded for reopening of the assessment to the assessee. Thereafter, the assessee filed the objection against the notice issued under section 148 on 04.12.2017 which was

disposed off by the AO on 07.12.2017. The AO has also recorded these facts in para 15 of the impugned reassessment order as under :-

> *" 15. On 04.12.2017, assessee filed objection with respect to the initiation of proceedings u/s 148 of the Act. The objection so raised by the assessee were disposed of as not acceptable on 07.12.2017 by passing a speaking order following the decision of Hon'ble Supreme Court in the case of GKN Drive shafts (India) Ltd. vs. ITO (2003) 259 ITR 19 (SC). The order was send through India Post tracking no. RR335815675IN. Along with the objection disposal order necessary notices were issued fixing the next date of hearing on 14.12.2017."*

The objection raised by the assessee on 04.12.2017 has been disposed off by a speaking order dated 07.12.2017 passed by the AO. Therefore, it is manifest from the record that the assessee has raised the objections against the initiation of the proceedings under section 148 at the fag end of the limitation of the reassessment on 04.12.2017 and the AO disposed off the objection within a period of three days from the date of objection raised by the assessee. Since the assessment was time barring on 31st December, 2017, therefore, the AO was having no option but to frame the reassessment before 31st December, 2017. In such a scenario it was not possible for the AO to wait for four weeks after disposing off the objection and then pass the reassessment order because by that time the reassessment order itself would become time barred. Accordingly, in the facts and circumstances of the case, when the delay is entirely attributable to the assessee for raising the objection against the notice under section 148 and there is no delay on the part of the Assessing Officer to dispose off the objection filed by the assessee, then we

do not find any substance or merits in this objection and ground of challenging the reassessment order passed by the AO.

5. The second leg of argument of the ld. Counsel for the assessee is that the AO has reopened the assessment without any reason to believe and without any application of mind but the assessment has been reopened on the basis of borrowed satisfaction as per the information forwarded by the AO of M/s. Saj Properties Pvt. Ltd. The ld. Counsel has submitted that the reason to believe recorded by the AO is not based on any material which has direct nexus to the belief that income assessable to tax has escaped assessment. It is mere suspicion in the mind of the AO as the reason to believe recorded do not show any application of mind on the part of the AO to form a reasonable belief that the amount in question has escaped assessment. The ld. Counsel has referred to the reasons recorded by the AO and submitted that this is nothing but reproduction of the information forwarded by the AO of M/s. Saj Properties Pvt. Ltd. wherein it is stated that the assessee has received loan/advance of Rs. 11.70 crores and M/s. Saj Properties Pvt. Ltd. has accumulated profits to the tune of Rs. 7,48,07,150/-. The ld. Counsel has submitted that the AO has not even conducted any enquiry or verification to find out the primary facts regarding the nature of transaction as well as accumulated profits of M/s. Saj Properties Pvt. Ltd. Therefore, the AO without even considering the relevant and necessary facts before initiating the proceedings under section 148 has reopened the assessment based on the said information forwarded by the AO of M/s. Saj Properties Pvt. Ltd. The reasons recorded by the AO to form the belief that the said amount of Rs. 7,48,07,150/- is assessable to tax as deemed dividend under the provisions of section 2(22)(e) is not based on any application of mind

independently but it is based on the said information forwarded by the AO of M/s. Saj Properties Pvt. Ltd. In support of his contention, the ld. Counsel has relied upon the decision of Hon'ble Delhi High Court in case of Krown Agro Foods Pvt. Ltd. vs. ACIT, 57 taxmann.com 355 (Delhi) as well as decision in case of Principal CIT vs. Meenakshi Overseas Pvt. Ltd. 82 taxmann.com 300 (Delhi). Thus the ld. Counsel has submitted that the requirement of law as held by the Hon'ble High Court is a reason to believe and not reason to suspect. The AO has acted merely on the basis of the said information and without any application of mind while forming the belief that income assessable to tax has escaped assessment. The AO has even not verified the fact whether any accumulated profits as provided under section 2(22)(e) was available at the time of alleged loan/advance given by M/s. Saj Properties Pvt. Ltd. He has contended that since there was a loss of Rs. 2.55 crores in the preceding years and, therefore, there was no accumulated profit at the time of the alleged transaction of loan/advance though the said payment to the assessee was not an advance or loan but it was a commercial transaction between the company and the assessee for purchase of land. The assessee produced the agreement dated 28th October, 2009 to show that the said amount was paid to the assessee under the agreement to sale whereby the assessee agreed to sell the land to the company and, therefore, the said payment does not fall in the ambit of loan or advance. The AO has not verified these facts before initiating the proceedings under section 148 of the Act and, therefore, the reasons recorded by the AO are without any application of mind but merely based on the report forwarded by the AO of M/s. Saj Properties Pvt. Ltd. The ld. Counsel has relied upon various decisions in support of the contention that the transaction is not covered under section 2(22)(e) as it is

business transaction and for the purposes of section 2(22)(e) accumulated profits are to be worked out without inclusion of current year's business profit. Since there was a loss in the preceding years, therefore, there was no accumulated profits at the time of alleged transaction as on 28th October, 2009 and, therefore, there is no income assessable being deemed dividend income under section2(22)(e) of the IT Act. The decisions relied upon by the ld. Counsel are as under :-

Ashok Kumar Agarwal vs. ACIT
ITA No. 778/JP/2015 dated 03.10.2016.

PCIT vs. Ashok Kumar Agarwal
(DB IT Appeal No. 168/2016 dated 29.09.2016 (Rajasthan HC)

PCIT vs. Ashok Kumar Agarwal
(DB IT Appeal No. 46/2017 dated 31.10.2017 (Rajasthan HC)

CIT vs. Krishna Behari Goyal
(DB IT Appeal No. 137/2016 dated 19.10.2016 (Rajasthan HC)

CIT vs. Om Prakash Suri (No.2)
359 ITR 41 (MP)

CIT vs. M.B. Stockholding P. Ltd.
64 taxmann.com 138 (Gujarat)

Rajmal Lakhichand vs. JCIT
92 taxmann.com 94 (ITAT Pune)

6. On the other hand, the ld. D/R has submitted that the AO has recorded his reasons independently. Further, these reasons for initiating proceedings u/s 147 were approved by the ld. PCIT-2, Jaipur. The AO has not only examined the assessment record but also the information sent by the Addl. CIT, Range-7, New Delhi and only, he has reason to believe that the income has escaped assessment. The case of the assessee is also covered by the deeming fiction of Explanation 2(b)

to section 147 of the Act. It could be seen from the reasons recorded by the AO that there was live link between the material and the reasons recorded for initiating proceedings u/s 147 of the Act. It is an undisputed fact that the assessee was having substantial shareholding of M/s. Saj Properties Pvt. Ltd. from which the assessee has obtained substantial amount as loan or advance. Further, the said company was having accumulated profits also and thus, the case of the assessee is clearly covered by the provisions of section 2(22)(e) of the Act. In the case of Dr. Shiv Kant Mishra vs. DCIT (2009) 118 ITD 347 (Lucknow), the action u/s 147 was upheld by the Hon'ble Tribunal on account of deemed dividend. He has relied upon the decision of Hon'ble Supreme Court in case of Raymond Wollen Mills Ltd. vs. ITO, 236 ITR 34 (SC) and submitted that the sufficiency of reasons recorded by the AO for reopening of the assessment under section 148 of the Act is not required to be looked into. As regards the accumulated profits for the purpose of section 2(22)(e), the ld. D/R has submitted that the current year's profit has to be taken into account. He has relied upon the decision of Mumbai Benches of the Tribunal in case of NCK Sons Exports Pvt. Ltd. vs. ITO, 102 ITD 311 and submitted that the Tribunal after analyzing the history of the provisions right from the Income Tax Act, 1922 and subsequent amendments has held that the accumulated profits has to be worked out on the date of transaction of disbursement which included the current year's profit. The ld. D/R has also relied upon the decision of Hon'ble Supreme Court in case of First ITO vs. Short Brothers Pvt. Ltd., 60 ITR 83 (SC) as well as the decision of Hon'ble Allahabad High Court in case of CIT vs. Roshan Lal, 98 ITR 349 (All.). Thus the ld. D/R has submitted that the Explanation 2 to section 2(22) of the IT Act makes it clear that the expression 'accumulated profits' shall include all profits of the

company upto the date of distribution or payment referred in clauses (a), (b), (d) and (e) of section 2(22). Thus the ld. D/R has submitted that the reasons recorded by the AO clearly make out a case of escapement of income assessable to tax. Since the original return of income was processed under section 143(1), therefore, the reasons recorded by the AO have direct connection and nexus with the fact of income assessable to tax has escaped assessment. He has relied upon the orders of the authorities below.

7. We have considered the rival submissions as well as the relevant material on record. The assessee is an individual and holding substantial shares in M/s. Saj Properties Pvt. Ltd. The assessee filed his return of income under section 139(1) of the IT Act on 3rd October, 2010 declaring total income of Rs. 6,24,44,930/- which was processed under section 143(1) of the Act. Subsequently, the AO has reopened the assessment by issuing the notice under section 148 on 9th March, 2017 by recording the reasons as under :-

> " *The assessee has filed its return of income for the A.Y. 2010-11 declaring total income of Rs.6,24,44,930/- which was assessed u/s 143(1) of the I.T. Act, 1961 at Rs. 6,24,44,930/-. In this case on the basis of information brought on record it is noted that M/s. Sai Properties has given a loan of Rs. 11.70 crore to its share holders Sh. Shravan Chowdhary who is having holding of 68% of share and M/s. Sai Properties has accumulated profits to the tune of Rs. 7,48,07,150/-. The transaction is squarely covered under the provisions of section 2(22)(e) of the Income Tax Act as deemed dividend. On the basis of the information available on record, I have reason to believe that income of Rs. 7,48,07,150/- chargeable to tax has escaped assessment within the meaning of section 147 of the I.T. Act, 1961."*

Thus the AO has stated in the reasons recorded that on the basis of the information it is noted that M/s. Sai Properties (correct name M/s. Saj Properties Pvt. Ltd.) have given a loan of Rs. 11.70 crores to the assessee who is holding 68% shares of the said company and the said company has accumulated profits to the tune of Rs. 7,48,07,150/-. Thus the AO formed the belief that the transaction is squarely covered under section 2(22)(e) of the Act as deemed dividend. The formation of belief as stated by the AO himself is based on the information, no further steps were taken by the AO to verify the correctness of the fact regarding the availability of the accumulated profits with M/s. Saj Properties Pvt. Ltd. or the nature of alleged transaction whether it is loan or advance or it is business transaction between the parties. It is pertinent to note that the AO of M/s. Saj Properties Pvt. Ltd. forwarded this information vide letter dated 8th May, 2013 as under :-

" No. Addl.CIT Range-7/Ref/2013-14/59.

Office of the
Addl. CIT Range-7
Room No. 316, C.P. Building
I.P. Estate, New Delhi 11 00 02
Dated : 08.05.2013

To

The Income-tax Officer
Ward 4(1),
NCR Building,
Statue Circle, Jaipur.

Sub : Information in the case of Sh. Sharwan Choudhary, PAN No. ABIPC 7810 K – A.Y. 2010-11 – Reg.

Kindly refer to the above subject. The assessee company M/s. Saj Properties Pvt. Ltd. (PAN No. AAKCS 1529 B), Regd Office : A 4, Near Shubham Tower, Shastri Nagar, Jaipur, Rajasthan-302016 has given a loan of Rs. 11.70 crores to its substantial shareholder Sh.

Sharwan Choudhary who is holding 68% shares. It is further noticed that M/s. Saj Properties Pvt. Ltd. has accumulated profits to the tune of Rs. 7,48,07,150/-. The transaction is covered under the provisions of section 2(22)(e).

The addition is to be made in A.Y. 2010-11 in the hands of Sh. Sharwan Choudhary PAN No. ABIPC 7810 K who is a beneficial shareholder of M/s. Saj Properties Pvt.

The issue is elaborately discussed in the assessment order passes u/s 143(3) dated 28.03.2013 in the case of M/s. Saj Properties Pvt. Ltd. for the A.Y. 2010-11. Copy of the assessment order in the case of M/s. Saj Properties Pvt. Ltd. for A.Y. 2010-11 as discussed above is being enclosed for necessary action at your end as the jurisdiction over the case lies with you.

(Sukhveer Choudhary)
Addl. Commissioner of Income-tax
Range-7, New Delhi.

Copy for kind information to :

i) The Commissioner of Income-tax, Delhi-III, New Delhi.
ii) The Commissioner of Income-tax, Jaipur-II.
iii) The Addl. Commissioner of Income-tax, Range-4, Jaipur."

Along with the said letter, the AO also sent a copy of the assessment order framed under section 144 of the Act in case of M/s. Saj Properties Pvt. Ltd. The AO has formed the belief and recorded the reasons by reproduction of this information forwarded vide letter dated 8th May, 2013. This information was sent by the AO of M/s. Saj Properties Pvt. Ltd. in the month of May, 2013 however, the AO has issued the notice under section 148 only on 9th March, 2017 which is after about four years from the date of said letter forwarding the information. The AO could have conducted a due verification and enquiry about the facts as pointed out by the AO of M/s. Saj Properties Pvt. Ltd. But no such steps were taken by the AO and waited till the fag end of the limitation period for issuing the notice under section 148. The AO has just recorded the reasons based on the said information and without even

conducting the bare minimum verification by calling the necessary information either from the assessee or from M/s. Saj Properties Pvt. Ltd., at least regarding the nature of transaction as well as the availability of accumulated profits. The ld. A/R has relied upon the various decisions on the point that the current year's profit cannot be included while working out the accumulated profits for the purpose of section 2(22)(e) of the Act. On the contrary, the ld. D/R has also relied upon the decisions wherein it has been held that the current year's profit upto the date of distribution/disbursement has to be taken into account for working out the accumulated profits for the purpose of section 2(22)(e) of the Act. Therefore, there are contrary decisions on this point. However, even without going into these decisions, the plain reading of the provisions of section 2(22)(e) and Explanation-2 to section 2(22) makes it clear that the accumulated profit as on the date of disbursement/distribution has to be taken into account. For ready reference, we quote Explanation-2 to section 2(22)(e) as under :-

> *" Explanation 2.*—The expression "accumulated profits" in sub-clauses (*a*), (*b*), (*d*) and (*e*), shall include all profits of the company up to the date of distribution or payment referred to in those sub-clauses, and in sub-clause (*c*) shall include all profits of the company up to the date of liquidation, [19][but shall not, where the liquidation is consequent on the compulsory acquisition of its undertaking by the Government or a corporation owned or controlled by the Government under any law for the time being in force, include any profits of the company prior to three successive previous years immediately preceding the previous year in which such acquisition took place]."

Hence the date of transaction of the alleged loan/advance is a relevant point on which the accumulated profits has to be considered even by taking the current year's profit for this purpose. Even by taking the current year's profit into

consideration it has to be first determined as on the date of alleged transaction and then to work out the accumulated profits. In the case in hand, there is no dispute that the AO has taken the accumulated profits of Rs. 7,48,07,150/- which is as on 31st March, 2010 and not the profit of the current year as on 28th October, 2009. Further, the AO of M/s. Saj Properties Pvt. Ltd. while giving the details of accumulated profits has taken this figure from the financial statements of the said company after reducing the brought forward losses of Rs. 2,55,34,499/-. Thus even for sake of argument and accepting the contentions of the ld. D/R that current year's profit has to be considered for working out the accumulated profits, the said profit is also required to be worked out as on the date of alleged loan/advance i.e. on 28th October, 2009. Once the profit of the current year is ascertained as on the date of transaction, then the brought forward loss of Rs. 2,55,34,499/- is also required to be reduced from such current year's profit as on 28th October, 2009 and only the remaining amount can be considered as accumulated profit for the purpose of section 2(22)(e) of the Act. These are the primary and minimum facts required to be verified by the AO at the time of initiating the proceedings under section 147/148 of the IT Act. If on working out the accumulated profits as on the date of transaction and after reducing the brought forward losses comes to Nil, then there would be no deemed dividend under section 2(22)(e) of the IT Act in the absence of accumulated profits. The assessee has also raised the issue that the transaction is a business transaction and the advance was given by the company to the assessee for purchase of land as per the agreement dated 28th October, 2009, copy of which has been produced before us. We find that the copy of the said agreement has been reproduced by the ld. CIT (Appeals) in the impugned order and the

AO as well as the ld. CIT (A) has rejected the contention and explanation of the assessee without conducting any enquiry about the genuineness and correctness of the said agreement. Even no enquiry was conducted from M/s. Saj Properties Pvt. Ltd. regarding the said transaction of purchase of land under the Agreement dated 28th October, 2009 but the AO as well as the ld. CIT (A) has held that the agreement to sale is nothing but a colourable device to avoid the payment of tax by resorting to dubious method. Even without considering the nature of transaction, the undisputed facts which were available on record at the time of recording the reasons were also not appreciated and considered by the AO while forming the belief that the income assessable to tax has escaped assessment. Thus it is a case of formation of belief by the AO merely based on the information forwarded by the AO of M/s. Saj Properties Pvt. Ltd. while framing the assessment under section 144 of the Act which shows that even the stand of the company M/s. Saj Properties Pvt. Ltd was not considered by the AO at the time of framing the assessment. Therefore, the reopening is based merely on the opinion of the AO of M/s. Saj Properties Pvt. Ltd. which clearly falls in the category of borrowed satisfaction as the AO has not applied his mind independently on the relevant and necessary facts to form the opinion that income assessable to tax has escaped assessment. The decision of Hon'ble Delhi High Court in case of Krown Agro Foods Pvt. Ltd. vs. ACIT (supra) is relevant on this point wherein it has been held in para 13 to 15 as under :-

> **"13.** The reason to believe recorded by the Assessing officer is not based on any material that had come to the knowledge of the Assessing Officer. There is a mere suspicion in the mind of the assessing officer and the notice under section 147/148 has been issued for the purpose of verification and for clearing the cloud of suspicion. The reasons to believe recorded do not show as to on what basis the Assessing Officer has formed a reasonable belief that

the said amount of Rs. 2,00,000/- had escaped assessment. It is apparent the Assessing Officer suspects that the income has escaped assessment. However, mere suspicion is not enough. The reasons to believe must be such, which upon a plain reading, should demonstrate that such a reasonable belief could be formed on some basis/ foundation and had in fact been formed by the Assessing Officer that income has escaped assessment. No such reasonable belief can be inferred from the purported reasons to believe recorded.

14. The words "reason to believe" indicate that the belief must be that of a reasonable person based on reasonable grounds emerging from direct or circumstantial evidence and not on mere suspicion, gossip or rumour. The "reason to believe" recorded in the case do not refer to any material that came to the knowledge of the Assessing Officer whereby it can be inferred that the Assessing Officer could have formed a reasonable belief that the said amount had escaped assessment. The purported belief that income has escaped assessment is not based on any direct or circumstantial evidence and is in the realm of mere suspicion. The requirement of law is "reason to believe" and not "reason to suspect". In the present case, since the purported reasons to believe recorded indicate that the Assessing Officer has acted on mere surmise, without any rational basis, the action of re-opening of the Assessment is thus clearly contrary to law and is unsustainable.

15. In view of the above, the impugned order dated 23.06.2014 is set aside and the proceedings initiated pursuant to the notice dated 18.03.2014 are hereby quashed."

Thus the reopening based on borrowed satisfaction and mere suspicion was held to be invalid and liable to be quashed. Further, in case of PCIT vs. Meenakshi Overseas Pvt. Ltd. (supra) the Hon'ble Delhi High Court again held in para 26, 36 & 37 as under :-

"26. The first part of Section 147 (1) of the Act requires the AO to have "reasons to believe" that any income chargeable to tax has escaped assessment. It is thus formation of reason to believe that is subject matter of examination. The AO being a *quasi* judicial authority is expected to arrive at a subjective satisfaction independently on an objective criteria. While the report of the Investigation Wing might constitute the material on the basis of which he forms the reasons to believe the process of arriving at such satisfaction cannot be a mere repetition of the report of investigation. The recording of reasons to believe and not reasons to suspect is the pre- condition to the assumption of jurisdiction under Section 147 of the Act. The reasons to believe must demonstrate link between the tangible material and the formation of the belief or the reason to believe that income has escaped assessment.

> **36.** In the present case, as already noticed, the reasons to believe contain not the reasons but the conclusions of the AO one after the other. There is no independent application of mind by the AO to the tangible material which forms the basis of the reasons to believe that income has escaped assessment. The conclusions of the AO are at best a reproduction of the conclusion in the investigation report. Indeed it is a 'borrowed satisfaction'. The reasons fail to demonstrate the link between the tangible material and the formation of the reason to believe that income has escaped assessment.
>
> **37.** For the aforementioned reasons, the Court is satisfied that in the facts and circumstances of the case, no error has been committed by the ITAT in the impugned order in concluding that the initiation of the proceedings under Section 147/148 of the Act to reopen the assessments for the AYs in question does not satisfy the requirement of law."

Thus when the AO has not applied his mind independently while forming the belief that income has escaped assessment but the reopening is based on the information received from the AO wherein a definite opinion or expression by the AO of M/s. Saj Properties Pvt. Ltd. is given then the case falls in the category of borrowed satisfaction as the reasons failed to demonstrate the link between the material and formation of reason to belief that income has escaped assessment. Accordingly, we hold that the initiation of proceedings under section 148 is not sustainable in law and the same is quashed.

8. The ld. Counsel for the assessee has also raised the objection regarding the jurisdiction of the AO Circle-5 Jaipur who has reopened the assessment and passed the reassessment order on the ground that the assessee has filed the return of income under the jurisdiction of the AO Circle-2, Jaipur. The ld. Counsel for the assessee has referred to the returns of income filed for the assessment year under consideration 2010-11 to 2018-19 and submitted that for all these years the assessee has been filing the return electronically with Circle-2, Jaipur. Thus the AO

Circle-5 Jaipur has no jurisdiction to issue the notice under section 148 and pass the reassessment order.

9. On the other hand, the ld. D/R has submitted that though the return might have been filed with Circle-2, Jaipur, however the processing under section 143(1) has been done by Circle-5, Jaipur and, therefore, the jurisdiction of AO Circle-5, Jaipur is based on the address shown in the PAN of the assessee.

10. Both the parties have relied upon a series of decisions in support of their contentions. At the outset, we are of the opinion that since we have already quashed the initiation of proceedings under section 147/148 on the ground of borrowed satisfaction and without application of mind independently by the AO, therefore, this objection raised by the assessee becomes infructuous. However, we leave this open.

Ground No. 2 is regarding the merits of addition made on account of deemed dividend under section 2(22)(e) of the IT Act.

11. The ld. Counsel for the assessee has submitted that the assessee had entered into an agreement to sale dated 28.09.2009 with M/s. Saj Properties Pvt. Ltd. of his immovable property situated at C-4, Sardar Patel Marg, C-Scheme, Jaipur for a sum of Rs. 15,00,00,000/- and the assessee had received a sum of Rs. 11,70,00,000/- as advance in lieu thereof. For this precise reason, 2 separate A/cs were maintained by M/s. Saj Properties Pvt. Ltd. of assessee in its books of accounts. One account was named as Sharavan Choudhary wherein transactions relating to amount given as advance by the assessee on interest were recorded. Second account was named as Sharavan Choudhary Advance A/c wherein transactions relating to amount given as advance by the company to the assessee towards sale of immovable property were

recorded. The assessing Officer has for no plausible reasons merged both the accounts and arrived at peak amount of Rs. 11,74,77,779/- as amount liable to be treated as deemed income. The ld. Counsel further submitted that M/s. Saj Properties Pvt. Ltd. was dealing in real estate business and had given an advance of Rs. 11,70,00,000/- to the assessee against sale of immovable property situated at C-4, Sardr Patel Marg, C-Scheme, Jaipur. However, subsequently the parties decided not to execute the sale deed, decided to cancel the agreement and accordingly the assessee has returned back the amount as was available with him. In support of his contention, the ld. Counsel has relied upon the following decisions :-

Ashok Kumar Agarwal vs. ACIT
ITA No. 778/JP/2015 dated 03.10.2016.

PCIT vs. Ashok Kumar Agarwal
(DB IT Appeal No. 168/2016 dated 29.09.2016 (Rajasthan HC)

PCIT vs. Ashok Kumar Agarwal
(DB IT Appeal No. 46/2017 dated 31.10.2017 (Rajasthan HC)

CIT vs. Krishna Behari Goyal
(DB IT Appeal No. 137/2016 dated 19.10.2016 (Rajasthan HC)

CIT vs. Om Prakash Suri (No.2)
359 ITR 41 (MP)

Thus the ld. Counsel has submitted that when the amount in question was received by the assessee in accordance with the sale agreement dated 28th October, 2009 entered into between the assessee and M/s. Saj Properties Pvt. Ltd. for sale of land owned by the assessee, then the said advance received by the assessee does not fall in the ambit of loan or advance as per provisions of section 2(22)(e) of the Act.

12. On the other hand, the ld. D/R has submitted that it could be seen from page 11 of the assessment order that initially it was stated by the assessee that the

amount of Rs. 11.70 crore was paid by M/s. Saj Properties to the assessee on account of its credit balance (Rs. 6.08 crore opening balance and Rs. 5.95 crore due to him on account of interest and other expenses) as appearing in its books of accounts. However, later on, it was stated that the amount of Rs. 11.70 crore was paid to the assessee by M/s. Saj Properties Pvt. Ltd. on account of sale of immovable property by the assessee to M/s. Saj Properties Pvt. Ltd. for Rs. 15 crore. In support, the ld. A/R filed a copy of agreement dated 28.10.2009. Thus, there was no consistency in the stand of the assessee about this amount of Rs. 11.70 crore. The ld. D/R also submitted that the said agreement to sale is nothing but a self-serving document and an afterthought as this agreement to sale was not registered and there is nothing on record which may suggest that the land was finally transferred in the name of M/s. Saj Properties Pvt. Ltd. It is to be noted from the balance sheet of M/s. Saj Properties Pvt. Ltd. as on 31.03.2010 that this transaction of alleged sale of land is not appearing in the Disclosures as required by AS-18 pertaining to "Related Party Disclosure". Instead, loan and advance of Rs. 1,89,77,779/- was still standing in the name of the assessee as on 31.03.2010. The assessee has not brought on record any material which may indicate that M/s. Saj Properties Pvt. Ltd. has authorized the authorized signatory to execute such agreement to sale. Further, the assessee has not brought on record that the said agreement to sale was cancelled subsequently and on what terms and conditions as there is no such stipulation in the agreement to sale of its cancellation and why the assessee has not returned the entire amount of Rs. 11.70 crore. He has relied upon the decision of Mumbai Bench of the Tribunal in case of Kapil N. Shah vs. ITO, 85

taxmann.com 253 as well as the decision of Hon'ble Supreme Court in case of Miss P. Sarada vs. CIT, 96 Taxman 11 (SC).

13. We have considered the rival submissions as well as the relevant material on record. The assessee has explained before the authorities below that this amount of Rs. 11.70 crores was received on account of agreement to sale dated 28.10.2009 whereby the assessee and M/s. Saj Properties Pvt. Ltd has entered into an agreement for purchase and sale of land owned by the assessee. Thus the said advance received by the assessee is a business transaction as the said company is engaged in the business of purchase and sale of real estate. The said contention of the assessee has been rejected by the ld. CIT (A) by recording her finding in para 3.3.2 as under :-

> " 3.3.2. I have considered the submission order and facts of the case. It is seen that the agreement was cancelled as per assessee's own admission therefore assessee cannot take shelter of this agreement for treating the same as business advance. Moreover since the assessee is a director in Saj Properties (P) Ltd., he was in a position to manage the affairs of the company also. Therefore to make this transaction look like a business advance, an agreement was made which was actually never intended to be executed. It is clear that in this way assessee tried to escape from the liability of section 2(22)(e) provisions. Thus this entire edifice was basically a colorable device to give the color of genuineness to these transactions through which he was successful in avoiding application of provisions of section 2(22)(e). The Hon'ble Supreme Court in the case of McDowell vs. CTO has given strong verdict against any such arrangements by stating that "Colorable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honorable to avoid the

payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges." In view of the Apex Court verdict, this entire arrangement is held as a mere colorable device devised with the aforementioned objectives."

Thus the ld. CIT (A) has suspected the genuineness of the agreement produced by the assessee on the ground that just to make this transaction looks like a business the agreement was made which was not actually intended to be executed and accordingly it was held to be a colorable device for avoiding the payment of tax. It is pertinent to note that the assessee was having a credit/opening balance of Rs. 6,07,75,000/- as on 1st April, 2009 on which the assessee also received interest from the company M/s. Saj Properties Pvt. Ltd. During the year under consideration the said amount of loan given by the assessee to the company was repaid to the assessee along with interest. This fact is also clearly mentioned in the audit report wherein the company has stated that it took loan from the directors of the company including the assessee and the interest paid to the assessee is also reflected in the category of related party transactions. For ready reference, we reproduce the details of the related party transactions as per the financial statements as well as Note on Accounts forming part of the balance sheet as under :-

" A) Related Parties

1. Bitthal Das Parwal
2. Hari Narain Parwal
3. Sharawan Choudhary
4. Shobha Choudhary
5. Krishna Choudhary

B) Nature of Transaction

1. Commission Rs. 18,00,000.00
2. Interest paid Rs. 5,95,00,644.00

C) Out-Standing Balance

1. Unsecured Loan
2. Sundry Advances
3. Sundry Creditors

Thus only the commission and interest paid to the Directors has been reported under the Related party transaction and no such transaction of granting of loan to the assessee was reported. Thus it is clear that it was not a case of advance to the assessee but this was only payment for purchase of the land from the assessee, the details of which are duly given in the agreement being land bearing no. C-4, Sardar Patel Marg, C-Scheme, Jaipur measuring 2852 sq. yards. Neither the AO nor the ld. CIT (A) has taken any steps to verify the genuineness of this agreement or the contents regarding the details of the land as well as the value of the land to be sold by the assessee under the Agreement. Thus without conducting any enquiry or verification of correctness of the transaction between the assessee and the company as narrated in the Agreement to sale dated 28.10.2009 the rejection of the claim is based on suspicion. There is no material either with the AO or any fact available on record to suggest that the impugned agreement is not genuine. Thus without bringing any contrary material on record by the AO as well as by the ld. CIT (A) the mere suspicion about the genuineness of the transaction cannot be the basis of arriving at the conclusion that the agreement filed by the assessee is a colorable device. In the case of Ashok Kumar Agarwal vs. ACIT (supra) the Coordinate Bench of this Tribunal while considering an identical issue has held in para 21 as under :-

21. We have heard the rival contentions and pursued the material available on record. An amount of Rs 50,26,604 has been reflected as an advance given to the assessee in the books of accounts of M/s Ashish Builcon Private limited. The said advance is reflected in the current account of the assessee maintained with M/s Ashish Builcon Private limited through which various transactions of deposits and withdrawals were made during the year. The AO held that the provisions of deemed dividend are applicable to day-to-day transactions between the company and its shareholders and accordingly brought the whole of amount of Rs 50,26,604 to tax as deemed dividend in the hands of the assessee. The ld CIT(A) after going through the ledger account of the assessee in the books of M/s Ashish Builcon Private Limited and the explanation given by the assessee in respect of each of the entries has given a clear finding of fact that an amount of Rs 29,80,000 is towards the advance given by the company to the assessee for purchase of land and Rs 20,46,604 is on account of repayment of old advance taken by the company from the assessee. No contrary material or explanation has been submitted before us to displace the said finding of the ld CIT(A) and we see no reason to interfere with the said finding of facts.

Now, coming to the provisions of section 2(22)(e) of the Act, it is the loan or advance given by the company to its shareholder which can be brought to tax as deemed dividend in the hands of the shareholders. Where the company has taken any loan or advances from a shareholder and repays the same subsequently and a clear nexus is established, such repayment relates back to the original loan/advance transaction and cannot be seen as an independent transaction of fresh advancement of loan/advance by the company to the shareholder. In the instant case, the ld CIT(A) has given a clear finding that the amount of Rs 20,46,604 paid by the company is towards repayment of old advances taken by the company from the assessee, in such a situation, the provisions of section 2(22)(e) are clearly not attracted in respect of Rs 20,46,604. Now coming to amount of Rs 29,80,000 which is towards the advance given by the company to the assessee for purchase of land is concerned, the assessee submitted a copy of agreement to sale/Ikarnama dated 6.4.2010 as per which the assessee had agreed to sell 2.602 hectares of agricultural land in Village Bamanwas, Tehsil Viratnagar, Distt Jaipur to M/s Ashish Buildcon Pvt. Ltd. for Rs 40 lacs. As per the Ikarnama, the assessee was required to get 90B

conversion formalities done before 31.3.2011. It was explained by the assessee that he was expecting the new township policy to be announced as was the case with other colonizer/builders and was under a bonafide belief that the JDA would allow the conversion of land. Unfortunately, the land under the sale agreement could not got 90B approval from the JDA and thereafter the agreement was cancelled and amount was refunded to the company. It is noted that both assessee and M/s Ashish Buildcon are engaged in the business of real estate and similar transactions have been undertaken by the assessee with M/s Ashish Buildcon Private limited in the earlier years and subsequent years as well. We are therefore of the view that these are normal business transactions where the money has been advanced by the company for purchase of land and the same cannot be deemed as dividend in the hands of the assessee. In some cases, the sale transaction has fructifed by complying with the necessary conditions/formalities in terms of registered sale deed and in some cases, due to non-fulfillment of specified conditions, the agreement may be cancelled. We do not agree with the contention of the ld CIT(A) that where the agreement to sell is not registered and not found during the search, the authencity of the agreement will be in doubt and the assessee would be precluded in producing the same in support of its contention especially given the fact that there are regular and similar business transactions entered into between the assessee and M/s Ashish Buildcon. Nothing has been brought on record to suggest that M/s Ashish Builcon Pvt limited has negated the existence of the said agreement. What is important to examine is the purpose at the point of time when the money was advanced by the company. Where the purpose is to carry out a business transaction for the benefit of the company, the amount of advance will be treated as normal business advance and cannot be termed as deemed dividend in the hands of the shareholders. The decision of Hon'ble Delhi High Court in case of Creative Dyeing and Printing Pvt. Ltd. (supra) supports the case of the assessee. Further, it is noted that in respect of a similar transaction entered between the assessee and M/s Ashish Buildcon in AY 2010-11, the Coordinate Bench has decided in favour of the assessee and the relevant findings are as under:

> "6. We have heard rival contentions and perused the material on record. On verification of copy of accounts placed at pages 38 to 39 of the Paper Book, it is seen that assessee had given money to the company. The opening balance as on 1.4.2009 was Rs. 1,12,17,000/-. Thereafter, he withdrew money from the company upto 15.7.2009. On 18.07.2009 the assessee again

paid to company Rs. 7 lakhs. Thereafter assessee withdrew various amounts from the company. On 21.8.2009 again he paid Rs.2 lakhs to company, Rs. 9.5 lakhs on 28.07.2009, Rs. 3 lakhs on 13.10.2009, Rs 1.25 lakhs on 15.10.2009, Rs. 5 lakhs on 26.10.2009, Rs. 5 lakhs on 29.10.2009, Rs. 20 lakhs on 10.02.2010 and Rs. 60 lakhs on 10.3.2010 (Rs. 20 lakhs each) and Rs.13 lakhs on 10.03.2010 and Rs. 1.25 lakhs on 10.3.2010 which show that there are numbers of transactions between the assessee and company. Finally, the assessee's accounts has been squared up. The assessee and company are in real estate business. It is a general practice in the line of business that most of the land are purchased and sold on agreement to sale basis to save the stamp duty and to increase the profit on the transactions. These facts have been accepted by the AO in scrutiny assessment also in number of years. The condition laid down in the section 2(22)(e) are squarely applied in case of the assessee but only issue disputed is whether these advances were loan for business purposes or otherwise. The prima facie copy of accounts in the books of the company shows that assessee had paid much more than amount received from the company. The transactions were regular. The assessee produced the evidence before the lower authorities to justify the transaction as a business transaction on the basis of agreement to sale dated 22.7.2009. There were certain conditions as per this Ikrarnama, which could not be fulfilled by the assessee but it does not mean that assessee's loans and advances are not for business purposes. The ld. A/R of the assessee has explained the reasons for not getting 90B done of agricultural land at village Ajayrajpura, Tehsil Sanganer as Draft Master Plan got changed by the JDA by draft Notification dated 10.11.2009 wherein it has been decided by the JDA that land use under 90B was to be approved not less than 25 acres but in final Master Plan this area has been reduced to 10 hectares. The assessee filed application on 23.08.2012 under section 90B of the Land Revenue Act before the JDA which was rejected by the JDA. The case laws relied on by the ld. A/R are squarely applicable on the facts of the case. Therefore, we hold that transactions made by the assessee and the company are for business purposes and are not deemed dividend under section 2(22)(e) of the Act. Accordingly, we allow the assessee's appeal and reverse the order of ld. CIT (A)." In light of above, we are of the opinion that the advance of Rs. 29,80,000 given by the company to the assessee is for business purposes towards purchase of land and the same cannot be treated as deemed dividend in the hands of the assessee. Accordingly, we allow the appeal of the assessee and dismiss the appeal of the Revenue on this ground."

The said decision of the Tribunal was upheld by the Hon'ble Jurisdictional High Court vide decision dated 31st October, 2017 in DB IT Appeal No. 46/2017 held in para 11 to 12 as under :-

" 11. After taking into consideration the evidence on record and law discussed by the CIT (A) and the facts, it is a matter of evidence and restriction was made and the entries which were taken from sister concerned or from the relatives of the group of persons is permissible under law.

12. In that view of the matter, on the first issue we are in complete agreement with the view taken by the Tribunal. Therefore, issue is answered in favour of the assessee against the department."

Thus it is clear that the Tribunal in case of Ashok Kumar Agarwal vs. ACIT (supra) has also decided an identical issue for the assessment year 2010-11 which was also upheld by the Hon'ble Jurisdictional High Court vide order dated 29th September, 2016 in DB IT Appeal No. 168/2016. Similarly the Hon'ble Madhya Pradesh High court in case of CIT vs. Om Prakash Suri (No. 2) 359 ITR 41 has held in para 6 to 10 as under :-

6. The assessee preferred further appeal before the Income-tax Appellate Tribunal Bench Indore. As against the appeal filed by the assessee for the assessment year 2005-06, the Income-tax Appellate Tribunal, Indore held that the amount was received by the assessee from PESPL against the sale of the land and thus the receipt is not in the nature of loans or advances. The Income-tax Appellate Tribunal, Indore, deleted the addition made by the Assessing Officer on account of section 2(22)(e).

7. Meanwhile, as per the direction of the learned Commissioner of Income-tax (Appeals) the case of the assessee for the assessment year 2004-05 was reopened and accordingly the assessment order was passed under section 143(3)/147 dated June 7, 2010, wherein the addition of Rs. 57,57,676 was made by the Assessing Officer under section 2(22)(e). The assessee went on appeal in his case for the assessment year 2004-05 against the addition of Rs. 57,57,676 under section.2(22)(e). The learned Commissioner of Income-tax (Appeals) relying on the decision of the Income-tax Appellate Tribunal, Indore, dated January 3, 2012, for the assessment year 2005-06, in the case of the assessee and deleted the addition of Rs. 57,57,676 in the assessment year 2004-05. Thereafter, the Revenue preferred the appeal before the Income-tax Appellate Tribunal Bench Indore for the assessment year 2004-05. The

learned Income-tax Appellate Tribunal relying on its earlier decision dated January 3, 2012, dismissed the appeal by the impugned order dated August 28, 2012, by holding that the issue towards of deemed dividend under section 2(22)(e) of the Act was decided in the favour of the assessee and dismissed the appeal of the Revenue. The relevant paragraph of the order dated January 3, 2012, passed by the Income-tax Appellate Tribunal in I.T.A. No. 425/ind/2009 for the assessment year 2005-06 is relevant which reads as under :

"5. The next ground pertains to confirming the addition of Rs. 85,488, considered as deemed dividend under section 2(22)(e) of the Act. The learned counsel for the assessee strongly objected the addition, whereas the learned senior Departmental representative defended the impugned order.

5.1 We have considered the rival submissions of the learned representatives of both sides and perused the material available on record. With regard to the addition made under section 2(22)(e) of the Act, the Assessing Officer observed that during the year, under consideration, the assessee has taken the following amounts of Rs. 1,94,58,728 from the company :

Date	*Particulars*	*Debit amount*	*Credit amount*
01-04-04	By op. Bal-		8,798,728
01-04-04	By cheque		600,000
08-04-04	By cheque		1,150,000
08-04-04	By cheque		1,550,000
02-06-04	By cheque		800,000
02-06-04	By cheque		1,900,000
02-07-04	By cheque		1,750,000
18-09-04	By cheques		1,00,000
05-10-04	By cheques		700,000
30-03-05	By cheques		410,000
	Total		1,94,58,728

On the Assessing Officer's query to add the said amount under section 2(22)(e) of the Act, the stand of the assessee was that the amount was not received as a loan but as an advance against the sale of its land situated in Gram Sinhansa Tehsil and District Indore. To support the contention the assessee has filed agreement to sell dated January 19, 2004, before the Assessing Officer. However, the Assessing Officer was not convinced with the same and held that the transaction was in the nature of loans and advances. On

finding that accumulated profit of the company was Rs. 58,43,165 he restricted the addition under section 2(22)(e) of the Act to the extent of accumulated profit, i.e., Rs. 58,43,165.

On appeal before the learned Commissioner of Income-tax (Appeals), the assessee contended that the amount was received as loans and advances. However, the learned Commissioner of Income-tax (Appeals) found that the accumulated profit of M/s. Puzzling Equipref Services P. Ltd. was Rs. 57,676 as on March 31, 2004, and Rs. 58,43,164 as on March 31, 2005. Accordingly, he directed that the addition to the extent of Rs. 57,57,676 is required to be made in the assessment year 2004-05 and the remaining amount of Rs. 85,488 was added to the income of the year under consideration. Further aggrieved, the assessee is in appeal before the Tribunal. We have perused the material available on record and also gone through the agreement to sell dated January 19, 2004, placed on record (pages 59 to 63 of the paper book). We find that the land was owned by the assessee which he agreed to sell to M/s. Puzzling Equipref Services P. Ltd. for a consideration of Rs. 2,53,60,000. As per the terms of the agreement, M/s. Puzzling Equipref Services P. Ltd. was required to pay a part of the sale consideration in advance. The agreement to sell also witnessed payment of these amounts through account payee cheques to the assessee on various dates as mentioned at page 3 of the agreement to sell. Thus, we find that the amount so received by the assessee was against the sale of land owned by him title of which is clear from the documents placed on record. Since the amount was received as a sale consideration in the normal course of business, the same cannot be branded as loans and advances. We also find that in its audited balance-sheet also, the assessee has changed the head of its classification from loans and advances to investment in the subsequent year. We, therefore, do not find any merit in the action of the lower authorities for treating the transaction as in the nature of loans and advances. The ground of the assessee is, therefore, allowed in his favour."

8. The Income-tax Appellate Tribunal while deciding the identical facts for assessment year 2005-06 found that the agreement to sale was also witnessed payment of the impugned amount through account payee cheques on various dates which were mentioned on the said sale agreements per the terms and conditions of the sale agreement. The amounts were received from the assessee against the sale of land and the title of which was clear from the documents placed on record and the impugned amounts were received in the normal course of business in sale transaction, consequently, these cannot be branded as loan advances. The learned Tribunal has held that such transaction would not come under the provisions of section 2(22)(e)pf the Income-tax Act, 1961.

9. Learned senior counsel for the appellant has submitted that the order dated January 3, 2012, passed by the Income-tax Appellate Tribunal in respect of the assessment year 2005-06 the same has attained finality land, therefore, relying on the same the learned Tribunal passed the impugned order.

10. The relevant paragraph of the impugned order reads as under :

> "We have perused the agreement to sale (pages 28 to 32 of the paper book). As per clause 2 of the said agreement (page 39 of paper, book), the amount of Rs. 2,53,60,000 was agreed to be given to the assessee by the purchaser and part of the payment was received through cheque. The assessee was also supposed to get conversion of the land within two months. As per clause 10 (page 31 of the paper book), the purchaser was free to do the development work on the land and was also free to sell the same to any third-party for which the assessee had no objection. In view of these facts, it cannot be said that it was a loan or an advance to the assessee. The contents of the sale agreements are very much clear that it was a clear cut agreement of sale. No contrary facts or decision was brought to our notice by either side and more specifically the Revenue. In view of these facts, we are not in agreement with the conclusion drawn in the assessment order and affirm the stand of the learned Commissioner of Income- tax (Appeals) in accepting the claim of the assessee, resultantly, there is no merit in the appeal of the Revenue.
>
> Finally, the appeal of the Revenue, is dismissed."

In the said case the AO has made the addition under section 2(22)(e) by rejecting the claim of the assessee that the advances by the company to the assessee was for purchase of land. If the transaction is a business transaction between the parties then the amount received under the said transaction cannot be held as loan or advance to be treated as deemed dividend under section 2(22)(e) of the Act. The assessee explained the facts regarding the loan given by the assessee to the company and which was also received during the year under consideration along with the interest, the details of which has been reproduced by the AO at pages 8 & 9 of the impugned order. However, the second transaction of payment of Rs. 11.70 crores was shown separately being advance given for purchase of land. Therefore, these are two separate transactions, first one is the loan earlier given by the assessee to the company was repaid during the year under consideration along with the interest and second transaction was the advance given for purchase of land as per the agreement dated 28th October, 2009. Thus when the transaction does not

fall in the category of loan or advance in terms of section 2(22)(e) of the Act but the same is a business transaction, then the addition made by the AO is not sustainable. In view of the above facts and circumstances and following the decisions of the Coordinate Benches as well as Hon'ble Jurisdictional High Court, the addition made by the AO is deleted. We have also discussed about the availability of accumulated profits with the company as on the date of alleged transaction and, therefore, in any case the addition made by the AO of the full amount is not sustainable when the AO has not computed the accumulated profits as on date of transaction and then reducing the brought forward losses to the tune of Rs. 2,55,34,499/-. After considering all these relevant aspects if something is still found to be accumulated profits as on the date of transaction, the addition can be made only to the extent of such amount. The AO has not conducted any such exercise and thus the assessment was framed in a mechanical manner without even considering the relevant provisions of the Act as well as the binding precedents. Accordingly, in view of the above discussion, the addition made by the AO is not sustainable and liable to be deleted.

14. In the result, appeal of the assessee is allowed.

Order is pronounced in the open court on 07/08/2019.

Sd/-	Sd/-
(विक्रम सिंह यादव)	(विजय पाल रॉव)
(VIKRAM SINGH YADAV)	(VIJAY PAL RAO)
लेखा सदस्य/Accountant Member	न्यायिक सदस्य/Judicial Member

Jaipur
Dated:- 07/08/2019.
Das/

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:

1. The Appellant- Shri Shravan Choudhary, Jaipur.
2. The Respondent – The ACIT, Circle-5, Jaipur.
3. The CIT(A).
4. The CIT,
5. The DR, ITAT, Jaipur
6. Guard File (ITA No. 517/JP/2019)

आदेशानुसार/ By order,

सहायक पंजीकार/ Assistant. Registrar