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IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G', NEW DELHI

BEFORE SH. AMIT SHUKLA, JUDICIALMEMBER
AND
SH.B. R. R. KUMAR, ACCOUNTANT MEMBER

ITA No.6356 to 6361 /DEL/2018
Assessment Year: 2010-11 to 2013-14 , 2015-16 & 2016-17

DCIT **Central Circle- II** **Gurgaon**	**Vs**	**Sudhir Dhingra** **F-25, Radhey Mohan** **Drive Bandh Road** **South West Delhi** **PAN No.AAFPD 7443K**
(APPELLANT)		**(RESPONDENT)**

ITA No.5721to 5722/DEL/2018
Assessment Year: 2014-15 & 2016-17

Sudhir Dhingra **F-25, Radhey Mohan** **Drive Bandh Road** **South West Delhi** **PAN No.AAFPD 7443K**	**Vs**	**DCIT** **Central Circle-II** **Gurgaon**
(APPELLANT)		**(RESPONDENT)**

ITA No.5728 to 5730/DEL/2018
Assessment Year: 2013-14 & 2015-16 to 2016-17

DCIT Central Circle- II Gurgaon	Vs	**Anoop Thatai** **C/o RRA Tax India, D-28,** **South Extension, Part-1,** **New Delhi** **PAN No.AAAPT0914G**
(APPELLANT)		**(RESPONDENT)**

Co. No.190/Del/2018

(In ITA No.5730/DEL/2018)

Assessment Year: 2013-14

Anoop Thatai **C/o RRA Tax India, D-28,** **South Extension, Part-1,** **New Delhi** **PAN No.AAAPT0914G**	Vs	**ACIT** **Central Circle-II** **Gurgaon**
(APPELLANT)		**(RESPONDENT)**

ITA No.5719/DEL/2018
Assessment Year: 2014-15

Anoop Thatai C/o RRA Tax India, D-28, South Extension, Part-1, New Delhi	Vs	DCIT Central Circle-II Gurgaon

PAN No.AAAPT0914G		
(APPELLANT)		**(RESPONDENT)**

ITA No.6362/DEL/2018
Assessment Year: 2015-16

ACIT Central Circle-II Gurgaon	Vs	Anoop Thatai C/o RRA Tax India, D-28, South Extension, Part-1, New Delhi PAN No.AAAPT0914G
(APPELLANT)		**(RESPONDENT)**

Appellant by	Sh. H. K. Choudhary CIT (DR)
Respondent by	Dr. Rakesh Gupta, Advocate

Date of hearing:	07.12.2021
Date of Pronouncement:	13.01.2022

ORDER

PER AMIT SHUKLA, JM:

In the aforesaid appeals filed by the Revenue's ITA Nos. 6356 to 6359/Del/2018 in the case of Mr. Sudhir Dhingra for A.Y. 2010-11 to 2013-14; and ITA Nos. 5728-5730/Del/2018 in the case of Mr. Anoop Thatai; for the A.Ys. 2011-2012 to 2013-14 involve common issues and

arising out similar set of facts, therefore are being disposed of by this consolidated order. Revenue has raised following grounds of appeal in each of these cases which for various assessment years are reproduced as under:-

Assessment Year- 2010-11

(i) Whether on the facts and in the circumstances of the case the Ld. CIT(A) has failed to appreciate that addition of Rs. 5,13,00,000/- on account of deemed dividend u/s 2(22)(e) of the Act in an assessment order framed u/s 153A can be made by the Assessing Officer on the basis in the documents found and seized during search u/s 132, information of fund flow collected during the enquiries conducted by the Investigation Wing/Assessing Officer and statements of Sh. Akshay Dhanda and Sh. Ajay Nagpal recorded on 22.06.2015 and 07.07.2015.

(ii) Whether on the facts and in the circumstances of the case the Ld. CIT(A) failed to appreciate that the Hon'ble Supreme Court in the case of CIT v. Mukundray K. Shah, 290 ITR 433 under identical circumstances has upheld the addition of deemed dividend u/s 2(22)(e) made by the AO in a block assessment u/s 158BC, the provisions of which are restrictive than those of section 153A.

(iii) Whether on the facts and in the circumstances of the case the Ld. CIT(A) was right in concluding that there was a difference in scope of proceedings under section 153A of the Income Tax Act, 1961 for an abated assessment and for a completed assessment.

(iv) Whether on the facts and in the circumstances of the case the Ld. CIT(A) was right in holding that no addition can be made u/s 153A in respect of completed assessment if no incriminating material is found during search.

(v) Whether there is any restriction on the powers of the Assessing officer under section 153A of the Income Tax Act, 1961 to confine only

to the "incriminating material found during the search", even though such words or conditions are not mentioned in the section per se.

(vi) Whether on the facts and in the circumstances of the case the Ld. CIT(A) was correct in interpreting section 153A which starts with a non-obstinate clause stating therein that the operation of section 139,147, 148, 149, 151 & 153 was deposed meaning thereby that in search cases the Assessing officer is duty bound to take up the assessment u/s 153A and that the above-mentioned sections cannot invoked. Therefore, even if incriminating material is not found during search, but if any escaped income or under-assessed income undisclosed income has to be assessed for such completed assessment, then it has to be done in the proceedings u/s 153A in search cases as during the pendency of the proceedings u/s 153A, the proceedings u/s 147 of the Income Tax Act, 1961 cannot be initiated.

(vii) Whether on the facts and in the circumstances of the case the Ld.CIT(A) was right in following Delhi High Court decision in the case of CIT vs. Kabul Chawla, 380 ITR 173 when the Hon'ble HC itself admits in para 37(iv) that "Although Section 153A does not say that additions should strictly be made on the basis of evidence found in course of search...." there by interpreting the statute in the manner which were never worded or intended by the legislature.

(viii) Whether on the facts and in the circumstances of the case the Ld.CIT(A) has erred in ignoring the principles of strict interpretation of statute when the words used in the statute i.e. sec 153A(1)(b) of the IT Act, 1961 are assess or reassess the "Total Income".

(ix) Whether on the facts and in the circumstances of the case the Ld.CIT(A) has erred in not deciding the issue of addition of Rs. 5,13,00,000/- on account of deemed dividend u/s 2(22)(e) of the Income Tax Act, 1961 on merits.

(x) The appellant craves to add, amend, alter or modify any grounds of appeal at the time of hearing.

Assessment Year 2011-12

(i) Whether on the facts and in the circumstances of the case the Ld. CIT(A) has failed to appreciate that addition of Rs. 15,44,11,500/- on account of deemed dividend u/s 2(22)(e) of the Act in an assessment order framed u/s 153A can be made by the Assessing Officer on the basis in the documents found and seized during search u/s 132, information of fund flow collected during the enquiries conducted by the Investigation Wing/Assessing Officer and statements of Sh. AkshayDhanda and Sh. Ajay Nagpal recorded on 22.06.2015 and 07.07.2015.

(ii) Whether on the facts and in the circumstances of the case the Ld. CIT(A) failed to appreciate that the Hon'ble Supreme Court in the case of CIT v. Mukundray K. Shah, 290 ITR 433 under identical circumstances has upheld the addition of deemed dividend u/s 2(22)(e) made by the AO in a block assessment u/s 158BC, the provisions of which are restrictive than those of section 153A.

(iii) Whether on the facts and in the circumstances of the case the Ld. CIT(A) was right in concluding that there was a difference in scope of proceedings under section 153A of the Income Tax Act, 1961 for an abated assessment and for a completed assessment.

(iv) Whether on the facts and in the circumstances of the case the Ld. CIT(A) was right in holding that no addition can be made u/s 153A in respect of completed assessment if no incriminating material is found during search.

(v) Whether there is any restriction on the powers of the Assessing officer under section 153A of the Income Tax Act, 1961 to confine only to the "incriminating material found during the search", even though such words or conditions are not mentioned in the section per se.

(vi) Whether on the facts and in the circumstances of the case the Ld. CIT(A) was correct in interpreting section 153A which starts with a non-obstinate clause stating therein that the operation of section

139,147, 148, 149, 151 & 153 was deposed meaning thereby that in search cases the Assessing officer is duty bound to take up the assessment u/s 153A and that the above-mentioned sections cannot invoked. Therefore, even if incriminating material is not found during search, but if any escaped income or under-assessed income undisclosed income has to be assessed for such completed assessment, then it has to be done in the proceedings u/s 153A in search cases as during the pendency of the proceedings u/s 153A, the proceedings u/s 147 of the Income Tax Act, 1961 cannot be initiated.

(vii) Whether on the facts and in the circumstances of the case the Ld. CIT(A) was right in following Delhi High Court decision in the case of CIT vs. Kabul Chawla, 380 ITR 173 when the Hon'ble HC itself admits in para 37(iv) that "Although Section 153A does not say that additions should strictly be made on the basis of evidence found in course of search …." there by interpreting the statute in the manner which were never worded or intended by the legislature.

(viii) Whether on the facts and in the circumstances of the case the Ld. CIT(A) has erred in ignoring the principles of strict interpretation of statute when the words used in the statute i.e. sec 153A(1)(b) of the IT Act, 1961 are assess or reassess the "Total Income".

(ix) Whether on the facts and in the circumstances of the case the Ld.CIT(A) has erred in not deciding the issue of addition of Rs. 15,44,11,500/- on account of deemed dividend u/s 2(22)(e) of the Income Tax Act, 1961 on merits.

(x) The appellant craves to add, amend, alter or modify any grounds of appeal at the time of hearing.

Assessment Year- 2012-13

(i) Whether on the facts and in the circumstances of the case the Ld CIT(A) has failed to appreciate that addition of Rs. 12,30,65,000/- on account of deemed dividend u/s 2(22)(e) of the Act in an assessment order framed u/s 153A can be made by the Assessing Officer on the basis in the documents found and seized during search u/s 132,

information of fund flow collected during the enquiries conducted by the Investigation Wing/Assessing Officer and statements of Sh. AkshayDhanda and Sh. Ajay Nagpal recorded on 22.06.2015 and 07.07.2015.

(ii) Whether on the facts and in the circumstances of the case the Ld. CIT(A) failed to appreciate that the Hon'ble Supreme Court in the case of CIT v. Mukundray K. Shah, 290 ITR 433 under identical circumstances has upheld the addition of deemed dividend u/s 2(22)(e) made by the AO in a block assessment u/s 158BC, the provisions of which are restrictive than those of section 153A.

(iii) Whether on the facts and in the circumstances of the case the Ld. CIT(A) was right in concluding that there was a difference in scope of proceedings under section 153A of the Income Tax Act, 1961 for an abated assessment and for a completed assessment.

(iv) Whether on the facts and in the circumstances of the case the Ld. CIT(A) was right in holding that no addition can be made u/s 153A in respect of completed assessment if no incriminating material is found during search.

(v) Whether there is any restriction on the powers of the Assessing officer under section 153A of the Income Tax Act, 1961 to confine only to the "incriminating material found during the search", even though such words or conditions are not mentioned in the section per se.

(vi) Whether on the facts and in the circumstances of the case the Ld. CIT(A) was correct in interpreting section 153A which starts with a non-obstinate clause stating therein that the operation of section 139,147, 148, 149, 151 & 153 was deposed meaning thereby that in search cases the Assessing officer is duty bound to take up the assessment u/s 153A and that the above-mentioned sections cannot invoked. Therefore, even if incriminating material is not found during search, but if any escaped income or under-assessed income undisclosed income has to be assessed for such completed assessment,

then it has to be done in the proceedings u/s 153A in search cases as during the pendency of the proceedings u/s 153A, the proceedings u/s 147 of the Income Tax Act, 1961 cannot be initiated.

(vii) Whether on the facts and in the circumstances of the case the Ld.CIT(A) was right in following Delhi High Court decision in the case of CIT vs. Kabul Chawla, 380 ITR 173 when the Hon'ble HC itself admits in para 37(iv) that "Although Section 153A does not say that additions should strictly be made on the basis of evidence found in course of search…." there by interpreting the statute in the manner which were never worded or intended by the legislature.

(viii) Whether on the facts and in the circumstances of the case the Ld.CIT(A) has erred in ignoring the principles of strict interpretation of statute when the words used in the statute i.e. sec 153A(1)(b) of the IT Act, 1961 are assess or reassess the "Total Income".

(ix) Whether on the facts and in the circumstances of the case the Ld.CIT(A) has erred in not deciding the issue of addition of Rs. 12,30,65,000/- on account of deemed dividend u/s 2(22)(e) of the Income Tax Act, 1961 on merits.

(x) The appellant craves to add, amend, alter or modify any grounds of appeal at the time of hearing.

Assessment Year-2013-14

(i) Whether on the facts and in the circumstances of the case the Ld. CIT(A) has failed to appreciate that addition of Rs. 6,57,50,000/- on account of deemed dividend u/s 2(22)(e) of the Act in an assessment order framed u/s 153A can be made by the Assessing Officer on the basis in the documents found and seized during search u/s 132, information of fund flow collected during the enquiries conducted by the Investigation Wing/Assessing Officer and statements of Sh. AkshayDhanda and Sh. Ajay Nagpal recorded on 22.06.2015 and 07.07.2015.

(ii) Whether on the facts and in the circumstances of the case the Ld. CIT(A) failed to appreciate that the Hon'ble Supreme Court in the case of CIT v. Mukundray K. Shah, 290 ITR 433 under identical circumstances has upheld the addition of deemed dividend u/s 2(22)(e) made by the AO in a block assessment u/s 158BC, the provisions of which are restrictive than those of section 153A.

(iii) Whether on the facts and in the circumstances of the case the Ld. CIT(A) was right in concluding that there was a difference in scope of proceedings under section 153A of the Income Tax Act, 1961 for an abated assessment and for a completed assessment.

(iv) Whether on the facts and in the circumstances of the case the Ld. CIT(A) was right in holding that no addition can be made u/s 153A in respect of completed assessment if no incriminating material is found during search.

(v) Whether there is any restriction on the powers of the Assessing officer under section 153A of the Income Tax Act, 1961 to confine only to the "incriminating material found during the search", even though such words or conditions are not mentioned in the section per se.

(vi) Whether on the facts and in the circumstances of the case the Ld. CIT(A) was correct in interpreting section 153A which starts with a non-obstinate clause stating therein that the operation of section 139,147, 148, 149, 151 & 153 was deposed meaning thereby that in search cases the Assessing officer is duty bound to take up the assessment u/s 153A and that the above-mentioned sections cannot invoked. Therefore, even if incriminating material is not found during search, but if any escaped income or under-assessed income undisclosed income has to be assessed for such completed assessment, then it has to be done in the proceedings u/s 153A in search cases as during the pendency of the proceedings u/s 153A, the proceedings u/s 147 of the Income Tax Act, 1961 cannot be initiated.

(vii) Whether on the facts and in the circumstances of the case the Ld. CIT(A) was right in following Delhi High Court decision in the case of CIT vs. Kabul Chawla, 380 ITR 173 when the Hon'ble HC itself admits in para 37(iv) that "Although Section 153A does not say that additions should strictly be made on the basis of evidence found in course of search …." there by interpreting the statute in the manner which were never worded or intended by the legislature.

(viii) Whether on the facts and in the circumstances of the case the Ld. CIT(A) has erred in ignoring the principles of strict interpretation of statute when the words used in the statute i.e. sec 153A(1)(b) of the IT Act, 1961 are assess or reassess the "Total Income".

(ix) Whether on the facts and in the circumstances of the case the Ld.CIT(A) has erred in not deciding the issue of addition of Rs. 6,57,50,000/- on account of deemed dividend u/s 2(22)(e) of the Income Tax Act, 1961 on merits.

(x) The appellant craves to add, amend, alter or modify any grounds of appeal at the time of hearing.

2. In the appeals of **Sh. Anoop Thatai**, also similar grounds have been raised which for the sake of ready reference are reproduced herein below:-

Assessment Year- 2011-12

(i) Whether on the facts and in the circumstances of the case the Ld. CIT(A) has failed to appreciate that addition of Rs.4,50,50,000/- on account of deemed dividend u/s 2(22)(e) of the Act in an assessment order framed w/s 153A can be made by the Assessing Officer on the basis in the documents found and seized during search u/s 132, information of fund flow collected during the enquiries conducted by the Investigation Wing/Assessing Officer and statements of Sh. Akshay Dhanda and Sh. Ajay Nagpal recorded on 22.06.2015 and 07.07.2015.

(ii) Whether on the facts and in the circumstances of the case the Ld. CIT(A) failed to appreciate that the Hon'ble Supreme Court in the case of CIT v. Mukundray K. Shah, 290 ITR 433 under identical circumstances has upheld the addition of deemed dividend u/s 2(22)(e) made by the AO in a block assessment u/s 158BC, the provisions of which are restrictive than those of section 153A.

(iii) Whether on the facts and in the circumstances of the case the Ld. CIT(A) was right in concluding that there was a difference in scope of proceedings under section 153A of the Income Tax Act, 1961 for an abated assessment and for a completed assessment.

(iv) Whether on the facts and in the circumstances of the case the Ld. CIT(A) was right in holding that no addition can be made u/s 153A in respect of completed assessment if no incriminating material is found during search.

(v) Whether there is any restriction on the powers of the Assessing officer under section 153A of the Income Tax Act, 1961 to confine only to the "incriminating material found during the search", even though such words or conditions are not mentioned in the section per se.

(vi) Whether on the facts and in the circumstances of the case the Ld. CIT(A) was correct in interpreting section 153A which starts with a non-obstinate clause stating therein that the operation of section 139,147, 148, 149, 151 & 153 was deposed meaning thereby that in search cases the Assessing officer is duty bound to take up the assessment u/s 153A and that the above-mentioned sections cannot invoked. Therefore, even if incriminating material is not found during search, but if any escaped income or under-assessed income undisclosed income has to be assessed for such completed assessment, then it has to be done in the proceedings u/s 153A in search cases as during the pendency of the proceedings u/s 153A, the proceedings u/s 147 of the Income Tax Act, 1961 cannot be initiated.

(vii) Whether on the facts and in the circumstances of the case the Ld.CIT(A) was right in following Delhi High Court decision in the case of CITvs. Kabul Chawla, 380 ITR 173 when the Hon'bleHC itself admits in para 37(iv) that "Although Section 153A does not say that additions should strictly be made on the basis of evidence found in course of search…." there by interpreting the statute in the manner which were never worded or intended by the legislature.

(viii) Whether on the facts and in the circumstances of the case the Ld.CIT(A) has erred in ignoring the principles of strict interpretation of statute when the words used in the statute i.e. sec 153A(1)(b) of the IT Act, 1961 are assess or reassess the "Total Income".

(ix) Whether on the facts and in the circumstances of the case the Ld.CIT(A) has erred in not deciding the issue of addition of Rs. 4,50,50,000/- on account of deemed dividend u/s 2(22)(e) of the Income Tax Act, 1961 on merits.

(x) The appellant craves to add, amend, alter or modify any grounds of appeal at the time of hearing

Assessment Year- 2012-13

(i) Whether on the facts and in the circumstances of the case the Ld. CIT(A) has failed to appreciate that addition of Rs.3,00,00,000/- on account of deemed dividend u/s 2(22)(e) of the Act in an assessment order framed u/s 153A can be made by the Assessing Officer on the basis in the documents found and seized during search u/s 132, information of fund flow collected during the enquiries conducted by the Investigation Wing/Assessing Officer and statements of Sh. Akshay Dhanda and Sh. Ajay Nagpal recorded on 22.06.2015 and 07.07.2015.

(ii) Whether on the facts and in the circumstances of the case the Ld. CIT(A) failed to appreciate that the Hon'ble Supreme Court in the case of CIT v. Mukundray K. Shah, 290 ITR 433 under identical circumstances has upheld the addition of deemed dividend u/s 2(22)(e)

made by the AO in a block assessment u/s 158BC, the provisions of which are restrictive than those of section 153A.

(iii) Whether on the facts and in the circumstances of the case the Ld. CIT(A) was right in concluding that there was a difference in scope of proceedings under section 153A of the Income Tax Act, 1961 for an abated assessment and for a completed assessment.

(iv) Whether on the facts and in the circumstances of the case the Ld. CIT(A) was right in holding that no addition can be made u/s 153A in respect of completed assessment if no incriminating material is found during search.

(v) Whether there is any restriction on the powers of the Assessing officer under section 153A of the Income Tax Act, 1961 to confine only to the "incriminating material found during the search", even though such words or conditions are not mentioned in the section per se.

(vi) Whether on the facts and in the circumstances of the case the Ld. CIT(A) was correct in interpreting section 153A which starts with a non-obstinate clause stating therein that the operation of section 139,147, 148, 149, 151 & 153 was deposed meaning thereby that in search cases the Assessing officer is duty bound to take up the assessment u/s 153A and that the above-mentioned sections cannot invoked. Therefore, even if incriminating material is not found during search, but if any escaped income or under-assessed income undisclosed income has to be assessed for such completed assessment, then it has to be done in the proceedings u/s 153A in search cases as during the pendency of the proceedings u/s 153A, the proceedings u/s 147 of the Income Tax Act, 1961 cannot be initiated.

(vii) Whether on the facts and in the circumstances of the case the Ld.CIT(A) was right in following Delhi High Court decision in the case of CIT vs. Kabul Chawla, 380 ITR 173 when the Hon'ble HC itself admits in para 37(iv) that "Although Section 153A does not say that additions should strictly be made on the basis of evidence found in course of

search.…" there by interpreting the statute in the manner which were never worded or intended by the legislature.

(viii) Whether on the facts and in the circumstances of the case the Ld.CIT(A) has erred in ignoring the principles of strict interpretation of statute when the words used in the statute i.e. sec 153A(1)(b) of the IT Act, 1961 are assess or reassess the "Total Income".

(ix) Whether on the facts and in the circumstances of the case the Ld.CIT(A) has erred in not deciding the issue of addition of Rs. 3,00,00,000/- on account of deemed dividend u/s 2(22)(e) of the Income Tax Act, 1961 on merits.

(x) The appellant craves to add, amend, alter or modify any grounds of appeal at the time of hearing.

Assessment Year- 2013-14

(i) Whether on the facts and in the circumstances of the case the Ld. CIT(A) has failed to appreciate that addition of Rs. 7,60,10,000/- on account of deemed dividend u/s 2(22)(e) of the Act in an assessment order framed u/s 153A can be made by the Assessing Officer on the basis in the documents found and seized during search u/s 132, information of fund flow collected during the enquiries conducted by the Investigation Wing/Assessing Officer and statements of Sh. AkshayDhanda and Sh. Ajay Nagpal recorded on 22.06.2015 and 07.07.2015.

(ii) Whether on the facts and in the circumstances of the case the Ld. CIT(A) failed to appreciate that the Hon'ble Supreme Court in the case of CIT v. Mukundray K. Shah, 290 ITR 433 under identical circumstances has upheld the addition of deemed dividend u/s 2(22)(e) made by the AO in a block assessment u/s 158BC, the provisions of which are restrictive than those of section 153A.

(iii) Whether on the facts and in the circumstances of the case the Ld. CIT(A) was right in concluding that there was a difference in scope

of proceedings under section 153A of the Income Tax Act, 1961 for an abated assessment and for a completed assessment.

(iv) Whether on the facts and in the circumstances of the case the Ld. CIT(A) was right in holding that no addition can be made u/s 153A in respect of completed assessment if no incriminating material is found during search.

(v) Whether there is any restriction on the powers of the Assessing officer under section 153A of the Income Tax Act, 1961 to confine only to the "incriminating material found during the search", even though such words or conditions are not mentioned in the section per se.

(vi) Whether on the facts and in the circumstances of the case the Ld. CIT(A) was correct in interpreting section 153A which starts with a non-obstinate clause stating therein that the operation of section 139,147, 148, 149, 151 & 153 was deposed meaning thereby that in search cases the Assessing officer is duty bound to take up the assessment w/s 153A and that the above-mentioned sections cannotinvoked. Therefore, even if incriminating material is not found during search, but if any escaped income or under-assessed income undisclosed income has to be assessed for such completed assessment, then it has to be done in the proceedings u/s 153A in search cases as during the pendency of the proceedings u/s 153A, the proceedings u/s 147 of the Income Tax Act, 1961 cannot be initiated.

(vii) Whether on the facts and in the circumstances of the case the Ld.CIT(A) was right in following Delhi High Court decision in the case of CIT vs. Kabul Chawla, 380 ITR 173 when the Hon'ble HC itself admits in para 37(iv) that "Although Section 153A does not say that additions should strictly be made on the basis of evidence found in course of search...." there by interpreting the statute in the manner which were never worded or intended by the legislature.

(viii) Whether on the facts and in the circumstances of the case the Ld.CIT(A) has erred in ignoring the principles of strict interpretation of

statute when the words used in the statute i.e. sec 153A(1)(b) of the IT Act, 1961 are assess or reassess the "Total Income".

(ix) Whether on the facts and in the circumstances of the case the Ld.CIT(A) has erred in not deciding the issue of addition of Rs.7,60,10,000/- on account of deemed dividend u/s 2(22)(e) of the Income Tax Act, 1961 on merits.

(x) The appellant craves to add, amend, alter or modify any grounds of appeal at the time of hearing.

3. Cases of the revenue were represented by Ld. CIT (DR) Mr. H.K Chaudhary, whereas those of the assessee were represented by Ld. Counsel, Dr. Rakesh Gupta, Advocate.

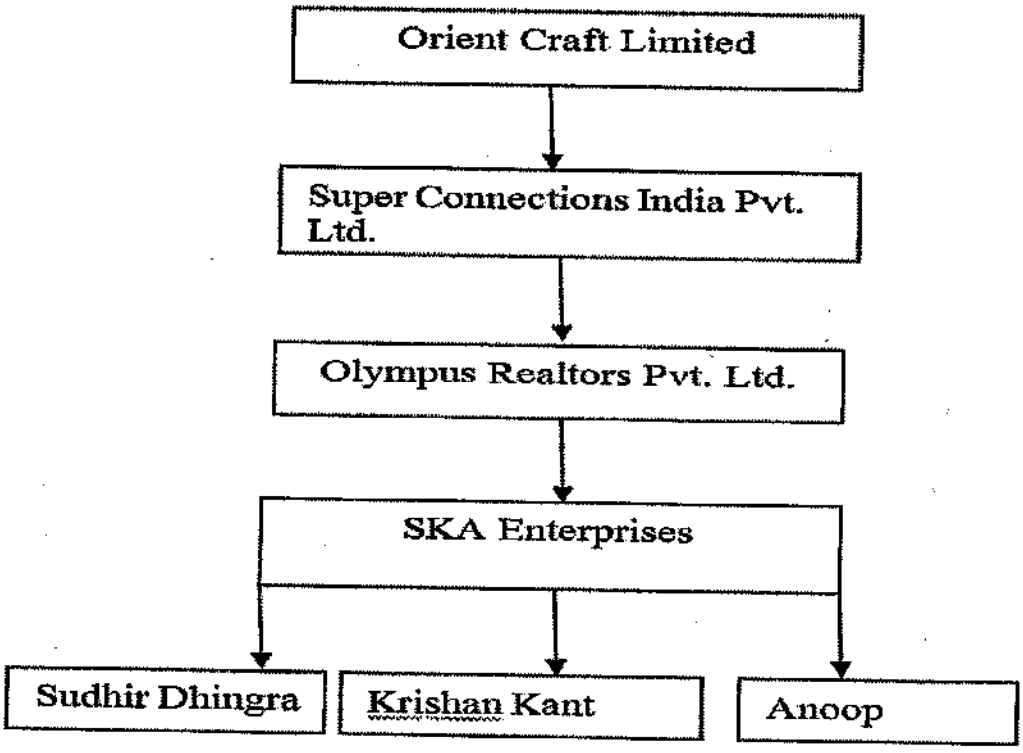
3. The facts in brief as mentioned in the assessment orders are that during the course of search proceeding various incriminating documents / books of accounts relating to Orient Craft Ltd. and various other entities were found and seized from the business premises of M/s Orient Craft Ltd., the details of which were as under:-

5.1 *During the course of search proceedings various incriminating documents/ Books of Accounts related to Orient Craft Limited and various other entities were found and seized from the business premises of M/s Orient Craft Ltd 7D, Maruti Industrial area sector 18 Gurgaon, detailed as under:*

S.No.	***Name of the Concern***	***Details of Seized documents, i.e. Page No./ Annexure/ Party***
1	*Orient Craft Limited*	*1-40/ A-8/ OS-I*
2	*Super Connection (P) Ltd.*	*41-51/ A-7/ OS-I*
3	*Olympus Realtors*	*78-92/ A-8/ OS-I*

	(P) Ltd.	
4	*SKA Enterprises*	*10-37/ A-7/ OS-I*

3.1 According to the A.O., from the above books of accounts of the above concerns found and seized from the office of Orient Craft Ltd., it was noticed that Orient Craft Ltd. has been routing huge amounts of funds through some fictitious entities of the group and finally to the shareholders of M/s Orient Craft Ltd. A.O. drew the following diagram depicting the fund flow from M/s Orient craft Ltd. to the hands of its shareholders.



3.2 Further, the A.O., observed that the assessee, Sh. Sudhir Dhingra and Sh. Anoop Thatai were having 57.33% and 19.61% shareholding of M/s Orient Craft Ltd. respectively and that books accounts of M/s Super Connection India P. Ltd. in which Mr. Ajay Nagpal and Mr. Akshay

Dhanda are the directors were found maintained in the office of Orient Craft Ltd. and that the registered office of M/s Super Connection India P. Ltd. is situated in a premise which is owned by Sh. Sudhir Dhingra. According to the A.O., M/s Super Connections India P. Ltd. is only a paper entity, which A.O. inferred from the basis of enquiries conducted and statement of the directors of Super Connection India P. Ltd. It was further noted by the A.O. in the assessment order that third company namely M/s Olympus Realtors P. Ltd. was also having Sh. Sudhir Dhingra and Sh. Anoop Thatai as its shareholders holding 60% and 20% respectively. Next firm mentioned by the A.O. in the assessment order was M/s SKA Enterprises in which Sh. Sudhir Dhingra and Sh. Anoop Thatai were partners having 54% and 18% as profit / loss sharing ratio respectively. According to the A.O., on perusal of books ofaccounts of the above mentioned concerns it was noticed that M./s Orient Craft Ltd. transferred funds to M/s Super Connection India P Ltd. and M/s Super Connection India P. Ltd. advanced money to M/s Olympus Realtors P. Ltd. and M/s Olympus Realtors P. Ltd. made investment in the partnership firm namely M/s SKA Enterprises.According to the A.O. balance sheet of M/s SKA Enterprises found during the course of search revealed that the partnership firm i.e. M/s SKA Enterprises has extended significant amounts of money to the partners namely Sh. Sudhir Dhingra and Sh. Anoop Thatai who were shareholders of M/s Orient Craft Ltd., thus according to the A.O., amount received by Mr. Sudhir Dhingra and Mr. Anoop Thatai from M/s SKA Enterprises was nothing but deemed dividend u/s 2(22)(e) of the Income Tax Act. Accordingly, the additions were made in the hands of Mr. Sudhir Dhingra and Mr. Anoop Thatai in various years as deemed dividend u/s 2(22)(e).

4. Both the Assessees namely, Sh. Sudhir Dhingra and Sh. Anoop Thatai preferred appeals before CIT (A)-3, Gurgaon and challenged the additions made in appeal both in law and on facts on the grounds mentioned in the appeal order passed by learned first appellate authority.

5. The finding recorded by Ld. CIT (A) in the appeal order arementioned therein in **para 6-12 of the appeal order**, whereby Ld. CIT(A) found in respect of these two assessee and in respect of the years involved in appeals before him that in these cases, search took place on 29.04.2015, whereas returns of income filed by these two assessee in various years were as under:-

SH. SUDHIR DHINGRA FOR A.Y. 2010-11 to 2013-14

- Appellant filed his return of income originally on 30.07.2010 which is enclosed in the paper book at **PB—1 For A.Y. 2010-11**
- Appellantfiled his return of income originally on 31.07.2011 which is enclosed in the paper book at **PB 538 for A.Y. 2011-12**
- Appellant filed his return of income originally on 30.07.2012 which is enclosed in the paper book at **PB—541 for A.Y. 2012-13**
- Appellant filed his return of income originally on 30.07.2013 which is enclosed in the paper book at **PB—544 for A.Y. 2013-14**

SH. ANOOP THATAI FOR A.Y. 2011-12 to 2013-14

- Appellant filed his return of income originally on 30.09.2011 which is enclosed in the paper book at **PB 536 for A.Y. 2011-12**

- Appellant filed his return of income originally on 27.09.2012 which is enclosed in the paper book at **PB 540 for A.Y. 2012-13**
- Appellant filed his return of income originally on 13.09.2013 which is enclosed in the paper book at **PB 544 for A.Y. 2013-14**

6. Ld. CIT(A) held in the backdrop of the above-mentioned facts that these cases were the cases of completed assessments on the date of search and there was no incriminating material found relating to the years involved in the appeals before him and therefore, additions could be made only in respect of incriminating material found as a result of search which according to Ld. CIT(A) was none in these cases.CIT(A) therefore, held in his appeal orders passed in these cases that these additions were made beyond the scope of assessment order passed u/s 153A in view of the judicial decisions cited by him in his appeal order including Delhi High Court decision in the case **CIT vs. Kabul Chawla 380 ITR 573 (Delhi), Pr. CIT vs. Meeta Gutgutia Prop. Ferns 'N' Petals & Ors. (2017) 395 ITR 526(Delhi).**

7. This is how the Revenue has come up in appeal before us and has raised the above- mentioned grounds of appeal in each of these appeals.

8. According to Ld. CIT DR the documents found during the course of search and tabulated by A.O. and reproduced by us in a Table herein above were incriminating material based upon which the issue of deemed dividend was noticed by the assessing officer and therefore, present cases are the cases where incriminating material was found and therefore the Order of Ld. CIT (A) holding that there was no incriminating material is factually and legally incorrect. Ld. CIT DR prayed that the appeal orders passed by Ld. CIT (A) in respect of these two assessee for

the years covered under the impugned appeal orders passed by him, be reversed.

9. On the other hand, Ld. Counsel for the assessee submitted and reiterated his submissions which were raised by him in the written submissions made on behalf of these assessees in first appeal proceedings. It was submitted by him that there was no incriminating material found in the course of search and the seized material were nothing but copies of balance sheet, Trial balance, returns of income of various entities, which was already in the knowledge of tax department by way of returns of income andbalance sheet filed by these entities and thus, these documents cannot be said to be incriminating in nature. He drew our attention to these seized documents filed in the paper book. It was further submitted that these seized documents do not pertain to previous years relevant to AY 2010-11, 2011-12, 2012-13 and these are in any case relating to AY 2013-14. It was further submitted by him all the four entities namely M/s Orient Craft Ltd. and Super Connection India P Ltd., M/s OlympusRealtorsIndia P Ltd. and M/s SKA Enterprises were assessed to tax. The decision of the Delhi High Court in the case of, **Meeta Gutgutia Prop. Ferns 'N' Petals & Ors.(2017) 395 ITR 526 (Delhi)** was specifically referred and relied upon. In sub and substance his submissions were that there was no incriminating material found as a result of search and whatever was found was part of books of accounts, returns of income filed by these entities and hence there was nothing incriminating. It was also submitted by him based upon his written submission and paper book pages filed before the first appellate authority and before us that M/s Super Connection India P Ltd. was not a paper entity. It was also submitted that there was nothing abnormal,

unusual or incriminating in the statements of the directors of M/s Super Connection India P. Ltd. and in any case statements by themselves do not constitute incriminating material. Reliance was placed by him on the decision of Delhi High Court for this proposition. Ld. Counsel for the assessee prayed for the confirmation of the order of CIT (A).

DECISION

10. We have perused the relevant material placed before us referred to during the course of hearing and considered the arguments advanced from both the sides and gone through the orders passed by the lower authorities. In this case, search u/s 132 of the Act was conducted on 29.04.2015 in the case of both the assessees and during the course of search, documents as mentioned in the above-mentioned table were found which have been enclosed in the paper book also filed before us. We were taken through these seized documents at the time of hearing. But before we discuss about the seized documents & arguments of both the sides, it would be relevant to note that all the four entities referred by the authorities below namely, M/s Orient Craft Ltd.; M/s Super Connection India P Ltd.; M/s Olympus Realtors P. Ltd.; and M/s SKA Enterprises had filed their returns of income in the ordinary course and were assessed to tax for the years involved in the present appeals and also of earlier years. It is significant to note that all the four entities are assessed to tax even for the years prior to the years involved in the present appeals. This fact is all the more important in the context of Super Connection India P Ltd in respect of which AO recorded a finding that this company is a paper company. Documents mentioned in the written submissions reproduced in the order of the first appellate

authority clearly establish this fact of the said four concerns being assessee and assessed to tax in respect of the years involved in the present appeal order. Paper book pages 399-404, 937-950 are the copies of computation of income and acknowledgement of returns of this company for AY 2007-08 to 2010-11 & 2011-12 to 2016-17; paper book pages 405-438, 951-1017 are the copies of the audited balance sheets and profit and loss accounts for the years ended on 31.3.2007, 2008, 2009, 2010, 2011 to 2016; and paper book page 439 to 446 are the copies of assessment order passed under section 143(3) dated 10.12.2007 for AY 2005-06 and order under section 143(3) dated 28.12.2010 for AY 2008-09. There is no ground to say that M/s Super Connection India P Ltd was some kind of paper company/concern. Its directors are also not remotely related to the assessees. There is nothing adverse even in the statements of the directors of Super Connection India P Ltd. to which our attention was drawn. We are unable to appreciate, how the said company can be held to be paper company more so when it is being assessed and that too from earlier years and its assessment has been made under section 143(3) with no adverse observations. After all a company is incorporated entity and is borne on the register of companies, who had been complying to statutory compliances. AO could not bring even an iota of evidence on record to hold validly in support of his allegation about this company. Merely because books of accounts of this company were found from the premises of Orient Craft Ltd. does not make Super Connection India P Ltd a paper company more so when adequate explanation was furnished in this regard that for reconciliation purpose these were available there as there were business dealings between the two. Similarly, taking a premises on rent from Mr. Sudhir

Dhingra, one of the assessee here, does not make Super Connection India P Ltd. as a paper concern. A quasi judicial authority cannot be permitted to record a finding without any valid basis, material or evidence. In fact the finding of AO regarding Super Connection India P Ltd as Paper Company is mere *ipsidixits.*

11. Similarly, Paper book pages 154-168, 169-340, 616-655, 656-887 are the copies of computation of income and acknowledgement of returns of Orient Craft Ltd. company for AY 2007-08 to 2010-11 & 2011-12 to 2016-17, and are the copies of the audited balance sheets and profit and loss accounts for the years ended on 31.3.2007, 2008, 2009, 2010, 2011 to 2016. Paper book pages 341-398, 888-936 are the copies of assessment orders passed under section 143(3) for AY 2007-08 to 2010-11, 2011-12 to 2012-13. Similarly, Paper book pages 447-450, 1018-1032, 451-480, 1033-1109 are the copies of computation of income and acknowledgement of returns of Olympus Realtors P Ltd. for AY 2007-08 to 2010-11 & 2011-12 to 2016-17 and are the copies of the audited balance sheets and profit and loss accounts for the years ended on 31.3.2007, 2008, 2009, 2010, 2011 to 2016. Paper book pages 1110-1114 are the copies of assessment order passed under section 143(3) for AY 2012-13. Likewise, Paper book pages 481-486, 1115-1126, are the copies of computation of income and acknowledgement of returns of S K A Enterprises for AY 2007-08 to 2010-11 & 2011-12 to 2016-17, and paper book pages 487 to 503, 1127-1152 are the copies of the audited balance sheets and profit and loss accounts for the years ended on 31.3.2007, 2008, 2009, 2010, 2011 to 2016.Paper book pages 1153-1156 are the copies of assessment order passed under section 143(3) for AY 2014-15.

12. There are no adverse observations in the assessment orders passed by the tax department, more so in the assessment order of Super Connection India P Ltd. There is nothing adverse in case of Super Connection India P Ltd. on the basis of which it can be said that the said company is paper company. We have referred the statements of the directors of Super Connection India P Ltd. and we do not find anything adverse which proves that Super Connection India P Ltd. was a paper company. Thus, We are not in agreement with the assessing officer's finding in this regard.

13. We have taken ourselves through the seized material also and it is seen that these seized documents are copies of balance sheet, Trial balance, returns of income of the above-said four entities and therefore such seized material is the material which was already in the knowledge of the tax department through their returns of income and balance sheet of respective years. These seized documents have been filed at page 28-121 of the paper book which we have seen ourselves.

14. First of all these documents are not relating to AY 2010-11 to 2012-13, then how can these documents be said to be relating to these years involved in the present appeals. In any case these documents are not incriminating in any manner to the assessees' cases involved in the present appeals. Merely because the final accounts which are part of the returns of income are found and seized in search do not make such documents as incriminating. All that is found in search is not incriminating merely for the reason of seizure in search. Page 1-40 of A-8/OS-1 are found enclosed at page 28-67 of the paper book and it is seen that, it is the audited balance sheet profit and loss account along

with the balance sheet schedules of Orient Craft Limited for the year ending on 31.3.2013. These are first of all, not relating to AY 2010-11 to 2012-13 and in any case this is the balance sheet that has already been filed by Orient Craft Ltd along with its return of income for AY 2013-14. There is nothing incriminating relating to the assessees and that too for the years under appeal. It has not been made out in the assessment order as to what is incriminating in the balance sheet so found during the course of search and that too for AY 2010-11 to 2012-13. In fact there could be nothing for these years.

14.1 Seized documents page 41-51 of AS-7/ OS-1 are found enclosed at page 68-78 of the paper book which is the trial balance of Super Connection P Ltd for the financial year 2013-2014, 2014-2015, trial balance of Fashionable Attire for the financial year 2013-14, Modernistic Attire's, Stylish Clothing's Starline Clothing's, Trendy Attire's trial balances for the financial year 2013-14, etc. There are no documents relating to AY 2010-11 to 2013-14 in these documents. There is nothing incriminating relating to the respondent-assessees and that too for the years under appeal. Names of the concerns other than Super Connections India P Ltd. have got nothing to do with the issues involved in the present appeals. There could be no incriminating based on these documents for the years involved in the present appeals when these documents by themselves do not relate to the years involved in the present appeals.

14.2 Likewise, seized documents page 78-92 of A-8/OS-1 are found enclosed at page 79-93 of the paper book which is the balance sheet of M/s Olympus Realtors P Ltd for the financial year ending 2013-2014

relevant to AY 2014-15. These are also not relating to the years involved in the present appeals and in any case these are part of the return of income filed by the said company for AY 2014-15. There is nothing incriminating in these seized documents relating to the respondent-assessees and that too for the years under appeal.

14.3 Seized documents page no. 10-37 of A-7/OS1 are found enclosed at page 94-121 of the paper book which are balance sheet and profit and loss account of M/s SKA Enterprises for the years ending 31.3.2010, 2011, 2012, 2013, 2014, together with the schedules. These are the documents already part of the returns of income filed by the said firm for the respective years. There is nothing incriminating relating to the respondent-assessees and that too for the years under appeal. Nothing has been spelt out in the assessment order.

15. Therefore, the entire seized material based on which the impugned addition was made under section 2(22)(e) as deemed dividend in the assessment orders involved in the present appeals, is not incriminating in nature for the cases of the both the respondent-assessees involved in the present appeals. We have taken note of the dates of filing of returns of income by both the respondent assessees for various years and on the date of search i.e. on 29.4.2015, these assessments covered by the present appeals, attained finality and were not abated assessments and there being no incriminating material found as a result of search relating to the years involved relating to the assesses involved in the present appeals, no addition and that too of the deemed dividend u/s 2(22)(e) could be made in view of the decision of Hon'ble Delhi High Court in the case of **Kabul Chawla 380 ITR 573(Del).**

15.1 Hon'ble Delhi High Court in the case of **Meeta Gutgutia Prop. Ferns 'N' Petals &Ors.(2017) 395 ITR 526(Delhi)** in para 38 have held as under:-

> *Although it was repeatedly urged by Mr. Manchanda that there were "hundreds of seized documents", what is necessary to examine is whether they were in fact 'incriminating documents'. Any and every document cannot be and is in fact not an incriminating document. The legal position, as will be discussed shortly, is that there can be no addition made for a particular AY without there being an incriminating material* qua *that AY which would justify such an addition. Therefore, the mere fact there may have been documents pertaining to the above AYs does not satisfy the requirement of law that there must be incriminating material.*

15.2 Moreover, it has been held by Delhi High Court in the case of **CIT vs. Harjeev Agrawal 290 ITR 263 (Del), PCIT vs. Best Infrastructure P Ltd. 397 ITR 82 (Del)** that statements recorded at the time of search cannot be said to be constituting incriminating material found as a result of search even though we have held hereinabove that there is even nothing in the statements which can be termed as incriminating material and more so qua the issue involved in the present appeals.

16. Therefore, having regard to the entire conspectus of these cases before us, we are of the considered view that the orders passed by Ld. CIT(A), which are the subject matter of appeals before us have been passed in accordance with law and do not require any interference. Since Ld. First appellate authority deleted the additions on the legal issue, we have not taken ourselves to decide the appeals on the merit of the

additions on other factual and legal grounds. In the result, appeals of revenue are dismissed.

17. Now we will take up the assessee's appeals in both the cases. As a lead case we are taking up the appeal of **SH. SUDHIR DHINGRA in ITANO. 5721/DEL /2018 For A.Y. 2014-15.**

18. This appeal has been filed by the assessee against the Order passed by Commissioner of Income Tax (Appeals)-3, Gurgaon, dated 28.07.2018 and assessee has preferred the following grounds of appeal, whereas revenue is not in appeal.

1) *That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and on facts in confirming the action of Ld. A.O. in assuming jurisdiction u/s 153A and the consequent assessment proceedings in the case are bad in law and against the facts and circumstances of the case and void- ab-initio and basic jurisdictional conditions and pre-requisites under section 153A were not met.*

2) *That in any case and in any view of the matter, the assessment framed under section 153A of the Act, is bad in law and against the facts and circumstances of the case.*

3) *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of the Ld. A.O. in restricting the addition to the extent of Rs. 17,33,98,000/- u/s 2(22)(e) and that too by recording incorrect facts and without any basis, material or evidence and more so when no incriminating material was found as a result of search.*

4) *That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in making addition of Rs. 17,33,98,000/- u/s 2(22)(e) is bad in law and against the facts and circumstances of the case.*

5) *That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. A.O. in passing the impugned assessment order without there being requisite approval in terms of section 153D and in any case approval if any is mechanical without application of mind and is no approval in the eyes of law.*

6) *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. A.O. in passing the impugned order and that too without giving adequate opportunity and without observing the principle of natural justice.*

7) *That the appellant craves the leave to add, alter or amend the grounds of appeal at any stage and all the grounds are without prejudice to each other.*

18. In this case, Assessing Officer has made additions of Rs. 17,78,30,000/- on account of deemed dividend u/s 2(22)(e) of the Income Tax Act, 1961 on the ground that there was flow of funds from M/s Orient Craft Ltd. to M/s Super Connections India P. Ltd. and then to M/s Olympus Realtors P. Ltd. and then M/s SKA Enterprises. Therefore, A.O. treated the amount of Rs. 17,78,30,000/- received by the assessee from M/s SKA Enterprises as deemed dividend u/s 2(22)(e). Assessing Officer'sOrder in this regard is identical to one passed by him for earlier assessment years, i.e. 2010-11, 2011-12, 2012-13 and 2013-14.

19. In first appeal preferred by the assessee before the Commissioner of Income Tax (Appeals)-3 Gurgaon). Ld. CIT(A) in para 7.3.5 of the appeal order held that dividend u/s 2(22)(e) consists inter-alia as the last limb *".....any payment by any such company on behalf, or for the individual benefit of any such shareholder to the extent to which the company neither case possesses accumulated profits"* . According to Ld. CIT (A), case of the appellant is squarely covered by this limb as it is payment by a company for the individual benefits of any such shareholder to the extent which the company possesses accumulated profits. According to CIT (A), payment has been received by the assessee fromM/s SKA Enterprises, which in turn has received the payments from two companies in which public are not substantial interested and assessee isholding not less than 10% voting power. CIT (A) recorded that M/s SKA Enterprises received payments from two companies as under:-

M/s Orient Craft Ltd.	**Rs. 28,84,90,373/-**
M/s Olympus Realtors P. Ltd.	**Rs. 35,21,49,537/-**

However, Ld. CIT(A) recorded that payment by a company with reference to deemed dividend has tobe restricted to accumulated profits and according to CIT(A) accumulated profits of M/s Olympus Realtors P. Ltd. as on 31.03.2014 was Rs. 6,83,78,062/- and therefore total payment of Rs.35,68,68,435/- from these companies to the shareholders having substantial interest in these companies will be covered under the definition of deemed dividend u/s 2(22)(e) but such deemed dividend will be restricted to the accumulated profits. Accordingly, CIT (A) confirmed the additions in the hands of the three shareholders namely Sh. Sudhir Dhingra of Rs. 17,33,98,000/- and Sh. Anoop Thatai Rs. 18,28,26,500/-

and Sh. Krishan Kant Kohliof Rs. 6,43,935/-. Ld. CIT (A) relied upon the decision of Hon'ble Supreme Court in the case of **CIT Vs Mukundray K. Shah, [2007] 290 ITR 433 (SC).**

20. In the setting of the above facts the present appeal has been preferred by the assessee, whereas there is no appeal preferred by the revenue.

21. Ld. CIT (DR) has relied upon the assessment order and the order of the first appellate authority, whereas Ld. Counsel for the assessee relied upon the written submissions and paper book filed and contended that the addition sustained deserves to be deleted.

DECISION

22. We have considered the arguments from both the sides and have gone through the Orders passed by the authorities below and also gone through the written submissions filed by the assessee and also referred various pages of paper book filed before us as referred to before us. We have summed up the findings of the assessment order and appellate order hereinabove. Before we discuss the merits of the arguments of the assessee& hat of the revenue, we consider it expedient to reproduce the relevant portion of the written submissions filed by the assessee for A.Y. 2014-15 as under:-

> ***GROUND NO.*** *1 General and specific submissions have been under the respective grounds of appeals.*
>
> ***GROUND NO. 2 to 5*** *Ld. A.O. made addition of Rs. 17,78,30,000/- on account of deemed dividend u/s 2(22)(e) on the ground that the said amount was transferred by M/s Orient Craft Ltd. (OCL) during the year*

under appeal to the appellant, through M/s Super Connections P. Ltd. (SCPL), which in turn was given to M/s Olympus Realtors P Ltd . (ORPL) which in turn has been paid to M/s SKA Enterprises (SKAE) which in turn has been received by the appellant and thus, according to Ld. A.O. amount received by the appellant was deemed dividend assessable u/s 2(22)(e) of the Income Tax Act, 1961. Since it has been treated as taxable income in the hands of the appellant, hence the present appeal.

1).....

.....

2) *Without prejudice to above, it is submitted that in fact the impugned addition could not be made u/s 2(22)(e) as there was no 'loan' or 'advance' from M/s OCL to the appellant. According to Ld. A.O. also as mentioned in the impugned order, the loan or advance has been received by the appellant from M/s SKAE. That being so, where is the question of applying and invoking section 2(22)(e), which requires that the loan should be advanced by a closely held company. It goes without saying that M/s SKAE is not a company and impugned loan has not been received by the appellant from M/s OCL. Therefore, impugned addition made does not stand to the test of law as explained above and it is thus requested that the addition made may please be deleted.*

3) *Without prejudice to above, it is submitted further that the amount was given by OCL to SCPL which is an independent company and that too during the course of business. It goes without saying that M/s SCPL is an independent assessee, which has been assessed to tax even in earlier years which is evident from the copies of assessment orders of SCPL for A.Y 2005-06 & 2008-09 which are enclosed at* ***PB439-446.***

Therefore when amount has been given by M/s OCL to M/s SCPL, where is the question of holding that the amount was given by OCL to the appellant instead, and where is the question of assessing that amount as deemed dividend in the hands of the appellant Individual. Thus, action of Ld. AO in disregarding the corporate character of SCPL is misplaced on facts and in law and so is the action of making impugned addition in the hands of the appellant. It is thus requested that the addition under appeal may please be deleted for the above stated submissions too.

4) *Without prejudice to above, it is submitted that M/s ORPL was one of the partners in M/s SKAE and infused its capital and no loan or advance was given to M/s SKAE by ORPL. Appellant too is the partner in SKAE. Appellant withdrew the amount as partner of SKAE and thus, how could the amount received by the appellant from M/s SKAE be treated as loan given by M/s OCL so as to constitute deemed dividend in the hands of the appellant. In fact Ld. AO is going entity after entity and that too by disregarding the nature of payment made by each entity/person to other. Ld. AO is disregarding the legal character of the entities also which is not permissible in law particularly when legal character of such entities have all along been accepted in their assessments. Thus, action of Ld. AO in making the impugned addition in the hands of the appellant as deemed dividend is neither here nor there and it is thus prayed that the addition made may please be deleted.*

5) *Without prejudice to above, it is submitted further that going by the logic of Ld. AO though denied vehemently but accepting for the sake of arguments, if at all there was any deemed dividend, it could be in the*

hands of M/s ORPL which received the amount first, and three Individuals who are the shareholders in M/s OCL for more than 10% were also having substantial interest in M/s ORPL. Thus, from this standpoint also, there was no question of making impugned addition as deemed dividend in the hands of the appellant. It is therefore prayed that the same may please be deleted in view of the above submissions also.

6) *Without prejudice to above, it is submitted that* ***PB 524*** *would show that assessee paid Rs. 10 Crore on 12.03.2013(3.75 Crore+ 3.50 crore + Rs. 2.75 Crore)and therefore, to this extent in A.Y. 2014-15 deemed divided amount should be reduced.* ***PB 526-527*** *is the copy of account of the assessee in the books of M/s SKAE for A.Y. 2014-15.*

Reliance is placed on the following:-

Commissioner of Income Tax vs. Francis Wacziarg High court of Delhi (2013) 353 ITR 0187: (2011) 203 taxman 0391 asst. Year 2003-04

Dividend—Deemed dividend under s. 2(22)(e)—Credit balance in accounts—Confirmations and copies of accounts showing that the amounts appearing in the accounts were in fact receipts due to assessee, in his normal course of business dealings with the companies—Such receipts from these companies cannot be treated as loans and advances—AO was not justified in treating these receipts as deemed dividend under s. 2(22)(e)

7) *The above, factual and legal situations were explained during the course of assessment proceeding also and are explained before your goods also with the help of following pleadings and evidences:-*

PB 150, 151, 152-153 *are copies of submissions made to Ld. AO*

PB 526-527,536 *is the copy of account of the appellant in the books of SKAE*

Therefore viewed from any angle the impugned addition made is liable to be deleted and it is prayed that the same may please be deleted.

<u>However, certain adverse observations have been made by Ld. AO which are met as under:-</u>

a) *Ld. AO has mentioned that perusal of books of accounts of OCL, SCPL, ORPL & SKAE seized during search revealed that OCL is routing huge amount of funds through some fictitious entities of the group and finally to the shareholders of OCL, appellant being one of the three shareholders.*

In reply, it is submitted that first of all there is no fictitious entities as alleged. All the entities are artificial juridical persons, which have been assessed to tax in all these years as is evident from copies of their income tax assessment orders of earlier years enclosed at ***PB 341-376, 439-446****. Thus, this allegation of there being any fictitious entity is absolutely denied and is contrary to material on record. Second, the fact of the payments made by these entities to other entities/persons are part of audited accounts and returns of income and thus it is wrong to say that it was noticed from the books of accounts of these entities seized during search that payments were being made by these entities to other entities/persons. Thus, this averment/finding by Ld. AO is only to show that but for the search this could not come to be known to him. But as submitted above, this finding is not correct.*

b) *Ld. AO has mentioned that statements of Mr. Dhanda and Mr. Nagpal directors of SCPL revealed during search that SCPL is paper*

company as books are maintained at the premises of OCL and so on and so forth.

In reply, it is submitted that SCPL is a company registered with ROC and is assessed to tax for number of years as is evident from its income tax assessment orders of earlier years enclosed at ***PB 439-446****. Merely because the shareholders of SCPL were employees of OCL and books were being maintained at the premises of OCL do not make SCPL as paper-company. Operational conveniences of these two shareholders of SCPL to maintain books at the premises of OCL may have led this but merely for that reason, SCPL cannot become paper company to the utter disregard to the past assessment orders and scale of business conducted by SCPL. Attempt of Ld. AO to show closeness of the shareholders of SCPL with OCL group does not make substantive SCPL to turn to a paper company. Other allegations of Ld. AO qua SCPL too stems from the colored vision of Ld. AO. Even statements if carefully gone through do not support what Ld. AO has inferred arbitrarily.*

c) *Ld. AO has mentioned that advance or loan to SCPL was just to by pass the provision of section 2(22)(e) and money trail clearly established that the ultimate beneficiaries are the shareholders of OCL or companies/firms in which they have substantial interest.*

In reply, it is submitted that advance was given by OCL to SCPL as advance against trade and thus inference that provision of section 2(22)(e) was sought to be bye passed is misconceived. Moreover, when the case of Ld. AO is that beneficiaries are company (ORPL)/firm (SKAE) first, deemed dividend could be taxed in the hands of such

company/firm and not in the hands of the appellant. This is being submitted on without prejudice basis without conceding anything.

***d)** Ld. AO has relied upon the decision **CIT vs. Mukundray K Shah 209 CTR 97 (SC)** but the facts of that case were different and hence the same could not be applied here.*

Thus, all the objections of Ld. AO may please be rejected and the case of the appellant may please be accepted in view of the above submissions.

23. According to the revenue, there was loan or advance from M/s Orient Craft Ltd. (OCL) to the appellant, whereas the case of the assessee was that there was no loan or advance received by the assessee, much less from M/s OrientCraft Ltd. and further, for that matter, no loan was received by the assessee from M/s Olympus Realtors P. Ltd. and hence there was no question of any deemed dividend to be assessed in his hands.

24. It is noted that in order to attract the fiction of section 2(22(e), it is essential that the elements of that section must be found applicable. Since section 2(22)(e) treats the loan or advance as dividend, hence it is essential to give a strict interpretation to such fiction.We have gone through section 2(22)(e) and the facts of the present case. There is no loan or advance received by the assessee from M/s Orient Crafts Ltd. It is seen that even as per the case of the A.O. made in the assessment order, the loan or advance has been received by the assessee from M/s SKA Enterprises which was a partnership firm. Therefore, as per the admitted case of the A.O., such loan or advance having notbeen received by the assessee from a closely held company i.e. from Orient Craft Ltd. or

Olympus Realters P Ltd. cannot be treated as dividend u/s 2(22)(e), since the first ingredient of section 2(22)(e) itself is not met in this case. As per the case of made out by Ld. A.O. in the assessment order, amount in question has not been received by the assessee from M/s Orient Craft Ltd. Rather it is seen that CIT (A) has recorded a finding at **para 7.3.2 of the appeal order** that Orient Craft P Ltd. had given **advance** of Rs. 28,84,90,373/- to M/s Super Connection India P. Ltd. It is important to submit that there is no appeal filed by the revenue against such finding of fact recorded by CIT (A).

25. Moreover, it is also seen that advance was given by M/s Orient Craft Ltd. to M/s Super Connection IndiaP. Ltd. The said M/s Super Connection India P Ltd. has been held by us as an independent and unrelated company in our order for A.Y. 2010-11 to A.Y. 2013-14 passed separately in ITA No. 6356 to 6359/Del/2018. Therefore, when M/s Super Connection India P. Ltd. which was an independent assessee and has been assessed to tax and when advance has admittedly been given by M/s Orient Craft Ltd. to M/s Super Connection India P. Ltd., how can it be assumed or held that the assessee received any loans and advance from M/s Orient Craft Ltd. After all the corporate identity and character and an independent status as an independent assessee and that too unrelated to the assessee that M/s Super Connection India P.Ltd. enjoys, such status cannot be permitted to be breached, more so when M/s Super Connection India P. Ltd. is an independent assessee, in which there was no control of any of the shareholders of M/s Orient Craft Ltd. Therefore, there was no question of treating any amount as deemed dividend u/s 2(22(e) in the hands of the assessee in the background of the facts of the present case and in the light of the finding recorded by

the first appellate authority as to the nature of the advance given by Orient Craft Ltd. to Super Connection India P Ltd. It is also noticed that CIT(A) has recorded a finding in para 7.3.2 (b) of the appeal order against which revenue is not in appeal that during the year under consideration capital advance amounting to Rs. 26,24,50,000/- was given by M/s Super Connections India P. Ltd. to M/s Olympus Realtors P. Ltd. Therefore, when there was specific finding of the nature of capital advance given by M/s Super Connection India P. Ltd. to M/s Olympus Realtors P. Ltd. as capital advance, where was the question of saying in the same breath that assessee received the advance and that too from M/s Orient Craft P. Ltd. and where was the question of applying the deeming fiction of section 2(22)(e) in the hands of the assessee. Therefore, for this reason also we are unable to uphold the order of Ld. CIT (A) in the case of the assessee in so far it relates to the confirmation of addition made under section 2(22)(e) of the Income Tax Act. Going further on the next argument on behalf of the assessee, it is noticed that, there was no loan or advance given by M/s Olympus Realtors P. Ltd. to M/s SKA Enterprises. Assessee was also partner in M/s SKA Enterprises and withdrew the amount as partner. In our considered opinion, such amount so withdrawn by the assessee in the capacity of the partner of the said firm cannot be covered within the meaning of deemed dividend under section 2(22)(e) of the Income Tax Act. Even CIT(A) in para 7.3.2(c) of the appeal order has recorded a factual finding that M/s OlympusRealtors P. Ltd.has made investment in M/s SKA Enterprises amounting to Rs. 35,21,49,597/-. Against this finding of fact, no appeal has been filed by the revenue nor has any rebuttal been made on behalf of the revenue. Therefore, when investment was made by M/s Olympus

Realtors P. Ltd. in M/s SKA Enterprises and assessee as partner has withdrawn amount from the partnership firm namely M/s SKA Enterprises in which assessee was one of the partners, there was no question of treating such amount received by the assessee as loan or advance that too from M/s Orient Craft Ltd. and / or from M/s Olympus Realtors P. Ltd. A.O. has disregarded the nature of payment made by each entity to the other entityregarding which the factual findings recorded by CIT(A) in his order have attained finality in the absence of any rebuttal or any appeal preferred by Revenue. Ld. AO has disregarded also the effect of legal character of all the entities more so when there was nothing adverse found in the assessments of these entities.

26. We have already mentioned earlier that section 2(22)(e) creates deeming fiction which gets triggers when the conditions mentioned in the section are met and not otherwise. It is settled principle of law that the deeming provisions are required to be construed strictly and nothing beyond which has been contemplated in the section can be inferred nor can it can be extended, more so in the light of factual findings in the present case having regard to the nature of the payments made by one entity to another as recorded by CIT(A) against which revenue has not filed any appeal nor has made any rebuttal during the course of hearing. Therefore, there is no question of treating the amount withdrawn by the assessee as partner from the partnership firm namely M/s SKA Enterprises in the nature of loan and advance and treat it as deemed dividend under section 2(22)(e) of the Income Tax Act. None of the ingredients of section 2(22)(e) stand satisfied in the instant case. We have also gone through part of written submissions as reproduced above where rebuttal of each and every adverse observation made by the

assessing officer has been made by the assessee and we are in agreement with the assessee on all those rebuttals.

27. The reliance of the decision of Hon'ble Supreme Court decision in the case of *"CIT Vs Mukundray K. Shah, Citation No. [2007] 160 Taxman 276 (SC)/[2007J 290 ITR 433 (SC)/[2007] 209 CTR 97 (SC):* is misplaced in the background of the facts of this case and the fact of that case more so when in the instant case the nature of payment by one entity to another has been held to be of a particular character by CIT(A) against which revenue is not in appeal. We have dealt this aspect in fair elaborate manner hereinabove and do not consider to repeat.

28. Ld. CIT (A) despite recording a clear cut finding as to the nature of payments made by one entity to another in para 7.3.2 of the appeal order has committed grave error in concluding without any basis, material or evidence that M/s Super Connections India P. Ltd., M/s Olympus Realtors P. Ltd. andM/s SKA Enterprises were used as conduits. Therefore, we are unable to subscribe to this bald conclusion of CIT(A). We thus hold that the additions sustained on account of deemed dividend u/s 2(22)(e) were sustained by CIT(A) contrary to the factual position and contrary to the law contained in this regard. Hence, we reverse the Order of CIT(A) and delete the addition of Rs. 17,33,98,000/- which was sustained in first appeal out of the total addition of Rs.17,78,30,000/-made in the assessment order u/s 2(22)(e). It is clarified that revenue was not appeal before us for the relief of Rs. 44,32,000/- allowed by learned first appellate authority. No other ground was argued before us. Hence appeal of the assessee is partly allowed.

29. Now we will take up revenue's appeal in case of **Mr. Sudhir Dhingra** for **AY. 2015-16, in ITA No. 6360/Del/2018,** in which the Revenue has raised following grounds of appeal in this case which are reproduced as under:-

(i) Whether on the facts and in the circumstances of the case the Ld.CIT(A) failed to appreciate that the Hon'ble Supreme Court in the case of CIT v. Mukundray K. Shah, 290 ITR 433 under identical circumstances has upheld the addition of deemed dividend u/s 2(22)(e) made by the AO.

(ii) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in concluding that the case of appellant(s) is neither covered by the judgment of the Hon'ble Supreme Court nor the definition of 'deemed dividend' u/s 2(22)(e) of the Act.

(iii) Whether on the facts and in the circumstances of the case, the Ld. CITA) has erred in concluding that the accumulated profits of M/s Olympus Realtors Pvt. Ltd. shall be taken into consideration for the purpose of determining deemed dividend despite the provisions of deemed dividend u/s 2(22)(e) providing that the accumulated profits of the company advancing the sum by way of loan or advance to the shareholder shall be taken into consideration.

(iv) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in working out and taking into consideration the accumulated profit of the company M/s Olympus Realtors Pvt. Ltd. at nil instead of that of M/s Orient Craft Ltd. for the purpose of application of section 2(22)(e).

(v) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in concluding that there has been no fund flow from M/s Orient Craft Limited during the year under consideration which is contrary to the records as on perusal of ledger account of M/s Super Connection India Pvt. Ltd. in the books of M/s Orient Craft Ltd., it is seen that during the year under consideration, there has been fund flow of more than Rs. 50crore from M/s Orient Craft Ltd. to M/s Super Connection India Pvt. Ltd.

(vi) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has failed to appreciate that such advances/loans which have been routed through different entities to the assessee with the only intention to subvert the provisions of sections 2(22)(e) would constitute deemed dividend.

(vii) The appellant craves to add, amend, alter or modify any grounds of appeal at the time of hearing.

30. In this year, Assessing Officer has made additions of Rs. 23,71,65000/- on account of deemed dividend u/s 2(22)(e) of the Income Tax Act, 1961 on the ground that there was flow of funds from M/s Orient Craft Ltd. to M/s Super Connections India P. Ltd. and then to M/s Olympus Realtors P. Ltd. and then M/s SKA Enterprises. Therefore, A.O. treated the said amount received by the assessee from M/s SKA Enterprises as deemed dividend u/s 2(22)(e). Assessing Officer's Order in this regard is identical to one passed by him for earlier assessment years i.e. 2010-11, 2011-12, 2012-13 and 2013-14.

31. In first appeal preferred by the assessee before Commissioner of Income Tax (Appeals)-3 Gurgaon (hereinafter called as 'CIT(A)' also), CIT(A) in **para 3.5 of the appeal order** held that dividend u/s 2(22)(e) consists inter-alia as the last limb *".....any payment by any such company on behalf, or for the individual benefit of any such shareholder to the extent to which the company neither case possesses accumulated profits"* . According to CIT (A), case of the assessee is squarely covered by this limb as it is payment by a company for the individual benefits of any such shareholder to the extent which the company possesses accumulated profits. According to CIT(A), payment has been received by the assessee from M/s SKA Enterprises, which in turn has received the payments from two companies in which public are not substantial

interested and assessee is holding not less than 10% voting power. CIT(A) recorded that M/s SKA Enterprises received payments from closely held company as under:-

M/s Olympus Realtors P. Ltd. Rs. 39,90,40,000/-

32. However, CIT(A) recorded that payment by a company with reference to deemed dividend has to be restricted to accumulated profits and according to CIT(A) accumulated profits of M/s Olympus Realtors P. Ltd. as on 31.03.2014 was Rs. 6,83,78,062/- and as on 31.3.2015 was Rs. 6,06,80,771/-, and thus there was no fresh accumulated profits. Therefore, total payment of Rs. 23,71,65000/- from M/s SKA Enterprises was there, but there was no increase in accumulated profits. It was also held by CIT (A) in para 3.3 at page 18 of the appeal order that there has been no fund flow from M/s Orient Craft Ltd during the year under consideration. Accordingly, CIT (A) deleted the additions in the hands of the three shareholders namely Sh. Sudhir Dhingra and Sh. Anoop Thatai and Sh. Krishan Kant Kohli.

33. Before us, Ld. CIT (DR) has relied upon the assessment order and assailed the order of the first appellate authority based on the arguments mentioned in the grounds of appeal, whereas Ld. Counsel for the assessee relied upon the written submissions and paper book filed and contended that the addition made in the assessment order deserved to be deleted and which was rightly deleted by CIT(A).

DECISION

34. We have heard both the parties and have gone through the orders passed by the authorities below and also gone through the written

submissions filed by the assessee and also the relevant documents referred to from the paper book filed before us. We have summed up the findings of the assessment order and appellate order hereinabove. Before we discuss the merits of the arguments of the assessee& those of the revenue, we consider it expedient to reproduce the relevant portion of the written submissions filed by the assessee for A.Y. 2015-16 as under:-

GROUND NO. 1 General and specific submissions have been under the respective grounds of appeals.

GROUND NO. 2 to 5 Ld. A.O. made addition of Rs. 23,71,65,000/- on account of deemed dividend u/s 2(22)(e) on the ground that the said amount was transferred by M/s Orient Craft Ltd. (OCL) during the year under appeal to the appellant, through M/s Super Connections P. Ltd. (SCPL), which in turn was given to M/s Olympus Realtors P Ltd . (ORPL) which in turn has been paid to M/s SKA Enterprises (SKAE) which in turn has been received by the appellantand thus, according to Ld. A.O. amount received by the appellant was deemed dividend assessable u/s 2(22)(e) of the Income Tax Act, 1961. Since it has been treated as taxable income in the hands of the appellant, hence the present appeal.

1).....

2) Without prejudice to above, it is submitted that in fact the impugned addition could not be made u/s 2(22)(e) as there was no 'loan' or 'advance'from M/s OCL to the appellant. According to Ld. A.O. also as mentioned in the impugned order, the loan or advance has been received by the appellant from M/s SKAE. That being so, where is the question of applying and invoking section 2(22)(e), which

requires that the loan should be advanced by a closely held company. It goes without saying that M/s SKAE is not a company and impugned loan has not been received by the appellant from M/s OCL. Therefore, impugned addition made does not stand to the test of law as explained above and it is thus requested that the addition made may please be deleted.

3) Without prejudice to above, it is submitted further that the amount was given by OCL to SCPL which is an independent company and that too during the course of business. It goes without saying that M/s SCPL is an independent assessee, which has been assessed to tax even in earlier years which is evident from the copies of assessment orders of SCPL for A.Y 2005-06 & 2008-09 which are enclosed at **PB439-446.** Therefore when amount has been given by M/s OCL to M/s SCPL, where is the question of holding that the amount was given by OCL to the appellant instead, and where is the question of assessing that amount as deemed dividend in the hands of the appellant Individual. Thus, action of Ld. AO in disregarding the corporate character of SCPL is misplaced on facts and in law and so is the action of making impugned addition in the hands of the appellant. It is thus requested that the addition under appeal may please be deleted for the above stated submissions too.

4) Without prejudice to above, it is submitted that M/s ORPL was one of the partners in M/s SKAE and infused its capital and no loan or advance was given to M/s SKAE by ORPL. Appellant too is the partner in SKAE. Appellant withdrew the amount as partner of SKAE and thus, how could the amount received by the appellant from M/s SKAE be treated as loan given by M/s OCLso as to constitute deemed

dividend in the hands of the appellant. In fact Ld. AO is going entity after entity and that too by disregarding the nature of payment made by each entity/person to other. Ld. AO is disregarding the legal character of the entities also which is not permissible in law particularly when legal character of such entities have all along been accepted in their assessments. Thus, action of Ld. AO in making the impugned addition in the hands of the appellant as deemed dividend is neither here nor there and it is thus prayed that the addition made may please be deleted.

5) Without prejudice to above, it is submitted further that going by the logic of Ld. AO though denied vehemently but accepting for the sake of arguments, if at all there was any deemed dividend, it could be in the hands of M/s ORPL which received the amount first, and three Individuals who are the shareholders in M/s OCL for more than 10% were also having substantial interest in M/s ORPL. Thus, from this standpoint also, there was no question of making impugned addition as deemed dividend in the hands of the appellant. It is therefore prayed that the same may please be deleted in view of the above submissions also.

Reliance is placed on the following:-

Commissioner of Income Tax vs. Francis Wacziarg High court of Delhi (2013) 353 ITR 0187: (2011) 203 taxman 0391 asst. Year 2003-04

Dividend—Deemed dividend under s. 2(22)(e)—Credit balance in accounts—Confirmations and copies of accounts showing that the amounts appearing in the accounts were in fact receipts due to

assessee, in his normal course of business dealings with the companies—Such receipts from these companies cannot be treated as loans and advances—AO was not justified in treating these receipts as deemed dividend under s. 2(22)(e)

6) The above, factual and legal situations were explained during the course of assessment proceeding also and are explained before your goods also with the help of following pleadings and evidences:-

PB 150, 151, 152-153 are copies of submissions made to Ld. AO

PB 529-531, 536-537 is the copy of account of the appellant in the books of SKAE

Therefore viewed from any angle the impugned addition made is liable to be deleted and it is prayed that the same may please be deleted.

However, certain adverse observations have been made by Ld. AO which are met as under:-

a) Ld. AO has mentioned that perusal of books of accounts of OCL, SCPL, ORPL & SKAE seized during search revealed that OCL is routing huge amount of funds through some fictitious entities of the group and finally to the shareholders of OCL, appellant being one of the three shareholders.

In reply, it is submitted that first of all there is no fictitious entities as alleged. All the entities are artificial juridical persons, which have been assessed to tax in all these years as is evident from copies of their income tax assessment orders of earlier years enclosed at **PB 341-376, 439-446**. Thus, this allegation of there being any fictitious entity is absolutely denied and is contrary to material on record.

Second, the fact of the payments made by these entities to other entities/persons are part of audited accounts and returns of income and thus it is wrong to say that it was noticed from the books of accounts of these entities seized during search that payments were being made by these entities to other entities/persons. Thus, this averment/finding by Ld. AO is only to show that but for the search this could not come to be known to him. But as submitted above, this finding is not correct.

b) Ld. AO has mentioned that statements of Mr. Dhanda and Mr. Nagpal directors of SCPL revealed during search that SCPL is paper company as books are maintained at the premises of OCL and so on and so forth.

In reply, it is submitted that SCPL is a company registered with ROC and is assessed to tax for number of years as is evident from its income tax assessment orders of earlier years enclosed at **PB 439-446**. Merely because the shareholders of SCPL were employees of OCL and books were being maintained at the premises of OCL do not make SCPL as paper-company. Operational conveniences of these two shareholders of SCPL to maintain books at the premises of OCL may have led this but merely for that reason, SCPL cannot become paper company to the utter disregard to the past assessment orders and scale of business conducted by SCPL. Attempt of Ld. AO to show closeness of the shareholders of SCPL with OCL group does not make substantive SCPL to turn to a paper company. Other allegations of Ld. AO qua SCPL too stems from the colored vision of Ld. AO. Even statements if carefully gone through do not support what Ld. AO has inferred arbitrarily.

c) Ld. AO has mentioned that advance or loan to SCPL was just to by pass the provision of section 2(22)(e) and money trail clearly established that the ultimate beneficiaries are the shareholders of OCL or companies/firms in which they have substantial interest.

In reply, it is submitted that advance was given by OCL to SCPL as advance against trade and thus inference that provision of section 2(22)(e) was sought to be bye passed is misconceived. Moreover, when the case of Ld. AO is that beneficiaries are company (ORPL)/firm (SKAE) first, deemed dividend could be taxed in the hands of such company/firm and not in the hands of the appellant. This is being submitted on without prejudice basis without conceding anything.

d) Ld. AO has relied upon the decision **CIT vs. Mukundray K Shah 209 CTR 97 (SC)** but the facts of that case were different and hence the same could not be applied here.

Thus, all the objections of Ld. AO may please be rejected and the case of the appellant may please be accepted in view of the above submissions

GROUND NO. 6 Ld. A.O. has passed the impugned order without valid statutory approval of Joint Commissioner in terms of section 153D.

It is respectfully submitted that as per section 153D no assessment order u/s 153A or u/s 153C can be passed without obtaining the prior approval of Joint CIT, which in the present case has not been obtained in as much as the approval which has been accorded is mechanical approval bereft of any application of mind as can be seen from the approval enclosed in the paper book. It has been held in the

following judicial decision that mechanical approval is no approval in the eyes of law.

- Hon'ble ITAT Mumbai 'F' Bench in the case of **Smt. Shreelekha Damani vs. Dy. CIT 125 DTR (Mumbai 'F') 263**
- **Chhugamal Rajpal vs. S.P. Chaliha&Ors.** (1971) 79 ITR 0603
- **United Electrical Company (P) Ltd. vs. Commissioner of Income Tax &ors.** (2002) 258 ITR 0317

GROUND NO. 7 General and specific submissions have been under the respective grounds of appeals.

GROUND NO.8 Not pressed as credit has been allowed in order u/s 154.

GROUND NO. 9 Consequential

GROUND NO. 10 General

35. According to the case of revenue, there was loan or advance from M/s Orient Craft Ltd. (OCL) & Olympus Realters P Ltd.to the appellant, whereas the case of the assessee was that there was no loan or advance received by the assessee, much less from M/s Orient Craft Ltd., and further, for that matter, no loan was received by the assessee from M/s Olympus Realtors P. Ltd. and hence there was no question of any deemed dividend to be assessed in his hands.

36. In order to attract the fiction of section 2(22(e), it is essential that the elements mentioned in the section must be found applicable. Since section 2(22)(e) treats the loan or advance as dividend, hence it is essential to give a strict interpretation to such fiction. Looking to the facts of the present case, we find that, there is no loan or advance

received by the assessee from M/s Orient Crafts Ltd. or the matter of fact from the other company namely, Olympus Realters P Ltd. It is seen that even as per the case of the A.O. made in the assessment order, the loan or advance has been received by the assessee from M/s SKA Enterprises which was a partnership firm. Therefore, as per the admitted case of the A.O., such loan or advance having not been received by the assessee from a closely held company, i.e., from Orient Craft Ltd. or Olympus Realters P Ltd. hence cannot be treated as dividend u/s 2(22)(e), since the first ingredient or any of the other conditions, of section 2(22)(e) itself is not met in this case. As per the case of made out by Ld. A.O. in the assessment order, amount in question has not been received by the assessee from M/s Orient Craft Ltd. Rather it is seen that CIT (A) has recorded a finding at para 7.1.2 (a) of the appeal order that Orient Craft P Ltd. had not given advance to M/s Super Connection India P. Ltd during the year under appeal. It is important to note here that there is no appeal filed by the revenue against such finding of fact recorded by CIT (A).

37. Moreover, it is also seen as a fact that advances was not given by M/s Orient Craft Ltd. to M/s Super Connection India P. Ltd during the year under appeal. In any case, the said M/s Super Connection India P Ltd. has been held by us as an independent and unrelated company in our order for A.Y. 2010-11 to A.Y. 2013-14 passed separately in ITA No. 6356 to 6359/Del/2018. Therefore, when M/s Super Connection India P. Ltd. which was an independent assessee and has been assessed to tax and when no advance has admittedly been given by M/s Orient Craft Ltd. to M/s Super Connection India P. Ltd. during the year under appeal, how can it be assumed or held that the assessee received any loans and advance from M/s Orient Craft Ltd. After all the corporate identity and

character & an independent status as an independent assessee and that too unrelated to the assessee that M/s Super Connection India P. Ltd. enjoys, such status cannot be permitted to be breached, more so when M/s Super Connection India P. Ltd. is an independent assessee, in which there was no control of any of the shareholders of M/s Orient Craft Ltd. Therefore, there was no question of treating any amount as deemed dividend u/s 2(22(e) in the hands of the assessee in the background of the facts of the present case and in the light of the finding recorded by the first appellate authority as to the nature of the advance given by Orient Craft Ltd. to Super Connection India P Ltd. In fact finding recorded by CIT(A) in this year is that no fresh advance has been given by Orient Craft Ltd. to Super Connection India P Ltd. during the year under consideration which we have already taken note of hereinabove. It is also noticed by us that CIT (A) has recorded a finding in para 7.1.2 (b) of the appeal order against which revenue is not in appeal that during the year under consideration that no fresh advance was given even by M/s Super Connections India P. Ltd. to M/s Olympus Realtors P. Ltd during the year under appeal. Therefore, when there was specific finding that no advance was given by M/s Super Connection India P. Ltd. to M/s Olympus Realtors P. Ltd. during the year under appeal, where was the question of saying in the same breath that assessee received the advance and that too from M/s Orient Craft P. Ltd.and/or Olympus Realters P Ltd. and where was the question of applying the deeming fiction of section 2(22)(e) in the hands of the assessee on such wrong presumption of facts. Therefore, for this reason also we uphold the order of Ld. CIT(A) in the case of the assessee in respect of the deletion of addition made under section 2(22)(e). Ergo, there was no loan or advance given by M/s

Olympus Realtors P. Ltd. to M/s SKA Enterprises. Assessing Officer case is that Assessee was also partner in M/s SKA Enterprises and withdrew the amount as partner and therefore it should be inferred as loan from M/s Orient Craft P. Ltd. In our considered opinion, such amount so withdrawn by the assessee in the capacity of the partner of the said firm cannot be covered within the meaning of deemed dividend under section 2(22)(e) Act as it tantamount to going beyond the deeming fiction envisaged in the section. Even CIT(A) in para 7.1.2(c) of the appeal order has recorded a factual finding that M/s Olympus Realtors P. Ltd. has made investment in M/s SKA Enterprises amounting to Rs. 39,90,40,000/-. Against this finding of fact also, no appeal has been filed by the revenue nor has any rebuttal been made on behalf of the revenue. Therefore, when investment was made by M/s Olympus Realtors P. Ltd. in M/s SKA Enterprises and assessee as partner has withdrawn amount from the partnership firm namely, M/s SKA Enterprises in which assessee was one of the partners, there was no question of treating such amount received by the assessee **as loan or advance** that too from M/s Orient Craft Ltd. and / or from M/s Olympus Realtors P. Ltd. It goes without saying that there is substantial difference between investment and advance. A.O. has disregarded the nature of payment made by each entity to the other entity regarding which the factual findings recorded by CIT (A) in his order have attained finality in the absence of any rebuttal or any appeal preferred by Revenue. Ld. AO has disregarded also the effect of legal character of all the entities more so when there was nothing adverse found in the assessments of these entities. We have already mentioned earlier that section 2(22)(e) creates fiction which operates very harshly and settled principle of law that provisions of law

of such a nature are required to be construed strictly, more so in the light of factual findings as to the nature of these payments made by one entity to another recorded by CIT(A) against which revenue has made any rebuttal during the course of hearing. Therefore, there is no question of treating the amount withdrawn by the assessee as partner from the partnership firm namely M/s SKA Enterprises in the nature of loan and advance and treat it as deemed dividend under section 2(22)(e) of the Income Tax Act. None of the ingredients of section 2(22)(e) stand satisfied in the instant case. We have through the written submissions also reproduced above where rebuttal of each and every adverse observation made by the assessing officer has been made by the assessee and we are in agreement with the assessee on all those rebuttals.

38. The reliance of the decision of Hon'ble Supreme Court decision in the case of *"CIT Vs Mukundray K. Shah, Citation No. [2007] 160 Taxman 276 (SC)/[2007J 290 ITR 433 (SC)/[2007] 209 CTR 97 (SC):* is misplaced in the background of the facts of this case and the fact of that case more so when in the instant case the nature of payment by one entity to another has been held to be of a particular character by CIT(A) against which revenue is not in appeal. We have dealt this aspect in fair elaborate manner hereinabove and do not consider to repeat.

39. Accordingly, we hold that the addition of Rs. 23,71,65,000/- deleted on account of deemed dividend u/s 2(22)(e) by CIT(A) was rightly deleted. Hence, we uphold the Order of CIT(A) who deleted the addition made u/s 2(22)(e). No other arguments were made. In the result the appeal of the revenue is dismissed.

Mr. Sudhir Dhingra

A.Y. 2016-17

40. This is Revenue's appeal bearing ITA No. 6361/Del/2018 in the case of Mr. Sudhir Dhingra for A.Y. 2016-17.Assessee is also in appeal and his appeal bears ITA 5722/Del/2018. Revenue has raised following grounds of appeal which are reproduced as under:-

(i) Whether on the facts and in the circumstances of the case, the Ld. CITA) has erred in concluding that the accumulated profits of M/s Olympus Realtors Pvt. Ltd. shall be taken into consideration for the purpose of working out the deemed dividend without appreciating that the flow of fund originates from M/s Orient Craft Ltd.and the accumulated profits of this company was relevant and required to be taken into consideration to determine the quantum of deemed dividend .

(ii) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in working out and taking into consideration the accumulated profit of the company M/s Olympus Realtors Pvt. Ltd. instead of that of M/s Orient Craft Ltd. for the purpose of application of section 2(22)(e) which had sufficient accumulated profit to tax the entire amount of Rs. 21,80,50,000/- as deemed dividend u/s 2(22)(e) of the Act.

(v) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in concluding that there has been no fund flow from M/s Orient Craft Limited during the year under consideration which is contrary to the records as on perusal of ledger account of M/s Super Connection India Pvt. Ltd. in the books of M/s Orient Craft Ltd., it is seen that during the year under consideration, there has been fund flow of more than Rs. 140crore from M/s Orient Craft Ltd. to M/s Super Connection India Pvt. Ltd.

(vi) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has failed to appreciate that such advances/loans which have been routed through different entities to the assessee with the

only intention to subvert the provisions of sections 2(22)(e) would constitute deemed dividend.

(vii) The appellant craves to add, amend, alter or modify any grounds of appeal at the time of hearing.

41. On the other hand, assessee's appeal assailed the partial sustenance of addition u/s 2(22)(e) to the extent of Rs. 7,52,95,592/-.

42. In this case, Assessing Officer has made additions of Rs. 21,80,50,000/- on account of deemed dividend u/s 2(22)(e) of the Income Tax Act, 1961 on the ground that there was flow of funds from M/s Orient Craft Ltd. to M/s Super Connections India P. Ltd. and then to M/s Olympus Realtors P. Ltd. and then M/s SKA Enterprises. Therefore, A.O. treated the said amount received by the assessee from M/s SKA Enterprises as deemed dividend u/s 2(22)(e). Assessing Officer's Order in this regard is identical to one passed by him for earlier assessment years i.e. 2010-11, 2011-12, 2012-13 and 2013-14.

43. In the first appeal preferred by the assessee before Commissioner of Income Tax (Appeals)-3 Gurgaon (hereinafter called as 'CIT(A)' also), CIT(A) in **para 6.3.5 of the appeal order** held that dividend u/s 2(22)(e) consists inter-alia as the last limb *".....any payment by any such company on behalf, or for the individual benefit of any such shareholder to the extent to which the company neither case possesses accumulated profits"* . According to CIT (A), case of the appellant is squarely covered by this limb as it is payment by a company for the individual benefits of any such shareholder to the extent which the company possesses accumulated profits. According to CIT(A), payment has been received by the assessee from M/s SKA Enterprises, which in turn has received the payments from two companies in which public are not substantial

interested and assessee is holding not less than 10% voting power. CIT (A) recorded that M/s SKA Enterprises received payments from under:-

M/s Olympus Realtors P. Ltd. Rs. 21,50,49,264/-

44. However, CIT(A) recorded that payment by a company with reference to deemed dividend has to be restricted to accumulated profits and according to CIT(A) accumulated profits of M/s Olympus Realtors P. Ltd. was Rs. 7,52,95,592/-. Therefore total payment of Rs. 21,50,49,264/-was received from M/s SKA Enterprises but there was accumulated profits to the tune of Rs. 7,52,95,592/-. It was also held by CIT (A) in para 6.3.2(a) that there has been no fund flow from M/s Orient Craft Ltd. but there were fund flow from Super Connection India P Ltd. to Olympus Realters P Ltd. and by Olympus Realters P Ltd to SKA Enterprises. Accordingly, CIT(A) partially sustained the additions in the hands of the three shareholders namely Sh. Sudhir Dhingra and Sh. Anoop Thatai and Sh. Krishan Kant Kohli to the extent of accumulated profits of Rs. 7,52,95,592/-

45. Ld. CIT (DR) has relied upon the assessment order and assailed the order of the first appellate authority based on the arguments mentioned in the grounds of appeal, whereas Ld. Counsel for the assessee relied upon the written submissions and paper book filed and contended that the addition deserves to be deleted in its entirety and the action of CIT(A) in partially sustaining addition is not correct either on facts or in law.

DECISION

46. We have considered the arguments from both the sides and have gone through the Orders passed by the authorities below and also gone

through the written submissions filed by the assessee and also referred various pages of paper book filed before us. On merits this year also the facts and issues are *pari-materia* with the above appeals. However, we consider it fit to discuss the facts and issues once again. The relevant portion of the written submissions filed by the assessee for A.Y. 2016-17 is reproduced as under:-

GROUND NO. 1 General and specific submissions have been under the respective grounds of appeals.

GROUND NO. 2 to 5 Ld. A.O. made addition of Rs. 21,80,50,000/- on account of deemed dividend u/s 2(22)(e) on the ground that the said amount was transferred by M/s Orient Craft Ltd. (OCL) during the year under appeal to the appellant, through M/s Super Connections P. Ltd. (SCPL), which in turn was given to M/s Olympus Realtors P Ltd . (ORPL) which in turn has been paid to M/s SKA Enterprises (SKAE) which in turn has been received by the appellantand thus, according to Ld. A.O. amount received by the appellant was deemed dividend assessable u/s 2(22)(e) of the Income Tax Act, 1961. Since it has been treated as taxable income in the hands of the appellant, hence the present appeal.

1) At the very outset, it is respectfully submitted that appellant received a sum of Rs. 21,80,50,000/- as loan and current advances during the year under appeal, but out of the said amount, cheque amounting to Rs. 30,00,000/- vide cheque No. 302742, dated 23.04.2015 was cancelled and reversed in the ledger account of the appellant in the books of accounts of M/s SKAE, which is evident from the ledger account filed to Ld. A.O during the course of

assessment proceedings vide letter dated 10.11.2017 enclosed in the paper book at **PB 151**, **533.**Therefore, this fact was not considered by the Ld. A.O while making the impugned addition..Therefore, first submission of the appellant is that the amount of advances of Rs.21,80,50,000 should be reduced to Rs. 21,50,50,000/.

2).....

3) Without prejudice to above, it is submitted that in fact the impugned addition could not be made u/s 2(22)(e) as there was no 'loan' or 'advance'from M/s OCL to the appellant. According to Ld. A.O. also as mentioned in the impugned order, the loan or advance has been received by the appellant from M/s SKAE. That being so, where is the question of applying and invoking section 2(22)(e), which requires that the loan should be advanced by a closely held company. It goes without saying that M/s SKAE is not a company and impugned loan has not been received by the appellant from M/s OCL. Therefore, impugned addition made does not stand to the test of law as explained above and it is thus requested that the addition made may please be deleted.

4) Without prejudice to above, it is submitted further that the amount was given by OCL to SCPL which is an independent company and that too during the course of business. It goes without saying that M/s SCPL is an independent assessee, which has been assessed to tax even in earlier years which is evident from the copies of assessment orders of SCPL for A.Y 2005-06 & 2008-09 which are enclosed at **PB439-446.** Therefore when amount has been given by M/s OCL to M/s SCPL, where is the question of holding that the

amount was given by OCL to the appellant instead, and where is the question of assessing that amount as deemed dividend in the hands of the appellant Individual. Thus, action of Ld. AO in disregarding the corporate character of SCPL is misplaced on facts and in law and so is the action of making impugned addition in the hands of the appellant. It is thus requested that the addition under appeal may please be deleted for the above stated submissions too.

5) Without prejudice to above, it is submitted that M/s ORPL was one of the partners in M/s SKAE and infused its capital and no loan or advance was given to M/s SKAE by ORPL. Appellant too is the partner in SKAE. Appellant withdrew the amount as partner of SKAE and thus, how could the amount received by the appellant from M/s SKAE be treated as loan given by M/s OCLso as to constitute deemed dividend in the hands of the appellant. In fact Ld. AO is going entity after entity and that too by disregarding the nature of payment made by each entity/person to other. Ld. AO is disregarding the legal character of the entities also which is not permissible in law particularly when legal character of such entities have all along been accepted in their assessments. Thus, action of Ld. AO in making the impugned addition in the hands of the appellant as deemed dividend is neither here nor there and it is thus prayed that the addition made may please be deleted.

6) Without prejudice to above, it is submitted further that going by the logic of Ld. AO though denied vehemently but accepting for the sake of arguments, if at all there was any deemed dividend, it could be in the hands of M/s ORPL which received the amount first, and three Individuals who are the shareholders in M/s OCL for more than

10% were also having substantial interest in M/s ORPL. Thus, from this standpoint also, there was no question of making impugned addition as deemed dividend in the hands of the appellant. It is therefore prayed that the same may please be deleted in view of the above submissions also.

Reliance is placed on the following:-

Commissioner of Income Tax vs. Francis Wacziarg High court of Delhi (2013) 353 ITR 0187: (2011) 203 taxman 0391 asst. Year 2003-04

Dividend—Deemed dividend under s. 2(22)(e)—Credit balance in accounts—Confirmations and copies of accounts showing that the amounts appearing in the accounts were in fact receipts due to assessee, in his normal course of business dealings with the companies—Such receipts from these companies cannot be treated as loans and advances—AO was not justified in treating these receipts as deemed dividend under s. 2(22)(e)

7) The above, factual and legal situations were explained during the course of assessment proceeding also and are explained before your goods also with the help of following pleadings and evidences:-

PB 150, 151, 152-153 are copies of submissions made to Ld. AO

PB 533,537 is the copy of account of the appellant in the books of SKAE

Therefore viewed from any angle the impugned addition made is liable to be deleted and it is prayed that the same may please be deleted.

<u>However, certain adverse observations have been made by Ld. AO which are met as under:-</u>

a) Ld. AO has mentioned that perusal of books of accounts of OCL, SCPL, ORPL & SKAE seized during search revealed that OCL is routing huge amount of funds through some fictitious entities of the group and finally to the shareholders of OCL, appellant being one of the three shareholders.

In reply, it is submitted that first of all there is no fictitious entities as alleged. All the entities are artificial juridical persons, which have been assessed to tax in all these years as is evident from copies of their income tax assessment orders of earlier years enclosed at **PB 341-376, 439-446**. Thus, this allegation of there being any fictitious entity is absolutely denied and is contrary to material on record. Second, the fact of the payments made by these entities to other entities/persons are part of audited accounts and returns of income and thus it is wrong to say that it was noticed from the books of accounts of these entities seized during search that payments were being made by these entities to other entities/persons. Thus, this averment/finding by Ld. AO is only to show that but for the search this could not come to be known to him. But as submitted above, this finding is not correct.

b) Ld. AO has mentioned that statements of Mr. Dhanda and Mr. Nagpal directors of SCPL revealed during search that SCPL is paper company as books are maintained at the premises of OCL and so on and so forth.

In reply, it is submitted that SCPL is a company registered with ROC and is assessed to tax for number of years as is evident from its income tax assessment orders of earlier years enclosed at **PB 439-446**. Merely because the shareholders of SCPL were employees of OCL and books were being maintained at the premises of OCL do not make SCPL as paper-company. Operational conveniences of these two shareholders of SCPL to maintain books at the premises of OCL may have led this but merely for that reason, SCPL cannot become paper company to the utter disregard to the past assessment orders and scale of business conducted by SCPL. Attempt of Ld. AO to show closeness of the shareholders of SCPL with OCL group does not make substantive SCPL to turn to a paper company. Other allegations of Ld. AO qua SCPL too stems from the colored vision of Ld. AO. Even statements if carefully gone through do not support what Ld. AO has inferred arbitrarily.

c) Ld. AO has mentioned that advance or loan to SCPL was just to by pass the provision of section 2(22)(e) and money trail clearly established that the ultimate beneficiaries are the shareholders of OCL or companies/firms in which they have substantial interest.

In reply, it is submitted that advance was given by OCL to SCPL as advance against trade and thus inference that provision of section 2(22)(e) was sought to be bye passed is misconceived. Moreover, when the case of Ld. AO is that beneficiaries are company (ORPL)/firm (SKAE) first, deemed dividend could be taxed in the hands of such company/firm and not in the hands of the appellant. This is being submitted on without prejudice basis without conceding anything.

d) Ld. AO has relied upon the decision **CIT vs. Mukundray K Shah 209 CTR 97 (SC)** but the facts of that case were different and hence the same could not be applied here.

Thus, all the objections of Ld. AO may please be rejected and the case of the appellant may please be accepted in view of the above submissions

GROUND NO. 6.....

47. According to the case of revenue, there was loan or advance from M/s Orient Craft Ltd. (OCL) to the appellant, whereas the case of the assessee was that there was no loan or advance received by the assessee, much less from M/s Orient Craft Ltd. and further, for that matter, no loan was received by the assessee from M/s Olympus Realtors P. Ltd. and hence there was no question of any deemed dividend to be assessed in his hands under section 2(22)(e).

48. We have gone through section 2(22)(e) and the facts of the present case. There is no loan or advance received by the assessee from M/s Orient Crafts Ltd. It is seen that even as per the case of the A.O. made in the assessment order, the loan or advance has been received by the assessee from M/s SKA Enterprises which was a partnership firm. Therefore, as per the admitted case of the A.O., such loan or advance having not been received by the assessee from a closely held company i.e. from Orient Craft Ltd. or Olympus Realters P Ltd. cannot be treated as dividend u/s 2(22)(e), since the first ingredient of section 2(22)(e) itself is not met in this case. As per the case of made out by Ld. A.O. in the assessment order, amount in question has not been received by the assessee from M/s Orient Craft Ltd. Rather it is seen that CIT(A) has

recorded a finding at **para 6.3.2(a)of the appeal order** that Orient Craft P Ltd. had not given any amount to M/s Super Connection India P. Ltd. during the year under appeal. Moreover, it is also seen on facts that no advance was given by M/s Orient Craft Ltd. to M/s Super Connection India P. Ltd during the year under appeal. In any case, the said M/s Super Connection India P Ltd. has been held by us as an independent and unrelated company in our order for A.Y. 2010-11 to A.Y. 2013-14 passed separately in ITA No. 6356 to 6359/Del/2018. Therefore, when M/s Super Connection India P. Ltd. which was an independent assessee and has been assessed to tax and when no advance has admittedly been given by M/s Orient Craft Ltd. to M/s Super Connection India P. Ltd. during the year under appeal as recorded by CIT(A) in his appeal order, how can it be assumed or held that the assessee received any loans and advance from M/s Orient Craft Ltd. After all the corporate identity and character & an independent status as an independent assessee and that too unrelated to the assessee that M/s Super Connection India P. Ltd. enjoys, such status cannot be permitted to be breached, more so when M/s Super Connection India P. Ltd. is an independent assessee, in which there was no control of any of the shareholders of M/s Orient Craft Ltd. Therefore, there was no question of treating any amount as deemed dividend u/s 2(22(e) in the hands of the assessee in the background of the facts of the present case and more so in the light of the finding recorded by the first appellate authority that no advance or sum has been given during the year under appeal by Orient Craft Ltd. to Super Connection India P Ltd. Therefore, for this reason also we are unable to uphold the order of Ld. CIT(A) in the case of the assessee in so far it relates to the confirmation of part addition made under section 2(22)(e) of

the Income Tax Act. Going further on the next argument on behalf of the assessee, it is noticed that There was no loan or advance given by M/s Olympus Realtors P. Ltd. to M/s SKA Enterprises. Assessee was also partner in M/s SKA Enterprises and withdrew the amount as partner. In our considered opinion, such amount so withdrawn by the assessee in the capacity of the partner of the said firm cannot be covered within the meaning of deemed dividend under section 2(22)(e) of the Income Tax Act. Even CIT(A) in **para 6.3.2(c)** of the appeal order has recorded a factual finding that M/s Olympus Realtors P. Ltd. has made **investment** in M/s SKA Enterprises amounting to Rs. 21,50,49,264/-. Against this finding of fact, no rebuttal has been made on behalf of the revenue. Therefore, when investment was made by M/s Olympus Realtors P. Ltd. in M/s SKA Enterprises and assessee as partner has withdrawn amount from the partnership firm namely M/s SKA Enterprises in which assessee was one of the partners, there was no question of treating such amount received by the assessee as loan or advance that too from M/s Orient Craft Ltd. and / or from M/s Olympus Realtors P. Ltd. A.O. has disregarded the nature of payment made by each entity to the other entity regarding which the factual findings recorded by CIT(A) in his order have attained finality in the absence of any rebuttal or any appeal preferred by Revenue. Ld. AO has disregarded also the effect of legal character of all the entities more so when there was nothing adverse found in the assessments of these entities. Therefore, there is no question of treating the amount withdrawn by the assessee as partner from the partnership firm namely M/s SKA Enterprises in the nature of loan and advance and treat it as deemed dividend under section 2(22)(e)

of the Income Tax Act. None of the ingredients of section 2(22)(e) stand satisfied in the instant case.

49. CIT (A) despite recording a clear cut finding as to the nature of payments made by one entity to another in **para 6.3.2 of the appeal order** has committed grave error in concluding without any basis, material or evidence that M/s Super Connections India P. Ltd., M/s Olympus Realtors P. Ltd. and M/s SKA Enterprises were used as conduits. Therefore, we are unable to subscribe to this bald conclusion of CIT(A). We thus hold that the addition made in the assessment order &also part of the addition sustained on account of deemed dividend u/s 2(22)(e), were made by AO and partially sustained by CIT(A) are contrary to the factual position and contrary to the law contained in this regard. No other arguments were made. Hence, we delete the entire addition amounting to Rs. 21,80,50,000/- involved in Revenue's appeal and in the appeal of the assessee. In the result, appeal of the revenue is dismissed and appeal of the assessee is partly allowed.

SH. ANOOP THATIA

FOR 2014-15

ITA No. 5719/DEL/2018

50. This appeal has been filed by the assessee against the Order passed by Commissioner of Income Tax (Appeals)-3, Gurgaon, dated 28.07.2018 and assessee has preferred the following grounds of appeal, whereas revenue is not in appeal.

1) *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. A.O. in assuming jurisdiction u/s 153A and the consequent assessment proceedings in the case are bad in law and against the facts and circumstances of the case and void abinitio and basic jurisdictional conditions and pre-requisites under section 153A were not met.*

2) *That in any case and in any view of the matter, the assessment framed under section 153A of the Act, is bad in law and against the facts and circumstances of the case.*

3) *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of the Ld. A.O. in restricting the addition to the extent of Rs.18,28,26,500/- u/s 2(22)(e) and that too by recording incorrect facts and without any basis, material or evidence and more so when no incriminating material was found as a result of search.*

4) *That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in making addition of Rs. 18,28,26,500/- u/s 2(22)(e) is bad in law and against the facts and circumstances of the case.*

5) *That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. A.O. in passing the impugned assessment order without there being requisite approval in terms of section 153D and in any case approval if any is mechanical without application of mind and is no approval in the eyes of law.*

6) *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. A.O.*

in passing the impugned order and that too without giving adequate opportunity and without observing the principle of natural justice.

7) That the appellant craves the leave to add, alter or amend the grounds of appeal at any stage and all the grounds are without prejudice to each other.

51. In this case, Assessing Officer has made additions of Rs. 18,75,00,373/- on account of deemed dividend u/s 2(22)(e) of the Income Tax Act, 1961 on the ground that there was flow of funds from M/s Orient Craft Ltd. to M/s Super Connections India P. Ltd. and then to M/s Olympus Realtors P. Ltd. and then M/s SKA Enterprises. Therefore, A.O. treated the amount of Rs. 18,75,00,373/- received by the assessee from M/s SKA Enterprises as deemed dividend u/s 2(22)(e). Assessing Officer's Order in this regard is identical to one passed by him for earlier assessment years i.e. 2011-12, 2012-13 and 2013-14.

52. In first appeal preferred by the assessee before Commissioner of Income Tax (Appeals)-3 Gurgaon (hereinafter called as 'CIT(A)' also), CIT(A) in **para 7.3.5 of the appeal order** held that dividend u/s 2(22)(e) consists inter-alia as the last limb *".....any payment by any such company on behalf, or for the individual benefit of any such shareholder to the extent to which the company neither case possesses accumulated profits"* . According to CIT (A), case of the appellant is squarely covered by this limb as it is payment by a company for the individual benefits of any such shareholder to the extent which the company possesses accumulated profits. According to CIT(A), payment has been received by the assessee from M/s SKA Enterprises, which in turn has received the payments from two companies in which public are not substantial

interested and assessee is holding not less than 10% voting power. CIT(A) recorded that M/s SKA Enterprises received payments from two companies as under:-

M/s Orient Craft Ltd.	**Rs. 28,84,90,373/-**
M/s Olympus Realtors P. Ltd.	**Rs. 35,21,49,537/-**

53. However, CIT(A) recorded that payment by a company with reference to deemed dividend has to be restricted to accumulated profits and according to CIT(A) accumulated profits of M/s Olympus Realtors P. Ltd. as on 31.03.2014 was Rs. 6,83,78,062/- and therefore total payment of Rs.35,68,68,435/- from these companies to the shareholders having substantial interest in these companies will be covered under the definition of deemed dividend u/s 2(22)(e) but such deemed dividend will be restricted to the accumulated profits. Accordingly, CIT(A) confirmed the additions in the hands of the three shareholders namely Sh. Sudhir Dhingra of Rs. 17,73,98,000/- and Sh. Anoop Thatai Rs. 18,28,26,500/- and Sh. Krishan Kant Kohli of Rs. 6,43,935/-. Ld. CIT(A) relied upon the decision of Hon'ble Supreme Court in the case of CIT Vs Mukundray K. Shah, [2007J 290 ITR 433 (SC).

54. Ld. CIT (DR) has relied upon the assessment order and the order of the first appellate authority, whereas Ld. Counsel for the assessee relied upon the written submissions and paper book filed and contended that the addition deserved to be deleted.

DECISION

55. We have heard both the sides, gone through the orders passed by the authorities below and also the written submissions filed by the

assessee and also referred various pages of paper book filed before us. We have summed up the findings of the assessment order and appellate order hereinabove. Before we discuss the merits of the arguments of the assessee& revenue, we consider it expedient to reproduce the relevant portion of the written submissions filed by the assessee for A.Y. 2014-15 as under:-

GROUND NO. 2 to 5 Ld. A.O. made addition of Rs. 18,75,00,373/- on account of deemed dividend u/s 2(22)(e) on the ground that the said amount was transferred by M/s Orient Craft Ltd. (OCL) during the year under appeal to the appellant, through M/s Super Connections P. Ltd. (SCPL), which in turn was given to M/s Olympus Realtors P Ltd . (ORPL) which in turn has been paid to M/s SKA Enterprises (SKAE) which in turn has been received by the appellantand thus, according to Ld. A.O. amount received by the appellant was deemed dividend assessable u/s 2(22)(e) of the Income Tax Act, 1961. Since it has been treated as taxable income in the hands of the appellant, hence the present appeal.

1).....

2) Without prejudice to above, it is submitted that in fact the impugned addition could not be made u/s 2(22)(e) as there was no 'loan' or 'advance'from M/s OCL to the appellant. According to Ld. A.O. also as mentioned in the impugned order, the loan or advance has been received by the appellant from M/s SKAE. That being so, where is the question of applying and invoking section 2(22)(e), which requires that the loan should be advanced by a closely held company. It goes without saying that M/s SKAE is not a company and

impugned loan has not been received by the appellant from M/s OCL. Therefore, impugned addition made does not stand to the test of law as explained above and it is thus requested that the addition made may please be deleted.

3) Without prejudice to above, it is submitted further that the amount was given by OCL to SCPL which is an independent company and that too during the course of business. It goes without saying that M/s SCPL is an independent assessee, which has been assessed to tax even in earlier years which is evident from the copies of assessment orders of SCPL for A.Y 2005-06 & 2008-09 which are enclosed at **PB 452-459.** Therefore when amount has been given by M/s OCL to M/s SCPL, where is the question of holding that the amount was given by OCL to the appellant instead, and where is the question of assessing that amount as deemed dividend in the hands of the appellant Individual. Thus, action of Ld. AO in disregarding the corporate character of SCPL is misplaced on facts and in law and so is the action of making impugned addition in the hands of the appellant. It is thus requested that the addition under appeal may please be deleted for the above stated submissions too.

4) Without prejudice to above, it is submitted that M/s ORPL was one of the partners in M/s SKAE and infused its capital and no loan or advance was given to M/s SKAE by ORPL. Appellant too is the partner in SKAE. Appellant withdrew the amount as partner of SKAE and thus, how could the amount received by the appellant from M/s SKAE be treated as loan given by M/s OCLso as to constitute deemed dividend in the hands of the appellant. In fact Ld. AO is going entity after entity and that too by disregarding the nature of payment made

by each entity/person to other. Ld. AO is disregarding the legal character of the entities also which is not permissible in law particularly when legal character of such entities have all along been accepted in their assessments. Thus, action of Ld. AO in making the impugned addition in the hands of the appellant as deemed dividend is neither here nor there and it is thus prayed that the addition made may please be deleted.

5) Without prejudice to above, it is submitted further that going by the logic of Ld. AO though denied vehemently but accepting for the sake of arguments, if at all there was any deemed dividend, it could be in the hands of M/s ORPL which received the amount first, and three Individuals who are the shareholders in M/s OCL for more than 10% were also having substantial interest in M/s ORPL. Thus, from this standpoint also, there was no question of making impugned addition as deemed dividend in the hands of the appellant. It is therefore prayed that the same may please be deleted in view of the above submissions also.

6)Without prejudice to above, it is respectfully submitted that **PB 529**which is the ledger account of the appellant in the books of M/s SKAE shows that M/s SKAE received an amount Rs. 2,50,00,000 on 25.03.2013and therefore, to this extent in A.Y. 2014-15 deemed dividend amount should be reduced. **PB 531** is the copy of account of the assessee in the books of M/s SKAE for A.Y 2014-15.

Reliance is placed on the following:

Commissioner of Income Tax vs. Francis Wacziarg High court of Delhi (2013) 353 ITR 0187: (2011) 203 taxman 0391 asst. Year 2003-04

Dividend—Deemed dividend under s. 2(22)(e)—Credit balance in accounts—Confirmations and copies of accounts showing that the amounts appearing in the accounts were in fact receipts due to assessee, in his normal course of business dealings with the companies—Such receipts from these companies cannot be treated as loans and advances—AO was not justified in treating these receipts as deemed dividend under s. 2(22)(e)

7) The above, factual and legal situations were explained during the course of assessment proceeding also and are explained before your goods also with the help of following pleadings and evidences:-

PB 158-161 are copies of submissions made to Ld. AO

PB 529,531,535A & 535B is the copy of account of the appellant in the books of SKAE

Therefore viewed from any angle the impugned addition made is liable to be deleted and it is prayed that the same may please be deleted.

<u>However, certain adverse observations have been made by Ld. AO which are met as under:-</u>

a) Ld. AO has mentioned that perusal of books of accounts of OCL, SCPL, ORPL & SKAE seized during search revealed that OCL is routing huge amount of funds through some fictitious entities of the group and finally to the shareholders of OCL, appellant being one of the three shareholders.

In reply, it is submitted that first of all there is no fictitious entities as alleged. All the entities are artificial juridical persons, which have been assessed to tax in all these years as is evident from copies of their income tax assessment orders of earlier years enclosed at **PB 354-411, 452-459**. Thus, this allegation of there being any fictitious entity is absolutely denied and is contrary to material on record. Second, the fact of the payments made by these entities to other entities/persons are part of audited accounts and returns of income and thus it is wrong to say that it was noticed from the books of accounts of these entities seized during search that payments were being made by these entities to other entities/persons. Thus, this averment/finding by Ld. AO is only to show that but for the search this could not come to be known to him. But as submitted above, this finding is not correct.

b) Ld. AO has mentioned that statements of Mr. Dhanda and Mr. Nagpal directors of SCPL revealed during search that SCPL is paper company as books are maintained at the premises of OCL and so on and so forth.

In reply, it is submitted that SCPL is a company registered with ROC and is assessed to tax for number of years as is evident from its income tax assessment orders of earlier years enclosed at **PB 452-459.** . Merely because the shareholders of SCPL were employees of OCL and books were being maintained at the premises of OCL do not make SCPL as paper-company. Operational conveniences of these two shareholders of SCPL to maintain books at the premises of OCL may have led this but merely for that reason, SCPL cannot become paper company to the utter disregard to the past assessment orders and

scale of business conducted by SCPL. Attempt of Ld. AO to show closeness of the shareholders of SCPL with OCL group does not make substantive SCPL to turn to a paper company. Other allegations of Ld. AO qua SCPL too stems from the colored vision of Ld. AO. Even statements if carefully gone through do not support what Ld. AO has inferred arbitrarily.

c) Ld. AO has mentioned that advance or loan to SCPL was just to by pass the provision of section 2(22)(e) and money trail clearly established that the ultimate beneficiaries are the shareholders of OCL or companies/firms in which they have substantial interest.

In reply, it is submitted that advance was given by OCL to SCPL as advance against trade and thus inference that provision of section 2(22)(e) was sought to be bye passed is misconceived. Moreover, when the case of Ld. AO is that beneficiaries are company (ORPL)/firm (SKAE) first, deemed dividend could be taxed in the hands of such company/firm and not in the hands of the appellant. This is being submitted on without prejudice basis without conceding anything.

d) Ld. AO has relied upon the decision **CIT vs. Mukundray K Shah 209 CTR 97 (SC)** but the facts of that case were different and hence the same could not be applied here.

Thus, all the objections of Ld. AO may please be rejected and the case of the appellant may please be accepted in view of the above submissions

56. According to the case of revenue, there was loan or advance from M/s Orient Craft Ltd. (OCL) to the appellant, whereas the case of the

assessee was that there was no loan or advance received by the assessee, much less from M/s Orient Craft Ltd. and further, for that matter, no loan was received by the assessee from M/s Olympus Realtors P. Ltd. and hence there was no question of any deemed dividend to be assessed in his hands.

57. We have gone through the facts of the present case and find that, there is no loan or advance received by the assessee from M/s Orient Crafts Ltd. It is seen that even as per the case of the A.O. made in the assessment order, the loan or advance has been received by the assessee from M/s SKA Enterprises which was a partnership firm. Therefore, as per the admitted case of the A.O., such loan or advance having not been received by the assessee from a closely held company i.e. from Orient Craft Ltd. or Olympus Realters P Ltd. cannot be treated as dividend u/s 2(22)(e), since the first ingredient of section 2(22)(e) itself is not met in this case. As per the case of made out by Ld. A.O. in the assessment order, amount in question has not been received by the assessee from M/s Orient Craft Ltd. Rather it is seen that CIT(A) has recorded a finding at para 7.3.2 of the appeal order that Orient Craft P Ltd. had given advance of Rs. 28,84,90,373/- to M/s Super Connection India P. Ltd. It is important to submit that there is no appeal filed by the revenue against such finding of fact recorded by CIT (A).

58. Moreover, it is also seen that advance was given by M/s Orient Craft Ltd. to M/s Super Connection India P. Ltd. The said M/s Super Connection India P Ltd. has been held by us as an independent and unrelated company in our order for A.Y. 2010-11 to A.Y. 2013-14 passed separately in ITA No. 6356 to 6359/Del/2018 in the case of Mr. Sudhir Dhingra. Therefore, when M/s Super Connection India P. Ltd. which was

an independent assessee and has been assessed to tax and when advance has admittedly been given by M/s Orient Craft Ltd. to M/s Super Connection India P. Ltd., how can it be assumed or held that the assessee received any loans and advance from M/s Orient Craft Ltd. After all the corporate identity and character & an independent status as an independent assessee and that too unrelated to the assessee that M/s Super Connection India P. Ltd. enjoys, such status cannot be permitted to be breached, more so when M/s Super Connection India P. Ltd. is an independent assessee, in which there was no control of any of the shareholders of M/s Orient Craft Ltd. Therefore, there was no question of treating any amount as deemed dividend u/s 2(22(e) in the hands of the assessee in the background of the facts of the present case and in the light of the finding recorded by the first appellate authority as to the nature of the advance given by Orient Craft Ltd. to Super Connection India P Ltd. It is also noticed that CIT(A) has recorded a finding in para 7.3.2 (b) of the appeal order against which revenue is not in appeal that during the year under consideration capital advance amounting to Rs. 26,24,50,000/- was given by M/s Super Connections India P. Ltd. to M/s Olympus Realtors P. Ltd. Therefore, when there was specific finding of the nature by way of capital advance given by M/s Super Connection India P. Ltd. to M/s Olympus Realtors P. Ltd. as capital advance, where was the question of saying in the same breath that assessee received the advance and that too from M/s Orient Craft P. Ltd. & where was the question of applying the deeming fiction of section 2(22)(e) in the hands of the assessee. Therefore, for this reason also we are unable to uphold the order of Ld. CIT(A) in the case of the assessee in so far it relates to the confirmation of addition made under section 2(22)(e) of the Income

Tax Act. Going further on the next argument on behalf of the assessee, it is noticed that, there was no loan or advance given by M/s Olympus Realtors P. Ltd. to M/s SKA Enterprises. Assessee was also partner in M/s SKA Enterprises and withdrew the amount as partner. In our considered opinion, such amount so withdrawn by the assessee in the capacity of the partner of the said firm cannot be covered within the meaning of deemed dividend under section 2(22)(e) of the Income Tax Act. Even CIT(A) in para 7.3.2(c) of the appeal order has recorded a factual finding that M/s Olympus Realtors P. Ltd. has made investment in M/s SKA Enterprises amounting to Rs. 35,21,49,597/-. Against this finding of fact, no appeal has been filed by the revenue nor has any rebuttal been made on behalf of the revenue. There is material difference between Investment and Advance. There is no attraction of section 2(22)(e) on investment. Therefore, when investment was made by M/s Olympus Realtors P. Ltd. in M/s SKA Enterprises and assessee as partner has withdrawn amount from the partnership firm namely M/s SKA Enterprises in which assessee was one of the partners, there was no question of treating such amount received by the assessee as loan or advance that too from M/s Orient Craft Ltd. and / or from M/s Olympus Realtors P. Ltd. A.O. has disregarded the nature of payment made by each entity to the other entity regarding which the factual findings recorded by CIT(A) in his order have attained finality in the absence of any rebuttal or any appeal preferred by Revenue. Ld. AO has disregarded also the effect of legal character of all the entities more so when there was nothing adverse found in the assessments of these entities. We have already mentioned earlier that section 2(22)(e) creates fiction which operates very harshly and settled principle of law that provisions of law

of such a nature are required to be construed strictly, more so in the light of factual findings as to the nature of these payments made by one entity to another recorded by CIT(A) against which revenue has not filed any appeal nor has made any rebuttal during the course of hearing. Therefore, there is no question of treating the amount withdrawn by the assessee as partner from the partnership firm namely M/s SKA Enterprises in the nature of loan and advance and treat it as deemed dividend under section 2(22)(e) of the Income Tax Act. None of the ingredients of section 2(22)(e) stand satisfied in the instant case. We have also taken ourselves to that part of written submissions also reproduced above where rebuttal of each and every adverse observation made by the assessing officer has been made by the assessee and we are in agreement with the assessee on all those rebuttals.

59. Ld. CIT (A) despite recording a clear cut finding as to the nature of payments made by one entity to another in para 7.3.2 of the appeal order has committed grave error in concluding without any basis, material or evidence that M/s Super Connections India P. Ltd., M/s Olympus Realtors P. Ltd. and M/s SKA Enterprises were used as conduits. Therefore, we are unable to subscribe to this bald conclusion of CIT(A). We have on identical facts allowed the appeal of other assessee namely Mr. Sudhir Dhingra in ITA no. 5721/Del/2018. We thus hold that the additions sustained on account of deemed dividend u/s 2(22)(e) were sustained by CIT(A) contrary to the factual position and contrary to the law contained in this regard. Hence, we reverse the Order of CIT(A) and delete the addition made u/s 2(22)(e). In the result, appeal of the assessee is allowed and entire addition of Rs. 18,75,00,373 is deleted.

Mr. Anoop Thatai

A.Y. 2015-16

60. This is Revenue's appeal bearing ITA No. 6362/Del/2018 in the case of Mr. Anoop Thatai for A.Y. 2015-16.Revenue has raised following grounds of appeal which are reproduced as under:-

(i) Whether on the facts and in the circumstances of the case the Ld.CIT(A) failed to appreciate that the Hon'ble Supreme Court in the case of CIT v. Mukundray K. Shah, 290 ITR 433 under identical circumstances has upheld the addition of deemed dividend u/s 2(22)(e) made by the AO.

(ii) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in concluding that the case of appellant(s) is neither covered by the judgment of the Hon'ble Supreme Court nor the definition of 'deemed dividend' u/s 2(22)(e) of the Act.

(iii) Whether on the facts and in the circumstances of the case, the Ld. CITA) has erred in concluding that the accumulated profits of M/s Olympus Realtors Pvt. Ltd. shall be taken into consideration for the purpose of determining deemed dividend despite the provisions of deemed dividend u/s 2(22)(e) providing that the accumulated profits of the company advancing the sum by way of loan or advance to the shareholder shall be taken into consideration.

(iv) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in working out and taking into consideration the accumulated profit of the company M/s Olympus Realtors Pvt. Ltd. at nil instead of that of M/s Orient Craft Ltd. for the purpose of application of section 2(22)(e).

(v) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in concluding that there has been no fund flow

from M/s Orient Craft Limited during the year under consideration which is contrary to the records as on perusal of ledger account of M/s Super Connection India Pvt. Ltd. in the books of M/s Orient Craft Ltd., it is seen that during the year under consideration, there has been fund flow of more than Rs. 50crore from M/s Orient Craft Ltd. to M/s Super Connection India Pvt. Ltd.

(vi) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has failed to appreciate that such advances/loans which have been routed through different entities to the assessee with the only intention to subvert the provisions of sections 2(22)(e) would constitute deemed dividend.

(vii) The appellant craves to add, amend, alter or modify any grounds of appeal at the time of hearing.

61. In this case, Assessing Officer has made addition of Rs. 13,45,00,000/- on account of deemed dividend u/s 2(22)(e) of the Income Tax Act, 1961 on the ground that there was flow of funds from M/s Orient Craft Ltd. to M/s Super Connections India P. Ltd. and then to M/s Olympus Realtors P. Ltd. and then M/s SKA Enterprises. Therefore, A.O. treated the said amount received by the assessee from M/s SKA Enterprises as deemed dividend u/s 2(22)(e). Assessing Officer's Order in this regard is identical to one passed by him for earlier assessment years i.e. 2011-12, 2012-13 and 2013-14.

62. In first appeal preferred by the assessee before Commissioner of Income Tax (Appeals)-3 Gurgaon (hereinafter called as 'CIT(A)' also), CIT(A) in **para 3.5 of the appeal order** held that dividend u/s 2(22)(e) consists inter-alia as the last limb *".....any payment by any such company on behalf, or for the individual benefit of any such shareholder to the extent to which the company neither case possesses accumulated*

profits" . According to CIT (A), case of the appellant is squarely covered by this limb as it is payment by a company for the individual benefits of any such shareholder to the extent which the company possesses accumulated profits. According to CIT(A), payment has been received by the assessee from M/s SKA Enterprises, which in turn has received the payment from company in which public are not substantial interested and assessee is holding not less than 10% voting power. CIT(A) recorded that M/s SKA Enterprises received payments from under:-

M/s Olympus Realtors P. Ltd. Rs. 39,90,40,000/-

63. However, CIT(A) recorded that payment by a company with reference to deemed dividend has to be restricted to accumulated profits and according to CIT(A) accumulated profits of M/s Olympus Realtors P. Ltd. as on 31.03.2014 was Rs. 6,83,78,062/- and as on 31.3.2015 was Rs. 6,06,80,771/-, and thus there was no fresh accumulated profits. Therefore total payment of Rs. 13,45,00,000/- from M/s SKA Enterprises but there was no increase in accumulated profits. It was also held by CIT(A) in para 3.3 that there has been no fund flow from M/s Orient Craft Ltd. Accordingly, CIT(A) deleted the additions in the hands of the three shareholders namely Sh. Sudhir Dhingra and Sh. Anoop Thatai and Sh. Krishan Kant Kohli.

64. Ld. CIT(DR) has relied upon the assessment order and assailed the order of the first appellate authority based on the arguments mentioned in the grounds of appeal, whereas Ld. Counsel for the assessee relied upon the written submissions and paper book filed and contended that the addition deserved to be deleted and was rightly deleted by CIT(A).

DECISION

65. We find that the findings as well as the facts are exactly same as discussed above in the appeal of the revenue in the case of Mr. Sudhir Dhingra for the same assessment year and therefore our finding will apply mutatis mutandis in this appeal also. However, for sake of completeness, the written submissions for this year filed by the assessee are reproduced as under:-

> **GROUND NO. 2 to 5** Ld. A.O. made addition of Rs. 13,45,00,000/- on account of deemed dividend u/s 2(22)(e) on the ground that the said amount was transferred by M/s Orient Craft Ltd. (OCL) during the year under appeal to the appellant, through M/s Super Connections P. Ltd. (SCPL), which in turn was given to M/s Olympus Realtors P Ltd . (ORPL) which in turn has been paid to M/s SKA Enterprises (SKAE) which in turn has been received by the appellantand thus, according to Ld. A.O. amount received by the appellant was deemed dividend assessable u/s 2(22)(e) of the Income Tax Act, 1961. Since it has been treated as taxable income in the hands of the appellant, hence the present appeal.
>
> **1)**.....
>
> **2)** Without prejudice to above, it is submitted that in fact the impugned addition could not be made u/s 2(22)(e) as there was no 'loan' or 'advance'from M/s OCL to the appellant. According to Ld. A.O. also as mentioned in the impugned order, the loan or advance has been received by the appellant from M/s SKAE. That being so, where is the question of applying and invoking section 2(22)(e), which requires that the loan should be advanced by a closely held company.

It goes without saying that M/s SKAE is not a company and impugned loan has not been received by the appellant from M/s OCL. Therefore, impugned addition made does not stand to the test of law as explained above and it is thus requested that the addition made may please be deleted.

3) Without prejudice to above, it is submitted further that the amount was given by OCL to SCPL which is an independent company and that too during the course of business. It goes without saying that M/s SCPL is an independent assessee, which has been assessed to tax even in earlier years which is evident from the copies of assessment orders of SCPL for A.Y 2005-06 & 2008-09 which are enclosed at **PB 452-459.** Therefore when amount has been given by M/s OCL to M/s SCPL, where is the question of holding that the amount was given by OCL to the appellant instead, and where is the question of assessing that amount as deemed dividend in the hands of the appellant Individual. Thus, action of Ld. AO in disregarding the corporate character of SCPL is misplaced on facts and in law and so is the action of making impugned addition in the hands of the appellant. It is thus requested that the addition under appeal may please be deleted for the above stated submissions too.

4) Without prejudice to above, it is submitted that M/s ORPL was one of the partners in M/s SKAE and infused its capital and no loan or advance was given to M/s SKAE by ORPL. Appellant too is the partner in SKAE. Appellant withdrew the amount as partner of SKAE and thus, how could the amount received by the appellant from M/s SKAE be treated as loan given by M/s OCLso as to constitute deemed dividend in the hands of the appellant. In fact Ld. AO is going entity

after entity and that too by disregarding the nature of payment made by each entity/person to other. Ld. AO is disregarding the legal character of the entities also which is not permissible in law particularly when legal character of such entities have all along been accepted in their assessments. Thus, action of Ld. AO in making the impugned addition in the hands of the appellant as deemed dividend is neither here nor there and it is thus prayed that the addition made may please be deleted.

5) Without prejudice to above, it is submitted further that going by the logic of Ld. AO though denied vehemently but accepting for the sake of arguments, if at all there was any deemed dividend, it could be in the hands of M/s ORPL which received the amount first, and three Individuals who are the shareholders in M/s OCL for more than 10% were also having substantial interest in M/s ORPL. Thus, from this standpoint also, there was no question of making impugned addition as deemed dividend in the hands of the appellant. It is therefore prayed that the same may please be deleted in view of the above submissions also.

6) Without prejudice to above, it is respectfully submitted that **PB 533** which is the ledger account of the appellant in the books of M/s SKAE shows that M/s SKAE received an amount Rs. 2,50,00,000 and therefore, to this extent the amount of deemed dividend should be reduced.

Reliance is placed on the following:

Commissioner of Income Tax vs. Francis Wacziarg High court of Delhi (2013) 353 ITR 0187: (2011) 203 taxman 0391 asst. Year 2003-04

Dividend—Deemed dividend under s. 2(22)(e)—Credit balance in accounts—Confirmations and copies of accounts showing that the amounts appearing in the accounts were in fact receipts due to assessee, in his normal course of business dealings with the companies—Such receipts from these companies cannot be treated as loans and advances—AO was not justified in treating these receipts as deemed dividend under s. 2(22)(e)

6) The above, factual and legal situations were explained during the course of assessment proceeding also and are explained before your goods also with the help of following pleadings and evidences:-

PB 158-161 are copies of submissions made to Ld. AO

PB 533,535B is the copy of account of the appellant in the books of SKAE

Therefore viewed from any angle the impugned addition made is liable to be deleted and it is prayed that the same may please be deleted.

<u>However, certain adverse observations have been made by Ld. AO which are met as under:-</u>

a) Ld. AO has mentioned that perusal of books of accounts of OCL, SCPL, ORPL & SKAE seized during search revealed that OCL is routing huge amount of funds through some fictitious entities of the group and finally to the shareholders of OCL, appellant being one of the three shareholders.

In reply, it is submitted that first of all there is no fictitious entities as alleged. All the entities are artificial juridical persons, which have been assessed to tax in all these years as is evident from copies of their income tax assessment orders of earlier years enclosed at **PB 354-411,452-459,** Thus, this allegation of there being any fictitious entity is absolutely denied and is contrary to material on record. Second, the fact of the payments made by these entities to other entities/persons are part of audited accounts and returns of income and thus it is wrong to say that it was noticed from the books of accounts of these entities seized during search that payments were being made by these entities to other entities/persons. Thus, this averment/finding by Ld. AO is only to show that but for the search this could not come to be known to him. But as submitted above, this finding is not correct.

b) Ld. AO has mentioned that statements of Mr. Dhanda and Mr. Nagpal directors of SCPL revealed during search that SCPL is paper company as books are maintained at the premises of OCL and so on and so forth.

In reply, it is submitted that SCPL is a company registered with ROC and is assessed to tax for number of years as is evident from its income tax assessment orders of earlier years enclosed at **PB 452-459**. Merely because the shareholders of SCPL were employees of OCL and books were being maintained at the premises of OCL do not make SCPL as paper-company. Operational conveniences of these two shareholders of SCPL to maintain books at the premises of OCL may have led this but merely for that reason, SCPL cannot become paper company to the utter disregard to the past assessment orders and

scale of business conducted by SCPL. Attempt of Ld. AO to show closeness of the shareholders of SCPL with OCL group does not make substantive SCPL to turn to a paper company. Other allegations of Ld. AO qua SCPL too stems from the colored vision of Ld. AO. Even statements if carefully gone through do not support what Ld. AO has inferred arbitrarily.

c) Ld. AO has mentioned that advance or loan to SCPL was just to by pass the provision of section 2(22)(e) and money trail clearly established that the ultimate beneficiaries are the shareholders of OCL or companies/firms in which they have substantial interest.

In reply, it is submitted that advance was given by OCL to SCPL as advance against trade and thus inference that provision of section 2(22)(e) was sought to be bye passed is misconceived. Moreover, when the case of Ld. AO is that beneficiaries are company (ORPL)/firm (SKAE) first, deemed dividend could be taxed in the hands of such company/firm and not in the hands of the appellant. This is being submitted on without prejudice basis without conceding anything.

d) Ld. AO has relied upon the decision **CIT vs. Mukundray K Shah 209 CTR 97 (SC)** but the facts of that case were different and hence the same could not be applied here.

Thus, all the objections of Ld. AO may please be rejected and the case of the appellant may please be accepted in view of the above submissions

66. Thus, according to the case of revenue, there was loan or advance from M/s Orient Craft Ltd. (OCL) to the appellant, whereas the case of

the assessee was that there was no loan or advance received by the assessee, much less from M/s Orient Craft Ltd. and further, for that matter, no loan was received by the assessee from M/s Olympus Realtors P. Ltd. and hence there was no question of any deemed dividend to be assessed in his hands.

67. Here again in this year's facts also we find that, there is no loan or advance received by the assessee from M/s Orient Crafts Ltd. It is seen that even as per the case of the A.O. made in the assessment order, the loan or advance has been received by the assessee from M/s SKA Enterprises which was a partnership firm and where the assessee was one of the partners. Therefore, as per the admitted case of the A.O., such loan or advance having not been received by the assessee from a closely held company, i.e. from Orient Craft Ltd. or Olympus Realters P Ltd. cannot be treated as dividend u/s 2(22)(e), since the first ingredient of section 2(22)(e) itself is not met in this case. As per the case of made out by Ld. A.O. in the assessment order, amount in question has not been received by the assessee from M/s Orient Craft Ltd. Rather it is seen that CIT (A) has recorded a finding at para 7.1.2 (a) of the appeal order that Orient Craft P Ltd. had not given advance to M/s Super Connection India P. Ltd during the year under appeal. It is important to submit that there is no appeal filed by the revenue against such finding of fact recorded by CIT (A). As noted above several times that advance was not given by M/s Orient Craft Ltd. to M/s Super Connection India P. Ltd during the year under appeal. In any case, the said M/s Super Connection India P Ltd. has been held by us as an independent and unrelated company in our order for A.Y. 2010-11 to A.Y. 2013-14 passed separately in ITA No. 6356 to 6359/Del/2018 in the case of Mr. Sudhir Dhingra. Therefore, when

M/s Super Connection India P. Ltd. which was an independent assessee and has been assessed to tax and when no advance has admittedly been given by M/s Orient Craft Ltd. to M/s Super Connection India P. Ltd. during the year under appeal, how can it be assumed or held that the assessee received any loans and advance from M/s Orient Craft Ltd. After all the corporate identity and character & an independent status as an independent assessee and that too unrelated to the assessee that M/s Super Connection India P. Ltd. enjoys, such status cannot be permitted to be breached, more so when M/s Super Connection India P. Ltd. is an independent assessee, in which there was no control of any of the shareholders of M/s Orient Craft Ltd. Therefore, there was no question of treating any amount as deemed dividend u/s 2(22(e) in the hands of the assessee in the background of the facts of the present case and in the light of the finding recorded by the first appellate authority as to the nature of the advance given by Orient Craft Ltd. to Super Connection India P Ltd. It is also noticed that CIT(A) has recorded a finding in para 7.1.2 (b) of the appeal order against which revenue is not in appeal that during the year under consideration that no fresh advance was given by M/s Super Connections India P. Ltd. to M/s Olympus Realtors P. Ltd during the year under appeal. Therefore, when there was specific finding that no advance was given by M/s Super Connection India P. Ltd. to M/s Olympus Realtors P. Ltd. during the year under appeal, where was the question of saying in the same breath that assessee received the advance and that too from M/s Orient Craft P. Ltd. and/or Olympus Realters P Ltd.& where was the question of applying the deeming fiction of section 2(22)(e) in the hands of the assessee. Therefore, for this reason also we uphold the order of Ld. CIT (A) in the case of the assessee. Further,

there was no loan or advance given by M/s Olympus Realtors P. Ltd. to M/s SKA Enterprises. Assessee was also partner in M/s SKA Enterprises and withdrew the amount as partner. In our considered opinion, such amount so withdrawn by the assessee in the capacity of the partner of the said firm cannot be covered within the meaning of deemed dividend under section 2(22)(e) of the Income Tax Act. Even CIT(A) in para 7.1.2(c) of the appeal order has recorded a factual finding that M/s Olympus Realtors P. Ltd. has made investment in M/s SKA Enterprises amounting to Rs. 39,90,40,000/-. Therefore, when investment was made by M/s Olympus Realtors P. Ltd. in M/s SKA Enterprises and assessee as partner has withdrawn amount from the partnership firm namely M/s SKA Enterprises in which assessee was one of the partners, there was no question of treating such amount received by the assessee as loan or advance that too from M/s Orient Craft Ltd. and / or from M/s Olympus Realtors P. Ltd. A.O. has disregarded the nature of payment made by each entity to the other entity regarding which the factual findings recorded by CIT(A) in his order have attained finality in the absence of any rebuttal or any appeal preferred by Revenue. Ld. AO has disregarded also the effect of legal character of all the entities more so when there was nothing adverse found in the assessments of these entities. Therefore, we hold that there is no question of treating the amount withdrawn by the assessee as partner from the partnership firm namely M/s SKA Enterprises in the nature of loan and advance and treat it as deemed dividend under section 2(22)(e) of the Income Tax Act. None of the ingredients of section 2(22)(e) stand satisfied in the instant case.

68. We thus hold that the addition deleted on account of deemed dividend u/s 2(22)(e) by CIT(A) was rightly deleted. Hence, we uphold the

Order of CIT(A) who deleted the addition made u/s 2(22)(e). Thus, the entire addition of Rs. 13,45,00,000/- made by the assessing officer stands deleted. In the result, appeal of the revenue is dismissed.

69. In the result all the appeals filed by the revenue are dismissed and assessee's appeals are allowed.

Order pronounced in the open court on 13.01.2022

Sd/-	**sd/-**
(B.R.R. KUMAR)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

NEHA/TS

Date:- 13.01.2022

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI