आयकर अपीलीय अधिकरण, कोलकाता पीठ 'सी', कोलकाता
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA

Before Shri Sanjay Garg, Judicial Member and Rajesh Kumar, Accountant Member

I.T.(SS)A Nos.108,109&585/Kol/2022
Assessment years: 2010-11, 2011-12 & 2012-13

DCIT, CC-3(2), Kolkata.....……Appellant

vs.

M/s Forum Projects Pvt. Ltd.....…….....……..…..…..Respondent
4/1, Red Cross Place,
Dalhousie,
Kolkata-1.
[PAN: AADCS7575E]

Appearances by:
Shri Subhrajyoti Bhattacharjee, CIT(DR), appeared on behalf of the appellant.
Shri Soumitra Choudhury, Advocate, appeared on behalf of the Respondent.

Date of concluding the hearing : March 30, 2023
Date of pronouncing the order : June 05, 2023

आदेश / ORDER

संजय गर्ग, न्यायिक सदस्य द्वारा / Per Sanjay Garg, Judicial Member:

The captioned appeals have been preferred by the revenue against the separate orders dated 20.05.2022, 08.06.2022 & 25.11.2014 respectively of the Commissioner of Income Tax (Appeals)-21, Kolkata (hereinafter referred to as the 'CIT(A)') passed u/s 250 of the Income Tax Act (hereinafter referred to as the 'Act') contesting therein the confirmation of additions made by the Assessing Officer (in short 'the A.O) in the assessments carried out u/s 153A of the Act. Since the facts and issues involved in all these appeals are identical, hence these have been heard together and are being disposed of by this common order. First we take Revenue's appeal in ITA No.108/Kol/2022 for assessment year 2010-11.

2. **ITA 108/Kol/2022** – The Revenue in this appeal has taken the following grounds of appeal:

> *"1. That on the facts and circumstances of the case and in law, the ld. CIT(A) has erred in deleting the addition on account of deemed dividend u/s 2(22)(e) of the Income Tax Act 1961.*
>
> *2. That on the facts and circumstances of the case and in law, the ld. CIT(A) has erred in deleting the addition u/s 14A of the I.T. Act, 1961.*
>
> *3. That on the facts and circumstances of the case and in law, the ld. CIT(A) has erred in deleting the addition u/s 24(i) of the I.T. Act 1961.*
>
> *4. That the Revenue reserves its right to substantiate, modify, delete, supplement and/or alter the grounds at any time of the appeal proceedings."*

3. Ground No.1 – Vide this ground, the revenue has contested the action of the CIT(A) in deleting the addition made by the Assessing Officer on account of deemed dividend u/s 2(22)(e) of the Act.

The brief facts of the case are that the assessee company has been in the business of development and construction of real estate projects.

During the assessment proceedings, the Assessing Officer noted that the assessee had received substantial advances from various parties against which interest was paid after due deduction of tax at source (TDS). One of the entities namely Safari Retreats Pvt. Ltd. from whom an advance of Rs17,15,00,000/- was received was a group company of the assessee. The Assessing Officer noted that the assessee had substantial share holding in the said company. The Assessing Officer further noted that the assessee had also received advance of Rs.44,62,00,000/- from its sister concern "Forum Venture Pvt. Ltd.". Since the assessee was having substantial interest in the said companies, therefore, the Assessing Officer held that the provisions of section 2(22)(e) were applicable in respect of aforesaid two companies. He, therefore, added the aforesaid

advances received by the assessee company as deemed dividend of the assessee company.

The ld. CIT(A) however deleted the addition so made by the Assessing Officer. The Revenue thus has come in appeal before us.

We have heard the rival contentions and gone through the record. The ld. CIT(A) in this case has deleted the addition so made by the Assessing Officer observing that the aforesaid advances received by the assessee from the aforesaid two concerns were purely business transactions. He has noted that M/s Safari Retreats Pvt. Ltd. had given the loan in the regular course of business, where the lending of money was the substantial part of the business of the company. The assessee had duly paid interest @12% per annum on the loan amount which was reasonably high commercial rate of interest. The ld. CIT(A) has further observed that in the case of advances from "Forum Ventures Pvt. Ltd", the said advances were received pursuant to an agreement entered into with the said concern of the assessee for purchasing 40,000 sq.ft. in the form of six flats for a real estate project. This was a pure business deal. Since, the project did not mature, therefore, the agreement was cancelled by an exit agreement dated 29.01.2010 and the entire amount was refunded by the assessee to the said Forum Venture Pvt. Ltd. The ld. CIT(A) therefore held that both the transactions with the aforesaid concerns were business and commercial arrangements duly supported not only by agreements but also by the conduct of the parties involved. The ld. CIT(A) has further observed that it was not the case of the Assessing Officer that the said amounts were given gratuitously to the assessee only by virtue of its company beneficial shareholder. The relevant observations made by the CIT(A) are reproduced as under:

"Ground No.2 and 3:

These grounds, being interrelated, are being disposed as one. Having gone through the material on record I find that the facts in brief in this ground are that the AO has observed that the appellant company was in the business of development and construction of real estate projects. During the year, the AO has noted that the appellant received substantial advances from various parties against which interest was due paid after due deduction of TDS.

One of the entities from whom such advance was received was Safari Retreats Pvt. Ltd, amounting to Rs 17,15,00,000/-, which was, as noted by the AO, a group company. The AO, in another place of his order has also called these advances loans. Be that as it may, it is undisputed that during the impugned period, the other conditions applicable for inviting the mischief of section 2(22)e were undisputedly satisfied including the percentage shareholding required as well as the presence of accumulated profits. The AO did not accept the appellant's submission that these moneys were advanced out of commercial expediency, and that interest was duly paid upon them and that the agency advancing the said amounts was in the business of making loans and advances. For this last argument, the appellant had pointed out to the AO that the entire capital of the lending company, Safari Resorts Pvt Ltd, had been used in the following manner:

Fixed assets: 14.76 crore
Fixed deposits: 10.99 crore
Loans and advances: 17.44 crore

The appellant had stated that these moneys had been given in the normal course of business of the lender.

The AO did not accept these contentions and treated these as loans within the meaning of as section 2(22)e of the Act and treating them as deemed dividend, added back this amount the hands of the appellant.

In appeal the appellant has stated that in the present year the appellant company had taken loan of Rs.17,15,00,000/- from Safari Retreat Pvt. Ltd and had paid interest amounting to Rs.32,70,247/- upon this loan. He further stated that M/s. Safari Retreat Pvt. Ltd had given this loan in the ordinary course of business where the lending of money is the substantial part of the business of the company. That the main object, clause of the company constitute giving of loan.

I find that the AO has ignored the main object of introduction of section 2(22)e. He has not taken cognisance of the fact that huge amounts of interest had been paid against the said loans by the appellant company against which TDS had duly been deducted. This fact itself is enough to cast shadow upon the applicability of section 2(22)e of the Act. In this

context, the case of Pradip Kumar Malhotra vs. CIT reported in 338 ITR P-538(Cal), is very pertinent. In this case it was held by the Hon'ble court that,

"The phrase 'by way of advance or loan appearing to sub-clause (e) of section 2(22) must be construed to mean those advances or loans which à shareholder enjoys for simply on account of being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than 10 per cent of the voting power, but if such loan r advance is given to such share holder as a consequence of any further consideration which is beneficial to the company received from such a shareholder, in such case, such advance or loan cannot be said to be a deemed dividend within the meaning of the Act. Thus, for gratuitous loan or advance given by a company to those classes of shareholders would come within the purview of section 2(22) but not to the cases where the loan or advance is given in return to an advantage conferred upon the company by such shareholder."

I find that in the instant case the loan was not a gratuitous loan or advance but it was given in return to an advantage conferred upon the company by such share holders. This advantage is accepted by the AO in the form of huge payments of interest upon such loans. These loans/advances were given against an interest rate of 12% per annum, which is a reasonably high commercial rate of interest. The fact that these loans were given in the ordinary course of business of the loan advancing company just adds further Credence to the already accepted fact that this loan was not gratuitous and given only by Virtue of the fact that the appellant held a beneficial interest in the loan advancing company. The AO has not suspected that these loans were in any way bogus or that the interest charged- which would constitute the consideration in this was not at an arms length. As per the decision of the Hon'ble Jurisdictional High Court, mentioned above, the provisions of section 2(22)e are not attracted in cases where an advantage is conferred upon the entity that has advanced the loan; This is squarely applicable to the facts as they stand in this case, where, as discussed earlier, an advantage has been conferred in the form of interest, upon the company that had advanced the loan.

I further find that the Hon'ble jurisdictional ITAT, Kolkata Bench in the case of Smt. Sangita Jain [lTAT No. : 1817/K/2009] for the assessment year 2006-07 has discussed this question at length. It has held that

"We have heard the arguments of both the sides and also perused the relevant material available on record. One of the main contentions raised by the ld. counsel for the assessee at the time of hearing before us is that the loan in question treated as deemed dividend under Section 2(22)(e) by the authorities below was taken by the assessee from M/s. Surya

Business Pvt. Limited on interest and since the said Company was compensated by way of Interest paid by the assessee on loan, the assessee in real sense did not derive any benefit from the funds of the Company so as to attract the provisions of section 2(22)(e). Although the ld. D.R. has vehemently opposed this contention of the ld. counsel for the assessee by submitting that the payment of interest alone cannot be considered from the benefit angle as envisaged under section 2(22)(e), it is observed that the judicial pronouncements cited by the ld. Counsel for the assessee clearly support the case of the assessee.

6. In the case of Pradip Kumar Malhotra reported in 338 ITR 538 cited by the ld. counsel for the assesese, it was held by the Hon'ble Calcutta High Court that the phrase "by way of advance or loan" appearing in section 2(22)(e) must be construed to mean those advances or loans, which a shareholder enjoys for simply on account of being a partner, who is the beneficial owner of shares, but if such loan or advance is given to such shareholder as a consequence of any further consideration, which is beneficial to the Company, received from such shareholder, in such case, such advance or loan cannot be said to be deemed dividend within the meaning of the Act. It was held that gratuitous loan or advance given by a Company to those classes of shareholders thus would come within the purview of section 2/22)(e) but not the cases where the loan or advance is given in return to an advantage conferred upon the Company by such shareholder. In the case of ACIT -Vs. - M/s. Zenon (India) Pvt. Limited, a loan taken by the assessee was treated by the Assessing Officer as deemed dividend under section 2(22)(e), but the ld. CIT(Appeals) did not approve the action of the Assessing Officer after having noticed that interest at the rate of 9% per annum was paid by the assessee on such loan, which, according to him, was a consideration received from her shareholders, which was beneficial to the Company and the order of the ld. CIT(Appeals) giving relief to the assessee was upheld by the Tribunal vide its order dated 29.06.2015 passed in ITA No. 1124/KOL/2012 by relying on the decision of the Hon'ble Calcutta High Court in the case of Pradip Kumar Malhotra (supra). Keeping in view the said decision of the Hon'ble Calcutta High which has been followed by the Co-ordinate Bench of this Tribunal in the case of M/s. Zenon (India) Pvt. Limited (supra), we hold that the addition made by the Assessing Officer and sustained by the ld. CIT(Appeals) under section 2(22)(e) on account of loan received by the assessee from M/s. Surya Business Pvt. Ltd. on which consideration in the form of interest was paid by the assessee to the benefit of the Company is not sustainable. We, therefore, delete the same and allow Grounds No. 1 & 2 of the assessee's appeal."

There are a plethora of decisions that have explained this set of facts that section 2(22)e is attracted only when an advantage is conferred upon a shareholder only by virtue of his being a shareholder, gratuitously. When against such a loan or advance an advantage or benefit comes to the

lending company or when this advance or loan is in the nature of a commercial transaction, then the mischief of section 2(22)e is not attracted.

Respectfully relying upon the above decision and in view of the present facts as discussed above this addition of the AO based upon section 2(22)e cannot be sustained and stands deleted.

Loan from Forum Venture Pvt. Ltd.

The facts in this case are very similar to the above mentioned addition based upon deemed dividend. In this case also the appellant had received an amount of Rs 44,62,00,000/- from its sister concern - Forum Venture Pvt Ltd. The AO once again observed that all the conditions necessary to invite the mischief of section 2(22)e were satisfied. In this case however, the accumulated profits of the lending company amounted only Rs 84,85,793/-. To this amount, the AO added Rs 79,63,003/-, being the total surplus for the current year available as on the date of advance of this amount, thus coming to a total amount available for disbursement of Rs 1,64,68,796/.

Thereafter, rejecting all the explanations of the appellant, the AO made additions on account of treating this loan as deemed dividend, and made additions accordingly, restricting the actual quantum of addition - and therefore deemed dividend- to the amount of accumulated profits available for disbursement.

During appeal the appellant has stated that the AO completely ignored all the facts of the case. He has stated that in the present case M/s. Forum Venture Pvt. Ltd. entered into agreement with Ms. Forum Projects Pvt. Ltd. on 24.01.2010 for purchasing 40000 sq.ft. in the form of 6 flats at the square footage rate specified in the said agreement in a project 2 acres at Eastern Metropolitan Bye Pass adjacent to Science City. For this purpose the said company has given the said advance to M/s. Forum Projects Put Ltd. Therefore, this was a business deal between M/s. Forum Venture Pvt. Ltd. and M/s. Forum Projects Pvt. Ltd. The appellant has provided a copy of the said agreement dated 24.01.2010 contained in the paper book pages-75 to 79.

The appellant has gone on to state that after a few days M/s. Forum Venture Pvt. Ltd. thought it wise not to invest in M/s. Forum Projects Pvt. Ltd., therefore, the said agreement dated 24.01.2010 was cancelled by an exit agreement dated 29.01.2010. This agreement has also been provided by the appellant and is contained on pages- 71 to 74 in the paper book. The said amount of Rs.44 62,00,000/ was accordingly refunded by M/s. Forum Projects Pvt. Ltd. to M/s. Forum Venture Pvt. Ltd, as a measure of full and final settlement between the two parties.

The appellant as stated that the AO despite being fully aware of all the facts and ignoring the Fact this was a purely business Venture or which

all the facts were present on record, went ahead and treated this commercial advance as deemed dividend.

I have examined the entire material including the two agreements which form part of a larger set of agreements for a commercial venture. I find that the AO has not discussed this aspect of a commercial transaction at all and has concentrated upon only the technical addition of u/s. 2(22)e.

*The overall facts of this case are that this is a commercial transaction in the form of a duly executed contractual agreement, wherein two parties have entered into a legally binding agreement, and where an amount of money has been taken against a valid consideration. Or to look at it from another point of view. the agreement between the appellant and Forum Venture Pvt Ltd is a purchase agreement, wherein a property is to be purchased in the future (after development) and for this a consideration has been given to the appellant as an advance. To refer once again to the decision of the Hon'ble Calcutta High Court discussed earlier. In the case of Pradip Kumar Malhotra reported in 338 ITR 538 it was held by the Hon'ble Calcutta High Court that the phrase "**by way of advance or loan" appearing in section 2(22)(e) must be construed to mean those advances or loans, which a shareholder enjoys for simply on account of being a partner, who is the beneficial owner of shares, but if such loan or advance is given to such shareholder as a consequence of any further consideration, which is beneficial to the Company, received from such shareholder, in such case, such advance or loan cannot be said to be deemed dividend** within the meaning of the Act. It was held that gratuitous loan or advance given by a Company to those classes of shareholders thus would come within the purview of section 2(22)(e) but not the cases where the loan or advance is given in return to an advantage conferred upon the Company by such shareholder.*

I further find that the Hon'ble jurisdictional ITAT, Kolkata Bench in the case of Smt. Sangita Jain (ITAT No.: 1817/K/2009] for the assessment year 2006-07 has discussed this question at length. It has held that,

"We have heard the arguments of both the sides and also perused the relevant material available on record. One of the main Contentions raised by the ld. counsel for the assessee at the time of hearing before us is that the loan in question treated as deemed dividend under section 2(22)(e) by the authorities below was taken by the assessee from M/s. Surya Business Pvt. Limited on interest and since the said Company was compensated by way of interest paid by the assessee on loan, the assessee in real sense did not derive any benefit from the funds of the Company so as to attract the provisions of section 2(22)(e). Although the ld. D.R. has vehemently opposed this contention of the ld. counsel for the assessee by submitting that the payment of interest alone cannot be considered from the benefit angle as envisaged under section 2(22)(e), it is

observed that the judicial pronouncements cited by the ld. counsel for the assessee clearly support the case of the assessee.

6. In the case of Pradip Kumar Malhotra reported in 338 ITR 538 cited by the ld. counsel for the assessee, I was held by the Hon'ble Calcutta High Court that the phrase "by way of advance or loan" appearing in section 2(22)(e) must be construed to mean those advances or loans which a shareholder enjoys for simply on account of being a partner, who is the beneficial owner of shares, but if such loan or advance is given to such shareholder as a consequence of any further consideration which is beneficial to the Company, received from such shareholder, in such case such advance or loan cannot be said to be deemed dividend within the meaning of the Act It was held that gratuitous loan or advance given by a company to those classes of shareholders thus would come within the purview of section 2(22)(e) but not the cases where the loan or advance is given in return to an advantage conferred upon the Company by such shareholder. In the case of ACIT -Vs. - M/s. Zenon (India) Pvt. Limited, a loan taken by the assessee was treated by the Assessing Officer as deemed dividend under section 2(22)(e), but the ld. CIT(Appeals) did not approve the action of the Assessing Officer after having noticed that interest at the rate of 9% per annum was paid by the assessee on such loan, which, according to him, was a consideration received from her shareholders, which was beneficial to the Company and the order of the ld. CIT(Appeals) giving relief to the assessee-was upheld by, the Tribunal vide its order dated 29.06.2015 passed in ITA No. 1124/KOL/2012 by relying on the decision of the Hon'ble Calcutta High Court in the case of Pradip Kumar Mlhotra (supra). Keeping in view the said decision of the Hon'ble Calcutta High Count which has been followed by the Coordinate Bench of this Tribunal in the case of M/s. Zenon (India) Pvt Limited (supra), we hold that the addition made by the Assessing Officer and sustained by the ld. CIT(Appeals) under section 2(22)(e) on account of loan received by the assessee from MIs. Surya Business Pvt. Limited on which consideration the form of interest was paid by the assessee to the benefit of the Company is not sustainable. We, therefore, delete the same and al low Grounds No. 1&2 of the assessee's appeal."

There are a plethora of decisions that have explained this set off facts that section 2(22)e is attracted only when an advantage is conferred upon a shareholder only by virtue of his being a shareholder, gratuitously. When against such a loan or advance an advantage or benefit comes to the lending company or when this advance or loan is in the nature of a commercial transaction, then the mischief of section 2(22)e is not attracted. Some of these decisions have been cited by the appellant during appeal, and have been reproduced above.

I find that in this case clearly the entire arrangement was a business and commercial arrangement duly supported not only by agreements but also

by the conduct of the parties involved. It has not been doubted by the AO that the said amounts were given in order to procure a set of flats in a luxurious real estate project not the Case of the AO that the said amounts were given gratuitously to the appellant only by the virtue of its being a beneficial shareholder in Forum Venture Pvt. Ltd. When no aspect of the total transaction is doubted or countered by the AO with any reasoning or evidence I cannot see how the transaction itself can be construed to be anything other than the sum total of its individual parts. Respectfully following the propositions and tests laid down in the aforementioned citations I cannot agree with the AO in his action in this regard. The impugned transaction is clearly a commercial transaction in which two parties entered into a sale purchase agreement for the sale purchase of flats. This is a standard agreement between an investor and a developer for the future purchase of property that was to be developed by the developer. The contractual agreement was binding on both parties. The moneys advanced by the purchaser was against a consideration – the right to purchase the flats specified in the agreement.

Within just a few days, the agreement was lawfully rescinded, with the developer returning the money in its entirety. The ratio of the above discussed citations clearly establishes that the impugned transaction is not governed by the mischief of section 2(22) e of the Act.

Coming to the aspect of this appeal raised by the appellant in his ground number 1, I find that in this case, the AO has not brought on record any material to show that the impugned additions made by him in these grounds are based on any incriminating material found during search. In these circumstances, and the fact that the ratio of the citations asserting that in this case an addition could only have been made based upon some incriminating material found during search, I find that in any case, and without prejudice to the discussions on merit, this addition could not be made.

These grounds are therefore allowed."

It is to be further noted here that apart from the above observations, the ld. CIT(A) has further held that even this addition was not based on any incriminating material found during the search action and that in the absence of incriminating material found during the search action, no addition could have been made by the Assessing Officer in an assessment carried u/s 153A of the Act. The above issue is squarely covered by the recent decision of the Hon'ble Supreme Court in the case

of PCIT vs. Abhisar Buildwell Pvt. Ltd. reported in [2023] 149 taxmann.com 399.

In view of the above discussion and after hearing the ld. representatives of the parties, we do not find any reason to interfere with the above findings of the ld. CIT(A), the same are accordingly upheld.

4. Ground No.2 – Vide Ground No.2, the revenue has contested the action of the CIT(A) in deleting the addition made by the Assessing Officer of Rs.37,09,868/- on account of proportionate disallowance of expenditure relating to earning of tax exempt income invoking the provisions of section 14A r.w.r 8D(2) of the Act.

At the outset, the ld. counsel for the assessee has submitted that the assessee during the year had received dividend income of Rs.4436 only, whereas, the assessee had already disallowed Rs.2,00,000/- in the computation of income on account of disallowance of expenditure u/s 14A of the Act. The ld. CIT(A) taking note of the aforesaid fact, while relying upon the various decisions of the Hon'ble High Courts including the decision of the Hon'ble Madras High Court in the case of Marg Ltd. vs. CIT reported in [2020] 120 taxmann.com 84 (Madras) and further of the Hon'ble Bombay High Court in the case of PCIT v. Bajaj Finance Ltd reported in (2019) 178 DTR 219 and of the Hon'ble Delhi High Court in the case of PCIT vs. Vedanta Ltd. (2019) 261 Taxman 179 (Delhi HC) observed that as per the settled law, the disallowance u/s 14A cannot exceed the exempt income. Without prejudice to the above observation, the ld. CIT(A) further held that since this was a case of reassessment proceedings u/s 153A pursuant to the search action u/s 132 of the Act, therefore, the addition if any could have been based on the basis of incriminating material found during the search action. He observed that

the aforesaid addition u/s 14A was not based on any incriminating material found during the search action. He therefore deleted the impugned addition.

After hearing the ld. representatives of the parties, we do not find any reason to interfere with the above findings of the CIT(A).

5. Ground No.3 - Vide Ground No.3, the revenue has contested the action of the CIT(A) in deleting the addition made by the Assessing Officer on account of disallowance of statutory deduction claimed by the assessee u/s 24(i) of the Act.

The Assessing Officer observed that the assessee company was engaged in real estate business and that the assessee had claimed certain administrative expenses in his business income and at the same time had claimed standard deduction u/s 24(i) of the Act. He therefore deleted the statutory deduction u/s 24(i) of the Act.

The ld. CIT(A) however deleted the aforesaid disallowance made by the Assessing Officer observing that the assessee himself had suo moto added back the aforesaid administrative expenditure relating to building maintenance etc. and that no double deduction was claimed. The ld. CIT(A) has further held that even this addition was not based on any incriminating material found during the search action and that in the absence of incriminating material found during the search action, no addition could have been made by the Assessing Officer in an assessment carried u/s 153A of the Act. The above issue is squarely covered by the recent decision of the Hon'ble Supreme Court in the case of PCIT vs. Abhisar Buildwell Pvt. Ltd. reported in [2023] 149 taxmann.com 399. In view of the above discussion, we do not find any

infirmity in the order of the CIT(A) in this respect and the same are hereby upheld.

6. In the result, the appeal of the revenue is hereby dismissed.

7. **ITA 109/Kol/2022 for assessment year 2011-12 –** The Revenue in this appeal has taken the following grounds of appeal:

> *"1. That on the facts and circumstances of the case and in law, the ld. CIT(A) has erred in deleting the addition on account of deemed dividend u/s 2(22)(e) of the Income Tax Act 1961.*
>
> *2. That on the facts and circumstances of the case and in law, the ld. CIT(A) has erred in deleting the disallowance u/s 40(a)(ia) of the I.T. Act, 1961.*
>
> *3. That on the facts and circumstances of the case and in law, the ld. CIT(A) has erred in deleting the addition u/s 24(i) of the I.T. Act 1961.*
>
> *4. That the Revenue reserves its right to substantiate, modify, delete, supplement and/or alter the grounds at any time of the appeal proceedings."*

8. Ground No.1 – Ground No.1 is relating to the deemed dividend u/s 2(22)(e) of the Act. The assessee during the year has taken advances of Rs.70,00,000/- from Technopolis Infrastructure Pvt. Ltd. The Assessing Officer added the same as deemed income of the assessee u/s 2(22)(e) of the Act. The ld. CIT(A) deleted the addition on this issue on two counts. Firstly that the assessee was not a substantial shareholder in the Technopolis Infrastructure Pvt. Ltd. from whom the advances were taken. Secondly, the same was purely business transaction and the assessee has also paid interest @12% on the loan amount which was a reasonable high interest amount as compared to the market rate. The ld. counsel for the assessee has invited our attention to the paper-book page 65, to show that the assessee did not have any share holding in the said concern i.e. Technopolis Infrastructure Pvt. Ltd. The Assessing Officer perhaps has mistaken the assessee with the another concern namely

"Forum Project Holding Pvt. Ltd. Therefore, the provisions of section 2(22)(e) of the Act were not attracted in this case. Even otherwise, this addition was not made by the Assessing Officer on account of any incriminating material found during the search action. Therefore, we do not find any infirmity in the order of the CIT(A) in this respect.

9. Ground No.2 – Vide Ground No.2, the revenue has contested the addition made by the Assessing Officer on account of disallowance made u/s 40(a)(ia) of the Act for non-deduction of TDS on certain payments made by the assessee. At the outset, the ld. counsel for the assessee has submitted that the issue has already been discussed and decided in favour of the assessee by the Tribunal in relation to appeal filed against the demand raised u/s 201(1)/201A of the Act vide order dated 05.09.2022 passed in ITA No.188&189/Kol/2018 for assessment year 2011-12 & 2012-13 respectively in the own case of the assessee. The Tribunal has observed as under:

> *"Since the facts before us in the instant appeal are similar to one as decided by the Coordinate bench, we therefore respectfully following the same, set aside the order of the ld. CIT(A) by holding that the payment made to non-resident recipient not having any permanent establishment in India and also that the services provided are not in the nature of royalty and fee for technical services. Accordingly we direct the A.O to delete the demand. The appeal of the assessee is allowed."*

Though the ld. CIT(A) has deleted the addition in respect of above issue on merits. However, the admitted fact is that addition was not based on any incriminating material found during the search action. The issue is squarely covered by the decision of the 'PCIT vs. Abhisar Buildwell P Ltd.' (supra). We therefore do not find any merit in this ground of the revenue.

10. Ground No.3 – Vide Ground No.3, the Revenue is aggrieved by the action of the CIT(A) in deleting the addition made by the Assessing Officer on account of disallowance of statutory deduction claimed u/s

24(i) of the Act. This issue is identical to the Ground No.3 taken by the Revenue in its appeal in ITA 108/Kol/2022 for assessment year 2010-11. In view of our findings given above in respect of the said issue, we do not find any infirmity in the order of the CIT(A) in this respect. Moreover, the aforesaid addition was not made on the basis of any incriminating material found during the search action and the same could not have been made in an assessment carried out u/s 153A of the Act. We therefore do not find any merit in this ground also.

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

12. **ITA 585/Kol/2022 -** The Revenue in this appeal has taken the following grounds of appeal:

> *"1. That on the facts and circumstances of the case and in law, the ld. CIT(A) has erred in deleting the addition on account of deemed dividend u/s 2(22)(e) of the Income Tax Act 1961.*
>
> *2. That on the facts and circumstances of the case and in law, the ld. CIT(A) has erred in deleting the disallowance u/s 40(a)(ia) of the I.T. Act, 1961.*
>
> *3. That on the facts and circumstances of the case and in law, the ld. CIT(A) has erred in deleting the addition u/s 24(i) of the I.T. Act 1961.*
>
> *4. That the Revenue reserves its right to substantiate, modify, delete, supplement and/or alter the grounds at any time of the appeal proceedings."*

13. Ground No.1 – The Assessing Officer noted that during the year the assessee had taken loan from M/s Forum Riviera Construction Pvt Ltd. of Rs.149,78,646/-. The Assessing Officer made the addition u/s 2(22)(e) of the Act and treated the said amount as deemed income of the assessee. At the outset, the ld. counsel for the assessee has invited our attention to page 63 of paper-book to submit that the assessee during the year was not having only substantial shareholding of the said 'Forum Projects Pvt. Ltd.'. The share holding of the assessee during the year in

the said company was 0.40% only and moreover the assessee has paid high interest on the said amount @12%. The aforesaid addition was not based on any incriminating material found during the search action. Therefore, there is no merit in the above ground of the Revenue.

14. Ground No.2&3 - Ground No.2 is relating to the disallowance of expenditure u/s 40(a)(ia) of the Act, whereas, Ground no.3 is relating to the statutory deduction u/s 24(i) of the Act. The aforesaid both the issues are identical to Ground No.2&3 taken by the Revenue in its appeal in ITA No.109 for assessment year 2011-12. In view of our findings given above, we do not find any merit in the aforesaid grounds of appeal of the revenue and the same are accordingly dismissed.

15. In the result, all the three captioned appeals of the revenue are hereby dismissed.

Kolkata, the 5th June, 2023.

Sd/-	Sd/-
[Rajesh Kumar]	**[Sanjay Garg]**
लेखा सदस्य /**Accountant Member**	न्यायिक सदस्य /**Judicial Member**

Dated: 05.06.2023.
RS

Copy of the order forwarded to:
1. DCIT, CC-3(2), Kolkata
2. M/s Forum Projects Pvt. Ltd.
3. CIT(A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches