Income Tax Appellate Tribunal - Ahmedabad
Dcit, Central Circle-2(4),, ... vs Shri Jateen Madanlal Gupta, ... on 2 February, 2021

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IN THE INCOME TAX APPELLATE TRIBUNAL,
'' D'' BENCH, AHMEDABAD
(CONDUCTED THROUGH VIRTUAL COURT AT AHMEDABAD)

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

./ITA No. 1932/AHD/2017
With
C.O. 133/Ahd/2019
/Asstt. Year: 2008-2009

D.C.I.T, Circle-2(4), Ahmedabad.	Vs.	Shri Jateen Madanlal Gupta, Bunglows No.1 Rivera Bunglows, Prahladnagar Road, Satellite, Ahmedabad.	30
		PAN: ABZPG8926H	
(Applicant)		(Respondent)	

Revenue by : Shri Rajdeep Singh, Sr. D.R
Assessee by : Smt. Nipur Shah, A.R

/ Da te of Hearing : 11/12/2020
/ Date of Pro nouncement: 02/02/2021

/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal is filed by the Revenue and the CO is filed by the Assessee against the order of the Learned Commissioner of Income Tax (Appeals)- 3 Ahmedabad, [Ld. CIT (A) in short] dated 20/06/2017 arising in the matter of assessment order passed under s. 143(3) r.w.s. 147 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dated 10/03/2016. The assessee has filed ITA no.1932/Ahd/2017 with CO No.133/Ahd/2019 Asstt. Year 2008-09 Cross Objection in the Revenue's appeals bearing ITA no. 1932/AHD/2017 for the Assessment Year 2008-2009.

2. The Revenue has raised the following grounds of appeal:

> 1. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in law and/or on facts in deleting the addition of Rs.2,62,33,800/- made on account of deemed devident u/s. 2(22)(e) of the I.T. Act, 1961.
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> 2. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) ought to have upheld the order of the A.O.
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> 3. It is, therefore, prayed that the order of the Ld.CIT(A) be set aside and that of the A.O be restored to the above extent.

3. The only issue raised by the Revenue is that the learned CIT (A) erred in deleting the addition made by the AO amounting to 2,62,33,800/- on account of deemed dividend under section 2(22)(e) of the Act.

4. Briefly stated facts are that the assessee in the present case is an individual and having income from salary, rent, interest and short term capital gain. The assessee, among other companies, is a registered shareholder and carrying voting rights not less than 10% in the companies as detailed under:

S. No.	Name of the company	% of
1	JP Iscon Pvt. Ltd (Formerly JP Infrastructure Pvt. Ltd.)	22

4.1 M/s JP Infrastructure Pvt. Ltd. in the year under consideration has advanced loan amounting for 28,02,234/- and 2,34,31,566/- to Dev Infratrade Pvt. Ltd. and Gujarat mall Management Company Pvt. Ltd. respectively. Accordingly, the AO was of the view that such transaction of advancing the loan to the companies as ITA no.1932/Ahd/2017 with CO No.133/Ahd/2019 Asstt. Year 2008-09 discussed above falls within the parameters of deemed dividend as provided under section 2(22)(e) of the Act.

4.2 However, the assessee contended that there is no accumulated profit in the company namely JP Infrastructure Pvt. Ltd. at the time of advancing the loans to the aforesaid parties/entities. As per the assessee an amount of 12,56,02,,890/- has already been treated as deemed dividend in the A.Y. 2007-08. Accordingly, if such amount is adjusted against the accumulated profit of 4,47,60,173/- available with the company at the time of advancing loan to the companies as discussed above, the accumulated profit of JP infrastructure becomes negative. Accordingly, the assessee claimed that in the absence of accumulated profit in the books of the company namely JP infrastructure Pvt. Ltd, the question of treating the impugned advances as deemed dividend does not arise.

4.3 The assessee further contended that he has not received any benefit out of the loan advanced by the company namely JP infrastructure to the parties/entities as discussed above. Thus, the same cannot be treated as deemed dividend in his hands under the provisions of section 2(22)(e) of the Act.

4.4 The assessee also contended that the advances made by the company JP infrastructure are inter corporate deposits and therefore such advances are outside the purview of deemed dividend as provided under section 2(22)(e) of the Act.

4.5 However the AO found that the accumulated profit of the company namely JP infrastructure at the time of advancing loan to the parties/entities as discussed above stands at 4,47,60,173/- only. Furthermore the amount of 12,56,02,890/- which was treated as deemed dividend in the immediate preceding assessment year cannot be taken into consideration as the same is in dispute before the learned CIT (A).

ITA no.1932/Ahd/2017 with CO No.133/Ahd/2019 Asstt. Year 2008-09 4.6 The AO also held that undisputedly the assessee is a shareholder in the companies as discussed above and it is not necessary that he has to obtain some benefit directly/ indirectly out of the loan given to the companies as discussed above. As per the AO it was sufficient enough to attract the provisions of section 2(22)(e) of the Act to the assessee in a situation where the company has advanced loan to the parties/entities/companies wherein the assessee has the substantial interest.

4.7 In view of the above, the AO treated the amount of 2,62,33,800/- as deemed dividend under the provisions of section 2(22)(e) of the Act and added the same the total income of the assessee.

5. Aggrieved assessee preferred an appeal to the learned CIT (A) who deleted the addition made by the AO by observing as under:

> The AO has held that deemed dividend is always taxed in the hands of shareholders. I am agreed with the contentions of the appellant that he has not receifed any loan either from JPIL (loan given company) or from DIPL and/or from GMMCPL (loan taken companies) and Gujarat Mall Management Company Pvt. Ltd. and Devinfratrade Pvt. Ltd. are not shareholders of JPIL and further loan given by JPIL to Gujarat Mall Management Company Pvt. Ltd. and Devinfratrade Pvt. Ltd. are ultimately not been received or benefited to appellant. Hence the provision of section 2(22)e of the Act are not applicable.

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx I agree with the contention of the appellant that there is no accumulated profits in the hand of JPIL. I also agree with the contention of the appellant that advances have been given by JPIL to GMMCPL and DIPL as Inter Corporate Deposit (ICD) in the normal course of business as having more than 50% assets in the form of loans and advances fairly covered by SBDT circular dated 12.06.2017. As the loans and advances and Inter ICDs given is in the normal course of business of JPIL. The provision of section 2(22)(e) of the I.T. Act is not applicable.

This is a case of shareholder individual of JPIL/BMMCL/DPL which need to be borne in mind. The corporate having business dealings can't fasten tax liability on shareholder as per ratio laid down in various judicial pronouncements. In view of above discussion the addition made by the AO for an amount of rs.2,62,33,800/- in the case of appellant as deemed dividend u/s.2(22)(e) of the I.T Act is hereby deleted. The ground No.2 of appeal is allowed.

6. Being aggrieved by the order of the learned CIT (A), the Revenue is in appeal before us.

ITA no.1932/Ahd/2017 with CO No.133/Ahd/2019 Asstt. Year 2008-09

7. The learned DR before us vehemently supported the order of the AO.

8. On the other hand the learned AR before us filed a paper book running from the pages 1-127 and reiterated the submission made before the authorities below. The ld. AR relied on the order of the ld. CIT-A.

9. We have heard the rival contentions of both the parties and perused the materials available on record. Admittedly, the assessee is a shareholder and carrying voting rights not less than 10% in the company namely JP infrastructure Pvt. Ltd. Similarly the assessee is also holding substantial interest in other entities/companies namely Dev Infratrade Pvt. Ltd. and Gujarat mall Management Company Pvt. Ltd. respectively. Accordingly, the AO in the case on hand has treated the amount of Rs. 2,62,33,800/- as deemed dividend in the hands of the assessee on the reasoning that the transactions of advancing loan to the companies as discussed above falls within the purview of the provisions of section (2)(22)(e) of the Act which has been elaborated and discussed in the preceding paragraph. However, the learned CIT (A) was pleased to delete the addition made by the AO for the reasons as discussed in the aforesaid paragraphs.

9.1 The 1st question before us arises whether it is sine qua non that the assessee, being a registered shareholder has to obtain the benefit out of the loan provided to the companies in which he was holding the substantial interest. In this regard we find pertinent to refer the provisions of section 2(22)(e) of the Act which reads as under:

> (22) "dividend" includes--
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> XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
>
> (e) any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) made after the 31st day of May, 1987, by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power, or to any concern in which such shareholder is a member or a partner and in which he ITA

> no.1932/Ahd/2017 with CO No.133/Ahd/2019 Asstt. Year 2008-09 has a substantial interest (hereafter in this clause referred to as the said concern) or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits ;

9.2 A plain reading of the provisions reveals that the provisions of section 2(22)(e) of the Act will be attracted in a situation where the company, in which the assessee was the registered shareholder, advances loans and advances to the other companies in which the assessee was holding the substantial interest and the assessee get some benefit out of such loans and advances. In the case on hand, the learned CIT (A) has given very clear-cut finding that there was no benefit accrued to the assessee out of the loans and advances given by the company namely JP Infrastructure Pvt. Ltd. to the companies as discussed above. It is also pertinent to note that, same contention was also raised by the assessee before the AO during the assessment proceedings as well as before us which was not disputed either by the AO or by the ld. DR.

9.3 We also find that there was another shareholder of JP infrastructure Limited and Gujarat Mall Management Pvt. Ltd. namely Shri Jayesh T Kotak, who was also subject to similar addition for the year under consideration i.e. being dividend under section 2(22)(e) of the Act. But the Hon'ble Gujatrat High Courts in his case reported in 116 taxmann.com 426, has held that to apply the provision of section 2(22)(e) there must be personal benefit arises to the assessee out of such loan and advances. The relevant finding of the Hon'ble Court is reproduced as under:

> any payment made by a company in which a shareholder has shareholding exceeding 10 per cent of the voting power to any concern in which such shareholder has substantial interest, would be deemed to be dividend in his hands if any benefit from such transaction has been received by such shareholder. The intention of the legislature is to tax funds ultimately received by a shareholder holding more than 10% voting power in the company, which have been routed through different modes/concerns. What needs to be taxed as deemed dividend is the amount ultimately used for the benefit of the shareholder. It is not the case of the Assessing Officer in the reasons recorded for reopening the assessment that the petitioner has received any amount as holder of substantial shares from the loan giver company or the loan receiver company. Therefore, in the absence of any benefit having been received by the petitioner, there was no obligation cast upon him to disclose such transactions.

ITA no.1932/Ahd/2017 with CO No.133/Ahd/2019 Asstt. Year 2008-09 Once it is established that there is no benefit accrued to the assessee out of the loan transactions as discussed above, the provisions of section 2 (22)(e) of the Act cannot be attracted.

9.4 Moving further, we also note that the assessee has contended before the AO that the loans has been advanced by the company, JP infrastructure to the parties as discussed above as inter corporate deposits. The relevant submission of the assessee stands as under:

> Without prejudice to the above submissions, it is further submitted that in the present cae, inter corporate deposits (ICD) ICD during the normal course of the business for the business transaction by one company JPIL to group companies (Gujarat Mall Mgt Company Pvt. Ltd. and Aryan Arcade Pvt. Ltd.) and where the assessee is the common shareholder in above specified companies, the same cannot be treated as deemed dividend in the hands of the assessee.

9.5 However, on perusal of the order of the assessment order, we find that the contention of the assessee has not been disputed by the AO. Similarly, the learned CIT (A) has also observed that the company has advanced money to the parties as inter corporate deposits which has not been disputed by the learned DR appeared for the revenue.

9.6 In the absence of any adverse finding from the side of the AO and the favorable finding of the learned CIT (A), it seems that the loans and advances were made as inter corporate deposits in ordinary course of its business which are not subject to the provisions of deemed dividend as provided under section 22(2) of the Act. In view of the above, we do not find any reason to interfere in the finding of the learned CIT (A) and thus we set aside the same with the direction to the AO to delete the addition made by him. Hence the ground of appeal of the Revenue is dismissed.

ITA no.1932/Ahd/2017 with CO No.133/Ahd/2019 Asstt. Year 2008-09 Coming to the CO No.133/Ahd/2019 raised by the assessee

10. The assessee has raised the following grounds in its CO.

1. The Ld.CIT(A) erred in law and on facts in confirming the action of the Ld.AO in issuing the notice u/s.148 of the Act and reassessment proceedings u/s.143(3) r.w.s 147 of the Act without properly considering the contention of the Respondent that no rangible material has been brought on record for reassessment proceedings on which the Ld.AO has recorded the reasons for issuance of notice for reassessment proceedings for A.Y.2008-09 and various judicial pronouncements relied upon by the respondent. On facts and circumstances of the case, the Ld.CIT(A) ought to have treated the order passed u/s.143(3) r.w.s 147 of the Act as invalid and required to be quashed.

2. The Ld.CIT(A) after carefully considering the facts of the case, submission of the Respondent as well as various judicial pronouncements relied upon by the respondent has held that "there is no accumulated profits in the hands of JP infrastructure Pvt. Ltd. (JPIL). I also agree with the contention of the appellant that advances have been given by JP Infrastructure Pvt. Ltd. (JPIL) to Gujarat Mall Management Company Pvt. Ltd. (GMMCPL) and DevelInfratrade Pvt. Ltd. (DIPL) as interoperate Deposit (ICD) in the normal course of business as having more than 50% assets in the form of loans and advances fairly covered by CBDT Circular dated 12.06.2017. As the loans and advances and Inter ICDs given is in the normal courseof business of JP Infrastructure Pvt. Ltd. the provisions of section 2(22)(e) of the I.T. Act is not applicable" and the Ld.CIT(A) has rightly deleted the addition made by the AO for an amount of Rs.2,62,33,800/- in th case of Respondent as deemed dividend u/s.2(22)(e) of the I.T. Act.

3. Your Respondent craves right to add, amend, alter, substitute, delete or modify all or any of the above grounds of cross objection.

11. The assessee in the CO has challenged the validity of the assessment framed under section 147 read with section 143(3) of the Act on the ground that there was no fresh tangible material available with the AO viz a viz there was no application of mind for arriving at the conclusion that the income of the assessee has escaped assessment.

12. The assessee, an individual, in the present case has filed return of income declaring total income at Rs. 1,11,44,950/- which was processed under Section 143(1) of the Act. Subsequently, the AO found that M/s JP Infrastructure Pvt. Ltd., in which the assessee is holding 22% registered shareholding, has extended loans to the companies namely Gujarat Mall Management Co. Pvt. Ltd. and M/s Aryan ITA no.1932/Ahd/2017 with CO No.133/Ahd/2019 Asstt. Year 2008-09 Arcade Pvt. Ltd in which the assessee has substantial interest. Therefore the AO was of the view the assessee is subject to the provisions of deemed dividend under section 2(22)(e) of the Act for the loans advanced by JP Infrastructure Pvt. Ltd. to the companies in which the assessee has substantial interest. Based on the above, the AO was of the opinion that the amount of loans as discussed above has escaped assessment and accordingly initiated the reassessment proceedings by issuing notice under Section 148 of the Act dated 27-03-2015.

12.1 However, the assessee challenged the proceedings initiated under section 147 of the Act vide letter dated 16-10-2015 for various reasons, inter-alia contending that there was no fresh material available with the AO suggesting that the income of the assessee has escaped assessment. As such the AO merely based on some wrong presumption and surmises of the facts initiated the proceedings. In fact the amount shown as loans and advances was representing the payment to the supplier on behalf the companies which does not fall under the preview of section 2(22)(e) of the act. Furthermore, the mere information that some amount has been paid by one company to another group company does not lead to draw the conclusion that the same is the income of the assessee. Likewise, the reason recorded contain incorrect information of the loan amount by JP infra Ltd to sister concern as well as undistributed profit in the hands of JPIL. Thus the AO has no material available with him suggesting the escapement of income. Accordingly, the reason to believe were formed for the escapement of income without the application of mind which is nothing but wrong assumption of facts.

12.2 However, the AO rejected the contention of the assessee by observing that 'JPIL' has extended loan to companies in which assessee has substantial interest. Thus such loans fall under the preview of section 2(22)(e) of the Act. Regarding the amount of loan and undistributed profit in the hand of JPIL, it was inadvertently recorded at Rs. Rs 50,97719 and Rs. 12,10,08,426/- and undistributed profit at Rs. 7,38,54,215/-. However the same is curable under the provision of section 292B of ITA no.1932/Ahd/2017 with CO No.133/Ahd/2019 Asstt. Year 2008-09 the Act. Accordingly the AO further held that the validity of assessment should be confined to technical discrepancies in the notice not to numerical or inadvertent mistake in amount. In view of the above the AO held that the reassessment proceedings under Section 147 of the Act are well within the provisions of law.

13. Aggrieved assessee preferred an appeal to the Learned CIT (A) who dismissed the ground of appeal of the assessee by observing as under:

> I have gone through the observation of the AO in the assessment order and submission filed by the appellant carefully. The appellant has challenged the validity of notice issued u/s.148 of the I.T. Act stating that figures mentioned in the reason recorded is not ascertainable how it is arrived and observation of the A.O. that assessee having 22% share in Aryan Arcade Pvt. Ltd. which is factually wrong as the assessee is not holding any share in Aryan Arcad^ Pvt. Ltd. Hence the AO's believe is merely on the basis of presumption and surmises and without there being any material on record and the basic requirement of section 148 of reasons to believe fails.Having considered the fact of the case. The A.O. formed an opinion on the basis of information available with him and the reasons to believe that income has escaped assessment has already been conveyed. In this case, the original return filed was processed under section 143(1)(a) and no assessment under section 143(3) has been made. Further in this case the notice u/s. 148 of the Act has been issued on 27/03/2015 and served on the appellant on 28/03/2015 The said notice has been issued after obtaining necessary approval of Addl.CIT, Range-3(3), Ahmedabad. Hence, notice u/s.148 is not barred by limitations.
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> In view of above facts, it can be inferred that the A.O. was in possession of evidences that appellant has not declared true state of affairs in its income Tax Return. Since A.O was having specific information in respect of the appellant, accordingly, it cannot be said that the A.O. had changed his opinion without any evidence in his possession. After the amendment to Sec. 147 by the Direct Tax Laws (amendment) Acts, 1987 and 1989, "what is necessary on the part of AO is to have reasons to believe which should be reduced in writing." The A.O. was in possession of specific details of real estate transaction which was not fully and truly disclosed to the department. In other words, it is the concealing rather than revealing specific information by the appellant which lead to the initiation of proceedings u/s.148 r.w.s.147 of I.T. Act, 1961.

14. Being aggrieved by the order of the Learned CIT (A), the assessee is in appeal before us.

15. The Learned AR before us submitted as under:

> 1. The Ld AO while recording the reasons at Para 2(i) has stated as under:
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> ITA no.1932/Ahd/2017 with CO No.133/Ahd/2019 Asstt. Year 2008-09 " (i) It is seen that the assessee Shri Jateen Gupta has 20% share in JP Infrastructure Pvt. Ltd. , 50% share in Gujarat Mall Management Co. Pvt. Ltd. And 22% share in Aryan Arcade Pvt. Ltd. It is further seen that unsecured loans was extended by M/s. J P Iscon Ltd (formerly known as M/s. J P Infrastructure Ltd.) to M/s. Gujarat Mall Management Pvt. Ltd. During FY 2006-07 amounting to sRs. 50,97,719/- and unsecured loans was extended by M/s. J P Iscon Ltd. During FY 2006-07 amounting to Rs.

12,10,08,426/-."

2. In respect of above reasons recorded it is submitted as under:

(ii) On perusal of above reasons it is evident that Ld AO has recorded reasons for reopening without bringing on record any fresh / new tangible material to form reason to believe for reopening the case of the appellant u/s 148 of the Income Tax Act or alleging escapement of income.

(iii) The reasons recorded forms its nucleus from the details provided by the appellant in his return of income as well as from the Return of income filed by companies in which appellant is shareholder. Further, Ld AO in reasons recorded has stated that appellant has 22% share in Aryan Arcade Pvt. Ltd. Which is factually wrong as the appellant is not as shareholder in Aryan Arcade Pvt. Ltd. Hence, it is evident that Ld AO has without application of mind on incorrect facts reopened the case of the apepllant which is not tenable and bad in law.

(iv) It is further submitted before your honour that Ld AO merely for verification of details available on records in the form of return of income and without bringing on record any new tangible material for making inquiry has reopened the case of appellant which is also bad in law.

(v) The power to reopen an assessment is conditional on the formation of a reason to believe that income chargeable to tax has escaped assessment. The power is not akin to a review. The existence of tangible material is necessary to ensure against an arbitrary exercise of power.

Ld AO nowhere mentioned in the reasons recorded that any tangible material either from assessment record or from other source has come in the notice of Ld AO for reason to believe that any income has escaped assessment. Therefore, the basic requirement of reopening of the assessment i.e. reason to believe is not fulfilled at the time of recording the reasons of reopening.

16. The learned DR before us vehemently supported the action of the authorities below.

17. We have heard the rival contentions of both the parties and perused the materials available on record. The Provisions of Section 147 of the Act, authorizes the AO, if he/she has "reasons to believe" that the income has escaped assessment, ITA no.1932/Ahd/2017 with CO No.133/Ahd/2019 Asstt. Year 2008-09 to assess or reassess the income escaped from assessment. Now to form the reasons to believe for the escapement of income, the AO first, should be in possession of some fresh/ new material which was previously not available with him viz a viz it impacts the aspect, that there is some undisclosed income.

17.1 Now the question comes what is fresh material. It refers the material which comes to the AO from the outside. Meaning thereby, information which was not available on record at the time of making the assessment and the assessment is completed initially, without taking into consideration the alleged information. Such information, can be called as new information, which requires fresh investigation/observation. As fresh application of mind to same set of facts is not allowable in the grab of Sec. 147/148 of the Act.

17.2 In the light of the above discussion, we proceed to adjudicate the issue on hand. For this purpose we refer to the reasons recorded by the AO for initiating the proceedings under Section 147/148 of the Act which are reproduced as under:

In this connection, the reasons for reopening'are as under:

> (i) It is seen that the assessee Shri Jateen Gupta has 20% share in JP Infrastructure Put.
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> Ltd, 50% share in Gujarat Mall management Co. Pvt. Ltd. and 22% share in Aryan Arcade Put. Ltd. It is further seen that unsecured loans was extended by M/s. J.P. Iscon Ltd. (formerly known as M/s. J.P. Infrastructure Ltd.) to M/s. Gujarat Mall Management Pvt. Ltd. during F.Y. 206-07. amounting to Rs. 50,97,719/- arid Unsecured loans was extended by M/s. J.R Iscon Ltd. during F.Y. 2006-07 amounting to Rs. 12,10,08,426/-.
>
> (ii) Provisions of Section 2(22)(e) are as under:-
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> "dividend" includesO(e) any payment a company, not being a company in which the public are substantially interested, of any sum (whether as representing a pqrt of the assets of the company or otherwise) /made after, the 31st day of May, 1987, by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares(no.t being shares entitled to a fixed rate 'of dividend whether with or without a right to participate in profits) holdi9ng not less than ten per cent of the voting power, or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest-(hereafter in this clause referred to as the said concern) or nay payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case prossesses accumulated profit.
>
> (iii) The accumulated profit in the case of M/s. J.P. /scon Ltd. .(formerly known as M/s. J.P.
>
> Infrastructure Ltd.) is Rs. 7,38,54,215/-, whereas the assesse'-s share with respect to ITA no.1932/Ahd/2017 with CO No.133/Ahd/2019 Asstt. Year 2008-09 the loan given to Gujarat Mall, management Co. Pvt. Ltd. and Aryan Arcade Pvt. Ltd. comes to Rs. 2,91, 70,712/-. Hence, Rs. 2,91,70,712/- is to be required to he taxed as per

> provisions of Section 2(22)(e) in view explanation 2(b) of Section 147 in respect of cases where no assessment has been made but income chargeable to tax has been under slated. -.

(iv) In view of the above facts, I have reason to believe that the income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for this assessment for that assessment year and income has escaped assessment to that extent of rs.2,91,70,712/-. Thus it is a fit case for re-opening the assessment u/s.147 of the IT Act 1961 for A.Y. 2008-09.

17.3 On perusal of the reasons recorded by the AO, we find that the AO at the threshold has recorded that it is seen that the assessee is having substantial share in 'JPIL' which has advanced loan to the companies namely M/S Gujarat Mall Management Pvt. Ltd, and M/S Aryan Arcade Pvt. Ltd and the assessee also holds 50% and 22% shares in both the companies. Thus the entire transaction of advancing loan fall under the preview of section 2(22)(e) of the Act and represent deemed dividend of the assessee.

17.4 From the above details, we note that the AO nowhere mentioned that he has new information or fresh material in possession from where he has seen such fact. Further the AO has recorded that assessee is having 22% share in M/S Aryan Arcade Pvt Ltd. which came to be factually wrong as the assessee is not holding any share in such company. There were also incorrect information recorded in reason by the AO with regard to amount of loan and accumulated profit. All this fact suggest that the AO has not applied his/her mind in reaching to the reason to believe or formed believe in mechanical order without adducing supporting material that income of the assessee has escaped to assessment. Thus reopening of assessment in absence of tangible material and without applying mind is not permissible. As such In this regard we find support and guidance from the judgment of Hon'ble Delhi High court in case of CIT vs. Central warehousing Corporation reported in 371 ITR 81 where it was held as under:

> This was affirmed by the Supreme Court in Honda Siel Power Products Ltd.case (supra). The Supreme Court ruling in CIT v. Kelvinator of India Ltd. [2010] 320 ITR 561/187 Taxman 312 is authority for the view that the "reason to believe" on which a reassessment can be ITA no.1932/Ahd/2017 with CO No.133/Ahd/2019 Asstt. Year 2008-09 validly ordered should necessarily be based on "tangible material" which an Assessing Officer comes by after the assessment. Necessarily, such material is outside the record. Straying from this clear path would be sliding down the slippery slope into a quagmire of reappreciation of existing material and-even the process of reasoning which is impermissible as it is a forbidden "merits review". Reassessment, if permitted in such instances would be a route which (to borrow the phrase from another context) "unlocks the gate which shuts" the Assessing Officer's review on the merits.

17.5 In view of the above, we hold that the reopening was made without bringing any fresh material on record. Thus we quash the assessment framed under section 147 of the Act. Hence, the ground

raised by the assessee in the CO is allowed.

18. In the combined results, the appeal filed by the Revenue is dismissed whereas the CO filed by the Assesse is allowed.

Order pronounced in the Court on 02/02/2021 at Ahmedabad.

Sd/-	Sd/-
(RAJPAL YADAV)	(WASEEM AHMED)
VICE PRESIDENT	ACCOUNTANT MEMBER

(True Copy)

Ahmedabad; Dated 02/02/2021