Dcit, Central Circle-2(2), Chennai vs M/S.Mac Quality Builders Pvt Lit., ... on 21 February, 2024

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IN THE INCOME-TAX APPELLATE TRIBUNAL 'A' BENCH, CHENNAI
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Before Shri V. Durga Rao, Judicial Member &
Shri Manjunatha, G., Accountant Member

./I.T.A. No.642/Chny/2023
/Assessment Year: 2021-22

The Deputy Commissioner of Income Tax, Central Circle 2(2), Investigation Building, Chennai 34.	Vs. M/s. Mukunda Land Developers Pvt. Ltd., Plot No. 198, 13th Cross Street Sai Nagar, Okkiam Thoraipakkam, Chennai 600 097. [PAN:AAHCP7751K]
(/Appellant)	(/Respondent)

./I.T.A. No.643/Chny/2023
/Assessment Year: 2021-22

The Deputy Commissioner of Income Tax, Central Circle 2(2), Investigation Building, Chennai 34.	M/s. Mugilan Structurals Pvt. Ltd., Plot No. 198, 13th Cross Street, Sri Vs. Nagar, Okkiam Thoraipakkam, Chennai 600 097. [PAN:AAJCM3182D]
(/Appellant)	(/Respondent)

./I.T.A. No.644/Chny/2023
/Assessment Year: 2021-22

The Deputy Commissioner of Income Tax, Central Circle 2(2), Investigation Building, Chennai 34.	M/s. MAC Quality Builders Pvt. Ltd., Plot No. 198, 13th Cross Street, Sri Nagar, Okkiam Thoraipakkam, Vs. Chennai 600 097. [PAN:AAECV8582B]
(/Appellant)	(/Respondent)

./I.T.A. No.645/Chny/2023
/Assessment Year: 2021-22

The Deputy Commissioner of Income Tax, Central Circle 2(2), Investigation Building, Chennai 34.	Vs.	M/s. Meadow Infrastructure Pvt. Ltd., Plot No. 198, 13th Cross Street, Sri Sai Nagar, Okkiam Thoraipakkam, Chennai 600 097. [PAN:AAFCK5856N]
(/Appellant)		(/Respondent)

./I.T.A. No.646/Chny/2023
/Assessment Year: 2021-22

The Deputy Commissioner of Income Tax, Central Circle 2(2), Investigation Building, Chennai 34.	Vs.	M/s. Minal Contractors and Builders Pvt. Ltd., Plot No. 198, 13th Cross Street, Sri Sai Nagar, Okkiam Thoraipakkam, Chennai 600 097. [PAN:AAECV8580D]
(/Appellant)		(/Respondent)

Department by	:	Shri Nilay Baran Som, CIT
Assessee by	:	Shri R. Venkata Raman, CA
/ Date of hearing	:	07.02.2024
/Date of Pronouncement	:	21.02.2024

/O R D E R

PER V. DURGA RAO, JUDICIAL MEMBER:

These five appeals filed by the Revenue pertaining to different assessee of same group are directed against different but identical orders of the ld. Commissioner of Income Tax (Appeals) 19, Chennai, all dated 29.03.2023 relevant to the assessment year 2021-22. The only effective common ground raised in these appeals relates to deletion of addition made towards deemed dividend in the hands of the assessee holding that the conditions prescribed in section 2(22)(e) of the Income Tax Act, 1961 ["Act" in short] were not satisfied and the assessee company is not a shareholder of lender company.

2. Brief facts of the case are that a search was conducted in the case of Shri Shanmugam Thiagarajan, Smt. Unnamalai Thiagarajan, Smt. Rukmini Thiagarajan, M/s. ETL Power Services Limited, M/s. IG3 Infra Limited on 04.11.2020. The assessee company M/s. MAC Quality Builders Private Limited is also a part of the group companies of M/s. IG3 Infra Limited. During the search proceedings, materials were seized in the case of M/s. IG3 Infra Limited and the assessee company. Neither there are common shareholder between the lender company nor the assessee. For the sake of convenience, since the issue and facts are similar in all assessee's case, the facts of M/s. MAC Quality Builders Private Limited has been considered for adjudication.

3. The assessee company is engaged in the business of real estate. The assessee company has filed the return of income under section 139(1) of the Act on 02.03.2022 and declared a total loss of ¡ .8,60,35,790/-.

4. The Assessing Officer has stated that the material seized vide ANN/BS/IG/LS/S-4 and ANN/BS/IG/LS/S-6 during the course of search conducted in the case of Shri Shanmugam Thiagarajan, Smt. Unnamalai Thiagarajan, Smt. Rukmini Thiagarajan, M/s ETL Power Services Ltd and M/s IG3 Infra Ltd contained information relating to the appellant company. The Assessing Officer stated that the said seized material contained the balance sheets of M/s IG3 Infra Limited as on 31.03.2020 & 03.11.2020. On analysing the said balance sheets, the Assessing Officer noted that the Capital Work In Progress (CWIP) increased from ¡ .366.83 crores as on 31.03.2020 to ¡ .714.01 crores as on 03.11.2020. On analysing the detailed reasons for the huge increase in CWIP, it was noticed that most of the said increase was due to the works said to have been undertaken by the assessee company and four other companies in the group. The details of works said to have been undertaken by them are as follows:

Sl.No.	Name	Amount (Rs.)
01	MAC Quality Builders Private Limited	88,92,45,200
02	Mukunda Land Developers Private Limited	51,13,44,866
03	Mugilan Structurals Private Limited	36,85,89,045
04	Minal Contractors and Builders Private Limited	87,80,05,819
05	Meadows Infrastructure Private Limited	72,60,86,883
	Total	337,32,71,813

5. Further, it was noticed that the assessee company received funds on various dates from M/s.IG3 Infra Limited towards the works said to have been undertaken by the assessee. The details of receipt of funds by the assessee company are as follows:

Date	Amount(Rs.)
27.04.2020	36,71,23,450
28.05.2020	22,65,46,790
17.06.2020	6,11,20,000
22.06.2020	4,40,00,000
25.06.2020	5,20,00,000
25.06.2020	3,60,00,000
25.06.2020	10,24,00,000
Total	88,91,90,240

6. On examination of the copies of the invoices for the works said to have been undertaken by the appellant and four other group companies for M/s. IG3 Infra Limited found in the seized material at page Nos.1-21 of ANN/BS/IG/LS/S-4, the Assessing Officer has noted that all the invoices are almost similar and the same are without much details. It was noticed that most of the invoices were dated in the months of August and September 2020, whereas the payments to the assessee company and four other group companies were made much before the said months. The Assessing Officer analyzed the purchase orders placed by M/s.IG3 Infra Limited on the assessee and four other group companies and noted that the same were prepared on a much later date when compared with the date of payment to the assessee and the date of invoices. The mail communication between

p2purchase@indiangreengridgroup.com and Rukmini@chennai1.in has shown that the purchase orders were prepared and sent by Shri Yogeshwaran of M/s. IG3 Infra Limited on 30.09.2020 whereas the dates mentioned in the purchase orders are in the month of December 2019. The copies of the relevant emails purchase orders and bills of quotation were seized vide ANN/BS/IG/LS/S-6.

7. In his sworn statement recorded under section 132(4) of the Act dated 05.11.2020, Shri Yogeshwaran, Purchase manager stated that the purchase orders and the Bills of Quotation (BoQ) were prepared on the instructions of Smt Rukmini Thiagaraian at later date. Thus, it is evident that the purchase orders and BoQ were prepared at a much later date after the dates of payments. The payments to the assessee company and four other group companies were made in April, May and June 2020 whereas the purchase orders were prepared in October, 2020, though they were dated as December 2019. The Assessing Officer has noted that the payments aggregating to ¡ .88,91,90,240/- were made by M/s. IG3 Infra Limited to the assessee even without purchase orders or BoQ. The same is the case in respect of payments made to four other group companies.

8. In his sworn statement recorded under section 132(4) of the Act dated 05.11.2020, Shri Ramesh, Senior Accounts Executive of M/s.IG3 Infra Limited stated that entries were made by him as per the instructions of Smt Rukmini Thiagarajan and that such entries were made by him without proper vouchers or original bills or the Goods Receipt Note (GRN). Further, Shri Manoharan and Ms. Umamaheswari of the accounts team of M/s. IG3 Infra Limited have also accepted in their statements that the tally entries were made as per the instructions of Smt Rukmini Thiagarajan. Shri Hallins Raj Selvan, the Stores Officer of M/s. IG3 Infra Limited admitted in his sworn statement dated 05.11.2020 that there is no GRN for the bills from the assessee company since there is no actual delivery of goods. Thus, it is clear from the seized material and the statements of the accounts personnel that the details for making ledger entries in the tally in respect of the assessee and four other group companies were given to them by Smt Rukmini Thiagarajan and the relevant entries were made without the availability of bills and without verification of GRN and other particulars which usually accompany the bills.

9. Apart from the above, in his sworn statement dated 06.11.2020, Shri Ramamoorthi, Accounts Executive has confirmed that he had made transfer of funds to the assessee company and four other group companies as per the instructions of Smt Rukmini Thiagarajan and that there was no actual purchase of goods by M/s.IG3 Infra Limited or delivery of goods by the assessee and four other group companies. Moreover, the premise of M/s. IG3 Infra Limited is situated in SEZ and any movement of goods in and out of the premise of the said company are entered in a register maintained by the Nodal Officer of the SEZ. The said registers maintained by the Nodal Officer were seized vide ANN/BS/IG/B&D/S-1 to 14 and the examination of the said registers has revealed that no goods were delivered to M/s. IG3 Infra Limited by the assessee company and four other group companies, which brought out the fact that there was no purchase of goods by M/s.IG3 Infra Limited or delivery of goods by the appellant company and four other group companies to M/s.IG3 Infra Limited.

10. On the basis of the above findings during the search, the AO observed that the assessee company and four other group companies were used by the promoters of M/s. IG3 Infra Limited to divert

funds of the said company for their own benefit and purpose. Further, a statement under section 131 of the Act was recorded from Shri Sasikumar, one of the Directors of the assessee company and that he had accepted that invoices were raised without carrying out any work. Smt Rukmini Thiagarajan has also admitted vide letter dated 03.02.2021 that funds were transferred from M/s.IG3 Infra Limited to the assessee company and four other group companies and that it was inadvertently recorded in the books of account as "Capital Work In Progress" instead of "Loans". Accordingly, the Assessing Officer has concluded that the amounts paid to the assessee company and four other group companies by M/s. IG3 Infra Limited during the previous year relevant to AY 2021-22 represent loans advanced by the said company.

11. The Assessing Officer has identified that the appellant company and four other group companies, to whom M/s.IG3 Infra Limited has advanced loans as stated above are related to each other. The AO observed that the address, the Directors, the Shareholders, details of Incorporation of the Companies and details of Change in the name of the companies have revealed that the said companies are related to one another. The AO pointed out that the registered addresses of the assessee company at Plot No. 198, 13th Cross Street, Sri Sai Nagar, Thoraipakkam, Chennai and at Plot No.10, Sri Karapaga Vinayagar Street, Thoraipakkam, Chennai are being used as residence for the staff working in M/s.IG3 Infra Limited. As confirmed by Shri Senthilnathan and Shri Palash Bora in their statements u/s 132(4) of the Act. Thus, the Assessing Officer was of the opinion that the assessee company and four other group companies are related to each other and that the assessee is one of the group concerns of M/s.IG3 Infra Limited.

12. The AO observed that there was a change in the shareholders of the assessee company and four other group companies during the previous year relevant to the assessment year under consideration. The details of changes in the shareholding are as follows:

Particulars	MAC Quality Contractors & Developers P. Ltd.	Minal Structurals P. Ltd.	Mukunda Infrastructure P Ltd.	Land Builders P. Ltd.	Mugilan Lrd.Ltd.	Meadows Ltd.	Builders P Ltd.
Date of change in shareholding	23.04.2020		23.04.2020		23.04.2020 & 08.05.2020		08.05.2020
	Southern Projects Management P Ltd. (998 shares)		Stur Power Sector Management P. Ltd.(998 shares)		Stur Power Sector Management P. Ltd. (998 shares)		Stur Power Sector Management P. Ltd.(998 shares)
Old shareholders	Unnamalai Thiagarajan (1 share)		Unnamalai Thiagarajan (1 share)		Unnamalai Thiagarajan (1 share)		Unnamalai Thiagarajan (1 share)
New Shareholders	Mohammed Rafi (999 shares)		Anu Abraham (999 shares)		Sikandar K. Sasikumar (999 shares)		Anu Abraham (999 shares)
	Sikandar K. Sasikumar (1 share)		Mohammed Rafi (1 share)		Anu Abraham (1 share)		Sikandar K. Sasikumar (1 share)

The Assessing Officer has observed that the shares of

the assessee company were transferred to Shri Sikandar Mohammed Rafi and Ms. Anu Abraham on 23.04.2020 just 3 days prior to the first transfer of funds from M/s.IG3 Infra Limited to the assessee on 27.04.2020 in order to avoid the provisions of section 2(22)(e) of the Act and payment of taxes under the Act. On analysis of the old and new share holding pattern of the assessee company and corporate structure of M/s. IG3 Infra Limited, it is clear that the assessee company is a group concern of M/s. IG3 Infra Limited in which the family of Thiagarajan has substantial interest and the ultimate shareholders of the assessee company are Shri Shanmugam Thiagarajan, Smt Unnamalai Thiagarajan and Smt Rukmini Thiagarajan. The AO observed that the reserves and surplus of M/s. IG3 Infra Limited as on 31.03.2020 amounted to ¡ .257,62,37,000/-. The AO also observed that these facts clearly establish that the fund transfers by way of loans to the tune of ¡ .88,91,90,240/- to the assessee by M/s. IG3 Infra Limited is nothing but dividend payments by M/s. IG3 Infra Limited to the benefit of shareholders in terms of the provisions of section 2(22)(e) of the Act.

The AO stated that the loan of ¡ .88,91,90,240/- was received by the assessee on behalf of and for the benefit of the ultimate shareholders i.e., Shri Shanmugam Thiagarajan, Smt Unnamalai Thiagarajan and Smt Rukmini Thiagarajan. The AO stated that it is therefore clear that the payments were made on behalf of and for the individual benefit of Shri Shanmugam Thiagarajan, Smt Unnamalai Thiagarajan and Smt Rukmini Thiagarajan by M/s. IG3 Infra Limited out of the accumulated profits of the said company. The AO referred to the provisions of section 2(22)(e) of the Act and held that the said payment of ¡ .88,91,90,240/- made to the assessee company falls under the scope of "Deemed Dividend" since the same represents a payment made by M/s. IG3 Infra Limited on behalf of or for the individual benefit of its shareholders i.e. Shri Shanmugam Thiagarajan, Smt Unnamalai Thiagarajan and Smt Rukmini Thiagarajan.

13. Accordingly, the Assessing Officer issued a show cause notice to the assessee vide Notice under section 142(1) of the Act dated 14.12.2022 to explain as to why the loan amount of ¡ .88,91,90,240/- received by it from M/s. IG3 Infra Limited should not be treated as "Deemed Dividend" under the provisions of sec 2(22)(e) of the Act. After considering the submissions of the assessee as well as by relying upon various case law, the Assessing Officer has observed that the provisions of Deemed dividend are applicable even when the shareholder in a company is a direct or indirect shareholder. The Assessing Officer further observed that the ultimate controlling ownership interest in M/s. IG3 Infra Limited and the appellate company lies with the Thiagarajan family i.e. Shri Shanmugan Thiagaraian, Smt Unnamalai Thiagarajan and Smt Rukmini Thiagarajan. The Assessing Officer has further observed that the change of shareholders just prior to transfer of funds clearly establishes that the shareholders of the assessee company were only nominees and it clearly proves that the shares are ultimately held by the family of Shri Thiagaraian by exerting significant influence on the corporate activity of the assessee company. Since the share holding pattern of the assessee company was changed on 23.04.2020 just prior to the transfer of funds from M/s. IG3 Infra Limited in order to escape from the tax liability under section 2(22)(e) of the Act, the Assessing Officer has held that

the loan payment of ₹ .88,91,90,240/- by M/s. IG3 Infra Limited to the assessee company was liable to be treated as deemed dividend under section 2(22)(e) of the Act in the hands of the assessee company as the same does not exceed the accumulated profits of M/s. IG3 Infra Limited as on 31.03.2020 and accordingly, made addition of ₹ .88,91,90,240/- under section 2(22)(e) of the Act.

14. The assessee carried the matter in appeal before the ld. CIT(A). After considering the detailed written submissions of the assessee, the ld. CIT(A) has observed as under:

> 28. I have given careful consideration to the findings of the AO, the written submission of the appellant and the material available on record. In the assessment order, the AO treated the loan of Rs.88,91,90,240/- advanced by M/s.IG3 Infra Limited to the appellant company on various dates during the period from 27.04.2020 to 25.06.2020 as income liable to tax in the hands of the appellant company by way of deemed dividend us 2(22)(e) of the Act.

In the grounds of appeal, the appellant contended that the provisions of sec 2(22)(e) are not applicable to its case since neither the appellant company nor its present shareholders (shareholders at the time of receiving the loans) were holding any shares in the company which advanced loans to the appellant company. The appellant also contended that the AO has wrongly considered the previous shareholders for reckoning the applicability of the provisions of sec 2(22)(e)instead of considering the shareholders as on the dates of receiving the loan.

29. In the written submission furnished during the course of the appellate proceedings, the appellant advanced the following contentions disputing the addition of deemed dividend made in the assessment order:

> 1) The provisions of deemed dividend u/s 2(22)(e) are applicable only in respect of the shareholder of the lender company holding not less than 10% of the voting power in cases where the lender company advances a loan either to such shareholder or to a concern in which such shareholder has substantial interest. In the appellant's case, neither the appellant company nor any of its present shareholders (as on the dates of receipt of loans) held any equity shares in the lender company i.e. M/s.IG3 Infra Limited.
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> 2) The provisions of sec 2(22)(e) do not give any authority to the AO to consider the previous shareholders for invoking the deemed dividend provision and the shareholders as on the date of receiving the loans only have to be taken into consideration for the said purpose. The action of the AO in considering the previous shareholders of the appellant company to arrive at the addition u/s 2(22)(e) is not permissible in Law.
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> 3) The deemed dividend provisions are applicable only when the shareholder is a registered as well as a beneficial shareholder. Since the appellant company is not a registered shareholder of the lender company in the first place, the deemed dividend

provisions are not attracted in its case.

4) The deemed dividend provisions are applicable to a shareholder only and any addition by invoking the provisions of sec 2(22) (e) can be made in the hands of the shareholder only and not in the hands of the concern which received the loan in which the shareholder has substantial interest. Since the appellant company is not a shareholder in M/s.IG3 Infra Limited, the loan received from the said company by the appellant company cannot be brought to tax as deemed dividend in the hands of the appellant.

5) The finding of the AO that the loan given by M/s.IG3 Infra Limited to the appellant company amounted to a payment made for the benefit or on behalf of the members of Thiagarajan family i.e. Shri Shanmugam Thiagarajan, Smt. Unnamalai Thiagarajan and Smt. Rukmini Thiagarajan and that such payment falls under the scope of deemed dividend u/s 2(22)(e) is erroneous since none of the said persons were shareholders in MsIG3 Infra Limited at the time of advancing the loan to the appellant company.

6) Though the AO asserted in the assessment order that Shri Shanmugam Thiagarajan, Smt. Unnamalai Thiagarajan and Smt. Rukmini Thiagarajan are the ultimate shareholders of MsIG3 Infra Limited as well as the appellant company, he has not substantiated the said assertion by any cogent material or reasoning. Further, the AO did not bring out any corroborative evidence to substantiate his finding that the ultimate shareholders have benefitted from the loan transactions even though they were not the shareholders in M/s. IG3 Infra Limited at the time of advancing the loan to the appellant company.

30. The contentions put forth by the appellant have been carefully examined in the light of the facts of the case and the provisions of sec 2(22)(e). The provisions of sec 2(22)(e) have laid down three situations where deemed dividend arises in the hands of the shareholders. The first situation is where loan is advanced by a closely held company to a shareholder who holds not less than 10% of the voting power in the said company. The second situation is where loan is advanced by a closely held company to a concern in which a shareholder of such company holding not less than 10% of the voting power has substantial interest in the concern. The third situation is where any payment is made by a closely held company on behalf or for the benefit of a shareholder who holds not less than 10% of the voting power in the said company. In all the three situations mentioned above, the amount of deemed dividend is required to be restricted to the accumulated profits of the company which advanced the loan/ made the payment. The three situations mentioned above are hereinafter referred to as the first limb, second limb and third limb of sec 2(22\e) respectively.

31. In the Assessment Order, the AO invoked the second limb as well as the third limb of sec 2(22)(e) for holding that the loans aggregating to Rs.88,91,90,240/- advanced by MsIG3 Infra Limited to the appellant company during the period from 27.04.2020 to 25.06.2020 amounted to deemed dividend liable for tax in the hands of the appellant company. The applicability of the

second limb and the third limb of sec 2(22)(e) to the facts of the appellant's case are discussed separately in the following paragraphs:

Applicability of second limb of sec.2(22)(e)

32. In order to invoke the second limb of sec 2(22)(e), the following conditions are required to be fulfilled:

1) The company advancing the loan should be a closely held company

2) The company should have a shareholder, being a person who is the beneficial owner of shares, holding not less than 10% of the voting power in the company.

3) The loan is advanced by the said company to a concern in which such shareholder has substantial interest. In cases where the recipient concern is a company, substantial interest means holding of not less than 20% of the voting power.

4) The company has accumulated profits and the loan has been paid out of such accumulated profits.

33. In the present case, there is no dispute with regard to the satisfaction of the conditions listed at Sl. Nos.1 & 4 above. As regards the conditions listed at Sl. Nos.2 & 3 above, it needs to be established that there is a common shareholder (being a person who is the beneficial owner of shares) between M/s. IG3 Infra Limited and the appellant company and that such common share holder holds not less than 10% of the voting power in M/s.IG3 Infra Limited and not less than 20% of the voting power in the appellant company at the time of advancing the loan by M/s.IG3 Infra Limited to the appellant company in order to hold that the said conditions have been satisfied.

34. In this connection, it is important to understand the meaning of the expression "shareholder, being a person who is the beneficial owner of shares" used in sec 2(22)(e). The interpretation of the said expression has been the subject matter of the decisions of Hon'ble Delhi High Court in the case of CIT vs. Ankitech Private Limited (2012) 340 ITR 14 (Delhi) and the Hon'ble Supreme Court in the case of CIT vs Madhur Housing and Development Co. (2018) 401 ITR 152 (SC), In the case of CIT vs Ankitech Private Limited (Supra), the Hon'ble Delhi High Court held that the expression "shareholder" has to be construed to mean a 'registered shareholder' in view of the decisions of the Hon'ble Supreme Court in the cases of CIT vs. CP Sarathy Mudaliar (1972) 83 ITR 170 (SC) and CIT vs. Rameshwarlal Sanwarmal (1980) 22 ITR 1 (SC), The Hon'ble High Court observed that the word "shareholder" followed by the expression "being a person who is the beneficial owner of shares" does not in any way alter the position that the shareholder has to be a registered shareholder and that the said expression imposes a further condition that the shareholder has also to be a beneficial owner of the shares. Accordingly, the Hon'ble High Court held that the expression "shareholder, being a person who is the beneficial owner of shares" in sec 2(22)(e) refers to both a registered shareholder and beneficial shareholder. The Hon'ble High Court held that if a person is a registered shareholder but not a beneficial shareholder, the provisions of sec 2(22)\(e) will not apply and similarly if a

person is a beneficial shareholder but not a registered shareholder, the provisions of sec 2(22)(e) will not apply. The relevant portion of the decision of the Hon'ble Delhi High Court is extracted as under:

> 20. In the case of CIT CP Sarathy Mudaliar (supra), provisions of Section 2(6A)(e) of the Act, 1922, which was synonymous to Section 2(22)(e) of the IT Act, 1961 came up for consideration. In the said case, members of HUF acquired shares in a company with the fund of the family. Loans were granted to HUF and the question was whether the loans could be treated as dividend income of the family falling within Section 2(64)(e) of the Act, 1922. The apex Court held that only loans advanced to shareholders could be deemed to be dividends under Section 2(64)(e) of the Act; the HUF could not be considered to be a shareholder under Section 2(6A)(e) of the Act and hence, loans given to the HUF will not be considered as loans advanced to "shareholder'" of the company and could not, therefore, be deemed to be its income. The apex Court further held that when the Act speaks of shareholder it refers to the registered shareholder.
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> 21. The aforesaid decision of the apex Court in the case of C.P Sarathy Mudaliar (supra) has been followed by the apex Court in the case of Rameshwarlal Sanwarmal v CIT (supra). In this case, the company advanced the loans to the assessee HUF who was the beneficial owners of the shares in the company, but the shares were registered in the name of the individual Karta, who held the shares for and on behalf of the HUF On the above facts, the question before the Supreme Court was whether the loans advanced to the HUF-

beneficial owner of the shares-would be taxed as deemed dividend in the hands of the HUE The Supreme Court held that the HUF being only the beneficial shareholder and not a registered shareholder would not fall within the purview of Section 2(6A)(e) of the 1922 Act. The apex Court observed as follows:

> .....What Section 2(6A)(e) is designed to strike at is advance or loan to a 'shareholder' and the word 'shareholder' can mean only a registered shareholder. It is difficult to see how a beneficial owner of shares whose name does not appear in the register of shareholders of the company can be said to be a 'shareholder'. He may be beneficially entitled to the share but he is certainly not a 'shareholder'. It is only the person whose name is entered in the register of the shareholders of the company as the holder of the shares who can be said to be a shareholder qua the company and not the person beneficially entitled to the shares. lt is the former who is a 'shareholder' within the matrix and scheme of the company law and not the latter. We are, therefore, of the view that it is only where a loan is advanced by the company to a registered shareholder and the other conditions set out in Section 2(6A)(e) are satisfied that the amount of the loan would be liable to be regarded as 'deemed dividend' within the meaning of Section 2(64)(e).

> 22. It is thus clear from the aforesaid pronouncement of the Hon'ble Supreme Court that to attract the first limb of the provisions of Section 2(22)(e) the payment must be to a person who is a registered holder of shares. As already mentioned the condition under the 1922 Act and the 1961 Act regarding the payee being a shareholder remains the same and it is the condition that such shareholder should be beneficial owner of the shares and the percentage of voting power that such shareholder should hold that has been prescribed as an additional condition under the 1961 Act. The word "shareholder"

alone existed in the definition of dividend in the 1922 Act. The expression "shareholder" has been interpreted under the 1922 Act to mean a registered shareholder. This expression "shareholder found in the 1961 Act has to be therefore construed as applying only to registered shareholder. It is a principle of interpretation of statutes that where once certain words in an Act have received a judicial construction in one of the superior Courts, and the legislature has repeated them in a subsequent statute, the legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given them.

23. In the 1961 Act, the word "shareholder" is followed by the following words "being a person who is the beneficial owner of shares". This expression used in Section 2(22)(e), both in the 1961 Act and in the amended provisions w.e.f. 1st April, 1988 only qualifies the word "shareholder" and does not in any way alter the position that the shareholder has to be a registered shareholder. These provisions also do not substitute the aforesaid requirement to a requirement of merely holding a beneficial interest in the shares without being a registered holder of shares. The expression "being" is a present participle. A participle is a word which is partly a verb and partly an adjective. In Section 2(22)(e) the present participle "being" is used to described the noun 'shareholder' like an adjective. The expression "being a person who is the beneficial Owner of shares" is therefore a further requirement before a shareholder can be said to fall within the parameters of Section 2(22)(e) of the Act. In the 196l Act, Section 2(22)(e) imposes a further condition that the shareholder has also to be 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 poser. It is not possible to accept the contention of the learned Departmental Representative that under the 1961 Act there is no requirement of a shareholder being a registered holder and that even a beneficial ownership of shares would be sufficient.

24. The expression "shareholder being a person who is the beneficial owner of shares" referred to in the first limb of Section 2(22)(e) refers to both a registered shareholder and beneficial shareholder If a person is a registered shareholder but not the beneficial then the provision of Section 2(22)(e) will not apply. Similarly if a person is a beneficial shareholder but not a registered shareholder then also the first limb of provisions of Section 2(22)(e) will not apply.

35. The abovementioned decision of the Hon'ble Delhi High Court has been affirmed by the Hon'ble Supreme Court in the case of CIT Vs Madhur Housing and Development Co. (Supra). The Hon'ble Supreme Court held that the judgement of the Delhi High Court is a detailed judgement going into sec 2(22) (e) of the Income Tax Act which arrives at the correct construction of the said section and

that it does not wish to add anything to the judgement except saying that it agrees with the said judgement.

36. In view of the abovementioned decisions of the Hon'ble Delhi High Court and Hon'ble Supreme Court, the expression "shareholder, being a person who is beneficial owner of shares" is required to be construed as a "registered and beneficial shareholder". Consequently, for the purpose of invoking the second limb of sec 2(22)(e), it needs to be seen whether there is any common registered and beneficial shareholder between M/s.IG3 Infra Limited and the appellant company, who holds not less than 10% of the voting power in M/s. IG3 Infra and not less than 20% of the voting power in the appellant company.

37. In this connection, the shareholding pattern of M/s.IG3 Infra Limited at the time of advancing the loans to the appellant company is as shown in the table below:

Sl.No.	Name of the Shareholder	Percentage of shareholding of Equity shares
1.	ETL Power Services Limited	89.56%
2.	Green Grid Group Pte Limited	7.86%
3.	IL & FS Trust Co. Ltd., A/c IL & FA Pvt. Equity Trust - IL & FS Realty Fund	1.77%
4.	Elnet Technologies	0.8%
5.	Unnamalai Thiagarajan	0.002%
6.	A. Subramanian	0.002%
7.	V.G. Madan Mohan	0.002%
8.	R. Tamil Selvam	0.002%
9.	Vaikkam Infrastructures Projects Pvt. Ltd.	0.002%

38. With regard to the shareholding pattern of the appellant company, it is observed that there was a change in the shareholding pattern during the previous year on 23.04.2020, which is just 3 days prior to the first tranche of the loan given by M/s.IG3 Infra Limited to the appellant. The shareholders of the appellant company upto 23.04.2020 were M/s. Southern Project Management Private Limited holding 99.80% of the voting power, Smt. Unnamalai Thiagarajan holding 0.1% of the voting power and Smt. Rukmini Thiagarajan holding 0.1% of the holding power. The said shareholders are hereinafter referred to as the previous shareholders'. The shareholders of the appellant company after 23.04.2020 are Shri. Sikandar Mohammed Rafi holding 99.90% of the voting power and Ms. Anu Abraham holding 0.1% of the voting power. The said shareholders are hereinafter referred to as the 'present shareholders'.

39. The existence of a common registered and beneficial shareholder between M/s.IG3 Infra Limited and the appellant company has to be seen at the time of release of various tranches of the loan to the appellant company during the period from 27.04.2020 to 25.06.2020. During the said period, the appellant company has new shareholders as mentioned in the preceding paragraph. On comparing the registered shareholders of M/s.IG3 Infra Limited and the appellant company during the period of advancing the loans, it is noticed that there is no common registered shareholder between the two companies, much less a common registered shareholder holding not less than 10%

of the voting power. As there is no common registered shareholder, the question of having a common registered and beneficial shareholder does not arise.

40. In the assessment order, the AO held that the ultimate shareholders of M/s.IG3 Infra Limited and the appellant company are the members of Thiagarajan Family in order to invoke the second limb of sec 2(22)(e). It appears that the AO used the expression "ultimate shareholder' to mean a "beneficial shareholder". In this regard, it is noticed that the AO did not furnish any reasons or data backed by evidence in support of the said finding regarding the common ultimate shareholders and consequently, the said finding which is unsubstantiated cannot be taken into consideration.

41. Moreover, even if the said finding is assumed to be factually correct, the same does not facilitate invoking of the second limb of sec 2(22)(e) since it is not adequate that the common shareholder is a beneficial shareholder and it is a mandatory requirement as per the decision of Hon'ble Supreme Court cited above that the common shareholder is a 'registered as well as beneficial' shareholder. Since there is no common registered and beneficial shareholder between M/s.IG3 Infra Limited and the appellant company during the period when loans were advanced, it is required to be held that the second limb of sec 2(22)(e) is not applicable to the facts of the appellant's case.

42. In the assessment order, the AO also made an observation that since the shareholders of the appellant company have been completely changed just 3 days prior to the advancing the first tranche of the loan, the same has to be considered as the attempt made to avoid the incidence of deemed dividend u/s 2(22)(e). In view of the said observation, the AO made comparison of the shareholders of M/sIG3 Infra Limited with the previous shareholders of the appellant company (shareholders prior to 23.04.2020) and recorded a finding that the ultimate shareholders of both the companies are Shri. Shanmugam Thiagarajan, Smt. Unnamalai Thiagarajan and Smt. Rukmini Thiagarajan. In this regard, it is pertinent to observe that no such comparison of shareholders of M/s.IG3 Infra Limited with the previous shareholders of the appellant company (shareholders prior to 23.04.2020) is legally permissible for the purpose of the second limb of sec 2(22)(e) and it is only the shareholders at the time of advancing the loans who need to be considered for the said purpose. This proposition has been laid down by the Hon'ble Allahabad High Court in the case of CIT vs HK Mittal (1996) 219 ITR 420. The Hon'ble High Court held in the said case that the chief ingredient of sec 2(22)(e) is that one should be a shareholder on the date the loan was advanced.

43. Notwithstanding the legal infirmity in the comparison made by the AO between the shareholders of M/s.IG3 Infra Limited and the previous shareholders of the appellant company as stated in the preceding paragraphs, it is found that the finding rendered by the AO based on the said comparison is also without factual basis. It is seen that the AO did not furnish any reasons or data or documentary evidence in support of his finding that the ultimate shareholders of both the companies are Shri Shanmugam Thiagarajan, Smt. Unnamalai Thiagarajan and Smt. Rukmini Thiagarajan. Consequently, the said finding which is unsubstantiated on facts cannot be taken into consideration.

44. Moreover, even if the said finding is assumed to be factually correct, the same does not facilitate invoking of the second limb of sec 2(22)(e) since it is not adequate that the common shareholder is a

beneficial shareholder and it is a mandatory requirement as per the decision of Hon'ble Supreme Court cited above that the common shareholder is a 'registered as well as beneficial' shareholder. Since there is no common registered and beneficial shareholder between M/s. IG3 Infra Limited and the appellant company even during the period prior to the change in shareholding of the appellant company, it is required to be held that the second limb of sec 2(22)(e) is not applicable to the facts of the appellant's case.

45. In the light of the above discussion, it is evident that regardless of whether the comparison of the shareholders of M/s.IG3 Infra Limited is made with the previous shareholders or the present shareholders of the appellant company, the finding that there are no common registered and beneficial shareholder between the two companies remains the same. As a result, the mandatory condition regarding existence of common registered and beneficial shareholder holding not less than 10% of the voting power in the lending company and not less than 20% of the voting power in the recipient company is found to be not satisfied in the facts of the appellant's case. Hence, it is required to be held that the second limb of sec 2(22)(e) cannot be invoked in the case of the appellant for the purpose of treating the loan received from M/s.IG3 Infra Limited as deemed dividend in its hands. Applicability of third limb of sec.2(22) (e).

46. In order to invoke the third limb of sec 2(22)(e), the following conditions are required to be fulfilled:

1) The company making the payment should be a closely held company

2) The company should have a shareholder, being a person who is the beneficial owner of shares, holding not less than 10% of the voting power in the company

3) The payment made by the company is on behalf or for the individual benefit of such shareholder.

4) The company has accumulated profits and the payment has been made out of such accumulated profits.

47. In the present case, there is no dispute with regard to the satisfaction of the conditions listed at Sl. Nos.1 & 4 above. As regards the conditions listed at S. Nos.2 &3 above, it is pertinent to state that the shareholder (holding not less than 10% of the voting power) of the company on whose behalf or for whose individual benefit the payment is made by the company is required to be a "registered and beneficial shareholder" as per the ratio laid down by the Hon'ble Delhi High Court in the case of CIT vs Ankitech Private Limited (Supra) and the Hon'ble Supreme Court in the case of CII Vs Madhur Housing and Development Co. (Supra), as already discussed earlier in this order.

48. In the Assessment Order, the AO rendered a factual finding that the ultimate shareholders of both M/s.IG3 Infra Limited and the appellant company are Shri. Shanmugam Thiagarajan, Smt. Unnamalai Thiagarajan and Smt. Rukmini Thiagarajan and that the funds transferred by way of loans by M/s.IG3 Infra Limited to the appellant company are for the individual benefit of the said

ultimate shareholders and that the appellant received the said funds on behalf of the ultimate shareholders. In this regard. it is seen that the AO did not furnish any reasons or data backed by evidence in support of his finding that the ultimate shareholders of M/s.IG3 Infra Limited (the company which made the payment) are Shri Shanmugam Thiagarajan, Smt. Unnamalai Thiagarajan and Smt. Rukmini Thiagarajan. Consequently, the said finding which is unsubstantiated on facts cannot be taken into consideration.

49. Moreover, even if the said finding is assumed to be factually correct, the same does not facilitate invoking of the third limb of sec 2(22)(e) since it is not adequate that the shareholder is a beneficial shareholder and it is a mandatory requirement as per the decision of Hon'ble Supreme Court cited above that the shareholder is a 'registered as well as beneficial shareholder. In this regard, it is noticed that Shri Shanmugam Thiagarajan and Smt Rukmini Thiagarajan are not registered shareholders of M/s.IG3 Infra Limited and consequently, both of them cannot be regarded as a "registered and beneficial shareholder". Further, it is noticed that though Smt Unnamalai Thiagarajan is a registered shareholder of M/s.IG3 Infra Limited, her shareholding in the company amounted to 0.002% which is less than the prescribed voting power of 10% to attract the provisions of the third limb of sec 2(22)e). It is therefore evident that none of the three persons of Thiagarajan family treated by the AO to be the ultimate shareholders of M/s IG3 Infra Limited can be considered to satisfy the legal requirements for being treated as a "shareholder, being a person who is the beneficial owner of shares" holding not less than 10% of the voting power, so as to attract the provisions of the third limb of sec 2(22)(e).

50. Notwithstanding the above, it is also noticed that the AO merely recorded a finding that the funds transferred by way of loans by M/s.IG3 Infra Limited to the appellant company amounted to payment made by M/s.IG3 Infra Limited on behalf and for the individual benefit of Shri Shanmugam Thiagarajan, Smt. Unnamalai Thiagarajan and Smt. Rukmini Thiagarajan, without citing any reasons and without referring to any documentary evidences in support of the said finding. The AO has not recorded any reasons as to why he is of the opinion that the funds transferred to the appellant company have resulted in conferring any individual benefit on the said shareholders or that the appellant company has received such funds on behalf of the said shareholders. In the absence of citing of supporting reasons along with cogent evidences, the above mentioned finding of the AO is held to be unsubstantiated and untenable.

51. In the light of the discussion above, it is evident that the mandatory conditions for invoking the provisions of the third limb of sec 2(22)(e) are not satisfied in the facts of the appellant's case, in as much as the payment made by M/s.IG3 Infra Limited to the appellant company by way of loans cannot be regarded as a payment made on behalf or for the individual benefit of a registered and beneficial shareholder of M/s.IG3 Infra Limited holding not less than 10% of the voting power. Hence, it is required to be held that the third limb of sec 2(22)(e) cannot be invoked in the case of the appellant for the purpose of treating the amount received from M/s.IG3 Infra Limited as deemed dividend in its hands.

Person in whose hands deemed dividend, if any, is taxable

52. Notwithstanding the findings rendered above that the conditions prescribed in sec 2(22)(e) are not satisfied in the facts of the appellant's case in order to hold that the provisions of deemed dividend are attracted, another issue which needs consideration is whether the deemed dividend, if any, is taxable in the hands of the appellant company. In the assessment order, the AO made addition of the deemed dividend in the hands of the appellant company. However, the appellant challenged the same in the grounds of appeal stating that the deemed dividend is not liable to be taxed in the hands of the appellant company since the appellant is not a shareholder in M/s.IG3 Infra Limited. Hence, the legal issue arising for consideration is whether the deemed dividend, if any, is assessable in the hands of the specified shareholder of the lender company or in the hands of the concern which received the loan in which such shareholder has substantial interest.

53. The said legal issue has been the subject matter of the decisions rendered by various High Courts and Tribunals. The Hon'ble Bombay High Court held in the case of CIT vs Universal Medicare Private Limited (2010) 324 ITR 263 that the deemed dividend us 2(22)\e) is required to be taxed in the hands of the shareholder and not in the hands of the concern in which such shareholder has substantial interest which received the loan. The relevant portion of the Hon'ble High Court is extracted as under:

> 8. Clause (e) of Section 2(22) is not artistically worded. For facility of exposition, the contents can be broken down for analysis: (i) Clause
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> (e) applies to any payment by a company not being a company in which the public is substantially interested of any sum, whether as representing a part of the assets of the company or otherwise made after the 31 May 1987; (ii) Clause (e) covers a payment made by way of a loan or advance to (a) a shareholder, being a 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 (b) any concern in which such shareholder is a member or a partner and in which he has a substantial interest; (iii) Clause (e) also includes in its purview any payment made by a company on behalf of or for the individual benefit, of any such shareholder; (iv) Clause (e) will apply to the extent to which the company, in either case, possesses accumulated profits. The remaining part of the provision is not material for the purposes of this Appeal.

By providing an inclusive definition of the expression 'dividend', clause 2(22) brings within its purview items which may not ordinarily constitute the payment of dividend. Parliament has expanded the ambit of the expression 'dividend' by providing an inclusive definition.

9. In order that the first part of clause (e) of Section 2(22) is attracted, the payment by a company has to be by way of an advance or loan. The advance or loan has to be made, as the case may be, either to a shareholder, being a beneficial owner holding not less than ten per cent of the voting power or to any concern to which such a shareholder is a member or a partner and in which he has a substantial interest. The Tribunal in the present case has found that as a matter of fact no loan or advance was granted to the assessee, since the amount in question had actually been defalcated and

was not reflected in the books of account of the assessee. The fact that there was a defalcation seems to have been accepted since this amount was allowed as a business loss during the course of assessment year 2006- 2007. Consequently, according to the Tribunal the first requirement of there being an advance or loan was not fulfilled. In our view, the finding that there was no advance or loan is a pure finding of fact which does not give rise to any substantial question of law. However, even on the second aspect which has weighed with the Tribunal, we are of the view that the construction which has been placed on the provisions of Section 2(22)(e) is correct. Section 2(22)(e) defines the ambit of the expression 'dividend'. All payments by way of dividend have to be taxed in the hands of the recipient of the dividend namely the shareholder. The effect of Section 2(22) is to provide an inclusive definition of the expression dividend. Clause (e) expands the nature of payments which can be classified as a dividend. Clause (e) of Section 2(22) includes a payment made by the company in which the public is not substantially interested by way of an advance or loan to a shareholder or to any concern to which such shareholder is a member or partner, subject to the fulfilment of the requirements which are spelt out in the provision.

Similarly, a payment made by a company on behalf, of for the individual benefit, of any such shareholder is treated by clause (e) to be included in the expression dividend'. Consequently, the effect of clause (e) of Section 2(22) is to broaden the ambit of the expression 'dividend' by including certain payments which the company has made by way of a loan or advance or payments made on behalf of or for the individual benefit of a shareholder.

The definition does not alter the legal position that dividend has to be taxed in the hands of the shareholder. Consequently in the present case the payment, even assuming that it was a dividend, would have to be taxed not in the hands of the assessee but in the hands of the shareholder. The Tribunal was, in the circumstances, justified in coming to the conclusion that, in any event, the payment could not be taxed in the hands of the assessee.

We may in concluding note that the basis on which the assessee is sought to be taxed in the present case in respect of the amount of Rs.32,00,000 is that there was a dividend under Section 2(22) (e) and no other basis has been suggested in the order of the Assessing Officer.

54. Similar view was expressed by the Hon'ble Rajasthan High Court in the case of CIT Vs Hotel Hilltop (2008) 217 CTR (Raj) 527. The relevant portion of the decision of the Hon'ble High Court is extracted as under:

> 9. The more important aspect, being the requirement of Section 2(22)(e) is, that "the payment may be made to any concern, in which such shareholder is a member, or the partner, and in which he has substantial interest, or any payment by any such company, on behalf, or for the individual benefit of any such shareholder.. " Thus, the substance of the requirement is, that the payment should be made on behalf of, or for the individual benefit of any such shareholder, obviously, the provision is intended to attract the liability of tax on the person, on whose behalf, or for whose individual benefit, the amount is paid by the company, whether to the shareholder, or to the concern firm. In which event, it would fall within the expression "deemed dividend"

> Obviously, income from dividend, is taxable as income from other sources, under Section 56 of the Act, and in the very nature of things, the income has to be, of the person earning the income. The assessee in the present case is not shown to be one of the persons, being shareholder. Of course the two individuals being Roop Kumar and Devendra Kumar, are the common persons, holding more than requisite amount of share holding, and are having requisite interest, in the firm, but then, thereby the deemed dividend would not be deemed dividend in the hands of the firm, rather it would obviously be deemed dividend in the hands of the individuals, on whose behalf, or on whose individual benefit, being such shareholder, the amount is paid by the company to the concern.
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> 10. Thus, the significant requirement of Section 2(22) (e) is not shown to exist. The liability of tax, as deemed dividend, could be attracted in the hands of the individuals, being the shareholders, and not in the hands of the firm.

55. The Hon'ble Delhi High Court has also rendered a similar finding in the case of CIT vs Ankitech Private Limited (2012) 340 ITR 14 (Del). The relevant portion of the decision of the Hon'ble High Court is extracted as under:

> 24. The intention behind enacting provisions of Section 2(22) (e) is that closely held companies (ie. companies in which public are not substantially interested), which are controlled by a group of members, even though the company has accumulated profits would not distribute such profit as dividend because if so distributed the dividend income would become taxable in the hands of the shareholders. Instead of distributing accumulated profits as dividend, companies distribute them as loan or advances to shareholders or to concern in which such shareholders have substantial interest or make any payment on behalf of or for the individual benefit of such shareholder. In such an event, by the deeming provisions, such payment by the company is treated as dividend. The intention behind the provisions of Section 2(22)(e) of the Act is to tax dividend in the hands of shareholders. The deeming provisions as it applies to the case of loans or advances by a company to a concern in which its shareholder has substantial interest, is based on the presumption that the loans or advances would ultimately be made available to the shareholders of the company giving the loan or advance.
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> 25. Further, it is an admitted case that under normal circumstances, such a loan or advance given to the shareholders or to a concern, would not qualify as dividend. It has been made so by legal fiction created under Section 2(22)(e) of the Act. We have to keep in mind that this legal provision relates to-dividend. Thus, by a deeming provision, it is the definition of dividend which is enlarged. Legal fiction does not extend to -shareholder. When we keep in mind this aspect, the conclusion would be obvious, viz, loan or advance given under the conditions specified under Section 2(22)(e) of the Act would also be treated as dividend. The fiction has to stop here and is not to be extended further for broadening the concept of shareholders by way of

legal fiction. It is a common case that any company is supposed to distribute the profits in the form of dividend to its shareholders/members and such dividend cannot be given to non members. The second category specified under Section 2(22) (e) of the Act, Viz., a concern (like the assessee herein), which is given the loan or advance is admittedly not a shareholder/member of the payer company. Therefore, under no circumstance, it could be treated as shareholder/member receiving dividend. If the intention of the Legislature was to tax such loan or advance as deemed dividend at the hands of -deeming shareholder, then the Legislature would have inserted deeming provision in respect of shareholder as well, that has not happened. Most of the arguments of the learned counsels for the Revenue would stand answered, once we look into the matter from this perspective.

26. In a case like this, the recipient would be a shareholder by way of deeming provision. It is not correct on the part of the Revenue to argue that if this position is taken, then the income -is not taxed at the hands of the recipient. Such an argument based on the scheme of the Act as projected by the learned counsels for the Revenue on the basis of Sections 4 5, 8, 14 and 56 of the Act would be of no avail. Simple answer to this argument is that such loan or advance, in the first place, is not an income. Such a loan or advance has to be returned by the recipient to the company, which has given the loan or advance.

27. Precisely, for this very reason, the Courts have held that if the amounts advanced are for business transactions between the parties, such payment would not fall within the deeming dividend under Section 2(22) (e) of the Act.

28. In so far as reliance upon Circular No. 495 dated 22.09.1997 issued by Central Board of Direct Taxes is concerned, we are inclined to agree with the observations of the Mumbai Bench decision in Bhaumik Colour (P) Ltd (supra) that such observations are not binding on the Courts. Once it is found that such loan or advance cannot be treated as deemed dividend at the hands of such a concern which is not a shareholder, and that according to us is the correct legal position, such a circular would be of no avail.

29. No doubt, the legal fiction deemed provision created by the Legislature has to be taken to logical conclusion' as held in Andaleeb Sehgal (supra). The Revenue wants the deeming provision to be extended which is illogical and attempt is to create a real legal fiction, which is not created by the Legislature. We say at the cost of repetition that the definition of shareholder is not enlarged by any fiction.

30. Before we part with, some comments are to be necessarily made by us. As pointed out above, it is not in dispute that the conditions stipulated in Section 2(22)(e) of the Act treating the loan and advance as deemed dividend are established in these cases. Therefore, it would always be open to the Revenue to take corrective measure by treating this dividend income at the hands of the shareholders and tax them

> accordingly. As otherwise, it would amount to escapement of income at the hands of those shareholders.

56. The Hon'ble Madras High Court (the Jurisdictional High Court) has also held in the case of Pr. CIT vs Ennore Cargo Terminal P Ltd (2018) 406 ITR 477 (Mad) that the deemed dividend can only be assessed in the hands of the registered shareholder for whose benefit the money was advanced. The relevant portion of the decision of the Hon'ble High Court is extracted as under:

> 4.Insofar as Question Nos.3 and 4 are concerned, the following brief facts are required to be noticed:
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> 4.1. The assessee-company, evidently, received a capital advance in a sum of Rs.1,09,50,000/- from an entity by the name of Indev Logistics Pvt. Ltd. The assessee-company as well as the said entity, i.e. Indev Logistics Pvt. Ltd., admittedly have common shareholders. The shares in the assessee company to the extent of 50% are held by Mr. Xavier Britto, while the balance shares are held by Smt. Vimalarani Britto. In so far as Indev Logistics Pvt. Ltd. is concerned, shares are held likewise by the said individuals, though in a different ratio. Mr. Xavier Britto holds 60% of the shares in Indev Logistics Pvt. Ltd., while Smt. Vimalarani Britto holds the balance 40% shares in the said entity.
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> 4.2.The Revenue seeks to assess as income the capital advance received by the assessee-company from Indev Logistics Pvt. Ltd. on the ground that it is deemed dividend received by the assessee-

company for the benefit of the registered shareholder. For this purpose, the provisions of Section 2(22)(e) of the Income-tax Act, 1961 (in short 'the Act') is sought to be relied upon. The Tribunal has rejected the said contention of the Revenue, principally, on the ground that deemed dividend can only be assessed in the hands of the registered shareholder for whose benefit the money was advanced. 4.3. As indicated above, there is no dispute that the assessee did receive capital advance from Indev Logistics Pvt. Ltd. There is also no dispute that there are common shareholders both in the assessee- company and Indev Logistics Pvt. Ltd. Therefore, quite correctly, as noted by the Tribunal, though, the advance received by the assessee company may have been for the benefit of the aforementioned registered shareholders, it could only be assessed in the hands of those registered shareholders and not in the hands of the assessee- company.

4.4. In our view, on a plain reading of the provisions of Section 2 (22)

(e) of the Act, no other conclusion can be reached. As a matter of fact, a Division Bench of this Court, in the case of Commissioner of Income Tax VS.Printwave Services P. Ltd., (2015) 373 ITR 665 (Mad.), has reached a somewhat similar conclusion.

5. Mr.Senthil Kumar, however, contends to the contrary and relies upon the judgement of the Supreme Court in Gopal and Sons (HUF) VS. Commissioner of Income-tax, Kolkata-XI, (2017) 77

taxmann.com 71 (SC).

5.1.In our view, the question of law considered by the Supreme Court in the case of Gopal and Sons (supra) was different from the issue which arises in the present matter. The question of law which the Supreme Court was called upon to consider was whether loans and advances received by a HUF could be deemed as a dividend within the meaning of Section 2(22)(e) of the Act. The assessee in that case was the HUF and the payment in question was made to the HUF. The shares were held by the Karta of the HUF. It is in this context that the Supreme Court came to the conclusion that HUF was the beneficial shareholder.

5.2. In the instant case, however, both the registered and beneficial shareholders are two individuals and not the assessee-company. Therefore, in our view, the judgement of the Supreme Court does not rule on the issue which has come up for consideration in the instant matter.

6. Accordingly, in so far as questions Nos. 3 and 4 are concerned, we find that no interference is called for with the view taken by the Tribunal via the impugned order. In these circumstances, the Revenue's appeal, i.e. T.C. (A) No. 105 of 2017, pertaining to AY 2007-08, with regard to the said questions, is dismissed.

57. It is also pertinent to state that the Hon'ble ITAT Chennai (the Jurisdictional Tribunal) has also considered the issue in the case of Pallava Resorts Private Limited Vs ITO (2022) 143 taxmann.com 08 (Chennai-Trib) and held that the amount of loan received by the assessee company from its holding company is not taxable as deemed dividend u/s 2(22)(e) in the hands of the assessee company and the same is taxable in the hands of the common registered shareholders only. The relevant portion of the decision of the Hon'ble Tribunal is extracted as under:

> 7. We have heard the rival contentions and had gone through the facts and circumstances of the case. We note that the Assessee does not hold any shares in QNEI and that it is QNEI that holds 72.299% shares in the Assessee Company. The fact remains that under the Companies Act, 1956, as a subsidiary company of QNEI, it is illegal to have shares in its holding company. From the Balance Sheet filed by the Assessee, it is noticed that the Assessee does not have any investments and therefore it is clear that the Assessee does not hold share in QNEI. However, it is noticed from the submissions of the learned Counsel for the Assessee that the holding company had regularly paid for the expenses of the Assessee and the Assessing Officer had considered these payments as loans and had brought to tax as deemed dividend.
>
> 7.1 From the above, it is clear that the transactions between the Assessee along with its holding company were in the nature of current account and not in the nature of loans and hence does not fall under the scope of the deemed dividend u/s.2(22)(e) of the Act. It is pertinent to point out that ITAT Chennai Tribunal has taken the same view in the case of Fairmacs Shipstores (P) Ltd. v Dy. CIT (IT Appeal No. 761 (Mds.) of 2014]. We noted that identically in this case also the payment should have been made by way of advance of loan to a shareholder of QNEI. The loan given by QNEI to

the Assessee does not fall within the aforesaid provision. Also, in the decision of the Jurisdictional High Court in the case of Ennore Cargo Container Terminal (P) Ltd. (supra) it is held that, even if common shareholders are there in both the companies, the deemed dividend can be taxed only in the hands of the registered shareholder of the company and not in the hands of the company which has received the loan.

7.2 However, the Bench took into cognizance the judicial precedents relied upon by the learned Counsel for the Assessee in support of his contentions. (a) The decision of the Hon'ble Delhi High Court in the case of the CIT v Ankitech (P) Ltd. [2011] 11 Taxmann.com 100/199 Taxman 341//20127 340 ITR 14 wherein the Hon'ble Delhi High Court has held that the provisions of section 2(22) (e) of the Act is not attracted if the recipient is not a shareholder: (b) The decision of the Jurisdictional High Court in the case of CIT v. Checkpoint Apparel Labelling Solutions (India) Ltd. [2020] 120 taxmann.com 125/[2021] 276 Taxman 312 (Mad) wherein it has held that since the recipient of the loan was not a shareholder in a company from which loan was received, hence loan cannot be assessed as deemed dividend. (c) The decision of the Mumbai High Court in the case of CIT v. Jignesh P Shah [2015) 54 tamann.com 293/229 Taxman 302/372 ITR 392 wherein it has held that the provision of 'section 2(22) (e) of the Act cannot be invoked unless the Assessee itself is a shareholder of the company who was lending money to him. (d) The decision of the Coordinate Bench of this Tribunal, Mumbai Benches in the case of the Bombay Oil Industries Ltd. v Dy CIT (2009] 28 SOT 383, wherein it is held that "section 2(22) (e) of the Act enacts a deeming fiction whereby the scope and ambit of the word dividend has been enlarged to bring within its sweep certain payments made by a company as per the situations enumerated in the Section. Such a deeming fiction would not be given a wider meaning that what it purports to do. The provisions would necessarily be accorded strict interpretation and the ambit of the fiction would not be pressed beyond its true limits. The requisite condition for invoking section 2(22) (e) of the Act is that payment must be by way of loan or advances. Since there is a clear distinction between the inter-corporate deposits, viz. loans/advances, according to us the authorities below were not right in treating the same as deemed dividend ws.2(22) (e) of the Act. "

7.3 Since, the Assessee is not a shareholder of QNEI, the amount received from QNEI will not be taxable in the hands of the Assessee as deemed dividend u/s. 2(22)(e) of the Act and common shareholding in two companies would not attract the provisions of Section 2(22)(e) of the Act. In the light of the above, we are of the opinion that the reassessment made by the Assessing Officer stands null and void and the addition of Rs.1,40,67,364/- made us.2(22)(e) of the Act be deleted. Thus, the ground raised by the Assessee is allowed.

58. Having regard to the Judicial Precedents cited above, including the binding decisions of the Hon'ble Jurisdictional High Court and the Hon'ble jurisdictional Tribunal, it is held that the deemed dividend u/s 2(22)(e) is required to be taxed in the hands of the common shareholder in a case

where a closely held company advances a loan to a company in which such common shareholder has substantial interest and the said deemed dividend is not liable to be taxed in the hands of the company which is in receipt of the loan. Accordingly, it is held that the deemed dividend, if any, arising from the transaction of advancing of loan of Rs.88,91,90,240/- by M/s. IG3 Infra Limited to the appellant company is not liable for tax in the hands of the appellant, since the appellant company is not a shareholder of M/s. IG3 Infra Limited. This finding is given without prejudice to the finding given earlier that the said loan transaction is not liable to be treated as "deemed dividend" in the first place on account of non-satisfaction of the prescribed conditions in sec 2(22)(e).

59. In view of the discussion in the preceding paragraphs, it is held that the addition of deemed dividend of Rs.88,91,90,240/- u/s. 2(22)(e) made in the Assessment Order is not sustainable and the same is directed to be deleted. Grounds of Appeal Nos. 3, 4 & 5 are accordingly allowed.

15. Aggrieved, the Revenue is in appeal before the Tribunal. The ld. DR submitted that search took place in the case of Shri. Shanmugam Thiagarajan, Smt. Unnamalai Thiagarajan, Smt. Rukmini Thiagarajan, M/s. ETL Power Services Limited and M/s. IG3 Infra Limited on 04.11.2020. The ld. DR further submitted that the assessee companies are part of group companies of M/s. IG3 Infra Limited and materials relating to M/s. IG3 Infra Limited and the assessee companies are seized during the course of search.

15.1 The ld. DR has drawn our attention to the assessment order where Balance Sheet of M/s. IG3 Infra Limited as on 31.03.2020 and 03.11.2020 as seized is extracted by the Assessing Officer. Referring to the Balance Sheet, the ld. DR submitted that there was a huge increase in the Capital Work in Progress of M/s. IG3 Infra Limited between 31.03.2020 and 03.11.2020. It was submitted that Capital Work in Progress as on 31.03.2020 was ¡ .366,83,51,830/- whereas the same was ¡ .714,01,89,265/- as on 03.11.2020. Thus, there was an increase of ¡ .347,18,37,435/- between 31.03.2020 and 03.11.2020. The ld. DR submitted that the increase in Capital Work in Progress was attributable to the payments made to the following assessee companies:

S.No	Name of the companies	Amount (Rs.)
1	MAC Quality Builders Private Limited	88,92,45,200
2	Mukunda Land Developers Private Limited	51 ,13,44,866
3	Mugilan Structurals Private Limited	36,85,89,045
4	MinalContractors and Builders Private Limited	87,80,05,819
5	Meadows Infrastructure Private Limited	72,60,86,883
	Total	337,32,71 ,813

The ld. DR submitted that though the above payments were accounted as made towards contract works undertaken by the assessee companies in the books of account of M/s. IG3 Infra Limited, the matter of fact is no works were actually carried out by the assessee companies.

15.2 The Ld. DR invited our attention to the assessment order and submitted that all the invoices raised by the assessee companies are similar without much detail. It is submitted that most of the invoices are dated subsequent to the payments made to assessee companies. The ld. DR submitted

that the purchase orders were also prepared much later than the dates of payment and invoice. In this context, ld. DR referred to the e-mail communication between Mr. Yogeswaran of M/s. IG3 Infra Limited and Ms. Rukmini Thiagarajan on 30.09.2020 and submitted that though the e-mail communication took place on 30.09.2020, the dates of purchase orders in the e-mail attachments were actually December, 2019. The ld. DR submitted that Mr. Yogeswaran, Purchase Manager who prepared and emailed the purchase orders to Ms. Rukmini Thiagarajan admitted in a sworn statement recorded on 05.11.2020 that he had prepared the back dated purchase orders on the instructions of Ms. Rukmini Thiagarajan. Thus, the ld. DR submitted that M/s. IG3 Infra Limited made payments to the assessee companies without Purchase order or the Bill of Quotation.

15.3 Further, the ld. DR referring to the statements of Mr. Ramesh, Mr. Manoharan and Ms. Uma Maheshwari, Accounts Team of M/s. IG3 Infra Limited submitted that all of them have admitted in their sworn statements that accounting entries in Tally Accounting Software was made on the instructions of Ms. Rukmini Thiagarajan without any bills or Good Receipt Note. The ld. DR relying on the statement of Mr. Ramamoorthi, Accounts Executive of M/s. IG3 Infra Limited submitted that M/s. IG3 Infra Limited has made the payments to the assessee companies on the instructions of Ms. Rukmini Thiagarajan. The ld. DR further submitted that M/s. IG3 Infra Limited is situated in SEZ and all the movement of goods in and out of the premises of M/s. IG33 Infra Limited are to be entered in register maintained by the nodal officer of SEZ. It is submitted that the registers seized during the course of search proved that no goods were actually delivered by the assessee companies in respect of payments received from M/s. IG3 Infra Limited.

15.4 The Ld. DR also submitted that Ms. Rukmini Thiagarajan vide letter dated 03.02.2021 admitted that the funds transferred by M/s. IG3 Infra Limited to the assessee companies are loans which were inadvertently recorded as Capital Work in Progress in the books of account. The ld. DR argued that had there been no search, loan payments would have been accounted as Capital Work in Progress to escape from the applicability of deemed dividend provisions. It is the submission of the Ld. DR that all the assessee companies are related to each other and connected with M/s. IG3 Infra Limited and operating under the instructions of family members of Shri Thiagarajan who are the promoters of M/s.IG3 Infra Limited. Thus, the ld. DR submitted that the loans given by M/s. IG3 Infra Limited to the assessee companies on the instructions of Ms. Rukmini Thiagarajan are for the ultimate benefit of family members of Thiagarajan and accordingly falls within the four corners of section 2(22)(e) which the Assessing Officer has rightly made the addition towards deemed divldend in the hands of the assessee companies.

15.5 The ld. DR further submitted that the shareholding of the assessee companies were changed just prior to the receipt of first tranche of loans from M/s. IG3 Infra Limited in order to escape from the applicability of section 2(22)(e) of the Act. It is the submission of the ld. DR that the shareholding prior to the change has to be taken into conslderation to examine the applicability of section 2(22)(e) of the Act in the hands of the assessee companies.

15.6 The ld. DR submitted that the Assessing Officer has rightly invoked third limb of section 2(22)(e) in making an addition since the loan payments were ultimately benefitted the family members of Shri Thiagarajan who are the ultimate beneficial shareholders of M/s. IG3 Infra

Limited. The ld. DR further submitted that the ld. CIT(A) has wrongly presumed that the Assessing Officer has invoked both second and third limbs of section 2(22)(e) of the Act.

15.7 The ld. DR also invited our attention to the appellate order and submitted that the ld. CIT(A) placing heavy reliance on the judgement of the Hon'ble Delhi High Court in the case of CIT v. Ankitech (P.) Ltd [2012] 340 ITR 74 (Del) has taken a view that the shareholder referred to in section 2(22)(e) of the Act to mean both registered and beneficial shareholder. The ld. DR submitted that the Hon'ble Supreme Court in the case of National Travel Service v. CIT (2018) 89 taxmann-com 332 (SC) has referred the matter to Hon'ble Chief Justice of India for constituting a three member bench to decide the meaning of the expression 'shareholder' used in section 2(22)(e) of the Act after holding that Ankitech's case itself requires to be reconsidered. Thus, it was the submission of the Ld. DR that reliance by the ld. CIT(A) in the case of Ankitech is on wrong footing.

15.8 In view of the above, the ld. DR submitted that the addition made by the Assessing Officer in the hands of the assessee companies under section 2(22)(e) of the Act is to be confirmed and accordingly prayed for the reversal of the order passed by the ld. CIT(A).

16. On the other hand, the ld. Counsel for the assessee companies vehemently supported the order of the ld. CIT(A). The ld. Counsel submitted that the impugned issue is taxability of loans received by the assessee companies from M/s. IG3 Infra Limited, whether such loans can be taxed as deemed dividends in the hands of the assessee companies or not. The ld. Counsel referring to the provisions of section 2(22)(e) of the Act submitted that the foremost condition to attract the applicability of section 2(22)(e) of the Act is the recipient or benefitted shareholder should hold not less than 10% of the voting power in both lender and payee company implying only equity share holders are covered since voting power comes only with the holding of equity shares. The ld. Counsel invited our attention to the shareholding pattern of M/s. IG3 Infra Limited as follows:

> Percentage of S.No. Name of the shareholder equity share holding (%) 1 ETL Power Services Limited 89.56 2 Green Grid Group Pte Limited 7.86 3 IL & FS Trust Co Ltd, A/c IL & FS Pvt. Equity Trust- IL & FS Reality Fund 1.77 4 Elnet Technologies Limited 0.8 5 Unnamalai Thiagarajan (beneficial interest held by ETL Power Services Ltd. 0.002 ETL Power Services Limited) 6 A. Subramanian (beneficial interest held by ETL Power Services Ltd. 0.002 7 V.G Madan Mohan (beneficial interest held by ETL Power Services Ltd. 0.002 8 R. Tamil Selvam (beneficial interest held by ETL Power Services Ltd. 0.002 Vaikkam Infrastructures Projects Private Limited (beneficial interest held 0.002 By ETL Power Services Limited) The ld. Counsel further invited our attention to the old and present shareholding of the assessee companies as follows:
>
> Particulars MAC Quality Minal Mukunda Land Mugilan Meadows Builders P Ltd. Contractors & Developers P. Structurals P. Infrastructure P Builders P. Lrd. Ltd. Ltd. Ltd.
>
> Date of change in shareholding 23.04.2020 23.04.2020 23.04.2020 & 08.05.2020 08.05.2020

Southern Projects Management P Ltd. (998 shares)	Stur Power Sector Management P.	Stur Power Sector Management P.	Stur Power Sector Management P.

Ltd.(998 shares) Ltd.(998 shares) Ltd. (998 shares) Old Unnamalai Unnamalai Unnamalai Unnamalai Unnamalai shareholders Thiagarajan Thiagarajan Thiagarajan Thiagarajan Thiagarajan (1 share) (1 share) (1 share) (1 share) (1 share) Rukmini Rukmini Rukmini Rukmini Rukmini Thiagarajan Thiagarajan Thiagarajan Thiagarajan Thiagarajan (1 share) (1 share) (1 share) (1 share) (1 share) Sikandar Anu Abraham S. Mohanraj S. Mohanraj K. Sasikumar New Mohammed Rafi (999 shares) (999 shares) (999 shares) (999 shares) Shareholders (999 shares) Anu Abraham Sikandar K. Sasikumar K. Sasikumar S. Mohanraj (1 share) Mohammed (1 share) (1 share) (1 share) Rafi (1 share) It is the submission of the ld. Counsel that none of the family members of Shri Thiagarajan own equity shares either in M/s. IG3 Infra Limited or in the assessee companies, either before or after change in the shareholding pattern. The ld. Counsel submitted that M/s. ETL Power Services Limited is the only shareholder owns more than 10% of the voting power in M/s. IG3 Infra Limited in which also none of the family members of Shri Thiagarajan own equity shares. The argument of the ld. Counsel is that when none of the family members of Shri Thiagarajan own equity shares either in M/s. IG3 Infra Limited or in the assessee companies, the question of invoking section 2(22)(e) does not arise even after invoking third limb of section 2(22)(e) of the Act.

16.1 The ld. Counsel further submitted that both M/s. Southern Projects Management Limited and M/s. Stur Power Sector Management Private Limited who own equity shares of the assessee companies before the change in the shareholding does not own any equity shares either in M/s. ETL Power Services or in M/s. IG3 Infra Limited. In view of this, the Ld. Counsel submitted that a change in shareholding pattern of the assessee companies is immaterial and cannot be the criteria to invoke section 2(22)(e) of the Act. The Ld. Counsel submitted that there are no common equity shareholders between M/s. IG3 Infra Limited and the assessee companies. It is submitted that these are undisputed facts which the Ld. CIT(A) has rightly discussed in detail in his appellate order. In this, the Ld. Counsel submitted that the provisions of section 2(22)(e) of the Act will not come into picture as the primary condition of being a equity shareholder with not less than 10% of the voting power is not satisfied.

16.2 The ld. Counsel submitted that the Ld. CIT(A) has rightly held that the expression 'shareholder' referred to in section 2(22)(e) of the Act to mean both registered and beneficial shareholder by relying on the judgement of the Hon'ble Delhi High Court in the case of CIT v.

Ankitech (P.) Ltd [2011] 340 ITR 14 (Del) which was affirmed by the Hon'ble Supreme Court in the case of CIT v. Madhur Housing & Development Co [2018] 401 ITR 152 (SC).

16.3 The Ld. Counsel submitted that in the case of CIT v, National Travel Services [2012] 347 ITR 305 (Del), the Hon'ble Delhi Court has taken a contrary view which matter was travelled before the Hon'ble Supreme Court. The Hon'ble Supreme Court in National Travel Services v. CIT [2018] 401 ITR 154 (SC) has referred the matter to the Hon'ble Chief Justice of India in order to constitute a larger bench for reconsideration of the issue whether the shareholder should be both registered and beneficial. The Ld. Counsel relying on the decision of the Mumbai Bench of this Tribunal in Neha Home Builders (P,) Ltd v. DCIT [2018] 98 taxmann.com 465 (Mum-Trib) has submitted that the Hon'ble Supreme Court in the case of National Travel Services v. CIT has neither rendered any decision nor granted any stay on the applicability of decision of the Hon'ble Supreme Court in the case of CIT v. Ankitech (P.) Ltd. In that case matter was only referred to larger bench for reconsideration and nothing has been decided yet. It is the submission of the Ld. Counsel that since the larger bench has not decided the issue, earlier law that shareholder should be both registered and beneficial shareholder as affirmed by the Hon'ble Supreme Court is binding on all the authorities which the Ld. CIT(A) has rightly followed.

16.4 The Ld. Counsel invited our attention to the fact that the assessee in the case of National Travel Services v. CIT (supra) has withdrawn the appeal referred by the Hon'ble Supreme Court to the Hon'ble Chief Justice of India for constitution of a larger bench by opting under Direct Tax Vivad se Vishwas Act, 2020. In this regard, the Ld. Counsel furnished the copy of order dated 10.08.2021 passed by the Hon'ble Supreme Court in Interlocutory Application No. 46492 of 2021 dismissing the appeals as withdrawn. It is the submission of the ld. Counsel that since the case of National Travel Services v. CIT (supra) has been settled under Direct Tax Vivad se Vishwas Scheme, no binding precedent arises from such judgement and accordingly submitted that the case of CIT v. Ankitech (P.) Ltd (supra) as affirmed by the Hon'ble Supreme Court is the only binding judgement on the issue that a shareholder should be both registered and beneficial. In view of this, the Ld. Counsel submitted that the decision of Ld.CIT(A) in placing reliance on the judgement of CIT v. Ankitech (P.) Ltd (supra) is valid and requires no interference.

16.5 The Ld. Counsel submitted that the Ld. CIT(A) has rightly held that the relevant date for determining the shareholding for the purpose of section 2(22)(e) is the date on which loan has been advanced and not any other date. In support of this, the Ld. Counsel placed reliance on the judgement of the Allahabad High Court in the case of CIT v. H.K. Mittal [1996] 219 ITR 420 (All). The Ld. Counsel placed further reliance on the decision of the Mumbai Bench of this Tribunal in the case of KIIC Investment Company v. DCIT [2019] 101 taxmann.com 19 (mum-Trib) and submitted that the relevant date for ascertaining the shareholding is the date of granting of loan.

16.6 The Ld. Counsel submitted that the factual finding of the Ld. CIT(A) regarding no common registered and beneficial shareholder is not controverted by the Ld. DR. Thus, the Ld. Counsel submitted that the Ld. CIT(A) is justified in deleting the additions made by the Assessing Officer towards deemed dividend holding that there is no common registered and beneficial shareholders between M/s. IG3 Infra Limited and the assessee companies.

16.7 The Ld. Counsel submitted that the Ld. CIT(A) has rightly held that the payments made by M/s. IG3 Infra limited to the assessee companies cannot be regarded as paid for the individual benefit of the family of Shri Thiagarajan since the Assessing Officer failed to substantiate with any cogent evidence. Thus, it is the submission of the Ld. Counsel that third limb of section 2(22)(e) cannot be invoked in the hands of the assessee companies.

16.8 The Ld. Counsel further submitted that the Ld. CIT(A) notwithstanding to the adjudication on the applicability of second and third limbs of section 2(22)(e) of the Act, alternatively held that the provisions of deemed dividend cannot be invoked in the hands of the assessee companies since the assessee companies are not the shareholders of M/s. IG3 Infra Limited. It is submitted that the Ld. CIT(A) has taken this view relying on the following judicial precedents:

• CIT v. Universal Medicare Private Limited (2010) 324 ITR 263 (Bom) • CIT v. Hotel Hilltop (2008) 217 CTR (Raj) 527 • CIT v. Ankitech Private Limited (2012) 340 ITR 14 (Del) • CIT v. Ennore Cargo Terminal P Ltd (2018) 406 ITR 477 (Mad) • Pallava Resorts Private Limited v. ITO (2022) 143 taxmann.com 208 (Chennai-

Trib) 16.9 The Ld. Counsel concluded his argument by submitting that the Ld. CIT(A) has passed a detailed order considering the facts at length and placing reliance on various judicial pronouncements and rightly held that no addition towards deemed dividend is warranted in the hands of the assessee companies. The Ld. Counsel thus prayed for upholding the order passed by the Ld. CIT(A).

17. We have heard both the sides, perused the materials available on record and gone through the orders of authorities below. The brief facts of the case are that M/. IG3 Infra Limited advanced loans to the assessee companies as follows:

S.No.	Name of the company	Amount of loan advanced by IG3 Infra Limited	Amount of addition u/s 2(22)(e) of the Act (Rs.)
1.	MAC Quality Builders Pvt. Ltd.	88,91,90,240	88,91,90,240
2.	Mukunda Land Developers Private Ltd.	51,07,07,558	51,07,07,558
3.	Mugilan Structurals Pvt. Ltd.	37,79,01,900	37,79,01,900
4.	Minal Contractors and Builders Pvt. Ltd. - Addition restricted to the extent of balance of available surplus of IG3 Infra Limited	88,10,38,052	7,15,85,181
5.	Meadows Infrastructure Pvt. Ltd.	72,68,52,121	72,68,52,121
	Total	338,56,89,871	257,62,37,000

The shareholding of the assessee companies undergone change just three days prior to the transfer of first tranche of loans. It is found during the course of search that loans were advanced by M/s. IG3 Infra Limited to the assessee companies on the instructions of Ms. Rukmini Thiagarajan. The Assessing Officer viewed the change in the shareholding as a mechanism adopted by the assessee companies to overcome the

clutches of applicability of the provisions of section 2(22)(e) of the Act. The Assessing Officer called upon the assessee companies to explain why the addition towards deemed dividend should not be made in their hands in view of transfer of loans from M/s.

IG3 Infra Limited to the assessee companies for the ultimate benefit of family members of Shri Thiagarajan.

17.1 The assessee submitted before the Assessing Officer that the shareholders do not hold any equity shares either on an individual basis or on a beneficial basis in M/s. IG3 Infra Limited, thus submitted that the provisions of section 2(22)(e) of the Act are not applicable. In respect of date of determination of shareholding to examine the applicability of section 2(22)(e) of the Act it was submitted that the shareholding as on the date of advancing of loans is to be considered. Thus, submitted before the Assessing Officer that the previous shareholders have no relevance on the date of advancing of loans by M/s. IG3 Infra Limited to the assessee companies. The assessee further submitted before the Assessing Officer that the previous shareholders do not own equity shares in M/s. IG3 Infra Limited as they were holding only Redeemable Optionally Convertible Cumulative Preference Shares (ROCCPS). Thus, the assessee companies requested the Assessing Officer to drop the additions proposed under section 2(22)(e) of the Act. However, the Assessing Officer rejected the contention of the assessee companies and made an addition under section 2(22)(e) of the Act in the hands of the assessee companies holding that the loans advanced by M/s. IG3 Infra Limited were for the ultimate benefit of family members of Thiagarajan who are the promoters of M/s. IG3 Infra Limited.

17.2 The assessee companies preferred appeals before the Ld. CIT(A) against the orders of the Assessing Officer making an addition u/s.2(22)(e) of the Act. Before the Ld. CIT(A), the assessee reiterated its submissions made before the Assessing Officer. The Ld. CIT(A) considering the facts and placing reliance on various judicial pronouncements deleted the additions made by the Assessing Officer in the hands of the assessee companies u/s.2(22)(e) of the Act. 17.3 The Ld. CIT(A) placing reliance on the judgement of the Hon'ble Allahabad High Court in the case of CIT v. H.K.Mittal [1996] 219 ITR 420 (All) has held that the shareholders as on the date of advancing of loans needs to be considered for examining the applicability of section 2(22)(e) of the Act. The Ld. CIT(A) further held that the shareholder referred to in section 2(22)(e) of the Act means registered and beneficial shareholder. For this proposition, Ld. CIT(A) drawn support from the judgement of the Hon'ble Delhi High Court in the case of CIT v. Ankitech (P.) Ltd [2011] 340 ITR 74 (Del) as affirmed by the Hon'ble Supreme Court in CIT v. Madhur Housing & Development Co [2018] 401 ITR 152 (SC). Thus, the Ld. CIT(A) held that since there is no common registered and beneficial shareholder between M/s. IG3 Infra Limited and the assessee companies the second limb of section 2(22)(e) is not applicable.

17.4 The Ld. CIT(A) held that the Assessing Officer failed to bring on record any cogent material to support that the family members of Shri Thiagarajan are the ultimate beneficiaries of loans advanced by M/s. IG3 Infra Limited to the assessee companies. The Ld. CIT(A) has held that the third limb is also not applicable to the facts of the impugned issue considering the fact that none of

the family members of Thiagarajan family satisfy the legal requirements for being treated as "shareholder, being a person who is the beneficial owner of shares"

holding not less than 10% of the voting power, so as to attract the provisions of the third limb of section 2(22)(e) of the Act. The Ld. CIT(A) drawn this conclusion on the basis of the fact that Shri Shanmugam Thiagarajan and Smt Rukmini Thiagarajan are not registered shareholders of M/s. IG3 Infra Limited and consequently both of them cannot be regarded as "registered and beneficial shareholder". Further, the Ld. CIT(A) observed that though Smt Unnamalai Thiagarajan is a registered shareholder in M/s. IG3 Infra Limited, her holding was a mere 0.002% which is less than the prescribed voting power of 10% to attract the provisions of section 2(22)(e) of the Act.

17.5 The Ld. CIT(A) having deleted the additions holding non applicability of second and third limbs of section 2(22)(e) of the Act, also held alternatively that no addition towards deemed dividend can be made in the hands of the assessee companies since the assessee companies are not the shareholders of M/s. IG3 Infra Limited. Thus, the Ld. CIT(A) deleted the additions made by the Assessing Officer in the hands of the assessee companies invoking the provisions of section 2(22)(e) of the Act.

18. The only issue to be adjudicated in the instant case is whether the loans advanced by M/s. IG3 Infra Limited to the assessee companies can be brought to tax in the hands of the assessee companies as deemed dividend u/s.2(22)(e) of the Act. Before going in to the case, we rely on the following undisputed facts which were not controverted by the Ld. DR during the course of arguments:

i. Neither the assessee companies nor its shareholders are the shareholders of M/s. IG3 Infra Limited;

ii. No common registered and beneficial shareholders between M/s.

IG3 Infra Limited and the assessee companies;

iii. None of the family members of Shri Thiagarajan are registered and beneficial shareholders in M/s. IG3 Infra Limited with equity share holding of 10% or more.

For the sake of reference, the provisions of section 2(22)(e) of the Act is extracted below:

"(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 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 ;"

18.1 From the bare reading of the section, it is clear that section 2(22)(e) of the Act is attracted under the following three circumstances:

i. Loan advanced by a closely held company to a shareholder;

ii. Loan advanced by a closely held company to a concern in which such shareholder has substantial interest; and iii. Payment made by a closely held company on behalf or for the benefit of a shareholder.

Therefore, the primary condition to attract section 2(22)(e) is the recipient of the loan or person benefitted should be a shareholder in the lender or payee company. Further, such shareholder should own not less than 10% of the voting power. It implies that only the equity share holders are covered since they are the ones who are eligible for voting power, thus, excluding all other shareholders like preference etc. The expression 'shareholder, being a person who is the beneficial owner of shares' is a subject matter of debate i.e. whether the shareholder to mean registered and beneficial or beneficial alone. The Hon'ble Delhi High Court in the case of CIT v. Ankitech (P.) Ltd (supra) has held that the term 'shareholder' used in the section referred to both a registered and beneficial shareholder. The relevant portion of the judgement is extracted below:

"20. In the case of CIT v. C.P. Sarathy Mudaliar (supra), provisions of section 2(6A)(e) of the Act, 1922, which was synonymous to section 2(22)(e) of the Income-tax Act, 1961 came up for consideration. In the said case, members of HUF acquired shares in a company with the fund of the family. Loans were granted to HUF and the question was whether the loans could be treated as dividend income of the family falling within section 2(6A)(e) of the Act, 1922. The Apex Court held that only loans advanced to shareholders could be deemed to be dividends under section 2(6A)(e) of the Act; the HUF could not be considered to be a 'shareholder' under section 2(6A)(e) of the Act and hence, loans given to the HUF will not be considered as loans advanced to "shareholder" of the company and could not, therefore, be deemed to be its income. The Apex Court further held that when the Act speaks of shareholder it refers to the registered shareholder.

21. The aforesaid decision of the Apex Court in the case of C.P. Sarathy Mudaliar (supra) has been followed by the Apex Court in the case of Rameshwarlal Sanwarmal v. CIT (supra). In this case, the company advanced the loans to the assessee HUF who

was the beneficial owners of the shares in the company, but the shares were registered in the name of the individual Karta, who held the shares for and on behalf of the HUF. On the above facts, the question before the Supreme Court was whether the loans advanced to the HUF-beneficial owner of the shares-would be taxed as deemed dividend in the hands of the HUF. The Supreme Court held that the HUF being only the beneficial shareholder and not a registered shareholder would not fall within the purview of section 2(6A)(e) of the 1922 Act. The Apex Court observed as follows:

'. . . What section 2(6A)(e) is designed to strike at is advance or loan to a 'shareholder' and the word 'shareholder' can mean only a registered shareholder. It is difficult to see how a beneficial owner of shares whose name does not appear in the register of shareholders of the company can be said to be a 'shareholder'. He may be beneficially entitled to the share but he is certainly not a 'shareholder'. It is only the person whose name is entered in the register of the shareholders of the company as the holder of the shares who can be said to be a shareholder qua the company and not the person beneficially entitled to the shares. It is the former who is a 'shareholder' within the matrix and scheme of the company law and not the latter. We are, therefore, of the view that it is only where a loan is advanced by the company to a registered shareholder and the other conditions set out in section 2(6A)(e) are satisfied that the amount of the loan would be liable to be regarded as 'deemed dividend' within the meaning of section 2(6A)(e).'

22. It is thus clear from the aforesaid pronouncement of the Hon'ble Supreme Court that to attract the first limb of the provisions of section 2(22)(e) the payment must be to a person who is a registered holder of shares. As already mentioned the condition under the 1922 Act and the 1961 Act regarding the payee being a shareholder remains the same and it is the condition that such shareholder should be beneficial owner of the shares and the percentage of voting power that such shareholder should hold that has been prescribed as an additional condition under the 1961 Act. The word "shareholder" alone existed in the definition of dividend in the 1922 Act. The expression "shareholder" has been interpreted under the 1922 Act to mean a registered shareholder. This expression "shareholder" found in the 1961 Act has to be therefore construed as applying only to registered shareholder. It is a principle of interpretation of statutes that where once certain words in an Act have received a judicial construction in one of the superior Courts, and the Legislature has repeated them in a subsequent statute, the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given them.

23. In the 1961 Act, the word "shareholder" is followed by the following words "being a person who is the beneficial owner of shares". This expression used in section 2(22)(e), both in the 1961 Act and in the amended provisions with effect from 1st April, 1988 only qualifies the word "shareholder" and does not in any way alter the position that the shareholder has to be a registered shareholder. These provisions

also do not substitute the aforesaid requirement to a requirement of merely holding a beneficial interest in the shares without being a registered holder of shares. The expression "being" is a present participle. A participle is a word which is partly a verb and partly an adjective. In section 2(22)(e), the present participle "being" is used to described the noun 'shareholder' like an adjective. The expression "being a person who is the beneficial owner of shares" is therefore a further requirement before a shareholder can be said to fall within the parameters of section 2(22)(e) of the Act. In the 1961 Act, section 2(22)(e) imposes a further condition that the shareholder has also to be 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. It is not possible to accept the contention of the learned Departmental Representative that under the 1961 Act there is no requirement of a shareholder being a registered holder and that even a beneficial ownership of shares would be sufficient.

24. The expression "shareholder being a person who is the beneficial owner of shares" referred to in the first limb of section 2(22)(e) refers to both a registered shareholder and beneficial shareholder. If a person is a registered shareholder but not the beneficial then the provision of section 2(22)(e) will not apply. Similarly if a person is a beneficial shareholder but not a registered shareholder then also the first limb of provisions of section 2(22)(e) will not apply."

18.2 The Hon'ble Supreme Court in the case of CIT v. Madhur Housing & Development Co (supra) has affirmed the judgement of the Hon'ble Delhi High Court in CIT v. Ankitech (P.) Ltd observing as follows:

"The impugned judgement and order dated 1 1-5-2011 has relied upon a judgement of the same date by a Division Bench of the High Court of Delhi in ITA No. 462 of 2009.

Having perused the judgement and having heard arguments, we are of the view that the judgement is a detailed judgement going into Section 2(22)(e) of the Income-tax Act which arises at the correct construction of the said Section. We do not wish to add anything to the judgement except to say that- we agree therewith", 18.3 The Hon'ble Delhi Court in the case of CIT v. National Travel Services (supra) has taken a contrary view holding that for the purpose of section 2(22)(e) of the Act it is not necessary that a shareholder has to be a registered shareholder and being a beneficial shareholder would suffice.

18.4 Against the above judgement of the Hon'ble Delhi High Court, assessee preferred further appeal before the Hon'ble Supreme Court.

The Hon'ble Supreme Court in National Travel Services v. CIT (supra) has referred the matter to the Hon'ble Chief Justice of India in order to constitute a larger bench for reconsideration of the issue.

18.5 In the case of National Travel Service v, CIT (supra), neither any decision was rendered nor was any stay on applicability of judgement of the Hon'ble Supreme Court in the case of CIT v. Ankitech (P.) Ltd.

(supra). Thus, there is no binding judgement arises in the case of National Travel Service v. CIT (supra). In this context, reliance is placed on the decision of the Mumbai Benches of the ITAT in the case of Neha Home Builders (P,) Ltd v. DCIT [2018] 98 taxmann.com 465 (Mum-Trib), wherein the Tribunal has held as follows:

"24. National Travel case neither any decision was rendered nor was any stay on applicability of decision of Hon'ble Supreme Court in case of CIT v. Ankitech P. Ltd. in Civil Appeal No.3961 of 2013 (Sic.) given. In that case matter was only referred to larger bench for reconsideration and nothing has been decided yet. Hence, till date Larger Bench not decided the case,' the earlier law will hold good and be in operation and binding on all courts and tribunal throughout; the territory of India, As per Article 141 of the Constitution of India which lays down that the law declared by the Supreme Court shall be binding on all courts throughout the territory of India. Earlier in case of CIT v. Ankitech P. Ltd. in Civil Appeal No.3961 of 2013 (sic.) Hon'ble Supreme Court lay down the Law that for attracting section 2(22)(e) shareholder needs to be registered and beneficial shareholder, in the present case it is a settled fact that the assessee is neither a registered nor a beneficial shareholder. Thus with no stretch of imagination the assessee can be covered under the definition of Section 2(22)(2) i.e., deemed dividend.

25. The similar issue was come before the Hon'ble Kerala High Court in case of CIT v. Settlement Commission (IT & WT) [2009] 176 Taxman 421 where the Hon'ble High Court held as under:-

"In this case, the Settlement Commission has rejected Ext. P2 on the ground that the issue raised is a debatable issue, But, I feel that when there is a decision of the Apex Court, no Inferior Court or Tribunal can say that the issue is a debatable issue for the reason that a Bench of two Judges of the Apex Court has doubted the correctness of the decision of the Constitution Bench. Even assuming there is a final judgement of a two Judges Bench of the Apex Court, the same has to be ignored and Inferior Courts and Tribunals are bound to follow the decision of the Constitution Bench in view of the law relating to precedents and also article 741 of the Constitution of India. So, the rejection of Ext. P2 application is unjustified."

26. In view of the above, the decision of the Hon'ble Supreme Court as on today established binding. Under Article 141 of the Constitution, ratio of decision of the Hon'ble Supreme Court and principle underlying decision is binding. It is most crucial to note that in that case matter was referred to reconsider the earlier decision with their observation that for applying deemed dividend provision it is sufficient if the shareholder is beneficial shareholder. It need not be necessary that shareholder must be registered shareholder. Because as per earlier decision for applying deemed dividend

shareholder must satisfy both character of shareholder i.e. Registered as well as beneficial shareholder. Thus, as per observation of this decision also shareholder needs to be beneficial Shareholder. If the sharehold3r is not a beneficial shareholder then as per this observation also provisions of deemed dividend will not apply. Hence, all the decision supports the contention of assessee that deemed divided cannot be apply in assessee's hand as it is neither registered nor beneficial shareholder of EIPL." 18.6 When the matter of National Travel Service v. CIT (supra) came up before the Larger Bench of the Supreme Court, it was dismissed as withdrawn as the assessee had settled the dispute under the Vivad se Vishwas scheme. The order of the Hon'ble Supreme Court is extracted below:

> "Interlocutory Application No.46492 of 2021 is an application for withdrawal of the appeals in light of the Direct Tax Vivad se Vishwas Act, 2020. Application is allowed.
>
> Consequently, Appeals stand dismissed as withdrawn."

18.7 The Ahmedabad Bench of the ITAT in the case of DCIT v. Aaryavart Infrastructure P. Ltd in ITA No.2105/Ahd/2015 has taken note of the above fact and observed as follows:

> "When the matter came up before the Larger Bench of the Supreme Court, it was dismissed as the assessee had settled the dispute under the Vivad se Vishwas scheme.
>
> The said order is reported in National Travel Service vs. Commissioner of Income Tax (2021) 111 CCH 0227 ISSC."

In view of the above, having withdrawn the appeal by the assessee in the case of National Travel Service v. CIT (supra), as on date the binding judgement on the issue of the expression 'shareholder' is that of the judgement of the Hon'ble Delhi High Court in the case of CIT v. Ankitech (P.) Ltd (supra) as affirmed by the Hon'ble Supreme Court in the case of CIT v. Madhur Housing & Development Co. (supra). Thus, respectfully following the same, we hold that the shareholder referred to in section 2(22)(e) of Act implies registered and beneficial shareholder.

19. The next issue arises for consideration is the relevant date for determining the shareholding in order to examine the applicability of section 2(22)(e) of the Act. In this context, reliance is placed on the judgement of the Hon'ble Allahabad High Court in the case of CIT v. H.K.Mittal (1996) 219 ITR 420 (All), wherein it has been held as follows:

> "3. The chief ingredient of sub-clause (e) to clause (22) of section 2 of the Act is that one should be a shareholder on the date the loan was advanced and according to the Tribunal that ingredient having not been established, the advance could not be taken as deemed dividend under section 2(22)(e). "

19.1 The Mumbai Bench of this Tribunal in the case of KIIC Investment Company v, DCIT [2019] 101 taxmann.com 19 (Mum-Tab) has held as follows :

"35. A perusal of Sec. 2(22)(e) of the Act would reveal that three types of payments are covered within its fold which are deemed to be understood as 'dividend'. The three categories are namely a) any payment by way of advance or loan to a shareholder; V) any payment on behalf of a shareholder; and, (iii) any payment for the individual benefit of a shareholder. In the present case, qua the payment of Rs.90,00,00,000/- made by Portescap to GVR, the Assessing Officer invoked Sec. 2(22)(e) of the Act considering that assessee was a common shareholder owning substantial shareholding in Portescap as well as GVR. The implication is that the Assessing Officer invoked the second limb of Sec, 2(22)(e) of the Act, namely that the payment by Portescap to GVR was on behalf of the common shareholder, i.e. the assessee. Quite clearly, the stand is not tenable because, factually speaking, on the dates when the monies have been given by Portescap to GVR, assessee was not holding any shares in GVR. Therefore, in such a situation, the judgement of the Hon'ble Allahabad High Court in the case of H.K. Mittal (supra) clearly militates against the Revenue because the relevant date to examine the shareholding pattern is the date on which the amount has been advanced. Insofar as the CIT(A) is concerned, he affirmed the approach adopted by the Assessing Officer by noticing that even prior to assessee becoming the shareholder of GVR, assessee was holding 100% shares of Videojet, who in turn was holding 300% shares of GVR and, therefore, at the relevant point of time when the impugned sums were given by Portescap to GVR, assessee was a beneficial shareholder in GVR. In our considered opinion, the conditions prescribed in Sec. 2(22)(e) of the Act in order to treat an amount as 'deemed dividend are to be strictly interpreted and in that light the approach of the CIT(A) is quite untenable. Apart from making a bland assertion, the CIT(A) does not justify as to how assessee became a beneficial shareholder of GVR in spite of it not having any direct shareholding on the relevant dates, but by simply holding shares of its subsidiary, Videojet. Further, the CIT(A) invoked the third limb of Sec. 2(22)(e) of the Act whereby a payment made for the benefit of a shareholder is also regarded as 'dividend' within the meaning of Sec. 2(22)(e) of the Act. In this context, we find that neither in the assessment order nor in the order of CIT(A) there is any material to point out that the payment in question made by Portescap to GVR was for the individual benefit of any shareholder of Portescap; and, in any case it cannot be straightaway inferred that the payments made on 29.30.2009, 02.03.2010 and 03.03.2010 to GVR were for the individual benefit of the assessee considering that assessee was not even a shareholder of Portescap on the aforesaid dates. Thus, there is no justification for the CIT(A) to invoke the third limb) of Sec. 2(22)(e) of the Act in the present situation. Thus, on this aspect, so far as the inclusion of Rs.90,00,00,000/- paid by Portescap to GVR within the scope of Sec. 2(22){e) of the Act is concerned, the same is quite untenable. We hold so."

Respectfully following the same, we hold that the relevant date for determining the shareholding is the date of advancing of the loans.

20. In the case of assessee companies, neither the assessee companies nor its shareholders are the shareholders of M/s. IG3 Infra Limited as on the date of advancing of loans. Further, there are no common registered and beneficial shareholders between M/s. IG3 Infra Limited and the respondent companies on the date of advancing of loans. Even prior to change in the shareholding pattern of the respondent companies, it is not the case of the revenue that both M/s. IG3 Infra Limited and the respondent companies have equity shareholders with 10% of the voting power or more. None of the family members of Shri Thiagarajan are registered and beneficial shareholders of M/s. IG3 Infra Limited and the respondent companies either before or after change in shareholding of the respondent companies. Thus, we are of the opinion that the provisions of section 2(22)(e) of the Act are not applicable to the facts of the respondent companies and accordingly no addition towards deemed dividend is warranted in the hands of the respondent companies.

21. The undisputed facts are Shri Shanmugam Thiagarajan and Smt Rukmini Thiagarajan are not the registered shareholders of M/s. IG3 Infra Limited and consequently, both of them cannot be regarded as a "registered and beneficial shareholder". Smt Unnamalai Thiagarajan though is a registered shareholder of M/s. IG3 Infra Limited, her shareholding in the company amounted to 0.002% which is less than the prescribed voting power of 10% to attract the provisions of third limb of section 2(22)(e) of the Act. Thus, none of the three persons of Thiagarajan family satisfy the legal requirements of being a shareholder in M/s. IG3 Infra Limited in order to attract third limb of section 2(22)(e) of the Act. Whether the Thiagarajan family benefitted from the loans advanced by M/s. IG3 Infra Limited or not is immaterial when they do not fall within the conditions laid down in section 2(22)(e) of the Act. In view of this, we are of the opinion that even third limb of section 2(22)(e) of the Act is also not applicable to the facts of the case and accordingly no addition under section 2(22)(e) of the Act is warranted in the hands of the respondent companies.

22. Notwithstanding to our adjudication above on the ground that no addition under section 2(22)(e) of the Act will survive in the hands of the respondent companies, another question considered is whether deemed dividend if any is taxable in the hands of the respondent companies when the respondent companies are not the shareholders. In this context, reliance is placed on the following judicial precedents:

> 22.1 The Hon'ble Bombay High Court in the case of CIT v. Universal Medicare Private Limited (2010) 324 ITR 263 (Bom) has held that the deemed dividend under section 2(22)(e) of the Act is required to be taxed in the hands of the shareholder and not in the hands of the concern in which such shareholder has substantial interest which received the loan. The relevant portion of the judgement is extracted as under:
>
> "8. Clause (e) of section 2(22) is not artistically worded. For facility of exposition, the contents can be broken down for analysis : (i) Clause (e) applies to any payment by a company not being a company in which the public is substantially interested of any sum, whether as representing a part of the assets of the company or otherwise made after the 31 May, 1987; (ii) Clause (e) covers a payment made by way of a loan or advance to (a) a shareholder, being a 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 (b) any concern in which such shareholder is a member or a partner and in which he has a substantial interest; (iii) Clause (e) also includes in its purview any payment made by a company on behalf of or for the individual benefit, of any such shareholder; (iv) Clause (e) will apply to the extent to which the company, in either case, possesses accumulated profits. The remaining part of the provision is not material for the purposes of this appeal.

By providing an inclusive definition of the expression 'dividend', section 2(22) brings within its purview items which may not ordinarily constitute the payment of dividend. Parliament has expanded the ambit of the expression 'dividend' by providing an inclusive definition.

9. In order that the first part of clause (e) of section 2(22) is attracted, the payment by a company has to be by way of an advance or loan. The advance or loan has to be made, as the case may be, either to a shareholder, being a beneficial owner holding not less than ten per cent of the voting power or to any concern to which such a shareholder is a member or a partner and in which he has a substantial interest. The Tribunal in'the present case has found that as a matter of fact no loan or advance was granted to the assessee, since the amount in question had actually been defalcated and was not reflected in the books of account of the assessee. The fact that there was a defalcation seems to have been accepted since this amount was allowed as a business loss during the course of assessment year 2006-07. Consequently, according to the Tribunal the first requirement of there being an advance or loan was not fulfilled. In our view, the finding that there was no advance or loan is a pure finding of fact which does not give rise to any substantial question of law. However, even on the second aspect which has weighed with the Tribunal, we are of the view that the construction which has been placed on the provisions of section 2(22)(e) is correct. Section 2(22)(e) defines the ambit of the expression 'dividend'. All payments by way of dividend have to be taxed in the hands of the recipient of the dividend namely the shareholder. The effect of section 2(22) is to provide an inclusive definition of the expression 'dividend'. Clause (e) expands the nature of payments which can be classified as a dividend, Clause (e) of section 2(22) includes a payment made by the company in which the public is not substantially interested by way of an advance or loan to a shareholder or to any concern to which such shareholder is a member or partner, subject to the fulfilment of the requirements which are spelt out in the provision. Similarly, a payment made by a company on behalf, of for the individual benefit, of any such shareholder is treated by clause (e) to be included in the expression 'dividend'. Consequently, the effect of clause (6) of section 2(22) is to broaden the ambit of the expression 'dividend' by including certain payments which the company has made by way of a loan or advance or payments made on behalf of or for the individual benefit of a shareholder. The definition does not alter the legal position that dividend has to be taxed in the hands of the shareholder. Consequently in the present case the payment, even assuming that it was a dividend, would have to

> be taxed not in the hands of the assessee but in the hands of the shareholder. The Tribunal was. in the circumstances, justified in coming to the conclusion that, in any event, the payment could not be taxed in the hands of the assessee. We may in concluding note that the basis on which the assessee is sought to be taxed in the present case in respect of the amount of Rs. 32,00,000 is that there was a dividend under section 2(22)(e) and no other basis has been suggested in the order of the Assessing Officer. "

22.2 Similar view was expressed by the Hon'ble Rajasthan High Court in the case of CIT v. Hotel Hilltop (2008) 217 CTR (Raj) 527. The relevant portion of the judgement is extracted below:

> "8. The more important aspect, being the requirement of Section 2(22)(e) is, that "the payment may be made to any concern, in which such shareholder is a member, or the partner, and in which he has substantial interest, or any payment by any such company, on behalf, or for the individual benefit of any such shareholder..." Thus, the substance of the requirement is. that the payment should be made on behalf of, or for the individual benefit of any such shareholder, obviously, the provision is intended to attract the liability of tax on the person, on whose behalf, or for whose individual benefit, the amount is paid by the company, whether to the shareholder. or to the concern firm in which event, it would fall within the expression "deemed dividend".

Obviously, income from dividend, is taxable as income from other sources, under Section 56 of the Act, and in the very nature of things, the income has to be, of the person earning the income. The assessee in the present case is not shown to be one of the persons, being shareholder. Of course the two individuals being Hoop Kumar and Devendra Kumar, are the common persons, holding more than requisite amount of share holding, and are having requisite interest, in the firm, but then, thereby the deemed dividend would not be deemed dividend in the hands of the firm, rather it would obviously be deemed dividend in the hands of the individuals, on whose behalf, or on whose individual benefit, being such shareholder, the amount is paid by the company to the concern.

9. Thus, the significant requirement of Section 2(22)(e) is not shown to exist. The liability of tax, as deemed dividend, could be attracted in the hands of the individuals, being the shareholders, and not in the hands of the firm." 22.3 The Hon'ble Delhi High Court has also rendered a similar finding in the case of CIT v. Ankitech Private Limited (supra). The relevant portion of the judgement is extracted below:

> "24. The intention behind enacting provisions of section 2(22){e) is that closely held companies (i.e., companies in which public are not substantially interested), which are controlled by a group of members, even though the company has accumulated profits would not distribute such profit as dividend because if so distributed the dividend income would become taxable in the hands of the shareholders. Instead of distributing accumulated profits as dividend, companies distribute them as loan or advances to shareholders or to concern in which such shareholders have substantial interest or make any payment on behalf of or for the individual benefit of such

shareholder. In such an event, by the deeming provisions, such payment by the company is treated as dividend. The intention behind the provisions of section 2(22)(e) of the Act is to tax dividend in the hands of shareholders. The deeming provisions as it applies to the case of loans or advances by a company to a concern in which its shareholder has substantial interest, is based on the presumption that the loans or advances would ultimately be made available to the shareholders of the company giving the loan or advance.

25. Further, it is an admitted case that under normal circumstances, such a loan or advance given to the shareholders or to a concern, would not qualify as dividend. It has been made so by legal fiction created under section 2(22)(e) of the Act. We have to keep in mind that this legal provision relates to 'dividend'.. Thus, by a deeming provision, it is the definition of dividend which is enlarged. Legal fiction does not extend to 'shareholder'. When we keep in mind this aspect, the conclusion would be obvious, viz., loan or advance given under the conditions specified under section 2(22)(e) of the Act would also be treated as dividend. The fiction has to stop here and is not to be extended further for broadening the concept of shareholders by way of legal fiction. It is a common case that any company is supposed to distribute the profits in the form of dividend to its shareholders/members and such dividend cannot be given to non-members. The second category specified under section 2(22)(e) of the Act, viz., a concern (like the assessee herein), which is given the loan or advance is admittedly not a shareholder/member of the payer company. Therefore, under no circumstance, it could be treated as shareholder/member receiving dividend. If the intention of the Legislature was to tax such loan or advance as deemed dividend at the hands of 'deeming shareholder', then the Legislature would have inserted deeming provision in respect of shareholder as well, that has not happened. Most of the arguments of the learned counsels for the revenue would stand answered, once we look into the matter from this perspective.

26. In a case like this, the recipient would be a shareholder by way of deeming provision. It is not correct on the part of the revenue to argue that if this position is taken, then the income 'is not taxed at the hands of the recipient'. Such an argument based on the scheme of the Act as projected by the learned counsels for the revenue on the basis of sections 4, 5, 8, 14 and 56 of the Act would be of no avail. Simple answer to this argument is that such loan or advance, in the first place, is not an income. Such a loan or advance has to be returned by the recipient to the company, which has given the loan or advance.

27. Precisely, for this very reason, the Courts have held that if the amounts advanced are for business transactions between the parties, such payment would not fall within the deeming dividend under section 2(22)(e) of the Act.

28. Insofar as reliance upon Circular No. 495, dated 22-9-1997 issued by (Central Board of Direct Taxes is concerned, we are inclined to agree with the observations of

the Mumbai Bench decision in Bhaumik Colour (P.) Ltd.'s case (supra) that such observations are not binding on the Courts. Once it is found that such loan or advance cannot be treated as deemed dividend at the hands of such a concern which is not a shareholder, and that according to us is the correct legal position, such a circular would be of no avail.

29. No doubt, the legal fiction/deemed provision created by the Legislature has to be taken to 'logical conclusion' as held in Andaleeb Sehgal's case (supra). The revenue wants the deeming provision to be extended which is illogical and attempt is to create a real legal fiction, which is no{ created by the Legislature. We say at the cost of repetition that the definition of shareholder is not enlarged by any fiction.

30. Before we part with, some comments are to be necessarily made by us. As pointed out above, it is not in dispute that the conditions stipulated in section 2(22)(e) of the Act treating the ban and advance as deemed dividend are established in these cases Therefore, it would always be open to the revenue to take corrective measure by treating this dividend income at the hands of the shareholders and tax them accordingly, As otherwise, it would amount to escapement of income at the hands of those shareholders."

22.4 The Hon'ble Madras High Court has also held in the case of CIT v. Ennore Cargo Terminal P Ltd (2018) 406 ITR 477 (Mad) that the deemed dividend can only be assessed in the hands of the registered shareholder for whose benefit money was advanced. The relevant portion of the decision of the Hon'ble High Court is extracted as under:

4.Insofar as Question Nos.3 and 4 are concerned, the following brief facts are required to be noticed:

4.1. The assessee-company, evidently, received a capital advance in a sum of Rs.1,09,50,000/- from an entity by the name of Indev Logistics Pvt. Ltd. The assessee-company as well as the said entity, i.e. Indev Logistics Pvt. Ltd., admittedly have common shareholders. The shares in the assessee company to the extent of 50% are held by Mr. Xavier Britto, while the balance shares are held by Smt. Vimalarani Britto. In so far as Indev Logistics Pvt. Ltd. is concerned, shares are held likewise by the said individuals, though in a different ratio. Mr. Xavier Britto holds 60% of the shares in Indev Logistics Pvt. Ltd., while Smt. Vimalarani Britto holds the balance 40% shares in the said entity.

4.2.The Revenue seeks to assess as income the capital advance received by the assessee-company from Indev Logistics Pvt. Ltd. on the ground that it is deemed dividend received by the assessee-company for the benefit of the registered shareholder. For this purpose, the provisions of Section 2(22)(e) of the Income-tax Act, 1961 (in short 'the Act') is sought to be relied upon. The Tribunal has rejected the said contention of the Revenue, principally, on the ground that deemed dividend can

> only be assessed in the hands of the registered shareholder for whose benefit the money was advanced.
>
> 4.3. As indicated above, there is no dispute that the assessee did receive capital advance from Indev Logistics Pvt. Ltd. There is also no dispute that there are common shareholders both in the assessee-company and Indev Logistics Pvt. Ltd.

Therefore, quite correctly, as noted by the Tribunal, though, the advance received by the assessee company may have been for the benefit of the aforementioned registered shareholders, it could only be assessed in the hands of those registered shareholders and not in the hands of the assessee-company. 4.4. In our view, on a plain reading of the provisions of Section 2 (22) (e) of the Act, no other conclusion can be reached. As a matter of fact, a Division Bench of this Court, in the case of Commissioner of Income Tax vs. Printwave Services P. Ltd., (2015) 373 ITR 665 (Mad.), has reached a somewhat similar conclusion.

5. Mr.Senthil Kumar, however, contends to the contrary and relies upon the judgement of the Supreme Court in Gopal and Sons (HUF) VS. Commissioner of Income-tax, Kolkata-XI, (2017) 77 taxmann.com 71 (SC). 5.1.In our view, the question of law considered by the Supreme Court in the case of Gopal and Sons (supra) was different from the issue which arises in the present matter. The question of law which the Supreme Court was called upon to consider was whether loans and advances received by a HUF could be deemed as a dividend within the meaning of Section 2(22) (e) of the Act. The assessee in that case was the HUF and the payment in question was made to the HUF. The shares were held by the Karta of the HUF. It is in this context that the Supreme Court came to the conclusion that HUF was the beneficial shareholder. 5.2. In the instant case, however, both the registered and beneficial shareholders are two individuals and not the assessee-company. Therefore, in our view, the judgement of the Supreme Court does not rule on the issue which has come up for consideration in the instant matter.

6. Accordingly, in so far as questions Nos. 3 and 4 are concerned, we find that no interference is called for with the view taken by the Tribunal via the impugned order. In these circumstances, the Revenue's appeal, i.e. T.C.(A) No. 105 of 2017, pertaining to AY 2007-08, with regard to the said questions, is dismissed. 22.5 The Chennai Bench of this Tribunal in the case of Pallava Resorts Private Limited v. ITO (2022) 143 taxmann.com 208 (Chennai - Trib) has held that the amount of loan received by the assessee company from its holding company is not taxable as deemed dividend under section 2(22)(e) of the Act in the hands of the assessee company and the same is taxable in the hands of the common registered shareholders only. The relevant portion of the decision is extracted below:

> "7. We have heard the rival contentions and had gone through the facts and circumstances of the case. We note that the Assessee does not hold any shares in QNEI and that it is QNEI that holds 72.29% shares in the Assessee Company, The fact remains that under the Companies Act, 1956, as a subsidiary company of QNEI, it is illegal to have shares in its holding company. From the Balance Sheet filed by the Assessee, it is noticed that the Assessee does not have any investments and therefore

it is clear that the Assessee does not hold share in QNEI. However, it is noticed from the submissions of the learned Counsel for the Assessee that the holding company had regularly paid for the expenses of the Assessee and the Assessing Officer had considered these payments as loans and had brought to tax as deemed dividend.

7.1 From the above, it is clear that the transactions between the Assessee along with its holding company were in the nature of current account and not in the nature of loans and hence does not fall under the scope of the deemed dividend u/s.2(22)(e) of the Act. It is pertinent to point out that ITAT, Chennai Tribunal has taken the same view in the case of Fairmacs Shipstores (P.) Ltd. v. Dy. CIT [IT Appeal No. 761 (Mds.) of 2014]. We noted that identically in this case also the payment should have been made by way of advance of loan to a shareholder of QNEI. The loan given by QNEI to the Assessee does not fall within the aforesaid provision. Also, in the decision of the Jurisdictional High Court in the case of Ennore Cargo Container Terminal (P.) Ltd. (supra) it is held that, even if common shareholders are there in both the companies, the deemed dividend can be taxed only in the hands of the registered shareholder of the company and not in the hands of the company which has received the loan.

7.2 However, the Bench took into cognizance the judicial precedents relied upon by the learned Counsel for the Assessee in support of his contentions. (a) The decision of the Hon'ble Delhi High Court in the case of the CIT v. Ankitech (P.) Ltd. [2011] 11 taxmann.com 100/199 Taxman 341/[2012] 340 ITR 14 wherein the Hon'ble Delhi High Court has held that the provisions of section 2(22)(e) of the Act is not attracted if the recipient is not a shareholder. (b) The decision of the Jurisdictional High Court in the case of CIT v. Checkpoint Apparel Labelling Solutions (India) Ltd. [2020] 120 taxmann.com 125/[2023] 276 Taxman 312 (Mad.) wherein it has held that since the recipient of the loan was not a shareholder in a company from which loan was received, hence loan cannot be assessed as deemed dividend. (c) The decision of the Mumbai High Court in the case of CIT v. Jignesh P. Shah [2015] 54 taxmann.com 293/229 Taxman 302/372 ITR 392 wherein it has held that the provision of section 2(22)(e) of the Act cannot be invoked unless the Assessee itself is a shareholder of the company who was lending money to him. (d) The decision of the Co-ordinate Bench of this Tribunal, Mumbai Benches in the case of the Bombay Oil Industries Ltd. v. Dy. CIT [2009] 28 SOT 383, wherein it is held that "section 2(22)(e) of the Act enacts a deeming fiction whereby the scope and ambit of the word dividend has been enlarged to bring within its sweep certain payments made by a company as per the situations enumerated in the Section. Such a deeming fiction would not be given a wider meaning that what it purports to do. The provisions would necessarily be accorded strict interpretation and the ambit of the fiction would not be pressed beyond its true limits. The requisite condition for invoking section 2(22)(e) of the Act is that payment must be by way of loan or advances. Since there is a clear distinction between the inter-corporate deposits, viz. loans/ advances, according to us the authorities below were not right in treating the same as deemed dividend u/s.2(22)(e) of the Act. 7.3 Since, are Assessee is not a shareholder of QNEI the amount received from QNEI will not be taxable in the hands of the Assessee as deemed dividend u/s.2(22)(e) of the Act and common shareholding in two companies would not attract the provisions of Section 23(22)(e) of the Act. In the light of the above, we are of the opinion that the reassessment made by the Assessing Officer stands null and void and the

addition of Rs.1,40,67,364/- made u/s.2(22)(e) of the Act be deleted. Thus, the ground raised by the Assessee is allowed.

23. In view of the above judicial precedents including the binding decision of the Hon'ble jurisdictional High Court, we hold that the deemed dividend under section 2(22)(e) of the Act is required to be taxed only in the hands of the common registered shareholder in a case where a closely held company advances a loan to a company in which such common shareholder has substantial interest and the said deemed dividend is not taxable in the hands of the company which is in receipt of the loan. Accordingly, on this count as well, the loans advanced by M/s. IG3 Infra Limited cannot be taxed in the hands of the assessee companies since the assessee companies are not the shareholders in M/s. IG3 Infra Limited.

24. Under the above facts and circumstances of the case, we are of the opinion that the ld. CIT(A) has rightly deleted the additions made by the Assessing Officer under section 2(22)(e) of the Act in the hands of the assessee companies.

25. In the result, all the appeals filed by the Revenue are dismissed.

Order pronounced on 21st February, 2024 at Chennai.

Sd/-	Sd/-
(MANJUNATHA, G.)	(V. DURGA RAO)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Chennai, Dated, 21.02.2024

Vm/-

/Copy to: 1. /Appellant, 2. / Respondent,

3. /CIT, 4. £ /DR & 5. / ¥ /GF.