

Asian Business Connection Pvt. Ltd., ... vs Dcit - 1(1) , Bhopal on 25 September, 2019

Asian Business Connection Private Limited
ITA No.936/Ind/2018

IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE
BEFORE HON'BLE KUL BHARAT, JUDICIAL MEMBER
AND HON'BLE MANISH BORAD, ACCOUNTANT MEMBER

ITA No.936/Ind/2018
Assessment Year 2015-16
M/s. Asian Business DCIT-1(1),
Connections Private Ltd, Vs. Bhopal
FM-18, Man Sarovar
Complex, 7No. Stop,
Shivaji Nagar, Bhopal
(Appellant) (Respondent)
PAN No.AAICA1206D

Revenue by	Smt. Ashima Gupta, CIT
Assessee by	S/Shri Sumit Nema, Sr. Adv. & Ayush Gupta, Adv
Date of Hearing	10.07.2019
Date of Pronouncement	25.09.2019

ORDER

PER MANISH BORAD, AM.

The above captioned appeal pertaining to the Assessment Year 2015-16 filed at the instance of the assessee is directed against the order of Ld. CIT(Appeals)-1 (in short 'CIT(A)'), Bhopal dated 07.12.2018 which is arising out of the order u/s 143(3) of the Asian Business Connection Private Limited Income Tax Act 1961 (In short the 'Act') dated 29.12.2017 framed by ACIT-1(1), Bhopal.

2. Assessee has raised following ground of appeal;

1. That the Ld. CIT(A) erred in confirming the addition of Rs.2,97,74,68,364/- made by A.O. u/s 2(22)(e) as alleged deemed dividend.

2. That the LD CIT (A) erred in holding that provisions of section 2(22)(e) of the income tax act are applicable in present case as advances received by the assessee from M/s Advantage overseas Pvt Ltd are in the nature of loans and advances only without appreciating the plethora of evidences filed before the AD & CIT(A) to demonstrate that the transaction was a commercial transaction.

3. That the CIT (A) failed to appreciate that the amount paid by its subsidiary M/s Advantage overseas Pvt Ltd was for a specific commercial purpose and was not in lieu of dividend and by virtue of this investment the profitability of ADPL was to increase due to assured return of 12 and 50 share in profit.

4. That CIT (A) erred in making an addition of Rs 2,97,74,68,364/- under section 2(22) (e) of the Act without understanding the fact of the case and without appreciating that the amount payable to M/s Advantage overseas Pvt Ltd was taken for strategic investment purpose same was evident from agreement dated 12/10/2012 executed between both holding and its subsidiary company.

5. That CIT (A) erred in not proper interpreting and applying the CBDT Circular No. 19 of 2017 under the facts and circumstances which specially says that contributions given for commercial purpose falls outside preview of Section 2 (22) (e) of the Act.

6. That in the facts and circumstances of the case, the transaction which was to be managed by Appellant as a holding company and which does not partake the character of deemed dividend under section 2 (22) (e) of the Act.

7. Without prejudice to above ground and without admitting in any way the amount received as dividend as an alternative ground it is submitted that the CIT (A) erred in upholding the view of AO in Asian Business Connection Private Limited considering the accumulated profits as on the last day of the assessment year i.e. 31 March for the purpose of calculating deemed dividend instead of considering the accumulated profits as on the date the amount was paid by advantages M/s Advantage overseas Pvt to the Appellant.

8. That there is no justification either in law or on facts for the Ld. CIT(A) to sustain the addition of Rs. 85.551akhs incurred for increase in share capital. The said amount should have been allowed as deduction u/s 35D of the Income-tax Act, 1961".

2. Brief facts of the case are that the Appellant, Asian Business Connections Private Limited (In short 'ABCPL'), is a company incorporated under the Companies Act, 1956 and is mainly engaged in the business of making strategic investments. ABCPL is a holding company for group companies which operate in Agri-business, International Trade in commodities, Film Production and Distribution, Multiplex and Film Screening, Restaurant and Food Courts, and Event Management - both domestic as well as overseas. It was with a view to synergizing the operations and enhancing the growth potential of the subsidiaries which catered to varied and diverse fields like Import - export of Agro Commodities, Entertainment, Movies, Music, Multiplex, along with Food & Beverages Business, ABCPL was transformed into a holding company in Asian Business Connection Private Limited January 2012. The appellant filed its return of income for Assessment Year (AY) 2015-16 under section 139(1) of the Income Tax Act, 1961 (the Act) on 30 September 2015. The appellant claimed losses of Rs. 2,04,22,414/- vide the said return of income. Subsequently, the appellant's case was selected for Limited Scrutiny and a Notice under section 143(2) and 142(1) of the Act was issued and served on the appellant. In response to the Notice issued, the appellant provided the requested information vide submissions dated 23 August 2017, 15 November 2017 and 11 December 2017.

Thereafter, the case was converted into a complete scrutiny vide letter dated 20.12.2017 served on 22.12.2017. Various details /explanations were called for vide the said Notice. ABC duly furnished the information called for to the extent possible given the paucity of time on 29th December 2017. The income was assessed at Rs.297,16,45,750/- after making various additions.

4. During the course of assessment proceedings Ld. A.O. Asian Business Connection Private Limited observed that the assessee company had shown huge amounts as unsecured loan from various parties including Rs. 428,50,73,821/- from M/s. Advantage Overseas Pvt. Ltd (In short AOPL) in which its share holding was 85%. The A.O. issued show cause to the appellant. After considering reply, the A.O. concluded that as the assessee company was holding more than 10% of the voting power of AOPL Pvt. Ltd and AOPL has accumulated reserve and surplus, provisions of section 2(22)(e) of the Act are attracted. The A.O. referred to the replies of the assessee that the company did not have any income other than investment in fixed deposit and also that the company was a holding company which invested in its subsidiary and did not have any other income. The Ld. A.O. referred to the submission of the assessee that it had no business other than investment in fixed deposit and concluded that when it had no business then there was no question of taking such huge trade advance of Rs. 428.50 crores. The Ld. A.O. held that this amount was nothing but an unsecured loan taken from. AOPL. The Ld. A.O. Asian Business Connection Private Limited noted that even in the balance sheet of the assessee it had been classified under the head long term borrowings and not trade payables/current liabilities, as normally trade advance are adjusted within 1 year which was not the case here. The Ld. AO further noted that on receipt of advance from AOPL, the amount was mainly diverted /transferred to sister concerns and not utilized in any kind of business activity. Further from the balance sheet of the assessee company it was seen that there was no investment of this amount in any kind of business activity. This amount was mainly invested in group companies.

5. When the assessee was confronted it was submitted that it had entered into an Memorandum of Understanding dated 12.10.2012 with the subsidiary company AOPL and as per this agreement AOPL gave the advance to the assessee company for making strategic investments in other concerns and the income there from shall be shared equally subject to the minimum assured return of 12% per annum of the investment made by Asian Business Connection Private Limited AOPL. The amount was invested in parts. It was also submitted that these transactions took place as per the Memorandum of Understanding and thereafter advances were received from AOPL and further strategic investment fetching income to the assessee and AOPL are transactions in the regular course of business and are commercial transactions which are out of the purview of provisions of Section 2(22)(e) of the Act. However the Ld. A.O was not satisfied with this statements and he was of the view that the conditions of section 2(22)(e) of the act are duly fulfilled and the alleged amount has been shown as unsecured loan by the assessee itself and therefore addition for deemed dividend u/s 2(22)(e) of the Act is called for. Accordingly addition of Rs. 297.74 crore (being the closing balance of accumulated reserve and surplus as on 31.3.2015) on account of deemed dividend u/s 2(22)(e) of the Act in respect of amount received from its subsidiary AOPL addition of Rs. 85.55 lakh on account of ROC fee for increase in authorized share capital treated as capital expenditure; and disallowance of interest on Asian Business Connection Private Limited TDS of Rs. 60,43,900/- were made and the income was assessed at Rs. 2,97,16,45,750/-.

6. Aggrieved assessee preferred appeal before Ld. CIT(A) and failed to succeed on any of the grounds raised before him, as the observations of the Ld. A.O were duly confirmed by Ld. CIT(A) by further adding few judgments after explaining the ingredients of provisions of section 2(22)(e) of the Act.

7. Aggrieved assessee is in appeal before the Tribunal. During the course of hearing assessee made following submission with the request to admit additional evidence:-

1. The aforesaid Appeal filed by the Appellant! Applicant is fixed for hearing on 20.03.2018 before this Hon'ble Tribunal.

2. That the present Appeal has been filed against the order dated 07/12/2018 passed by CIT (A)-I where in Ld CIT (A) has dismissed the Appeal of the Appellant and sustained the addition made by the Ld. AO on account of deemed dividend under Section 2 (22) (e) of the Act.

3. That during the year under consideration, the Appellant Company has received funds from one of its subsidiary. company i.e. M/s Advantage overseas Private Limited (AOPL) in relation to an MOU entered between the appellant and its subsidiary.

4. The appellant had filed the MOU entered into with its subsidiary Advantage overseas Ltd. To demonstrate that the amounts received from Advantage Overseas Ltd. Were for further investment from which the Asian Business Connection Private Limited profits generated will be shared equally between the appellant and its subsidiary and this was an investment related amount and not an unsecured loan. As part of this MOU a substantial amount received was invested in shares of a realty company which operated a mall and these shares were subsequently sold in AY 2018-19 for a substantial profit was received which was shared equally between the appellant and its subsidiary. To demonstrate this aspect the IT Return of the appellant company and the audit report for AY 2018-19 is being filed herewith.

Also to demonstrate the fact that profits generated from sale of investment were also shared 50:50 between the appellant and its subsidiary from whom the amount was taken for investment, the audit report of the subsidiary (duly filed with the IT return) is also being filed herewith.

True Copy of Return of Income for A.Y 2018-19 along with audit report of Appellant Company is Annexure A/1 and true copy of the audit report of subsidiary M/s Advantage overseas Pvt Ltd. Is Annexure (A/2)

5. That the aforesaid annexures A/1 & A/2 are for AY 2018-19 and are also available online with the IT department and in a true sense are already on the record of the Income-tax department. However since these were filed in 2018-19 with the IT return and are much after the completion of assessment therefore in technical sense these are additional evidences. However in order to explain

the nature of the transaction and the bonafide thereof these are necessary to be placed on record.

5. It is, therefore, prayed that this application for taking additional Evidence may be allowed & the Return of Income for A.Y 2018-19 along with audit report of Appellant Company (Annexure A1) and the audit report of the subsidiary M/s Advantage overseas Pvt. Ltd. (Annexure A2) may kindly be allowed to be taken on record as additional evidences in Asian Business Connection Private Limited the larger interest of justice.

8. Before admitting this additional evidence which was contended by the Ld. Counsel for the assessee to be very essential for adjudication of the facts, it was decided to call a remand report from Ld. A.O. through Ld. CIT (DR). The remand report dated 9.7.19 was received which is placed on record and the observation of the Ld. A.O are reproduced below;

F.No.DCIT(1)/BPL/ITAT/2019-20 Dated: 09.07.2019 To The Commissioner of Income Tax (DR), Income Tax Appellate Tribunal, CGO Building, 2nd floor, White Church Road, Indore 452001 Madam, Sub: Appellate proceedings in the case of Asian Business Connections Private Limited, Bhopal, ITA No.936/Ind/2018 for the A.Y. 2015-16 - reg.- Kind refer to the above subject and letter F.No.CIT(DR)/ITAT/ IND/ 2018-19/1149 dated 20.03.2019.

In this regard, comments are desired in the case of Asian Business Connections Private Limited's application filed under Rule, 29 of Appellate Tribunal Rule, 1963.

As additional evidence, the appellant has submitted return of income filed for AY 2018-19 along with audit report of the company and audit report of subsidiary M/s. Advantage Overseas Pvt. Ltd. The appellant has submitted that substantial amount received was invested in shares of a realty company which operated a mall and these shares were subsequently sold in AY 2018-19 for a substantial profit which was shared equally between the appellant and its subsidiary. To demonstrate this aspect the IT return of the appellant company and the audit report for AY 18-19 has been filed.

Asian Business Connection Private Limited In this regard, it is submitted that the return of income filed for AY 18-19 does not have any bearing on the additions made in the hands of the appellant on account of deemed dividend u/s 2(22)(e) of the Act. The ld. CIT(A) in para 41 of CIT(A)-1/BPL/IT-10630/17-18 dated 07.12.2018 has held that "The appellant has relied upon the MoU between ABC and AOPL, however, it is observed that the MoU is too general and vague in nature as it does not show any specific investment where the investment was proposed/contemplated by the ABC. Further, the appellant could not show that the investment ultimately made by ABC was made in the joint name of AOPL and ABC, if the same was a genuine strategic investment made in partnership. Further, the appellant cannot rebut the finding of the A.O in the remand report by showing genuineness by way of any independent filing that an agreement existed which was subsequently shown as investment agreement. It is observed that even if we consider the investment agreement, the provision of section 2(22)(e) are squarely applicable".

Therefore, it is clear that the division of sale proceeds from investment made by the appellant and subsequently offering the profit from sale proceeds of investments to tax in return of income by the appellant and Advantage Overseas Limited, does not affect the deemed dividend transaction u/s 2(22)(e) in its hands because:

- The investment was not made in the joint name
- Secondly, Id. CIT(A) has held in para 22 that if AOPL was genuinely interested in making some investment, it could have easily made direct investment and could have retained the entire profit on the investment. The argument that the appellant company was having expertise in making strategic investments is to no avail as in a normal transaction, the AOPL could have easily obtained professional services of ABC, being both holding and subsidiary company and if required for some payment.

Therefore, it is clear that the manner in which the profits have been shown from the sale of investments in return of income by the appellant and Advantage Overseas Limited are not relevant to the deemed dividend transaction u/s 2(22)(e) of the Act and are meant to circumvent the provisions of section 2(22)(e) of the Act.

Submitted for kind consideration.

Yours faithfully, Sd/-

(Rajat Singhai) Deputy Commissioner of Income Tax-1(1), Bhopal Asian Business Connection Private Limited

9. From perusal of the above we find that the additional evidence mainly constitutes the Income Tax returns for Assessment Year 2018-19 along with the audit reports of the assessee as well as the subsidiary company i.e. M/s. AOPL, in support of the contention that the strategic investments made jointly during Assessment Year 2015- 16 finally gave profits and the same are equally shared by both the concerns and duly offered to tax. In our considered view since the additional evidence bear a direct nexus with the transaction carried out during the year under appeal, we are inclined to admit the additional evidence for adjudicating the issues raised in this appeal.

10. Id. Counsel for the assessee submitted that the rational behind the investment is as under;

Issue : Whether the amount received by the appellant from its subsidiary is in fact liable to be treated as a Deemed Dividend u/s 2(22)(e) of the Income-tax Act, 1961 or whether it is a purely commercial transaction which does not fit in the category of either a loan or a deposit ? • This ground of appeal is against the additions made by the AO under Section 2(22)(e) of the Act.

Asian Business Connection Private Limited • The appellant is engaged in the business of making strategic investments. It performs the role of holding company to a number of subsidiary companies.

- During the year under consideration, the appellant had received funds from one of its subsidiary company, Advantage Overseas Private Limited (AOPL) towards business purposes. • AOPL is an agri-based trading company. It had accumulated surplus over a period of time.
- In the meantime, in order to efficiently use the existing resources for 5 years and to maximize returns of its stakeholders, AOPL was contemplating to invest these funds in avenues that would generate good returns.
- The board of AOPL, in their meeting held on 25Th September 2012 (AY 203-14) deliberated on identifying options available for investing the excess funds. If no other opportunity to invest and earn is identifiable, it was decided that the amount will be invested in bank fixed deposit. • ABC was contemplating making strategic investment in identified companies for few years and was looking out for investors for funding the said investment. On understanding that surplus funds were available with AOPL for 5 years, ABC conducted a board meeting on 03rd October 2012 to decide on strategy to approach AOPL. It was decided that a detailed proposal will be placed before board of AOPL proposing the investment plan for 850 crores. It was decided to offer AOPL 50% share of profits arising from the gain from the said investment subject to minimum assured return of 8% p.a. on investment made. Asian Business Connection Private Limited • Accordingly, a detailed proposal was provided to AOPL on 03rd October 2012.
- The proposal received by ABC was considered by the board of directors of AOPL in its meeting held on 04Th October 2012. After detailed deliberations, it was decided that the proposal should be accepted subject to ABC agreeing on assured return of 12% p.a. instead of 8% p.a. • ABC in its board meeting dated 08Th October 2012 deliberated on the request of 12% assured returns of AOPL and agreed to the offer. • AOPL in its board meeting dated 11Th October 2012 accepted the offer of ABC to invest Rs. 850 crores. AOPL was eligible to 50% profits on sale of investment made, subject to assured return of 12% p.a. of the investment made.
- The parties entered into an agreement dated 12Th October 2012 formalizing / recording their understanding. • On basis of the above agreement, AOPL advanced Rs. 428.00 crores to ABC (in AY 2015-16) in parts as and when called for by ABC. It is important to mention here that
 - a) MOU was entered into on 11th Oct 2012 while the amount was received starting from 2/04/2014 i.e. as and when the investment was needed .
 - b) Entire Amount of 423 crores was not given lump sum but was disbursed as and when investment was needed. Asian Business Connection Private Limited
 - c) The receipt of funds from subsidiary was immediately followed by investment i.e. no part was kept in the hands of appellant.
 - d) The receipt of funds was entirely invested in strategic investment and nothing was utilized elsewhere.

• As can be seen from above, the amount of Rs. 428 crores was made available to ABC for business venture and not as a loan simplicitor or loan / advance in lieu of dividend. In case of a loan or a deposit the entire amount is left to the disposal of the borrower however in the present case the inflow of funds was followed by immediate strategic investment as per the MOU dated 12th Oct, 2012. • It is submitted that the provisions of Section 2(22)(e) are not applicable if:

- Contributions given are for commercial purpose, or
 - The contributor is benefitting from the advance, or
 - Contributions are utilized for the specified purpose of business as agreed with the contributor by the recipient, or
 - Contributions given are not in lieu of dividend / avoiding dividend distribution tax, or
 - Contributions are given for commercial expediency, business necessity and emergency needs resulting in financial accommodation between sister concerns.
- In the instant case, the contribution given was for commercial purpose, AOPL the contributor is benefitting from the contribution provided, contribution provided is utilized for specified investments by ABC and the contribution provided are not in lieu of dividend or for avoiding dividend distribution tax. In view of the above, it is submitted Asian Business Connection Private Limited that provisions of Section 2(22)(e) of the Act are not applicable to the facts of the case.

10. Ld. Counsel for the assessee further submitted that;

In line with the above, the phrase "by way of loan or advance" as appearing in section 2(22)(e) of the present Act shall be construed to mean those advance or loans which a shareholder would enjoy for simply being a person who is the beneficial owner of shares. However, where loans and advances are given to a shareholder as a consequence of any further consideration which is beneficial to the company, then such loans or advances cannot be said to be deemed dividend within the meaning of the Act. Therefore, if the intention of loan or advance is to avoid payment of dividend distribution tax, such a payment by a company would constitute deemed dividend. However, where the advance is for the purpose which would directly or indirectly benefit the company making the advance, such advance would be construed to give effect to a commercial transaction not falling within the ambit of section 2(22)(e). Contributions given for commercial expediency, business necessity and emergency needs resulting in financial accommodation between sister concerns cannot be considered as deemed dividend

1. The words "loan or advance" as used in the deeming provision has to be interpreted strictly. The word "loan" would mean the act of money lending which generally carries interest and there is an obligation of repayment. The word "advance" may or may not be interest bearing and may or may

not carry an obligation of repayment. However, the word "advance" used in the section has to be associated with the word Asian Business Connection Private Limited "loan". It is a well-established fact that associated words take their meaning from another word under the doctrine of noscitur a sociis.

2. It is a well-established fact that every financial transaction cannot be a loan or advance. Commercial expediency, business necessity and emergency needs result in financial accommodation between sister concerns. These transfer of funds between sister concerns are in line with the object of achieving a common objective. On account of being in one group, there will be large number of debit and credit transactions between group companies. These accounts would be in the nature of current adjustment accommodation account wherein there is a movement of fund in both ways, on need basis.

3. Reliance may be placed on the ITAT judgement in the case of Ravindra Fotedar v. ACIT [2017] 85 taxmann.com 314 (Mum) and Saamag Developers (P.) Ltd v ACIT [2018] 90 taxmann.com 20 (Delhi - Trib.) wherein it was held that "Perusal of the relevant records reveals that they are in the form of current and inter banking accounts and contain both types of entries i.e. giving and taking the amount and appear to be a current account and cannot be considered as loans and advances as contemplated under section 2(22)(e)"

4. The appellant has already submitted during the course of assessment proceedings that it has a running account with AOPL. There is no one-way flow of funds. In view of the above, it may be contended that the funds advanced to the appellant by AOPL are not in the nature of loans and advances taxable under the ambit of deemed dividend. In view of the above, it is submitted that the funds advanced by AOPL to ABC shall not be termed as "loans or advances" taxable as "deemed dividend" u/s 2(22)(e) of the Act.

Asian Business Connection Private Limited THE APPELLANT NOW PROCEEDS TO DISTINGUISH THE JUDICIAL PRONOUNCEMENTS REFERRED BY THE AO IN THE ASSESSMENT ORDER FROM THE FACTS OF THE INSTANT CASE.

AO has wrongly relied on the decision of Supreme Court in the case of CIT vs Namdhari Seeds

1. In the said case, the Hon'ble Supreme Court has accepted the special leave petition against the order of the Hon'ble High court. The Hon'ble High court, without considering the facts of the case wherein the conditions prescribed under provisions of section 2(22)(e) of the Act were fulfilled, referred to its own order in another case of CCIT vs Sarva Equity (P) Ltd. [IT Appeal Nos. 322 to 324 of 2012] wherein it held that any advance or loan to a shareholder would imply a registered shareholder and not a beneficial shareholder. While the judgement of the Hon'ble Supreme Court dealt with the definition of the word "shareholder", in the instant case of the appellant, there is no dispute over the definition of "shareholder". Infact, the transaction does not fall within the ambit of first leg of the definition i.e. "any sum by way of advance or loan" since the payment made by AOPL to ABC was for a business venture and not a loan per se.

2. In view of the above, this decision does not apply to the appellant's case.

AO has wrongly relied on the decision of Supreme Court in the case of Smt. Tarulata Shyam vs CIT

1. In the said case, the Hon'ble Supreme Court held that any sum by way of advance or loan shall be deemed to be dividend irrespective of the fact that such advance or loan is entirely repaid during the year. Further, the loan or advance was given in the ordinary course of business was also not established.

Asian Business Connection Private Limited

2. The relevant para is reproduced below for ready reference.

"For the foregoing reasons, it could be said that payment by a company not being a company in which the public were substantially interested within the meaning of section 23A of 1922 Act, of any sum by way of advance or loan to a shareholder, not exceeding the accumulated profits possessed by the company was to be deemed as his dividend under section 2(6A)(e) read with section 12(1B) of the 1922 Act, even if that advance or loan was subsequently repaid in its entirety during the relevant previous year in which it was taken."

3. In the case of the appellant, the transaction does not fall within the ambit of first leg of the definition i.e. "any sum by way of advance or loan" since the payment made by AOPL to ABC was for a business venture and not a loan per se. Therefore, the question whether the repayment of loan or advance would alter the position does not arise.

4. In view of the above, this decision does not apply to the appellant's case.

The AO has wrongly relied on the decision of Supreme Court in the case of P. Sarada vs CIT

1. The Hon'ble Supreme Court, in the said case, held that any sum by way of advance or loan shall be deemed to be dividend irrespective of the fact that such advance or loan was subsequently adjusted against future payments or against the credit balance of another shareholder.

2. The relevant para is reproduced below for ready reference.

"The withdrawals made by the appellant from the company amounted to grant of loan or advance by the company to the shareholder. The legal fiction came into play as soon as the monies were paid by the company to the assessee. The assessee must be deemed to have Asian Business Connection Private Limited received dividends on the dates on which she withdrew the amounts of money from the company. The loan or advance taken from, the company may have been ultimately repaid or adjusted but that would not alter the fact that the assessee, in the eye of law, had received dividend from the company during the relevant accounting period.

3. In the case of the appellant, the transaction does not fall within the ambit of first leg of the definition i.e. "any sum by way of advance or loan" since the payment made by AOPL to ABC was for a business venture and not a loan per se. Therefore, the question whether the repayment of loan or advance or subsequent adjustment of the account would alter the position does not arise.

4. In view of the above, this decision does not apply to the appellant's case.

The AO has wrongly relied on the decision of High Court in the case of CIT vs P.K Abubucker

1. The High Court, in the said case, relying on the Hon'ble Supreme Court judgement in the case of Miss P. Sharda v. CIT [1998] 229 ITR 444, held that any sum by way of advance or loan shall be deemed to be dividend irrespective of the fact that such advance or loan would subsequently be adjusted against future payments.

2. In the case of the appellant, the transaction does not fall within the ambit of first leg of the definition i.e. "any sum by way of advance or loan" since the payment made by AOPL to ABC was for a business venture and not a loan per se. Therefore, the question whether the subsequent adjustment of such advance or loan against future payments would alter the position does not arise.

3. In view of the above, this decision does not apply to the appellant's case.

Asian Business Connection Private Limited The AO has wrongly relied on the decision of ITAT in the case of ITO vs Ajanta Cycles (P) Ltd.

1. In the instant case, the company had advanced funds to the director shareholder for the purpose of utilizing the same for the purpose of business. However, in the relevant year, the director had not utilized the funds for the purpose of business and further, no explanation was provided for the huge balance lying with the director and for not withdrawing such funds for the purpose of business.

2. The Income-tax Appellate tribunal, questioning the business expediency of the transaction held that "The argument of the assessee that since the entire amount was utilised in the subsequent year, the purpose of creating imprest account with the director/shareholder would not get frustrated merely because this amount was not utilised in the year under consideration, had no force. In the instant case, admittedly, the entire impugned amount created as a sham imprest account with the director/shareholder, was not utilised during the entire year and there was no explanation as to why the entire amount created was not utilised in the relevant year even though there were huge deposits in this account by the assessee. The amount given to the director/shareholder towards the imprest amount, in real sense was, in fact, not an amount given to the director towards the imprest but was a short-term loan because admittedly it was evident from the accounts that, from June 1997 to February 1998, there were huge deposits in the imprest account of the said shareholder/director, and there were no withdrawals indicating the utilization of those funds during the year in the business of the assessee and so, this imprest account was a sham creation by the assessee. The creation of imprest account with the director/shareholder by the assessee was a loan transaction by giving short-term interest-free loan to its director/shareholder to evade the payment of the tax on

accumulated profits.

Asian Business Connection Private Limited

3. In the case of the appellant, the funds contributed by AOPL to ABC were utilized for making strategic investments. The same is evident from the ledger accounts. Therefore, once the funds were applied by ABC for strategic investments with the intention that the same would earn high yields for the group, the business expediency of the transaction cannot be questioned. Once the business expediency is established, the amount contributed by AOPL to ABC cannot fall within the ambit of deemed dividend since the same would eventually benefit AOPL in terms of high returns.

The AO has wrongly relied on the decision of High Court in the case of Mayur Madhukant Mehta. In this case, the High Court dealt with the method of calculation of deemed dividend i.e. whether the entire accumulated profits as on the date of loan or advance would be considered or whether accumulated profits to the extent of the shareholder's share would be considered.

1. In the case of the appellant, the transaction does not fall within the ambit of first leg of the definition i.e. "any sum by way of advance or loan" since the payment made by AOPL to ABC was for a business venture and not a loan per se. Therefore, the question of calculation of deemed dividend does not arise.

2. In view of the above, this decision does not apply to the appellant's case.

- It is a pertinent question to be asked to the assessee as to whether the amounts advanced for investment qualifies as trade advance?

The contributor has given a business advance to the appellant for further investments and not made investments in appellant. The said transaction cannot be classified as investments as the same is not Asian Business Connection Private Limited backed by any underlying securities like shares, bonds etc. issued by the appellant. In view of the above, the same cannot be treated as Investments in the books of accounts of the contributor. Further, in view of the fact that the contribution by AOPL was for the purposes of a joint business venture, it is possible to contend that the said transaction can be classified as a Trade Advance as Business includes an adventure in the nature of Trade. In view of the above, it is contended that the AO has not considered the submissions made by the appellant and the terms of the agreement entered into by the appellant and consequently, the observations/conclusions by the AO are baseless and fallacious. It is submitted that the AO has failed to appreciate that the said transaction has been accounted in the balance sheet and adequate disclosure is made in the notes to accounts as required under the provisions of Companies Act, 2013 and the applicable accounting standards.

Further, it is submitted that the AO has himself accepted that he has jumped into the shoes of the appellant. In this respect, it is once again submitted that various courts have held that commercial decisions are to be taken by the assessee itself and the tax officer are not authorized to make additions / draw conclusions based on such decisions taken by the appellant. It is submitted that the

AO is not authorized to step into the shoes of the businessman.

Further, the AO has himself not justified why such transactions would not be undertaken by a prudent and rational person. As such, no Asian Business Connection Private Limited justification is provided for reviewing the business decision of the contributor.

In view of the above, it is submitted that the AO's observations are misplaced, incorrect and based on conjecture and guess work. In light of the above, we would like to reiterate that the AO has not considered the submissions made by the appellant. Once the same are taken into consideration, it would be amply clear that the transaction between ABC and AOPL is a business transaction and provisions of section 2(22)(e) of the Act are not applicable.

1.The judicial precedents relied by the appellant are rejected without any cogent and sound reasons.

The AO has summarily rejected the judicial pronouncements referred to by the appellant in the submissions, without providing any reasons and by merely stating that the judgement does not pertain to jurisdictional High Court / Tribunals.

The AO has concluded that the judgement of CIT vs Farida Holdings (P) Ltd. (supra) is not applicable.

The AO has rejected the application of the judgement CIT vs. Farida Holdings (P) Ltd. (supra) stating that:

- In the judgement, the holding company was only an intermediary company and no beneficial interest accrued to it.
- In the instant case, ABC is entitled to benefits derived from investments made in the other companies from the funds received from AOPL.

In this regard, we submit that Asian Business Connection Private Limited

- In the case of CIT vs Farida Holdings (P) Ltd (supra), even general loan from a subsidiary to the holding company for an onward loan to another subsidiary was held to not fall within the preview of Section 2(22)(e) of the Act.
- In the appellant's case, the amount was given by AOPL under a business venture with specified consideration and timelines. Given this, it is submitted that the facts of the appellant are more commercially prudent and consequently, the aforesaid decision squarely applies to the appellant. Further, the AO has completely ignored the principles laid down in the other judicial pronouncements mentioned in the submissions. By relying on them, one of principles which emulates is that if the contributor is benefitting from the contribution made, provisions of section 2(22)(e) of the Act does not apply.

- Bagmane Constructions [2015] 57 taxmann.com 120 (Karnataka)

- Sarat Chand Bhavaraju [2017] 81 taxmann.com 323 (Vishakapatnam ITAT) In the instant case, the contributor, AOPL is benefitting from the investment made. Given this, it is contended that the provisions of Section 2(22)(e) of the Act will not be applicable to the appellant.

2.The AO, based on conjectures, guess work and personal opinion, has concluded that transaction between AOPL and ABC is not a business transaction without considering the submissions of the appellant and facts of the case On page no 6 of the Remand Report, while providing his comments on CIT vs Madurai Chettiar Karthikeyan (2014) (45 taxmann.com Asian Business Connection Private Limited

274), the AO has summarily concluded that the transaction between ABC and AOPL is not a normal business transaction without assigning any cogent and sound reasons or substantiating his conclusion.

In this regard, it may be noted that the AO has not challenged the facts as mentioned by the appellant. As discussed above, he has not examined in detail all the submissions available with him and has summarily concluded that the transaction is not a business transaction. It is submitted that based on the facts of the case, the transaction squarely qualifies as business transaction.

2.The AO has relied on the nomenclature used in the financial statements of AOPL and ABC to conclude that the contribution paid by AOPL to ABC is a loan given by AOPL to ABC, without considering the appellant's submissions. In his Remand Report, the AO has considered the contribution by AOPL to ABC as a loan liable to deemed dividend tax. In this respect, it is submitted that the AO has completely ignored the format of Schedule VI as prescribed by the Companies Act, 2013. As the financial statements of ABC and AOPL were being prepared as per the new format prescribed by the Department of Companies Affairs for the first time in financial year 2014-15, the said business contribution amounts in the financial statements of AOPL and ABC were classified as 'Current Asset' in the sub-head 'Short-term loans and advances' in the financial statements of AOPL and as 'Current Liabilities' in the sub-head 'Long term borrowings' in the financial statements of ABC. There is no Asian Business Connection Private Limited other head under which such trade advances could have been shown in the balance sheet.

- In the notes to accounts of FY 2014-15, the amounts were correctly explained as an advance to the related party by way of disclosure.

Further, it is submitted that in the case law relied by the AO, it is held that "it is trite law that mere nomenclature of entry in the books of accounts is not determinative of the true nature of transaction". In fact, the appellant, vide submissions dated 18th July 2018 referring to the same Delhi High Court judgement, had highlighted that the nomenclature of the transaction in the financial statements is not relevant in determining the taxability of the transaction. However, the AO has not considered the submissions made by the appellant. Further to above, reference may be

made to the Hon'ble Supreme Court judgement in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd. v. CIT [1997] 93 Taxman 502 (SC) wherein, the Supreme Court held that "It is true that this Court has very often referred to accounting practice for ascertainment of profit made by a company or value of the assets of a company. But when the question is whether a receipt of money is taxable or not or whether certain deductions from that receipt are permissible in law or not, the question has to be decided according to the principles of law and not in accordance with accountancy practice. Accounting practice cannot override section 56 or any other provision of the Act. As was pointed out by Lord Russell in the case of B.S.C. Footwear Ltd., the Income-tax Law does not march step by step in the footprints of the accountancy profession." [Emphasis added] Asian Business Connection Private Limited The Hon'ble Supreme Court in the case of Taparia Tools Ltd. v. Joint Commissioner of Income-tax [2015] 55 taxmann.com 361 (SC) reiterate that "...because a different treatment was given in the books of account cannot be a factor which would deprive the assessee from claiming the entire expenditure as a deduction. It has been held repeatedly by this Court that entries in the books of account are not determinative or conclusive and the matter is to be examined on the touchstone of provisions contained in the Act"

[Emphasis added].

In view of the above, it is submitted that the conclusion made by the AO basis the treatment in the books of accounts / financial statements is based on conjectures and guess work and is against the principles of taxation.

- The AO has wrongly stated that Board resolutions and MOU passed on various dates for investment appears prima facie to be post facto action It is a well settled principle that assessment cannot be done on conjecture, guesswork and in absence of any evidence provided by the AO, the observations in the Remand Report should be completely ignored. In fact the manner in which the transaction has been carried out i.e-

a. Receipt of funds only when investment fructified b. Inflow of funds followed at the same time by investment. c. No receipt of funds in excess of investment requirement. d. Sale of investment in AY 2018-19 and sharing of profits between the appellant and its subsidiary and payment of taxes thereon Asian Business Connection Private Limited Show that the MOU was genuine and was in fact carried out in letter and spirit.

.

- The AO has wrongly stated that if such board resolutions would have been passed, the same would have appeared in notes to accounts as the assessee was to receive further amounts for investment from AOPL.

It is submitted that the transaction is duly reflected in the related part schedule of the financial statements, in compliance with the Companies Act, 2013 requirements.

Further, the AO has ignored the confirmation of the statutory auditor that they have examined the business venture agreement dated 12th October 2012 entered into between ABC and AOPL and the related documents.

In view of above, it is submitted that the AO has expressed his personal view and hence his observations should be ignored.

- The AO has wrongly stated that that this transaction should have also appeared in the notes to accounts of AOPL as it had contingent liability of additional amount to be paid to ABC on account of agreement of investment of Rs. 850 crores In respect of mention of the balance amount payable by AOPL to ABC under the head 'contingent liability', it is submitted that the amount payable by AOPL cannot be classified as 'contingent liability'.

Asian Business Connection Private Limited As per Accounting Standard (AS) 29 on Provisions, Contingent Liabilities and Contingent Assets, a contingent liability is:

(a) a possible obligation that arises from past events and the existence of which will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not wholly within the control of the enterprise; or

(b) a present obligation that arises from past events but is not recognised because: (i) it is not probable that an outflow of resources embodying economic benefits will be required to settle the obligation or (ii) a reliable estimate of the amount of the obligation cannot be made.

It is submitted that the balance contribution to be made under the agreement do not fall under either of the two scenarios. The balance payments to be made by AOPL to ABC is certain and not subject to occurrence or non-occurrence of future uncertain events. Also, the contributions are not a present obligation which are not recognized as it is not probable that an outflow of resources embodying economic benefits will be required to settle the obligation or a reliable estimate of the amount of the obligation cannot be made. It is a case where contributions are to be made by AOPL as and when called for by ABC. Further, the contingent liability if and when arises gives rise to a permanent outflow of funds which are generally irrecoverable. In the instant case, the contribution made by AOPL to ABC is a business contribution which is to be received back by AOPL. Asian Business Connection Private Limited Given the above, it is submitted that the amount of contribution payable by AOPL to ABC cannot be classified as a contingent liability by any stretch of imagination.

As evident from above, the AO's opinion that the said transaction results in contingent liability is a personal view and should be ignored.

- The AO has wrongly stated that the two entities being related parties, the same would have appeared in related party transaction list also and the AO has wrongly stated that on perusal, no

such details of related party transaction are found. Instead, the AO wrongly concludes that such amounts are being shown as trade advances instead of investments in list of related party transactions. It is submitted that the transaction is duly reflected in the related part schedule of the financial statements, in compliance with the Companies Act, 2013 requirements. Further, it is clarified that the contribution by AOPL is a business advance and as such, is correctly reflected as trade advances in the related part schedule.

The AO fails to appreciate that the said transaction cannot be classified as investments as the same is not backed by any underlying securities like shares, bonds etc. It is further submitted that the AO has ignored the confirmation of the statutory auditor wherein it is specifically mentioned that the amounts are correctly shown as 'trade advances' in the related party schedule of ABC and AOPL.

Asian Business Connection Private Limited

- That the AO wrongly concluded that there appears to be a major mistake committed by the auditors on account of the new facts now presented by the assessee. Either the auditors were not presented with the agreement between ABC and AOPL or the auditors chose to remain silent on such major transaction undertaken. Also, whether minutes of meetings as now being presented were reported to the MCA has not yet been clarified [Emphasis added].

As evident from the observation of the AO itself (underlined above), it is submitted that the AO has indulged in complete conjecture and guess work.

It is submitted that the AO has ignored the confirmation of the statutory auditor that they have examined the business venture agreement dated 12th October 2012 entered into between ABC and AOPL and the related documents.

In respect of filing of minutes of meetings with the MCA, it is submitted that under the provisions of the Companies Act, 2013, the minutes of a board meeting including resolution passed therein are not required to be submitted to any statutory authorities. Once again, it is the personal opinion and view of the AO that it has not been clarified that the minutes of the meeting were submitted to MCA.

In view of the above, it is submitted that the AO's observation needs to be ignored.

Asian Business Connection Private Limited The AO has based on conjectures, guess work and personal opinion, wrongly concluded that there exists a repayment obligation of ABC to AOPL and hence the business contribution is loan.

The AO has referred to the Hon'ble Delhi High Court in ITA No. 589 of 2011, wherein it was held that the word 'advance' has to be read in conjunction with the word 'loan'. The word 'loan' generally carries an obligation of re-payment. On the other hand, the word 'advance' may or may not include the obligation of re-payment. If it does, it would be considered as 'loan'.

Basis the above, the AO has concluded that in the instant case, since there is an element of minimum assured return, it is assumed that the advance is the one which carries with it an obligation of repayment and therefore, it is squarely covered under the definition of term 'loan'.

It may be noted here that although the proposal from ABC to AOPL assured minimum return to AOPL, there is no guarantee provided by AOPL in respect of the principal amount. There is a possibility that AOPL may not receive the principal amount and in that respect, AOPL has taken risk in the business venture. In view of the above, it is submitted that the AO's observations are misplaced, incorrect and based on conjectures and guess work.

2. Why Direct investment cannot be made by AOPL itself :

As evident on perusal of page 13, para 2 of the Remand Report, the AO attempts to step into the shoes of the appellant.

Asian Business Connection Private Limited In this respect, it is submitted that various courts have held that commercial decisions are to be taken by the assessee itself and the tax officer are not authorized to make additions based on such decisions taken by the assessee. It is submitted that the AO is not authorized to step into the shoes of the businessman. AOPL and ABC are separate companies and assessed to tax separately as well. ABC had investment plan ready whereas AOPL was considering avenues of investing its surplus funds. Given this, there was anyways no question of AOPL investing directly in companies identified by ABC. Given this, it is submitted that the sweeping observation made by the AO should be completely ignored.

The said investment was not made by AOPL directly because :

- a) The investment by AOPL (the subsidiary) would have been a huge risk to the balance sheet, given that it is in the business of Agri trade where continuous banking support in the form of LOC issuance is required and any short term dip in the value of investment would have had to be marked as mark-to market loss thereby directly affecting the banking transactions of LOC which are based on credit risk rating.
- b) It had not investment in its books earlier or in future and had no expertise in strategic investments. Its had only FDR's in its books and nothing else.
- c) The Appellant had been negotiating with the seller since 2012 and had considerable expertise in strategic investments and to turn over the seller to a completely different buyer does not happen in business negotiations.

Asian Business Connection Private Limited

d) The appellant assumed all the risk in its balance sheet which protected the subsidiary from any adverse outcome of the investment.

11. As regards alternate ground raised by the assessee that the addition u/s 2(22)(e) without prejudice to our contention that the alleged transaction of receiving advance was purely for business purpose, if in case the issue is decided against it then the addition for the accumulated profits may be made only to the extent of to the opening balance of the accumulated profits. It was further submitted that without prejudice to the above ground, the AO has erred in considering the accumulated profits as on the last day of the assessment year i.e. 31 March 2015 for the purpose of calculating deemed dividend. In this regard, the extract of provisions of section 2(22)(e) of the Act are reproduced below:

12. In support of its contention Ld. Counsel for the assessee relied on following judgments;

1. CIT v Creative Dyeing & Printing (P.) Ltd. [2009] 184 Taxmann 483 (Delhi) (HC) :

Asian Business Connection Private Limited

2. Intention of section 2(22)(e) as explained in CIT v. Mukundray Shah[2007] 160 Taxmann 276 (SC) :

3. CIT v Gayatri Chakraborty [2018] 94 taxmann.com 244 (Calcutta) (HC)

4. Chadrasekhar Maruti v ACIT [2016] 71 taxmann.com 239 (Mumbai ITAT)

5. M. Amareswara Rao v DCIT [2016] 67 taxmann.com 15 (Vishakhapatnam ITAT)

6. Commissioner of Income Tax v. Farida Holding (P) Ltdn(2016) (76 Taxmann.com 10)

7. Commissioner of Income Tax, Chennai V Madurai Chettiyar Karthikeyan (2014) 45 taxmann.com 274

8. Assistant Commissioner of Income Tax V Sunil Chopra (2010) 2 ITR(T) 469 (Delhi)

9. Sarad Chand Bhavaraju V Income Tax Officer, Ward-4, Visakhapatnam (2017) 81 taxmann.com 323 (Vishakapatnam-Trib.)

10. Pradip Kumar Malhotra V Commissioner of Income Tax, Bangalore-V (2015) 15 taxmann.com 66 (Cal)

11. Bagmane Constructions (P) Ltd V Commissioner of Income Tax, Bangalore (2015) 57 taxmann.com 120 (Karnataka)

12. Commissioner of Income tax V Prasidh Leasing Ltd. (2018) 90 taxmann.com 385 (Delhi)

13. Dr. Shiv Kant Mishra V Deputy Commissioner of Income Tax, Central Circle-II, Kanpur (2009) 118 ITD 347 (Lucknow-Trib)
14. Navnit Lal C Javeri V K.K. Sen, Appellate Assistant Commissioner of Income Tax (1965) 56 ITR 198 (SC)
15. Ravinbdra R Fotedar V. Assistant Commissioner of Income Tax 10(2), Mumbai (2017) 85 Taxmann.com 314 (Mum-Trib) Asian Business Connection Private Limited
16. Saamag Developers (P) Ltd V Assistant Commissioner of Income Tax (2018) 90 taxmann.com 20 (Delhi-Trib)
17. Commissioner of Income Tax Kottayam V Malayala Manorama Co. Ltd (2018) 89 Taxmann.com 252 (Kerala)
18. Commissioner of Income Tax, Chennai V Raj Kumar (2009) 181 taxmann.com 156 (Delhi)
19. Commissioner of Income Tax V Arvind Kumar Jain (2012) 18 Taxmann 132 (Delhi)
20. Ishwar Chand Jindal V Assistant Commissioner of Income Tax (2015) 61 Taxmann.com 428 (Delhi-Trib.)
21. Assistant Commissioner of Income Tax-3(1), Indore V Pravin C Pandya (2013) 38 taxmann.com 408 (Indore-Trib.)
13. To demonstrate that the transaction is a business transaction ABCPL filed the following evidences before the lower authorities:-
 - i. Memorandum of Association of ABC.
 - ii. Memorandum of Association of AOPL.
 - iii. AOPL's Board Resolution for the board meeting held on 25th September 2012.
 - iv. AOPL's Board Minutes for the board meeting held on 25th September 2012.
 - v. ABC's Board Resolution for the board meeting held on 3rd October 2012.
 - vi. ABC's Board Minutes for the board meeting held on 3rd October 2012.
 - vii. Business Proposal provided by ABC to AOPL.
 - viii. AOPL's Board Resolution for the board meeting held on 4th October 2012.

- ix. AOPL's Board Minutes for the board meeting held on 4th October 2012.
 - x. ABC's Board Resolution for the board meeting held on 8th October 2012.
 - xi. ABC's Board Minutes for the board meeting held on 8th October 2012.
 - xii. AOPL's Board Resolution for the board meeting held on 11th October 2012.
 - xiii. AOPL's Board Minutes for the board meeting held on 11th October 2012.
 - xiv. Agreement dated 12th October 2012 between ABC and AOPL.
 - xv. Details of date wise receipt of funds by ABC from AOPL and utilization of these funds for business venture by ABC in financial year ('FY') 2014-15.
 - xvi. Summary of funds received from AOPL and deployed for business venture during FY 2014-15.
 - xvii. Calculation of profit on sale of shares of one of the company in which investment was made under the business venture by ABC and share of profit of AOPL thereon.
 - xviii. Computation of advance tax of ABC of FY 2017-18 reflecting its share of profits as income.
- Asian Business Connection Private Limited xix. 26AS of ABC reflecting the advance tax paid and taxes deducted at source by their payers.
- xx. Income-tax returns and audited final accounts for AY 2018-19 showing the factum of sharing of profits and payment of tax thereon.

Following additional details / documents were provided to the Ld. CIT(A):

- 1. Fund flow from subsidiary and onward investment in target companies as per the business venture.
- 2. Subsequent gains on sale of investments and distribution of such gains to co-venturer including details of Advance tax paid.

The appellant submitted the following details / explanations:

- 1. Receipt and deployment of funds i. Details of date wise receipt of funds by the Appellant from Advantage Overseas Private Limited ('AOPL') and utilization of these funds for business venture by the Appellant in financial year ('FY') 2014-15.

ii. Summary of funds received from AOPL and deployed for business venture during FY 2014-15.

2. Gains on liquidation and details of Advance tax paid i. Out of the investments made, it is submitted that as on date, the Appellant has sold its shares held in CSJ Asian Business Connection Private Limited Infrastructure Private Limited on 19th July 2017. As per the terms of the agreement dated 12th October 2012 entered into between the appellant and AOPL, AOPL is eligible to receive 50% of profits earned by the appellant from the investment. Calculation of profit on sale of shares of CSJ Infrastructure Private Limited by the Appellant and share of profit of AOPL thereon was also filed.

ii. Further, computation of advance tax of FY 2017-18 of the appellant considering his share of profits as income was also filed before the Ld. CIT(A). In respect of AOPL, the company has, after considering the 50% share of profit on disinvestment, estimated that no advance tax is due for AY 2018-19.

iii. Form 26AS of the appellant reflecting the advance tax paid and taxes deducted at source by their payers was also filed iv. On perusal of the above details, it will be observed that the Appellant and AOPL has duly paid taxes on their respective share of profits.

Thus in all aspects the transaction is a commercial transaction which does not result in any deemed divided u/s 2(22)(e).

14. As regards the last ground against the disallowance of registry fees paid for increase in share capital Ld. Counsel for the Asian Business Connection Private Limited assessee submitted that in view of the judgment of Hon'ble Supreme Court in the case of CIT V/s General Insurance Corporation 286 ITR 232 only proportionate disallowance of 37% of the expenses ought to have been made by the Ld. A.O since the fresh capital of Rs.37 crores only was issued during the year whereas the alleged amount was paid in increase in authorized capital from Rs.5 crores to Rs.100 crores.

15. Per contra Ld. Departmental Representative vehemently argued supporting the orders of both the lower authorities and supported the following findings of Ld. CIUT(A) and judgments referred therein;

Issue related to addition u/s 2(22)(e) for deemed dividend:

19. Section 2(22)(e) which is pari materia with clause (e) of section 2(6A) of the Indian Income-tax Act, 1922, was brought in the statute book to bring within the tax net accumulated profits which are distributed by closely held companies to its shareholders in the form of loans/ advances. This clause seeks to suppress this mischief by creating a legal fiction whereby all such loans/advances are deemed to be dividend. It is a well-

settled legal principle as decided by Hon'ble Bombay High Court in CIT vs P.K. Badiani, 76 ITR 369 that a legal fiction has to be carried to its logical conclusion within the framework of the purpose for which it is created. Further, since this clause Asian Business Connection Private Limited creates an artificial liability, as held by Hon'ble Apex Court in Tarulata vs CIT (1977) 108 ITR 345 (SC) it must be given a strict interpretation.

20. The relevant extract of the provision is reproduced below:

"(22) 'dividend' includes-

** ***** (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 May 31, 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."

21. 'Dividend' in its ordinary connotation means the sum paid to or received by a shareholder proportionate to his shareholding in a company out of the total sum distributed. As held by Hon'ble Supreme Court in Bharat Insurance vs CIT', 53 ITR 108 (SC), the definition as per this clause is an inclusive one implying that any receipt by a shareholder which is 'dividend' under general law would be taxable as such under Asian Business Connection Private Limited this Act, even if it falls outside the purview of this definition or is not attributable to the company's 'accumulated profit'.

22. The concept of deeming certain payments or loans or advances to substantial shareholders as income was introduced with the object of curbing tax evasion. Upto 31-5- 1997 dividend was taxed in the hands of the recipient of the dividend. However many closely held companies never declared any dividend and accumulated profits in the company itself. Since no dividend was declared the same could not be taxed. However the companies did give loans or advances to substantial shareholders or to their concerns/companies that presumably enjoyed these funds but were not liable to pay any tax on the same as the amounts were loans or advances liable to be returned. These amounts of loans or advances are sought to be taxed as dividend by section 2(22)(e) of the Act by way of a deeming fiction.

23. The deemed dividend as comprehended by this clause, is not a dividend that arises out of distribution but dividend that arises out of payment. There is a distinction between 'distribution' and 'payment'. Distribution implies two acts, namely, diversion and delivery. Payment, however, implies something that is given and it need not have been first apportioned and then disbursed.

24. The five instances of dividend enumerated by this section in clauses (a) to (e) are cases of distribution or payment out of, or to the extent of accumulated profits of the company (Explanation

2). The 'deemed' dividend under this sub-clause is not restricted to profits proportionate to the shareholding of the assessee in the capital but it extends to the entire Asian Business Connection Private Limited accumulated profits. 'Accumulated profits' means profits in a commercial sense. The expression includes tax-free profits like agricultural Income, general reserve, development rebate reserve, credit balance and initial depreciation but not normal depreciation nor provision for taxation and dividends.

25. On a bare perusal of section 2(22)(e), it becomes clear that it brings to tax three types of payments. Firstly, any loans/ advances to shareholders. Secondly, it includes any payment on behalf of a shareholder. Thirdly, it includes any payment for the individual benefit of a shareholder.

26. As held by the Hon'ble Gujarat High Court in Ravindra D. Amin vs CIT 208 ITR 815, a loan to a shareholder is deemed dividend irrespective of the purpose of the loan.

27. The Hon'ble Apex Court in Ms. P. Sarda vs CIT, 229 ITR 444 (SC) and Smt. Tarulata Shyam vs CIT, 108 ITR 345 (Se) that the fact that the loan is to be repaid during the same accounting year is immaterial.

28. The Delhi High Court, in the case of CIT v. Raj Kumar, 181 taxman 155 has distinguished between a 'loan' and an 'advance'. The relevant extract from the judgment is reproduced below:-

"If this purpose is kept in mind then, in our view, the word (advance' has to be read in conjunction with the word 'loan'. Usually attributes of a loan are that it involves positive act of lending coupled with acceptance by the other side of the money as loan: it generally carries an interest and there is an obligation of repayment. On the other hand, in its widest Asian Business Connection Private Limited meaning the term (advance' may or may not include lending. The word (advance' if not found in the company of or in conjunction with a word (loan' may or may not include the obligation of repayment. If it does then it would be a loan "(p.

166)

29. In this background, the facts of the case are that the appellant received a loan of Rs. 428.50 crore from its subsidiary company AOPL in which it was having 85 shareholding. In the year under consideration, in the balance sheet of the shareholder ABC (assessee) it was shown as Long term borrowings and in the balance sheet of the company AOPL, it was shown as Short Term Loans and Advances. The appellant relying upon an MoU between ABC and AOPL dated 12.10.2012, contended that it was decided between the two companies to invest in ABC for purpose of making certain strategic investments in identified companies on which AOPL was eligible to 50% profits on sale of investments, subject to assured return of 12% of the investment made. The appellant relied upon CBDT Circular No. 19 of 2017 dated 12.06.2017 to claim that the transaction was in the nature of trade advance which as per the circular is not covered u/s 2(22)(e) of the Act.

30. The basic conditions for deemed dividend as per section 2(22)(e) of the Income Tax Act, are examined as follows:-

(i) There was a payment was made by the subsidiary company (AOPL) to holding company (ABC);

(ii) The payment was made by a company in which public are not substantially interested;

Asian Business Connection Private Limited

(iii) The payment was made by way of advance or loan as per the balance sheet of the shareholder ABC (assessee) it is shown as Long term borrowings and in the balance sheet of the company AOPL, it is shown as Short Term Loans and Advances;

(iv) The shareholder is beneficial owner of shares holding not less than 10 percent. In fact, ABC holds 85 shares of AOPL.

(v) The AOPL possesses accumulated profits to the tune of Rs. 3875,95,992/- on 31.03.2014 and Rs 29974,68,364 on 31.03.2015.

31. Therefore, from the plain perusal of facts read in the light of the section 2(22)(e), it is clear that all the conditions of deemed dividend as envisaged are satisfied. The payments have been made to beneficial shareholder, which are in the nature of loan as classified in the balance sheet by assessee himself. The company ABCL is not in the business of lending of money.

32. The appellant has relied upon mainly on judgment of CIT vs. Farida Holdings (P) Ltd. [2016] (76 tamann.com 10). It is observed that in that case the main point considered was that the holding company was only an intermediary and no beneficial interest accrued to the assessee company by the advances between the subsidiary companies and sub subsidiary companies. However, in the instant case, the holding company i.e. the assessee ABC is entitled to benefits derived from investments made in other companies from the funds received from AOPL @ 50 of profits on such investments. Asian Business Connection Private Limited Therefore, the case law is not applicable in the case of the assessee company.

33. The appellant has relied upon the CBDT circular No. 19 of 2017 to contend that contributions given for commercial purpose fall outside preview of section 2(22)(e). The aforesaid circular is reproduced below:-

Section 2(22) clause (e) of the Income Tax Act, 1961 (the Act) provides that "dividend" includes any payment by a company, not being a company in which the public are substantially interested, of any sum 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.

2. The Board has observed that some Courts in the recent past have held that trade advances in the nature of commercial transactions would not fall within the ambit of the provisions of section 2(22) (e) of the Act. Such views have attained finality.

2.1 Some illustrations/examples of trade advances/commercial transactions held to be not Asian Business Connection Private Limited covered under section 2(22) (e) of the Act are as follows:

i. Advances were made by a company to a sister concern and adjusted against the dues for job work done by the sister concern. It was held that amounts advanced for business transactions do not fall within the definition of deemed dividend under section 2(22) (e) of the Act. (CIT vs. Creative Dyeing & Printing Pvt. Ltd. (Delhi High Court)).

ii. Advance was made by a company to its shareholder to install plant and machinery at the shareholder's premises to enable him to do job work for the company so that the company could fulfil an export order. It was held that as the assessee proved business expediency, the advance was not covered by section 2(22)(e) of the Act.

(CIT vs Amrik Singh, P&H High Court). .

iii. A floating security deposit was given by a company to its sister concern against the use of electricity generators belonging to the sister concern. The company utilised gas available to it from GAIL to generate electricity and supplied it to the sister concern at concessional rates. It was held that the security deposit made by the company to its sister concern was a business transaction arising in the normal course of business between two concerns and the transaction did not attract section 2(22) (e) of the Act. CIT Agra vs Atul Engineering Udyog, Allahabad High Court.

3. In view of the above it is, a settled position that trade advances, which are in the nature of commercial Asian Business Connection Private Limited transactions would not fall within the ambit of the word 'advance' in section 2(22)(e) of the Act. Accordingly, henceforth, appeals may not be filed on this ground by Officers of the Department and those already filed, in Courts/Tribunals may be withdrawn/not pressed upon.

34. It is observed that circular covers only 'trade advances' in the nature of commercial transactions. The trade advances have been illustrated in the circular to be advances made by a company to a sister concern and adjusted against the dues for job work done by the sister concern; advance made by a company to its shareholder to install plant and machinery at the shareholder's premises to enable him to do job work for the company so that the company could fulfil an export order; a

floating security deposit given by a company to its sister concern against the use of electricity generators belonging to the sister concern etc. It may be seen that the nature of transaction here is entirely different and can in no way be treated as a normal trade advance as the appellant company is not engaged in any trade transactions with AOPL in routine in its normal course of business. From the illustrative transactions given in the circular, it can be inferred that only transactions such as where the subsidiary company was a dealer say of a cement producing holding company and gives some trade advance in its normal course of business, then such transaction would not be covered within the ambit of section 2(22)(e). Here it was not a trade advance that was extended by AOPL to ABC but was parking of its surplus funds with the ABC. Therefore, in the facts of the case, the circular was clearly not applicable.

Asian Business Connection Private Limited

35. The appellant has relied upon CIT vs. Maduari Chettiar Karthikeyan [2014] 45 taxmann.com 274, the High Court held as follows:-

" ... assessee had executed work for the company in the nature of construction of buildings and the said transaction being in the nature of a simple business transaction, we do not find any justifiable ground to bring the case of the assessee within the definition of deemed dividend under Section 2(22)(e) of the Income Tax Act, 1961".

It is observed that the transaction involved in the said decision was a simple business transaction which is not the case here as the transaction between AOPL and ABCL is not a normal business transaction even by the contention of the appellant a onetime strategic transaction. Thus, clearly the case is not applicable.

36. The appellant has also relied on ITAT judgments in the case of Ravindra Fotedar v. ACIT [2017] 85 taxmann.com 314 (Mum) and Saamag Developers (P.) Ltd v ACIT [2018] 90 taxmann.com 20 (Delhi - Trib.). It is observed that the transactions involved in those cases were current and inter banking accounts and contained both types of entries i.e. giving and taking the amount and the account appeared to be a current account which is not the case here. Therefore, the decisions are not applicable.

37. It is observed that the other case laws relied upon by the appellant are distinguishable on facts and not applicable in the present case.

Asian Business Connection Private Limited

38. It is observed that the transaction is covered as deemed dividend u/s 2(22)(e) of the Income Tax Act, 1961 in view of the judgment of Hon'ble Delhi High Court in CIT vs Arvind Kumar Jain, ITA No. 589 of 2011. The facts of the case are as follows:

- There was a business transaction between assessee and A&A periodicals and the amount reflected running business relationship and there was a running account maintained by the assessee showing those transactions.
- In the books of accounts, the amount was shown as unsecured loan.

In the judgment it was held that:

«It is clear that Sub-clause (e) of Section 2(22) of the Act, which is parimateria with Clause (e) of Section 2(6A) of the 1922 Act, plainly seeks to bring within the tax net accumulated profits which are distributed by closely held companies to its shareholders in the form of loans. The purpose being that persons who manage such closely held companies should not arrange their affairs in a manner that they assist the shareholders in avoiding the payment of taxes by having these companies pay or distribute, what would legitimately be dividend in the hands of the shareholders, money in the form of an advance or loan. "

"If this purpose is kept in mind then, in our view, the word 'advance' has to be read in conjunction with the word 'loan'. Usually attributes of a loan are that it involves positive act of lending coupled with acceptance by the other side of the money as loan: it generally carries an interest and there is an Asian Business Connection Private Limited obligation of re-payment. On the other hand, in its widest meaning the term 'advance' may or may not include lending. The word 'advance' if not found in the company of or in conjunction with a word 'loan' may or may not include the obligation of repayment. If it does then it would be a loan. Thus, arises the conundrum as to what meaning one would attribute to the term 'advance'. The rule of construction to our minds which answers this conundrum is *noscitur a sociis*. The said rule has been explained both by the Privy Council in the case of *Angus Robertson v. George Day* (1879) 5 AC 63 by observing "it is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them" and our Supreme Court in the case of *Rohit Pulp & Paper Mills Ltd v. CCE*, AIR 1991 SC 754 and *State of Bombay v. Hospital Mazdoor Sabha*, AIR 1960 SC

610."

"It is important to note that *Rohit Pulp* (supra) was the case dealing with taxation. In brief in the said case the assessee was seeking to take benefit of an exemption notification. The Department denied the benefit of the 'notification' on the ground that the paper manufactured by the assessee was 'coated paper' to which as per the proviso to the said notification the concession was not available. The Supreme Court in coming to the conclusion that the assessee's case did not fall within the proviso and was thus entitled to the benefit of the notification applied the rule of construction of *noscitur a sociis*. "

"Let's examine as to whether based on the aforesaid tests the said rule of construction 'noscitur a sociis' ought to be applied Asian Business Connection Private Limited in the instant case.

(i) the term 'advance' has undoubtedly more than one meaning depending on the context in which it is used;

(ii) both the terms, that is, advance or loan are related to the 'accumulated profits' of the company;

(iii) and last but not the least the purpose behind insertion of the term advance was to bring within the tax net payments made in guise of loan to shareholders by companies in which they have a substantial interest so as to avoid payment of tax by the shareholders;

Keeping the aforesaid rule in mind we are of the opinion that the word 'advance' which appears in the company of the word 'loan' could only mean such advance 'which carries with it an obligation of repayment. Trade advance which are in the nature of money transacted to give effect to a commercial transactions would not, in our view, fall within the ambit of the provisions of Section 2(22)(e) of the Act. This interpretation would allow the rule of purposive construction with *noscitur a sociis*, as was done by the Supreme Court in the case of *LIC of India v. Retd. LIC Officers Assn.* [2008J 3 SCC 321. "

39. The aforesaid judgment clearly establishes the usage of word advance or loan in the context of section 2(22)(e) of the Income Tax Act, 1961. As per the judgment a trade advance is different from a loan which carries an obligation for repayment i.e. a trade advance is normally adjusted against trading transactions. Clearly, this is not the case here as per the undisputed facts the amount was given under an obligation of Asian Business Connection Private Limited repayment and in the transaction, the appellant ABC was clearly a beneficiary.

40. In any case, even if the argument of the assessee is considered for argument sake that some investment agreement indeed happened, which remained to be accounted for in the balance sheet and notes to accounts; from the judgment of Hon'ble High Court of Delhi in Arvind Jain case (supra), it is clear that such advance was in the nature of loan as discussed in the judgment as AOPL was eligible for 50 share of profits arising from the gain on the investments made by ABC subject to minimum assured return of 12 p.a. The same transaction has been categorized very differently in the balance sheets of ABC and AOPL. ABC is showing it as long term borrowings, where as AOPL is showing it as short term loans and advances. However, leaving that aside, from the judgment of Hon'ble High Court of Delhi, it is clear that the advance received by ABC from AOPL, as the same has been categorized as short term loans and advance by AOPL, is in the nature of advance which carries an obligation of repayment. From the judgment of Hon 'ble High Court of Delhi and bare reading of the provision of section 2(22)(e) as discussed earlier, in which it was stated that all the conditions of deemed dividend are satisfied, it is clear that the contributions were in the nature of advances with an obligation of repayment. They were not in the nature of trade advances nor was

AOPL a finance company.

41. It is observed that in the balance sheet of Advantage Overseas Pvt. Ltd., the amount given to Asian Business has been shown as Short Term Loans and Advances, Unsecured, considered good. If contention of the appellant that AOPL Asian Business Connection Private Limited contributed to ABC for investment in identified companies was correct, the same would have been categorized under the head Investments or Long term Loans or Advances and not under the head Short Term Loans and Advances. The A.O. has raised doubts on board resolutions passed on various dates for investment. The appellant could not rebut the doubts on board resolutions and MoU between AOPL and ABC by showing filing with any independent third party.

42. The appellant could not rebut the argument of A.O. that the investments that have been made by holding company ABC utilizing funds from AOPL could have been well made by the subsidiary company AOPL itself and that assessee is now trying to rationalize that an investment agreement was undertaken for the said transaction. The persons deciding the strategic investments are also holding the reins of AOPL and could have chosen to invest directly through AOPL. If AOPL was genuinely interested in making some investment it could have easily made direct investment and could have retained the entire profit on the investment. The argument that the assessee company was having expertise in making strategic investments is to no avail as in a normal transaction, the AOPL could have easily obtained professional services of ABC, being both holding and subsidiary company, and if required, for some payment. In this case, it was purely a transaction of giving loan/ advance to ABC which is clearly hit vi] s 2(22)(e) of the Act.

43. The appellant has relied upon the MoU between ABC and AOPL, however, it is observed that the MoU is too general and vague in nature as it does not show any specific investment Asian Business Connection Private Limited where the investment was proposed/ contemplated by the ABC. Further, the appellant could not show that the investment ultimately made by ABC was made in the joint name of AOPL and ABC, if the same was a genuine strategic investment made in partnership. Further, the appellant could not rebut the finding of A.O. in the remand report by showing genuineness by way of any independent filing that an agreement existed which was subsequently shown as investment agreement. It is observed that even if we consider the investment agreement, the provisions of section 2(22)(e) are squarely applicable.

44. Another argument has been raised that the A.O. did not consider the accumulated profits as on the date of transaction. It is observed that the A. O. has taken the correct figure of accumulated profits as even during appeal the appellant could not rebut the figure as it submitted during appeal that "Currently, the appellant is unable to extract the accumulated profits as on the date when the payments were made to the shareholder and therefore we have not pressed this ground further. JJ

45. It is further observed that the following case laws relied upon by the A.O. are fully applicable to the facts of the case.

- CIT Vs Namdhari Seeds [2017] 79 taxmann.com 124 (SC)

- Smt. Tarulata Shyam VS CIT (108 ITR 345)
- P. Sarada Vs CIT 229 ITR 444
- Commissioner of Income-tax Vis. P.K. Abubucker [2004]

Asian Business Connection Private Limited 135 Taxman 77 (Madras) • Income-tax Officer Vis. Ajanta Cycles (P.) Ltd. [2008] 22 SOT 1 (Chandigarh) • CIT Vis. Arati Debi 111 ITR 277 (Cal.) • CIT Vs P.K. Abubucker (Mad) 259 ITR 507 • Mayur Madhukant Mehta 85 ITR 230 (GUJ)

46. In view of the facts and circumstances of the case and legal position, it is concluded that the amount of Rs. 429.50 crore given by AOPL to ABC was a transaction squarely covered u/s 2(22)(e) of the Act. The A.O. has rightly restricted the addition in Rs.297,74,68,364/- to the extent of accumulated reserves and surplus of ABC. The addition made by the A.O. is confirmed. This ground of appeal is dismissed.

16. We have heard rival contentions and perused the records placed before us and also gone through submissions made by both the lower authorities. In the instant appeal 9 grounds have been raised of which Ground No. 1 to 6 challenges the finding of Ld. CIT(A) confirming the addition of Rs.2,97,74,68,364/- made by the Ld. A.O u/s 2(22)(e) of the Act as alleged deemed dividend. Ground No.7 is an alternate ground raised by the assessee without prejudice to Ground No. 1 to 6 and Asian Business Connection Private Limited without admitting to have received any dividend has challenged the amount of accumulated profit considered by the Ld. A.O contending that the accumulated profit should have been taken as on the date of receiving the amount from subsidiary company. In Ground No.8 assessee has challenged the finding of Ld. CIT(A) sustaining the addition of disallowance of registry fees of Rs.85.55 lakhs incurred for increase in share capital.

17. We will first take up Ground No. 1 to 6 challenging the addition made u/s 2(22)(e) of the Act for alleged deemed dividend of Rs.2,97,74,68,364/-. We observe that the assessee is having substantial interest by way of 85% share holding in AOPL which was further increased to 99.9% during the year under appeal. AOPL is having huge turnover and is a profit making company. In pursuance of the Memorandum of Understanding entered into between the assessee and AOPL for making strategic investment and sharing profits in equal ratio subject to the minimum return of 12% per annum to AOPL, assessee received Asian Business Connection Private Limited amounts on various dates during the year totalling to Rs. 428.51 crores (approx). Since the assessee company was holding more than 10% of voting power of AOPL, Ld. A.O made addition for deemed dividend u/s 2(22)(e) of the Act of accumulated profits at the year end at Rs.297.75 crores (approx.). While making addition Ld. A.O observed that the amount has been shown as loan to the assessee by AOPL and in the audited financial statement ABCPL has shown the amount under the head unsecured loans and not as trade advance/credit payable. He also concluded that the alleged transactions is not a business transaction and it is purely a loan given by the subsidiary company to its holding company and provisions of Section 2(22)(e) are squarely applicable.

18. On the other hand Ld. Counsel for the assessee referred to the consistent submissions made before the lower authorities and before us that the alleged transactions was a commercial transaction carried in the regular course of business for earning profit. It was Asian Business Connection Private Limited submitted that AOPL was having accumulated surplus over a period of time and in order to use the idle funds for earning maximum return for its shareholders was looking for investment opportunities which can generate good returns. The holding company i.e. assessee ABCPL having expertise and experience in making strategic investments in identified funds was looking out for investments for funding investments. Proposal was given by the assessee to AOPL to make strategic investments. After various rounds of meetings, on 12.10.12 Memorandum of Understanding was entered into between ABCPL and AOPL. Thereafter funds as and when required were received by ABCPL from AOPL which are claimed to have applied for strategic investments.

19. Ld. Senior Counsel for the assessee referring to additional evidence submitted that after few years during financial year 2017-18 strategic investments made jointly out of funds of AOPL were sold and profit earned. Equal amount of profit has been disclosed in the audited financial statements and due taxes have been paid thereon. Amount Asian Business Connection Private Limited received from AOPL along with the income earned was returned back by ABCPL to AOPL. Relying on these facts Ld. Counsel for the assessee contended that the alleged transaction was purely of commercial nature and by no canon can be treated as deemed dividend.

20. Before advertizing to the detailed adjudication we will first go through section 2(22) of the Act which is reproduced as under;

Section 2(22) in The Income- Tax Act, 1995 (22) " dividend" includes-

(a) any distribution by a company of accumulated profits, whether capitalised or not, if such distribution entails the release by the company to its shareholders of all or any part of the assets of the company;

(b) any distribution to its shareholders by a company of debentures, debenture- stock, or deposit certificates in any form, whether with or without interest, and any distribution to its preference shareholders of shares by way of bonus, to the extent to which the company possesses accumulated profits, whether capitalised or not;

(c) any distribution made to the shareholders of a company on its liquidation, to the extent to which the distribution is attributable to the accumulated profits of the company immediately before its liquidation, whether capitalised or not;

(d) any distribution to its shareholders by a company on the reduction of its capital, to the extent to which the company possesses accumulated profits which arose after the end of the previous year ending next before the 1st day of April, 1933 , whether such accumulated profits have been capitalised or not;

(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) 5 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 Asian Business Connection Private Limited 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; but" dividend" does not include--

(i) a distribution made in accordance with sub- clause (c) or sub- clause (d) in respect of any share issued for full cash consideration, where the holder of the share is not entitled in the event of liquidation to participate in the surplus assets;

(ia) 1 a distribution made in accordance with sub- clause (c) or sub- clause

(d) in so far as such distribution is attributable to the capitalised profits of the company representing bonus shares allotted to its equity shareholders after the 31st day of March, 1964 , 2 and before the 1st day of April, 1965];]

(ii) any advance or loan made to a shareholder 3 or the said concern] by a company in the ordinary course of its business, where the lending of money is a substantial part of the business of the company;

(iii) any dividend paid by a company which is set off by the company against the whole or any part of any sum previously paid by it and treated as a dividend within the meaning of sub- clause (e), to the extent to which it is so set off. Explanation 1-The expression" accumulated profits", wherever it occurs in this clause, shall not include capital gains arising before the 1st day of April, 1946 , or after the 31st day of March, 1948 , and before the 1st day of April, 1956 . Explanation 2.-- The expression"

accumulated profits" in sub- clauses (a), (b), (d) and (e), shall include all profits of the company up to the date of distribution or payment referred to in those sub- clauses, and in subclause (c) shall include all profits of the company up to the. date of liquidation, 4 but shall not, where the liquidation is consequent on the compulsory acquisition of its undertaking by the Government or a corporation owned or controlled by the Government under any law for the time being in force, include any profits of the company prior to three successive previous years immediately preceding the previous year in which such acquisition took place]. Explanation 3.- For the purposes of this clause,-

(a) " concern" means a Hindu undivided family, or a firm or an association of persons or a body of individuals or a company;

(b) a person shall be deemed to have a substantial interest in a concern, other than a company, if he is, at any time during the previous year, beneficially entitled to not less than twenty per cent of the income of such concern;] Asian Business Connection Private Limited

21. The above provisions deals with dividend and includes various types of payments in cash or otherwise to the share holders of the company. In the instant appeal revenue authorities have invoked provisions of Section 2(22)(e) of the Act which provides that "dividend" includes any payment made by the company not being the company in which the public are substantially interested, of any sum by way of advance or loan to a shareholder company being a person who is the beneficial owner of shares holding not less than 10% of voting power. The assessee company is a holding company of various subsidiary companies including AOPL. AOPL was having accumulated profits and it gave amount to the assessee company i.e. ABCPL for the alleged strategic investment. ABCPL is having 99.90% of equity shares of AOPL as on the last date of the year under appeal so there is no dispute to the fact that the assessee is a shareholder having more than 10% of the voting rights. It has received the sum from the subsidiary company having accumulated reserve and surplus. Since the amount was shown as loan by AOPL to ABCPL and in the Asian Business Connection Private Limited financial statement of ABCPL the amount received from AOPL has been shown as unsecured loans, the impugned addition u/s 2(22)(e) of the Act for the deemed dividend of Rs.297.75 crores (pprox.) was made by the Ld. A.O and the same was confirmed by Ld. CIT(A) after giving detailed finding as mentioned above in the preceding paras. But in the provision of Section 2(22) of the Act which deals with the items included as dividend also provides some exclusions which are not considered to be dividend. 5 exclusions are provided in this section after the provision of Section 2(22)(e) of the Act. One of such item which is not to be included as dividend is "any advance or loan made to a share holder or the said concern by a company in the ordinary course of its business, where the lending of the money is a substantial part of the business of the company". Ld. Senior Counsel for the assessee has put his energy to explain that the alleged transaction of the advance given by AOPL to ABCPL is in the ordinary course of business of AOPL which do not attract the provision of Section 2(22)(e) of the Act.

Asian Business Connection Private Limited

22. We observe that Ld. CIT(A) has purely focused on the main provisions of Section 2(22)(e) of the Act and since the conditions mentioned therein were matching with the transaction carried out by the assessee primarily the finding of Ld. A.O. was confirmed. However, Ld. CIT(A) failed to consider the assessee's submission that the transaction in question falls under point No. (ii) of exception list, as the advance/loan given by AOPL to its shareholder i.e. ABCPL is in the ordinary course of business.

23. Now our adjudication will be centered on the point that "whether the amount given by AOPL to ABCPL is an advance or loan given in the ordinary course of business".

24. As far as the contention of Ld. Departmental Representative the alleged amount has been shown as unsecured loan by the assessee company, we observe that the Hon'ble Apex court in the case of

Tapadia Tools Ltd V/s JCIT (2015) 55 taxmann.com 361 (SC) held that "because a different treatment was given in the books of Asian Business Connection Private Limited accounts cannot be a factor which would deprive the assessee from claiming the entire expenditure as a deduction. It has been held repeatedly by the courts that entries in the books of accounts are not determinative or conclusive and the matter is to be examined on the touch stone of the provisions contained in the Act [emphasis added]. Therefore mere depicting the amount received under a particular head will not be conclusive to hold that the amount is an unsecured loan only. It has to be examined in the light of the facts of a particular case. In the financial statements the alleged amount received by ABCPL from AOPL though has been shown as unsecured loan but in the notes of accounts it has been mentioned that there are transaction with the related party. In Schedule XIV of the audited balance sheet of ABCPL for financial year 2014-15 placed at page 145 to 151 at point No.12 the related party disclosures as required under Accounting Standard 18 have been duly disclosed along with the opening balance, trade advance received during the year, amount repaid during the year and closing balance. So on one hand the Asian Business Connection Private Limited alleged amount received as loan is appearing under the head "long term borrowing" as a loan repayable on demand on the other hand in the very same set of audited financial statement the amount received from AOPL has been shown as trade advance. So the basis of revenue authorities making the addition merely for showing the amount as unsecured loan has no merit. Various judgments relied on by the revenue authorities on this point has been fairly rebutted by the Ld. Senior Counsel for the assessee in the written submission reproduced in the earlier part of this order which we find to be in order.

25. So now we will proceed to examine the facts of the case relating to the transaction of the loan/trade advance received by ABCPL from AOPL as per the records placed before us and the same are summarised in the following points:-

- The assessee company i.e ABCPL is a holding company who is having three subsidiary companies namely Advantage Overseas Private Asian Business Connection Private Limited Ltd (AOPL) Global Business Conexxtions Pvt. Ltd and Carnival Media Pvt. Ltd. AOPL has further two more subsidiary companies under it, namely AOPL Entertainment (P) Ltd and AMG Marketing (P) Ltd. Similarly Global Business Conexxtions Ltd is also having three subsidiary companies namely Carnival Films (P) Ltd, Travancore Foods Pvt. Ltd and Atlantic Commodities (P) Ltd. The holding company over all these companies is the assessee company i.e. ABCPL. In the instant case we are concerned with the transaction between the holding company i.e. ABCPL and its subsidiary AOPL in which /ABCPL have 99.90% shareholding.

- AOPL is a company having regular business operations and the gross receipts includes

revenue from sales turnover and other income including interest. The accumulated reserve and surplus as on 31.3.2014 was 38.76 crores (approximate) which at the end of financial year Asian Business Connection Private Limited 2014-15 has risen to 297.75 crores (approximate).

So AOPL has accumulated reserve and surplus which is the profit after tax available with the company which can be distributed as dividend to the shareholders or can be reinvested for the business purpose to earn more profits.

- As per the Memorandum of Association placed at page 191 to page 206 of the paper book, AOPL is authorised to carry out the business to achieve its main objects and the objects incidental or ancillary to the attainment of main object of the company. As per the other objects No.2, AOPL is authorised to invest money of the company not immediately required in such manner as may from time to time determined by the company in assets, properties, shares, bullion and sell or vary such investments and to execute all transfers, agreements, receipts that may be necessary in that behalf.
- On 25.5.2012 in the meeting of Board of Directors Asian Business Connection Private Limited of AOPL placed at page 208 of the paper book, it was resolved that company can find investment opportunities for investing its idle fund and utilise it in accordance with the provisions of companies Act 1956 and other rules made therein to maximise returns for the shareholders. It also resolved that Mr. Maneesh Kumar Singh (Director) of the company be appointed to find out the investment opportunity for the company.
- On 3.10.2012 in the meeting of Board of Directors of the assessee company i.e. ABCPL it was decided to prepare detailed proposal to be provided to AOPL for the investment of Rs.850 crores to be invested in identified options in consideration for 50% share of profit subject to minimum assured return of 8%.
- The detailed business proposal for strategic investment was prepared by ABCPL to be provided to AOPL running in 44 pages (placed on paper book page 213 to 257). In this proposal Asian Business Connection Private Limited information is provided for various securities including real estate, the past history of the revenue generated in this market, details of various projects undertaken by various companies. Details also provided for various market players in the real estate sector and the plan for making the strategic investment.
- On 8.10.2012 in the meeting of Board of Directors of ABCPL the proposal of AOPL of giving minimum assured return of 12% in place of 8% equal share profit was accepted.
- On the same date i.e. 4.10.2012 AOPL also resolved to go ahead with the business plan of strategic investment of Rs.850 crores to be invested in parts with 50% sharing of profits subject to minimum assured return of 12%.
- In the business proposal given by ABCPL to AOPL it was specifically agreed that ABCPL will use the proceeds of the amount for investment in real estate project or any other sector identified Asian Business Connection Private Limited mutually and the amount infused by AOPL will be returned back along with share profit/Assured Return over and above the investment amount after the sale of the investments.

- Thereafter on 12.10.2012 Memorandum of Understanding was prepared between AOPL and ABCPL agreeing for the terms and conditions for the strategic investment to be made by ABCPL sharing of profit and minimum assured returns. In Clause-2 of this memorandum it was agreed that ABCPL will pay back in full the investment amount along with profits on the sale of the project.

- All the above steps undertaken by M/s AOPL and ABCPL took place during financial year 2012-13 and at that point of time also AOPL was having liquid funds.

- During financial year 2014-15 i.e. the year under appeal, amount in the shape of trade

advance/loan was given by AOPL to ABCPL as per Asian Business Connection Private Limited the terms and conditions of the Memorandum of Understanding dated 2.10.2012.

- Against the agreed amount of investment of Rs.850 crores, only amount of Rs.428 crores was advanced and that too not in lumpsum rather as and when investment was needed. In the ledger account of AOPL in the books of ABCPL, amount was received from AOPL on around 51 occasions during the year. The receipt of funds from subsidiary was immediately followed by investments so that no fund is kept idle in the hands of ABCPL. The amount received by ABCPL was not at its disposal but it was applied for the agreed strategic investment as per the memorandum of understanding dated 12.10.2012.

- As regards the application of fund received for strategic investment is concerned in the audited financial statement of ABCPL for financial year 2014-15 in Schedule-VIII under the head Asian Business Connection Private Limited investment placed at page 139, following major new investments were made;

(a) Equity share in AOPL Rs. 0.50 crores

(b) Equity share in AUSIN Software Pvt. Ltd Rs.5.00 crores

(c) Equity share in Carnival Finance Pvt. Ltd Rs.31.00 Crores

(d) Equity share in Leela Software Pvt. Ltd Rs.206.70 crores.

(e) Equity share in L&T Realty Ltd Rs. 180.36 crores.

In the above list apart from increasing the shareholding in AOPL, no other new investment is made in the subsidiary companies of ABCPL. All the other investments are independent strategic investments mainly in real estate sector.

- The above investments along with other investments in subsequent years were sold during financial year 2017-18 giving surplus Asian Business Connection Private Limited amount/income over and above the investments made amounting to Rs.574.80 crores (Approx). This amount was shared equally at Rs.287.40 crores (Approx.) each by both AOPL and ABCPL.
- In the audited balance sheet for financial year 2017- 18 the income from sale of investment at Rs.287.40 crores (Approx.) has been shown by both the ABCPL and AOPL under the head "other income" and duly offered to tax . This fact is verifiable from the additional evidence filed by the assessee on 15.3.2019 placed at page 36 to 67.

26. So the transaction which started from 25.9.12 ultimately concluded during financial year 2017-18 with the surplus/income of Rs.574.80 crores which was shared equally at Rs.287.40 crores each by both the ABCPL & AOPL as per the terms and conditions entered into between both of them under the Memorandum of Understanding dated 12.10.2012 and duly offered to tax.

Asian Business Connection Private Limited

27. From perusal of the above facts there remains no dispute to the fact that the amount given by AOPL to ABCPL for the strategic investment reached to its finality during financial year 2017-18 and the original amount invested was received back by AOPL along with 50% share of profit of Rs.287.40 crores,

28. Now in the above given facts whether the amount advanced as loan/trade advance during the year under appeal by the subsidiary company i.e. AOPL to its holding company i.e. ABCPL having 99.90% shareholding can be treated as deemed dividend.

29. The word dividend " comes from the latin words dividendum (thing to be divided). In the case of sole proprietorship concerns or partnership firm the profits earned during the year or accumulated profits are either taken by the sole proprietor or by the partners as per the share of profit in the proprietorship. In the case of company the profit is divided on the basis of equity shares held by the shareholders. Dividend is the payment made by the Asian Business Connection Private Limited corporate to its shareholders usually as distribution of profits. Company can either reinvest the profits in the business for earning more profits or it can distribute the profit as dividend to the shareholders. The dividend is allocated as a focused amount per share. Shareholders receive the dividend in proportion to the shareholdings. In some cases where there are large number of shareholders and the company is not interested to distribute the dividend to all the shareholders but want to part away with the retained earnings by way of giving loan or advances to the shareholders having substantial interest in the company who are normally at the helm of affairs of the company. Such diversion of the accumulated reserves/ earnings to few of the substantial interested shareholders which are actually in the nature of dividend but this action restricts the other shareholders from getting their share of dividend. In our understanding of law in such type of situation when the retained earnings/accumulated surplus funds are diverted to the substantial interested shareholders as loans or advance and not as dividend at Asian Business Connection Private Limited fixed rate per equity share to avoid paying dividend distribution tax, then the

provision of Section 2(22)(e) comes into play.

30. But in case where the amount is advanced to the substantial interested shareholder as a part of the business transaction then the situation changes. In the provision of section 2(22)(e) under the list of items which are not to be included as dividend are such advance or loan given by the company to its shareholder in its ordinary course of business which cannot be treated as dividend. In the instant case we find that business deal strucked in September 2012 when the idea of strategic investment came in the mind of board of directors of AOPL to maximise the return on the idle funds which were mainly invested in bank fixed deposits. ABCPL by no cannon can be treated as a company having no regular business activity. ABCPL is a holding company having various subsidiary companies under it including AOPL. It also holds 99.90% shares in AOPL as on 31.3.2015. So Asian Business Connection Private Limited indirectly it is eligible for 99.90% of the retained earnings/accumulated surplus of AOPL. There was no bar for ABCPL to get the amount as dividend directly from AOPL.

31. At this juncture we have to note that it is a judicial settled law that the businessmen should not be taught how to carry its business affairs. Each business organisation/group has its own strategy to run its business affairs. Revenue authorities should refrain from guiding the business concerns how to run the business. For achieving the business goals depends on the business concept (idea) and the same depends upon the market situation. Extensive market research may be necessary to determine whether converting the idea into a business is feasible or not and whether the business can deliver a value base to customers. Business is an open forum. After development of business plan, which is a formal document comes the step of dealing with business goal and objectives and its strategies of how it will achieve the goals and Asian Business Connection Private Limited objectives. Business plans are almost essential when borrowing capital to begin the operations.

32. In the instant case the assessee company is the head of group of companies having various business projects running under the name of subsidiary companies. AOPL is having regular source of income from sale of goods and was having idle funds which can be diverted to other lucrative investment fetching more income to the company. Board of Directors of the holding company as well as subsidiary companies certainly have the authority to carry out their business plans as per their wish within the permissible four corners of law with an object of maximising the returns. Memorandum of Association and Articles of Association of the company registered with Registrar of Companies authorises the Directors to run the business. It is not the case before us that AOPL has given interest free loan to ABCPL with no condition or the time limit of receiving back the amount from ABCPL. It is also not the case before us that there are various shareholders of AOPL Asian Business Connection Private Limited which were deprived of the dividend from the accumulated reserve and surplus. The case before us is that the amount was advanced to AOPL under a documented business plan with Memorandum of Understanding. Amount has actually used for the purpose of investing in real estate companies as appearing in the audited financial statements. ABCPL is not a new entrant to business world. It is a well established company having so many business running under its subsidiaries. The result came up in financial year 2017-18 which may have been profit or loss i.e. not the concern at this stage because the business may end up in loss also. However AOPL was able enough to get a minimum assured return of 12% along with the

repayment of original amount advanced to ABCPL. So the crux of the transaction is that the original amount of accumulated reserves and surplus of AOPL came back to it during financial year 2017-18 along with handsome profits which were further added to the accumulated reserve and surplus of the AOPL available for distribution of dividend to its shareholders.

Asian Business Connection Private Limited

33. So we can safely conclude that the entire transaction of giving trade advance/loan by AOPL out of its reserve and surplus to its holding company AOPL was a commercial transaction carried out in the ordinary course of business. Since the contributor is benefited from the advance which was utilised for the specific purpose of business as agreed between the contributor company and the receiving shareholder, thus cannot be treated as contribution given in lieu of dividend or to avoid dividend distribution tax.

34. We find that Hon'ble Madras High Court in the case of CIT V/s Farida Holding Pvt. Ltd (supra) has held that where the company receives loan from its subsidiaries which is further advanced to other subsidiaries, the ingredient of Section 2(22)(e) of the Act are not attractive.

35. In the circular No.19 of 2019 dated 12.2.2017 issued by Central Board of Direct Taxes also mentions that trade advance, which are in the nature of commercial transaction would not fall within the ambit of the word 'advance' under section 2(22)(e) of the Act.

Asian Business Connection Private Limited

36. Similarly in the case of ACIT V/s Creative Dyeing & Printing Pvt. Ltd (2009) 184 taxmann.com 483 (Delhi) Hon'ble High Court held "that the section 2(22)(e) can be applied to 'loans or advances' simplicitor and not to those transaction carried out in the course of business as such. In the course of carrying of business transaction between the company and the stockholder the company may be required to give advance in mutual interest. There is no legal bar in having such transaction. What is to be ascertained is what is the purpose of such advance. If the amount is given as an advance simplicitor or as such per se without any further application, receiving such advance may be treated as "deemed dividend" but if it is otherwise, the amount given cannot be branded as advance within the meaning of deemed dividend u/s 2(22)(e). By granting advance if the business purpose of the company is served and which is not the sum, which it otherwise would have distributed as dividend, cannot be brought within the deeming provision of treating such Advance as deemed dividend".

Asian Business Connection Private Limited

37. Hon'ble Kolkata High Court in the case of CIT V/s Gayatri Chakraborty (2018) 94 Taxman.com 244, Kolkata (SC) has held that "law on this point is clear in the event transaction between a shareholder and a company in which the public were not substantially interested and the former had substantial stake, create mutual benefits and obligations, then the provision of treating any sum received by the shareholder out of accumulated profits as deemed dividend would not apply".

38. Co-ordinate Bench, Vishakapatnam in the case of M.A. Rao V/s DCIT (2016) 67 taxman 15 also observed that provisions of section 2(22)(e) make it clear that the registry wanted to bring to tax the amount paid by the closely held companies to their principle shareholders to avoid dividend distribution tax and that the provisions of section 2(22)(e) must be made applicable, wherein the dividend is paid in the guise of loan/advance to avoid tax. But to apply the provisions of section 2(22)(e) of the Act, an honest attempt is to be made to understand, whether the impugned Asian Business Connection Private Limited amount is a loan or advance within the meaning of sub section.

39. In the light of the above judicial proceedings we observe that the revenue authorities should invoke provisions of Section 2(22)(e) of the Act only in case when loans and advances are given to substantial shareholder in the garb of avoiding dividend distribution tax or with the intention to not to share the dividend with the non substantial shareholders. The statute has clearly identified various types of situations about the payments which are to be included in the category of dividend and has also excluded the payments under the circumstances where payments are given for business purposes, or as enumerated in the provision itself, then the deemed dividend provision should not be applied. Revenue authorities should refrain from using the provisions of Section 2(22)(e) of the Act as a tool for maximising the tax collection rather they should use the powers to keep a check of such distribution of accumulated reserves which Asian Business Connection Private Limited are not for the ordinary course of business and are intentionally entered into for the benefit of substantial shareholders having more than 10% voting right without any clear indication of receiving the amount back to avoid the dividend distribution tax.

40. We therefore in the given facts and circumstances of the case are of the considered view that the alleged amount received as loan/advance by the assessee company ABCPL from AOPL is purely of the nature of trade advance received in the ordinary course of business as per the agreed Memorandum of Understanding entered during the financial year 2012-13 after passing necessary resolutions in the board meetings of both the companies for making strategic investments in the real estate sector for equal sharing of profits subject to minimum return and the amount advanced have been duly invested majorly in the companies not coming under the list of subsidiary companies which have been finally sold giving returns during financial year 2017-18. The total transaction is commercial in nature and in our considered view have been entered in the ordinary course of business by AOPL as duly Asian Business Connection Private Limited authorised in the "other objects" of the Memorandum of Association of the Company, in order to maximise its profits and there is no iota of evidence which proves that there was an intention of avoidance of dividend distribution tax which can attract the provision of deemed dividend. Therefore making the addition u/s 2(22)(e) of the Act for deemed dividend is uncalled for since the transaction falls in the list of payments which are not considered as dividend as provided under Sub Clause (ii) to section 2(22)(e) of the Act. We therefore set aside the findings of Ld. CIT(A) and allow Ground No. 1 to 6 of the assessee's appeal and delete the addition for deemed dividend at Rs.297.75 crores (approx.) made by the Ld. A.O u/s 2(22)(e) of the Act.

41. Apropos to Ground No.7 which is an alternate ground raised without prejudice to Ground No. 1 to 6, assessee has challenged the finding of Ld. CIT(A) holding the view of Ld. A.O in considering the accumulated profits as on the last date of the assessment year i.e. 31st March for the purpose of

calculating deemed dividend instead of considering the accumulated profits as on the date the amount was paid by AOPL to ABCPL.

Asian Business Connection Private Limited

42. Although we have already allowed assessee's Ground No. 1 to 6 holding that the alleged transaction of giving advance by AOPL to ABCPL was for commercial purpose and in the ordinary course of business which do not fall within the category of deemed dividend as provided u/s 2(22)(e) of the Act and no addition of deemed dividend of Rs.297.75 crores (Approx.) was called for but still for academic purpose will like to adjudicate this alternate ground.

43. We observe that as per the audited balance sheet of AOPL the accumulated reserve and surplus as on 31.3.2014 was Rs.38.76 crores and the closing balance on 31.3.2015 is Rs.297.75 crores. Ld. A.O after applying provisions of Section 2(22)(e) has confirmed the addition for deemed dividend to the extent of closing balance of reserve and surplus of Rs.297.75 crores. Ld. Senior Counsel for the assessee has contended that both the lower authorities have erred in taking the closing balance of reserve and surplus balance because in understanding of section Asian Business Connection Private Limited 2(22)(e) of the Act which provides that the accumulated profits shall include only the profits up to the date of such payment.

44. However before coming to such conclusion we will like to go through the decision of Co-ordinate bench, Ahmedabad in the case of M.P. Stock Holding Pvt. Ltd V/s ACIT (2003) 84 ITD 542 (Ahd).

"If section 2(22)(e) were to be considered without Explanation 2, then there does not seem to be any difficulty in appreciating that the accumulated profits do not include the profits of the year in which the loan is advanced to the shareholder. This is well-settled by the decision of the Supreme Court in the case of CIT v. V. Damodaran [1980] 121 ITR 572. It is in the light of the Explanation 2 to section 2(22)(e) that a doubt arises as to whether the Explanation superseded the decision of the Supreme Court in the case of V. Damodaran (supra). In order to appreciate the issue in proper perspective, it would be relevant to refer to the decision of the Bombay High Court in the case of CIT v. Mrs. Maya B. Ramchand [1986] 162 ITR 460/ 25 Taxman 232 (Bom.) where it was held that for purposes of section 2(22)(e), the accumulated profits are to be calculated up to the date of payment of each loan. Reference to the decision of the Supreme Court in the case of Tarulata Shyam v. CIT [1977] 108 ITR 345 (SC) which affirms the decision of the Calcutta High Court in the case of Tarulata Shyam v. CIT [1971] 82 ITR 485 is also pertinent. In the aforementioned cases it was held that for purposes of section 2(22)(e), the accumulated profits are to be seen as on the date of payment and any repayment during the same year after the advancement of the loan will not affect the Asian Business Connection Private Limited working of the accumulated profits on the date of loan. In other words the repayment of loan during the year of advancement of loan is not to be deducted from the accumulated profits.

The Supreme Court in the case of CIT v. Asokbhai Chimanbhai [1965] 56 ITR 42 held that the profits do not accrue from day to day or even from month to month and have to be ascertained by comparison of assets of two stated points. Unless the right to profits comes into existence, there is no accrual of profits and the destination of profits must be determined by the title thereto on the day on which they arise. It further held that the profits do not arise until the contingency, which by operation of law or under a covenant of the partnership deed, gives rise to right.

It cannot be said that the Explanation 2 to section 2(22)(e) is redundant. It is bound to be for a specific purpose. The Legislature has taken into account the fact that whereas the profits from business for the current year may not be determinable in the middle of the year, there are certain sources of income, the income from which is capable of determination which, according to the legislative intent, should also be taken into account while determining the accumulated profits on the day of advancing the loan. The company is a person. It may carry on business and may also derive income from various other sources. For example, the company may sell an asset from which capital gains are derived. If the capital gain is derived before the date of advancement of the loan, that profit shall have to be taken into account in determining the accumulated profits notwithstanding the fact that such an event has taken place in the middle of the year. It is so as the determination of capital gains is not to wait till the end of the previous year. Similarly, there can be income from other sources also such as receipt of dividend income or interest which may not have to wait for determination at the end of the year. Similarly, some subsidy may be received from the Government which may be taxable on receipt basis. Such income shall also have to be taken into account in Asian Business Connection Private Limited determining the accumulated profits as it has not to wait for determination of income at the close of the year.

The Supreme Court in the case of V. Damodaran (supra) have specially held that there is distinction, between the "accumulated profits" and the "current year's business profits" and, therefore to hold that current year's business profits are to be included in the accumulated profits would be contrary to the decision of the Supreme Court.

The intention of the Legislature in incorporating Explanation 2 to section 2(22)(e) was not to override the decision of the Supreme Court but to provide for adjustments for all other profits accrued up to the date of payment of the loan in working out the accumulated profit. The Supreme Court in the case of Navnitlal C. Javeri v. K.K. Sen, AAC [1965] 56 ITR 198 having held that the business profits accrue only at the end of the year, it is inconceivable that for purposes of application of section 2(22)(e), an exercise shall have to be taken to work out the business profits of the company on each day the loan is advanced. Working out the profits in the middle of the year is a complicated affair in contrast to working out the accumulated profits on the date of loan with reference to the accumulated profits of the preceding year with certain

adjustment.

On analysis of the aforementioned discussion, the following principles emerge :

(i)That for purposes of section 2(22)(e), the accumulated profits are to be worked out up to the date of each payment/advancement of the loan.

(ii)That there is a distinction between the 'accumulated profits' of business and the current year's profits of business.

(iii)That the profits of business accrue at the end of the previous year.

(iv)That loan or advance treated as deemed income up to the date of fresh loan is to be reduced from accumulated profits.

Asian Business Connection Private Limited (v)That the repayment of loan during the same year is not to be deducted from the accumulated profits.

Thus, the Explanation 2 to section 2(22)(e) does not have the effect of inclusion of current year's business profits. These are certain examples to show that Explanation 2 to section 2(22)(e) does not become redundant in the light of the decision of the Supreme Court in the case of V. Damodaran (supra).

Therefore, whereas the aforementioned adjustments and other adjustments as may be permissible in law are to be made, accordingly, accumulated profits worked out on each day of loan or advance is made to the shareholder. All the profits that have not accrued to the company advancing the loan up to each day of advance/loan have to be taken into account in working out the accumulated profits within the meaning of section 2(22)(e). But since the business profits of the company accrue only at the end of the year, the current year's business profits are not to be included. Therefore, in the interest of justice, the issue was restored to the file of the Assessing Officer for the purpose of working out the accumulated profits on each day of advancing the loan to the appellant and apply section 2(22)(e) to such loans subject to the maximum of accumulated profits up to the date of advancement of the loan."

Thus in light of the aforesaid decision the computation of accumulated profits has to be redone by excluding current years' profits.

45. From perusal of the above decision we find that for making addition u/s 2(22)(e) of the Act the amount of accumulated profit needs to be worked out on the date of such payment/advancement of loan. In case only a single amount has been advanced to the assessee, then we may Asian Business Connection Private Limited have set aside the issue to the file of the Ld. A.O to work out the amount of accumulated profits as on the date of giving advance. However from perusal of the fund flow statement placed on page 82 to 83 of the paper book dated 14.3.2019 we find that the assessee

company started receiving funds from AOPL from 2.4.2014 and thereafter almost on 50 more occasions the amount have been received and there is alleged investment in other companies as per the strategic investment plan. Therefore in case of the assessee it will not be practicable to compute the accumulated profits on 50 days during the year since at some point of time there may be addition to the accumulated profit and at some time there may be reduction in the accumulated profits. Therefore without giving a general finding for the adoption of accumulated profits as on date of payment, in the instant case since the first day of receiving the fund from AOPL is 2.4.2014, therefore only the opening balance of the accumulated profits as on 1.4.2014 at Rs.38.76 crores should have been considered for computing the amount of deemed dividend Asian Business Connection Private Limited as per the provisions of section 2(22)(e) of the Act. This alternate ground No.7 of the assessee's appeal which we have adjudicated only for academic purpose is thus allowed.

46. Apropos to Ground No.8 relating to disallowance of ROC expenses and stamp duty incurred for increase in share capital. At the outset Ld. Senior Counsel for the assessee submitted that only a proportionate disallowance of 37% is called for since against the increase in authorised capital from Rs.5 to 100 crores only fresh capital of Rs.37 crores was issued during the year. In support of this contention reliance was placed on the decision of Co- ordinate Bench, Delhi in the case of DCIT V/s Hero Motors Ltd ITA Nos 2919 & 2920/Del/2012 order dated 17/05/2013.

47. Per contra Departmental Representative vehemently argued supporting the orders of both the lower authorities.

48. We have heard rival contentions and perused the Asian Business Connection Private Limited records placed before us. Through Ground No.8 assessee has challenged the disallowance of ROC fees and stamp duty charges totalling to Rs.85,53,900/-. We find that the assessee has increased his share capital from Rs.5 crores to Rs.100 crores for which ROC expenses of Rs.85,53,900/- was incurred. However only share capital of Rs.37 crores only was issued during the year which means that against total expenses of Rs.85,53,900/- for increase in share capital from Rs.5 crores to Rs. 100 crores, the actual share capital issued was of Rs.37 crores only.

49. In these circumstances the total amount of ROC fees needs to be disallowed also needs to be examined in the light of the decision of Co-ordinate Bench. Ld. CIT(A) confirmed the disallowance of the ROC expenses by referring to various judgments of Hon'ble Apex Court observing as follows;

"48. The A.O. observed that the appellant had claimed amount of Rs. 85,55,900/- as ROC expenses which was Roc fees and stamp duty incurred towards increase in authorized share capital of the company from Rs. 5crore to Rs. 100 crore. Relying Asian Business Connection Private Limited upon decisions in the case of Brooke Bond India Ltd. v. CIT [1997] 225 ITR 798/91 Taxman 26 (SC), in Punjab State Industrial Development Corpn. Ltd. v. CIT [1997] 225 ITR 792/93 Taxman 5 (SC) and followed in CIT v. Kodak India Ltd. [2002] 253 ITR 445/120 Taxman 498 (SC), the A.O. held that the expenditure for enhancing authorized capital was a capital expenditure and not revenue expenditure. The amount of Rs. 85,55,900/- was

disallowed and added to the total income of the assessee.

49. The appellant has filed following submission in this regard:-

- During the assessment year under appeal, the appellant had incurred ROC expenses for increase in share capital.
- In this regard, during the course of assessment proceedings, the appellant had submitted the ledger account evidencing the expenses incurred amounting to Rs. 85,53,900, the challans for stamp duty and others fees paid and the form SH -7 filed with the Ministry of Corporate Affairs.
- The AO, vide its assessment order, disallowed the expenditure incurred on the basis that the same are capital in nature.
- The provisions of section 35D of the Act specifically deals with expenditure incurred in connection with issue of shares. The extract of provisions of section 35D are reproduced below:

"The expenditure referred to in sub-section (1) shall be the expenditure specified in anyone or more of the following clauses, namely Asian Business Connection Private Limited

a) b)

c) where the assessee is a company, also expenditure i.

ii.

iii.

iv. in connection with the issue, for public subscription, of shares in or debentures of the company, being underwriting commission, brokerage and charges for drafting, typing, printing and advertisement of the prospectus"

- Since expenses relating to issue of shares are eligible for deduction under Section 35D, the appellant requests your goodself to grant a relief under Section 35D of the Act in respect of expenses incurred."

50. The facts are undisputed that the impugned amount was incurred as ROE expenses for enhancement of authorized share capital of the assessee company.

51. In Brooke Bond India Ltd. vs CIT, [1997] 91 Taxman 26 (sq), the Hon'ble Supreme Court has held that expenditure incurred on issuing share to increase its share capital by a company would not be

allowable as revenue expenditure. The head note is reproduced below:-

Facts During the assessment year 1969-70, the assessee-company issued share to increase its share capital and claimed deduction of expenditure incurred in connection therewith as revenue expenditure but the same was disallowed as capital expenditure by all the lower authorities.

Asian Business Connection Private Limited On appeal to Supreme Court:

Held Though the increase in the capital results in expansion of the capital base of the company and incidentally that would help in the business of the company and may also help in the profit making, the expenses incurred in that connection still retains the character of a capital expenditure since the expenditure is directly related to the expansion of the capital base of the company. Hence, expenditure incurred by the assessee was capital expenditure.

52. In Punjab State Industrial Development Corpn. Ltd. vs CIT, [1997] 93 Taxman 5 (SC), the Apex Court ruled that amount paid by company to ROC, as filing fee for enhancement of capital base of company was capital expenditure. The head note published in taxmann.com is as below:-

Facts The assessee-company claimed certain amount paid to the Registrar of Companies as filing fee for enhancement of capital base, as the revenue expenditure. The assessee's claim was allowed by the Assessing Officer but the Commissioner exercising power under section 263 disallowed the same. On appeal, the Tribunal upheld the Commissioner's order. In view of the conflict of opinion amongst the High Courts the question had been directly referred to the Supreme Court for determination.

On reference under section 257 :

Held The fee paid to the Registrar for expansion of the capital base of the Asian Business Connection Private Limited company was directly related to the capital expenditure incurred by the company and although incidentally that would certainly help in the business of the company and may also help in profit-making, it still retained the character of a capital expenditure since the expenditure was directly related to the expansion of the capital base of the company. Therefore, the amount paid to the ROC, as filing fee for enhancement of capital, was not a revenue expenditure.

53. In CIT vs Kodak India Ltd., [2002] 120 Taxman 498 (se), the Supreme Court reiterated its view that whether where object of assessee was to increase its share capital, either to continue to do business after RBI directive or otherwise, expenditure incurred for public issue of shares was capital expenditure. The head note is as follows:-

Facts According to the assessee, it had acted to increase its share capital on the directions of the RBI because it had to reduce its non-residential holding to 40 per cent. It was submitted that the only way in which the assessee could do business after the RBI directive was to issue share capital to comply with it.

Held Whichever way one looked at it, the object of the assessee was to increase its share capital; whether it did so to continue to do business after the RBI or otherwise, the case was covered by the judgment in the case of Punjab State Industrial Development Corpn. Ltd v. CIT [1 997] 225 ITR 792/93 Taxman 5 (SC).

54. Even before the Hon'ble Apex Court decisions cited above, the jurisdictional Hon'ble M.P. High Court in CIT vs M.P. Asian Business Connection Private Limited Audhyogik Vikas Nigam Ltd. 225 ITR 782 MP had held that that such expenditure would be treated to be capital expenditure and not revenue expenditure.

55. In view of the above discussion, it is concluded that the A.O. has rightly disallowed the ROC expenses incurred for enhancement of authorized share capital. The addition is confirmed. The ground of appeal is dismissed.

50. Ld. Senior Counsel for the assessee has mainly placed reliance on the decision of Co-ordinate Bench for proportionate disallowance and also referred to the provision of Section 35D of the Act.

51. We however find no merit in the contention of Ld. Senior Counsel for the assessee as section 35D is not applicable on the facts of the assessee, since section 35D of the Act refers to "amortization of preliminary expenses"

whereas in the case of the assessee the alleged expenses are not preliminary expenses.

52. We however in the given facts and circumstances of the case as well as on observing that Hon'ble Apex Court in the case of Brooke Bond India Ltd V/s CIT (supra), Punjab State Industrial Development Corporation Ltd V/s CIT Asian Business Connection Private Limited (supra) as well as in the case of CIT V/s Kodak India Ltd (supra) has consistently held that the "fees paid to the registrar for expansion of the capital base of the company is directly related to the capital expenditure incurred by the company and although incidentally that would certainly help in the business of the company and may also help in profit making, it still retained the character of a capital expenditure since the expenditure was directly related to the expansion of the capital base of the company, Therefore the amount paid to the ROC as filing fee for enhancement of capital, was not a revenue expenditure".

53. Therefore respectfully following the judgments of Hon'ble Apex Court as mentioned above we are of the view that Ld. CIT(A) has rightly confirmed the disallowance of ROC fees incurred exclusively for increase in share capital. No interference is therefore called for in the finding of Ld. CIT(A). In the result Ground No.8 is dismissed. Asian Business Connection Private Limited

54. In the result appeal of the assessee is partly allowed as per the terms indicated herein above.

The order pronounced in the open Court on 25.09.2019.

Sd/-

Sd/-

(KUL BHARAT)
JUDICIAL MEMBER

(MANISH BORAD)
ACCOUNTANT MEMBER

/Dated : 25 September, 2019

/Dev

Copy to: The Appellant/Respondent/CIT concerned/CIT(A) concerned/ DR, ITAT, Indore/Guard file.

By order Asstt.Registrar, I.T.A.T., Indore