IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH 'F', MUMBAI

BEFORE SHRI D. KARUNAKARA RAO, ACCOUNTAT MEMBER AND
SHRI VIVEK VARMA, JUDICIAL MEMBER

I.T.A. NO.4362/M/2011 (AY: 2002-03)
I.T.A. NO.4363/M/2011 (AY: 2004-05)
I.T.A. NO.4364/M/2011 (AY: 2005-06)
I.T.A. NO.4495/M/2011 (AY: 2006-07)
I.T.A. NO.4440/M/2011 (AY: 2007-08)

DCIT-Central Circle-23, R.No.464, 4th Floor, Aayakar Bhavan, M.K. Marg, Mumbai-400020.	Vs.	Shri **Vikas Oberoi,** International Business Park, Oberoi Garden City, Off. W.E. Highway, Goregaon (E), Mumbai-400 063. PAN: AAAPO 0468 L
(Appellant)		(Respondent)

C.O. No.169/M/2012 (Arising from ITA No.4362/M/2011) (AY: 2002-03)
C.O. No.170/M/2012 (Arising from ITA No.4363/M/2011) (AY: 2004-05)
C.O. No.112/M/2012 (Arising from ITA No.4495/M/2011) (AY: 2006-07)
C.O. No.113/M/2012 (Arising from ITA No.4440/M/2011) (AY: 2007-08)

Shri Vikas Oberoi, International Business Park, Oberoi Garden City, Off. W.E. Highway, Goregaon (E), Mumbai-400 063. PAN: AAAPO 0468 L	Vs.	DCIT-Central Circle-23, R.No.464, 4th Floor, Aayakar Bhavan, M.K. Marg, Mumbai-400020.
(Appellant)		(Respondent)

Assessee by	:	Shri Muralidhar
Revenue by	:	Shri A P Singh CIT-DR

Date of Hearing:25.2.2013 Date of order: 20.3.2013

O R D E R

Per D. KARUNAKARA RAO, AM:

There are **nine** appeals under consideration and the five appeals are filed by the revenue and assessee filed four COs as per the details given above. Considering the fact that the core issue in all these appeals revolves around the applicability of the provisions of section 2(22)(e) of the Act, all these appeals are clubbed and they are being disposed of in this order. However, the appeal I.T.A. NO.4364/M/2011 for AY: 2005-06 is filed by the revenue against the relief granted by the CIT (A) on

other issues. Appeal wise and ground wise adjudication is given in the following paragraphs. For the sake of convenience, firstly, we shall stake up the appeals for the assessment year 2002-03 in the succeeding paragraphs of the order.

Revenue's ITA 4362/M/2011 &
Assessee's Cross Objection 169/M/2012

2. Grounds raised in ITA No.4362/M/2011 are as follows:

1. *On the facts and circumstances of the case and in law, the Ld CIT (A) erred in deleting the addition of Rs. 74,06,226/- being deemed dividend within the meaning of* ***section 2(22)(e)*** *of the IT Act, 1961.*
2. *On the facts and in the circumstances of the case and in law, the Ld CIT (A) erred in holding that an advance received in the grab of share application money is beyond purview of section 2(22)(e) of IT Act, 1961.*

3. Ground raised in the said CO No.169/M/2012 is as follows.

1. *Whether, on the facts and the circumstances of the case and in law, an addition in respect of deemed dividend u/s 2(22)(e), is an assessment order passed u/s 153A is justified when the same is* ***not based on any incriminating documents*** *found in the search and is based on material already on records."*

4. Briefly stated relevant facts of the case are that the assessee is an individual and is a partner / director / shareholder in various **Oberoi Group** entities. There was a search action on the assessee on 19.7.2007 and the same resulted in seizure of various documents, cash, jewelry etc and the details are given in para 1 & 2 of the assessment order. Originally, assessee filed the return of income and it was accepted without any additions. In view of the search action and in response to the notice u/s 153A dated 6.12.2007, assessee filed the return with no additional income was offered. During the assessment proceedings u/s 153A of the Act, AO noticed that undisputedly Sri Vikas Oberoi is a **beneficial** shareholder in both Kingston Properties P Ltd. (KPPL) and New Dimensions Consultants P Ltd (NDCPL).

5. Further, AO also noticed from the accounts of the above mentioned companies, that the NDCPL has reserves and contributed share application money into KPPL. KPPL is not a beneficial share holder of NDCPL and the assessee is in both the companies. Further, he also noticed that the NDCPL did not allot shares and instead the said share application money was returned after the period of three

years. With regard to subsequent AYs, other group companies which have reserves have contributed towards the share application money and got allotment of shares either in the same AY or in the subsequent AYs. Details of contributors & amounts of the share application money, relevant AYs and if the share are allotted or amounts refunded are depicted in the table as follows.

Particulars of Subscription by	**AY**	**Share application Money received**	**Allotment Made in AY**	**Limited to Accumulated Profits**
Mr. Ranvir Oberoi	AY: 2002-03	79,98,000	AY 2002-03	
Mr. Vikas Oberoi	AY: 2002-03	2,19,98,000	AY 2002-03	
Ms Santosh Oberoi	AY: 2002-03	99,98,000	AY 2002-03	
New dimension Constructions P Ltd -NDCPL	AY: 2002-03	1,40,03,700	**Refunded**	74,06,226
R.S. Estate Developers P Ltd.	AY: 2004-05	12,32,40,000	AY 2005-06	6,79,41,437
R.S. Estate Developers P Ltd.	AY: 2005-06	5,67,60,000	AY 2005-06	3,67,60,000
R.S. Estate Developers P Ltd	AY: 2005-06	6,89,00,000	**Refunded**	
Mr. Vikas Oberoi	AY: 2007-08	44,50,02,466	AY 2007-08	
SSIII India Investment P Ltd.	AY: 2007-08	5,96,70,00,000	AY 2007-08	

6. The data in the above table is relevant for all the appeals under consideration. Relevant to the AY 2003-04, which is under adjudication right now, it is clear the above table that NDCPL contributed towards share application money into KPPL amounting to Rs 1,40,03,700/- in this year and the shares were not allotted. Consequently, the said amount was **refunded in November, 2004**. This transaction is the subject matter of addition by the AO by invoking the provisions of section 2(22)(e) of the Act. On finding that the **Reserves** available with the NDCPL is only Rs. 74,06,226/- and therefore, AO invoked the provisions and restricted the addition u/s 2(22)(e) of the Act to Rs.74,06,226/-only. The relevant assessment order does not contain full particulars of the reasons for addition and however, it contains the reference to the discussion given in the assessment order in the case of **KPPL** for the assessment year 2002-03.

7. According to the said order in the case of KPPL, the case of the AO is that the said share application money constitutes an amount of **advance** given by NDCPL to KPPL. The said amount was returned or refunded to NDCPL after lapse of three years as the intended shares were never allotted. (3) The assessee being a beneficial share holder, has chosen this route to enrich his wealth by increasing net worth of the KPPL, where he has substantial beneficial interest. In that sense, assessee is an ultimate beneficiary within the meaning of section 2(22)(e) of the Act.

In the process, AO rejected the book entries bearing in the balance sheet of both the companies involved (NDCPL & KPPL), mentioning that it is a case for lifting of the corporate veil. Further, to support his conclusion that the said contribution towards share application money constitutes loan or advances within the meaning of section 2(22)(e) of the Act, AO relied on various decisions which are enumerated in para 8.9 and 8.10 of the assessment order which are as under:

(1) Nannit Lal C. Jhaveri vs. K.K. Sen (1965) 56 ITR 198, 207-8 (SC)
(2) Walchand & Co. Ltd. vs. CIT (1975) 100 ITR 598 (Bom.)
(3) Miss P. Sarada vs. CIT (229 ITR 444)
(4) CIT vs. P.K. Abubucker (259 ITR 507)
(5) CIT vs. TPSH Selva Saroja (244 ITR 671)
(6) CIT vs. Jamnadas Sriniwas Pvt. Ltd. (1970) 76 ITR 656, 660 (Cal.)
(7) KMS Lakshmana Aiyar vs. Addl. ITO (1960) 40 ITR 469, 473 (Mad.)
(8) CIT vs. Sushma Saxena (1997) (233 ITR 395)
(9) DCIT vs. Nikko Technologies (I) P. Ltd. (ITA No. 4077/Mum/2002)

8. Originally, AO made this addition in the hands of the assessee on **protective** basis and made substantive addition in the hands of KPPL. Subsequently, the addition in the hands of KPPL on the substantive basis came up for judicial review of the Mumbai Bench Tribunal vide ITA No.4330/M/2011; 4331 to 4334/M/2011 and 4309/M/2011 and Tribunal adjudicated the issue vide the order dated 16.6.2012 and para 17 to 19 of the order said order is relevant. In the said paragraphs, Honble Tribunal has held that the provisions of section 2(22)(e) are not applicable in the case of the KPPL and KPPL is not a beneficial share holder of NDCPL and the binding judgment of jurisdictional High Court in *Universal Medicare P Ltd* (2010) 324 ITR 264 (Bom) helped M/s KPPL in winning its appeal. In the process, Tribunal has confirmed the views of the CIT (A) which held that the **substantive** addition needs to be done in the hands of the assessee Shri Vikas Oberoi. Relevant discussion is given in para 5.9 of the impugned order in the case of Vikas Oberoi and the same is reproduced here under:

> *"5.9. I have carefully considered the issue. It is apparent from the facts of the case that M/s. KPPL is not beneficial shareholder of M/s. NDCPL and, therefore, the issue of taxability of deemed dividend u/s 2(22)(e) is squarely covered by the decision of jurisdictional High Court in Universal Medicare P. Ltd. (2010) 324 ITR 264 (Bom) and, accordingly, the said addition made in the case of M/s. KPPL has been deleted by my in the appellate order no. CIT (A)-40/IT/DCCC-23/351/09-10 dated 22.03.2011 for the year under consideration. Therefore, the protective addition made in the case of appellant has to be*

treated as substantive while dealing with this ground of appeal and the addition made is being considered on merits in the following paragraphs."

9. Thus, regarding the nature of addition in the hands of the assessee ie substantive or protective, it is a settled issue at the level of this Tribunal that the addition of Rs. 74,06,226/- constitutes a substantive addition in the hands of the assessee – Sri Vikas Oberoi. Aggrieved with the substantive addition of Rs 74,06,226/- in the hands of Sri Vikas Oberoi u/s 2(22)(e) of the Act, assessee carried the matter in appeal before the CIT (A).

10. **Before Ld CIT(A):** During the proceedings before him, assessee made elaborate submissions mentioning that the share application money (in short 'SAM') subscribed by the company - NDCPL does not amount to 'loan or advance' within the scope of the expressions used in section 2(22)(e) of the Act. Referring to all the appeals under consideration, assessee submitted AO invoked the said provisions in respect of similar subscription towards SAM involving different companies, assessee stated that **except** in two cases as depicted in the table above, in all other cases the SAM was converted into equity shares by KPPL. Referring to the said two instances, assessee stated that the subscriptions were returned or refunded, which must constitutes normal transaction, which happens when shares are not finally allotted. Hence, the assessee submitted that the subscription of Rs 1.4 cr was refunded By KPPL to NDCPL after a period of three years. Further, assessee submitted that the additions were thus made in both the situations ie (1) application money paid and refunded without allotment of shares; and (2) equity shares allotted. The fact in the impugned AY 2003-04 is the case of refund. In this context, assessee brought our attention to para 5.5 of the impugned order and mentioned that (i) share application money is not construed as "loans and advances for the purpose of section 2(22)(e) of the Act"; (ii) provisions of section 2(22)(e) are deemed fiction and they cannot be stretched to apply to share application money; (iii) the transaction between the NDCPL and KPPL is a legitimate transaction carried out in the ordinary course of business and intention was never to confer to Mr. Vikas. Further, assessee mentioned that the amount of Rs. 74,06,226/- has not benefited assessee. In this regard, assessee relied on the decision of ITAT, Delhi Bench in the case of Ardee

Finvest P. Ltd vs. DCIT (79 ITD 547) (Del.) for the proposition that the share application money given for allotment of shares is **not an advance or loan** to attract the provisions of section 2(22)(e) of the Act. He also relied on the other decisions ie the judgment of the Hon'ble Bombay High Court judgment in the case of Nagindas M. Kapadia (177 ITR 393); Hon'ble Bombay High Court judgment in the case of NH Securities Ltd. vs. DCIT [2007] 011 SOT 0302 and others. CIT (A) considered the above and discussed about the pending outstanding balances of the assessee with KPPL amounting to Rs. 8.95 Cr and held that assessee was never benefited as he himself was made various advances to KPPL. Further, CIT (A) decided the issues in favour of the assessee by holding that the share application money is not an advance and relied on the above cited decision in the case of Nagindas M. Kapadia (supra). Thus, the CIT(A) held that the book entries reflects the original intentions of the assessee and the advance is question, whether refunded or otherwise, when the same is towards the share application money, the provisions of section 2(22)(e) of the Act has no application. CIT(A) granted relief for the reasons discussed in para 5.9.1 of his order. Aggrieved with the above, Revenue is in appeal before the Tribunal as per the details given in initial pages of this order.

11. **Before Honble ITAT - Arguments of the Representatives:** For revenue, **Shri A.P. Singh** CIT-DR opened the discussion and narrated the above cited facts of the case and fairly mentioned that there is no dispute on the facts relevant for adjudicating the appeals under consideration. However, he mentioned that the share application money paid essentially is in the nature of advance paid by KPPL, ie the prospective shareholder, therefore, it constitutes as an advance till the shares are allotted by NDCPL, the recipient of the advance. Ld Singh mentioned that the book entries in the books of the KPPL and NDCPL do not constitutes a conclusive proof. As per the DR, the transaction in question is case of colourable devise resorted to by the assessee and the same aimed at enriching the net wealth of the assessee- Vikas Oberoi. Elaborating the arguments, Ld DR submitted that it requires lifting of the corporate veil and requested the Bench to ignore the said book entries. He is also for disregarding the Board's resolution referred to in para 5.9.1. of impugned order. Sri Singh further brought to our notice that the said share application money of Rs.

74,06,226/- was **finally refunded** by KPPL after period of three years. In that case, as per the DR, the said amount was never intended for share application money and therefore, it is a case of advance refunded by KPPL and therefore, the books entries are not reliable. Referring to refunds to unsuccessful application, which happens in the cases of Initial Public Offers - IPOs, Sri Singh mentioned the same are incomparable procedurally with that of the present transactions. Otherwise, Ld DR relied on the order of the AO in its entirety and summed up by mentioning that the present dispute for adjudication revolves around the **nature** of the impugned amount of Rs. 74,06,226/-. Further, Ld DR mentioned that the advance means "*something that precedes, something paid in advance; such as a payment of money made before it is due*" (as per the Law Lexicon). Referring to the decision of Hyderabad Bench of this Tribunal in the case of Hyderabad Chemical Products vs. ITO [2000] 72 ITD 323 (Hyd.), Ld DR mentioned that description in the balance sheet is **not a conclusive** in the case, where **unsecured loan was converted into the share application money** and the same should be deemed as dividend within the meaning of section 2(22)(e) of the Act. The 'onus' is on the assessee to demonstrate that the amounts in question was a share application money and not the loan and if it is a loan, the provisions of section 2(22)(e) applied. Ld DR also relied on the decision of ITAT, Lucknow Bench in the case of Dr. Shiv Kant Mishra vs. DCIT [2009] 118 ITD 347 (Luck.) for the proposition that 'deemed provisions allow lifting up of the corporate veil though these are the deemed fictions'. Finally, relying on the judgment of the Hon'ble Delhi High Court in the case of CIT vs. *Sunil Chopra* [2011] 12 Taxmann.com 496 (Del) and mentioned that in the context, where the assessee **fails to evidence** the allotment of shares, by furnishing a certificate from the Registrar of Companies in support of assessee's contention that the shares are intended to be allotted by the company, the impugned payments for the 'share application money' attracts the provisions of section 2(22)(e) of the Act.

12. *Per contra,* Shri Muralidhar, Advocate for the assessee, relied heavily on the order of the CIT (A). Opening his arguments, *inter alia*, on the book entries issue, Ld Council has brought our attention to the paper book (page 13 and 19) and demonstrated that the books entries suggest the amounts paid by NDCPL to KPPL is

the 'share application money'. Later on, referring to the Delhi Bench of this Tribunal in the case of Ardee Finvest (P) Ltd. vs. DCIT vide ITA No.218/Del/2000 (AY: 1996-97), Ld Counsel mentioned that such the 'share application money' is not loan or advance and therefore, it is outside the scope of the provisions of section 2(22)(e) of the Act. Relying on the Hon'ble Madras High Court judgment in the case of CIT vs. *Rugmini Ram Ragav Spinners P Ltd* [2008] 304 ITR 417 (Mad.) Ld Counsel mentioned that the **repayment** of share application money is part of the procedures relating to the share allotment process and such an eventuality of refunding of the 'share application money' , which is a business decision of the assessee should not be used to define the same as 'an advance or loan' as done by the AO. Ld Counsel also relied on certain Coordinate Bench decisions in this regard and brought our attention to the order of this Tribunal's Mumbai Bench (Para 7) in the case of ITO vs. *M/s. Direct Information Pvt. Ltd vide* ITA No. 2576/Mum/2011 (AY: 2006-07) dated 31.1.2012 in the factual matrix of payment of share application money with an intention to invest in shares. The said payments will not have the character of loan or advance and therefore, the provisions of section 2(22)(e) are not attracted to share application advance. The refunding of the said payment does not alter the situation. Further, Ld Counsel relied on another decision of Hon'ble ITAT, Mumbai Bench in the case of *Shubhmangal Credit Capital P. Ltd* vs. DIT vide ITA No.7328/Mum/2008 for an identical proposition that the share application money cannot be deemed to be loan or advance, even if any part of the said amount was returned or refunded without allotment of shares for any reason and of course, so long as the payments is made originally for share allotment only. On the issue of colorable nature of the transaction, Ld Counsel relied on the Hon'ble Supreme Court judgment in the case of Union of India and Another vs. Azadi Bachao Andoland and Another (263 ITR 706) (SC) and also the judgment in the case of Vodafone 341 ITR 1 (SC) for deciding the issue in his favour.

13. At the end, referring to the judgment of the Hon'ble Delhi High Court in the case of CIT vs. *Sunil Chopra,* which was strongly relied by Ld DR, Sri Muralidhar, Ld Counsel filed a copy of another judgment dated 27.4.2011 of the same High Court in the assessee's own case vide ITA No.106/2011 and demonstrated that there are two

judgments by the same High Court in the asssessee's own case ie (a) ITA No.106/2011 dt 27.4.2011 and (b) ITA No. 1878/2011 dt 11.5.2011. Referring to the one at (a), Ld Counsel mentioned that Honble High court held that the 'share application advance' is outside the ken of the provisions of section 2(22)(e) of the Act and this ratio apply directly to the present appeals. Referring to the other judgment delivered in May 2011, Ld AR mentioned that that these observations are merely an *obiter dicta.* As per Ld AR, when there is clash between a 'ratio' favouring the assessee and a '*obiter dicta*' against the assessee, the former one, being the favourable one should prevail. In this regard, Ld Counsel relied on number of judgments to support the assessee's line. *Ex consequenti,* the *ratio* of the decision dated 27.4.2011 vide the appeal No.106/2011 is binding legally. Thus, he summed up by stating the in view of the judgment of Honble High courts of Delhi and Chennai read with number of coordinate bench decisions directly on the impugned issue relating to 'share application advance' *qua* the provisions of section 2(22)(e) of the Act, the conclusions given in the order of the CIT(A) should not be disturbed.

14. **Tribunal's Conclusions:** We have heard both the parties and perused the orders of the Revenue Authorities and the citations relied upon by Ld Representatives of both the parties in dispute. *In limine,* we take up the divergent stands of the revenue and the assessee and they are as follows.

A. The **case of the Revenue** is in the factual matrix of making a payment by NDCPL to KPPL, which was returned after three years without shares being allotted to the assessee. In view of the said payment, the same falls within the *ken* of section 2(22)(e) of Act. In fact, even if the shares are allotted in lieu of the share application money received by KPPL, even then the share application money, being an advance paid to NDCPL, falls within the scope of "*advance or loan"* and consequently, within the purview of section 2(22)(e) of the Act. In fact, this proposition is relevant for subsequent cross appeals which will be narrated in the subsequent paragraphs of this order. The whole exercise is to Sri Vikas Oberoi who is undisputedly a beneficial shareholder of both the companies.

B. *Per contra,* the **case of the assessee** is the book entries evidences and reveals the original intention of the assessee and the amount so returned which

is a result of a commercial decision of the assessee by preferring to make allotment of shares to other companies which is a business decision, therefore, refunding will not ascribe the loan nature of the impugned amount. The share application money paid for allotment of shares to NDCPL and it does not permit any flow of benefit of the assessee. Considering the ITAT, Delhi Bench decision in the case of Ardee Finvest (P) Ltd. (supra) and the '*ratid*' of the judgment and not the '*obiter dicta*' of Hon'ble Delhi High Court in the case of Sunil Chopra (supra) assessee concludes that the 'share application advance' is not a 'loan or advance' within the meaning of section 2(22)(e) of the Act.

15. We have perused the contents of the para 5.9.1 of the impugned order and find it is appropriate to insert relevant portions in this order for the sake of completeness of the order and the same is reproduced here under:

> *"5.9.1. Having held so, the main issue to be considered in the case is whether the conditions are satisfied in the given facts and circumstances of the case to trigger the provisions of section 2(22)(e). The Ld AO's opinion has been that the amount in question has been advances as share application money though the real character of the advance is* ***only an advance.*** *…… The Ld AO has not refuted the positive assertion by the appellant that even the book entries in the books of M/s. NDCPL shows the sum as share application money paid in the* ***books of M/s. KPPL*** *the same is shown as share application money received under the shareholder's fund. The appellant has backed these entries with* ***Board Resolution of both*** *the companies. To call such transactions as an arranged affair, amounts to* ***not believing*** *the assertion without sufficient reason. It is not the AO's case that the appellant has been* ***in the habit of*** *giving such advances in the name of share application money and receiving a refund thereof subsequently. The Ld AO seems to have given undue weightage to statutory distinction provided in the Limitation Act, 1963 between mutual, open and current account and an advance / loan. The share application money is an advance given for appropriation at a future date for shares to be allotted. Therefore, the Ld AO's argument is that until the share are allotted in respect of this advance, the sum remains only an advance in the hands of the recipient company. However, it is seen that none of the cases which have considered share application money for the purpose of applicability of deemed dividend provisions u/s 2(22)(e) have held such money to be in the nature of loan or deposit. In fact, all the judgments which have considered share application money with reference to section 2(22)(e) have held them to be out of the purview of the said section by differentiation between share application money and the loan or deposit. Even the advances made towards purchases to be made by the company from the proprietary concern has been held to be not falling under the deeming provisions of section 2(22)(e) by the Hon'ble Bombay High Court in the case of Nagindas M. Kapadia (177 ITR 393). The*

case of Ardee Finvest P. Ltd vs. DCIT (79 ITD 547), the Hon'ble ITAT Delhi Bench have directly considered the nature of share application money and decided that ***it does not bear the character of loan or deposit****."*

15.1. From the above, CIT(A) analysed the book entries on one side and the Board's resolutions on the other as well as the conduct of NDCPL in subscribing SAM to the KPPL. From the same, it is understood that there is no dispute on related fact and the dispute is legal in nature and the CIT(A) has relied on the various decisions to derive strength for finalizing that 'share application money' (SAM) is outside the scope of section 2(22)(e) of Act.

16. On the issue of **initial intention** of NDCPL in subscribing to the SAM into KPPL, it is undisputed fact that none of the subscribers to SAM are in the habit of giving advance towards SAM and **taking refunds** of the same later. In this regard, we have examined the said pages 13 and 19 and relevant **book entries** in the Schedules fo the B/S read as follows:

a. Extracts from the Balance Sheet of M/*s Kingston Properties P Limited*,-

"Shareholders' Funds		
Share Capital	*Sch-1*	*Rs. 2,00,00,000/-*
Share Application Money		*Rs. 1,40,03,700/-*
Reserves and Surplus Sch-2		*Rs. 2,29,60,830/-*
		Rs. 5,69,64,530/-"

b. Extracts from the Balance Sheet of the Subscriber of SAM ie *New Dimension Consultants P Ltd*,-

Loans and Advances	
Deposits	*Rs. 3,000/-*
Share Application Money	*Rs. 1,40,03,700/-*
Income Tax (Net of Provisions)	*Rs. 1,41,500/-*
Other Current Assets	*Rs. 55,625/-*
	Rs. 1,42,03,825/-"

16.1. The contents of page 13 of the paper book demonstrate that the KPPL received the share application money of Rs. 1,40,03,700/- and the contents of page 19 shows that the M/s NDCPL reflects the payment of Rs. 1,42,03,825/- and the said amount is the share application money.

17. Then we have examined the **judicial finding** on the issue ie the SAM constitutes 'loans or advances' for the purposes of section 2(22)(e) of the Act.

i. To start, we have taken up the Delhi Bench of this Tribunal in the case of Ardee Finvest (P) Ltd. vs. DCIT vide ITA No.218/Del/2000 (AY: 1996-97) and the same read out the relevant conclusion which reads that the "*Share application money received from a closely-held company could not be treated as loan to the assessee-company in terms of section 2(22)(e) and it could not be considered as deemed dividend, when in fact shares were allotted subsequently.*" In the said case, Delhi Bench of the Tribunal held that the payments made which are in the nature of share application money is beyond the *ken* of section 2(22)(e) of the Act.

ii. ***M/s Direct Information P Ltd*** vide ITA NO 2576/m/2011 DT 31.1.2012 is another relevant one on the topic under consideration, where the Co-ordinate bench held that the Share Application Money (**SAM)** pending for allotment is in the nature of loan or advance and the same is outside the ken of section 2(22)(e) of the Act. Para 7 in the order of the Tribunal is relevant here and the same is reproduced as under:

> "*7. We have carefully considered the submissions of the rival parties and perused the material available on record. We find that there is no dispute that the assessee has shown share application money received from TIPL of Rs. 1.3 Cr under the head 'current liabilities' of its balance sheet. According to the AO the said amount is in the nature of loan and advances since directors are common and provisions of section 2(22)(e) are applicable. Per contra, according to the assessee,* ***it is a share application money pending for allotment, therefore, it is not in the nature of a loan and advances.*** *It is a settled law that making of entry or absence of an entry cannot determine right and liability of party. This being so and in the absence of any material placed on record by the Revenue to show that* ***TIPL has not applied for shares or the entries recorded in the books of account in this regard are false, untrue and without any basis, we are of the view that the amount received by the assessee does not come under the scheme of loan and advances,*** *therefore, the Ld CIT (A) was carefully justified in holding that the provisions of section 2(22)(e) are not attracted and hence, the case falls outside the ambit of deemed dividend u/s 2(22)(e). We while upholding the order of the CIT (A) on this account, reject the grounds taken by the Revenue."*

iii. The judgment of the Hon'ble Delhi High Court in the case of CIT vs. **Sunil Chopra** is directly on the topic and Ld Counsel filed a copy of the judgment dated 27.4.2011 vide ITA No.106/2011. The question of reference before the Delhi High Court and judgment on the same are extracted as under:

"*Following the question of law is proposed in this appeal (of the revenue).*

(a) Whether ITAT was correct in law in deleting the additions of Rs. 13,00,000/- being the loans taken from M/s. National Capital region Electronics. Pvt. Ltd., ***treating the same as deemed dividend*** *under section 2(22)(e) of the Act?*

We may record that the ***assessee had received*** *the aforesaid amount of Rs. 13,00,000/- from National Capital regional Electronics P Ltd* ***as share application money.*** *The CIT (A), on that ground deleted the addition as it was not loan or advance. The ITAT has upheld the same.*

We do not find any infirmity *in the orders passed by the CIT (A) as well as the ITAT. More particularly, when we take not of the fact that the CIT (A) has stated* ***this amount of share application money cannot be construed as loan or advance and hence would fall beyond the definition of section of 2(22)(e)*** *of the Income Tax Act. This appeal is accordingly dismissed."*

18. Thus, Honble Delhi High court held that the share application money of Rs 13 lakhs, which was considered as loan u/s 2(22)(e) of the Act by the AO, is outside the scope of the said provisions and deleted the addition as 'deemed dividend' and upheld the decisions of the AO and ITAT.

iv. Regarding the other judgment of the Delhi High Court in the **same case** vide the IT Appeal no 1879 of 2010 dated 11th May 2011, reported in 201 Taxman 316 which is heavily relied up on by Ld CIT-DR, Sri Muralidhar Ld Counsel for the assessee clarified that the IT Appeal 1879 of 2010 and IT Appeal no 106 of 2011 are the connected appeals and both of them came up hearing on 27.4.2011. While the IT Appeal no 106 of 2011 of the revenue was dismissed vide the order dated 27.4.2011 holding that the share application money is outside the scope of section 2(22)(e) of the Act (refer to para iii above), the other appeal ie IT Appeal no 1879 of 2010 was adjourned to later date 11.5.2011 at the request of the concerned Counsel for the assessee for want of some documents. Accordingly, on the appointed date on 11.5.2011, IT Appeal no 1879 of 2010 was adjudicated. However, while adjudicating, Hon'ble High Court again deliberated on the issue already decided in appeal 106 of 2011 which must be a bona fide mistake. Other mistake is that this time, Honble High Court has taken a contrary stand. Thus, there are two divergent decisions of the same court on the same involving the same issue and it that sense, it is an unusual judgment and one favourable to the assessee must be

followed. Therefore, as per Ld Counsel, the references made to the issue relating to Rs 13 lakhs, which is considered as 'deemed dividend' should not be taken as a ratio in view of the clear cut adjudication vide the IT Appeal no 106 of 2011. On perusal of available material on the issue, we find there is some confusion over the matter. But the fact is that the ratio of the judgment vide the I T Appeal no 106 of 2010 is not only expressly rejected but also the same is favourable to the assessee. Considering the settled nature of the judicial discipline to follow the **judgment favourable to the assessee**, we find no difficulty to imitate the same.

v. ***M/s Subhmangal Credit Capital P Ltd*** ITA NO 7238/Mum/2008: This is the decision dated 19.01.2010 of the coordinate bench relevant for the proposition that share application money is 'deemed dividend' u/s 2(22)(e) of the Act. The facts of this case are that assessee received SAM towards the allotment of equity and preference shares and part allotment was made and balance of SAM was returned like in the present case. Para 3 of the decision was relevant and significant. Therefore relevant lines are inserted as follows.

> *3. …The undisputed fact is that the assessee had received certain share application money and had disclosed the same as such in the balance sheet. The total amount received as SAM was Rs …. . Out of this, the assessee company had allotted preference shares for Rs….. to ….. against SAM received. The balance was returned. The first appellate authority, in our considered opinion, had correctly dealt with a matter and held that SAM cannot be deemed to be loan or deposit.*

19. Thus, in the factual matrix that the assessee allotted shares towards the share application money received, the amounts cannot be held as loan or deposit. The refund of the part amount shall not alter the situation.

vi. In the case of **M/s *Rugmini Ram Gagav Spinners P Ltd*** 304 ITR 417, Madras High court arrived at an opinion that the '*share application advance*' is distinguishable from '*loan or advance'* for the purpose of section 269SS r w 271E of the Act. Relevant portion from 'Held' segment is extracted as under:

> *Held, dismissing the appeal of the revenue, that the assessee had received cash over a period of time as advance towards allotment of shares from 16 persons …. . the money retained by the company was neither deposit nor*

loan, it was only share capital advance….If the intention was to receive them as loans or deposits, then certainly the lenders would not have made the advances gratuitously…..there was no dispute that the advances were only against allotment of shares and not by way of loans or advances. …

20. Thus, from the above extracts of the judgmental laws, it is clear that the share application money or share application advance is distinct from the 'loan or advance'. Although the share application money is one kind of advance given with the intention to obtain the allotment of shares/equity/preference shares etc, such advances are innately different form the normal loan or advances specified both in section 269SS or 2(22)(e) of the Act. Unless the *mala fide* is demonstrated by the AO with evidence, the book entries or resolution of the Board of the assessee become relevant and credible, which should not be dismissed without bringing any adverse material to demonstrate the contrary. From the above extracts, it is also evident that the share application money when partly returned without any allotment of shares, such refunds should not be classified as 'loan or advance' merely because, share application advance is returned without allotment of share. In the instant case, the refund of the amount was done for commercial reasons and also in the best interest of the prospective Share applicant. Further, it is self explanatory that the assessee being a 'beneficial share holder', derives no benefit whatsoever, when the impugned 'share application money/advance' is finally returned without any allotment of shares for commercial reasons. In this kind of situations, the books entries become really relevant as they show the initial intentions of the parties into the transactions. It is undisputed that the books entries suggest clearly the 'share application' nature of the advance and not the 'loan or advance'. As such the revenue has merely suspected the transactions without containing any material to support the suspicion. Therefore, the share application money may be an advance but they are not advances which are referred to in section 2(22)(e) of the Act. Such advances, when returned without any allotment or part allotment of shares to the applicant/subscriber, will not take a nature of the loan merely because the same is repaid or returned or refunded in the same year or later years after keeping the money for some time with the company. So long as the original intention of payment of share application money is towards the allotment of shares of any kind, the same

cannot be deemed as 'loan or advance' unless the mala fide intentions are exposed by the AO with evidence. Therefore, relying on the cited judgments of Madras High court and the Delhi High court, supra and further relying on the number of coordinate bench decisions of Mumbai Tribunal and others, we are of the opinion, the decisions given by the CIT(A) vide para 9.2.1 of the impugned order does not call for any interference. Accordingly, the grounds raised by the revenue are **dismissed.**

21. In the result, the appeal of the revenue is **dismissed**.

Assessee's Cross Objection 169/M/2012 – AY:2002-03

22. **Condonation of delay:** Sri Muralidhar, Ld Counsel for the assessee mentioned that the assessee filed Cross Objections for the AYs 2002-03, 2004-05, 2006-07 and 2007-08 and mentioned that they were filed belatedly. The periods of delay for these four AYs are 90 days, 90 days, 60 days and 60 days respectively. In this regard, Ld Counsel brought to our notice the applications of the assessee and the affidavits dated 9th November, 2012. These documents contain the prayer for condonation of delay. As per the assessee, the reasons for not filing the Cross Objection within the stipulated time are read as under:

> "*As the appeal of the Department was received by the respondent on 19th March, 2012, the cross objection ought to have been filed u/s 253(4) by 18th April, 2012. As the Cross Objection is being filed on 18th July, 2012, there is a delay of 90 days.*
>
> *The respondent respectfully submits that the said delay was inadvertent and was caused due to the Respondent not being aware of the judgment of the Special Bench of the Tribunal (All Cargo Global Logistics Ltd vs DCIT) which is dated 6th July, 2012.*
>
> *The respondent respectfully submits that the issue raised in the cross objection is a question of law, which goes to the root of the matter. It is necessary for the same to be considered by the Hon'ble ITAT to do justice to the matter.*
>
> *The respondent also prays that the Hon'ble ITAT may be pleased to condone the --- days of delay in filing the Cross Objection and decide the case on the merits of the same."*

23. We have heard the Ld Counsel for the assessee on the issue of condonation of delay of 90 days in filing the Cross Objection and examined the reasons for the delay ie SB decision in the case of *All Cargo Global Logistics Ltd*, *supra*. We have considered the objections of the Ld DR, who dutifully opposed the condonation prayer of the assessee. On considering the arguments of the parties relating to the condonation prayer, prima facie, we find that said SB decision has direct relevance to the facts of the appeals under consideration. Further, it is a settled law that while condoning the delay, the Court needs to take a lenient view considering the preciousness of the right of appeal granted to parties aggrieved. On considering the SB decision based reasons, we find that the explanation is bona fide and reasonable one. In view of this legal and factual position, we condone the delay in these four COs filed before the Tribunal and we proceed to adjudicate the issues raised in them at appropriate parts of this order. Thus, delay is **condoned** and COs are **admitted.**

24. Further, Ld Counsel mentioned that in case the appeal of the revenue is dismissed on its merits, the adjudication of the Cross Objection, that relates to the legal issue relating to the validity of the notice issued by the AO u/s 153A of the Act in the absence of incriminating material relating to the issue of deemed dividend, becomes purely an **academic exercise**. Considering our agreement with the order of CIT(A) on merits and dismissal of the revenue's ground, the adjudication of the CO becomes merely an academic exercise. Therefore, we dismiss the CO **169/M/2012** for AY: 2002-03 as an academic.

25. In the result, the CO 169/M/2012 is **dismissed**.

ITA No.4363/M/2011&
Cross Objection 170/M/2012 (AY: 2004-05)

26. This appeal filed by the Revenue on 30.5.2011 is against the order of CIT (A)-40, Mumbai dated 23.3.2011 for the AY: 2004-05 and the Cross Objection filed by the assessee on 31.7.2012 for the same assessment years. But for the amounts, the issues raised by the revenue are identical to the ones discussed in the appeal for the AY 2002-03. Same is the case with the CO of the assessee too. For the sake of

completeness, the Grounds raised in Revenue's appeal ITA No. 4363/M/2011 read as under:-

> 1. *On the facts and circumstances of the case and in law, the Ld CIT (A) erred in deleting the addition of* ***Rs. 6,79,41,437/-*** *being deemed dividend within the meaning of section 2(22)(e) of the IT Act, 1961.*
> 2. *On the facts and circumstances of the case and in law, the Ld CIT (A) erred in holding that an advance received in the grab of share application money is beyond the purview of section 2(22)(e) of the Act."*

27. In this **AY 2004-05,** the distinguishable facts are that (a) the share application advance of Rs. 6,79,41,437/- was contributed by R S Estate Developers P Ltd = RSEDPL (not M/s. *Oberoi Construction P Ltd* wrongly mentioned by the AO in his order); and (b) M/s KPPL made allotment of shares in the AY 2005-06 in return of the Share application money subscribed by RSEDPL. Otherwise, the conclusions of the revenue authorities, submissions of the assessee before the I T Authorities are the same. Even before us, both the parties in the dispute fairly submitted that their arguments in respect of the appeals for the AY 2002-03, are applicable *mutatis mutandis* to the present appeals for the AY 2004-05.

28. We have considered the arguments of the parties and also our conclusions for the AY 2002-03 in respect of the issue of applicability of the provisions of section 2(22)(e) to the share application advance, and find the said decisions apply with equal force to the appeal of the revenue and also the CO of the assessee. Therefore, we confirm the conclusions of Ld CIT(A) for different other reasons as well and paragraphs 15 to 18 of this order is relevant. Therefore, the grounds raised by the revenue are **dismissed**.

Cross Objection: 170/M/2012 - AY 2004-05

29. There is an issue of condonation of delay in this CO and we have granted the prayer of the assessee in this regard for the reasons given in para 22 above. Further, Ld Counsel mentioned that in case the appeal of the revenue is dismissed on its merits, the adjudication of the Cross Objection, that relates to the legal issue relating to the validity of the notice issued by the AO u/s 153A of the Act in the absence of incriminating material relating to the issue of deemed dividend, becomes

purely an **academic exercise**. Considering our agreement with the order of the CIT(A) on merits and dismissal of the revenue's ground, the adjudication of the CO becomes merely an academic exercise. Therefore, we dismiss the CO **170/M/2012** as an academic.

30. In the result, the CO 170/M/2012 is **dismissed**.

31. In the result, the appeal of the revenue and the CO of the assessee are **dismissed**.

ITA No.4364/M/2011 - AY: 2005-06

32. This appeal filed by the Revenue on 30.5.2011 is against the order of CIT (A)-40, Mumbai dated 23.3.2011 for the AY: 2005-06. The grounds raised in the Revenue's appeal read as under:

1. *On the facts and circumstances of the case and in law, the Ld CIT (A) erred in deleting the addition of Rs. 3,67,60,000/- being deemed dividend within the meaning of section 2(22)(e) of the IT Act, 1961.*
2. *On the facts and circumstances of the case and in law, the Ld CIT (A) erred in holding that an advance received in the grab of share application money is beyond the purview of section 2(22)(e) of the Act."*

33. In this **AY 2005-06,** the distinguishable facts are that the share application money of Rs.3,67,60,000/- was contributed by R S Estate Developers P Ltd = RSEDPL (not M/s. *Oberoi Construction P Ltd* wrongly mentioned by the AO in his order); and (b) M/s KPPL made allotment of shares in the AY 2005-06 in return of the Share application money subscribed by RSEDPL. Otherwise, the conclusions of the revenue authorities, submissions of the assessee before the I T Authorities are the same. Even before us, both the parties in the dispute fairly submitted that their arguments in respect of the appeals for the AY 2002-03, are applicable *mutatis mutandis* to the present appeals for the AY 2005-06.

34. We have considered the arguments of the parties and also our conclusions for the AY 2002-03 in respect of the issue of applicability of the provisions of section 2(22)(e) to the share application advance, and find the said decisions apply with equal force to the appeal of the revenue and also the CO of the assessee. Therefore,

we confirm the conclusions of Ld CIT(A) for different other reasons as well and paragraphs 15 to 18 of this order is relevant. Therefore, the grounds raised by the revenue are **dismissed**.

35. In the result, the appeal of the revenue is **dismissed**.

ITA No.4495/M/2011 &
Cross Objection 112/M/2012
(AY: 2006-07)

36. This appeal filed by the **Revenue** on 3.6.2011 is against the order of CIT (A)-40, Mumbai dated 23.3.2011 for the AY: 2006-07 and the Cross Objection filed by the **assessee** on 18.6.2012 for the same assessment years. The grounds raised in the Revenue's appeal as well as the Cross Objection read as under:

"*Grounds raised in Revenue's appeal ITA No. 4495/M/2011:*

1. *On the facts and circumstances of the case and in law, the Ld CIT (A) erred in deleting the **addition of Rs. 17,24,34,900/-** being deemed dividend within the meaning of section 2(22)(e) of the Act.*
2. *On the facts and circumstances of the case and in law, the Ld CIT (A) erred in holding that an advance received in the grab of share application money is beyond the purview of section 2(22)(e) of the Act.*
3. *On the facts and circumstances of the case and in law, the Ld CIT (A) erred in allowing **exemption u/s 54F** of the IT Act of Rs. 1,23,50,854/- towards investment made in two residential houses against long term capital gain.*
4. *On the facts and circumstances of the case and in law, the Ld CIT (A) erred in holding that investment made in **two distinct adjacent flats** would qualify for exemption u/s 54F without appreciating the facts that the said section provides for exemption in respect of a residential property implying a single residential unit only."*

37. Grounds 1 and 2 deal with the issue of applicability of section 2(22)(e) of the Act to the advance by way of 'share application money'. In this **AY 2006-07,** the distinguishable facts are: (a) *Siddhivinayak Realties P Ltd* (SRPL) received a sum of Rs 10,35,34,900 from M/s *Oberoi Constructions P Ltd; (b) KPPL* also received a sum of Rs 6,89,00,000/- from *RSEDPL* in the form of share application advances; (c) Total '*share application advance'* works out to Rs. 17,24,34,900/-; and (d) so far as the share application advance of Rs 6,89,00,000/- is concerned, the same is refunded as part of the business considerations in December, 2006. It is submitted

that the said sum was refunded to RSEDPL as the KKPL received Rs 675 crores of share application money on 17.1.2207 from Morgan Stanely group and of course, undisputedly, the shares are accordingly allotted on the same date. Otherwise, the conclusions of the revenue authorities, submissions of the assessee before the I T Authorities *et cetera* are the same. Even before us, both the parties in the dispute fairly submitted that their arguments in respect of the appeals for the AY 2002-03, are applicable *mutatis mutandis* to the present appeals for the AY 2005-06.

38. We have considered the arguments of the parties and also our conclusions for the AY 2002-03 in respect of the issue of applicability of the provisions of section 2(22)(e) to the share application advance, and find the said decisions apply with equal force to the appeal of the revenue and also the CO of the assessee. Therefore, we confirm the conclusions of Ld CIT (A) for different other reasons as well and paragraphs 15 to 18 of this order is relevant. Therefore, the grounds raised by the revenue are **dismissed**.

39. Ground no.3 and 4 relates to allowability of exemption u/s 54F when the capital amount invested in two adjacent residential flats.

40. Briefly stated relevant facts of this issue are that the AO restricted the claim of an exemption u/s 54F of the Act to Rs. 1,10,59,626/- only as against the assessee's claim of Rs. 1,23,50,854/-. It was invested by the assessee on two residential flats located adjacent to each other. In this regard, AO made disallowance of Rs. 12,91,228/- by giving the reasoning that the assessee has invested the capital gain in two separate flats, hence, as per the provisions of 54F, exemption has to be granted only in respect of investment in a residential house. On appeal, CIT (A) allowed the assessee and directed the AO to recompute the exemption u/s 54F by treating the both units as comprising of a residential house and the relevant para is reproduced here under:

> *"6.9.5. Having analyzed the judgments which end up defining "a residential house" for the purpose of exemption from capital gains tax, it is relevant to notice in this case that the same appellant has purchased two contiguous flats with a common wall. In view of the fact that the Courts have been of the opinion that flats on different floors being utilized for different purposes*

also qualify to be considered as "a residential house", there is no reason to treat two contiguous houses as separate for this purpose. Accordingly, it is held that the Ld AO is not justified in not allowing exemption in respect of investment in one of the units. The AO is directed to recompute the exemption u/s 54F by treating both the units as comprising of "a residential house" for this purpose. This ground of appeal is accordingly allowed."

41. Aggrieved, the Revenue is in appeal before the Tribunal.

42. During the proceedings before us Ld Counsel brought our notice that an identical issue was adjudicated by the Hon'ble Delhi High Court in the case of CIT vs. ***Gita Duggal*** vide ITA 1237/2011 dated 21.03.2013 and para 8 from the said order is relevant in this regard which is reproduced here under:

"*There could also be another angle. Section 54/54F uses the expression "a residential house". The expression used is not "a residential unit". This is a new concept introduced by the assessing officer into the section. Section 54/54F requires the assessee to acquire a "residential house" and so long as the assessee acquires a building, which may be constructed, for the sake of convenience, in such a manner as to consist of several units which can, if the need arises, be conveniently and independently used as an independent residence, the requirement of the section should be taken to have been satisfied. There is nothing in these sections which require the residential house to be constructed in a particular manner. The only requirement is that it should be for the residential use and not for commercial use. If there is nothing in the section which requires that the residential house should be built in a particular manner, it seems to us that the income tax authorities cannot insist upon that requirement. A person may construct a house according to his plans and requirements. Most of the houses are constructed according to the needs and requirements and even compulsions. For instance, a person may construct a residential house in such a manner that he may use the ground floor for his own residence and let out the first floor having an independent entry so that his income is augmented. It is quite common to find such arrangements, particularly post-retirement. One may build a house consisting of four bedrooms (all in the same or different floors) in such a manner that an independent residential unit consisting of two or three bedrooms may be carved out with an independent entrance so that it can be let out. He may even arrange for his children and family to stay there, so that they are nearby, an arrangement which can be mutually supportive. He may construct his residence in such a manner that in case of a future need he may be able to dispose of a part thereof as an independent house. There may be several such considerations for a person while constructing a residential house. We are therefore, unable to see how or why the physical structuring of the new residential house, whether, it is lateral or vertical, should come in the way of considering the building as a residential house. We do not thing that the fact that the residential house consists of several independent units can be permitted to act as an impediment to the allowance of the deduction under section 54/54F. It is neither expressly nor by necessary implication prohibited.*

For all the above reasons, we are of the view that the Tribunal took the correct view. No substantial question of law arises for our consideration. The appeal is accordingly dismissed."

43. We have applied the above ratio to the facts of the instant case and find the two flats in question are not adjacent and they are not functionally one residential house with two adjacent units. Revenue has not brought any contrary decision to our notice. Considering the settled nature of the issue, we are of the opinion, the order the CIT(A) does not call for any interference on this issue. Accordingly, the grounds 3 and 4 are **dismissed**.

44. In the result, the appeal of the revenue is **dismissed**.

Cross Objection: 112/M/2012 - AY 2006-07

45. There is an issue of condonation of delay in this CO and we have granted the prayer of the assessee in this regard for the reasons given in para 22 above. Further, Ld Counsel mentioned that in case the appeal of the revenue is dismissed on its merits, the adjudication of the Cross Objection, that relates to the legal issue relating to the validity of the notice issued by the AO u/s 153A of the Act in the absence of incriminating material relating to the issue of deemed dividend, becomes purely an **academic exercise**. Considering our agreement with the order of the CIT(A) on merits and dismissal of the revenue's ground, the adjudication of the CO becomes merely an academic exercise. Therefore, we dismiss the CO **112/M/2012** as an academic.

46. In the result, the CO 112/M/2012 is **dismissed**.

47. In the result, the appeal of the revenue and the CO of the assessee are **dismissed**.

ITA No.4440/M/2011
and CO No.113/M/2012 -(AY: 2007-08)

48. This appeal (ITA No.4440/M/2011) filed by the Revenue on 2.6.2011 is against the order of CIT (A)-40, Mumbai dated 23.3.2011 for the AY: 2007-08 and

the Cross Objection filed by the assessee on 18.6.2012. The grounds raised in the Revenue's appeal are:

1. *On the facts and circumstances of the case and in law, the Ld CIT (A) erred in deleting the addition of Rs. 13,22,50,000/- being deemed dividend within the meaning of section 2(22)(e) of the Act.*

3. *On the facts and circumstances of the case and in law, the Ld CIT (A) erred in holding that an advance received in the grab of share application money is beyond the purview of section 2(22)(e) of the Act.*

49. In this **AY 2007-08,** the distinguishable facts are that the share application money of Rs.13,22,50,000/- was received by ***Siddhivinayak Realities P Ltd*** – SRPL from M/s. ***Oberoi Construction P. Ltd***. Undisputedly, assessee is beneficial owner in both the said companies. Otherwise, the conclusions of the revenue authorities, submissions of the assessee before the I T Authorities *et cetera* are the same. Even before us, both the parties in the dispute fairly submitted that their arguments in respect of the appeals for the AY 2002-03, are applicable *mutatis mutandis* to the present appeals for the AY 2007-08.

50. We have considered the arguments of the parties and also our conclusions for the AY 2002-03 in respect of the issue of applicability of the provisions of section 2(22)(e) to the share application advance, and find the said decisions apply with equal force to the appeal of the revenue and also the CO of the assessee. Therefore, we confirm the conclusions of Ld CIT (A) for different other reasons as well and paragraphs 15 to 18 of this order is relevant. Therefore, the grounds raised by the revenue are **dismissed**.

Cross Objection: 113/M/2012 - AY 2007-08

51. There is an issue of condonation of delay in this CO and we have granted the prayer of the assessee in this regard for the reasons given in para 22 above. Further, Ld Counsel mentioned that in case the appeal of the revenue is dismissed on its merits, the adjudication of the Cross Objection, that relates to the legal issue relating to the validity of the notice issued by the AO u/s 153A of the Act in the

absence of incriminating material relating to the issue of deemed dividend, becomes purely an **academic exercise**. Referring to the deduction u/s 54F of the Act appearing in the CO, Ld Counsel mentioned that the same is not pressed. Considering our agreement with the order of the CIT(A) on merits and dismissal of the revenue's ground, the adjudication of the CO becomes merely an academic exercise. Therefore, we dismiss the CO **113/M/2012** as an academic.

52. In the result, the CO 113/M/2012 is **dismissed**.

53. To sum up, all the five appeals of the revenue and all four COs of the assessee are **dismissed**.

Order pronounced in the open court on this 20th day of March, 2013.

Sd/-	**Sd/-**
(VIVEK VARMA)	**(D. KARUNAKARA RAO)**
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Date : 20.3.2013
At :Mumbai
Okk

Copy to :
1. *The Appellant.*
2. *The Respondent.*
3. *The CIT (A), Concerned.*
4. *The CIT concerned.*
5. *The DR "F", Bench, ITAT, Mumbai.*
6. *Guard File.*

// True Copy//

By Order

Assistant Registrar
ITAT, Mumbai Benches, Mumbai