

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 15992 of 2015****FOR APPROVAL AND SIGNATURE:****HONOURABLE MS.JUSTICE HARSHA DEVANI****and****HONOURABLE MR.JUSTICE G.R.UDHWANI**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

JAYESH T KOTAK

Versus

DEPUTY COMMISSIONER OF INCOME TAX

Appearance:

MR MANISH J SHAH(1320) for the Petitioner(s) No. 1

MRS MAUNA M BHATT(174) for the Respondent(s) No. 1

CORAM: HONOURABLE MS.JUSTICE HARSHA DEVANI

and

HONOURABLE MR.JUSTICE G.R.UDHWANI**Date : 26/03/2020****ORAL JUDGMENT****(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)**

1. Rule. Mrs. Mauna Bhatt, learned Senior Standing Counsel waives service of notice of Rule on behalf of the respondent.

2. By this petition under article 226 of the Constitution of

India, the petitioner has challenged the notice dated 27.03.2015 issued by the respondent under section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') seeking to reopen the assessment of the petitioner for assessment year 2008-2009 as well as the orders at Annexure 'T' and 'V' to the petition whereby the respondent has rejected the objections raised by the petitioner to the reopening of assessment.

3. The facts as averred in the petition are that the petitioner is an individual and is assessed as such. For assessment year 2008-2009, the petitioner filed his return of income showing total income at Rs.1,48,89,810/- as per the statement of income annexed along with the return of income. The petitioner had also filed audit report in Form No.3CB and 3CD before the Assessing Officer. Thereafter, the petitioner received a noticed dated 16.09.2010 issued under section 142(1) of the Act, calling upon the petitioner to furnish certain details. The petitioner furnished such details through his Chartered Accountant by a reply dated 14.10.2010. A further notice dated 19.10.2010 came to be issued under section 142(1) of the Act calling for further information from the petitioner. A notice dated 19.10.2010 issued under section 143(2) of the Act was received by the petitioner, whereby the petitioner was called upon to attend the respondent's office. It is the case of the petitioner that he supplied details which were called for by the respondent by his letters dated 18.11.2010 and 26.11.2010. In response to the said notices, the petitioner filed his reply dated 02.12.2010 annexing in all 7 exhibits with the said reply. By a letter dated 27.12.2012, the petitioner furnished some further details which were called for by the

respondents during the assessment proceedings under section 143(3) of the Act. After calling for extensive details by various notices and the petitioner replying to those notices, the respondent passed an assessment order dated 28.12.2010 under section 143(3) of the Act, wherein, six additions came to be made. The petitioner challenged the assessment order before the Commissioner of Income Tax (Appeals), who passed an order dated 26.09.2011.

3.1 Now, after a gap of more than four years, the petitioner has received a notice dated 27.03.2015 under section 148 of the Act, whereby, the respondent wants to reopen the assessment for the assessment year 2008-2009.

3.2 In response to the notice under section 148 of the Act, the petitioner gave his reply dated 16.04.2015 making certain legal submissions and requested the respondent to provide the reasons recorded for reopening the assessment. By a further letter dated 04.05.2015, the petitioner, once again, requested for a copy of the reasons recorded and also requested the respondent to take the original return filed by him under section 139 of the Act as the return filed in response to the notice under section 148 of the Act. By a letter dated 18.05.2015, the respondent furnished the reasons recorded. The respondent called upon the petitioner to file a copy of the return instead of relying on the previously filed return and so the petitioner filed the same return once again electronically and mentioned the said fact in a letter submitted to the Department on 04.06.2015. Thereafter, by a letter dated 13.07.2015, the petitioner submitted his objections. The petitioner filed further objections vide letter dated 27.07.2015

making certain points on merits as well as reiterating the fact that the petitioner had disclosed fully and truly all material facts for the purpose of assessment under section 143(3) of the Act. It is the case of the petitioner that he had filed all primary documents which were statutorily required to be filed along with the return of income and had also filed all documents that were called for during the course of scrutiny assessment. The petitioner pointed out that the Assessing Officer, while carrying out scrutiny assessment, had examined the issue of deemed dividend under section 2(22)(e) of the Act.

3.3 By an order dated 11.09.2015, the respondent disposed of the objections raised by the petitioner vide letter dated 13.07.2015. Furthermore, by a letter dated 11.09.2015, the respondent called upon the petitioner to explain as to why loans extended by M/s. J. P. Infrastructure Pvt. Ltd. (now known as J. P. Iscon Limited) to its sister concern amounting to Rs.12.61 crores should not be treated as deemed dividend under section 2(22)(e) of the Act as the petitioner was holding 27.49% of the shares in M/s. M/s. J. P. Iscon Ltd and called upon the petitioner to reply the query within the time specified thereunder. The petitioner responded by a letter dated 23.09.2015, bringing to the notice of the respondent that he had missed out in dealing with his objections dated 27.07.2015, wherein, this very issue was dealt with and reply to the query in the letter dated 11.09.2015 was already addressed in the petitioner's objections dated 27.07.2015. Thereafter, the respondent, by a letter dated 23.09.2015, disposed of the petitioner's objections dated 27.07.2015. Being aggrieved, the petitioner has filed the present petition.

3A. In response to the averments made in the petition, the respondent has filed an affidavit-in-reply; the petitioner has filed a rejoinder thereto and the respondent has filed a sur-rejoinder to the rejoinder filed by the petitioner.

4. Mr. J. P. Shah, Senior Advocate, learned counsel for the petitioner invited the attention of the court to the assessment order made under section 143(3) of the Act for the assessment year under consideration, to submit that specific questions on section 2(22)(e) of the Act have been asked and the issue has been gone into and has been specifically addressed. It was submitted that the issue having already been gone into at the time of scrutiny assessment, it is not permissible for the Assessing Officer to reopen the assessment in respect of the same issue. The attention of the court was invited to Accounting Standard (AS) 18, which relates to Related Party Disclosures to point out that the council has decided to make AS 18 mandatory only to the enterprises mentioned therein and not to all enterprises. It was pointed out that two categories of enterprises are mentioned therein out of which (i) which relates to enterprises whose equity or debt securities are listed on a recognised stock exchange etc. is not applicable to the petitioner who is an individual, whereas (ii) relates to all other commercial, industrial and business reporting enterprises, whose turnover for the accounting period exceeds Rs.50 crores. It was pointed out that the gross total income of the petitioner is only Rs.1.48 crores and hence, he does not fall under the second category of enterprises also. It was submitted that therefore, there was no specific requirement for the petitioner to disclose such transaction.

4.1 Reference was made to the decision of the Supreme Court in **Commissioner of Income Tax v. Mukundray K. Shah**, (2007) 290 ITR 433 SC, wherein, the Court has held thus:

11. xxxxxxxxThe companies having accumulated profits and the companies in which substantial voting power lies in the hands of a person other than the public (controlled companies) are required to distribute accumulated profits as dividends to the shareholders. In such companies, the controlling group can do what it likes with the management of the company, its affairs and its profits. It is for this group to decide whether the profits should be distributed as dividends or not. The declaration of dividend is entirely within the discretion of this group. Therefore, the legislature realised that though funds were available with the company in the form of profits, the controlling group refused to distribute accumulated profits as dividends to the shareholders but adopted the device of advancing the said profits by way of loan to one of its shareholders so as to avoid payment of tax on accumulated profits. This was the main reason for enacting Section 2(22)(e) of the Act.

12. xxxxxxxx It is not in dispute that the assessee had more than 10% of voting power in MKSEPL during the block period. It is not in dispute that the assessee had substantial interest of about 16% in MKF. It is not in dispute that the three companies were the controlled companies. There is one more point which needs to be mentioned. The timing of so-called repayments by the company to MKF and MKI and the immediate withdrawal of the funds by the assessee-cum-Director-cum-shareholder-cum-partner and the timing of investment in purchase of bonds were around the same time. Moreover, in MKSEPL the assessee is not only a shareholder having more than 10% of total voting power, he is also a Director of that company. The said company is also a partner in MKF and MKI which explains why the amount of Rs 5.99 crores was routed by splitting the said amount into two parts of Rs 2.79 crores and Rs 3.20 crores. In the present case, the most important aspect, which has not been considered by the High Court, was that withdrawal of money by the assessee from his capital account, in the books of MKI, during Financial Year 1999-2000 led to a debit balance of Rs 8.18 crores as on 31-3-2000. To this extent, the finding given by the AO and by the Tribunal remains unchallenged. Lastly, on the maintainability of the block assessment, we are of the view that the Department was right in assessing the said amount as deemed dividend in the hands of the assessee under Section 2(22)(e) of the Act. The impugned assessment order was passed under Section 158-BC. That assessment originated on account of a search conducted under Section 132(1) of the Act. In that search

the diary "ML-20" was identified. That identification was the starting point of connected enquiries resulting in the detection of undisclosed income of Rs 5.99 crores. In other words, undisclosed income, in the nature of deemed dividend, did not arise from any scrutiny proceedings, tax evasion petitions, surveys, information received from external agency, etc. The undisclosed income was detected by the AO wholly and exclusively as a result of a search and, therefore, the Department was right in invoking the provisions of Chapter XIV-B. There is one more aspect in this regard. From the facts, indicated above, the Department has established a sort of circular trading in this case. One of the important features of circular trading is to route the funds through conduits. In such cases the picture emerges only after seeing the cash-flow statements. In the present case, ML-20 made the AO to hold enquiries and in that enquiry the cash-flow statement emerged, therefore, the Department was right in invoking the provisions of Chapter XIV-B in the present case. The five payments had direct correlation with Rs 5.99 crores paid by MKSEPL to MKF and MKI and payments by the said two firms to the assessee who used the said money to buy 9% RBI Relief Bonds. Therefore, the said payment by the company through the two firms was for the benefit of the assessee. Therefore, the said funds were not repayment of loans, they were for purchase of 9% RBI Relief Bonds by the respondent.

16. The above two judgments indicate that the question as to whether payment made by the company is for the benefit of the assessee is a question of fact. In this case, the Tribunal has concluded that the payment routed through MKF and MKI was for the benefit of the assessee. This was a finding of fact. It was not perverse. Therefore, the High Court should not have interfered with the said finding. Further, the above two judgments lay down that the concept of deemed dividend under Section 2(22)(e) of the Act postulates two factors, namely, whether payment is a loan and whether on the date of payment there existed "accumulated profits". These two factors have to be correlated. This correlation has been done by the Tribunal coupled with the fact that all withdrawals were debited in the capital account of the firm leading to the debit balance of Rs 8.18 crores. The High Court has erred in disturbing the findings of fact.

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4.2 It was submitted that thus as laid down in the above decision for the purpose of invoking section 2(22)(e) of the Act, two factors are postulated. Firstly, whether the payment is a loan, in other words whether the petitioner has received some benefit; and secondly, whether on the date of payment there existed "accumulated profits" in the concern which advanced the loan. It was submitted that in the facts of the present case,

there is no allegation that any benefit has accrued to the petitioner and as there is no benefit to the petitioner, there is no question to taxing him. It was submitted that if the controlling holder is not benefitted, section 2(22)(e) of the Act would not apply. It was further submitted that the Supreme Court, in the above decision, has held that receiving of a benefit is a *sine qua non* for application of section 2(22)(e) of the Act. Such amount may be received either directly or the money may be received through concerns in which the assessee had interest.

4.3 Attention was invited to the objections dated 13.07.2015 raised by the petitioner against the reopening of assessment, to submit that a specific contention had been raised that the petitioner has not received a single rupee as loans and advances, either from the loan giver company, that is, M/s. J. P. Infrastructure Pvt. Ltd. or loan taker companies, that is, Gujarat Mall Management Company Pvt. Ltd. or Aryan Arcade Pvt. Ltd., and hence, there was no question of any deemed dividend in the hands of the petitioner. However, the Assessing Officer has not given any reply to the contention that no benefit has travelled to the assessee. It was urged that the very basis that income has escaped assessment is fallacious inasmuch as when there is no income, there is no question of escapement.

4.4 The learned counsel submitted that in this case, the two essential ingredients for invoking section 2(22)(e) of the Act are missing: (i) that the lending company has accumulated profits; and (ii) that the loan has been advanced to concerns for the benefit of the assessee. It was submitted that section 2(22)(e) contains a deeming provision and hence, it must be

strictly construed and that the court should adopt a practical approach.

4.5 Adverting to the reasons recorded, it was submitted that the reasons do not state that any loan or advance has been received by the petitioner or any benefit has been received; there is no allegation that income of dividend has been earned by the petitioner; and there is no allegation that M/s. J. P. Infrastructure Pvt. Ltd. has accumulated profits; and hence, in the absence of those overriding considerations, the notice under section 148 of the Act must fail.

4.6 Referring to the objections raised against the reopening of assessment, it was submitted that in the objections, the petitioner has stated that he has not received a single rupee from the two loanees, which has not been dealt with in the order disposing of the objections; it was also contended that the loan was given for the purpose of business, and hence, there is no question of dividend, however, these two objections have not been dealt with.

4.7 It was urged that the return is filed electronically and it is not possible to load any further details other than that which are provided in the form. It was submitted that the basic requirement for invoking section 2(22)(e) of the Act is that the petitioner should have received the benefit of the moneys parted with by the company in which he is a substantial shareholder. Whereas in the present case, the petitioner has not received any benefit and consequently, there is no income, there is nothing to disclose.

4.8 Reliance was placed by the decision of this court in the case of **Viren Surendra Shah v. Assistant Commissioner of Income Tax**, (2015) 63 Taxman.com 104 (Gujarat), wherein, the court referred to the decision of this court in **Niko Resources Ltd. v. ADIT**, [2014] 51 Taxmann.com 568, wherein it has been held that once all primary facts are before the Assessing Officer, no further assistance is required by way of disclosure. All inferences of the facts and legal inference need to be drawn by the Assessing Officer. It is not for anyone to guide the Assessing Officer in respect of inference “factual or legal” which is required to be drawn by him alone. Once the case of the assessee is covered by the first proviso to section 147 of the Act, the re-assessment proceedings beyond the period of four years from the end of the relevant assessment year would be without any jurisdiction and bad in law, if all material facts are furnished and there remained no omission or failure on the part of the assessee to disclose fully and truly all material facts. It was further held that the onus on the assessee is to reveal the primary facts and to draw the inferential facts would be responsibility of the Assessing Officer. Once having revealed from the record that the assessee disclosed full and complete facts and on scrutiny, at the time of original assessment all those details are examined, no change of opinion is permissible merely because there was some error earlier on the part of the Assessing Officer himself or because he choose not to opine on the issue and even when he changes his mind and interprets the material or law otherwise then what was done by him. Applying the above decision to the facts of the case before it, the court found that there was no failure on the part of the assessee to disclose truly and fully all material facts necessary to assessment with

respect to the deemed dividend under section 2(22)(e) of the Act and hence, the initiation of the impugned re-assessment proceedings, which were beyond a period of four years was not permissible

4.9 Reliance was also placed upon the decision of this Court in ***CIT v. Alfa ICA, (India) Ltd., (2013) 217 Taxman 129 (Gujarat)***, wherein, the court has held that where there is no failure on the part of the assessee to disclose fully and truly all material facts, merely because the claim was not previously processed during the scrutiny assessment or that such claim was legally not sustainable, would not vest the jurisdiction in the Assessing Officer to reopen the assessment beyond a period of four years from the end of relevant assessment year. It was contended that the impugned notice under section 148 of the Act having been issued after a period of more than four years from the end of relevant assessment year, in the absence of any failure on the part of the petitioner to disclose fully and truly all material facts, the assumption of jurisdiction on the part of the Assessing Officer lacks validity.

4.10 It was, accordingly, urged that on the reasons recorded, the Assessing Officer could not have formed the belief that income chargeable to tax has escaped assessment and hence, the Assessing Officer is not justified in invoking the provisions of section 147 of the Act and that in the absence of any failure on the part of the petitioner to disclose fully and truly all material facts necessary for his assessment, the reopening of assessment beyond a period of four years from the end of the relevant assessment year is not permissible in law.

5. Mr. M. R. Bhatt, Senior Advocate, learned counsel for the respondent submitted that section 2(22)(e) of the Act contemplates loan or interest to a concern wherein, the shareholder has an interest. Referring to the reasons recorded, it was pointed out that it is an admitted position that assessee is an individual whose shareholding is more than 10 per cent of the voting power in the three companies. It was submitted that the second table referred in the reasons recorded has been disclosed in the return on income filed by the assessee, but the table showing the loans given by M/s. J. P. Infrastructure Pvt. Ltd. to Gujarat Mall Management Company Pvt. Ltd. and Aryan Arcade Pvt. Ltd. has not been disclosed.

5.1 It was submitted that clarification called for by the Assessing Officer during the course of scrutiny assessment in relation to deemed dividend under section 2(22)(e) of the Act was in respect of different parties, namely Palitana Sugar Mills Pvt. Ltd. and Shiva Agency Pvt. Ltd. Attention was invited to paragraph 7.1 of the assessment order made under section 143(3) of the Act, to submit that this transaction was not gone into at the stage of assessment. It was submitted that while the petitioner had given details of the direct loans received by him, no details were given with regards to subject transactions. Therefore, in respect of the transactions in question which are also under section 2(22)(e) of the Act, the petitioner has remained silent.

5.2 It was submitted that the inquiry at the original stage was in respect of different parties, whereas, the reopening of assessment is on the basis of information received from DCIT,

TDS circle, Ahmedabad to the effect that unsecured loans have been given by M/s. J. P. Infrastructure Pvt. Ltd. to Gujarat Mall Management Company Pvt. Ltd. and Aryan Arcade Pvt. Ltd. and the shareholding of the petitioner in all the three companies exceeds 10% of the shares.

5.3 Reference was made to the decision of this Court in the case of ***Dishman Pharmaceuticals and Chemicals Ltd. v. Deputy Commissioner of Income Tax*** (supra). Attention was invited to paragraph 6 of the said decision to submit that the arguments of the revenue in this case are similar. It was pointed out that one of the arguments raised on behalf of the assessee in the said case was that the format of filing return did not require such information to be given, which contention has been repelled by the court.

5.4 As regards the contention of the learned advocate for the petitioner that the amount given by M/s. J. P. Infrastructure Pvt. Ltd. to Gujarat Malls Management Pvt. Ltd. and Aryan Arcade Pvt. Ltd. were inter-corporate deposits. It was submitted that in this case, the entire transaction was not disclosed. Consequently, in the absence of nature of transaction being disclosed, there was no question of considering whether or not the payments were in the nature of inter-corporate deposits.

5.5 Insofar as the decision of this Court in the case of ***Viren Sureshchandra Shah*** (supra) is concerned, it was submitted that in the case of a private limited company, the control is with a few persons and a director who holds more than 10% shares, would be aware of a transaction with a related company. It was contended that what is required to be

considered is whether the case falls under section 2(22)(e) of the Act, which is in the affirmative; whether the assessee was required to disclose the transaction, which also would be in the affirmative. It was submitted that a fact which is a material fact is relevant for the purpose of assessment and is, therefore, required to be stated and not stating thereof amounts to non disclosure of relevant facts.

5.6 It was submitted that formation of opinion by the Assessing Officer is being examined at the threshold, which is in the context of section 2(22)(e) of the Act, which says that when 'A' company gives loan to 'B' company and 'C' company in whom the assessee has specific interest, such amount is deemed dividend in the case of the assessee and the next aspect as to whether the assessee had received the money or not, will have to be evaluated at the assessment stage. At the stage of formation of opinion all that the Assessing Officer has to do is to be satisfied that the basic requirements of section 2(22)(e) of the Act are fulfilled. If the assessee is in a position to point out that no benefit has been received, the assessment will fail. But, at this stage of the proceedings, reasons do not have to go beyond the section. No finding is necessary at this stage in the reasons. It was also contended that at the stage of formation of opinion, the Assessing Officer does not have to say that there are accumulated profits. It was submitted that while decision of the Supreme Court in Commissioner **of Income Tax v. Mukundray K. Shah** (supra) would be applicable, it would be evaluated at the next stage during the course of assessment.

5.7 Reliance was placed upon the decision of the Delhi High

Court in ***Honda Seil Power Products Ltd. v. Deputy Commissioner of Income Tax***, (2012) 340 ITR 53, wherein, the Court held thus:

“10. Thus, the petitioner has accepted and admitted that he had not given details with regard to proportionate expenses relatable to tax free or exempt income, which were claimed as a deduction under the cumulative head "expenditure". It is pleaded and stated that the petitioner was not required to disclose the said fact as when they had filed the return, Section 14A was not in the statute book. Sequitor, there was no omission and failure on the part of the assessee-petitioner to make full and true disclosure. The term "failure" on the part of the assessee is not restricted only to the income-tax return and the columns of the income-tax return or the tax audit report. This is the first stage. The said expression "failure to fully and truly disclose material facts" also relate to the stage of the assessment proceedings, the second stage. There can be omission and failure on the part of the assessee to disclose fully and truly material facts during the course of the assessment proceedings. This can happen when the assessee does not disclose or furnish to the Assessing Officer complete and correct information and details it is required and under an obligation to disclose. Burden is on the assessee to make full and true disclosure.”

“12. The law postulates a duty on every assessee to disclose fully and truly all material facts for its assessment. The disclosure must be full and true. Material facts are those facts which if taken into accounts they would have an adverse affect on assessee by the higher assessment of income than the one actually made. They should be proximate and not have any remote bearing on the assessment. Omission to disclose may be deliberate or inadvertent. This is not relevant, provided there is omission or failure on the part of assessee. The latter confers jurisdiction to reopen assessment”

“15. It is clear from the aforesaid paragraph the petitioner has accepted that "material particular"

referred to in the first proviso not only refers to details in the Return but also explanations and details furnished during the course of assessment. The petitioner had not stated anything or given factual matrix to justify and state that the material facts had been fully and truly disclosed in the assessment proceedings and there was no omission or failure on the part of the petitioner. Explanation to section 147 stipulates that mere production of books of accounts or other evidence is not sufficient. (Refer paragraph 11 above wherein judgment in the Consolidated Photo and Finvest Ltd. (supra) has been quoted). Therefore merely because material lies imbedded in material or evidence, which the Assessing Officer could have uncovered but did not uncover is not a good ground to deny or strike down a notice for reassessment. Whether the Assessing Officer could have found the truth but he did not, does not preclude the Assessing Officer from exercising the power of reassessment to bring to tax the escaped income.

16. There was an omission and failure on the part of the petitioner to point out the expenses incurred relatable to tax free/exempt income which prima facie have been claimed as a deduction in the income and expenditure account. There was, therefore, omission and failure on the part of the petitioner to disclose fully and truly material facts."

5.8 It was submitted that, therefore, the term 'failure' on the part of the assessee is not restricted only to the income tax return of the columns in the income tax return or the tax audit report. There could be an omission on the part of the assessee to disclose fully and truly all material facts during the course of assessment proceedings. This can happen when the assessee does not disclose or furnish to the Assessing Officer complete and correct information and details that it is required and under an obligation to disclose. It was submitted that the petitioner has failed to discharge the burden cast upon him of making a full and true disclosure, and hence, the Assessing Officer is wholly justified in reopening of assessment under

section 147 of the Act. It was urged that the petition being devoid of merits, deserves to be dismissed.

6. In rejoinder, Mr. M. J. Shah, learned advocate for the petitioner submitted that in the case of ***Dishman Pharmaceuticals and Chemicals Ltd. v. Deputy Commissioner of Income Tax*** (supra), the transaction was made by the company itself and the percentile of share was not given. It was submitted that the petitioner is required to state the percentage of shares which he has duly disclosed and that, insofar as the loans given by M/s. J. P. Infrastructure Pvt. Ltd. to Gujarat Malls Management Company Pvt. Ltd. and Aryan Arcade Pvt. Ltd. are concerned, since no amount has been received by the petitioner from the amount given to the two concerns, the petitioner may not be aware of the transaction between the two companies. It was submitted that this case is not identical to the case of ***Dishman Pharmaceuticals and Chemicals Ltd. v. Deputy Commissioner of Income Tax*** (supra). In the said case, primary facts were not disclosed; whereas, in this case, the percentage of shares has been disclosed and hence, primary facts have been disclosed. It was submitted that once the primary facts are disclosed, what question would arise is for the Assessing Officer to ask. In support of such submission, reliance was placed upon the decision of this Court in the case of ***Niko Resources Ltd. v. ACIT, (2015) 229 Taxman 86***, wherein, the court has held that once all primary facts are before the assessing authority, no further assistance is required by way of disclosure. All inferences of facts and legal inference need to be drawn by the Assessing Officer. It is not for anyone to guide the Assessing Officer in respect of

inference “factual or legal”, which requires to be drawn by him alone. It was submitted that in the case of ***Dishman Pharmaceuticals and Chemicals Ltd. v. Deputy Commissioner of Income Tax*** (supra) the facts were gross and the basic requirements of section 2(22)(e) of the Act were not satisfied.

6.1 It was pointed out that in the case of ***Dishman Pharmaceuticals and Chemicals Ltd. v. Deputy Commissioner of Income Tax*** (supra), the shareholding of the assessee was not disclosed; whereas, in this case, transactions in question are between the company 'A' and company 'B' and company 'A' and company 'C' and the petitioner is 'D' who only has a substantial shares in the three companies. It was submitted that the onus upon the petitioner was to disclose his shareholding in the three companies and he has duly disclosed his percentile of shareholding in those parties. Since no part of the amount given by M/s. J. P. Infrastructure Pvt. Ltd. to Gujarat Malls Management Company Pvt. Ltd. and Aryan Arcade Pvt. Ltd. has travelled to the petitioner, there was no obligation upon the petitioner to disclose such fact. It was submitted that in ***Dishman Pharmaceuticals and Chemicals Ltd. v. Deputy Commissioner of Income Tax*** (supra), the transaction was between the petitioner and the party; and hence, the court held that it was bound to disclose the percentile holding which was a primary fact. It was contended that, therefore, the ratio of the decision of this court in the case of ***Dishman Pharmaceuticals and Chemicals Ltd. v. Deputy Commissioner of Income Tax*** (supra) will not apply in this case.

6.2 Reference was made to paragraphs 9.1, 11 and 12 of the decision of this court in **Dishman Pharmaceuticals and Chemicals Ltd. v. Deputy Commissioner of Income Tax** (supra) to submit that in the facts of the said case it could not be ascertained as to what was the shareholding of the petitioner. Thus, a primary fact was missing, which is the distinction between that case and this case.

6.3 Referring to the decision of this Court in the case of **Viren Sureshchandra Shah** (supra), it was submitted that section 2(22)(e) of the Act envisages disclosure qua those parties. Primary facts which are required to be given have been provided by the petitioner, what questions are to be asked by the Assessing Officer is not for the assessee to tell. According to the learned counsel, the facts of the present case are identical to the facts to the case of **Viren Sureshchandra Shah** (supra).

6.4 It was submitted that in the objections, it was contended that section 2(22)(e) of the Act would not be applicable as there is divergence of views. Only if the loan is for the benefit of the shareholder, section 2(22)(e) of the Act would apply. It was submitted that these were inter-corporate deposits between two companies which are covered by judgment and order dated 18th July, 2012 passed by this court in the case of **Commissioner of Income-tax v. Daisy Packers Pvt. Ltd.** rendered in Tax Appeal No.212 of 2010. It was submitted that if the issue is covered by a decision of the Gujarat High Court, the impugned notice under section 148 of the Act would fail.

6.5 It as submitted that section 2(22)(e) of the Act creates a fiction by which certain receipts or part thereof are treated as dividend for the purpose of levy of income tax. Under the Company law, a company can pay dividend out of the profits for the current or the past year. The definition ensures that any distribution or payment referred to therein out of accumulated profits, howsoever made, is brought to tax. Section 2(22)(e) of the Act requires determination of two factors: (i) whether the payment is a loan etc.; and (ii) whether on the date when the payment is made, thereby, were accumulated profits. It was submitted that the loan advanced to such shareholder can be deemed to be a dividend only to the extent to which, it is shown that company possesses accumulated profits on the date of the of the loan etc. Whereas, in the reasons recorded for reopening the assessment, the Assessing Officer has not recorded any satisfaction that M/s J.P. Infrastructure Ltd. has any accumulated profits, in the absence of which a basic requirement for invoking section 2(22)(e) of the Act is not satisfied. Hence, on the reasons recorded, the Assessing Officer could not have formed the belief that income chargeable to tax has escaped assessment.

6.6 In conclusion, it was submitted that in the absence of failure on the part of the petitioner to disclose fully and truly all material facts necessary for his assessment, the reopening of assessment beyond a period of four years from the end of relevant assessment year is without authority of law. Moreover, even on merits, on the reasons recorded, the Assessing Officer could not have formed the belief that income chargeable to tax has escaped assessment. It was accordingly urged that the petition deserves to be allowed quashing and

setting aside the impugned notice under section 148 of the Act.

7. In the backdrop of the facts and contentions noted hereinabove, reference may first be made to the reasons recorded for reopening the assessment, which read as under:

“Reasons recorded u/s. 148(2) of the I.T. Act

In this case the return of income for A.Y. 2008-09 declaring income of Rs.1,48,89,810/- was filed on 30.09.2008. Assessment u/s. 143(3) of the Act was finalized on determining total income at Rs.2,02,55,060/- after making addition on various counts.

As per the information received from DCIT, TDS Circle, Ahmedabad it is noted that unsecured loans have been extended by M/s. J. P. Infrastructure Ltd. (Now Known as J. P. Iscon Ltd.) to various sister concerns during F.Y. 2007-08.

Sr. No.	Name of Group Company	Unsecured loan extended by M/s. J. P. Infrastructure Pvt. Ltd.	Amount paid on behalf of Group company by M/s. J. P. Infrastructure Pvt. Ltd.
1	Gujarat Mall Management Co. Pvt. Ltd.	14650000	5097719
5	Aryan Arcade Pvt. Ltd.	6120000	121008426
	Total	20770000	126106145

On verification of assessment record, it is seen that during the year under consideration the assessee is shareholder and is holding beneficial interest by holding equity shares in the various companies as follows:

Sr. No.	Name of Group Company	Shareholding percentage
1	J. P. Infrastructure Pvt. Ltd.	27.49%

Sr. No.	Name of Group Company	Shareholding percentage
2	Gujarat Mall Management Co. Pvt. Ltd.	50.00%
3	Aryan Arcade Pvt. Ltd.	29.00%

A perusal of the assessment records for A.Y. 2008-09 shows that no such Disclosure has been made by the assessee with regard to above mentioned related party transactions.

As per the provisions of section 2(22)(e) of the Income Tax Act, 1961 the unsecured loans extended by M/s. J. P. Infrastructure Pvt. Ltd. to its related concerns should be treated as deemed dividend in the hands of the shareholder and taxed accordingly. In view of the above, I am of the opinion that Rs.14,68,76,145/- of income has escaped assessment for A.Y. 2008-09 and this is a fit case for reassessment by invoking the provisions of section 147 of the Income Tax Act, 1961."

7.1 Against the reasons recorded, the petitioner, inter alia, raised the following objections:

- (1) Four years from the end of relevant assessment year have passed and there is no failure to disclose fully and truly all material facts relevant for the assessment, the reopening of assessment is void *ab initio*.
- (2) On the reasons recorded there is no reason to believe that income chargeable to tax has escaped assessment.
 - (i) There is no provision in section 2(22)(ee) to tax deemed dividends in the hands of the shareholder if the amount has not been received by the assessee shareholder.

- (ii) The audited financial statements contain various investment details and hence he has fully and truly disclosed the investments in his books of account. He has also disclosed the relevant details called for during the course of the assessment proceedings
- (iii) He is a shareholder of JPIL but no loan or advance has been given to him and hence the first limb of section 2(22)(e) is not applicable. Though he is a shareholder of the loan receiver companies, he has not received any loans or advances even from those companies. Hence, the second limb read with the third limb of section 2(22)(e) is also not applicable.
- (iv) The third limb of section 2(22)(e) has the quantification aspect and is based on the principle that the amount which needs to be taxed as deemed dividend is the amount which has ultimately been made available to the concerned shareholder. Hence, in a case where the funds are advanced by a company to a concern which in turn are advanced to the concerned shareholder, then only the second and third limb of section 2(22)(e) need to be invoked simultaneously so as to work out the amount of deemed dividend. Since no amount has been advanced to him, the second limb read with the third limb would not be applicable.
- (v) The amount that has been received is not loans and advances but ICD received for the purpose of

business and ICD does not fall within the purview of loans and advances.

- (vi) There is no provision under section 2(22)(e) to consider payments made by a company on behalf of another company as deemed dividend.
- (vii) All primary documents which are statutorily required to be filed along with the return of income and also documents called for during the course of assessment proceedings for the year under consideration have been provided and disclosed by him. The Assessing Officer has made certain additions of deemed dividend under section 2(22)(e) which shows that the Assessing Officer has verified the aspect of deemed dividend also.

7.2 Thereafter, the petitioner raised further objections dated 27.07.2015, against reopening of assessment and the order rejecting objections inter alia stating that similar notices have been issued on similar questions and similar issues and hence, there cannot be any assessment and taxability on the same account. By an order dated 23.09.2015, the said objections have already been disposed of.

7.3 On behalf of the petitioner, it has been contended that no loan or advances has been given by M/s. J. P. Infrastructure Pvt. Ltd. to the two concerns and that, what is given is by way of inter-corporate deposits in the normal course of business which would have attracted the provisions of section 2(22)(e) of the Act. However, at this stage, while considering the

validity of notice under section 148 of the Act, this court would not go into the nature of advance, more so, when there is nothing on record to indicate as to whether the payment is made by way of loan or advance or inter-corporate deposit.

7.4 The main contention raised on behalf of the petitioner is that he had disclosed all primary facts and that, there was no onus cast upon him to disclose payment made by M/s. J. P. Infrastructure Pvt. Ltd. to two concerns namely Gujarat Malls Management Pvt. Ltd. and Aryan Arcade Pvt. Ltd in which the petitioner had shareholding of more than 10 per cent of the voting power. It has been contended that once the primary facts have been placed before the Assessing Officer, it cannot be said that the petitioner has failed to disclose any material facts relevant for the purpose of his assessment for the assessment year under consideration and hence, the reopening of assessment beyond a period of four years from the end of relevant assessment year, is without authority of law.

7.5 For the purpose of testing the above arguments, what would be required to be examined is as to what was the nature of the obligation cast upon the petitioner insofar as disclosure of the transactions in question is concerned. It would, therefore, be apposite to refer to the decision of the Supreme Court in **Commissioner of Income Tax v. Mukundray K. Shah** (supra). In the said decision the court had placed reliance upon the decision of the Madras High Court in the case of **Commissioner of Income-tax v. Alagusundaram Chettiar**, [1977] 109 ITR 508, wherein it was held that the word "payment" in section 2(22)(e) of the Act means the act of

paying and, therefore, in that case it was held that payment by the company to Karupppiah Chettiar was for the benefit of the assessee, the Managing Director of the company, L. Alaugusunsaram Chettiar, and was therefore assessable as dividend in the hands of the assessee. It was held further that the basic test to be applied in such cases is not whether the loan given is a benefit but whether the payment made by the company to Karupppiah Chettiar was for the benefit of the assessee who was the managing director of the paying company. Applying the said decision to the facts of the case before it, the Supreme Court held thus:

"Applying the above test to the facts of the present case, we are of the view that the Tribunal was right in holding, on examination of the cash-flow statement, that MKSEPL had made payments to MKF and MKI for the benefit of the assessee which enabled the assessee to buy 9% RBI Relief Bonds in Financial Year 1999-2000. It is in this sense that the Tribunal was right in holding that the two firms were used as conduits by the assessee. It is not in dispute that the assessee had more than 10% of voting power in MKSEPL during the block period. It is not in dispute that the assessee had substantial interest of about 16% in MKF. It is not in dispute that the three companies were the controlled companies. There is one more point which needs to be mentioned. The timing of so-called repayments by the company to MKF and MKI and the immediate withdrawal of the funds by the assessee-cum-Director-cum-shareholder-cum-partner and the timing of investment in purchase of bonds were around the same time. Moreover, in MKSEPL the assessee is not only a shareholder having more than 10% of total voting power, he is also a Director of that company. The said company is also a partner in MKF and MKI which explains why the amount of Rs 5.99 crores was routed by splitting the said amount into two parts of Rs 2.79 crores and Rs 3.20 crores. In the present case, the most important aspect, which has not been considered by the High Court, was that withdrawal of money by the assessee from his capital account, in the books of MKI, during Financial Year 1999-2000 led to a debit balance of Rs 8.18 crores as on 31-3-2000. To this extent, the finding given by the AO and by the Tribunal remains unchallenged. Lastly, on the maintainability of the block assessment, we are of the view that the Department was right in assessing the said amount as deemed dividend in the hands of the assessee under Section 2(22)(e) of the Act. The impugned assessment

order was passed under Section 158-BC. That assessment originated on account of a search conducted under Section 132(1) of the Act. In that search the diary "ML-20" was identified. That identification was the starting point of connected enquiries resulting in the detection of undisclosed income of Rs 5.99 crores. In other words, undisclosed income, in the nature of deemed dividend, did not arise from any scrutiny proceedings, tax evasion petitions, surveys, information received from external agency, etc. The undisclosed income was detected by the AO wholly and exclusively as a result of a search and, therefore, the Department was right in invoking the provisions of Chapter XIV-B. There is one more aspect in this regard. From the facts, indicated above, the Department has established a sort of circular trading in this case. One of the important features of circular trading is to route the funds through conduits. In such cases the picture emerges only after seeing the cash-flow statements. In the present case, ML-20 made the AO to hold enquiries and in that enquiry the cash-flow statement emerged, therefore, the Department was right in invoking the provisions of Chapter XIV-B in the present case. The five payments had direct correlation with Rs 5.99 crores paid by MKSEPL to MKF and MKI and payments by the said two firms to the assessee who used the said money to buy 9% RBI Relief Bonds. Therefore, the said payment by the company through the two firms was for the benefit of the assessee. Therefore, the said funds were not repayment of loans, they were for purchase of 9% RBI Relief Bonds by the respondent.

7.6 The Court further held referred to the decision of the Calcutta High Court in **Nandlal Kanoria v. CIT, [1980] 122 ITR 405** and the Bombay High Court in **CIT v. P.K. Badiani, [1070] 76 ITR 369**, and held thus:

16. The above two judgments indicate that the question as to whether payment made by the company is for the benefit of the assessee is a question of fact. In this case, the Tribunal has concluded that the payment routed through MKF and MKI was for the benefit of the assessee. This was a finding of fact. It was not perverse. Therefore, the High Court should not have interfered with the said finding. Further, the above two judgments lay down that the concept of deemed dividend under Section 2(22)(e) of the Act postulates two factors, namely, whether payment is a loan and whether on the date of payment there existed "accumulated profits". These two factors have to be correlated. This correlation has been done by the Tribunal coupled with the fact that all withdrawals were debited in the capital account of the firm leading to

the debit balance of Rs 8.18 crores. The High Court has erred in disturbing the findings of fact.

7.7 Thus, the Supreme Court in the above decision has recorded that there were findings of fact to establish that the payment made by the loan giver company in which the assessee had substantial interest to the two concerns in which the assessee had substantial interest had been travelled to the assessee. The court found that the two concerns to whom loans were given were used as a conduit and that the payment made by the loan giver company through the two concerns were for the benefit of the assessee.

7.8 Section 2(22)(e) of the Act as it stood at the relevant time and to the extent the same is relevant for the present purpose reads thus:

“(22) “dividend” includes-

(e) any payment made 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 beneficial owner of the shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than 10% of the voting power, or to any concern in which such shareholder is a member or a partner and in which he has substantial interest, or any payment by any such company on behalf of or for the individual benefit of any such shareholder, to the extent to which the company in either case possesses accumulated profits to be dividend.

7.9 Thus, under section 2(22)(e) of the Act, if a person who is a beneficial owner of shares holding not less than 10 % of the voting power in a company as described therein, and such

company makes any payment:

(i) to the shareholder; or

(ii) to any concern in which such shareholder is a member or a partner and in which he has substantial interest; or

(iii) on behalf of or for the individual benefit of any such shareholder;

then, to the extent to which the company in either case possesses accumulated profits, the same shall be deemed to be dividend.

7.10 Thus, section 2(22)(e) envisages payment by way of loan or advance in any of the three modes provided therein to be deemed dividend in the hands of the concerned shareholder to the extent of the accumulated profits of the loan giver company. As held in the above decision, the concept of deemed dividend under section 2(22)(e) of the Act postulates two factors, namely, whether the payment is a loan and whether, on the date of payment there existed “accumulated profits” and that these two factors have to be co-related.

7.11 Examining the facts of the case in the light of the above legal and statutory position, this case relates to the second mode of payment envisaged under clause (e) of section 2(22) viz. to any concern in which such shareholder is a member or a partner and in which he has substantial interest. From the reasons recorded it emerges that according to the Assessing Officer unsecured loans have been extended by M/s JP Infrastructure Limited to its sister concerns, viz. Gujarat Mall Management Co. Pvt. Ltd. and Aryan Arcade Pvt. Ltd. and that the petitioner held 27.49% shares in M/s JP Infrastructure

Limited; 50% shares in Gujarat Mall Management Co. Pvt. Ltd.; and 29% shares in Aryan Arcade Pvt. Ltd., which according to him had to be treated as deemed dividend in the hands of the shareholder and taxed accordingly. As is apparent on a plain reading of the reasons recorded, while the Assessing Officer has information that M/s JP Infrastructure Limited has advanced unsecured loans as referred to therein to its sister concerns, viz. Gujarat Mall Management Co. Pvt. Ltd. and Aryan Arcade Pvt. Ltd., there is no information to the effect that such payment was made for the benefit of the petitioner. Except for the fact that the loan giver company in which the petitioner had shareholding in excess of 10 per cent of the voting power, had given loans and advances as referred to therein to two concerns in which the petitioner had substantial interest, the reasons are totally silent as regards any benefit having been obtained by the petitioner from the said loan transactions. It is not the case of the respondent that even if no amount has travelled to the petitioner, he would still be liable to be taxed for the said transactions merely by dint of the fact that two concerns in which he had substantial interest had received loans from a company in which he had shareholding exceeding 10 per cent of the voting power. According to the respondent, the question as to whether or not the amount had travelled to the petitioner is a matter to be decided at the stage of evaluation at during the course of the re-assessment proceedings. Evidently, therefore, the Assessing Officer has not recorded any satisfaction that the amount paid by M/s JP Infrastructure Limited to its sister concerns, viz. Gujarat Mall Management Co. Pvt. Ltd. and Aryan Arcade Pvt. Ltd. had been paid for the benefit of the petitioner. In the opinion of this court, in the light of the decision of the Supreme

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

7.12 Besides, as pointed out by the learned counsel for the petitioner, the council has decided to make Accounting Standard (AS) 18, which relates to Related Party Disclosures mandatory only to the enterprises mentioned therein and not to all enterprises. The two categories of enterprises are mentioned therein are (i) enterprises whose equity or debt securities are listed on a recognised stock exchange etc. and (ii) all other commercial, industrial and business reporting enterprises, whose turnover for the accounting period exceeds Rs.50 crores. In the facts of this case, the petitioner being an individual does not fall in the first category; and since his gross total income is only Rs.1.48 crores, he also does not fall under

the second category of enterprises. Therefore, also there does not appear to be any specific requirement for the petitioner to disclose such transaction. In the aforesaid premises, this court is of the view that on the reasons recorded by the Assessing Officer, he could not have formed the belief that income chargeable to tax has escaped assessment.

7.13 If the contention of the learned counsel for the respondent that the fact as to whether the petitioner has benefitted from the transaction or not is a matter to be decided at the stage of evaluation of the material during the course of re-assessment were to be accepted, it would amount to allowing the Assessing Officer to make a fishing inquiry to ascertain as to whether or not any income has escaped assessment. For the purpose of invoking section 147 of the Act, the Assessing Officer has to form a belief that income chargeable to tax has escaped assessment and not that income chargeable to tax may have escaped assessment.

7.14 Another aspect of the matter is that in this case the assessment year is 2008-09 and the impugned notice has been issued on 27.03.2015, which is clearly beyond a period of four years from the end of the relevant assessment year. Moreover, assessment for the assessment year under consideration has been made under section 143(3) of the Act. Therefore, in the light of the first proviso to section 147 of the Act no action can be taken under the section unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. The question that then arises for consideration is whether

there was any such failure on the part of the petitioner to disclose fully and truly all material facts necessary for this assessment for the assessment under consideration. On behalf of the respondent it has been contended that while the petitioner has shown the extent of his shareholding in the three concerns in which he had substantial interest as shown in the first table in the reasons recorded, he had failed to disclose the loans advanced by M/s JP Infrastructure Limited to Gujarat Mall Management Co. Pvt. Ltd. and Aryan Arcade Pvt. Ltd. In the opinion of this court, unless the petitioner had received any benefit from the loan transactions referred to in the reasons recorded, there was no obligation cast upon him to disclose the same. Furthermore, as rightly submitted by the learned counsel for the petitioner, the transactions in question being between independent entities, the petitioner may not even be aware of such transactions if they were not for his benefit.

7.15 As discussed earlier clause (e) of section 2(22) of the Act, postulates two factors, firstly, whether the payment by the company in which the shareholding of the assessee is more than 10 per cent of the voting power is a loan; and whether on the date of payment there existed "accumulated profits". In the facts of the present case, the reasons recorded do not say that the petitioner has received any loan from the loan giver company, nor do they say the amount advanced by the loan giver company to the two concerns in which the petitioner had substantial interest, was out of the accumulated profits of that company. Therefore, in absence of either of the two factors being satisfied in the reasons recorded, it is clear that the reopening of assessment is without due application of mind on

the part of the Assessing Officer.

7.16 It has also been contended on behalf of the petitioner that the format for the income tax return does not provide for disclosure of such details; whereas on behalf of the respondent strong reliance has been placed on the decision of this court in ***Dishman Pharmaceuticals and Chemicals Limited v. Deputy Commissioner of Income Tax*** (supra) for the purpose of demonstrating that a similar contention raised therein has been repelled by this court. It may, therefore, be necessary to refer to the facts of the case in ***Dishman Pharmaceuticals and Chemicals Limited*** (supra). In that case the Assessing Officer had recorded that during the assessment proceedings of assessment year 2006-07, it was seen that the amounts given by SDBL to the assessee were in the nature of loan transactions on which section 2(22)(e) was clearly applicable. Since there was opening balance of Rs.2,91,10,000/- in the books of SDPL in the case of the assessee for assessment year 2006-07, the assessee was asked to produce accounts of earlier years. On a perusal of the accounts of the assessee it was seen that the assessee held 22.3% shareholdings in M/s Schutz Dishman Biotech Limited [SDBL]. Apart from business transactions, it was seen that [as per information available on records], SDBL had also given loans to the assessee. On perusal of the accounts for assessment year 2003-04 (the assessment year under consideration) it was found that the assessee company had taken loans of Rs.2,03,50,000/- from SDPL. This court observed that if the payment by a Company to an assessee fulfills the conditions laid down in clause (e) of section 2(22) of the Act, the same has to be treated as deemed dividend of the

assessee for that year, in which such payment is made. Thus, if the petitioner was holding shares of not less than 10 per cent of the voting power in SDBL, such payment of Rs.2,03.50,000/0 for the relevant year would be treated as “deemed dividend”. The fact necessary to ascertain whether such payment could be treated as “deemed dividend” under section 2(22)(e) was whether the assessee was holding share of not less than 10 per cent of the voting power in SDBL. The court found that from the return submitted by the assessee and the documents produced along with such returns, nowhere can it be ascertained as to what was the share holding in terms of the voting power of the assessee-company in SDBL. While the assessee had disclosed the number of shares it held in SDBL, the extent of its holding in SDBL, namely that it was more than 10% of the voting power was not disclosed. It is in this backdrop that the court held that the petitioner-Company had failed to truly and fully disclose all material facts.

7.17 Thus, it is evident that in the facts of the said case: (i) the petitioner company had obtained a loan from a company in which it had shareholding not less than 10 per cent of the voting power. While the loan was disclosed and the number of shares held in the loan giver company was disclosed, the extent of the petitioner's shareholding in the said company, which is a relevant fact for the purpose of computation of deemed dividend under section 2(22)(e) of the Act, had not been disclosed. In the facts of the present case, it is not the case of the Assessing Officer that the petitioner has received any loan from the loan giver company or that the loans advanced by the loan giver company in which the petitioner had shareholding of not less than 10% of the voting power to

the two concerns in which the petitioner had substantial interest was for the benefit of the petitioner. The petitioner had also disclosed the extent of his shareholding in the loan giver as well as loan receiver companies. The reopening of assessment is founded on the premise that the petitioner did not disclose the transactions between the loan giver company in which he had shareholding not less than 10 per cent of the voting power and the loan receiver concerns in which he had substantial interest. However, as discussed earlier, when the amount received by the two concerns from the loan giver company was neither received by the petitioner nor was it for the benefit of the petitioner, such amount cannot be considered as deemed dividend in the hands of the petitioner, and consequently no income accrued to the petitioner from such transactions. In the absence of any finding having been recorded by the Assessing Officer that any income had accrued in favour of the petitioner, it is not possible to say that there was any obligation cast upon him to disclose such transactions. Under the circumstances, in the absence of any failure on the part of the petitioner to disclose fully and truly all material facts necessary for his assessment, the reopening of assessment beyond a period of four years from the relevant assessment is without authority of law.

7.18 On behalf of the respondent reliance has been placed by the learned counsel on the decision of the Delhi High Court in ***Honda Siel Power Products Limited v. Deputy Commissioner of Income Tax*** (supra), wherein the court has held that the term “failure” on the part of the assessee is not restricted only to the income-tax return and the columns of the income-tax return or the tax audit report. This is the first

stage. The said expression “failure to fully and truly disclose material facts” also relate to the stage of assessment proceedings, the second stage. There can be omission and failure on the part of the assessee to disclose fully and truly material facts during the course of the assessment proceedings. This can happen when the assessee does not disclose or furnish to the Assessing Officer complete and correct information and details it is required and under an obligation to disclose. Burden is on the assessee of make full and true disclosure. While there can be no quarrel with the above proposition of law, as discussed hereinabove, on facts, this court has found that there was no such obligation on the part of the petitioner to disclose the transactions between M/s JP Infrastructure Limited and Gujarat Mall Management Co. Pvt Ltd and Aryan Arcade Pvt. Ltd. as he had not received any benefit from such transaction. The aforesaid decision therefore, does not further the case of the respondent.

8. For the foregoing reasons, the petition succeeds and is accordingly allowed. The impugned notice dated 27.03.2015 issued by the respondent under section 148 of the Income Tax Act, 1961 reopening the assessment of the petitioner for assessment year 2008-09, as well as all proceedings pursuant thereto are hereby quashed and set aside. Rule is made absolute accordingly, with no order as to costs.

(HARSHA DEVANI, J)

(G.R.UDHWANI, J)

Z.G. SHAIKH