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INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER

ITA No.: -2167/Del/2014
Assessment Year: 2006-07

ACIT Circle-32(1) New Delhi.	Vs.	M/s. Wig Investment 79, Sunder Nagar New Delhi. PAN AAAFW6972B
(Appellant)		**(Respondent)**

CO No. 21/Del/2015
(ITA No. 2167/Del/2014)
Asstt. Year 2006-07

M/s. Wig Investment 79, Sunder Nagar New Delhi PAN AAAFW6972B	Vs.	ACIT Circle-32(1) New Delhi.
(Appellant)		**(Respondent)**

ITA No. 4141/Del/2015
Asstt. Year 2011-12

ACIT Circle-52(1), Room No. 1405, 14th Floor, E-2 Block, Dr. S.P. Mukherjee Civic Centre New Delhi.	Vs.	M/s. Wig Investment 79, Sunder Nagar New Delhi. PAN AAAFW6972B
(Appellant)		**(Respondent)**

Department by:	Shri Vijay Verma, CIT(DR) Shri Amit Jain, Sr. DR
Assessee by:	Shri Vinod Kumar Bindal, Smt. Sweety Kothari, CA
Date of Hearing	06/08/2018
Date of pronouncement	16/10/2018

O R D E R

PER AMIT SHUKLA, J.M.

The appeal for the assessment year 2006-07 has been filed by the Revenue and cross objection by the assessee; and the appeal for the assessment year 2009-10 has been filed by the assessee, against common impugned order dated 27.1.2014, passed by Ld. CIT (Appeals)-XXVI, New Delhi. Since the issues involved in both the appeals are common arising out of identical set of facts, therefore, same were heard together and are being disposed of by way of this consolidated order.

2. We will first take up revenue's appeal for the assessment year 2006-07 wherein revenue has raised following grounds: -

"(i) The CIT(A) has erred in directing the AO to treat profit of Rs. 4,28,82,839/- from sale of shares/mutual funds under the head 'capital gain' instead of business income without appreciating the fact that this is the core and only business activity of the assessee.

(ii) The CIT(A) has erred in law and on facts in deleting an addition of Rs. 21,08,38,530/- u/s 2(22)(e) in the hands of appellant firm without appreciating the fact that the assessee firm is beneficial owner of shares of companies through its partners (Pradeep Wig – 55% & Neera Wig-45%) and is benefitted by the amount made available by the companies in the guise of capital contribution.)"

3. Apart from that an additional ground has also been filed by the Revenue, which reads as under: -

"(i) Without prejudice to the ground No. 2 the CIT(A), while holding that deemed dividend u/s 2(22)(e) should be taxed in the hands of Shri Pradeep Wig and Ms. Neera Wig erred in not mentioning I explicit terms that his directions are directions u/s 150(1) of the Income Tax Act, 1961."

4. Brief facts are that, earlier the assessment in the case of the assessee was completed u/s 143(3) vide order dated 8.12.2008 whereby the income declared in the return of Rs. 4,18,84,945/- was accepted. Thereafter, such an assessment order was set aside by the Ld. CIT in his revisionary jurisdiction u/s 263, vide order dated 15.3.2011 on the ground that, provision of deemed dividend u/s 2(22)(e) has not been examined; and redemption of mutual funds by the assessee during the year should be treated as 'business income' as against the capital gains declared by the assessee. The assessee is a partnership firm and one of the clauses in the Partnership Deed was to invest in equity and debt funds and other kinds of securities. During the year assessee has shown gain of Rs. 4,88,00,000/- on redemption of Mutual Funds which was declared as short-term capital gain and also certain dividend income was earned on the said investment. The firm came into existence vide partnership deed dated 12.7.2005 which was later on amended on 31.8.2005. The assessee firm consists of four partners sharing profit and loss as under: -

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Particulars	Share in Profit	Share loss	Profit shared (Rs.)
M/s. Pradeep Wig HUF	20%	67%	109.99 Lakhs
Mrs. Neera Wig	10%	33%	54.99 Lakhs
M/s. Kwality Ice Creams (I) (P) Ltd.	50%	Nil	274.98 Lakhs
M/s. Kwality Processed Food Services Equipments (P) Ltd.	20%	Nil	109.99 Lakhs

4.1 As per the amended partnership deed the object of the firm was to carry out money lending business, trading, etc. and making investments in shares and securities. However, the assessee firm has not carried out any business activities as per its objects in the relevant year being the first year and had only undertaken transaction in 15 mutual funds and 2 portfolio investments. Volume of such transactions aggregated to Rs. 129.06 crores which included; (i) Rs. 97.51 crores through the bank; (ii) Rs. 31.55 crores through switch over from one mutual fund to another mutual fund; and (iii) Rs. 28 crores through dividend reinvestment. The total redemption of mutual fund amounting to Rs. 97.23 crores and dividend income of Rs. 1.74 crores were received during the year.

4.2 Ld. AO observed that the assessee firm has carried out only purchase and sale of mutual funds and securities on which short term capital gain of Rs. 4,18,84,950/- earned on redemption of units of

mutual funds has been shown in the return of income under the head "capital gains". However, he held that the amount of Rs. 4,31,96,995/- derived on redemption of mutual fund is assessable as business income. This he deduced from the fact that in the original Partnership Deed dated 12.7.2005 the assessee firm was constituted with the intention of doing business in shares and securities as per clause – 2 of the deed which reads as under: -

> *' …….the business of the firm shall be comprising of investment in stock, shares, debenture, bonds, mutual funds or any other securities of lending of monies for interest…..'*

This deed was later on modified on 31.8.2005 and the word '*business*' was removed and hence AO even questioned the existence of the firm in absence of any business activities carried out in the relevant assessment year. He took note of section 6, 11 and 12 of the Partnership Act and opined that the Partnership Firm is a group of persons for carrying of business and distributing profit among themselves and profit can be earned only from business. Section 6 of the Partnership Act provides that the real relation between the parties has to be considered. Sharing of profits or returns arising from property does not make such person, partners. Even receipt of a share of profits of a business does not itself make him a partner in certain cases. Section 11 of the Partnership Act provides that the mutual rights and duties of the partners of the firm may be determined by way of contract which may be express or implied and the terms and

condition of the said contract can be varied. Section 12 provides that every partner has a right to take part in the conduct of the business. Relying on these provisions he deduced that the Partnership firm can carry business to share profits.

4.3 Thereafter, AO relied upon various judgements and inferred that volume of the transaction and the quantum involved goes to show that income earned by the assessee firm is a business income and not merely investment to earn dividend. The purchase and sale of Mutual Funds was the only activities and the total purchases were Rs. 97.51 crores and mutual fund worth to Rs. 41.17 crores were outstanding as investment in the balance sheet as on 31.3.2006. The purchases were made solely with an intention of resale at a profit and not for earning dividend; and thus, such a volume proves the intention of the assessee which was to earn profit and earning of dividend was only an activity incidental to the trade. The assessee has itself admitted that only an amount of Rs. 3 crores were invested through portfolio managers and all other investment has been made directly by the assessee which shows that the intention was to purchase and sale in MF in the usual trade of business. Merely showing the securities as investment and offering the profit as capital gain will not change the income. Accordingly, he treated the entire short term capital gain by

the assessee as business income and computed the same in the following manner:-

Profit of business:	Rs. 4,31,96,995/-
Less: Expenses allowed as discussed above:	Rs. 3,14,156/-
Income from business:	Rs.4,28,82,839/-

5. Before the Ld. CIT (A), assessee made very detailed submissions and also relied upon the various case laws which have been dealt and incorporated in the impugned appellate order from pages 6 to 11. After considering the entire facts and material on record and submissions made by the assessee, Ld. CIT(A) noted down the fact that in both the partnership deed the word "business" existed, however later on it was amended and the word '*business*' has not been removed but it is appearing prior to the phrase 'lending of monies'. In the case of assessee, the capital invested was rotated only 3.13 times in the entire year and it has not entered into large number of transactions as alleged by the AO and if one goes by the terms of value and also rotation of its capital then it can be seen that it not huge which is evident from the fact that only 23 transactions of redemption of mutual funds units have been done and such a lower rate of capital investment to turnover itself indicates intention of the assessee to undertake investment in mutual fund was not as a business activity. The material on record shows that transaction of purchase and redemption of mutual funds were undertaken only in 15 mutual funds

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during the year and transactions in same mutual funds were neither invested nor redeemed repeatedly, because the assessee has invested in different mutual funds and the same were not churned again and again. He further observed that the presence of commercial motive is a primary legal requisite in trade which is not established in the case of the assessee, because assessee has only invested in mutual fund for earning the dividend and appreciation in value therein which is evident from the fact that assessee has not repeatedly invested in units in the same mutual fund and they were not for reaping the profits looking to the volatile market condition. No borrowed fund has been utilised and the investments have been made out of own funds and these have been classified as 'investment' and not as 'stock in trade' in the books of accounts or balance sheet. Thus, after detailed discussion and appreciating the assessee's contention Ld. CIT(A) held that the gain arising out of redemption on mutual fund is to be assessed under the head capital gain and not as a business income.

6. Before us Ld. DR submitted that apart from activity of investment in mutual fund no other activities have been done by the assessee and the Ld. CIT (A) has ignored one crucial fact that all the transactions have been taken place within six months and even a solitary transaction can be treated as a business transaction and

entire arrangement was to earn profit. He thus, strongly relied upon the order of the AO.

7. On the other hand, Ld. Counsel for the assessee Shri Vinod Kumar Bindal after explaining the entire facts and referring to various documents filed before the authorities below submitted that as per the revised deed of partnership the main object was as under: -

> *"That* ***the firm shall invest in stocks, shares, debentures, bonds, Mutual funds, or any other securities and carry on the business of lending of monies for interest****, or on other terms and conditions out of own funds or arranged funds in the name of the firm or such other names as may be mutually agreed to among the partners and for this purpose borrowing monies from any source or sources including Banks, Financial institutions, partners and / or their associates or associated concerns or relatives and other persons on such terms and conditions by offering as securities assets of the firm, partners, their associates, associated concerns or relatives that may be mutually agreed among the partners from time to time."*

8. Thus, clearly in so far as investment in stocks, shares, debentures, bonds, mutual funds or any other securities is concerned, it was for the purpose of investment and the business which was intended to be done was of money lending for interest. Drawing our attention to the details of the transaction of mutual funds during the year which has been given at pages 16 and 16A of the paper book, he pointed out that only 15 transactions have been undertaken and there is no repetition of purchase of redemption of mutual fund. Right from the day one the assessee has treated the purchase of mutual funds as

a part of investment in his books of accounts and same has been continued in the subsequent years also. The investments have been made out of its own funds and were never has been treated as part of stock in trade. He further submitted that at no point of time mutual funds were tradable commodities which can be traded in the open market, because it has to be redeemed to the same person from whom it was purchased and since they are not tradable securities and are not exchangeable freely between any two persons, therefore, it cannot be held that assessee was engaged in the business of purchasing and selling of mutual funds. In support of his contention that if shares and securities are disclosed under the head 'investment' then it cannot be treated as stock-in-trade for earning business income, he relied upon various judgments including that Hon'ble Bombay High Court in the case of **CIT vs. Gopal Purohit, 228 CTR 582 (Bombay)** SLP of which has been rejected by the Hon'ble Supreme Court (334 ITR 308); Delhi High Court judgment in the case of **CIT vs. PNB Finance & Industries Ltd. (2010) 236 CTR;** and lastly, Bhanuprasad D. Trivedi (HUF) reported in (2018) 95 taxmann.com19.

9. We have heard the rival submissions, perused the relevant finding given in the impugned orders as well as material referred to before us. The ld. AO has first of all has tried to draw an inference from the 'objects' given in the original Partnership Deed dated

12.7.2005 and amended Partnership Deed dated 31.8.2005 that earlier the assessee firm intended to trade in securities and mutual funds which has been subsequently the amended and word '*business*' has been removed in the amended partnership. If the assessee has amended its clause immediately after one month of its Partnership Deed whereby the word '*business*' has been removed before the phrases, "*stock, shares, debentures, bonds, Mutual funds, or any other securities* ...." and in place the word '*invest*' has been inserted; and the word '*business*' is now appearing before the words "*lending of monies for interest..........",* then how such an amendment be adversely viewed to reach to a conclusion that assessee firm intended to do business in shares, securities and mutual funds. If the assessee firm has decided that it will do investment in shares, securities, mutual fund, etc. and the business activities will only be in money lending business, then it cannot be inferred that the assessee intended to trade in securities and mutual funds also. Moreover, here in this case it is an undisputed fact that the assessee has undertaken transaction of 15 mutual funds and the total redemption value of such mutual funds amounting to Rs. 97.23 crores on which short term capital gain of Rs. 4,18,84,950/- has been shown. One of the observations of the AO is that the Partnership Firm has to carry business only and if it has formed only for the purpose of making an investment, then it is not a valid Partnership Firm. Such an observation is *de hors* any

express provision of law cannot be sustained because, *firstly*, neither in the Partnership Act nor in the Income Tax Act there is any such provision that partnership firm can earn income only from carrying on the business; and *secondly*, it is not necessary that profits earned from business alone can be shared amongst the partners and not any other income earned by the partnership firm. There could be income from any source, like capital gain, income from house property, income from other sources, etc. which can be shared. Thus, this reasoning of AO is devoid of any merits.

10. One very important fact here is that the entire transaction is on account of redemption of mutual fund which is neither freely tradable nor exchangeable in the market. It is a transaction between two persons, that is, person buying the MF and the other is Mutual Fund Manager who facilitates the fund and it can only be redeemed from the same mutual fund manager from whom it has been purchased. Therefore, it would be very difficult to hold that one would carry out business of mutual funds and will not make any investment. If any item is purchased from one person which can be sold or redeemed to that person alone, then it cannot fall into the category of freely traded commodity. For instance, if the FDR is made from a particular bank then same can be encashed by that particular bank alone and it cannot be treated as tradable commodity. The concept of 'business'

alludes to the concept of systematic activity carried out with an object to earn profit. Where investment is the motive then endeavour is to maximise the gain on such investment, but it does not mean that every gain on an investment is always in the nature of trade for profit. Here it is not a case where the mutual funds have been rotated again and again to purchase and sell the same which is a typical feature in a business, *albeit* here in this case as pointed out earlier, only 15 transactions have been undertaken for redemption of mutual funds and investment in the same mutual funds have not been made and redeemed again and again. The purchase of mutual funds has been classified as 'investment' in the books of account and in the balance sheets and such a treatment is continuing in the subsequent periods also and at no point of time, they have been treated as 'stock in trade' in the books of accounts. Thus, the intention of the assessee right from the day one was to make investment in the form of mutual fund and not for the trading. This is also fortified by the fact that no borrowed funds have been utilised in such an investment. The computation and the details of short-term capital shows that mutual funds were held and redeemed mainly on maturity date which again indicates that the intention for purchase of mutual funds was only for the purpose of investment and held for benefits accruing thereon. Further on perusal of the profit and loss account it is seen that there is no expenditure debited which can be said to be incidental for the

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business purpose. Hon'ble Gujarat Court in the case of **PCIT vs. Bhanuprasad D Trivedi (HUF)** reported in (2017) 87 taxmann.com 137, held that, if the assessee had an intention of being an investor and held shares by way of investment in the books of accounts then it has to be treated as investor and any gain arising out of transfer of shares should be treated as capital gains and not business income. Hon'ble High Court has also referred to the CBDT circular dated 29.2.2016 in which guidelines have been provided and one such guidelines is that, if the assessee in respect of the listed shares and securities held for a period of more than twelve months before transfer and treats the same as transfer of shares, then it has to be treated as "capital gain". This circular was later on modified to include unquoted shares also. Though here in this case redemption of mutual funds are for a period less than 12 months, but it is quite clear from the CBDT circular that intention of the assessee and the treatment given by the assessee in the books has been given paramount importance. SLP against the said decision of the Hon'ble Gujarat High Court has been dismissed. The same principle has been earlier reiterated by Hon'ble Bombay High Court in CIT vs. Gopal Purohit (supra) and Delhi High Court in CIT vs. PNB Finance & Industries Ltd. (supra) Accordingly, on facts and circumstances of the case we hold that Ld. CIT (A) has rightly held that redemption of units of mutual funds is to be taxed as

capital gains and not as business. In the result ground No. 1 raised by the revenue is dismissed.

11. Coming to the issue of deemed dividend, the brief facts are that, the Partnership Firm constituted of four partners, viz., i) Pradeep Wig (HUF); ii) M/s. KPFSE; iii) M/s. KICIPL; and iv) Mrs. Neera Wig. The share profit has already been discussed in the earlier part of the order. The two partners namely, M/s. Pradeep Wig (HUF) and M/s. Neera Wig, though may not have contributed any amount as capital contribution but have taken 20% and 10% shares in the net profit and 67% and 63% shares in the net loss. The assessee firm has 6034 shares of M/s. Kwality Ice Cream India Pvt. Ltd. (KICIPL) which has been shown as part of capital contribution by the company. However, these shares were later on transferred in the name of Shri Pradeep Wig individual and thus, Shri Pradeep Wig individual had become the beneficial shareholder in the shares of KICPIL by way of 6030 shares. Ld. AO held that entire funds of both the companies have been given at the disposal of these two persons through the above firm which goes to show that both of them were real beneficiaries to the above transaction. He held that, since assessee firm through its partner was benefited by the amount advanced by the partner companies by way of capital contribution, therefore, transactions are covered within the meaning section 2(22)(e). First of all he has noted the share holding

pattern of M/s. Kwality Ice Creams India Pvt. Ltd. and M/s. Kwality Processed Food Services & Equipment Pvt. Ltd. as on 31.3.2005 and 31.3.2006 which was as under: -

Sl No.	Name of share holder	M/s. Kwality Ice Creams India Pvt. Ltd.			
		As on 31.03.2005		As on 31.03.2005	
		No. Of shares	%Age	No. Of shares	%Age
1.	Neera Wig	7518	46.99%	7518	46.99%
2.	Pradeep Wig	2435	15.22%	8469	52.93%
3.	Neela	11	0.07%	11	0.07%
4	Sonu	1	0.01%	1	0.01%
5	Gauri	1	0.01%	1	0.01%
6	KPFSE	6034	37.71%		

11.1 Similarly, M/s. Kwality Processed Food Services & Equipment Pvt. Ltd. had total subscribed capital of 108 Equity Shares of Rs. 1,000/- each. These shares are held by the persons as per following details: -

Name	Since July 1977	Bonus shares allotted on 11.12.2002	Total	%Age
Pradeep Wig & Neera Wig	5	40	45	41.67%
Neera Wig & Pradeep Wig	5	40	45	41.67%
Shanta Wig & Pradeep Wig	1	8	9	8.33%
Shanta Wig & Pradeep Wig (Dr. K.L. Wig's Estate A/c)	1	8	9	8.33%
	12	96	108	100%

11.2 Thereafter, AO noted the position of capital contribution of the partners of the assessee firm that, M/s. Kwality Ice Creams India Pvt. Ltd. has contributed Rs. 47 crores, whereas M/s. Kwality Processed Food Services & Equipment Pvt. Ltd. has contributed Rs. 14 crores. After detailed discussion and relying upon various judgments, he held that amount of Rs. 15,37,36,375/- and Rs. 5,71,02,155/- is to be taxed as deemed dividend u/s 2(22)(e) in the hands of the assessee firm.

12. Ld. CIT (A) after considering the submissions made by the assessee as well as observations and finding given in the assessment order, held that in order to attract the provisions of 2(22)(e) there should be loan or advance by a company to its shareholder or any payment by any such company on behalf or for the individual benefit of any such shareholder. Every payment by company to its shareholder may not be a loan or advance or any payment by any such company on behalf or for the individual benefit. Here there are four partners and two of them are companies. Now one of the other two partners, Mrs. Neera Wig is a substantial shareholder in one of the partners companies and another partner which is HUF is also a substantial shareholder in another partner company. From the perusal of the balance sheet he noted that the assessee firm has not taken any loan from any of the company, then how a capital

contribution by the partner companies can be treated as loan as advance for the purpose of deemed dividend u/s 2(22)(e). He thus held that amount given by the two partners to the assessee firm in which the shareholders of the company are substantial interest cannot be treated as loan and advances because no one can get a right to share the profit of shareholder by giving loan and advances to it. There are two partner companies who are sharing the profit of the firm as per the partnership deed. However, after observing as above, he held that contribution of capital as partners by these two companies is in the nature of payment for the individual benefit of such shareholders as the other two partners are getting benefit of capital investment and thus it falls in purview of section 2(22)(e). He thus held that, since there is no benefit accrued to the assessee firm but actual to the real beneficiaries, therefore, deemed dividend would be taxable in the hands of the shareholder either registered or beneficial and not in the hands of any other person or the concern to which amount was given as loan or advance paid to any such company or for the individual benefit of any such shareholder. Here the assessee firm is neither a beneficial nor registered shareholder and therefore, deemed dividend cannot be taxed in the hands of the assessee firm. Accordingly, he deleted the addition of deemed dividend in the hands of the firm. But he gave direction to the AO that he may consider remedial action in

the hands of the registered and beneficial of the shareholders, i.e., Shri Pradeep Wig and Mrs. Neera Wig.

13. Ld. DR submitted that this entire arrangement was made to divert the profit of the two companies for the benefit of two partners and all the investment in mutual funds were in the name of Shri Pradeep Wig and Mrs. Neera Wig, because the firm cannot hold on its own name. It is for this reason AO has treated the capital contribution of the two partners in the nature of loan/advance/payments in the benefit of Shri Pradeep Wig and Mrs. Neera Wig to the firm and the same has rightly been taxed in the hands of the firm. He thus strongly relied upon the order of the AO.

14. On the other hand, Ld. Counsel for the assessee submitted that, once it is an admitted fact that the assessee firm is neither a registered nor beneficial shareholder then no deemed dividend can be taxed in the hand of the assessee firm and this proposition is well supported by various judgments, the list and compilation thereof have been given before us. Apart from that, he has submitted that it is purely a commercial transaction whereby the company has given capital contribution to the firm and therefore, such a capital contribution is outside the ambit of provision of deemed dividend u/s 2(22)(e). He thus strongly relied upon the order of the Ld. CIT(A).

15. We have heard the rival submissions and also perused the relevant finding given in the impugned order as well as material referred to before us. The AO has sought to tax deemed dividend in the hands of the assessee firm for sums aggregating to Rs. 21,08,38,530/- on the presumption that the entire capital contribution has been made by the company namely, Kwality Ice Creams (I) (P) Ltd. and Kwality Processed Food Services & Equipments (P) Ltd. and no contribution has been made by the two other partners, namely Shri Pradeep Wig and Mrs. Neera Wig but still they are having share in the net profit of 20% and 10% respectively and the loss if at all was to be suffered by the companies only. In this manner without contribution any amount in the capital these individual persons are sharing the profit and thus such transaction has been sought to be brought within the ambit of section 2(22)(e). AO has also analysed share holding pattern of both the companies and found that Shri Pradeep Wig and Mrs. Neera Wig are one of the major shareholders having controlled over these two companies and also the assessee firm. First of all, it is an undisputed fact that assessee firm is neither the registered shareholder nor the beneficial shareholder in these two companies. These companies were also partner in the assessee firm. If these two companies have made capital contribution in the firm so as to share profits, then such capital contribution does not partake the character of the loan or advance given to the shareholders. The partner contributing in the

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capital in a firm is entitled to gets its remuneration in the form of interest as well as the profit earned from such a capital. Thus, it is purely a commercial transaction and will not fall under the category of loan and advance so as to attract provision of deemed dividend u/s 2(22)(e). CBDT in its **Circular No.19/2017, dated 12th June, 2017** has clarified that commercial transaction would not fall within the ambit of 'advance' in section 2(22)(e). Thus, in wake of such clarificatory circular, such kind of commercial transaction will not fall within the mischief of deemed dividend u/s 2(22)(e).

16. Ld. CIT(A) has deleted the said deemed dividend in the hands of the assessee firm on the ground that *firstly*, such a capital contribution is not a loan or advance, because no one gets right to share the profit of the firm merely by giving loan and advance; and *secondly*, the assessee firm not being the registered or beneficial shareholders in these two companies, therefore, provision of deemed dividend cannot be attracted. Such a conclusion is based on well settled proposition of law, therefore, same is affirmed. However, the Ld. CIT(A) has given direction to the AO to examine the issue of deemed dividend in the hands of individual persons. In so far as the direction of the Ld. CIT(A) to delete the addition of deemed dividend in the hands of the firm the same is affirmed, but in so far as direction given to the AO, we are not interfering in such a direction, because

that issue if at all could be examined if only any such action is taken in the hands of the individuals and not otherwise. Accordingly, the grounds raised by the revenue on this score are dismissed.

17. In so far as the additional ground raised by the revenue that such a direction of the Ld. CIT(A) should have been specifically mentioned that it is within the meaning of section 150(1), we do not find any substance in such a ground, because the power to give such directions is only with the Ld. CIT(A) and this Tribunal cannot hold that any such direction given by the Ld. CIT(A) should be read in a particular manner and within any particular section. Thus, we cannot interfere so as to modify the directions of the Ld. CIT(A) to be read in the manner provided in section 150(1). Thus, additional ground raised by the revenue is dismissed.

18. In so far as the ground raised in the Cross Objection is concerned, that no action should be taken by the AO in the hands of the shareholder on the basis of such direction of Ld. CIT(A), we do not find any merits on such a plea, because the Ld. CIT(A) has mainly made the observation that AO may consider to take remedial action as per the law in the in the hands of the registered or beneficial shareholders. There is no categorical direction, but an observation suggesting the AO to take action as per law. Therefore, grounds raised by the assessee in CO are dismissed.

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19. In so far as the revenue's appeal for the assessment year 2011-12 is concerned the only ground raised is that, Ld. CIT(A) has erred in law in directing the AO to treat the profit of Rs.1,54,79,202/- from sale of shares / mutual fund under the head 'capital gains' instead of business income. As admitted by both the parties, the issue involved in the appeal for the assessment year 2006-07 and this year are exactly the same as during the year assessee has undertaken 7 transactions in redemption of mutual funds and the gain has been offered as 'capital gain'. Hence, our findings given in the aforesaid appeal to the extent that transaction of redemption of mutual fund is to be taxed under the head 'capital gain' and not as business income will apply *mutatis mutandis*.

20. One additional feature in this year is that, assessee has undertaken transactions of sale of two shares also. In the case of transfer on sale of two shares is concerned, the same has been shown as long-term capital gain as these shares were held for more than period of three years and were held as investment in the books of accounts/balance sheet and not as stock-in-trade. AO has treated the transaction of sale of long-term shares as business income on the same logic that assessee firm had intended to do business in shares as held by him in the earlier years. The long-term capital gain and the

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working of capital gain as shown by the assessee in its return of income were as under: -

Long term capital gain on investment in shares	Rs. 1,09,84,077/-	
Less : Exempt U/s 10 (38)	Rs. 1,09,84,077/-	Nil
Long Term Capital Gain on Redemption of Mutual Funds	Rs. 27,31,515/-	
Less : Exempt U/s	Rs. 27,31,515/-	Nil
Short term capital gain on Redemption of Mutual Funds	Rs. 17,63,615/-	

21. AO has treated not only the gain on mutual funds as business income but also gain on profit and sale of shares as also as business income. Now in view of the CBDT Circular dated 29.9.2016, if shares are held for more than 12 months which have been treated as investment, the same has to be taxed under the head 'capital gain' and not as 'business income'. Accordingly, we hold that Ld. CIT (A) has rightly held that gain on account of sale of shares is to be taxed under the long-term capital gain. Consequently, grounds raised by the revenue are dismissed.

22. In the result both the appeals of the revenue and cross objection of the assessee are dismissed.

Order pronounced in the Open Court on 16/10/2018.

sd/- **sd/-**

(L.P. SAHU)
ACCOUNTANT MEMBER

(AMIT SHUKLA)
JUDICIAL MEMBER

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Dated: 16 /10/2018

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Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi