IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

BEFORE SHRI M. BALAGANESH, AM AND SHRI AMARJIT SINGH, JM

(Hearing through Video Conferencing Mode)

आयकर अपील सं/ I.T.A. No.1003/Mum/2020

(**निर्धारण वर्ष** / Assessment Year: 2012-13)

DCIT-CC-3(1), Central Range-3 Room NO.1924, Air India Building, Nariman Point, Mumbai-400021.	**बनाम**/ Vs.	Yogesh Jogindernath Mehra 201, Hare Krishna Presidency Society, North South Road No.8, JVPO, Vile Parle (W), Mumbai-400053.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAAPM6139N		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Revenue by:	Dr. Yogesh Kamat (DR)
Assessee by:	Ms. Ritu Kishor

सुनवाई की तारीख / Date of Hearing: 27/10/2021

घोषणा की तारीख /Date of Pronouncement: 21/12/2021

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The revenue has filed the present appeal against the order dated 18.11.2019 passed by the Commissioner of Income Tax (Appeals) -51 Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2012-13.

2. The revenue has raised the following grounds: -

> *"1. Whether on the facts and circumstances of the case the Ld. CIT(A) was correct in law in deleting the addition of Rs.1,62,20,313/- made on account of deemed dividend by holding that the provisions of the Section 2(22)(e) are not*

applicable when the transactions of loans/advances are made through journal entries even when the loans/advances were reflected in the balance sheets of the respective companies.?

2. Whether on the facts and circumstances of the case the ld. CIT(A) was correct in law in directing the AO to verify the ledger accounts of M/s. WWIL in the books of the six relatd concern which received loans and advances for ascertaining the claim of the assessee that there are no actual payments made/received and only journal entries have been passed and if found correct, to delete the additions made of Rs.1,62,20,313/- on account of deemed dividend in respect of the transactions of M/s. WWIL with the said six concerns, as it amounts to setting aside the issue, which is impermissible in law.?"

3. The brief facts of the case are that the assessee is an individual and derives her income from House Property, remuneration from the partnership firm M/s. Sudershan & Co. and Income from other sources. The assessee filed his return of income u/s.139 on 11.10.2012 declaring an income of Rs 2,16,52,010/-. Thereafter, a search and seizure action u/s. 132 of the I.T. Act was carried out on 14.03.2013 on M/S. Wind World (India) Ltd., which was formerly named as M/s. Enercon (India) Ltd. (henceforth referred to as WWIL/EIL) and its group companies. In the said search the appellant and the main persons of the group were also covered. In course of the search action, it was revealed that the M/s WWIL/EIL has given loans M/s. Enercon Wind Farms (Andhra Pradesh) P Ltd. (Rs.36,29,830/-), M/s Enercon Wind Farms (Kerala) P Ltd (Rs.30,50,000/-), M/s Enercon Wind Farms (Maharashtra) P Ltd (Rs.32,52,342I-), M/S Enercon Wind Farms

(Tamil Nadu) P Ltd (Rs.18,45,398/-), M/s. Enercon Wind Farms (Uttar Pradesh) P Ltd. (Rs.28,52143/-) and M/s Enercon Wind Farms (Gujarat) P Ltd (Rs.18,55,600/-). The amount of loans received by the said 6 related concerns from M/s WWIL/EIL during the relevant year. An aggregate amount was of Rs.1,64,85,313/-. It was further revealed in the said search action that the assessee and his mother, Mrs Sudarshan Mehra have a shareholding more than 10% in M/s WWIL/EIL and also have a shareholding more than 20% in the said 6 related concerns. It was therefore concluded at the time of the search action that the provisions of deemed dividend u/s 2(22)(e) was applicable in respect of the loan transactions involving M/s WWIL/EIL and the said 6 related concerns.

4. Consequent to the said search, the AO issued a notice u/s. 153A on 28.01 .2014. In response to notice the assessee filed its return of income on 11.08.2014 declaring total income of Rs.2,16,52,0081-. Notices u/s. 143(2) and 142(1) were issued and duly served on the assessee. During the course of assessment proceedings, the AO asked the assessee to show cause as to why the provisions of sec 2(22)(e) should not be invoked in respect of the said loans given by M/s WWIL/EIL to the said 6 related concerns for an aggregate amount of Rs.1,64,85,313/- and taxed in his hands. In response, the assessee contended that he was not the recipient of loan from MIs VVINIL/EIL and therefore the question of invoking the provisions of sec 2(22)(e) in his hands, would not arise. Considering the complexity of the matter, directions u/s. 144A of the Addl. CIT. CR-3, Mumbai were sought by the AO. The Addl. CIT directed the AO to invoke the provisions of Sec. 2(22)(e) and make additions on substantive basis in the hands of the shareholders viz the assessee and his mother, Sudarshan Mehra on a

proportionate basis and also make addition on protective basis in the hands of the said 6 related concerns, the recipients of the loans. Following the directions of the Addl. CIT, CR-3, the AO made an addition of Rs.1,60,50,281/-as deemed dividend on substantive basis in the hands of the assessee. The present appeal has been filed against this order u/s 143(3) rws 153A dated 28.06.2017 of the AO. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who partly allowed the claim of the assessee but the revenue was not satisfied, therefore, revenue has filed the present appeal before us.

ISSUE NOS. 1 & 2

4. Issue nos. 1 & 2 are in connection with the deletion of the addition of Rs.1,62,20,313 made on account of deemed dividend by holding that the provisions of the Section 2(22)(e) are not applicable to the transactions of loans/advances made through journal entries and also challenged the direction of CIT(A) in which the AO is directed to verify the ledger accounts of the M/s WWIL/EIL in the books of the said 6 related group companies and recompute the amount of deemed dividend u/s 2(22)(e) after excluding the amounts related to journal entries and considering only those amounts wherein actual payments have been made/received. Before going further, we deem it necessary to advert the finding of the CIT(A) on record: -

> *"6.5 The contentions of the assessee have been duly considered. The Hon'ble Supreme Court in the case of Navnitlal C Javeri (56 ITR 198) has explained the mischief which was sought to be cured by enactment of the provisions of section 2(6A)(e) of the Income Tax Act, 1922*

(the corresponding provisions of section 2(22)(e) of the income Tax Act, 1961). Similarly, the Hon'ble Jurisdictional High Court in the case of P.K. Badiani (76 ITR 369) has explained the mischief which was sought to be cured by enacting the provisions of section 2(22)(e). It has been explained that prior to insertion of the provisions of Sec. 2(6A)(e)/2(22)(e), a company in which the public were not substantially interested would not declare dividends or adequate dividends and would merely give loans to its shareholders. By doing this, it would avoid payment of taxes since, loans are not taxable whereas dividends were taxable then. As the public would not have substantial interest in the lender company, the said loan would never be recovered back and would be allowed to be barred by limitation. The ultimate result would be that the amount which ought to be taxed in the hands of the shareholders as his dividend income would escape the tax net. It is to avoid this evil that the provisions of Sec. 2(6A)(e)/2(22)(e) were enacted which, however, restricted the amount to be taxed as deemed dividend to the extent of the accumulated profits since, dividend is paid only out of the accumulated profits.

6.6 In submissions filed, it has been explained by the assessee that Wind World India Ltd. sells windmills including the plot of land on which the windmills are erected, to the buyers of windmills. It has further been submitted that due to restrictions on holding of land beyond a particular limit in the case of individual

companies, Wind World India Ltd., buys land in the name of its other group companies including M/s. Enercon Wind Farms (Andhrapradesh) P Ltd., M/s Enercon Wind Farms (Kerala) P Ltd , M/s Enercon Wind Farms (Maharashtra) P Ltd , M/s Enercon Wind Farms (Tamil Nadu) P Ltd, M/s.Enercon Wind Farms (Uttar Pradesh) P Ltd., M/s Enercon Wind Farms (Gujarat) P Ltd. and also pays the entire cost of acquiring the land and related costs on behalf of these other group companies. From the submissions, it can be observed that the transaction being shown by the said 6 group companies to be advance received on account of purchase/sale of land is not an actual business transaction but has been entered into with Wind World India Ltd. only to circumvent the various laws which restrict land holdings by individual companies. Thus, the contention of the assessee that the said amount considered for addition as deemed dividend u/s 2 22 e is of the nature of business advance is clear incorrect.

6.7 The assessee has raised an alternative contention that most of the transactions je entered into by M/s. Wind World India Ltd. with the said 6 other group companies which have been considered for addition as deemed dividend u/s 2(22)(e) are by way of journal entries and there are no actual payments made and therefore should have been excluded while making the said addition. On this contention, it is noted that the Hon'ble Kerala High Court in the case of P.V. John (181 ITR 1) has held that the provisions of section 2(22)(e) create a legal fiction for

bringing payments of the nature of loans and advances, in the tax net as deemed dividend and therefore, it will have to be given strict construction, nevertheless, a construction so as to suppress the mischief which it sought to suppress. Similarly, the Hon'ble Jurisdictional High Court in the case of P.K. Badiani (supra) has held that sec. 2(6A)(e) creates a fiction which cannot be extended further or so interpreted as to go beyond the legislature's intention in creating the fiction.

Whether the provisions of section 2(22)(e) are also applicable to book entries or notional payments and not restricted to actual payments.

6.6 The Hon'ble Jurisdictional High Court in the case of Parle Plastics Ltd. (332 ITR 63) has explained that the opening words "any payment" occurring in Sec. 2(22)(e) contemplates actual payment made by the lender company to the shareholder assessee or related entity for being treated as deemed dividend while computing the income of the shareholder assessee. It further held that making a provision for interest cannot be regarded as payment made by the lender company to the assessee shareholder on related entity and only the actual payment received by the shareholder assessee or related entity in the form of loan and advance would fall within the definition of deemed dividend as per Sec. 2(22)(e). The relevant portion of the decision of the Hon'ble Jurisdictional High Court is reproduced as under:

During the relevant previous year (F.Y.1996-97), AMPL had actually lent to the assessee only a sum of Rs.11,68,135/- in two instalments, namely Rs.6,00,000/- on 10.9.1996 and Rs.5,68,135/- on 31.3.1997. The opening balance of Rs.1,76,39,425/- was not advanced by AMPL to the assessee during the relevant previous year and could, therefore, be not treated as the amount of loan or advance received by the assessee during the relevant previous year. The said amount, therefore, could not be included as the dividend (hereinafter, referred to as "the deemed dividend") under clause (e) of Section 2(22) of the Act. The amount of Rs.32,13,367/- represented the provision for the interest which was to be paid by the assessee to AMPL on the old outstanding loan of Rs.1,76,39,425/- and further loan of Rs.11,68, 135/- advanced during the relevant financial year. This was merely an entry regarding the provision. No interest was actually received by AMPL. This amount which was not paid by the AMPL to the assessee cannot be treated as a loan/advance paid by the AMPL to the assessee during the relevant previous year. The opening words "any payment" occurring in clause e of Section 2(22) of the Act contemplates actual payment made by the company to the assessee for being treated as a dividend in computing income of the assessee. Moreover making of a 'provision for an interest which the assessee would ultimately be required to «a to the lender on the money lent cannot be regarded as payment made by the Company to the assessee. As such, the amount of

Rs.32,13,367/- which represents only the provision made for interest which the assessee was liable by way of an interest on the outstanding amount could not b payment made by AMPL within the meaning of clause (e) of Section 2(22) of the Act. Only the amount of Rs.11,68,135/-which was actually received by the assessee as and by way of loan or advance from AMPL would fall within inclusive clause (e) of the definition of "dividend" appearing in Section 2(22)(e) of the Act.

6.7 Similarly, the Hon'ble Madras High Court in the case of G.R. Govindarajalu Naidu (90 ITR 13) has held that the words "payment by way of a loan or advance" employed in Sec. 2(6A)(e) requires that there should be an outgoing or flow of money from the lender company to the shareholder assessee or related entity so as to attract the said provision. It was explained by the Hon'ble Court that the provisions of Sec. 205(5) of the Company's Act, 1956 provides that no dividend shall be payable except in cash, the only exception being the issue of fully paid-up bonus shares or payment towards unpaid call monies on any shares held by the members which suggest that the words "payment by way of a loan or advance" denotes actual payment. The Hon'ble High Court finally concluded that the payment contemplated in sec. 2(6A)(e) would not include notional payments by way of book entries. Similarly, the Hon'ble Madras High Court in the case of G. Venkataraman (101 ITR 673) held that the provisions of deemed dividend u/s. 2(6A)(e) are not attracted if, there

has been no actual payment by the lender company of a loan or advance to the assessee shareholder or related entity. The relevant portion of the decision of Madras High Court in the case of G R Govindarajalu Naidu (supra) is reproduced as under:

"But for the said sum, there was no room for the application of section 2(6A)(e). Having regard to the words 'payment by way of loan or advance' employed in section 2 (6A) (e) there should be an outgoing or flow of money from the company for the shareholder so as to attract the said provision. Some light is thrown by the provision in section 205(5) of the Companies Act 1956 which provides that no dividend shall be able except in cash the only exception being the issue of fully said us bonus shares or the payment towards unsaid call monies on an shares held by the members. In this instant case, the sum of Rs.1,65,000 could not be treated as an advance, for it was not an amount paid towards any other amount due by the company to the assessee-family. The only question then was whether the said sum represented the payment by way of loan by the company to the assessee-family. Having regard to the setting in which the said clause (e) of section 2(6A) occurs, it was not possible to say that the payment contemplated would include a notional payment by way of book entries.

6.8 Similarly, the Hon'ble Madras High Court in the case of Smt. Savithiri Sam (236 ITR 1003) has held that by way

of creating a fiction, dividend has been made to include payments of the nature of loan and advance and therefore, creating another fiction in respect of the words "payment by the company" to construe that even a transfer entry amounts to actual payment, cannot be accepted.

6.9 In view of the aforesaid discussion and the said decisions of the Hon'ble Jurisdictional High Court and Hon'ble Madras High Court, the credit/debit entries by way of journal entries cannot be considered while invoking the provisions of deemed dividend as per Sec. 2(22)(e). From the ledger accounts of M/s WWIL/EIL in the books of M/s Enercon Wind Farms (Andhra Pradesh) P. Ltd., M/s Enercon Wind Farms (Kerala) P Ltd, M/s Enercon Wind Farms (Maharashtra) P Ltd, M/s Enercon Wind Farms (Tamil Nadu) P Ltd., M/s Enercon Wind Farms (Uttar Pradesh) P. Ltd., M/s Enercon Wind Farms (Gujarat) P Ltd, it is observed that only in few instances actual payments have been made / received and for the others only journal entries have been passed. The AO is accordingly directed to verify the ledger accounts of the M/s WWIL/EIL in the books of the said 6 related group companies and recompute the amount of deemed dividend u/s 2(22)(e) after excluding the amounts related to journal entries and considering only those amounts wherein actual payments have been made/received. Accordingly, Ground Nos.2 and 3 are partly allowed."

5. On appraisal of the above mentioned finding, we noticed that the CIT(A) has directed the AO to verify the ledger account of M/s. WWIL/EIL in the books of six related group of companies and re-compute the amount of deemed dividend u/s 2(22)(e) after excluding the amounts related to journal entries and considering only those amounts wherein actual payments have been made/received. We nowhere found these directions as illegal or against law and facts. The facts are not distinguishable at this stage. Moreover, we noticed that the issue has duly been covered by the decision of the Hon'ble ITAT in the assessee's own case for the A.Y. 2007-08 & 2009-10 bearing ITA. No. 4006 & 4008/M/2019 decided on 22.07.2021. The relevant finding is hereby reproduced below:-

> *"12. The facts qua the loans and advances given by M/s. Wind World India Ltd. have already been discussed in the ground no 1 and are not being repeated here. After hearing the rival parties and perusing the material on records, we find that even on merits, the assessee has a very strong case in his favour. We note that these loans and advances were given out of commercial considerations and expediency. The Wind Word (India) Ltd. is engaged in the business of installing wind Mills and sales thereof. In order to install the windmills it needs land. The Wind Word (India) Ltd. purchases land in the name of these related companies in order to overcome the land ceiling conditions imposed by Land Ceiling Act in vogue in various States. For the said purpose, The Wind Word (India) Ltd. advances loans to these companies and thereafter the necessary adjustments are made upon purchase of land. We note that the Wind Word (India) Ltd. has to buy land in the name of related entities/companies and it is only that*

purpose the loans were advanced to the related companies. In our opinion the money was advanced out of business and commercial consideration and therefore not covered by the provisions of section 2(22)(e) of the Act. The case of the assessee is supported by the following decisions namely (i) Chandrashekhar Maruti vs. ACIT ITA No.5410/Mum/2012 47 CCH 0783, 183 TTJ 0459, (ii). Ackruti City Ltd. vs. DCIT [ITA No. 4869/Mum/2009(iii)CIT vs. Suraj Dev Dada [(2014) 46 taxmann.com 402 (Punjab & Haryana)]. In the case of Chandrasekhar Maruti vs. ACIT (supra) the coordinate bench of the Tribunal has held that where there is a running account between the two sister concerns wherein there is a continuous exchange of transactions and the account was squared up during the year, no part of the said amounts could be treated as being attributed to the shareholders. We find that in the case of the assessee, the facts are exactly same as the funds were transferred to various entities inter se out of commercial expediency in order to purchase land in the name of these entities in various states in view of the Land Ceiling Act in vogue in those states. As the installation of windmills and sales thereof is the business of the assessee and the necessary adjustments are made after purchase of land by these entities and therefore the advancing of loans is out of business and commercial consideration. Similarly, in the case of Akruti City Ltd. vs. DCIT (supra) the identical issue was decided in favour of the assessee by holding that financial transactions out of business expediency between two sister concerns can not be called as loans or advances for the purpose of invoking section 2(22)(e) of the Act. The same view as held by the Hon'ble High Court of Punjab & Haryana in the case of CIT vs. Suraj Dev Dada (supra) wherein it has been held that it will be a travesty of law

to apply the provision of section 2(22)(e) of the Act where the assessee had running account with the company with whom the assessee advanced money to the company as and when required for the purpose of business and also in real sense the assessee has not derived any benefit from the funds of the company. The issue is also clarified by CBDT in its circular No.19/2017 dated 12.06.2017 wherein it has been clarified that trade advances in the nature of commercial transactions would not fall within the ambit of words "loans/advances within the meaning of section 2(22)(e) of the Act. Considering the facts and circumstances of the case in the light of various decisions as discussed above, we are of the considered view that the money advanced is used for the purpose of business of the former and therefore can not a loan/deposit to be treated as deemed dividend. Accordingly, we are not in agreement with the conclusion drawn by the Ld. CIT(A) on this issue. Thus we are inclined to set aside the order of Ld. CIT(A) and direct the AO to delete the addition.

13. In the result, the appeal of the assessee is allowed."

Thereafter, by relying upon the above said decision, the Hon'ble ITAT has decided the issue in the assessee's own case bearing ITA. No. 4007/M/2019 for the A.Y.2008-09 by virtue of order dated 27.07.2021. Therefore, taking into account of all the facts and circumstances, we are of the view that the CIT(A) has passed the order judiciously and correctly which is not liable to be interfered with at this appellate stage. Accordingly, we affirm the finding of the CIT(A) on this issue and decide these issues in favour of the assessee against the revenue.

6. In the result, the appeal filed by the revenue is hereby dismissed.

Order pronounced in the open court on 21/12/2021

Sd/-	Sd/-
(M. BALAGANESH)	**(AMARJIT SINGH)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य/JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 21/12/2021
Vijay Pal Singh (Sr. P.S.)

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**