

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A" DELHI**

**BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
&
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

I.T.A. No.3394/DEL/2017
Assessment Year 2013-14

Assistant Commissioner of Income Tax, Circle-II, Block-B, New CGO Complex, Faridabad.	Vs.	M/s. Bhagwati Coal Movers (P) Ltd., Plot No.419-A, Sector-17, Faridabad.
TAN/PAN: AAACB4814C		
(Appellant)		(Respondent)

Appellant by:	Shri Kanav Bali, Sr.D.R.		
Respondent by:	Shri Alok Gupta, CA		
Date of hearing:	04	08	2022
Date of pronouncement:	02	11	2022

ORDER

PER PRADIP KUMAR KEDIA, A.M.:

The captioned appeal has been filed by the Revenue against the order of the Commissioner of Income Tax (Appeals), Faridabad [‘CIT(A)’ in short] dated 24.03.2017 arising from the assessment order dated 28.03.2016 passed by the Assessing Officer (AO) under Section 143(3) of the Income Tax Act, 1961 (the Act) concerning AY 2013-14.

2. The grounds of appeal raised by the Revenue read as under:

“(i) On the facts and in the circumstances of the case, the Ld. CIT(A) has erred on facts and in law in deleting the addition of Rs.56,88,000/- made by the A.O on account of disallowance of interest u/s. 36(i)(iii) of the Act, disregarding the facts that amount of interest on investment made in the assets not used for the business purpose is not allowable.

(ii) On the facts and in the circumstances of the case, the Ld.

CIT(A) has erred on facts and in law in the deleting the addition of Rs.5,49,63,916/- out of addition of Rs.5,52,50,000/- made by the A.O on account of deemed dividend of income as per the provisions of section 2(22)(e) of the Act, disregarding the incontrovertible evidence with regard to loan taken by the assessee from M/s Ajmala Stationery (P) Ltd.”

3. Briefly stated, the assessee is stated to be engaged in the business of supply of coal and real estate business. The assessee filed return of income declaring total income of Rs.1,20,11,130/-. A survey was conducted under Section 133A of the Act on 29.11.2012 at the business premises of the assessee. Consequently, the return of the assessee was subjected to scrutiny assessment. In the course of the scrutiny assessment, the Assessing Officer *inter alia* observed that the assessee is engaged in the business of trading of coal only and no trade in real estate is substantiated. It was further noticed that the assessee has paid Rs.4,74,00,000/- by way of advance for purchase of land during the year under consideration and incurred interest cost thereon which is claimed as revenue expenditure. The Assessing Officer estimated interest @12% *per annum* attributable to such investment in land which worked to Rs.56,88,000/-. The Assessing Officer held that the aforesaid amount of interest of Rs.56,88,000/- has been incurred towards purchase of capital asset being advance towards land and therefore the assessee is not entitled to deduction of such interest expenditure under Section 36(1)(iii) of the Act. Thus disallowance under Section 56,88,000/- was carried out under Section 36(1)(iii) of the Act.

4. The Assessing Officer further observed that it has obtained loan amounting to Rs.5,52,50,000/- from M/s. Ajmala Stationery Pvt. Ltd. A part of the loan amounting to Rs.2,57,00,000/- was repaid during the year. It was observed by the Assessing Officer that the assessee-company is beneficial owner if more than 10% of

voting power in the lender-company and thus susceptible to provisions of Section 2(22)(e) of the Act and consequently the amount of Rs.5,52,50,000/- is liable to be taxed as deemed dividend income under Section 2(22)(e) of the Act. The addition was accordingly made in the hands of the assessee to this extent.

5. Aggrieved by such additions, the assessee preferred appeal before the CIT(A). The CIT(A) took note of the factual matrix and submissions made on behalf of the assessee. The respective issues dealt with by the CIT(A) are reproduced hereunder:

“8. Ground No. 2 deals with the fact that the AO has made an addition of Rs.56,88,000/- by disallowing interest Rs.56,88,000/- @ 12% u/s 36(1)(iii) by holding that investment of Rs.4,74,00,000/- for purchase of land remained invested during the year which were never put to use for the business purpose, as evident from para 5 of the assessment order.

9. During the course of appellate proceedings, the Ld. AR of the appellant filed written submissions on this issue, which are reproduced as below:

“That the LD AO erred in law and erred in facts to disallow interest Rs.56,88,000/- on the pretext of investment Rs.4,74,00,000/- not used for business purpose u/s 36(1) Hi of the Income Tax Act, 1961.

- The disallowance of interest Rs. 56,88,000/- @ 12% u/s 36(1)(iii) has been made holding investment of Rs. 4,74,00,000/- for purchase of land remained invested during the year which were never put to use for the business purpose, without considering the details of the documents for the shortage of time, by the time the details of the documents in corroborating the claim had been submitted, the assessment was concluded.*

- The established facts is, company also deals in real estate business and this had been ratified in his case even from LD AO &*

Hon, ITAT in the AY 2007-08, since this addition made grossly ignoring the facts of the case a'nd ON WRONG BELEIF THAT COMPANY DOES NOT DEAL IN REAL ESTATE BUSINESS. The copy of respective order establishing that the company also deal in the real estate business are being enclosed in the paper index book.

- *The Ld AO never verified this fact before going to such assessment. There is no change of company business for the during year.*

- *Since it has been established that the company also deal in real estate business this addition on the footing of wrong belief of the Ld AO. Thus the investment made by assessee company amounting*

Rs. 4,74,00,000/- is in the course of the routine business this addition u/s 36(1) iii need to be deleted.

10. I have perused the submissions of the appellant and the order of the AO. I find that the addition has been made by the AO by holding that the appellant is not engaged in the business of real estate. The facts relevant to this ground are that the appellant has made an advance of Rs.4,74,00,000/- during the year for purchase of land. The AO has made disallowance u/s 36(l)(iii) by holding that the appellant is not engaged in real estate business and since this capital asset was not put to use during the year, disallowance @ 12% on Rs.4,74,00,000/- working out to Rs.56,88,000/- has been disallowed from the interest expenses of the appellant.

11. The Ld. 4TR in his written submissions has vehemently objected to these findings. He has contended that the appellant is indeed engaged in the business of real estate and hence the disallowance u/s 36(l)(iii) has been wrongly made by the AO. To establish his case the appellant has furnished following evidences:

(i) Order of the Hon'ble ITAT in the case of the appellant for Asstt. Year 2007-08, wherein exactly the same issue has been

adjudicated by the Hon'ble ITAT in the case of the appellant. The relevant part of the same is as below:

"2. The facts of the case are that the assessee company filed its return on 30.10.2007 declaring total income of Rs. 43,10,400/-. The return was processed u/s 143(1) of the Income-tax Act, 1961 on 21.11.2008. Thereafter, the case was taken up for scrutiny by issuing notice u/s 143(2) on 26.9.2008. The assessee is carrying on the business of purchase and sale and transportation of coal and allied material. It is also carrying on the business of development of real estate. It was noticed that the assessee claimed deduction of bad debt amounting to ' 11,59,019/- which inter-alia contained as sum of 2,24,500/-, being the advance paid to Municipal Corporation of Faridabad in respect of open bid for purchase of land for the purpose of constructing shops thereon. The assessee could not pay further installments, therefore, the amount was forfeited. Accordingly, the amount was written off as bad debt. The assessee was required to explain how the amount is deductible in computing the total income, particularly in view of the provisions contained in sections 36(1)(vii) and 36(2) of the Act....

5. We have considered the facts of the case and submissions made before us. The AO has clearly mentioned in paragraph 2 of the assessment order that the assessee is carrying on the business inter-alia of development of real estate. The money was advanced to the Municipal Corporation for purchase of land on which shops were proposed to be construction. After making the initial advance, the assessee was not able to make payments of subsequent installments. Therefore, the Corporation forfeited the amount. From the aforesaid, it is clear that the advance was made for the purpose of acquisition of stock-in-trade. It was not for the purpose of acquiring any fixed asset for running the business, rather it was for acquiring the stock-in- trade. Therefore, the advance made to the Corporation was in the course of Carrying on the business of

real estate. Accordingly, the loss on forfeiture of the advance is in the revenue field. The assessee has not acquired any capital asset. It has also not obtained any advantage of enduring nature so as to constitute the expenditure to be capital expenditure. Accordingly, it is held that the loss has been incurred in revenue field in the course of business. Therefore, the same is deductible in computing the total income...."

(ii) During the course of appellate proceedings the Memorandum and Article of Association of the appellant company were called for by me to examine whether business of real estate formed a part of the objects of the company. It is seen that it is reflected as one of the objects of the company as per clause 48 of the MOA.

Thus in view of these facts, it is clearly established that the appellant is engaged in the business of real estate. Once this fact is established no disallowance u/s 36(1)(iii) is called for. Hence the same is deleted and this Ground of the appellant is allowed.

12. Ground No. 3 deals with the fact that the AO has made an addition of Rs.5,52,50,000/- u/s 2(22)(e) of the Act as evident from para 7 of the assessment order.

13. During the course of appellate proceedings, the Ld. AR of the appellant filed written submissions on this issue, which are reproduced as below:

"That the LD AO erred in law and facts to make the addition of Rs.5,52,50,000/- u/s 2(22)(e) without calling due explanations.

- The disallowance of Rs. 5,52,50,000/- u/s 2(22) (e) for deemed dividend on the amount of Rs. 5,52,50,000/- loan raised from M/s Ajmala Stationery Pvt. Ltd, has been made, without considering the details of the documents for the shortage of time and by the time the details of the documents in corroborating the claim had been submitted, the assessment was concluded.*

- *In the para 7 the addition on account of Deemed Dividend u/s 2(22)e:*
- *LD AO has made the addition of Rs.5,52,50,000/- on account of loan taken from M/s Ajmala Stationery Pvt. Ltd by the assessee company treating the deemed dividend income as per the provisions of section 2(22)e.*
- *The amount considered as general reserve of the above said company is 24,48,16,083/- which include the Share premium amount of Rs. 24,45,30,000/-. Whereas the amount of general reserve is only Rs. 2,86,084/- (24,48,16,083 - 24,25,30,000/-) and thus the addition under the deemed provisions of Act should be restricted to Rs. 2,86,084/- only as against Rs, 5,52,50,000/-.*
- *The Balance Sheet of the company and the certificate from the statutory auditor of the company is being enclosed herewith to substantiate the facts stated above.*

Share premium account:

- *Any sum collected in respect of issue of shares (except interest for delayed payment of allotment or call money) over and above paid-up of face value of shares is considered as share premium. This is a capital receipt and is not in nature of income or revenue receipt. This is to be shown as Reserve under the head 'Reserves and Surplus' in the balance sheet of the company as per provisions of the Companies Act. Share premium can be utilized only for purposes which are permitted under the Companies Act, 1956. Any other use is considered as reduction of capital which can be made only with approval of court. The provisions of Companies Act prohibit use of share premium account for declaration of dividend.*
- *Share premium is a capital receipt and it is contributed by shareholders while subscribing or applying for shares to be issued by the company. Therefore, when a company issues shares at a*

premium, it receive share application money, allotment money and call money etc. from shareholders which consists some portion towards share capital and other towards premium.

Share premium is not profit:

- *As discussed earlier, share premium is not in nature of 'profit' or 'gain', and therefore it cannot be regarded as accumulated profit. Therefore, irrespective of any restrictions, which the Companies Act may provide on its use or a company may provide through its memorandum of association or articles of association, the share premium cannot be regarded as 'profit' or 'gain' when it is received and as 'accumulated profit' or 'accumulated surplus', subsequently.*

- *As per Company Act 1956 S. 78 (2) provides five purposes for which alone the share premium account may be applied without attracting consequence of reduction of the share capital. These are:*

- (i) Issue and pay up fully paid bonus shares to be issued to the members;*

- (ii) to write-off preliminary expenses of the company;*

- (Hi) to write-off expenses of issue of shares or debentures or under-writing commission paid or discount allowed on such issues;*

- (iv) To pay premium on the redemption of redeemable shares or debentures issued by the company;*

- (v) Purchase of its own shares or other specified securities in terms of section 77A.*

The covered case laws:

Decision of ITAT in context of S. 2(22) (e) and share premium:

In Deputy Commissioner of Income-tax, Co. Circle 2(2), New Delhi V. MAIPO India Ltd.(IT Appeal No. 2266 (Delhi) of 2005 for Assessment year 1996-97 decided on March 7, 2008 the question

for consideration was whether loan or advance given by a company, when the company had share premium as one of reserves in books of account can be considered as dividend u/s 2(22) (e).

The Tribunal relied heavily on the provisions of the Companies Act, 1956 according to which share premium cannot be used to pay dividend and it can be used only according to permitted purposes. Utilisation of share premium for any other purpose is considered as reduction of capital and the provisions for such reduction are applicable.

- *In this case assessee held 40% of the shares of another company "G"; therefore it was a shareholder having substantial interest within the meaning u/s 2(22). During the previous year relevant to the assessment year 1996-97, it received an amount of Rs. 25,42,772 as advance from 'G'. The amount was in the nature of loans and advances*
- *The assessee repaid Rs. 14,31,000 and the balance remained outstanding. Assessing Officer included the balance amount of Rs. 11,11,772 as deemed dividend in the hands of the assessee under section 2(22)(e).*
- *The case of the assessee was that entire reserve and surplus amount appearing in the books of G' Ltd. consisted of share premium which was a capital receipt and could not have been distributed as dividend.*
- *The Assessing Officer while rejecting assessee's contention, took view that in sub-clause (e) of clause (22) of section 2. the words 'whether capitalised or not' did not appear, in contrast with the earlier clauses of the section where these words found a place and, therefore, it was immaterial that the reserve and surplus consisted only of capital receipt by way of share premium.*
- *The Commissioner (Appeals) however, accepted the claim of the assessee. He, however, found that out of the reserve and*

surplus account of 'G' Ltd., Rs. 190 lakhs represented share premium and Rs. 1,85,821 was on account of balance in the profit and loss account. Accordingly, he sustained the addition of Rs.1,85,821 only and deleted the balance. The revenue being aggrieved preferred appeal before the Tribunal. The Tribunal noted and observed as follows:

A. There was a sum of Rs. 1,90,00,000 as reserves in account of 'G' Ltd. as on 31-3-1996 which was by way of share premium collected by the said company.

B. As per section 78(1) of the Companies Act 1956 Act the premium received shall be transferred to a separate account styled 'the share premium account', and provide that hat the provisions of the 1956 Act relating to the reduction of the share capital of the company shall apply as if the share premium account was paid-up share capital of the company.

C. S. 78 (2) provides five purposes for which alone the share premium account may be applied without attracting consequence of reduction of the share capital. These are:

(i) Issue and pay up fully paid bonus shares to be issued to the members;

(ii) to write-off preliminary expenses of the company;

(Hi) to write-off expenses of issue of shares or debentures or under-writing commission paid or discount allowed on such issues;

(iv) To pay premium on the redemption of redeemable shares or debentures issued by the company; (v) Purchase of its own shares or other specified securities in terms of section 77A.

• Any other use or application of the proceeds of the share premium account will be treated as a reduction of the company's share capital and the provisions of the 1956 Act dealing with this subject stand attracted. The share premium account cannot be used

otherwise than for the specific purposes mentioned above.

- *'The Tribunal further considered that when there is a statutory bar on the share premium account being used for distribution of dividend, the deeming provisions of section 2(22)(e) cannot apply. Not only is there a prohibition on the distribution of the share premium account as dividend under the 1956 Act, the same is obliged to be treated as a part of the share capital of the company and this is made clear in section 78(1) of the 1956 Act which says that any payment out of the share premium account, except for purposes authorised by sub-section (2), will be treated as reduction of share capital attracting the provisions of the 1956 Act in relation thereto. This provision of the 1956 Act takes care of the argument of the revenue that section 2(22)(e) does not use the expression 'whether capitalized or not'. These words can have application only where the profits are capable of being capitalized. They are not applicable where the receipt in question forms part of the share capital of the company under the provisions of the 1956 Act.*

- *The decision of the Commissioner (Appeals) that the amount of Rs. 1,85,821 alone out of the amount of Rs. 25,42,772 could be assessed as deemed dividend under section 2(22)(e) was thus affirmed by the Tribunal. The Tribunal has referred to the following judgments:*

- *P.K. Badiani v. CIT [1976] 105 ITR 642 (SC)),*

The term "accumulated profits" should be construed in the commercial sense and not assessable or taxable profits liable to tax under 1922 Act. Development rebate debited to profit and loss account and taken to reserve would amount to accumulated profits.

- *CIT v. Urmila Ramesh [1998] 230 ITR 422*

ITO held that the amount distributed on liquidation of company was the accumulated profits of the Company and assessable as

"deemed dividend" u/s. 2(22) of Income-tax Act, 1961.

- *Court held that the amount received was not assessable because the Liquidator sold assets for less than their purchase price. "Profits" are to be actual profits calculated on commercial principles. Amount taxed u/s 41(2) in the hands of company did not represent "accumulated profits" for the purpose of section 2(22) of the Act.*

- *CIT v. Allahabad Bank Ltd. AIR [1969 SC 1058.= 2008 - TMI - 5136 - SUPREME Court]*

Share premium account is to be included in the paid-up capital for the purpose of computing rebate if it is maintained as a separate account. The Explanation does not contemplate that the account must be kept apart from the reserves. If within the reserves it is an identifiable separate account, the share premium will qualify for inclusion in the paid-up capital for computing the reduction in rebate for super-tax.

In view of the above facts and settled position of law the addition made by the Ld OA is illegal unjustified and uncalled for and deserve to be deleted and may kindly be deleted."

14. I have perused the submissions of the appellant and the order of the AO. The appellant company has received a loan from Ajmala Stationary Pvt. Ltd. (ASPL) during the year amounting to Rs.5,52,50,000/-. The appellant company owns more than 10% shares in M/ ASPL by virtue of which the loan receipt by the appellant company is deemed to be the dividend receipt as per the provisions of section 2(22)(e). These facts are not in dispute between the Revenue and the appellant. The A& has made an addition of the entire amount of Rs.5,52,50,000/- as the deemed dividend u/s 2(22)(e). The main argument of the Ld. AR has been that there are not enough reserves and surpluses in M/s ASPL and the addition can be made only to the extent of reserves and

surpluses. As per the AO the general reserves and surplus of M/s ASPL is to the tune of Rs. 25 Crore. As per the Ld. AR reserves and surplus of M/s ASPL though are to the tune of Rs.25 Crores but out of this reserve the general reserve is only to the extent of Rs.2,86,084/- and rest pertains to share premium reserve. To substantiate this, the Ld. AR has furnished the balance sheet of M/s ASPL in his paper book, and written submissions dated 17.03.2017 the same is reproduced below:

"Please find the following documentary evidences for SHARE PREMIUM AMOUNT Rs.2,44,530,000/- as required.

The copy of the balance sheet for the period ending on 31/03/2011 of M/S Ajmala Stationery Pvt. Ltd. enclosed in the BIB. The copy of the balance sheet for the period ending on 31/03/2016 M/s Ajmala Stationery Pvt. Ltd. enclosed in the PIB.

The copy of the ITR-6 for the A. Y. 2011-12 M/s Ajmala Stationery Pvt. Ltd. enclosed in the PIB.

The copy of the "Statement of the account of M/s Ajmala Stationery Pvt. Ltd. enclosed in the PIB.

From the perusal of all the above documents it has been evidenced that the amount of the share premium account Rs.2,44,530,000/- which had been shown clearly in the Balance Sheet of ending 2011 as well. The same has also been duly shown in the ITR-6 of the AY 2011-12.

Later on by mistake the share premium amount had been shown in the sub head: General Reserve under the main head: RESERVE AND SURPLUS which in the year 2016 has been rectified and shown as sub head: securities premium account correctly.

However the facts remain the same that the amount Rs.2,44,530,000/- is of share premium account, and ultimately it has to be shown under the head RESERVE AND SURPLUS with sub head securities premium account and this amount is not available

to distribute any dividend and further the amount of the share premium amount cannot be deemed as dividend u/s 2(22)e of the act.

The copy of the M/s Ajmala Stationery Pvt. Ltd. clearly states that the opening balance of the account is Rs.4,71,908/- and during the year amount Rs.5,52,50,000/- has been received and Rs.2,57,00,000/- has been repaid. The balance amount at the year-end is Rs.3,00,21,908/- only.

The total amount in the reserve and surplus in the year ending 2013 in M/s Ajmala Stationery Pvt. Ltd. Balance sheet is Rs.2,44,81,6084/- only and this amount includes the Share premium amount Rs.2,44,530,000/-. Thus Rs.2,86,084/- left being amount of the general reserve.

The addition u/s 2(22)e of the act has to be restricted to the Rs.2,86,084/- only.

In view of the above facts and settled position of law the addition made by the Ld. AO is illegal, unjustified and uncalled for and deserve to be deleted and may kindly be deleted."

15. I have perused the balance sheet of M/s ASPL for period ending 31.03.2016, 31.03.2011, ITR for A.Y. 2011-12. Perusal of these documents reveal that the general reserves is only for Rs.2,86,084/- and the balance amounting to Rs.24,25,30,000/- is the share premium account received by M/s ASPL As per the appellant there has been a clerical error of ASPL for the period under consideration. The clerical error resulted in the share premium account being clubbed with the general reserve account. He has contended and furnished documentary evidence in the form of the following documents:

(i) The Copy of the balance sheet for the period ending on 31/03/2011 of M/S Ajmala Stationery Pvt. Ltd.

(ii) The copy of the balance sheet for the period ending on

31/03/2016 M/s. Ajmala Stationery Pvt. Ltd.

(iii) *The copy of the ITR-6 for the A.Y. 2011-12 M/s Ajmala Stationery Pvt. Ltd.*

(iv) *The copy of the statement of the account of M/s Ajmala Stationery Pvt. Ltd.*

16. *From the perusal of all the above documents it has been evidenced that the amount of the share premium account Rs.2,44,530,000/- which had been shown clearly in the Balance Sheet of period ending 2011 as well. The same has also been duly shown in the ITR-6 of the Asstt. Year 2011-12.*

17. *This brings us to the next contention of the appellant i.e. the share premium account (reserve) is a capital receipt and it is shown as reserve under the head "Reserve & Surplus" as per the provisions of the companies act. Thus by its very nature it can be utilized only for the purposes specified in the companies act and not covered under the deeming provisions of section 2(22)(e). In this regard I have perused the provisions of the law and the various judicial precedents on this issue and I find merits in the arguments of the appellant. The Hon'ble Delhi ITAT in the case of DCIT vs. MAIPO India Ltd. (ITA No. 2266) vide its order dated 07.03.2008 has addressed this issue and has held as follows:*

"3. Before the AO, the assessee, inter alia, took up the contention that the entire reserves and surplus of Rs. 1,85,42,869 appearing in the books of Gorgeous Chemical (P) Ltd. consisted of "share premium" which was a capital receipt and could not have been distributed as dividend. The AO rejected the contention, stating that in Clause (e) of Sub-section (22) of Section 2 the words "whether capitalised or not" did not appear, in contrast with the earlier clauses of the sub-section where these words found a place and therefore it was immaterial that the reserves and surplus consisted only of capital receipt by way of share premium.

4. On appeal, the CIT(A) accepted the aforesaid contention of the assessee. He however found that out of the reserves and surplus account of Gorgeous Chemical (P) Ltd., Rs. 1,90,00,000 represented share premium and Rs. 1,85,821 was on account of balance in the P&L a/c. He accordingly sustained the addition of Rs. 1,85,821 and deleted the balance.

5. It is the aforesaid decision of the CIT(A) that is challenged before us on behalf of the Revenue. The assessee is not in appeal against the addition of Rs. 1,85,821 sustained by the CIT(A).

6. We have heard the rival contentions. The contention of the Revenue is that "accumulated profits" includes all profits, including capital profits and is not restricted to commercial or revenue profits. Attention was drawn to Explan. 2 to Section 2(22)(e). It was submitted that no exclusion was provided for capital profits expressly. The line of reasoning adopted by the AO that in Clause 3. (e) the expression "whether capitalised or not" did not find place in contrast with the earlier clauses was also pressed into service. It was contended that the section provided for "deemed dividend" and such a provision should be given its full play. It was further contended that the judgment of the Supreme Court in *P.K. Bodiiani v. CIT*, which was relied on by the CIT(A), was distinguishable and was not applicable to the present case.

7. The learned representative for the assessee, on the other hand, submitted that every gain is not commercial profit and that where the profit is not capable of being distributed as dividend the deeming provisions of Section 2(22)(e) are not attracted. It was contended that the deeming provision should be strictly construed. Strong reliance was placed on Section 78(2) of the Companies Act, 1956 which prohibits distribution of dividend out of share premium account. It was submitted that there was a statutory bar which cannot be disregarded while interpreting Sec Jon 2(22) (e), especially when the object of the IT Act was to tax amounts

distributed by the company to the shareholders ostensibly as loans and advances but actually as dividend. The teamed representative for the assessee thus submitted that the profits accumulated by the company should be capable of being distributed as dividend. Reliance in this connection was placed on the judgment of the Supreme Court in CIT v. Urmila Ramesh, especially the observations of the Court at pp. 434-435.

8. We have carefully considered the rival contentions and we are inclined to uphold the decision of the CIT(A). There is no dispute that a sum of Rs. 1,90,00,000 out of the reserves and surplus account of Gorgeous Chemical (P) Ltd. as on 31st March, 1996 represented share premium collected by the said company. Section 78(1) of the Companies Act deals with the application of premium received on issue of shares. It says that the premium received shall be transferred to a separate account styled "the share premium account" and further says that the provisions of the Companies Act relating to the reduction of the share capital of the company shall apply as if the share premium account were paid up share capital of the company. Sub-section (2) mentions five purposes for which alone the share premium account may be applied without attracting the provisions of the Companies Act relating to the reduction of the share capital. These are:

- (i) To pay up fully paid bonus shares to be issued to the members.*
- (ii) To write off preliminary expenses of the company.*
- (iii) To write off expenses of issue of shares or debentures or under-writing commission paid or discount allowed on such issues.*
- (iv) To pay premium on the redemption of redeemable shares or debentures issued by the company.*
- (v) Purchase of its own shares or other specified securities in terms of Section 77A.*

Except in the above five cases, any other application of proceeds of the share premium account will be treated as a reduction of the company's share capital and the provisions of the Companies Act dealing with this subject stand attracted. The share premium account cannot be used otherwise than for the specific purposes mentioned above and this position has been recognised by the Supreme Court in CIT v. Allahabad Bank Ltd. In this case, it was held that the share premium account is liable to be included in the paid up capital for the purpose of commuting the rebate allowable under para D, Part 2 of the Finance Act. The object and scope of Section 78 of the Companies Act has been stated as follows at p. 989 of "Guide to the Companies Act by A. Ramaiya, Sixteenth edition by Justice Y.V. Chandrachud, former Chief Justice of India:

There was no corresponding provision in the previous Act, and in the absence of any statutory prohibition, share premium amounts were being freely distributed as dividends, and the misuse of the funds collected as premiums was not lacking. The object of the present section is to lay down specifically how the premiums collected on the issue of shares should be utilised.

At p. 990 of the above treatise, the nature of share premium account has been described as follows:

The effect of this section is to create a new class of capital of a company which is not share capital but not distributable as income any more than any other capital asset. On a winding up the surplus monies in the shares (now securities) premium account will be returned to the shareholders as capital and so long as the company is a going concern, the same monies can never be returned?to the shareholders except through the medium of a reduction petition or, in other words, except under exactly the same conditions as those under which any other capital asset can reach the shareholder's hands. [Re, Duffs Settlement Trusts, (1951) 1 All ER 869

(following Re, Bates Mountain v. Bates (1928) Ch 682 affirmed in (1951) 2 All ER 534]. See also, Addl. CIT v. Om Oils & Oil Seed Exchange Ltd. (1985) 57 Com Cases 592 (Del), where it has been held that premium on issue of shares is to be regarded as money paid on capital account and not as revenue receipt.

Another effect of the section is that distribution of shares (now securities) premium amount as dividend is not permitted, and it is taken out of the category of divisible profits. But premiums received on the issue of shares, under the 1913 Act, were profits and so could be distributed as dividends. [Bharat Fire & General Insurance Ltd. v. CIT (1964) 34 Com Cases (SC)]. Any distribution of the amount among shareholders except in any of the modes specified in Sub-section (2) can only be by way of reduction of capital and this will require the sanction of the Court and the procedure laid down in Section 100.

The above view based on the interpretation of Section 78 of the Companies Act settles the dispute before us in favour of the assessee. When there is a statutory bar on the share premium account being used for distribution of dividend, the deeming provision of Section 2(22)(e) cannot apply. Not only is there a prohibition on the distribution of the share premium account as dividend under the Companies Act, the same is obliged to be treated as part of the share capital of the company and this is made clear in Section 78(1) of the Companies Act which says that any payment out of the share premium account, except for purposes authorised by Sub-section (2), will be treated as reduction of share capital attracting the provisions of the Companies Act in relation thereto. This provision of the Companies Act takes care of the argument of the Revenue that Section 2(22)(e) of the IT Act does not use the expression "whether capitalized or not". These words can have application only where the profits are capable of being capitalized. They are not applicable where the receipt in question

forms part of the share capital of the company under the provisions of the Companies Act. This position has been recognised by the Supreme Court in CIT v. Urmila Ramesh (supra) where at pp. 434-435 the following observations were made:

Section 2(22) of the Act has used the expression 'accumulated profits', 'whether capitalized o. not'. This expression tends to show that under Section 2(22) it is only the distribution of the accumulated profits which are deemed to be dividends in the hands of the shareholders. By using the expression 'whether capitalized or not' the legislative intent clearly is that the profits which are deemed to be dividend would be those which were capable of being accumulated and which would also be capable of being capitalized. The amounts should, in other words, be in the nature of profits which the company would have distributed to its shareholders. This would clearly exclude return of part of a capital to the company, as the same cannot be regarded as profit capable of being capitalized, the return being of capital itself.

9. *In P.K. Badiani v. CIT (supra), it was held by the Supreme Court that the /term "profits" occurring in Section 2(6A)(e) of the 1922 Act means profits in the commercial sense, that is to say, the profits made by the company in the real and true sense of the term. The share premium account cannot be stated to be commercial profits in the true sense of the term, having regard to the provisions of the Companies Act referred to above. Applying the judgment in Badiani's case (supra), it was held in Urmila Ramesh (supra) that where assets of the company were sold at a price less than the purchase price, the amount so received, apart from being in the nature of return of capital, cannot represent profits of the company.*

10. *For the above reasons, we are in agreement with the decision of the CIT(A) that the amount of Rs. 1,85,821 alone out of*

the amount of Rs. 25,42,772 can be assessed as deemed dividend under Section 2(22)(e) of the IT Act. We affirm his order on this point and dismiss the appeal filed by the Revenue with no order as to costs."

18. The same reasoning has been upheld by the Hon'ble Delhi ITAT once again in its judgment last month in the case of Ramesh Chand Goyal, New Delhi vs ITO, New Delhi dated 15 February, 2017 in ITA No. 1187/Del/2014 for the Asstt. Year 2009-10 wherein it has once again held as below:

"Thus, the Tribunal in above case has clearly held that the share premium account cannot partake the nature of commercial profit and, therefore, it cannot be called as accumulated profits. Respectfully following the above decision of the Tribunal, we uphold that the share premium amount appearing in the financial statement of the assessee cannot be included while computing the accumulated profit of the assessee company as on the date of loan or advance to the concerned firm. Since the learned Commissioner of Income Tax (Appeals) has already directed the Assessing Officer to restrict the deemed dividend to the extent of accumulated profit, we feel it appropriate to direct the Assessing Officer to compute the accumulated profit keeping in view our finding above. Needless to mention that the assessee shall be afforded sufficient opportunity of hearing. Accordingly, the ground no. 5 is allowed for statistical purposes.

19. Thus in view of these facts, I find that the addition u/s 2(22)(e) can only be made to the extent of general reserves available with M/s ASPL as on 31.03.2013 which amounts to Rs.2,86,084/- and thus the addition is restricted to this and balance addition is deleted. Thus this Ground of the appellant is partly allowed."

6. The CIT(A) thus reversed the additions made by the Assessing

Officer and granted relief on the disallowance of interest under Section 36(1)(iii) as well as the loan amount deemed as income of the assessee under Section 2(22)(e) of the Act.

7. The Revenue has challenged the relief granted by the CIT(A) before the Tribunal.

8. We have carefully considered the rival submissions as well as the material placed and referred to before us in the course of hearing by the respective sides. We have also carefully perused the orders of the Assessing Officer and CIT(A).

8.1 The first issue concerns disallowance of interest under Section 36(1)(iii) of the Act. It is the case of the Revenue that interest expenditure has been incurred on investment made in assets and is in the nature of capital expenditure wrongly claimed as Revenue expenditure by the assessee. The assessee is, on the other hand, claims that (a) the interest free funds to the extent of Rs.5,52,50,000/- was available to meet the advance towards land, (b) the ITAT in Assessment Year 2007-08 has observed that Assessee is engaged in real estate activity as one of its business activity. We notice that the CIT(A) took note of the decision of the Tribunal rendered in Assessment Year 2007-08 and observed that the assessee is indeed engaged in the business of real estate and not merely in coal trading. As a consequence, it was observed that the interest expenses incurred on acquisition of real estate has to be treated as ordinary business activity and therefore the interest incurred on acquisition of real estate partakes the character of Revenue expenses and thus cannot be disallowed. We find that the CIT(A) has taken note of the object clause in the MOA as well as past and present state of affairs to come to a conclusion that acquisition of land is ordinary business activity in the business of real estate and therefore

attendant interest expenses cannot be disallowed by treating it for non business purposes with reference to Section 36(1)(iii) of the Act. We do not see any error committed by the CIT(A) for returning such finding. Hence, we decline to interfere.

9. Ground No.1 of the appeal of the Revenue is dismissed.

10. Ground No.2 of the Revenue appeal concerns addition under Section 2(22)(e) of the Act. We observe that the CIT(A) has examined the issue threadbare and restricted the addition to the extent of 'General Reserve' after excluding the 'Security Premium Reserve' which has been regarded to be outside the ambit of expression 'accumulated profits' under Section 2(22)(e) of the Act. The CIT(A), in essence, held that the security premium reserve cannot be regarded as part of accumulated profits under Section 2(22)(e) and when such security premium is excluded, the General Reserve available for the purposes of addition under Section 2(22)(e) is Rs.2,86,084/- only and thus sustained the addition to the extent accumulated profit excluding share premium reserve. We find the approach of the CIT(A) is in consonance with judicial precedent available in this regard as cited by the CIT(A). We thus see no infirmity in the action of the CIT(A). Hence, we decline to interfere.

11. Ground No.2 of the appeal of the Revenue is dismissed.

12. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open Court on 02/11/2022.

Sd/-

**[CHANDRA MOHAN GARG]
JUDICIAL MEMBER**

DATED: /11/2022

prabhat

Sd/-

**[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER**