

IN THE INCOME TAX APPELLATE TRIBUNAL
NAGPUR BENCH, NAGPUR

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER AND
SHRI K.M. ROY, ACCOUNTANT, MEMBER

ITA no.348/Nag./2023
(Assessment Year : 2011-12)

SMS Tolls and Developers Ltd.
267, Ganesh Phadaavis Bhawan
Near Triangular Park
Dharampeth, Nagpur 440 010
PAN – AAMCS5653A

..... Assessee

v/s

Income Tax Officer
Ward-1(5), Nagpur

..... Respondent

Assessee by : Shri Kapil Hirani
Revenue by : Shri Abhay Y. Marathe

Date of Hearing – 07/11/2024

Date of Order – 18/11/2024

ORDER

PER K.M. ROY, A.M.

The present appeal has been filed by the assessee challenging the impugned order dated 14/06/2023, passed by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, [“learned CIT(A)”], for the assessment year 2011-12.

2. The assessee has raised following grounds:-

“1. On the facts and circumstances of the case and in law, the learned CIT Appeals, NFAC, Delhi has grossly erred in confirming reopening of assessment by issue of notice u/s 148 of IT Act and subsequent assessment order passed u/s 143(3) r.w.s. 147 of the Act.

2. On the facts and circumstances of the case and in law, the learned CIT Appeals, NFAC, Delhi has grossly erred in confirming addition of Rs. 2,69,30,925/- made u/s 2(22)(e) of IT Act. The said addition is unjustified, arbitrary and illegal.

3. On the facts and circumstances of the case and in law, the learned CIT Appeals, NFAC. Delhi ought to have seen that the assessee assessee has taken Inter Corporate Deposit which is out of purview of section 2(22)(e) of the I. T. Act.

4. Without prejudice to above grounds, on the facts and circumstances of the case the working of accumulated profit for the purpose of section 2(22)(e) of the I.T. Act is unjustified, arbitrary and highly excessive.

5. The Assessee craves leave to add, amend, alter, vary and / or withdraw any or all the above grounds of Appeal."

3. Before us, during the course of hearing, the learned Counsel, Shri Kapil Hirani, appearing on behalf of the assessee, initially submitted that he wish to press grounds no.2, only. Rest all other grounds are not being adjudicated as per his concession.

4. Facts in Brief:- The assessee is a Private Limited Company engaged in infrastructure development. For the year under consideration, the assessee filed its return of income on 30/08/2011, declaring total income at ₹ nil, [current year loss being ₹ (-)6,927]. The return of income was accepted under section 143(1) of the Income Tax Act, 1961 ("*the Act*") and no notice under section 143(2) was issued. The case of the assessee was re-opened vide notice dated 26/03/2018, issued under section 148 of the Act in response to which, the assessee requested to treat the original return filed on 30/08/2011, as the return filed in response to notice under section 148 of the Act. During the relevant previous year, the assessee received Inter Corporate Deposit (ICD) of ₹ 107,70,00,000, from SMS Shivnath Infrastructure Pvt. Ltd. (SSIL), a Company in which the assessee holds substantial interest. It was

alleged in the reasons recorded for re-opening that SSIL had accumulated profit at the end of the year of ₹ 8,90,70,728, and that the assessee has received loan of ₹ 107,70,00,00, therefore, the loan so advanced to the extent of ₹ 8,90,70,728, is liable to be assessed as deemed dividend under section 2(22)(e) of the Act in the hands of the assessee.

5. During re-assessment proceeding, the assessee objected to the proposed addition on two grounds. First, the assessee submitted that the amount advanced by SSIL is in the nature of Inter Corporate Deposit, therefore, the provisions of section 2(22)(e) of the Act are not applicable. Assessee further submitted that as per the provisions of section 2(22)(e) of the Act, addition of deemed dividend can only be made to the extent lender company possesses accumulated profit on the date of giving loan. It was submitted that SSIL gave ICD of ₹ 107,70,00,000 on 07/05/2010 and 27/08/2010. Although accumulated profit in the books of SSIL as on the end of financial year 2010-11 is ₹ 7,42,66,710/-, the actual accumulated profit as on 29/04/2010 was only ₹ 4,79,825, therefore, if any addition is required to be made in the case of the assessee under section 2(22)(e), the same must be restricted to ₹ 4,79,825. In support of the argument, the learned Counsel relied on the proposition laid down by the Hon'ble Apex Court in CIT v/s Damodharan, [1980] 121 ITR 572 (SC) and in the Co-ordinate Bench decision of the Tribunal, Vishakapatnam Bench, in P. Satya Prasad v/s ITO [2013] 141 ITD 403].

5. However, the submissions of the assessee were not considered properly, and the Assessing Officer calculated proportionate profit upto the date of

advances of ₹ 2,64,51,100, and added the same to the total income of the assessee under section 2(22)(e) of the Act. It is not clear from the assessment order that how the figure of ₹ 2,64,51,100/- was computed. It appears that the Assessing Officer has considered pro-rata business profits of the current year to arrive at the quantum of accumulated profits as on the date of granting of ICD. Further, the Assessing Officer also added ₹ 4,79,825 to the total income of the assessee. Thus, the order under section 143(3) r/w section 147 of the Act was passed on 30/12/2018 making total addition of ₹ 2,69,30,925, as deemed dividend under section 2(22)(e) of the Act. Against this addition, the assessee preferred appeal before the first appellate authority.

6. The matter was agitated before the learned CIT(A), who did not find favour with the arguments of the assessee. The appeal of the assessee was dismissed by holding as follows:—

"6.3. The contention of the Appellant, Grounds of appeal, the statement of facts, online submissions of the appellant and the case laws relied upon and the assessment order have been considered. The AO observed that as explanation 2 to section 2(22)(e) clearly states that "accumulated profits" includes all profits of the company up-to the date of distribution or payments; all other conditions of deemed dividend u/s 2(22)(e) are fulfilled. The AO has made addition of accumulated profits of Rs. 4,79,825/- and Rs. 2,64,51,100/- as current years proportionate profit up-to the date of advances u/s 2(22)(e) of the I. T. Act. The appellant contended that for the purpose of deemed dividend, only accumulated profit should be worked out without considering current year's profit as the same is accrued only on 31st march i.e. year end of that year. The appellant has further submitted that as the accumulated profit of SSIL as on 29/04/2010 was only Rs.4,79,825/-, the addition as deemed dividend should be restricted to only Rs.4,79,825/-. The case laws relied upon by the appellant are considered, however, found to be distinguishable.

6.3.1 In the case of Sanjay Subhashchand Gupta Vs ACIT (ITAT Mumbai) / No.4573/Mum./2018/Date of Order: 25/04/2022/AY: 2012-13; ITAT Mumbai held:

As per the provisions of section 2(22)(e), loan or advance paid by a company shall be considered as deemed dividend on fulfillment of following conditions (i) the company must be a company in which the public is not substantially interested; (ii) such a company has given advance or loan: (iii) such payment has been made to a shareholder: and (iv) such shares hold not less than 10% of the voting power. From the facts available on record, it is evident that both the companies i.e. M/s Rustagi Projects and M/s Yen Pulses Private Limited, were not the companies in which public was substantially interested.

Further, the assessee, being shareholder, was holding shares more than 10% (i.e. 95% in M/s Rustagi Projects and 50% in M/s Yen Pulses Private Limited) in both the companies. Both the companies have credited loan to the assessee. Thus, the basic conditions of section 2(22)(e) of the Act are satisfied in the present case. Further, such a payment for the purpose of section 2(22)(e) of the Act should be to the extent to which the company possesses accumulated profits. As per the provision of Explanation 2. all the profits of the company up to the date of distribution or payment under section 2(22)(e) of the Act shall be considered as accumulated profits. Thus, the provision of Explanation 2 to section 2(22) of the Act does not distinguish between the profit accumulated in the immediately preceding year and the current year profit, and takes within its ambit all the profits up to the date of payment. Hon'ble Jurisdictional High Court in CIT v/s Mrs. Maya B. Ramchand: [1986] 162 ITR 460 (Bombay) while considering the issue of -accumulated profit" under Section 2(6A)(e) of the Indian Income-tax Act, 1922 [corresponding to section 2(22) of the Act], observed as under: "The position, as found by the Supreme Court in Navnit Lal C. Javen's case (supra) and this Court's judgment in P.K. Badiani's case (supra) is that, for the purposes of section 2(6A)(e), the company's accumulated profits must be determined upon the day on which the loan or advance to the shareholder is made." The learned CIT(A) also relied upon various other judicial precedents, while upholding the addition made by the Assessing Officer under section 2(22)(e) of the Act. Thus, in view of the above legal position, we do not find any infirmity in the order passed by the learned CIT(A) affirming the addition on account of deemed dividend.

The Para 9 of the order is as under:

"...9. We have considered the submissions and perused the material available on record.

Section 2(22)(e) of the Act reads as under. "(e) any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) made after the 31st day of May, 1987, by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power, or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern) or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits;"

Thus, as per the provisions of aforesaid section, loan or advance paid by a company shall be considered as deemed dividend on fulfillment of following conditions (i) the company must be a company in which the public is not substantially interested; (ii) such a company has given advance or loan: (iii) such payment has been made to a shareholder: and (iv) such shares hold not less than 10% of the voting power.

From the facts available on record, it is evident that both the companies i.e. M/s Rustagi Projects and M/s Yen Pulses Private Limited, were not the companies in which public was substantially interested. Further, the assessee, being shareholder, was holding shares more than 10% (i.e. 95% in M/s Rustagi Projects and 50% in M/s Yen Pulses Private Limited) in both the companies. Both the companies have credited loan to the assessee. Thus, the basic conditions of section 2(22)(e) of the Act are satisfied in the present case. Further, such a payment for the purpose of section 2(22)(e) of the Act should be to the extent to which the company possesses accumulated profits.

Explanation 2 to section 2(22) of the Act, elaborates the term - accumulated profits and same reads as under: "Explanation 2.-The expression "accumulated profits" in sub-clauses (a), (b), (d) and (e), shall include all profits of the company up to the date of distribution or payment referred to in those sub-clauses, and in sub-clause (c) shall include all profits of the company up to the date of liquidation, but shall not, where the liquidation is consequent on the compulsory acquisition of its undertaking by the Government or a corporation owned or controlled by the Government under any law for the time being in force, include any profits of the company prior to three successive previous years immediately preceding the previous year in which such acquisition took place."

As per the provision of Explanation 2, all the profits of the company up to the date of distribution or payment under section 2(22)(e) of the Act shall be considered as accumulated profits. Thus, the provision of Explanation 2 to section 2(22) of the Act does not distinguish between the profit accumulated in the immediately preceding year and the current year profit. and takes within its ambit all the profits up to the date of payment.

10. We find that Hon'ble Jurisdictional High Court in CIT v/s Mrs. Maya B. Ramchand: [1986] 162 ITR 460 (Bombay) while considering the issue of accumulated profit "under Section 2(6A)(e) of the Indian Income-tax Act, 1922 [corresponding to section 2(22) of the Act], observed as under: -The position, as found by the Supreme Court in Navnit Lal C. Javeri's case (supra) and this Court's judgment in P.K. Badiani's case (supra) is that, for the purposes of section 2(6A)(e) the company's accumulated profits must be determined upon the day on which the loan or advance to the shareholder is made."

11. The learned CIT(A) also relied upon various other judicial precedents, while upholding the addition made by the Assessing Officer under section 2(22)(e) of the Act. Thus, in view of the above legal position, we do not find any infirmity in the order passed by the learned CIT(A) affirming the addition on account of

deemed dividend. As a result, ground no.1 raised in assessee's appeal is dismissed..."

6.3.2. In view of the detailed discussion in the case of Sanjay Subhashchand Gupta Vs ACIT (supra), I find no reason to interfere with the AO's order on the appeal on ground nos. 2, 3 & 4 are dismissed."

7. The learned Counsel for the assessee lucidly pointed out that he is accepting the factum of deemed dividend to the extent of ₹ 4,79,825. His only contention is that the accumulated profit must exclude the proration of current year's business profit. To buttress his proposition, he has relied on the following two case laws:—

- i) M.B. Stock Holding Pvt. Ltd. v/s ACIT, [2004] 84 ITD 542 (Ahd.); and*
- ii) Ramesh Premji Shah v/s DCIT, ITA no.1985/Mum./2022, A.Y. 2012-13, order dated 09/01/2023.*

8. We also find that similar issue was considered by the Co-ordinate Bench of the Tribunal, Mumbai Bench, in Ramesh Premji Shah (supra) in favour of the assessee. It is deemed fit to reproduce Para-6 to 18 of the said order:—

"6. We have heard both the parties and perused the records. The main plea of the Ld. AR of the assessee Shri Subhas Bains is that the authorities below failed to appreciate that the accumulated profit of M/s. Sony Mony Developers Pvt. Ltd. as on 31.03.2011 (relevant previous assessment year 2011-12) was (-) Rs.74,80,633/- which means the opening balance as on 01.04.2011 was loss of Rs.74,80,633/-. And therefore, according to Ld. AR, M/s. Sony Mony Developers Pvt. Ltd. could not have given any dividend to the assessee/shareholder. Therefore, according to the Ld. AR, the AO/Ld. CIT(A) erred in adopting the accumulated profit as on 31.03.2012 (current year) accumulated profit at Rs.3,46,93,780/-. For buttressing this submission that the current year balance-sheet should not be looked into for looking into the accumulated profit and that only previous year as on 31.03.2011 should be only looked into, the Ld AR relied on the decision of the Tribunal (Delhi) in the case of ACIT Vs. Sanjay Passi in ITA. No.1450/Del/2015 for AY 2012-13 dated 11.07.2018 and the Hon'ble Supreme Court decision in the case of CIT Vs. Ashokbhai Chimabhai (1965) 56 ITR 42 (SC) wherein the Hon'ble Supreme Court has held as under: -

"6. In the gross receipts of a business day after day or from transaction to transaction lies embedded or dormant profit or loss, on such dormant profit or loss undoubtedly taxable profits, if any, of the business will be computed. But dormant profits cannot be equated with profits charged to tax under ss. 3 and 4 of the IT Act. The concept of accrual of profits of a business involves the determination by the method of accounting at the end of the accounting year or any shorter period determined by law. If profits accrue to the assessee directly from the business the question whether they accrue de die, in diem or at the close of the year of account has at best an academic significance, but when upon ascertainment of profits the right of a person to a share therein is determined, the question assumes practical importance, for it is only on the right to receive profits or income, profits accrue to that person. If there is no right, no profits will be deemed to have accrued...."

7. And the Ld. AR relied on the decision in *CIT vs. M. B. Stockholding Pvt. Ltd.*, wherein the Hon'ble Gujarat High Court observed as under: -

"CIT vs. M. B. Stockholding Pvt. Ltd., 2015-TIOL1139-HC-AHM++ while determining the amount of deemed dividend under Explanation 2 to Section 2(22)(e) of the Act, the current profit was not required to be included to be part of accumulated profit. As such, as observed by the Tribunal, the issue is already settled by the Supreme Court against the Revenue in the case of Associated Banking Corporation of Ind. Ltd. V Is. Commissioner of Income-Tax, Bombay reported in (1965) Vol.56 ITR 1 (SC) by which, the view taken that the profit accrues when the books of account are closed."

8. According to the Ld. AR, it is well-settled that the profit will accrue only when there is a right to receive the same. And since in this case, the right to receive the profits didn't accrue on 31.03.2012 when M/s. Sony Money Developers Pvt. Ltd. determined the share of profit as on 31.03.2012, therefore, only after the 31.03.2012 the assessee / shareholder had a right to receive a profit accrued to M/s. Sony Money Developers Pvt. Ltd. as on 31.03.2012. And therefore, the AO/Ld. CIT erred in looking into the balance-sheet of the assessee as on 31.03.2012 whereas the right to receive dividend in (AY. 2012- 13/FY. 2011-12), the accumulated profit as on 31.03.2011 should only be looked into; and if the same was taken into consideration, then the assessee was having (-) Rs.74,80,633/-. (as on 31.03.2011). And since M/s. Sony Money Developers have loss in AY. 2011-12 i.e. as on 31.03.2011, there would be no accumulated profit for making any addition for the current/relevant AY. 2012-13. Therefore, no addition u/s 2(22) (e)/deemed dividend was warranted. Therefore, the Ld. AR pleads that the addition confirmed by the Ld. CIT(A) to the tune of Rs.3.46 crores should be deleted.

9. Per contra, the Ld. DR of the revenue contended that the AO/Ld. CIT(A) have rightly adopted the accumulated profit as on 31.03.2012 (Rs.3,46 crores). And therefore, there was no infirmity in the action of the AO/Ld. CIT(A) and she does not want us to interfere with the order of the Ld. CIT(A). According to Ld. DR, the assessee maintains savings account with HDFC Bank, JVPD Branch, Mumbai when the assessee's account were analyzed for the period Nov, 2011 to April 2012 reveals

fund transfer credits totaling Rs. 21.60 crores out of which funds amounting to Rs. 16.19 crores was received from the account of M/s Sony Money Developers Pvt Ltd; and that fund was immediately transferred to the account of M/s Sony Money Electronics Ltd. And since assessee is a director in both the entities (i.e. M/s. Sony Money Developers Ltd. & M/s. Sony Money Electronics Ltd.), when asked by the AO, he admitted that he has taken unsecured loan from one company for the purpose of investment in another group company. According to Ld. DR, this sort of circulation of funds within the group companies with no business rationality was suspicious. It was pointed out by the Ld. DR that M/s Sony Money Developers Pvt Ltd has transferred funds of Rs. 16.19 crores to the account of Assessee; and M/s Sony Money Electronics Ltd has received fund transfers of Rs. 19.08 crores from Mr. Ramesh P Shah (Assessee). And that M/s. Sony Money Developers Pvt. Ltd. from which the assessee took loan of Rs.16.19 crores, had accumulated profit of Rs.3.41 crores as on 31.03.2012. Therefore, in the facts of the case, sec 2(22)(e) are applicable and after issuance of Show cause notice and finding no response from the assessee, and taking note of the fact that in M/s. Sony Money Developers Ltd, the assessee/ Ramesh P Shah had 50% shareholding and was Director of it, the AO in his order added the Deemed income u/s 2(22)(e) of Rs. 3,41,96,270/- as per balance sheet dated 31.03.2012. According to Ld. DR "Accumulated profits" mean commercial profits and not profits as assessed for income-tax purposes. From accumulated profits all "disbursements legitimately attributable to it by way of expenses, development, dividends and deemed dividends" must be reduced. And she relied upon the following case laws:-

Hon'ble Supreme Court in the case of P.K. Badiani vs CIT 105 ITR 642 (SC) has held that the term profits appearing in Section 2(6a)(e) of Indian Income Tax Act, 1922 which corresponds to Section 2(22)(e) of the 1961 Act, means profits in the commercial sense, i.e. profits made by the company in the usual and true sense of the term. It has also been held that development rebate reserves created out of the company's profits constitute a part of the accumulated profits of the company. (Copy enclosed)

Hon'ble Supreme Court in CIT Vs Damodaran & CIT Vs Ashokbhai Chimmanbhai held that "accumulated profits cannot include current profits. However, Explanation 2 to Section 2(22) provides that the expression accumulated profits shall include all profits of the company up to the date of distribution or payment of liquidation.

These would include development rebate & investment allowance reserve. P.K. Badiani vs CIT 105 ITR 642 (SC). It will even include income which is exempt from tax. Tea Estate v CIT 103 ITR 785 (SC)

The Revenue also relies upon the order of THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI, in ITA No.4573/Mum/2018 (Assessment Year: 2012-13) Sanjay Subhashchand Gupta 3rd Floor, Atul Baug Near Saraswat Co-operative Bank Syndicate, Kalyan (West) PAN AAXPG1576G. Appellant v/s Asstt. Commissioner of Income Tax Circle-2, Kalyan RESPONDENT, Where the addition made under section 2(22)(e) is confirmed. The facts of the case are similar and the accumulated profits as on 31" March 2012 are considered for the purpose of addition of deemed

dividend. In this case also there were no accumulated profits as on 31 March 2011.

10. In the light of the aforesaid, the Ld. DR, does not want us to interfere with the order of Ld. CIT(A).

11. After hearing both parties, and facts not disputed are not repeated for the sake of brevity. We note that the bone of contention raised in ground no. 3 by the assessee is against the action of AO/Ld CIT(A) in adopting the accumulated profit of M/s Sony Mony Developers Pvt Ltd as on 31.03.2012 (Rs.3.46 crores) and treated the same as deemed dividend, whereas according to the Ld. AR, the AO/Ld. CIT(A) ought to have adopted the accumulated profit as on 31.03.2011 i.e. [(-) Rs.74,80,633/-] and in such an event, there would have been no occasion for making any addition u/s 2(22)(e) of the Act.

The Ld. DR in order to support the action of the AO/Ld. CIT(A) has heavily relied on the Explanation-2 to Section (2(22)(e) of the Act which defines the expression accumulated profit as under:-

Explanation 2:- The expression "accumulated profits" in sub clauses (a),(b), (d) and (e), shall include all profits of the company up to the date of distribution or payment referred to in those clauses, and in sub clause (c) shall include all profits of the company up to the date of liquidation, but shall not, where the liquidation is consequent on the compulsory acquisition of its undertaking by the Government or a corporation owned or controlled by the Government under any law for the time being in force, include any profits of the company prior to three successive previous years immediately preceding the previous year in which such acquisition took place".

12. The Ahmedabad bench of Tribunal in the case of M/s M.B. Stock Holdings (P) Ltd Vs ACIT (2003) 84 ITD 542] took note of the Hon'ble Supreme Court decision in the case of CIT Vs. Asokbhai Chimmanbhai (1965)(56 ITR 42) wherein it was held that the profits do not accrue from day to day or even from month to month and have to be ascertained by a comparison of assets at two stated points. It was further held that unless the right to profits comes into existence there is no accrual of profits and the destination of profits must be determined by the title thereto on the day on which they arise. Then the Tribunal went on to explain the purpose of Explanation 2 to sec. 2(22)(e) as under in para 24 of the order:-

"Keeping in view the above interpretation of law, it cannot be said that Expln.2 to sec. 2(22)(e) is redundant. It is bound to be for a specific purpose. The question for determination is as to what is the purpose for which this Explanation has been incorporated when the Hon'ble Supreme Court in the case of CIT Vs. Ashokbhai Chimmanbhai (supra) have held that the profits of business do not accrue from day to day or even from month to month. In our considered view, the legislature has taken into account the fact that whereas the profits from business for the current year may not be determinable in the middle of the year, there are certain sources of income, the income from which is capable of determination which, according to the legislative intent, should also be taken into account while determining the accumulated

profits on the day of advancing the loan. The company is a person. It may carry on business and may also derive income from various other sources. For example, the company may sell an asset from which capital gains are derived. If the capital gain is derived before the date of advancement of the loan that profit shall have to be taken in account in determining the accumulated profits notwithstanding the fact that such an event has taken place in the middle of the year. It is so the determination of capital gains is not to wait for the end of the previous year. Similarly, there can be income from other sources also such as receipt of dividend income or interest which may not have to wait for determination at the end of the year. Similarly, some subsidy may be received from the Government which may be taxable on receipt basis. Such income shall also have to be taken into account in determining the accumulated profits as it has not to wait for determination of income at the close of the year".

13. The Tribunal has expressed the above said view, when it was pointed out to it by the counsel for the assessee that the Hon'ble Supreme Court in the case of CIT Vs. V.Damodaran (1980)(121 ITR 572) has held that the accumulated profits shall not include current year's profit. Finally the Tribunal summarized the principles of sec. 2(22)(e) as under:- (i) That for purposes of s. 2(22)(e), the accumulated profits are to be worked out upto the date of each payment/advancement of loan. (ii) That there is a distinction between the "accumulated profits" of business and the current year's profits of business. (iii) That profits of business accrue at the end of the previous year. (iv) That loan or advance treated as deemed income up to the date of fresh loan is to be reduced from accumulated profits. (v) That the repayment of loan during the same year is not to be deducted from the accumulated profits. Thus, it has been held that the accumulated profits do not include current year's business profit, since it accrues only at the end of the year.

14. We note that the Revenue has challenged the aforesaid Tribunal order before the Hon'ble High Court of Gujarat (CIT Vs. M. B. Stockholding (P) Ltd. Tax Appeal No. 772 of 2007) by order dated 23.04.2015 reported in (2015) 64 taxmann.com 138 the Hon'ble High Court considered the following substantial question of law and as under:-

"(A) Whether the Appellate Tribunal is right in law and on facts in setting aside the order of the CIT(A) and directing the Assessing Officer not to include the current profit to be part of accumulated profit while determining the amount of deemed dividend u/s 2(22)(e) of the Act?

(B) Whether the Appellate Tribunal has not substantially erred in not appreciating that the main issue in the appeal before it was not how to compute the accumulated profit for the purpose of 2(22)(e) but the issue was whether the Assessing Officer was right in rejecting the assessee's rectification application u/s 154 on the ground that there was no mistake apparent from the record?

(C) Whether the Appellate Tribunal has not erred in law and on facts in not adjudicating the issue in appeal relating to order u/s 154 and thereby transgressing from the main issue?"

15. And the Hon'ble High Court answered the aforesaid question of law in favour of assessee by upholding the Tribunal order (*supra*) and while doing so, especially took note of Explanation-2 to Section 2(22)(e) of the Act (which defines the accumulated profit) as under;-

2. Mrs. Bhatt, learned advocate appearing on behalf of the appellant-Revenue has vehemently submitted that as such, the Tribunal had materially erred in entering into the merits of the case without deciding the issue whether the Assessing Officer was justified in rejecting the rectification application submitted by the assessee which was submitted under Section 154 of the Income Tax Act (hereinafter referred to as the "Act"). Mrs. Bhatt, learned advocate appearing on behalf of the Revenue has even made the submissions on merits and submitted that the learned Tribunal has materially erred in not properly interpreting and/or considering the Explanation 2 to Section 2(22)(e) of the Act. It is submitted that as per Explanation 2 to Section 2(22)(e) of the Act, for the purposes of 'accumulated profit, the current year profit upto the date of distribution has to be taken into account. It is submitted that, therefore, the learned Tribunal has materially erred in deciding the issue on merits, in favour of the assessee and against the Revenue and in allowing the appeal.

3. Though served, nobody appears on behalf of the respondent.

4. It is to be noted that as such, the respondent-company has gone into liquidation and the Official Liquidator has been appointed. However, nobody has appeared on behalf of the Official Liquidator. The same would be the fate even if the matter is remitted either to the learned Tribunal or to the Assessing Officer to consider the issue on merits afresh. Therefore, we ourselves have considered the issue with respect to the main issue on merits whether the Assessing Officer was justified in including the current profit to be part of accumulated profit while determining the amount of deemed dividend Section under 2(22) (c) of the Act.

4.1 Having heard Mrs. Bhatt, learned advocate appearing on behalf of the Revenue and considering the provisions of Section 2(22)(e) of the Act, more particularly, Explanation 2 to Section 2(22)(e) of the Act, it cannot be said that the learned Tribunal has committed any error in directing the Assessing Officer not to include the current profit to be part of accumulated profit while determining the amount of deemed dividend under Section 2(22)(c) of the Act. While determining the amount of deemed dividend under Explanation 2 to Section 2(22)(c) of the Act, the current profit was not required to be included to be part of accumulated profit. As such, as observed by the learned Tribunal, the issue is already settled by the Hon'ble Supreme Court against the Revenue in the case of *Associated Banking Corporation of India Ltd.v. CIT [1965] 56 ITR I* by which, the view taken that the profit accrues when the books of account are closed.

5. Under the circumstances and considering the Explanation 2 to Section 2(22)(e) of the Act, we confirm the view taken by the learned Tribunal and held the question No. 1 raised in the present appeal in favour of the assessee and against the revenue. Consequently, the present appeal deserves to be dismissed and is accordingly dismissed. No order as to costs."

16. Thus, we note that the Hon'ble High Court has upheld the action of the Tribunal directing the Assessing Officer not to include the current year profit to be part of accumulated profit while determining the amount of deemed dividend under Section 2(22)(e) of the Act after considering Explanation-2 to Section (222)(e) of the Act (which defines the accumulated profit). And the Hon'ble High Court specifically observed that while determining the amount of deemed dividend under Explanation 2 to Section 2(22)(e) of the Act, the current profit was not required to be included to be part of accumulated profit. And their Lordship also took note that the issue was already settled by the Hon'ble Supreme Court against the revenue in the case of Associated Banking Corporation of India Ltd. Vs. CIT (1965) 56 ITR 1, wherein the view was taken that the profit accrues when the books of account are closed. In the light of the judicial precedent laid by Hon'ble Gujarat High Court in CIT Vs. M. B. Stockholding (P) Ltd.(supra), and since no decision of jurisdictional High Court was cited in support of impugned action of Ld CIT(A), we are of the considered opinion that in the present case, while determining the deemed dividend, the AO/Ld. CIT(A) ought to have taken into consideration the accumulated profit as on 31.03.2011 i.e., loss/(-) of Rs.74,80,633/- and not accumulated profit adopted as on 31.03.2012 (Rs.3.46 crores). Therefore, no addition was possible u/s 2(22)(e) of the Act in the facts of the case and thus the assessee succeeds. And consequently, we direct the deletion of of Rs Rs.3,41,96,270/-."

9. The learned Departmental Representative could hardly controvert the above findings. Thus, respectfully following the aforesaid legal proposition, we set aside the impugned order passed by the learned CIT(A) and allow the ground no.2, raised by the assessee and direct the Assessing Officer to restrict the addition on account of deemed dividend only to the extent of accumulated profits of ₹ 4,79,825, and delete the balance addition made.

10. In the result, appeal filed by the assessee is partly allowed in terms indicated above.

Order pronounced in the open Court on 18/11/2024

Sd/-
V. DURGA RAO
JUDICIAL MEMBER

Sd/-
K.M. ROY
ACCOUNTANT MEMBER

NAGPUR, DATED: 18/11/2024

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The PCIT / CIT (Judicial);
- (4) The DR, ITAT, Nagpur; and
- (5) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Sr. Private Secretary
ITAT, Nagpur