

IN THE INCOME TAX APPELLATE TRIBUNAL

"G" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

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

Assessee by : None

Revenue by : Shri Hoshang B. Irani

Date of Hearing – 28.02.2022

Date of Order – 25.04.2022

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned order dated 25.05.2018, passed under section 250 of the Income Tax Act, 1961 ("*the Act*") by the learned Commissioner of Income Tax (Appeals)-3, Thane [*learned CIT(A)*], for the assessment year 2012-13.

2. In this appeal, the assessee has raised the following grounds:-

"1. Because, the learned Assessing Officer erred in making ad-hoc disallowances of Rs.3,62,366, on account of deemed dividend without considering the business exigency and other fact of the case.

2. Because, the learned Assessing Officer erred in making ad-hoc disallowances of Rs.27,615, on account of depreciation with unjustified reasons."

3. When the appeal was called for hearing, no one was present on behalf of the assessee to present the case. There is no application seeking adjournment either. On perusal of the record, it is observed that on immediate four previous occasions also no one appeared on behalf of the assessee, however, prior to that there was intermittent representation on few dates of hearing on behalf of the assessee. Therefore, we are proceeding to hear this appeal on the basis of submissions made by the learned Departmental Representative ("learned D.R.") and the material available on record.

4. The assessee is an individual and was carrying out the sub-broking activity in share and security market along with the investment in property and giving it on rent. For the year under consideration, the assessee e-filed its return of income on 29.09.2012 declaring total income of Rs. 46,88,845.

5. The issue arising in ground No. 1, raised in assessee's appeal, is with regard to disallowance under section 2(22)(e) of the Act on account of deemed dividend.

6. The brief facts of the case pertaining to this issue as emanating from the record are: During the course of assessment proceedings, it was observed that assessee has shown M/s Rustagi Projects and M/s Yen Pulses Private Limited as loan creditor in its balance sheet. The total outstanding loan as on 31.03.2012 from the aforesaid 2 companies was shown at Rs. 1,95,49,600. As the assessee was a director in both the companies, the assessee was asked to furnish the income tax return of both the companies. The Assessing Officer also observed that the reserve and surplus in both the companies was Rs.3,39,021 and Rs. 79,000, respectively, as on 31 March 2012. From the Ledger, the Assessing Officer noted that the assessee has received total loan of Rs. 1,95,49,600 from both the companies during the relevant financial year. In order to further verify applicability of section 2(22)(e) of the Act, the assessee was asked to furnish copy of share capital account in the books of aforesaid 2 companies. On perusal of Ledger, the Assessing Officer found that percentage of the shareholding of the assessee in M/s Rustagi Projects and M/s Yen Pulses Private Limited was 95% and 50% respectively. The Assessing Officer also found from the balance sheet of M/s Rustagi Projects that the accumulated profit as on 31.03.2011 was Rs. Nil and as on 31.03.2012 was Rs. 3,39,021. Further the accumulated profit in M/s Yen Pulses Private Limited as on 31.03.2012 was Rs. 79,000. As, both the companies were privately held companies and the assessee was holding not less than 10% shares in both the companies, the Assessing Officer vide order dated 25.03.2015 passed under section 143(3) of the Act treated the

amount of Rs. 3,62,366 as deemed dividend under section 2(22)(e) of the Act, in the hands of the assessee and disallowed the same.

7. In appeal before the learned CIT (A), assessee submitted that deemed dividend will be attracted where profit has been accumulated in the immediately preceding year and the current year profit accumulation will not attract deemed dividend. The assessee further submitted that there is no profit accumulation in the case of M/s Rustagi Projects as the company was set up on 24.06.2011 and M/s Yen Pulses Private Limited on 31.03.2011. The assessee also submitted that in case of M/s Rustagi Projects the current year profit cannot be included in deemed dividend for the relevant assessment year. The learned CIT(A) vide impugned order dated 25.05.2018 after considering the provision of section 2(22)(e) of the Act and various judicial precedents upheld the addition made under section 2(22)(e) of the Act as deemed dividend. Being aggrieved, the assessee is in appeal before us.

8. During the course of hearing, learned D.R. vehemently relied upon the orders passed by the lower authorities.

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.

12. The issue arising in ground no.2, raised in assessee's appeal, is with regard to disallowance of depreciation on vehicle.

13. The brief facts of the case pertaining to this issue as emanating from the record are: During the year under consideration, assessee claimed depreciation of Rs. 1,38,077 on vehicle. In absence of any log book being maintained for the usage of vehicle by the proprietor and their family, the Assessing Officer vide order dated 25.03.2015 disallowed 20% of depreciation on motor car as being attributable to personal usage of the asset in terms of provisions of section 38(2) of the Act. Accordingly, an amount of Rs. 27,615 being 20% was added back to the assessee's total income. The learned CIT(A) vide impugned order dated 25.05.2018 dismissed the appeal filed by the assessee on this issue.

14. Being aggrieved, the assessee is in appeal before us. During the course of hearing, the learned D.R. vehemently relied upon the orders passed by the lower authorities.

15. In view of the material available on record, we are of the considered opinion that the disallowance of depreciation on vehicle to an extent of 20% was rightly upheld by the learned CIT(A). As a result, ground no.2 raised in assessee's appeal is dismissed.

16. In the result, appeal by the assessee is dismissed.

Order pronounced in the open court on 25.04.2022

Sd/-
PRASHANT MAHARISHI
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 25.04.2022

Copy of the order forwarded to:

- (1) The Assessee;*
- (2) The Revenue;*
- (3) The CIT(A);*
- (4) The CIT, Mumbai City concerned;*
- (5) The DR, ITAT, Mumbai;*
- (6) Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

By Order

Assistant Registrar
ITAT, Mumbai