

BOMBAY HIGH COURT

Commissioner of Income-Tax

Vs.

P.K. Badiani

ITR No. 54 of 1963

(N.A. Mody, Actg. C.J. and K.K. Desai, J)

02.02.1970

JUDGMENT

N.A. Mody, Actg. C.J.

1. This is a reference under section 66(1) of the Indian Income-tax Act, 1922.
2. The questions referred are :

"(1) Whether the development rebate reserve created by the company by duly discharging the amount to the profit and loss account and being allowable under the Act constituted 'accumulated profits' of the company within the meaning of section 2(6A)(e) of the Act ?
(2) If the answer to question No. 1 is in the affirmative, whether the development rebate reserve provided for the accounting year 1957 alone would constitute 'accumulated profits' of the company within the meaning of section 2(6A)(e) of the Act to the exclusion of the development rebate reserve provided in earlier years ?
(3) Whether the debit balance in the mutual, open and current account of the assessee with the company at any point of time could be taken to represent an advance or loan by the company to the assessee within the meaning of section 2(6A)(e) of the Act ?
(4) Whether, on the facts and in the circumstances of the case, the amount outstanding at the end of the accounting year, if any, was alone to be taken or any payment at any point of time during the accounting year as hit by the provisions of section 2(6A)(e) of the Act ?"

3. The first question has been referred at the instance of the revenue department and question Nos. 2, 3 and 4 have been referred at the instance of the assessee.
4. The order of the Income-tax Tribunal out of which this reference arises relates to the two assessment years 1958-59 and 1959-60. This reference, however, concerns only the former

assessment year and reference to the latter year will, therefore, be omitted except when relevant to the former year.

5. The assessee is an individual. The accounting year relevant to the assessment year 1958-59 was 1st April, 1957, to 31st March, 1958. The assessee is a major shareholder in the Sadhana Textile Mills Private Ltd. Which is a private limited company. The assessee was also the managing director of the said company. The assessee had a mutual, open and current account in the books of the company and he had withdrawn through that account a sum of ₹ 3,37,416 in the accounting year. A question arose whether these amounts to his debit were loans or advances by the company to the assessee and as such liable to be deemed to be dividends under section 2(6A)(e). The other question which arose was what were the "accumulated profits" of the company in the relevant year. The third question which arose was whether the deemed dividends were to the extent of the "accumulated profits" and liable to be included in the taxable income of the assessee. A question arose whether the amounts of development rebate allowed to the company as a deduction under section 10(2)(vib) were liable to be treated as "accumulated profits" for the purposes of section 2(6A) (e). The Appellate Assistant Commissioner calculated the amount of such development rebate. The company's accounting year is the calendar year ending on 31st December. The Appellate Assistant Commissioner held that for the assessee's assessment for the assessment year 1958-59, the company's "accumulated profits" have to be ascertained as at 31st December, 1956. The Appellate Assistant Commissioner has found and the assessee does not dispute that at 31st December, 1956, the aggregate amount of the development rebate was ₹ 2,36,470 and that the balance in the profit and loss account was ₹ 6,641, the two amounts aggregating to ₹ 2,43,110. The Tribunal, however, held that the accumulated amounts of development rebates are not liable to be treated as "accumulated profits" for the purposes of section 2(6A)(e). The question No. 1 has, under the circumstances, been raised at the instance of the taxing department.

6. The assessee contended that if the accumulations of the development rebates were to be included when calculating "accumulated profits" for the purposes of section 2(6A)(e), only the allowance for development rebate for the company's accounting year 1957, could be taken into account and not the accumulations of the years prior to 1957. The Tribunal has negatived this contention. Question No. 2 has, hence, been referred at the instance of the assessee.

7. The assessee's account in the books of the company for the assessee's accounting year 1st April, 1957, to 31st March, 1958, has been annexed to the statement of the case and forms part of it. It shows that it opens with a debit balance of ₹ 67,842.95 carried forward from the previous year, that there are both credits and debits in that year, that it continued to be to the debit of the assessee till 31st January, 1958, but that as from 1st February, 1958, it turned to be to the credit of the assessee and ended on 31st March, 1958, with a credit to the assessee of a balance of ₹

1,38,240.60. The assessee contended that only the amount, if any, outstanding at the end of his accounting year and not any payment at any point of time during the accounting year can be taken into consideration for ascertaining, for the purposes of section 2(6A)(e), whether the assessee had taken any loan or advance from the company. The Tribunal negated that contention. Hence, questions Nos. 3 and 4 have been referred at the instance of the assessee.

8. Section 10(2)(vi) provides for depreciation as therein provided being granted as an allowance or deduction from the profit for ascertaining the taxable income. Section 10(2)(vib) provides that profits or gains shall be computed after making an allowance for –

"..... (vib) in respect of machinery or plant being new, which has been installed after the 31st day of March, 1954, and which is wholly used for the purposes of the business carried on by the assessee, a sum by way of development rebate in respect of the year of installation equivalent to twenty-five per cent. of the actual cost of such machinery or plant to the assessee :....."

9. Clause (vi) provides for depreciation and clause (vib) provides for an allowance for development rebate. The object of the two allowances is separate and distinct. A physical asset like a building or machinery deteriorates by normal wear and tear and its usefulness ends after a period of time. The basis and object of providing for depreciation is to set apart a fund which would enable replacement of the worn out building or machine. The provision for depreciation is made on the basis of what it had cost and usually no change in the amount which it had cost is made on the basis of fluctuations in price which have already occurred or are likely to occur. The very word "depreciation" shows that the intention behind the provision for depreciation allowance is to provide a fund which equals the value of the asset which has depreciated by normal wear and tear. The allowance under section 10(2)(vib), however, is by way of "development rebate". The very use of the word "development" shows that the intention and the object of providing this allowance is to provide a fund for development of industry. Depreciation is for replacement of machinery when it is worn out and becomes useless. Development rebate is for expansion of the industry by adding something to its existing machinery or other assets, be the addition similar to the existing machinery or other asset or of a totally different kind. The intention behind the two allowances is clearly apparent from the very use of the words "depreciation" and "development". The Tribunal has, however, held that development rebate has been provided only by way of an additional depreciation because of the continuous rise in prices in our country and the consequent necessity of a larger fund to replace the machinery or the other asset when it loses its usefulness by normal wear and tear. The Tribunal is clearly wrong in reaching this conclusion. That conclusion is negated by two reasons. The first is that it ignores the very meaning of the word "development". The second reason is that development rebate is provided by creating the new item (vib) in section 10(2) and not by merely increasing the rate of depreciation provided in item (vi) which already existed when item (vib) was introduced by an amendment. If that which is provided by way of development rebate was intended to be only an

additional depreciation to counter rising prices, it would have been secured by calling it additional depreciation and amending, if necessary, from time to time item (vi) itself providing a surcharge on or an increase in the rates of depreciation or in the value of the asset on which it is to be allowed. Allowance for depreciation is to replace the value of an asset to the extent it has depreciated during the period of accounting relevant to the assessment year and as the value has to that extent been lost, the corresponding allowance for depreciation takes its place and, therefore, when arriving at the profits for that period the amount of depreciation has to be deducted, because the amount of the value lost by depreciation is a capital loss which must be replaced first as otherwise the initial capital would, to that extent, incorrectly and falsely be converted into and treated as profits.

10. But such is not the position of the amount allowed for development rebate. That amount is not intended to replace any capital loss by wear and tear or in any such other way. It, therefore, forms part of real profit and even after it is allowed as a deduction under section 10(2)(vib), it continues to retain its original character of profits.

11. Now, the words used in section 2(6A)(e) are "accumulated profits". There must first have been profits. Profits would include development rebate. Next they must be "accumulated profits", i.e., the profits must have been accumulated prior to the accounting year of which year the income, profits and gains are being assessed. The profits of such accounting year itself would be current profits. The "accumulated profits" may notionally be treated as a fund. All amounts legitimately paid out of that fund would diminish that fund, i.e., the accumulations, and must be debited to that fund. Such payments out may be of different categories. For example, they may be for development as distinguished from replacement. Payments out for development must be debited and deducted from the "accumulated profits". Similarly, payments of dividends declared from the "accumulated profits". Similarly, payments of dividends declared to the extent that they exceed the provision for the purpose out of the current year's profits must be debited to the "accumulated profits". The position of loans, advances, etc., which are to be deemed to be dividends by reason of section 2(6A)(e) would be exactly similar as that of declared dividends. Care must be taken to debit every payments legitimately made out of the fund of "accumulated profits" as and when each such payment is made, because by reason of such payment, the quantum of the fund gets reduced. If it is not so done, there is the danger of a mistake occurring and the payments out being treated as having been made out of "accumulated profits" even if the aggregate of the former exceeds the amount of the latter. To illustrate, if the amount of "accumulated profits" is ₹ 10,000 and a loan is given to a shareholder of ₹ 7,500, and later but in the same accounting year to another shareholder of ₹ 5,000, each such loan being less than the amount of ₹ 10,000 of the "accumulated profits" may mistakenly be treated as a deemed dividend, although the aggregate of the two loans amounting to ₹ 12,500 exceeds ₹ 10,000 of the "accumulated profits".

12. Section 2(6A)(e) provides :

"2. In this Act, unless there is anything repugnant in the subject or context, -

(6A) 'dividend' includes -...

(e) any payment by a company, not being a company in which the public are substantially interested within the meaning of section 23A, of any sum (whether as representing a part of the assets of the company or otherwise) by way of advance or loan to a shareholder or any payment by any such company on behalf or for the individual benefit of a shareholder, to the extent to which the company in either case possesses accumulated profits;..."

13. This provision legislates in respect of "any payment". This case concerns payments by the company by way of loans or advances to the assessee and, therefore, we will omit reference to any payment made on behalf of the assessee. Now, the original transaction would be a loan. Section 2(6A)(e), however, creates a fiction that it should be treated as dividend subject to the condition that it shall be so treated only to the extent that the company possesses "accumulated profits". This is a fiction created only for the purpose of the Income-tax Act. The original transaction being a loan, the company is a creditor and the shareholder is debtor and the assessee is under an obligation to repay it along with interest, if any, payable thereon. The amount of the loan, however, though a borrowing and not income, is to be deemed to be a dividend and the shareholder must therefore, include it as forming part of his income to be taken into account in his income-tax assessment. As the amount of the loan must be debited to and deducted from the "accumulated profits" but only to the extent of the amount available in that fund, when the assessee repays the loan, the amount having already been deemed to be a dividend, cannot again be credited to the fund of "accumulated profits", because it would become liable if again advanced to a shareholder to be again deemed to be a dividend. For example, the "accumulated profits" are of ₹ 5,000 and a loan of ₹ 5,000 is advanced to a shareholder and the repays it. If this amount of ₹ 5,000 is credited to the "accumulated profits" and another loan of ₹ 5,000 is thereafter advanced by the company to another shareholder, it would again have to be deemed to be dividend in the hands of the latter. Surely, two dividends of ₹ 5,000 each cannot be paid out of only ₹ 5,000 available as "accumulated profits". Section 2(6A)(e) create a fiction and the fiction cannot be extended further or so interpreted as to go beyond the legislature's intention in creating the fiction. Section 2(6A)(e) clearly reveals the intention. A company in which the public are not substantially interested may not declare dividends or adequate dividends and may merely give loans to its shareholders. Being loans and not dividends, the amounts would not be taxable in hands of the shareholders. As the public would not have a substantial interest in the company, those substantially interested in the company may not recover back the loan or allow it to be barred by limitation. The result would be that the amount which ought in the hands of the

shareholders to have been taxable as his income would escape being taxed. It is to avoid that evil that section 2(6A)(e) created the fiction but limited it to the extent of the "accumulated profits". It is, therefore, clear that section 2(6A)(e) must be so interpreted that once an amount goes out of the "accumulated profits" as a loan and the loan is to be deemed to be dividend, the same amount when repaid cannot again be capable of attracting the fiction and be deemed to be dividend. To avoid the happening of any such eventuality, the "accumulated profits" must be notionally reduced by the amount of all loans, etc., which are to be deemed to be dividends under the fiction under section 2(6A)(e).

14. Arguments in this case reveal the necessity of another point being clarified. The point relates to the actual operation of section 2(6A)(e) and can best be brought out by an illustration : Suppose the "accumulated profits" to be ₹ 5,000 and a loan is advanced to a shareholder of ₹ 2,000. The shareholder then repays it and again borrows ₹ 1,000 in the same accounting year. Can the second loan be deemed to be a dividend for the purposes of section 2(6A)(e) ? Now, the loan of ₹ 2,000 reduced the "accumulated profits" to ₹ 3,000. When the second loan of ₹ 1,000 was borrowed, the amount of the "accumulated profits" was larger than the second loan. Section 2(6A)(e) uses the words "any payment", which must mean every payment, and the amount of "accumulated profits" being more than sufficient to cover the amount of the second loan, the fiction requires that the loan must be deemed to have been paid out of the "accumulated profits" and be deemed to be dividend and not having been paid out of the sum of ₹ 2,000 being the repayment of the first loan. This repaid sum of ₹ 2,000 is just like any other amount in the hands, of the company at the time when the first loan was advanced, in spite of the existence of which, section 2 (6A)(e) compelled the first loan to be deemed to be dividend. The position which emerges is that section 2(6A)(e) requires that when every loan is advanced to a shareholder, the amount of "accumulated profits" must be ascertained. The amount must be reduced by all disbursements legitimately attributable to it by way of expenses, development, dividends and deemed dividends, if any, the amount cannot be argued by the repayments of the loan and the amount of the loan must be deemed to be dividend to the extent of the balance remaining out of the "accumulated profits".

15. Mr. Joshi, the learned counsel for the applicant, contended that "profits" in "accumulated profits", as occurring in section 2(6A)(e), mean commercial profits or the profits which are so regarded in commercial practice and not profits as assessed for income-tax purposes and would, therefore, include development rebate, though not the amount set aside for depreciation. He cited the Supreme Court judgment in *Commissioner of Income-tax v. Bipinchandra Maganlal & Co*¹, the judgment of the Gujarat High Court in *Commissioner of Income-tax v. Bai Vina*², the judgment of the Madras High Court in *Commissioner of Income-tax v. M. V. Murugappan*³, and another judgment of the Supreme Court in *First Income-tax Officer v. Short Brothers (P.) Ltd*⁴, in support of his contention, that "profits", as used in some sections of the Income-tax Act, has

been interpreted to mean commercial profits and not assessed profits. It is not necessary to consider these decided cases, because we have already reached the conclusion that the allowances for development rebate are to be included in "accumulated profits" for the purposes of section 2(6A)(e) independently of these decided cases.

16. Mr. Rajgopal, the learned counsel for the respondent, contended that "accumulated profits" must mean actual profits and not deemed profits and that "actual profits" means what is earned in business, that development rebate is allowed by statute and stands on the same footing as the allowance for depreciation and that like the allowance for depreciation the allowance of development rebate should be omitted from the calculation of "accumulated profits". For reasons we have already pointed out, Mr. Rajgopal's contentions that there is no difference between the allowance for depreciation under section 10(2)(vi) and the allowance for development rebate under section 10(2)(vib), and that the latter like the former must not be included in "accumulated profits" under section 2(6A)(e), and that "profits" in "accumulated profits" means, profits as assessed, cannot be accepted. So also, his contention that development rebate having been allowed as an allowance under section 10(2)(vib) for arriving at profits cannot be treated as profits without an express provision to that effect in the statute itself cannot be accepted. He contended that development rebate is earmarked as capital and cannot, therefore, be deemed to be available for dividends or even deemed dividends, because dividends cannot be paid out of company's capital. This contention cannot be accepted, because there is no earmarking of development rebates, as there is no statutory compulsion to

¹(1961) 41 ITR 290 (SC) : (1961) 2 SCR 493

³(1966) 63 ITR 382 (Mad.)

²(1965) 58 ITR 100 (Guj)

⁴(1966) 60 ITR 83 (SC)

retain or use them as capital. He contended that if development rebates are to be included in "accumulated profits" under section 2 (6A)(e) and are so made available for purposes of deemed dividend, when such dividends are subjected to tax, it would amount to taxing capital. This contention cannot be accepted, because development rebates are intended to be used as capital, but there is no statutory compulsion that they shall be so used, nor is there any provision that they cannot be treated as capital. They do not become capital unless they are so used. He contended that the said Supreme Court judgment in *Commissioner of Income-tax v. Bipinchandra Mahanlal & Co*⁵, shows that, although the excess of the sale proceeds of an asset over its written down value is by reason of section 10(2)(vii) to be treated as profits for assessing taxable income, the excess is not to be treated as profits for the purposes of section 23A and that, similarly, development rebates having allowed as a deduction under section 10(2)(vib) should not be treated as profits for the purposes of section 2(6A)(e). Now, the said excess and the development rebates are not at all comparable. The excess of the sale proceeds is part of the realisation of a capital asset and is, therefore, factually capital. When section 10(2)(vii), however, requires the excess to be included in taxable income, it really includes an amount equal to the excess out of the prior allowance for depreciation which amount is on actual sale found to have been larger than what ought to have been initially allowed. What really gets taxed is, therefore, not part of the capital being the excess of the sale proceeds of a capital asset but the earlier profits equal to the excess which the actual sale proves ought to have been allowed as a deduction out of taxable

profits and are, therefore, brought to tax in the later year in which it is so found when the sale takes place. It is because of that reason, that what really gets taxed is the earlier profit or income, although the statute purports to provide for taxing the said excess of the sale proceeds. The amount of the allowance under section 10(2)(vib), however, though not to be taxed, was initially and factually a part of profits and though deductible from taxable income, continues even after such deduction to be profits. Section 10(2) (vib) only intends that it should thereafter be used as capital, but, non the less, it continues to retain its original character of profits till it is actually used for development and, thereupon gets transformed into capital but only if and when the owner does so. Mr. Rajgopal contended that section 2(6A)(e) creates by deeming loans to be dividends and the fiction should not be extended by deeming development rebates as forming part of "accumulated profits". The simple answer to this contention is that the amounts of development rebates were originally profits and that even after they are allowed as a deduction under section 10(2) (vib), they continue to retain their original character of profits till they are actually used for development when they get converted into capital and till the latter event for development when they get converted into capital and till the latter event happens it is no fiction to continue to treat the amount as profits. We must reject all these contentions urged by Mr. Rajgopal.

17. Questions No. 2 raised at the instance of the assessee raises the question whether the development rebate reserve provided for the accounting year 1957 alone would constitute "accumulated profits" of the company within the meaning of section 2 (6A)(e) to the exclusion of the development rebate reserve provided in earlier years. Now, the word "accumulated" in the phrase "accumulated profits" in section 2(6A)(e) clearly indicates that "accumulated profits" mean, profits which have been accumulated before the beginning of the accounting year which would be the previous year relevant to the assessment year. The provision of section 2(6A)(e) may fall for consideration during that

⁵(1961) 41 ITR 290 (SC) : (1961) 2 SCR 493

previous year and at that point of time it would not be even possible to know whether in that previous year there were any profits or to ascertain their amount and even if there were profits of that previous year up to that their amount and even if there were profits of that previous year up to that point of time, whether they would not be wiped out during the subsequent period of that previous year. The profits of that previous year would be current profits as distinguished from "accumulated profits". Therefore, the profits of that previous year cannot be included in "accumulated profits."

18. Questions Nos. 3 and 4 essentially relate to the facts of this case and the principles of law involved necessitate a statement of essential facts and we will proceed to state them. The relevant accounting or previous year of the assessee is 1st April, 1957, to 31st March, 1958. It is the loans received by the assessee from the company during this period which have to be examined to ascertain whether they should be deemed to be dividends under section 2(6A)(e). That in its turn necessitates the ascertainment of the company's "accumulated profits" at the time of each such

loan. The company's accounting year, however, is the calendar year. The assessee's account in the company which forms part of the statement of the case shows that the assessee has taken loans from the company in his said accounting year before 1st January, 1958, as well as after 31st December, 1957. It would, therefore, necessitate ascertaining whether the company had "accumulated profits" in respect of its year 1957, so far as its loan to the assessee during the first nine months April to December, 1957, of the assessee's accounting year 1957-58 is concerned, and of the company's accounting year 1958, in so far as the last three months January to March, 1958, of the assessee's said accounting year are concerned. For the company's accounting year 1957, its "accumulated profits" would be those as at the end of 31st December, 1956, and, as stated earlier, the Tribunal had found, and the assessee does not dispute, that they were in the amount of ₹ 2,36,470. It is only this amount which the Tribunal has taken into consideration as "accumulated profits" for ascertaining whether the loans to the assessee have to be deemed as dividends for the assessee's entire accounting year 1st April, 1957, to 31st March, 1958, i.e., even for the three months of January to March, 1958. For these latter three months the company's "accumulated profits" would be those at the end of the company's next year, i.e., 1958. The Tribunal has, however, taken only the said amount of ₹ 2,36,470 into consideration and not the amount of "accumulated profits" as at the end of 1958 also but only in connection with the loans advanced during the last three months of January to March, 1958. This aspect seems to have completely escaped the Tribunal's attention. The Tribunal's judgment, however, also relates to the assessee's next assessment year 1958-59, and ascertains that the "accumulated profits" of the company as at the end of 31st December, 1957, increased by ₹ 1,13,212. The assessee does not dispute this finding of the Tribunal also. This finding of an increase is useful only negatively to show that the said amount of ₹ 2,36,470 did not decrease except to the extent of the loans to the assessee which may have to be dividends under section 2(6A)(e) and this amount of ₹ 2,36,470 is much larger than the total amounts of loans to the assessee, which, as we will see later on, aggregate to a lesser sum. Though the position as it transpires presents no practical difficulty, it must be pointed out that an aspect essential in law has been overlooked.

19. Now, the assessee's account for 1st April, 1957, to 31st March, 1958, shows that there are credits as well as debits. What has to be ascertained is whether the debits are "loans", so that they can be deemed dividends. The account is a mutual, open, and current account. Every debit, i.e., every payment by the company to the assessee, may not be a loan. To be treated as a loan, every amount paid must make the company a creditor of the assessee for that amount. If, however, at the time when the payment is made by the company is already a debtor of the assessee, the payment would be merely a repayment by the company towards its already existing debt. It would be a loan by the company only if the payment exceeds the amount of its already existing debt and that too only to the extent of the excess. Therefore, the position as regards each debit will have to be individually considered, because it may or may not be a loan. The two basic principles are, that only a loan, which would include the other payments mentioned in section

2(6A)(e), can be deemed to be dividend and that too only to the extent that the company has at the date of the payment "accumulated profits" after deducting therefrom all items legitimately deductible therefrom.

20. The assessee's said account opens with a debit of ₹ 67,842.95. It is, however, only a carry-forward of the debit balance of the previous year and not being a payment by the company during this year, it has to be excluded. Then, there is a credit entry under date 29th June, 1957, of ₹ 7,500 being for the assessee's remuneration payable by the company for three months. There are three debit entries of ₹ 2,500 each under dates 6th April, 4th May and 6th June, 1957. The total amount of these three debit entries and the amount of this credit entry are equal and they are really contra-entries. Though the dates of the debit entries are earlier than that of the credit entry, the credit entry shows that it is merely a transfer entry and the remuneration was payable to the assessee at the respective dates of the said debit entries. These three debit entries are in payment specifically of remuneration which had already become payable by the company to the assessee and they are merely a mode of payment. These debit entries are, therefore, not loans and being part of contra-entries should really be excluded and ignored and we will proceed on that basis. Excluding this credit entry of ₹ 7,500, there are only four credit entries totalling ₹ 75,656.56 before the last credit entry of ₹ 4,00,000, under date 1st February, 1958. Before 1st February, 1958, being the date of this last credit entry of ₹ 4,00,000, and excluding the carry-forward debit of ₹ 67,842.95, there are 44 debit entries aggregating to ₹ 1,83,493.76. An examination of this account shows that not a single of these four credit entries made the assessee, as a result of the credit entry, a creditor of the company, because at the date of each credit entry, the total debit to the assessee was much larger. All these 44 debit entries were, therefore, loans to the assessee and the "accumulated profits" of the company were much larger, being ₹ 2,36,470. The aggregate of these 44 debit entries must be treated as dividend. On 1st February, 1958, there is the credit entry of ₹ 4,00,000 which wiped out the said total debit of ₹ 1,83,493.76 and wiped out even the opening carry-forward debit of ₹ 67,842.95 and made the assessee a creditor of the company for the sum of ₹ 1,48,663.29. There are 12 debit entries subsequent to 1st February, 1958 aggregating to ₹ 86,079.25, but as that total is less than the said balance of ₹ 1,48,663.29 in favour of the assessee, they are mere repayments by the company towards this said liability and none of these 12 debit entries was a loan by the company to the assessee, and, hence, no question of any of them being deemed dividends arises. We have referred to this account of the assessee only as the best available illustration to show how the principles we have stated in this judgment are to be applied. We have referred to the various figures which we have just mentioned without having them properly checked up or worked out and the Tribunal or the revenue authorities, as

the case may be, should and will be free to work out the correct position on its own, on the principles mentioned in our judgment and the answers to the questions which we give. In mentioning these figures we have not decided or taken into account any principles of law other than those covered by the subject-matter of the four questions herein. For example, Mr. Rajgopal contended that the amounts of dividends actually declared and paid by the company have been credited into this account of the assessee and that, therefore, necessary adjustments will have to be made, e. g., under section 2(6A)(e)(iii), as contended by him. The question of construing section 2(6A)(e)(iii) does not arise before us and we, therefore, express no opinion as to its application. The Tribunal and the revenue authorities, as the case may be, will act according to law and will be free to consider and give effect, when ascertaining the amount of deemed dividends, to all other provisions of law, i.e., other than those covered by the questions herein and the principles we have laid down.

21. As regards questions Nos. 3 and 4, Mr. Rajgopal contended that the debit balance, if any, at the last date of the assessee's accounting year 1st April, 1957, to 31st March, 1958, should be taken as the amount to be treated as dividend and as the assessee's account is on the last day to his credit, no amount can be deemed to be dividend. As already pointed out, the position has to be ascertained at the date of each payment by the company to the assessee and this contention must, therefore, be rejected. If Mr. Rajgopal's contention was to be accepted, the result would be that if a shareholder borrows a large amount during the year, but repays it on the last day of the year, it would not be considered to be a loan, though the facts show that he did borrow a loan. Such a contradiction of the real fact would result if Mr. Rajgopal's contention were to be accepted. Mr. Rajgopal further contended that in any event the highest amount to the assessee's debit on any day of the year should be the amount to be deemed to be dividend. This argument, again, ignores the principle laid down by us, that the position at the date of each payment must be considered. Moreover, there is another reason and that is that if it were to be so done, it would not enable the position of the balance of the "accumulated profits" being taken into account, as more than one shareholder may have borrowed loans from the company in an account similar to that of the assessee. All these contentions of Mr. Rajgopal ignore the basic fact that section 2(6A)(e) uses the words "any payment" which means, every payment, and section 2(6A)(e) requires the determination of two factors, viz., whether the payment is a loan and whether at the date when the payment is made there were "accumulated profits" and that these two factors are to be correlated and the result must be ascertained at the date of each such payment.

22. We now proceed to answer the questions.

22.1. Question No. 1 in the affirmative.

22.2. Question No. 2 in the negative.

22.3. As regards question No. 3 the real position is that what has to be considered is not the

balance in account but the position of every payment and on that footing we answer question No. 3 in the negative.

22.4. Questions No. 4 in the negative on the same footing as that of our answer to question No. 3.

23. The respondent to pay the applicant's costs.

24. Questions answered accordingly.

.