

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "D", MUMBAI**

**BEFORE SHRI SANJAY GARG (JUDICIAL MEMBER)
AND
SHRI ASHWANI TANEJA (ACCOUNTANT MEMBER)**

I.T.A. No.4551 /Mum/2013
(Assessment Year : 2009-10)

Devidayal Sales Limited 123-124, Mittal Chambers, 12 th Floor, Nariman Point, Mumbai-21	vs	The Addl CIT, Rang 6(2), Mumbai
PAN : AAACD0557C		
(Appellant)		(Respondent)

Appellant by	Shri Dhinal Shah
Respondent by	Shri Vachaspati Tripathi

Date of hearing : 06-10-2016
Date of pronouncement : 19 -10-2016

ORDER

Per ASHWANI TANEJA, AM:

This appeal is against the order of Commissioner of Income-tax (Appeals)-12, Mumbai [hereinafter called CIT(A)] dated 28-03-2013 passed against the assessment order u/s dated 26-12-2011 for A.Y. 2009-10 on the following grounds:

"All the grounds of appeal in this appeal are mutually exclusive and without prejudice to each other.

1. *The Ld. Commissioner of Income Tax (Appeals)-XII, Mumbai has erred in law and in facts in confirming the disallowance of Rs. 75,00,000/- paid to Directors as*

remuneration by holding that the payment made to them under the head 'Commission' would attract the provisions of sec. 194H as against sec. 192 so as to attract the provisions of sec. 40(a)(ia). The impugned disallowance of Rs. 75,00,000/- being bad in law and in facts is prayed to be allowed.

1.1 The Ld. CIT(A) has further erred in law and in facts in holding that the commission received by the Directors was not a part of salary but would be required to be considered as commission as envisaged in sec. 194H.

1.2 The Ld. CIT(A) has further erred in law and in facts in holding that the amendment to sec. 194J by the Finance Act 2012 is unambiguous and provide for invocation of the provisions of sec. 194J and consequently sec. 40(a)(ia) wherever the commission is payable to the Directors.

2. The Ld. Commissioner of Income Tax (A^{pp}eals)-X11, Mumbai has erred in law and in facts in confirming the action of the Ld. A.O. in the disallowance of Rs. 4,78,949/- by invoking the provisions of uls. 40(a)(ia) of the Act and also ignoring the decision of the Special Bench of the Hon'ble Tribunal in the case of Merylin Shipping & Transports Vs. ACJT 136 ITD 23 (Vizag). The impugned disallowance of Rs. 4,78,949/- being bad in law and in facts is prayed to be allowed.

3. The Ld. Commissioner of Income Tax (Appeals)-XII, Mumbai has erred in law and in facts in confirming the action of the Ld. A.O. in the addition to the extent of Rs. 1,01,754 (Rs. 1,53,724 minus Rs. 51,970) being the amount of long term capital gains with respect to property at Navi Mumbai by invoking the provisions of sec. SOC as also making further adjustments to the long term capital gains computed by the appellant. The impugned addition being bad in law and in facts is prayed to be allowed.

4. The Ld. Commissioner of Income Tax (Appeals)-XII, Mumbai has erred in law and in facts in confirming the action of the Ld. A.O. in assuming and estimating the annual letting value of the Company's property at Navi Mumbai at Rs. 19,012 in disregard of the facts as also the law. The impugned addition being bad in law and in facts is prayed to be deleted.

5. The Ld. Commissioner of Income Tax (Appeals)-XII, Mumbai has erred in law and in facts in confirming the action of the Ld. A.O. in assuming and estimating the annual letting value of Company's property at Navi Mumbai at Rs.19,012 in disregard of the facts as also the law. The impugned addition being bad in law and in facts is prayed to be deleted."

2. During the course of hearing, grounds 2, 4, 5 & 6 were not pressed; hence these grounds are dismissed, as such.

3. **Ground 1** : In this ground, the assessee has contested the action of the Ld CIT(A) in confirming the disallowance of Rs.75 lakhs paid to directors as remuneration by holding that the payment made to them under the head "commission" would attract the provisions of section 194H as against section 192 of the Act.

4. The brief background of the case is that the assessee was paying salary to its directors. In addition to that the assessee also paid commission. According to the assessee, only provisions of section 192 were applicable on any payment made to directors, whether it was called as salary or commission or by any other name. On the other hand, the Assessing Officer was of the view that with regard to amount of commission paid to directors, provisions of section 194H were applicable and, therefore, assessee was liable to deduct tax on commission payment separately. Being aggrieved, assessee filed appeal before the Ld. CIT(A) wherein no relief was granted by holding that if any payment had been made to a director as commission, then provisions of section 194H would be applicable and, therefore, the assessee was under obligation to deduct tax at source on the commission paid to its directors. It was also held that failure to deduct tax at source u/s 194H makes the assessee liable for

disallowance u/s 40(a)(ia) of the Act and accordingly disallowance made by the Assessing Officer u/s 40(a)(ia) was upheld.

5. During the course of hearing before us, the Ld. Counsel of the assessee brought our attention upon the fact that commission was paid as per the terms of agreement with the director for which requisite resolution was passed by the company. Our attention was also drawn on the return filed by the director wherein the entire amount received by the director from the assessee company was offered to tax under the head "Income from salaries" and has been accepted as such by the department. Our attention was also drawn to provisions of section 17(1)(iv) wherein it is clearly laid out that the entire amount has to be assessed as "salaries". Under these circumstances, the entire amount was liable for TDS u/s 192 which is outside the provisions of section 40(a)(ia) in the impugned assessment year.

6. Per contra, the Ld. DR relied upon the orders of the authorities below.

7. We have gone through the orders of lower authorities. It is noted that though the amount paid to the director has been termed as "commission", but the same has been paid as part of overall remuneration paid to the director as per terms of appointment of the director. The said payment has been offered as part of salary income under the "Income from salaries" by the directors and has been accepted as such by the income tax department, as per the facts before us. Section 17(1)(iv) clearly provides that salary includes any fee, commissions, perquisites or profits in lieu of or in addition to any salary or wages. Thus, once the said payment is assessable under the head "Income from

salaries”, then clearly provisions of section 192 are applicable for deduction of tax at source. In the year before us, i.e. A.Y. 2009-10, provisions of section 40(a)(ia) were not applicable on the amounts paid as salary on which TDS was to be deducted u/s 192. Under these circumstances, we hold that the impugned payment was not liable to be disallowed u/s 40(a)(ia). In case assessee has had failed in deducting tax u/s 192, then, the other remedies as available under the law should have been pursued by the Assessing Officer. We leave it at that stage. As far as the present appeal is concerned, we find force in the arguments of the Ld. Counsel in view of the aforesaid discussion made by us and, therefore, disallowance made by the Assessing Officer is directed to be deleted.

8. Ground 3: In this ground, the assessee has challenged the action of the lower authorities in making disallowance u/ 14A. It was argued that assessee had voluntarily disallowed a sum of Rs.60,000/-. The Assessing Officer without recording any satisfaction applied rule 8D and made disallowance of Rs.10,82,549 comprising of disallowance on account of interest of Rs.88,857 and on account of expenses of R.9,93,692 computed @0.5% of investment. It was argued by the Ld. DR that the assessee had himself agreed for disallowance of Rs.9,93,687/- as per its tax audit report and therefore, disallowance of the same amount should be confirmed.

9. We have gone through the orders passed by the lower authorities and find that a sum of Rs.88,857/- representing interest on vehicle loans should be deleted as the said loan has been clearly used for acquisition of vehicles and not for making any investment in tax free securities. With regard to the balance disallowance on account of expenses, in our view, no effective arguments have been made before us. The AO has rightly

made the disallowance and, therefore, the same is confirmed. The voluntary disallowance made by the assessee of Rs.60,000/- should be adjusted against the disallowance to be made on account of administrative expenses. Thus, this ground is partly allowed.

10. As a result, this appeal is partly allowed.

Order was pronounced in the open court at the conclusion of the hearing.

Sd/- (SANJAY GARG)	Sd/- (ASHWANI TANEJA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt: 19th October, 2016

Pk/-

Copy to:

1. The appellant
2. The respondent
3. The CIT(A)
4. The CIT
5. The Ld. Departmental Representative for the Revenue, D-Bench

(True copy)

By order

ASSTT.REGISTRAR, ITAT, MUMBAI BENCHES