IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE SRI MAHAVIR SINGH, JM AND SRI G. MANJUNATHA, AM

ITA No. 143/Mum/2016

(A.Y:2012-13)

The Asst. Commissioner of Income Tax -4(3)(2), Mumbai Room No. 649, Aayakar Bhavan, M.K. Road, New Marine Lines, Mumbai-400 020	Vs.	S.H. Kelkar & Co. Pvt. Ltd. 36, Devkaran Mansion, Mangaldas Road, Mumbai-400 002
Appellant	..	**Respondent**
PAN No.AAACS9778G		

Revenue by : Ram Tiwari, DR

Assessee by : Sauravh V. Bhat, AR

Date of hearing: 24-10-2017 **Date of pronouncement :** 27 -10-2017

O R D E R

PER MAHAVIR SINGH, JM:

This appeal by the Revenue is arising out of the order of Commissioner of Income Tax (Appeals)-9, Mumbai, [in short CIT(A)] in appeal No. CIT(A)-9/Cir.4/359/2014-15, dated 27-10-2015. The Assessments were framed by the Additional Commissioner of Income Tax, Circle-4(3), Mumbai (in short ACIT or AO) for the assessment year 2012-13 vide order dated 23-02-2015 under section 143(3) of the Income Tax Act, 1961(hereinafter 'the Act').

2. The first issue in this appeal of Revenue is against the order of CIT(A) deleting the disallowance made by AO of ₹ 84,00,000/- as

commission paid to managing director and two his working director. For this Revenue has raised following ground No.1: -

> *"1. "On the facts and circumstances of the case and in law, the Ld CIT(A) erred in deleting the disallowance of Rs. 84,00,000/- made u/s 37(1)(iii) of the IT Act in respect of commission paid to Managing Director and Working Director?"*

3. Briefly stated facts are that out of four directors of the assessee company, two are working directors, who were paid remuneration including salary and commission subject to overall limits prescribed under the Companies Act. The total remuneration included an amount of ₹ 84,00,000/- commission to these two directors. According to AO commission was paid to directors who were also shareholders in the company and hence, the commission was otherwise payable as dividend. Accordingly, the AO invoking the provisions of section 36(i)(ii) of the Act, disallowed the expenditure and also following the similar disallowance made in preceding assessment years i.e. AY 2006-07 to 2011-12. Aggrieved, assessee preferred the appeal before CIT(A), who relying on the Tribunal decision for earlier years allowed the claim of the assessee vide Para 4.4 and 4.5 as under: -

> *"4.4 I have considered the contention of the AO as vel1 as of the AR of the appellant. It is dispute that the issue involved in the current ground is similar to the disallowance ma& in the case of the appellant in the preceding years. The AO, in fact, has categorically stated in the Assessment Order as under:*
>
> > *"5.4 The submissions of the assessee have been duly considered but the same are not acceptable. In this case, the identical issue*

was involved for assessment year 2006-07, 2007-08, 2008-09 and 2009-10, wherein the payment of commission to directors was disallowed."

In this regard, the appellant has submitted the order of the Hon'ble Income-tax Appellate Tribunal "E" Bench, which vide order dated 07/11/2014 in ITA Nos. 7256 & 7257/Mum/2010 and 678/Mum/2012 for AYs 2006-07, 2007-08 and 2008-09 has dealt with the same issue of disallowance of commission paid to the same directors.

The Hon'ble Tribunal has made the following observations on page 4 of the order:

> *"7. We have considered the rival submissions. A perusal of the impugned order of the Ld. CIT(A) reveals that the amount of salary plus commission paid to the directors has not been held to be excessive by the lower authorities. There is no denial of the fact that the amount paid was reasonable in comparison to the remuneration paid for the services in the market. There is no denial of the fact that the dividend of Rs.3 crore was declared in the year under consideration. There seems merit in the contention of the ld. AR that the company has 29 shareholders and 4 directors whereas the commission was paid to two working directors only. So far the reliance of the Ld. D.R. on the special bench decision of the Tribunal in the case of "Dalal Broacha Stock Broking P. Ltd. v. Addl. CIT"*

(supra) is concerned, we find that the facts of the present case are quite distinguishable. In the said case there were only three shareholders who were directors of the company and no dividend was declared and there was no explanation as to why the dividend was not declared. Under such circumstances, we find force in the contention of the Ld. A.R. that company was justified in paying the commission to the working directors which was quite reasonable. The lower authorities have not noticed these facts while deciding the issue under consideration.

8. In view of our observations given above, the order of the lower authorities is set aside and the addition made on this ordered to be deleted."

4.5 I find considerable force in the arguments put forth by the learned AR that the assessee company has got 29 shareholders and the 2 working directors are being commission since last more than 30 years whereas none of the other 27 shareholders and/or 2 other nonworking directors are paid anything. the AO never challenged the reasonability of expenses incurred by the appellant towards the remuneration of directors which included salary, commission and benefits such as PP etc. subject to all limit of 5% of the net profits computed under the provisions of the companies Act, 1956. The appellant further submitted that commission is nothing but a part of remuneration and hence, the same has to be judged from the angle of commercial expediency for the

> *appellant. The appellant finally submitted that the nomenclature of Commission was provided to the remuneration since the same was done with a view to keep salary of the director's variable and avoid fixed burden on the appellant company.*
>
> *In view of the above, the addition made on this account is directed to be deleted because it is covered issue in favour of the appellant by its own order by Hon'ble ITAT, Mumbai in AYs 2006-07, 2007-08 & 2008-09 and since AO has not placed any material on record as to the status of case in High Court. However, the relief is guaranteed subject to the outcome of Bombay High Court, if any.*

Aggrieved, Revenue is in second appeal before us.

4. We have heard the rival contentions and gone through the facts and circumstances of the case. We find that in the preceding years, the assessee has incurred expenses towards commission paid to managing director Shri GD kelkar (now expired) and to the another director of the company Shri Ramesh Veze. In the present year, apart from Mr. Ramesh Veze, Shri Kedar Veze has been appointed as director of the assessee company and commission was paid amounting to ₹ 84,00,000/- i.e. ₹ 42,00,000/- each of the working director. We find that commission paid is apart from salary to director and the said commission is paid within the prescribed limit under companies Act 1956. We find that this commission has been consistently been paid to the working directors as part of their salary structure which comprises of basis salary and contribution to provident fund, superannuation contribution and commission as explained by the learned Counsel for the assessee. The logic behind the payment of commission is to bring accountability among the higher

management and to ensure that in the event of profitability of the company is reduced, the directors shall be the first person to be affected by way of their payment of lower emoluments. This commission is subject to limit prescribed under the companies Act at the rate of 5% of any profits. We find that both the working directors are well qualified and look after general administration, Finance apart from research activity also production and marketing. Both the directors attained the following achievements

> *"a. Since 1970, one of the director was member of Research advisory committee, Central institute of Aromatic and Medicinal plants (CIMAP) Lucknow, a Government of India Research Institute.*
>
> *b. Invited to be a member of ESGAP in the year 2976 a body of the United Nations and then of a UN/DO Mission for several countries, on a number of occasions.*
>
> *c. The company was bestowed with "Rashiriya Sanman being one of the highest taxpayers during Asst years 1994-95 to 1998-99.*
>
> *d. Expo - 95 SDIR Award, in the year 1995 for invaluable contribution in fragrance and flavor industry through dedication, research, innovation and indigenous technology in the manufacturer of various perfumery chemicals.*
>
> *e. Honorary membership of French Society of Perfumers, Paris."*

5. We also find that similar disallowances were made consistently from AY 2006-07 onwards till AY 20010-11 but only year 2006-07 where Tribunal has deleted the disallowance which was followed in AY 2009-10.

For other years, appeals are pending either at CIT(A) stage or before Tribunal. We find that during the year under consideration, the assessee company has already declared the dividend of ₹ 5.40 crores and hence, it cannot be doubted that the payment of dividend was made in the guise of commission to the directors. In view of these facts and circumstances we affirmed the order of CIT(A) and dismissed this issue of Revenue's appeal.

6. The next issue in this appeal of Revenue is against the order of CIT(A) deleting the disallowance of legal and consultancy charges of ₹ 27,5,996/-. For this Revenue has raised following ground No.2: -

> *"2. 0n the facts and circumstances of the case and in law, the IA CIT(A) erred in deleting the disallowance of legal and consultancy charges of Rs. 27,05,996/- without considering the fact that these expenses are not allowable as these expenses are related to inter-se dispute between two factions of the directors of the company."*

7. Briefly stated facts are there was a legal dispute among directors and group of shareholders namely Shri Ajit S Veze, Girish S Veze and their family members, who filed a case with the Company Law Board against the company under section 397 and 398 of the Companies Act, which ultimately resulted in separation of these two factions from company i.e. Ajit Veze faction and G.D. Kelkar Faction. Ultimately, Companies Law Board, after litigation of three four years passed an order. In the whole process, the assessee incurred legal expenses for representing itself before the Company Law Board and AO in other years i.e. AY 2008-09 and 2009-10 also disallowed the said legal expenses. The CIT(A) after considering the decision of Hon'ble Bombay High Court in the case of CIT vs Chemosyn Ltd., Mumbai in ITA No. 361 of 2013 and

also considering the judgement of Hon'ble Supreme Court in the case of CIT vs. Malayalam Plantations Ltd. [1964] 53 ITR 140 (SC) allowed the claim of the assessee by observing in Paras. 5.4.1 to 5.4.3 as under: -

> *"5.4.1 I have considered the contention of the AO as well as of the AR of the appellant. I find that the issue is again identical to the one raised in AY 2008-09 and AY 2009-10. The learned AR has pointed out that the issue as earlier dismissed by the Hon'ble ITAT, Mumbai for AY 2008-09 but was later recalled following the order of the Hon'ble Bombay High Court in the case of CIT vs. /Chemsyn Ltd.(supra)*
>
> *The Hon'ble ITAT, Mumbai in its order against the Miscellaneous Application filed for AY 2008-09 vide order dated 13.03.2015 has staed as under:*
>
> > *5……...so far as the disallowance of legal expenditure in relation to dispute between the directions of the company is concerned, in view of the law laid down by the Hon'ble Bombay High Court in the case of CIT vs. M/s Chemosyn Ltd., Mumbai: (supra) the issue, in our view, requires re-examination because of the binding precedential value of the decision of the jurisdictional high court……"*
>
> *I find that the Hon'ble Bombay High Corut in the case of CIT vs. Chemosyn Ltd., Mumbai has dealt with the similar issue wherein the expenses incurred towards arriving at the settlement of dispute before the Hon'ble Company Law Board was directed to be allowable by the Hon'ble Jurisdictional High Court.*

5.4.2 I further find that the Hon'ble Income-tax Appellate Tribunal in the case of Echjay Ltd. v Dy. CIT (2004) 088 TTJ 1089 has held that hwere a compromise or settlement is shown to have been arrived at between the parties to proceedings under section 397 and 398 of the Companies Act, 1956, the Company Law Board has to consider whether the said settlement was of the company as well as in public interest and if it is not so, the Company Law Board is not bound to accept and record the same. It is also mentioned that the proceedings under section 397 and 398 are of representative nature. No individual rights can be ascertained nor can a personal relief granted to any member. The Reliefs contemplated under both the section concern the affairs of the company. Also, the before passing of the order, the Hon'ble Company Law Board has to notify the Government Under section 400, and the Government also has the right to raise objections on the same if it feels that it is not in the interest of the company as also in the larger public interest. it is thus submitted that while passing the orders, the Hon'ble Company Law Board has taken into consideration the interest of the company and substantial public interest.

5.4.3 Further Hon'ble Supreme Court reported in CIT vs. Malayalam Plantations Ltd. has held that-

> *The expression 'for the purpose of the business' is wider in scope than the expression 'for the purpose of earning profits'. Its range is wide; it may take in not only the day to day running of a business but also the*

> *rationalization of its administration and modernization of its machinery; it may include measures for the preservation of the business and for the protection of its assets and property from expropriation, coercive process or assertion of hostile title; it may also comprehend payment of statutory dues and taxes imposed as a pre-condition to commence or for carrying on of a business;*
>
> *In view of the above observations and judicial pronouncement and due to the order of the Hon'ble ITAT, Mumbai in the appellant's own case during AY 2008-09, I delete the disallowance made by AO.*

8. We find from the above facts that the facts are not in dispute only legality of legal expenses are challenged by the Revenue. We find that this issue is settled by Hon'ble Bombay High Court in the case of Chemosyn Ltd (supra), wherein it is held as under: -

> *11. We find that the impugned order records a finding of fact that the amounts which were paid by the respondent assessee for the purpose of purchase of its shares, to its shareholder for subsequent cancellation was an expenditure incurred only to enable smooth running of the business. Thus, the expenditure was incurred for carrying on its business smoothly and therefore, was a deductible expenditure. Thus, the impugned order of the Tribunal is essentially a finding of fact. The respondents have not been able to show that these findings are in any manner perverse or arbitrary. Therefore, questions nos. 3 to 5 do not*

give arise to any substantial question of law. Thus, question nos.3 to 5 are dismissed.

Respectfully following the same, we confirm the order of CIT(A) and the appeal of Revenue is dismissed on this issue.

9. The next issue in this appeal of Revenue is against the order of CIT deleting the disallowance made by the AO on payment of assessee's contribution to PF/ESIC made beyond due date of the respective statutes. For this Revenue has raised following ground No.3: -

"*3. 0n the facts and the circumstances of the case and in law the IA. CIT(A) erred in deleting the disallowance made u/s 36(1)(va) of the IT Act without considering the fact that the payment of assessee's contribution to PF/ESIC has been made beyond the due date allowed for payment under the provisions of the PF/ESIC Act."*

10. At the outset, the AO noticed from the tax audit report that the assessee has made payments of employees' contribution to PF/ ESIC i.e. beyond due dates of respective statues. The details are as under: -

Month	Nature of contribution	Due date of payment	Payment date	Amount (₹ in Lakhs)
February 2012	PF	15.03.2012.	31.03.2012	14.45
April 2011	ESIC	21.05.2011	10.06.2011	0.08
May 2011	ESIC	21.06.2011	23.07.2011	0.09
June 2011	ESIC	21.07.2011	28.07.2011	0.10
July 2011	ESIC	21.08.2011	22.08.2011	0.09
October 2011	ESIC	21.11.2011	24.11.2011	0.16
November 2011	ESIC	21.12.2011	26.12.2011	0.14
Total	ESIC			15.11

Aggrieved, assessee preferred the appeal before CIT(A), who noted that the payments are within due date of filing of return on income under section 139(1) of the Act and once, the payments are within the due date of filing under section 139 of the Act, the payments are to be allowed as deduction. We confirm the finding of the CIT(A) and this issue of Revenue's appeal is dismissed.

11. **In the result, the appeal of Revenue is dismissed.**

Order pronounced in the open court on 27-10-2017.

Sd/-	Sd/-
(G. MANJUNATHA)	(MAHAVIR SINGH)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dated: 27-10-2017
Sudip Sarkar /Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

Assistant Registrar
ITAT, MUMBAI