आयकर अपीलीय अधिकरण "F" न्यायपीठ मुंबई मे।

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

BEFORE SRI MAHAVIR SINGH, JM AND SRI NK PRADHAN, AM

आयकर अपील सं./ ITA No. 6054/Mum/2016

(निर्धारण वर्ष / Assessment Year 2012-13)

Fouress Engg (I) Ltd. 22, Bhulabhai Desai Road, Mahalaxmi Chamber, Mumbai-400 026	Vs.	The Dy. Commissioner of Income Tax, Circle 5(1), Aayakar Bhawan, Mumbai
(अपीलार्थी / Appellant)	..	**(प्रत्यर्थी / Respondent)**
PAN No. AAACF5897K		

आयकर अपील सं./ ITA No. 6789/Mum/2016

(निर्धारण वर्ष / Assessment Year 2012-13)

The Dy. Commissioner of Income Tax, Circle 5(1), Aayakar Bhawan, Mumbai	Vs.	Fouress Engg (I) Ltd. 22, Bhulabhai Desai Road, Mahalaxmi Chamber, Mumbai-400 026
(अपीलार्थी / Appellant)	..	**(प्रत्यर्थी / Respondent)**

Assessee by	:	Shri K Shirram & Neelam Jadhav, ARs'
Revenue by	:	Shri Virendra Singh, DR

Date of hearing: 03-05-2018 **Date of pronouncement :** 11-05-2018

आदेश / O R D E R

PER MAHAVIR SINGH, JM:

These cross appeals are arising out of the order of Commissioner of Income Tax (Appeals)-10, Mumbai [in short CIT(A)], in appeal No. CIT(A)-10/DCIT-5(1)(2)/302/2015-16 dated 31.08.2016. The Assessment was framed by the Dy. Commissioner of Income Tax, Circle-5(1)(2), Mumbai (in short 'DCIT') for the A.Y. 2008-09 vide order dated 26.03.2015 under section 143(3) of the Income Tax Act, 1961 (hereinafter 'the Act').

2. At the outset, it is noticed that this appeal by Revenue is bared by time limitation of 19 days. The learned Sr. Departmental Representative, stated that delay occurred due to transfer of officer and hence, the same be condoned. The learned Counsel for the assessee has not objected to the condonation of delay. Hence, we condone the delay and admit the appeal.

3. The first issue in Revenue's appeal is as regards to the order of CIT(A) deleing the disallowance made by the AO bank guarantee commission for sanction of bank loan. For this Revenue has raised the following two grounds: -

> *"1) Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in allowing the assessee's claim of payment of commission to the directors for giving personal guarantee to Bank for sanction of bank loan to the assessee company."*
>
> *2) Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A)*

was justified in allowing the guarantee commission u/s 37(1) of the Act."

4. Briefly stated facts are that the assessee paid a sum of ₹ 1.73 crores as guarantee commission to the following persons: -

"1) Smt Soumyalatha S. Shetty ₹ 86,50,000/-

2) Shri Sameer S. Shetty ₹ 86,50,000/-

₹ 1,73,00,000/-"

5. The assessee company obtained bank loan from State Bank of India amounting to ₹ 86.50 crores and for this both the directors were paid commission i.e. guarantee commission. The AO disallowed the commission on the premises that in the day to day business of assessee company, the directors are supposed to take personal initiative so that the company manages its financial and surviving competition. According to the AO, the directors have only given guarantee to get the loan sanctioned from the Bank. The assessee contested before the AO that Soumyalatha S. Shetty is not the director and both the persons are not paid annual remuneration from the company. But the AO following the CIT(A)'s order for AY 2010-11 and 2011-12 made addition by observing in para 7.7 and 7.8 as under: -

"7.7 It is also pertinent to mention here that a similar addition was made in the assessment order for A.Y. 2010-11 and A.Y.2011-12 and the addition was made for A.Y. 2010-11 has been confirmed by the CIT (A), Mumbai vide Order no. CIT(A)/9/DCIT-5(1)/289/2012-13 dated 13.12.2013.

7.8 In view of the above, an amount of Rs.1,73,00,000/- is not to be considered as business expenditure and treated as not allowable

> *expense and therefore, deserve to be disallowed u/s 37(1) of the I.T. Act. Accordingly, guarantee commission paid to Directors and debited to P & L A/c amounting to ₹ 1,73,00,000/- is hereby disallowed and added back to the total income of the assessee. In view of the above, I am satisfied that the assessee has furnished inaccurate particulars of its income thereby concealed income and hence penalty proceedings under section 271(1)(c) of the I.T. Act are initiated."*

Aggrieved, assessee preferred the appeal before CIT(A).

6. The CIT(A) following the Tribunal's order for AY 2010-11 deleted the disallowance by observing in para 7.2 as under:-

> *"7.2. I have carefully considered the facts of the case and submissions made by the Id AR. During the course of appellate proceedings, the Id. AR has brought to my notice that the Hon'ble ITAT has decided the issue in their favour for AY 2010-11 vide their order dated 16/9/2015. Since the facts and circumstances being same for both the years, respectfully following the decision of the jurisdictional ITAT, the ground is allowed."*

Aggrieved, Revenue is in appeal before us.

7. We have heard the rival contentions and gone through the facts and circumstances of the case. We find that the Tribunal in assessee's own case in ITA No. 589/Mum/2014 for AY 2010-11 vide order dated 16.09.2015 by observing in Para 4.1 as under:-

> *"4.1 We have gone through the orders of the authorities below and material on record. We find*

force in the contention of the Ld. Counsel for the assessee that the issue before the Hon'ble Bombay High Court in the case of Indo Saudi Services (Travels) P. Ltd. (Supra) wherein the assessee was a general sales agent of foreign airlines. It earned commission at the rate of 12 per cent from S on the tickets booked/ sold by it. The assessee appointed several agents including its sister concern and paid incentive mission to such agents by way of handling charges. For the assessment years 1991-92 and 1992-93, the Assessing Officer held that the incentive commission paid to the sister concern was half per cent more than that paid to others sub-agents. The assessing officer invoked section 40A(2) Income-tax Act, 1961, and disallowed the excess commission paid to the concern at the rate of half per cent. This was confirmed by the Commissioner (Appeals). On appeal, the Tribunal, while dismissing the appeal held that the assessee part from paying handling charges at the same rate to other agents also. For the assessment years 1986-87 and 1987-88, the assessee had paid handling charges at the rate of 10 per cent to the sister concern and such charges were considered to be reasonable by the Revenue. For the assessment year 1989-90, the assessee had reduced the payment of handling charges to 9.5 per cent and h ad been allowed after due scrutiny. For the assessment year 1990-91, claim of the assessee at the rate of 9.5 per cent had been allowed though it not been dealt with by the Assessing Officer specifically in the order. For the assessment year 1993-94, the rate of 9.5 per cent had been held

> *reasonable and had been allowed. When the matter reached before the Hon'ble Bombay High Court, the court observed that the Tribunal was correct in coming to the conclusion that the Commissioner of Income Tax (Appeals) was wrong in disallowing half per cent commission paid to the sister concern of the assessee during assessment years 1991-92 and 1992-93 and accordingly dismissed the appeal filed by the Revenue. Since the facts involved in this appeal are similar to the facts in the case of Indo Saudi Services (Travels) P. Ltd., respectfully following the same, we set aside the order of the Ld. CIT(A) and delete the disallowance of ₹1,52,68,356/-."*

Similarly, for AY 2011-12 also in ITA No. 754/Mum/2016 vide order dated 23.03.2018, following the orders of Tribunal in earlier years deleted the disallowance vide Para 7 as under: -

> *"7. Considering the fact that similar set of fact the addition was deleted by Guarantee Commission of Tribunal. We do not find any justification in sustaining the disallowance when the order of Tribunal was brought in the notice of Ld. CIT(A). Even there are no variations of fact related with the issue under consideration in this year. Thus, respectfully following the principle of consistency, the Ground No. I of the appeal is allowed."*

8. There being no difference in the facts in this year also and taking a consistent view, we confirm the order of CIT(A) deleting the addition. This issue of Revenue's appeal is dismissed.

9. The first issue in this appeal of assessee is against the order of CIT(A) confirming the adhoc disallowance of 3 lacs i.e. 1.50 lacs out of business promotion expenses and ₹ 1.50 lakhs out of Misc. expenses. For this assessee has raised the following ground No. 1:-

> *"1. Learned CIT(A) erred in confirming adhoc disallowance of Rs. 300000/- i.e. Rs.1,50,000/- out of business promotion expenses and Rs,1,50,000/- out of miscellaneous expenses, based on general remark of the Assessing Officer Appellant prays for deleting the Adhoc disallowance of Rs.300000/-."*

10. Briefly stated facts are that the AO noticed from the P & L Account that the assessee has debited a sum of ₹ 69,57,639/- towards business promotion expenses and ₹ 1,65,16,647/- towards Misc. Expenses. According to AO, some of the bills and vouchers found defective and same were not supported by proper vouchers. According to the AO, some of the vouchers were not supported by the relevant bills. Accordingly, he disallowed 1.50 lakhs towards business promotion expenses and 1.50 lacs towards Misc. expenses on estimate basis. Aggrieved assessee preferred the appeal before CIT(A). The CIT(A) also confirmed the action of the AO by observing in Para 5.2 as under:-

> *"5.2. I have carefully considered the facts and submissions made by the Id AR. As seen from the facts of the case the AO has verified the bills and vouchers producer before him and noticed that some of the bills and vouchers are defective like some were undated or unsigned and many vouchers were not supported with relevant bills. Therefore, holding that the entire expenditure debited under these two heads was not incurred wholly and exclusively for the purpose of business,*

> *he has made an ad hoc disallowance of Rs.1,50000/- towards business promotion and Rs.1,50000/- towards miscellaneous expenses. Since the AO has verified the bills and vouchers at the grassroots level he made the addition having not satisfied with them. Since the AO has made the disallowance applying his discretion after verification of the bills and overtures, I do not wish to interfere in his action as I find the estimation is very reasonable. In view of this the addition is sustained and, that ground is dismissed."*

Aggrieved, now assessee is in second appeal before us.

11. After hearing both the sides and going through the facts of the case, we find that even now before us the learned Counsel for the assessee could not support that vouchers and bills etc. are complete with the assessee. Accordingly, we are of the view that the AO has verified the bills and vouchers and he made estimated disallowance in the absence of proper vouchers. We find no infirmity in the orders of the lower authorities and hence, the same is dismissed.

12. The next issue in this appeal of assessee is against the order of CIT(A) confirming the disallowance of Prior Period Expenses amounting to ₹6, 76,998/-. For this assessee has raised the following ground No. 2:-

> *"2. Learned CIT(A) erred in confirming disallowance of Rs.6,76,998/- on a/c of prior period expenses based on remark in Tax Audit Report, since liability is crystallized during the year Appellant prays to allow Rs 6,76,998/-."*

13. The AO made disallowance on Prior Period Expenses in the absence of any explanation. Aggrieved assessee preferred the appeal

before CIT(A), who also confirmed the action of the AO following the earlier years order by observing in Para 6.2 as under:-

> *"6.2 Similar issue has come up before me for discussion in appellants own case for AY 2011-12 dated 20/11/2015 wherein I have dismissed the appeal as the expenditure does not pertain to the year under consideration and the same cannot be allowed especially when the appellant is following mercantile system of accounting. Since facts and circumstances being same for both the years the ground is dismissed for this year also."*

Aggrieved, assessee is in second appeal.

14. At the outset, the learned Counsel for the assessee stated that this issue is covered by Tribunal's order in assessee's own case for AY 2011-12 in ITA No. 754/Mu/2016 vide order dated 23.03.2018, wherein Tribunal has deleted the addition of Prior Period Expenses by observing in para 13,14,15 & 16 as under: -

> *"13. We have considered the rival submission of the parties and perused the order of authorities below. During the assessment, the Assessing Officer noted that assessee claimed an expenditure of Rs. 6,26,228/- as Prior Period Expenses. The assessee was asked to substantiate the payment of Prior Period expenses. The assessee filed its reply dated 27.02.2014. In the reply the assessee contended that as per Bonus Act, bonus was paid @ 8.33% for Financial Year 2009-10. However, the bonus was declared @ 20% after completion of balance-sheet and the profit declared for Financial Year 2009-10. The difference is debited to the current year account*

and hence, the liability is debited to current financial year 2010-11. The bonus was declared in October/November 2010; hence, difference of bonus is paid as ex-gratia to the employee of the company. The contention of the assessee was not accepted by Assessing Officer as the assessee is following the mercantile system of accounting. The Ld. CIT(A) concurred with the finding of Assessing Officer holding that the expenses do not pertain to the year. The assessee has clearly brought out on record that bonus was declared in October/November 2010 and the difference of bonus was paid as ex-gratia to the employee. The bonus was declared by management of the assessee after completion of the balance-sheet on the profit prevailing for Financial Year 2009-10. Thus, the assessee was entitled to debit the difference from the current Financial Year i.e. 2010-11.

14. The Hon'ble Delhi High Court in case of CIT Vs. Exxon Mobile Lubricants (P) Ltd. (supra) while considering the ground related with Prior Period Expenditure held that when the liability of the assessee under agreement had arisen and accrued in August 2002 when agreement was executed, therefore, the liability of the assessee to pay for the period January 2002 to March 2002 arose and crystallized in August 2002. If the assessee had shown the Prior Period Expenses and the Assessing Officer had not excluded while working out the current year taxable income than there was no reason on the part of Assessing Officer to disallow

only one part of the Prior Period Adjustment i.e. Prior Period Expenditure. It was held that the addition by Assessing Officer was not sustainable. We have noted that the facts of the present case in principle are similar.

15. The Hon'ble Supreme Court in case of Non-such Tea State Ltd. Vs CIT (supra) held that when the liability to pay is crystallized in the year of approval, therefore, deductable in computing the profit from the period ending when liability was crystallized. Further, the Hon'ble Supreme Court in case of Saurashtra Cement & Chemical Industry Vs CIT 213 ITR 523 (Guj) held that merely because the expenses related to a transaction of an earlier year does not become a liability payable in the earlier year unless it can be said that the liability was determined and crystallized in the year in question.

16. In view of the above legal position, the liability to make the ex-gratia payment was crystallized during the year under consideration. In our view, the assessee was entitled for deduction of the said Prior Period Expenses. In the result, this ground of appeal is allowed."

15. The learned Departmental Representative could not point out any difference in facts of this year and as the facts are similar and issue is exactly identical. Respectfully, following the Tribunal's order in assessee's own case we delete the addition. This issue of Assessee's appeal is allowed.

16. The next issue in this appeal of assessee is as regards to the order of CIT(A) confirming the estimated disallowance of 50% of Travelling

expenses of directors. For this assessee has raised the following ground No 3 :-

> *"3. Learned CIT(A) erred in confirming disallowance of ₹ 1,97,400/- adhoc 50% of total expenses out of 'travelling expenses director' as of personal nature. Appellant prays to allow sum of ₹ 1,97,400/-."*

17. Brief facts are that the assessee has incurred travelling expenses of directors amounting to ₹ 3,94,880/-. The AO disallowed 50% of Travelling Expenses at ₹ 1,97,400/- by holding the same as personal in nature. The CIT(A) also confirmed the action of the AO by observing in para 8.2 as under:-

> *"8.2. I have carefully considered the facts of the case and the submissions of the Id.AR. As seen from the facts of the case the appellant has debited an amount of Rs.3,94,8801- under travelling and Rs2,14,599/- under club expenses. The AO has disallowed 50% of each head and made a total disallowance of Rs.3,04,750/- treating them as personal expenditure. With regard to travelling expenses similar issue has come up for discussion before me in appellant's own case for AY 2011-12 dated 20.11.2015 wherein I have dismissed the ground holding as under:-*
>
> > *5.2 I have carefully considered the facts and circumstances of the case and submissions made by the Ld. AR. The AO has found that the appellant company has claimed guest house expenses of ₹ 8,12,400/- which was owned by one of the*

> *shareholders. As he found that such expenses are on a higher side the AO has disallowed 50% of such expenses. Even though the ld. AR has brought a comparison between the guest house charges and the rates prevalent in five star hotels and submitted that the charges debited on guest house are far less than the charges at five star hotels, he has not justified why the comparison should be made only with five star hotels. Further, as the AO, after careful examination of the case and books of account has already used his discretion to disallow only 50% of such expenses claimed by the appellant, I do not wish to interfere in the discretion of the Assessing Officer. The ground is dismissed.*
>
> *Since the facts and circumstances for both the years being same the ground is dismissed for this year also."*

Aggrieved, now assessee is in appeal before Tribunal.

18. We have heard the rival contentions and gone through the facts and circumstances of the case. The learned Counsel for the assessee drew our attention to Tribunal's order for AY 2011-12 in ITA No. 754/Mum/2016 vide order dated 23.03.2018, wherein Tribunal vide Para 10 and 11 has deleted the addition and the same reads as under:-

> *"10. We have considered the rival submission of the parties and perused the record. The Assessing Officer disallowed 50% of the expenditure on his observation that no evidence has been furnished by*

the assessee. The Ld. CIT(A) after considering the comparative rate furnished by assessee for Guest house charges and prevalent rate of Five Star hotel concluded that the rate of Guest house are not less than the Five Star hotels..

11. The Hon'ble Gujarat High Court in Sayaji Iron & Engineering Co. v CIT (supra) while considering the grounds related with Business Expenditure for use of vehicle of assessee-company by its Director held that when vehicle were used by Directors in a limited company "Even if they proportionately used by the Director, because the limited company by its nature cannot have personal use", the limited company is an any intimate person and there cannot be anything person about such entity. Once the expenditure in question was in term as provided in section 309 and 198 of Companies Act, therefore, not be any non-business purpose so far as the assessee companies are concerned. It was further held that it was wrong in disallowing 1/6 of the total Car expenditure and depreciation claimed by assessee-company on account of personal use of the Car which has been used by the Directors. In our view, it is settled law that the Revenue authority cannot step into the shoes of businessmen to dictate them how to make the expenditure for running their business. The lower authorities have not brought anything on record that visit of the Directors namely Suchitra Hegde and Ritvik Hegde was not for the purpose of business. In absence of any finding or any material on record that the visit and stay of Directors was for stay of personal use,

> *this ad-hock disallowance in not justifiable. Thus, we do not find any justification in adhoc disallowance on account of Travelling Expenses. In the result, Ground No.II of the appeal is allowed."*

19. The learned Counsel for the assessee stated that in this year there is no different in the facts. We find that the Tribunal has allowed this issue in earlier years, taking a consistent view and respectfully following the same, we delete the addition and allow this issue of assessee's appeal.

20. The next issue in this appeal of assessee is against the order of CIT(A) confirming the disallowance of 50% on club expenses as personal in nature. For this assessee has raised the following ground No. 4:-

> *'4. Learned CIT(A) erred in confirming disallowance of ₹ 1,07,300/- adhoc 50% out of total club expenses as of personal nature. Appellant prays for allowing the same."*

21. Brief facts are that the assessee incurred expenditure on account of club payment amounting to ₹ 2,14,594/-. According to AO, these club expenses are personal in nature and accordingly, he disallowed 50% of the same amounting to ₹ 1,07,300/-. Aggrieved, assessee preferred the appeal before CIT(A), who also confirmed the action of the AO by observing in Para 8.2.1 as under:-

> *"8.2.1. With regard to club expenses even though the ld.AR has submitted that membership and monthly subscription charges (Rs.1,67,650/-) are allowable expenses as held by various courts, he has not brought to my notice any such references. The remaining amount of Rs. 46,949/- was claimed to be expenditure for entertaining customers which is a business expenditure, therefore, that also*

cannot be disallowed. I do riot find merit in the argument raised by the ld.AR. As the element of personal expenditure in this type of spending is not ruled out, I am in agreement with the AO and confirm the disallowance. The ground is dismissed."

Aggrieved, now assessee is in second appeal before Tribunal.

22. Now, before us the assessee could not substantiate that these are business expenditure and not personal in nature. And it is not the case of assessee that these are incurred for business. Once this is the position, we are of the view that the CIT(A) has rightly confirmed the disallowance of these expenses. This issue of assessee's appeal is dismissed.

23. **In the result, the appeal assessee is partly allowed and that of the Revenue is dismissed.**

Order pronounced in the open court on 11-05-2018.

आदेश की घोषणा खुले मे दिनंक 11.05.2018 को की गई ।

Sd/-	Sd/-
(NK PRADHAN)	(MAHAVIR SINGH)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dated: 11-05-2018
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