IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI
BEFORE SHRI R.C.SHARMA, AM AND SHRI RAVISH SOOD, JM

ITA Nos. 4011 & 5070/Mum/2013
(**निर्धारण वर्ष** / Assessment Years: 2009-10 & 2010-11)

M/s Nat Steel Equipment Private Limited, G.D. Ambedkar Marg, Naigaum Road, Bombay- 400014.	**बनाम**/ Vs.	DCIT-7(1), Room No. 622, Aaykar Bhawan, M.K Road, Churchgate, Mumbai 400 020.
स्थायी लेखा सं./जीआइआर सं./PAN No. AAACN5119J		
(अपीलार्थी /**Appellant)**	**:**	**(**प्रत्यर्थी / **Respondent)**

ITA Nos. 4681 & 5270/Mum/2013
(**निर्धारण वर्ष** / Assessment Years: 2009-10 & 2010-11)

DCIT-7(1), Room No. 622, Aayakar Bhavan M.K. Road, Churchgate, Mumbai-20	**बनाम**/ Vs.	M/s Nat Steel Equipment Private Limited, G.D. Ambedkar Marg, Naigaum Road, Mumbai- 400014.
स्थायी लेखा सं./जीआइआर सं./PAN No. AAACN5119J		
(अपीलार्थी /**Appellant)**	**:**	**(**प्रत्यर्थी / **Respondent)**

अपीलार्थी की ओर से / **Assessee by**	:	Shri Deepak Tralashwala, A.R
प्रत्यर्थी की ओर से**/Respondent by**	:	Shri Suman Kumar, D.R

सुनवाई की तारीख / **Date of Hearing**	**:**	02.05.2018
घोषणा की तारीख **/ Date of Pronouncement**	**:**	13.06.2018

आदेश / O R D E R

PER RAVISH SOOD, JUDICIAL MEMBER:

The present cross appeals filed by the assessee and revenue for A.Ys 2009-10 and 2010-11 are directed against the respective orders passed by the CIT(A)-13, Mumbai, dated 13.03.2013 and 13.05.2013, respectively, which in itself arises from the assessment orders passed by the AO under Sec. 143(3) of the Income tax Act, 1961 (for short 'Act'), dated 30.12.2011 and 30.12.2012, respectively. As certain common issues are involved in the aforesaid appeals, thus the same are being disposed off by way of a consolidate order. We shall first advert to the cross appeals filed by the assessee and the revenue for A.Y 2009-10. The assessee assailing the order of the CIT(A) had raised before us the following grounds of appeal:

"(1) The learned CIT (A) has erred in law, facts and circumstances of the case in confirming the disallowance of 30% of total commission [Total commission: Rs.90,25,273/-] (Ninety lakhs twenty five thousand two hundred and seventy three only) amounting to Rs.27,07,582/- (Twenty lakhs seven thousand five hundred and eighty two only) paid to related parties u/sec 40A(2)(b) of Income Tax Act, 1961.

(2) The learned CIT (A) has erred in law, facts and circumstances of the case in confirming the disallowance of 30% of commission amounting to Rs. 27,07,582/- (Twenty lakhs seven thousand five hundred and eighty two only) on adhoc basis without ascertaining the Fair value of services provided to related parties u/sec 40A(2)(b) and further erred in not considering the fact that commission paid to independent agents at the same rate of 12% as paid to related parties.

(3) The learned CIT (A) has erred in law, facts and circumstances of the case in confirming the disallowance of 30% of salary amounting to Rs.3,60,000/- (Three lakhs sixty thousand only) by treating Rs 12,00,000/- (Twelve lakhs) as commission instead of salary (Total salary paid Rs. 80,60,000/-) (Eighty lakhs sixty thousand only) paid to Zoru Bhathena, the general manager of the company.

(4) The learned CIT (A) has erred in law, facts and circumstances of the case in confirming the disallowance of 30% of legal & professional fees paid to an Advocate [Total fees paid: Rs.27,33,745/-] (Twenty seven lakhs thirty three thousand seven hundred forty five only) amounting to Rs. 8,20,123/- (Eight lakhs twenty thousand one hundred & twenty three only) on the ground of payment to related parties u/sec 40A (2) (b) of Income Tax Act, 1961.

(5) The learned CIT(A) has erred in law, facts and circumstances of the case in confirming the disallowance of 30% of commission amounting to Rs.8,20,123/- (Eight lakhs twenty thousand one hundred and twenty three only) on adhoc basis without ascertaining the Fair value of services provided to related parties u/sec 40A (2)(b).

(6) The Learned CIT (A) has erred in law, facts and in circumstances of the case by confirming the levy of interest u/s 234B, 234C and 234D.

(7) Your Appellant craves leave to add to, alter, amend, delete and/or modify the above grounds of appeal on or before the final date of hearing.

(8) Prayer: The Appellant prays your honor for allowing the appeal."

2. Briefly stated, the facts of the case are that assessee company which is engaged in the business of manufacturing of pharmaceuticals, hospital and laundry appliances had filed its return of income for A.Y 2009-10 on 30.09.2009, declaring total income of Rs.57,62,100/-. The return of income filed by the assessee was processed as such under Sec. 143(1) of the Act. The case of the assessee was thereafter selected for scrutiny assessment under Sec. 143(2). The A.O after deliberating on the facts of the case made the following additions/disallowances in the hands of the assessee:

Sr. No.	Particulars	Amount
1.	Disallowance u/s 36(1)(ii)	Rs.1,16,83,883/-
2.	Disallowance u/s 40A(2)(a)	Rs. 38,87,705/-

, and assessed the income at Rs.3,04,05,001/-.

3. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The CIT(A) after giving a thoughtful consideration to the contentions advanced by the assessee deleted the disallowance of Rs.1,16,83,883/- made by the A.O under Sec.36 (1)(ii) of the Act. However, not impressed with the explanation of the assessee that the A.O was not justified in making the disallowance under Sec. 40A(2)(a) of the Act, upheld the same.

4. The assessee being aggrieved with the sustaining of the disallowance of Rs.38,87,705/- made by the A.O under Sec. 40A(2)(a) has carried the matter in appeal before us. The ld. Authorized Representative (for short

'A.R') for the assessee took us through the facts of the case and submitted that the A.O had disallowed an amount of Rs.38,87,705/- being 30% of the payments made by the assessee to its related parties under Sec.40A(2)(a) of the Act, as under :

Sr. No.	Name	Total Payment	Head of Payment
1.	Katie Bathea	69,47,220	Commission
2.	Farad Bathena	20,78,053	Commission
3.	Zoru Bathena	12,00,000	Commission
4.	Adv. Nevia Bhathena	27,33,745	Legal and professional
	Total	**1,29,59,018**	

The ld. A.R before adverting to the maintainability of the aforesaid disallowance submitted that the salary of Rs. 12,00,000/- paid to Mr. Zoru Bathena as general manager of the assessee company was wrongly considered by the A.O as payment by way of commission. It was submitted by the ld. A.R that as the respective payments made to the aforementioned related parties were in conformity with those made to the unrelated parties, hence the A.O had most arbitrarily carried out a disallowance under Sec. 40A(2)(a) of Rs. 38,87,745/- in the hands of the assessee. It was submitted by the ld. A.R that the A.O while making the disallowance under Sec. 40A (2)(a) had failed to place on record any such material which could evidence that the payments made by the assessee for the services rendered by its related parties were excessive or unreasonable, having regard to the fair market value of the services for which the same were made. It was thus, the contention of the ld. A.R that as the very *sine qua non* for invoking the disallowance contemplated under Sec. 40A(2)(a) of the Act was not satisfied by the A.O, thus no disallowance under the said statutory provision could have been validly made in the hands of the assessee. The ld. A.R to support his contention that unless the revenue is able to point out as to how the assessee by making the payments to its related parties had evaded payment of taxes, no disallowance under Sec.40A(2)(a) could have been made, relied on the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Indo Saudi Services (Travel) Pvt. Ltd. (2009) 310 ITR 306 (Bom). The ld. A.R further in order to drive home his contention that not only a heavy onus was

cast upon the revenue to establish that the payment made by the assessee to its related parties was found to be excessive or unreasonable, having regard to the fair market value of the goods, services or facilities for which the payment was made, but rather, it was obligatory on the part of the revenue to arrive at any such inference on the basis of a feasible comparison and not otherwise, relied on the judgment of the High Court of Delhi in the case of CIT, Delhi-IV Vs. Denso Haryana (P) Ltd. (2010) 328 ITR 14 (Del). The ld. A.R further in support of his contention that payments made by an assessee to its related parties could not be summarily dislodged without proving that such payments were not for the *bonafide* reasons, took support of the judgment of the High Court of Allahabad in the case of CIT-1, Lucknow Vs. Sahu Investment Mutual Benefit Company Ltd. (2017) 396 ITR 595 (All).

5. Per contra, the ld. Departmental Representative (for short 'D.R') relied on the order of the CIT(A). It was the contention of the ld. D.R that as the assessee had made excessive payments to its related parties, hence the A.O in all fairness had most reasonably disallowed 30% of such payments under Sec. 40A(2)(a), which however had wrongly been set aside by the CIT(A).

6. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that the fact that the assessee had made an aggregate payment of Rs.1,29,59,018/- to its related parties by way of commission /legal and professional charges is not in dispute. It is further discernible from the records that the assessee on being called upon by the A.O to substantiate the reasonableness of the payments made to its related parties, however had failed to place on record any documentary evidence in support thereof. The A.O was of the view that the assessee had paid commission to its related parties at an exorbitant rate of 10% of the sale value. It was further observed by the A.O that not only the payments made by the assessee to its related parties appeared to be unreasonable, but rather 90% of the total payments were found to have been made to such related parties. We find that on the basis of the aforesaid deliberations, the A.O after

characterising the payments made by the assessee to its related parties as unreasonable and excessive had disallowed 30% of such payments and made a consequential addition of Rs.38,87,705/- in its hands.

7. We have deliberated at length on the issue under consideration and are unable to persuade ourselves to subscribe to the view taken by the lower authorities. We find from a perusal of Sec. 40A(2)(a) that it is only where an assessee incurs an expenditure in respect of which a payment has been or is to be made by an assessee to a related party, that the A.O is of the view that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or is to be made, keeping in view the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him therefrom, then so much of the expenditure as is considered by him to be excessive or unreasonable shall not be allowed as a deduction. We though are in agreement with the view taken by the CIT(A) that once the A.O forms an opinion that the expenditure incurred by the assessee in respect of the goods, services or facilities for which the payment is made or is to be made to the related party is found to be excessive or unreasonable, then the onus is cast upon the assessee to rebut the same and prove the reasonableness of such related party expenses. However, we find that the legislature had in all its wisdom in order to avoid any arbitrary exercise of powers by the A.O in the garb of the aforesaid statutory provision, specifically provided that such formation of opinion on the part of the A.O that the expenditure incurred in respect of the related party payments is excessive or unreasonable, has to be arrived at having regard to the fair market value of the goods, services or facilities for which the payment is made by the assessee or keeping in view the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him therefrom. We are afraid, that in the case of the assessee before us the CIT(A) had upheld the *adhoc* disallowance of 30% of the payments made by the assessee to its related parties, without uttering a word as to on what basis the respective expenditure incurred by the assessee in context of the related party services viz. Commission charges

and Legal and Professional fees was found to be excessive or unreasonable, having regard to either the fair market value of the services for which the payment was made by the assessee or the legitimate needs of its business or the benefit derived by or accruing to the assessee therefrom. Rather, the manner in which the A.O had carried out the disallowance under Sec. 40A(2)(a) can be gathered from the fact that though the assessee company had paid salary to one of its related party viz. Mr. Zoru Bathena for his services rendered as general manager, however the same was considered by the A.O as payment towards commission. We are of the considered view that the lower authorities had carried out the disallowance under Sec. 40A(2)(a) on an *adhoc* basis viz. 30% of the payments made to the related parties and made a disallowance of Rs. 38,87,705/- without placing on record any material which could prove to the hilt that the payments were excessive or unreasonable, having regard to the fair market value of the services for which the same were made or keeping in view the legitimate needs of the business of the assessee or the benefit derived by or accruing to the assessee therefrom. Be that as it may, we are of the considered view that in the absence of satisfaction of the basic condition for invoking of Sec. 40A(2)(a) by both of the lower authorities, the disallowance of 30% of the related party expenses i.e Rs. 38,87,705/- made under Se. 40A(2)(a) cannot be sustained. We thus, delete the disallowance of Rs.38,87,705/- sustained by the CIT(A) under Sec.40A(2)(a) of the Act. The **Grounds of appeal Nos. 1 to 5** are allowed.

8. That as the levy of interest under Sec. 234B and 234C are mandatory pursuant to the judgment of the Hon'ble Supreme Court in the case of CIT Vs. Anju M.H. Ghaswala (2001) 252 ITR 1 (SC), hence the assailing of the levy of interest under the said statutory provisions would be rendered as consequential. On a similar footing, the interest charged under Sec. 234D also being consequential to giving effect to our order by the A.O, is thus disposed off on similar terms. The **Ground of appeal No. 6** is disposed off as having been rendered as consequential in nature.

9. The **Ground of appeal No. 7** raised by the assessee being general is dismissed as not pressed.

10. The appeal of the assessee is allowed in terms of our aforesaid observations.

ITA No. 4681/Mum/2013
A.Y 2009-10

11. We shall now advert to the appeal filed by the revenue for A.Y 2009-10. The revenue assailing the order of the CIT(A) had raised before us the following grounds of appeal:

> *"(i) The Learned CIT(A) has erred on facts and in law in deleting the addition of Rs.1,16,83,883/- made by the Assessing Officer u/s. 36(1)(ii) of the Income Tax Act, 1961, without properly appreciating the factual and legal matrix as clearly brought out by the Assessing Officer.*
>
> *(ii) The Learned CIT(A) has erred facts and in law in deleting the addition of Rs.1,16,83,883/- made by the Assessing Officer u/s.36(1)(ii) of the Income Tax Act, 1961 without appreciating the fact that the Assessing Officer has clearly proved that the arrangement of payment of commission to Shri Darayus Bathena is covered by the exception clause of Section 36(1)(ii) of the Income Tax Act, 1961."*

12. Briefly stated, the facts to the extent relevant to the issue under consideration are that during the course of the assessment proceedings the A.O observed that the assessee had made a payment of total commission of Rs.2,45,40,049/- as against its total sales of Rs.21,13,25,254/-. On perusal of the facts as had emerged during the course of the assessment proceedings, it was observed by the A.O that the total payment of commission made by the assessee comprised of related party payments of Rs.2,19,09,156/- and those made to the independent parties were to the tune of Rs.26,30,893/-. It was further observed by the A.O that during the year under consideration the assessee had made substantial payment of commission of Rs.1,16,83,883/- to its Managing director viz. Mr. Darayus A. Bathena, who held the majority shareholding of 75% of total shares in the assessee company. It was further noticed by the A.O that though Mr.

Darayus A. Bathena played an important role in day to day activities of the assessee company, however no salary was shown to have been paid to him. On the basis of the aforesaid facts, the A.O held a conviction that the assessee had deliberately arranged the aforesaid transaction to avoid disallowance of payment of commission under Sec.36(1)(ii) and to evade the payment of taxes on distribution of dividend. The A.O was of the view that in case if the assessee company would have shown payment of salary to Mr. Darayus A. Bathena, the same would had led to disallowance of commission payment under Sec.36(1)(ii) of the Act. On the basis of the aforesaid deliberations, it was concluded by the A.O that the assessee had deliberately not paid any salary to Mr. Darayus A. Bathena, despite the fact that he was playing an active role in the day to day activities of the assessee company. The A.O held a conviction that the assessee in order to facilitate his arrangement to avoid payment of taxes, had claimed to have made payment of commission to Mr. Darayus A. Bathena. The A.O further observed that as the assessee despite being afforded sufficient opportunity had failed to place on record any supporting document which would justify the payment of commission to him, thus the fact that the aforesaid arrangement was purposively entered into by the assessee to avoid disallowance under Sec. 36(1)(ii) and also to evade payment of taxes on distribution of dividend stood fortified. The A.O on the basis of his aforesaid observations, taking support of the exception carved out in Sec.36(1)(ii) of the Act, disallowed the amount of Rs.1,16,83,883/- paid by the assessee company as commission to Mr. Darayus A. Bathena.

13. Aggrieved, the assessee assailed the aforesaid disallowance in appeal before the CIT(A). It was observed by the CIT(A) that though Mr. Darayus A. Bathena was holding 75% shares of the assessee company and was its Managing director, however he was not working as an employee of the company. The CIT(A) after deliberating on the contentions advanced by the assessee before him was persuaded to be in agreement with the same. The CIT(A) held a strong conviction that as the disallowance contemplated by way of an exception carved out in Sec. 36(1)(ii) was applicable only in a case

where an employee of the company was also a shareholder, hence no disallowance under the said statutory provision was liable to be made in the respect of the commission paid to Mr. Darayus A. Bathena, as the latter was not an employee of the assessee company. Alternatively, the CIT(A) was of the view that even if it was to be presumed that Mr. Darayus A. Bathena, despite working as an employee was however deliberately not shown as such, in that case the core issue would be as to whether the commission paid to him was for the services rendered to the assessee company. The CIT(A) observed that a perusal of the assessment order revealed that the A.O had repeatedly stated that Mr. Darayus A. Bathena had played an important role in the day to day activities of the assessee company. On the basis of his aforesaid observations, the CIT(A) concluded that now when the A.O had himself admitted that Mr. Darayus A. Bathena was rendering services to the assessee company, hence the deduction of commission was allowable as an expenditure under Sec.36(1)(ii) of the Act. The CIT(A) in the backdrop of the aforesaid facts further observed that the commission of Rs.1,16,83,883/- paid to Mr. Darayus A. Bathena who was concededly the main and controlling person of the assessee company was found to be well within the reasonable parameters. On the basis of his aforesaid deliberations, the CIT(A) not finding favour with the view taken by the A.O deleted the disallowance of Rs. 1,16,83,883/- made under Sec. 36(1)(ii) of the Act.

14. The revenue being aggrieved with the order passed by the CIT(A) had carried the matter in appeal before us. The ld. Departmental Representative (for short 'D.R') at the very outset of the hearing of the appeal took us through the facts of the case in context of the issue under consideration. It was submitted by the ld. D.R that the assessee company had clearly manoeuvred the payment of salary to its managing director Mr. Darayus A. Bathena in the garb of commission payment. The ld. D.R in order to drive home his contention that there was no justifiable reason for the assessee company to have paid any commission to M/s Darayus A. Bathena, submitted that despite being afforded sufficient opportunity, no details of the services rendered by him to the assessee company were placed on record

during the course of the assessment proceedings. The ld. D.R submitted that the letter dated 31st March, 2005 addressed by Mr. Darayus A. Bathena to the assessee company in context of rendering of services by him as a commission agent was only a self serving document and did not conclusively prove the same. It was further averred by the ld. A.R that not only the assessee had failed to place on record any evidence which did go to prove rendering of services by Mr. Darayus A. Bathena to the assessee company, rather there was nothing from which it could be gathered that the payments made to him were within arms length. The ld. D.R further took us through the relevant observations recorded by the CIT(A) in context of the issue under consideration. The ld. D.R drawing our attention to Page 3 to 5 of the 'Paper book' of the assessee (for short 'APB') which is a 'Debit note' raised by Mr. Darayus A. Bathena on the assessee company, in respect of the commission of Rs.1,16,83,883/- which was charged by him on the sale orders procured for the company, submitted that the very fact that the same was raised on 30.03.2009 in itself raised serious doubts as regards the genuineness and veracity of the transaction under consideration. The ld. D.R took us through the judgment of the Hon'ble High Court of Bombay in the case of Loyal Works Company Ltd. Vs. CIT (1946) 14 ITR 647 (Bom), wherein the High Court in the backdrop of the facts involved in the case before them, had observed that for allowability of a sum paid to an employee as bonus or commission under the then provisions of Sec. 10(2)(x) of the Indian Income Tax, 1922 [which is *pari materia* to Sec. 36(1)(ii) of the Act], it was obligatory on the part of the assessee to prove certain vital aspects viz. (i) that the partners were the employees of the firm; (ii) the amount of the bonus in the backdrop of the pay of the employee and the condition of his service was found to be reasonable ; (iii) the profits of the business for the year in question made it reasonable to pay the amount granted as allowance; and (iv) the general practise in similar business or trade justified the payment of the amount as bonus. The ld. D.R taking support of the aforesaid observations of the High Court submitted that a plain reading of Sec. 36(1)(ii) revealed that the profits of a business could not be allowed to be dwindled by merely describing the payment as commission, if the same

was made in lieu of dividend of the assessee company. It was thus, the claim of the ld. D.R. that as the assessee in the present case had failed to discharge the onus and prove to the hilt that the amount of Rs.1,16,83,883/- was paid to Mr. Darayus A. Bathena for services rendered by him to the assessee company as a sales agent, hence the CIT(A) had erred in summarily allowing the same as an expense in the hands of the assessee.

15. Per contra, the ld. Authorized Representative (for short 'A.R') for the assessee rebutted the aforesaid contentions of the revenue. The ld. A.R took us through a letter dated 31.03.2005 addressed to the assessee company by Mr. Darayus A. Bathena (Page 1-2) of APB, wherein it was confirmed by him that on the basis of the discussions held with the assessee company, he had taken the responsibility of giving services as a sales agent for marketing of the products manufactured and/or traded by the assessee company with effect from 01.04.2005. The ld. A.R taking us through the contents of the aforesaid letter submitted that the complete nature of activities which were to be performed by Mr. Darayus A. Bathena were clearly mentioned in the same. It was the contention of the ld. A.R that the allegation raised by the revenue that the payment of commission to Mr. Darayus A. Bathena was merely an eye wash as no services were rendered by him, thus clearly stood dislodged. The ld. A.R further took us through the 'debit note', dated 30.03.2009 of an amount of Rs.1,16,83,883/- which was raised by Mr. Darayus A. Bathena on the assessee company for the sale orders which were procured by him for the assessee company during the financial year 2008-09. The ld. A.R taking us through the contents of the said 'debit note', drew our attention to the complete details of the 49 orders procured by him during the year under consideration viz. date of order, name of party and the amount of respective order for which the 'debit note' for commission @12% of the Sale value aggregating to Rs. 9,75,39,136/- was raised on the assessee company. The ld. A.R further in order to support the fact that Mr. Darayus A. Bathena was consistently since 01.04.2005 procuring sale orders for the assessee company, for which commission was paid to him,

took us through the respective 'debit notes' for financial year 2006-07, dated 30.03.2007 for Rs. 18,00,000/- (Page 7 of 'APB') and that for financial year 2007-08, dated 31.03.2008 for Rs. 60,25,009/- (Page 5-6 of 'APB'), which revealed the commission charged by him on the sale orders that were procured in the said respective years for the assessee company. The ld. A.R vehemently submitted that the revenue had failed to disprove both the authenticity of the aforesaid documents and the veracity of the claim of the assessee of having paid commission to Mr. Darayus A. Bathena for the sale orders procured by him for the assessee company. The ld. A.R. in order to buttress his contention that the commission paid by the assessee company to Mr. Darayus A. Bathena was clearly allowable under Sec. 36(1)(ii) of the Act, placed reliance on the order of the ITAT, Pune bench 'B' in the case of Arihantam Infra Projects (P) ltd. Vs. Jt. CIT, Range-2 Nashik (2015) 64 Taxmann.com 404 (Pune). The ld. A.R taking us through the aforesaid order, submitted that the Tribunal had concluded that when the directors of the assessee company had given services and in recognition thereof, there was payment of commission to them, the same could not be questioned merely on the basis of speculation by the revenue that the same was to avoid payment of dividend tax. It was submitted by the ld. A.R that the Tribunal on the basis of its aforesaid observations had deleted the disallowance made under Sec. 36(1)(ii) of the Act. The ld. A.R further referring to the order of the 'Special bench' of the ITAT Mumbai Bench 'D' in the case of Dalal Barocha Stock Broking (P) Ltd. Vs. Addl. CIT, Range-4(1), Mumbai (2011) 11 Taxman.com 426 (Mum)(SB), relied upon by the ld. D.R, submitted that the same was distinguishable on facts. The ld. A.R to fortify his aforesaid contention and to impress upon us that the facts involved in the case before the 'Special bench' of the Tribunal were distinguishable, took us through the said order of the Tribunal.

16. The ld. A.R further in order to dislodge the observations of the lower authorities that the assessee had manoeuvred its true profits and suppressed the same in the garb of payment of commission of Rs. 1,16,83,883/- to its Managing director, viz. Mr. Darayus A. Bathena,

submitted that if the said amount had been paid in the form of salary for the services rendered by him, then keeping in view the present economic scenario where all the medium range companies were remunerating their managing directors in the range of Rs. 5 to 10 lacs per month, the payment of salary of Rs. 1,16,83,883/- to Mr. Darayus A. Bathena who was the main and controlling person of the company, could safely be held to be within the reasonable parameters. The ld. A.R further in order to put to rest the speculations of the lower authorities that the assessee by making payment of commission to Mr. Darayus A. Bathena had manoeuvred the affairs of the assessee company with an intent to facilitate tax evasion, took us through the observations of the CIT(A) at Page 20 of his order. It was submitted by the ld. A.R that in case if the aforesaid amount would have been paid by the assessee company to Mr. Darayus A. Bathena as salary, the assessee company would have been eligible for deduction of the said sum as an expenditure and its aforesaid employee viz. Mr. Darayus A. Bathena would have paid 30% tax on such salary received by him for the services rendered to the company. In the backdrop of the aforesaid facts, it was submitted by the ld. A.R that now when the receipt of commission had been subjected to tax in the hands of Mr. Darayus A. Bathena at the same rate of 30%, hence the claim of the revenue that there was any attempt on the part of the assessee to suppress its profits was devoid of any force. The ld. A.R further averred that if the assessee company would had paid dividend to Mr. Darayus A. Bathena, then it would have paid 15% as dividend distribution tax, while for the entire dividend of Rs.1,16,83,883/- would have been exempt in the hands of the shareholder viz. Mr. Darayus A. Bathena. On the basis of his aforesaid observations, it was submitted by the ld. A.R that the allegation raised by the revenue that the assessee in the garb of payment of commission to Mr. Darayus A. Bathena had tried to evade payment of taxes, was clearly disproved to the hilt. The ld. A.R. further drew our attention to the observations of the CIT(A) that if the commission paid to Mr. Darayus A. Bathena was to be disallowed, then the maximum dividend that could have been declared by the assessee company would have been Rs.87,65,347/-. On the basis of the aforesaid facts, it was submitted by the ld. A.R that a

dividend of Rs. 87,65,347/- on 15,952 equity shares of Rs. 100/- each, would have worked out to 550%, which could not have been paid as dividend under any circumstances. The ld. A.R taking support of the aforesaid facts submitted that now when it stood established that the commission of Rs. 1,16,83,883/- paid to Mr. Darayus A. Bathena was not an amount which was otherwise payable to him as dividend, hence no disallowance under Sec. 36(1)(ii) was called for in the hands of the assessee company. The ld. A.R further relied on the judgment of the High Court of Delhi in the case of AMD Metplast (P) Ltd. Vs. DCIT (2012) 341 ITR 563 (Del). The ld. A.R taking support of the aforesaid judicial pronouncement submitted that now when it stood proved to the hilt that the commission paid to Mr. Darayus A. Bathena was for the services rendered by him as a sales agent of the assessee company and the said amount could by no means have been paid to him as dividend, hence the same was duly allowable as an expense and did not fall within the realm of the exception carved out in Sec. 36(1)(ii) of the Act.

17. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material placed on record. We find that our indulgence in the present appeal has been sought by the revenue for adjudicating as to whether the CIT(A) was right in law and facts of the case in concluding that the commission of Rs.1,16,83,883/- paid by the assessee company to Mr. Darayus A. Bathena was allowable as an expense under Sec.36(1)(ii) of the Act. Before proceeding further, we may herein observe that Sec. 36(1)(ii) which contemplates the allowance of an amount paid as bonus or a commission to an employee of a company, reads as under:

> *"36. (1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in Section 28.*
>
> *(ii) Any sum paid to an employee as bonus or commission for services rendered, where such sum would not have been payable to him as profits or dividend if it had not been paid as bonus or commission."*

On a perusal of the aforesaid statutory provision, it emerges that though the same takes within its sweep allowability of any sum paid to an employee as bonus or commission for services rendered, however, the same also carves out an exception to the allowability of any such expense in a case where the same would have been payable to such employee as profits or dividend. As is discernible from a perusal of the aforesaid statutory provision viz. Sec. 36(1)(ii), the same comes with an inbuilt rider or rather an exception carved out for allowability of bonus or commission paid to an employee as an expense. Be that as it may, we are of the considered view that the disallowance carved out in the exception contemplated under Sec.36(1)(ii), would be invoked only in a situation where the payment of the bonus or commission had been made to an employee, and not otherwise. We thus, are of the considered view that the qualification regulating the allowability of bonus or commission as an expense while computing the income of an assessee under Sec. 28, would only be applicable in a case where the same had been paid to an employee, and not otherwise. We are of the considered view, that the purpose of jeopardising the right of an assessee to claim the payment of bonus or commission as an expense, by making available the disabling rider in Sec. 36(1)(ii) is that when a particular amount was to be paid to the shareholder as dividend, the company cannot be allowed a deduction on the ground of claiming the payment of the same as a bonus or commission to such shareholder. To put it in other words, Sec. 36(1)(ii) is intended to prevent an escape from taxation by describing a payment as bonus or commission, when in fact ordinarily it should have reached the shareholder as profit or dividend. Rather, to be brief and explicit, a plain reading of the aforesaid statutory provision viz. Sec. 36(1)(ii) reveals that the profits of a business will not be allowed to be dwindled by merely describing the payment as bonus or commission, if the payment is in lieu of dividend or profit. We are of the considered view that as in the case of the assessee company before us, as Mr. Darayus A. Bathena during the year under consideration was not an employee of the assessee company, thus the qualification or the rider embodied in the latter part of Sec. 36(1)(ii) would not come into play in the case of the assessee, on the said count itself.

Rather, on a broader perspective, as Mr. Darayus A. Bathena is not an employee of the assessee company, hence the allowability of the commission paid to him by the assessee company would by no means be regulated by Sec. 36(1)(ii) of the Act. We are of the considered view that the rider or the exception carved out in Sec. 36(1)(ii) would apply only to an employee who is also a shareholder in the company. As observed by us hereinabove, though Mr. Darayus A. Bathena was a major shareholder of the company, but not its employee, thus the allowability of the commission of Rs.1,16,83,883/- paid to him would not be hit by the provisions of Sec. 36(1)(ii).

18. Alternatively, we are of the considered view that even if it is to be presumed that Mr. Darayus A. Bathena despite working as an employee of the assessee company was however deliberately not shown as such, in that case the next question for consideration would be as to whether the commission paid to him was for the services rendered to the assessee company. We are of the considered view that a perusal of the records to which our attention was drawn by the ld. A.R during the course of hearing of the appeal, viz. (i) copy of the confirmation letter dated 31.03.2005 of Mr. Darayus A. Bathena wherein he had undertaken the responsibility of providing services as sales agent to the assessee company with clear details as regards the nature of services to be provided (Page 1-2 of APB); and (ii) 'debit notes' drawn by Mr. Darayus A. Bathena on the assessee company for the year under consideration i.e. A.Y 2009-10 and the preceding years viz. A.Y 2007-08 and A.Y 2008-09 (Page 3-7 of APB), substantially proves that the commission was paid to him for the sale orders procured for the assessee company. We may herein observe that neither it is borne from the records nor any such material had been placed before us, which could persuade us to conclude that the claim of the assessee that commission paid to Mr. Darayus A. Bathena was not for the services rendered by him as a sales agent. Rather, we may herein observe that the A.O had himself admitted that Mr. Darayus A. Bathena had rendered services to the assessee company and was playing an important role in its day to day activities. We thus, are of the considered view that though the provisions of Sec. 36(1)(ii),

as observed by us hereinabove, would not be applicable to the commission payment made to Mr. Darayus A. Bathena for the reason that he is not the employee of the assessee company, however, even otherwise as the rendering of services as a sales agent by him to the assessee company is established to the hilt, hence deduction of commission even otherwise cannot be disallowed as an expenditure under Sec. 36(1)(ii) of the Act.

19. We are further persuaded to be in agreement with the view taken by the CIT(A) that keeping in view the present economic scenario, wherein all the medium range companies are remunerating their managing directors in the range of Rs. 5 to 10 lacs per month, the payment of commission to Mr. Darayus A. Bathena, even if it was to be considered to have been paid in lieu of salary, keeping in view the fact that he was the main and controlling person of the company looking after its affairs, was well within the reasonable parameters.

20. We have also deliberated at length on the observations of the lower authorities, which had been taken support of by the ld. D.R. in his attempt to persuade us to subscribe to his contention that the payment of commission was used by the assessee company as a colorable device for tax evasion. We are unable to persuade ourselves to subscribe to the said view of the lower authorities. As observed by the CIT(A), the assessee in neither way would had benefited by making the payment of Rs. 1,16,83,883/- to Mr. Darayus A. Bathena in the form of commission as against salary. In either case, the said amount would had been allowed as an expense in the hands of the assessee company and equally suffered tax at the rate of 30% in the hands of Mr. Darayus A. Bathena. We are also unable to comprehend that as to how the assessee by showing the payment of Rs. 1,16,83,883/- as commission to Mr. Darayus A. Bathena had evaded payment of dividend distribution tax. Rather, we find ourselves to be in agreement with the view taken by the CIT(A) that any such arrangement would not have led to any tax evasion. If the assessee company would had paid dividend to Mr. Darayus A. Bathena, then though it would had been liable to pay 15% as dividend distribution tax, however the entire dividend of Rs.1,16,83,883/-

would have been exempt in the hands of the shareholder viz. Mr. Darayus A. Bathena. We thus, finding ourselves to be in agreement with the view taken by the CIT(A), are of the considered view that there is no force in the observations of the A.O that the payment of commission to Mr. Darayus A. Bathena was used as a colourable device for tax evasion on its part.

21. We shall now advert to the judicial pronouncements which had been relied upon by the ld. D.R. We find that the reliance placed by the A.O on the decision of ITAT, Mumbai Special bench in the case of Dalal Barocha Stock Broking (P) Ltd. Vs. Addl. CIT, Range-4(1), Mumbai (2011) 11 Taxman.com 426 (Mum)(SB) is distinguishable on facts. We find that in the case before the Tribunal, there was no evidence to show that the directors had rendered any extra service for payment of huge commission in addition to the service rendered by them as an employee for which salary was paid. We are of the considered view, that in the aforementioned case salary and commission both were paid to the directors, unlike the case of the assessee before us, where only commission had been paid. Still further, as observed by us at length hereinabove, the commission paid to Mr. Darayus A. Bathena was clearly in lieu of services rendered by him as a sales agent of the assessee company. We further find that the assessee company had duly proved before the lower authorities that the payment of commission to Mr. Darayus A. Bathena was as per the terms of appointment and Memorandum and Articles of association of the assessee company. The payment of commission is also found to be as per the provisions of the Companies Act. We are further of a strong conviction that the veracity of the payment of commission to Mr. Darayus A. Bathena can safely be gathered from a perusal of the fact, that the turnover of the assessee company had witnessed an increase due to the efforts put in by him. As observed by us hereinabove, the fact that the entire commission of Rs.1,16,83,883/- would not have become payable to the assessee as dividend cannot also be lost sight of, as the same takes the case of the assessee beyond the sweep of the disallowance contemplated in Sec. 36(1)(ii) of the Act. We thus, on the basis of our aforesaid deliberations are of the considered view that the

applicability of the disabling rider of Sec. 36(1)(ii) would stand ousted in respect of the commission payment made to Mr. Darayus A. Bathena for two fold reasons viz. (i) that he was not the employee of the assessee; and (ii). the commission was paid to him for the services rendered as a sales agent to the assessee company. In the backdrop of our aforesaid observations, we are of the considered view that the allowability of the commission of Rs.1,16,83,883/- paid to Mr. Darayus A. Bathena would in no way stand jeopardised by bringing the same within the sweep of Sec. 36(1)(ii) of the Act.

22. We have further perused the order of the ITAT, Pune Bench 'B' in the case of Arihantam Infra Projects (P) Ltd. Vs. JCIT, Range-2 Nashik (2015) 64 Taxman.com 404 (Pune). We are persuaded to be in agreement with the view taken by the coordinate bench of the Tribunal, that where the directors of the assessee company had provided services and in recognition thereof were in receipt of commission income, the same merely on the basis of speculation by the revenue authorities that the same was to avoid payment of dividend tax, could not be disallowed by taking recourse to Sec. 36(1)(ii) of the Act.

23. We thus, in terms of our aforesaid observations are of the considered view that the CIT(A) after deliberating at length on the issue under consideration, had rightly concluded that the payment of commission of Rs.1,16,83,883/- by the assessee company to Mr. Darayus A. Bathena for the sale orders procured by him as a sales agent for the company, could not have been disallowed under Sec.36(1)(ii) of the Act. We thus, finding no infirmity in the order of the CIT(A) in context of the issue under consideration, uphold the same in terms of our aforesaid observations.

24. The appeal filed by the revenue is dismissed.

A.Y 2010-11
ITA No. 5070/Mum/2013

25. We shall now take up the appeal of the assessee for A.Y 2010-11. The assessee assailing the order of the CIT(A) had raised before us the following grounds of appeal:

> *"(1) The learned CIT(A) has erred in law, facts and circumstances of the case in confirming the disallowance of 30% of total commission [Total commission: 1.80,00,000/-] amounting to Rs.54,00,000/- paid to related parties u/sec. 40A(2)(b) of Income Tax Act, 1961.*
>
> *(2) The learned CIT(A) has erred in law, facts and circumstances of the case in confirming the disallowance of 30% of commission amounting to Rs.54,00,000/- on adhoc basis without ascertaining the Fair value of services provided to related parties u/sec. 40A(2)(b) and further erred in not considering the fact that commission paid to independent agents at the same rate of 12% as paid to related parties.*
>
> *(3) The learned CIT(A) has erred in law, facts and circumstances of the case in confirming the disallowance of 30% of legal & professional fees paid to two Advocates [Total fees paid: Rs. 48,00,000/-] amounting to Rs.14,40,000/- on the ground of payment to related parties u/sec. 40A(2)(b) of Income Tax Act, 1961.*
>
> *(4) The learned CIT(A) has erred in law, facts and circumstances of the case in confirming the disallowance of 30% of commission amounting to Rs.14,40,000/- on adhoc basis without ascertaining the Fair value of services provided to related parties u/sec 40A(2)(b).*
>
> *(5) The Learned CIT(A) has erred in law, facts and in circumstances of the case by confirming the levy of interest u/s 234B, 234C and 234D.*
>
> *(6) Your Appellant craves leave to add to, alter, amend, delete and/or modify the above grounds of appeal on or before the final date of hearing.*
>
> *(7) Prayer: The Appellant prays your honor for allowing the appeal."*

26. Briefly stated, the facts of the case are that the assessee had filed its return of income for A.Y 2010-11 on 15.10.2010, declaring total income of Rs.40,71,103/-. The A.O while framing the assessment made the following additions/disallowances:-

Sr. No.	Particulars	Amount
1.	Disallowance under Sec.36(1)(ii)	Rs.1,20,00,000/-
2.	Disallowance under Sec.40A(2)(b)	Rs.1,02,55,500/-

On the basis of his aforesaid deliberations, the A.O assessed the income at Rs.2,63,26,600/-.

27. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The CIT(A) following his order for the immediately preceding year i.e. A.Y 2009-10, though deleted the disallowance made by the A.O under Sec.36(1)(ii) of Rs.1,20,00,000/-, but upheld the disallowance under Sec.40A(2)(b) of Rs. 68,40,000/- [out of total disallowance of Rs.1,02,55,500/- made under Sec. 40A(2)(a)].

28. The assessee being aggrieved with the order of the CIT(A) to the extent he had upheld the disallowance made by the A.O under Sec.40A(2)(a), had carried the matter in appeal before us. We find that as the facts and the issue involved in the present appeal of the assessee for A.Y 2010-11 remains the same, as were there before us in its appeal for the immediately preceding year, viz. A.Y 2009-10 in ITA No. 4011/Mum/2013, hence our order passed in context of the issue under consideration while disposing off the aforesaid appeal for A.Y 2009-10 shall apply *mutatis mutandis* in the present appeal of the assessee company. The **Ground of appeal No. 1 to 7** raised by the assessee before us are disposed off in terms of our aforesaid observations.

29. The appeal of the assessee is allowed in terms of our aforesaid observations.

A.Y 2010-11
ITA No. 5270/Mum/2013

30. We shall now take up the appeal filed by the revenue for A.Y 2010-11. The revenue assailing the order of the CIT(A) had raised before us following grounds of appeal:

> *"(i) The Learned CIT(A) has erred on facts and in law, in deleting the addition of Rs.1,20,00,000/- made by the Assessing Officer u/s. 36(i)(ii) of the Income Tax Act, 1961 without properly*

appreciating the factual and legal matrix as clearly brought out by the Assessing Officer.

(ii) The Learned C7T(A) has erred on facts and in law, in deleting the addition of Rs.1,20,00,000/- made by the Assessing Officer u/s. 36(i) (ii) of the Income Tax Act, 1961, without properly appreciating the fact that the Assessing Officer has clearly proved that the arrangement of payment of commission to Shri Darayus Bathena is covered by the exception clause of Section 36(i)(ii) of the Income Tax Act,1961.

(iii) The Learned CIT(A) has erred on facts and in law, iii deleting the addition of Rs.34,15,500/-(@ 30% of Rs.1,13,85,000/-) made by the Assessing Officer u/s. 40A(2)(b) of the Income Tax Act, 1961, without properly appreciating the factual and legal matrix as clearly brought out by the Assessing Officer.

(iv) The Learned CIT(A) has erred on facts and law, in deleting the addition of Rs.34,15,500/- made by the Assessing officer u/s. 40A(2)(b) of the Income Tax Act, 1961, in respect to payment to Shri Zoru Bathena relying on the additional evidence without giving opportunity to the assessing officer."

31. We find, that as the facts and the issue as regards the addition of Rs.1,20,00,000/- made by the A.O under Sec.36(1)(ii) in context of commission paid to Mr. Darayus A. Bathena during the year under consideration remain the same, as were there before us in the appeal of the revenue for A.Y 2009-10 in ITA No. 4681/Mum/2013, hence our order passed in context of the issue under consideration in A.Y 2009-10 while disposing off the appeal of the revenue shall apply *mutatis mutandis* in context of the issue before us in the present appeal of revenue for A.Y 2010-11. The **Grounds of appeal nos. (i) and (ii)** raised by the revenue before us are dismissed in terms of our aforesaid observations.

32. We further find that the revenue had assailed before us the deletion of an addition of Rs.34,15,500/- (30% of Rs.1,13,85,000/-) pertaining to the remuneration and commission paid by the assessee to Mr. Zoru Bathena (as claimed by the A.O), which was disallowed by the A.O under Sec.40A(2)(a) to the extent of 30% of the said amount. We find that on appeal the CIT(A) observed that the A.O had wrongly concluded that the amount of Rs.1,13,85,000/- was paid to Mr. Zoru Bathena as commission, as the fact was that the said payment was made by way of salary to him. The CIT(A)

observed that as the entire amount of Rs.1,13,85,000/- was paid as salary to Mr. Zoru Bathena for his services rendered as general manager of the assessee company, therefore, the disallowance made by the A.O under Sec. 40A(2)(a) on the wrong premises, without even correctly appreciating the nature of services which were rendered by him to the assessee company, thus could not be sustained and were liable to be vacated.

33. We have given a thoughtful consideration to the issue as regards the disallowance of Rs.34,15,500/- (i.e. 30% of Rs.1,13,85,000/-) made by the A.O under Sec.40A(2)(a) and find that the same was made by the A.O absolutely on the basis of misconceived facts. We find that the assessee had placed on record of the CIT(A) the copy of 'Form No. 16' which was issued to Mr. Zoru Bathena, who during the year under consideration was working as general manager with the assessee company. We find that the AO loosing sight of the aforesaid facts had wrongly carried out the disallowance under Sec.40A(2)(a), on the premises that the assessee had failed to prove the reasonableness of the payments which were made to the aforesaid party towards commission, legal and professional fees. We are of the considered view that the CIT(A) had rightly concluded that now when Mr. Zoru Bathena was not in receipt of any amount towards commission, legal and professional fees, thus no disallowance on the ground that the assessee had failed to prove the reasonableness of the payments made in the context of such services rendered by him, could by any stretch of imagination have been disallowed under Sec.40A(2)(a) of the Act. We are also not impressed with the contention of the revenue that the CIT(A) had admitted the 'Form No. 16' issued by the assessee company to Mr. Zora Bathena, without affording any opportunity to the A.O. We are unable to comprehend that even if the 'Form No. 16' placed on record by the assessee was not to be taken cognizance of by the CIT(A), how the revenue would justify the disallowance of the payments made to Mr. Zoru Bathena, which contrary to the claim of the A.O were never paid by the assessee company towards commission, legal and professional expenses. We thus, finding ourselves to be in agreement with the view taken by the CIT(A) that as the payment of Rs.

1,13,85,000/- was made by the assessee company to Mr. Zoru Bathena for the services rendered by him in the capacity of general manager of the company, therefore, in the absence of any adverse inferences as regards the reasonableness of the payments made by the assessee company for such services rendered by him, no disallowance was called for in the hands of the assessee under Sec.40A(2)(a) of the Act. We thus, finding no infirmity in the order of the CIT(A) in context of deletion of the addition of Rs.34,15,500/-, uphold his order. The **Grounds of appeal No. (iii) and (iv)** are dismissed in terms of our aforesaid observations.

34. The appeal filed by the revenue is dismissed.

35. The appeal filed by the assessee for A.Ys 2009-10 and 2010-11 viz. ITA No. 4011/Mum/2013 and ITA No. 5070/Mum/2013 are allowed. The appeals filed by the revenue for A.Ys 2009-10 and 2010-11 viz. ITA No. 4681/Mum/2013 and ITA No. 5270/Mum/2013 are dismissed.

Order pronounced in the open court on 13.06.2018

Sd/-	Sd/-
(R.C.SHARMA)	(RAVISH SOOD)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 13.06.2018
Ps. Rohit

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**