

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI**

**BEFORE
SHRI G.D. AGRAWAL, HON'BLE PRESIDENT
AND
SHRI AMIT SHUKLA, JUDICIAL MEMBER**

ITA No.:- 1541/Del/2014
Assessment Year: 2009-10

TBWA Anthem Pvt. Ltd. C-30, Chirag Enclave, Greater Kailash, Part-1 New Delhi 110 048 PAN AAACA5394A	Vs.	ACIT Circle-16(1) New Delhi.
(Appellant)		(Respondent)

Appellant by:	None
Respondent by :	Shri Amit Jain, Sr. DR
Date of Hearing	19/06/2018
Date of pronouncement	25/06/2018

ORDER

PER AMIT SHUKLA, J.M.

The aforesaid appeal has been filed by the assessee against impugned order dated 18.12.2013. passed by the Ld. CIT (Appeal) 19, New Delhi in relation to the penalty proceedings u/s 271(1)(c) for the assessment year 2009-10. The assessee is mainly aggrieved by levy of penalty of Rs. 2,00,763/ -on addition of disallowance of ex-gratia

payment to the staff in excess of entitlement of bonus which was 8.33 after invoking the provision of section 43B.

2. In the course of the assessment proceedings, AO noted that assessee has shown bonus payable amounting to Rs. 10,12,264/- and has only added back amount of Rs. 4,21,608/- in the computation of income. In response to the show cause notice, assessee informed that the amount which has been added back and disallowed is 8.33% bonus which was as per the Bonus Act 1965 and balance is ex gratia to each staff. AO held that the balance sum of Rs. 5,90,656/- is disallowable u/s 43B. On the same disallowance, AO has levied the penalty of Rs. 2,00,763/- on the ground that assessee has claimed incorrect expenses. Ld. CIT (A) too has confirmed the said penalty on the ground that such an ex gratia payment cannot be allowed u/s 37(1), because it has to be reckoned as a payment u/s 43B(c) which covers the payment of any sum referred to in section 36(1(ii)).

3. None appeared on behalf of the assessee despite service of notice; therefore, we are disposing of the appeal on the basis of merits and after hearing the arguments placed by the Ld. DR.

4. After considering the submissions made by the Ld. DR as well as the finding given in the impugned order, we find that on merits the disallowance has been made simply on the ground that the amount of payment of bonus which is exceeding the limit of 8.33% as per the

Bonus Act has been treated as ex gratia by the assessee which has been claimed u/s 37(1). AO has invoked the provision of section of 43B(c) holding that such a difference of Rs. 5,90,656/- falls within the ambit of scope of 43B r.w.s. 36(1)(ii). However it has not been pointed out by him that such an ex-gratia payment, whether falls within the provision of Bonus Act or not; or whether such a payment made to its labourers and staff was not during the course of carrying on the business or for commercial expediency. Section 43B creates an artificial or deemed disallowance if not paid within the prescribed date. If an expenditure has incurred during the course of business which otherwise is revenue expenditure, then it cannot be held such a claim of expenditure is bogus or non-genuine. Here the payment has been treated as ex-gratia by the assessee which otherwise is allowable but AO has treated it as part of bonus and brought within the scope of section 43B denied simply because the AO has tried to bring such payment within the scope of section 43B, this action of the AO does not lead to an inference that either the assessee has furnished inaccurate particulars of income or has made any false claim. Even if such ex-gratia payment is in excess of the limit prescribed under the payment under Bonus Act or u/s 36(1)(ii), but same being in the nature of business expenditure cannot be held that claim of such expenditure warrants any levy of penalty u/s 271(1)(c). In fact the decisions cited by the Ld. CIT(A) in his impugned orders are all in

favour of the assessee which is evident from the following judicial decisions as quoted in para 5:-

“5. This view is supported by the following judicial decisions :-

(1) CIT vs. Maina Ore Transport P. Ltd. (2010) 324 ITR 100 (Bom)

The object of the proviso to section 36(1)(ii) of the Income-tax Act, 1961 is to encourage the management to pay bonus in excess of what is statutorily bound to be paid to the employees provided the payment is justifiable as a "reasonable payment".

The assessee claimed deduction in respect of the ex gratia payment made to its employees which exceeded the prescribed limit of 8.33 per cent. The Deputy Commissioner of Income-tax (Assessment) disallowed the amount but the Commissioner (Appeals) and the Tribunal allowed deduction in respect of the ex gratia payment made to the employees, On a reference:

Held, that the Tribunal was justified in holding that the ex gratia payment made in excess of the limit prescribed under the Payment of Bonus Act, 1965, either under section 36(1)(ii) or section 37(1) of the Act was allowable as business expenditure. The Tribunal was justified in holding that ex gratia payment made over and above the amount paid in accordance with the Bonus Act was an allowable expenditure though the payment did 'not cover contractual payment or customary payment.

CIT v. Rajaram Bandekar and Sons (Shipping) P. Ltd. [1999] 237 ITR 628 (Bom) and CIT v. Raghuvanshi Mills Ud. (I. T. R. No. 169 of 1987. dated October 25. 1993 (Bom) followed.

(2) CIT v Ganges Rope Co. Ltd. (2002) 262 ITR 624 (CAL)

Section 36(1)(ii) read with section 37(1) of the Income-tax Act, 1961 - Bonus or commission - Assessment year 1981-82 - Assessee company

made ex gratia payment of bonus to employees and workers - It was not disputed that payment was made for purpose of business - Whether even though ex gratia payment does not form part of bonus as contemplated under section 36(1)(ii), since payment satisfied three conditions laid down in second proviso to section 36(1)(ii), payment would be deductible under section 36(1)(ii) • Held, yes.

(3) CIT v. Radico Khaltan Ltd. [2005] 2741TR 354 (ALL.)

Section 36(1)(ii) of the Income-tax Act, 1961 - Bonus or commission - Assessment year 1990-91 - Whether ex- gratia payment towards bonus is an allowable deduction - Held, yes.”

5. Once in aforesaid judgments ex-gratia payment over and above the sum as contemplated u/s 36(1)(ii) has been held to be deductible, then we do not find reason as to why penalty should be levied on such. Accordingly, penalty levied by the AO and confirmed by the Ld. CIT (A) on disallowance of Rs. 5,90,656/- is directed to be deleted.

6. In the result the appeal of the assessee is allowed.

Order pronounced in the Open Court on 25th June, 2018.

sd/-

(G.D. AGRAWAL)
PRESIDENT

Dated: /06/2018

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Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)

sd/-

(AMIT SHUKLA)
JUDICIAL MEMBER

5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi