

आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।

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

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री एन. के. प्रधान लेखा सदस्य के समक्ष ।

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

आयकर अपील सं./ ITA No. 7401/Mum/2017

(निर्धारण वर्ष / Assessment Year 2012-13)

The Dy. Commissioner of Income, Circle-12(1)(1), Room No. 223, 2 nd Floor, Aayakar Bhavan, M.K. Rd, Mumbai-20	Vs.	Ami Polymer Pvt. Ltd. A-104, 1 st Floor, Panchsheel Heights, Mahavir Nagar, Dahanukarwadi, Kandivali(W), Mumbai-400 067
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
स्थायी लेखा सं./ PAN No. AAECA6387P		

अपीलार्थी की ओर से / Appellant by	:	Shri Satischandra Rajore, DR
प्रत्यर्थी की ओर से / Respondent by	:	Shri Nitesh Joshi, Ms. Jhankhana Shah, Ms. Zankhana Sanghvi, ARs'

सुनवाई की तारीख / Date of hearing:	09-05-2019
घोषणा की तारीख / Date of pronouncement :	24-05-2019

आदेश / ORDER

महावीर सिंह, न्यायिक सदस्य/
PER MAHAVIR SINGH, JM:

This appeal filed by the Revenue is arising out of the orders of Commissioner of Income Tax (Appeals)-20, Mumbai [in short CIT(A)], in



appeal No. CIT(A)-20/DCIT-12(1)(1)/IT-65/15-16, dated 29.09.2017. The Assessment was framed by the Dy. Commissioner of Income Tax, Circle-12(1)(1) Mumbai (in short DCIT/ITO/ AO) for the A.Y. 2012-13 vide order dated 23.03.2015 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 addition made by AO on account of commission paid to director Shri, Alpesh Gandhi under section 36(1)(ii) of the Act. For this Revenue has raised the following ground No. 1: -

"1. Whether on the facts and in circumstances of the case and in law, the Ld. CIT(A) was right in deleting the addition made u/s 36 (1)(i1) of the Act to the tune of Ps 42,11,363/- on account of commission paid to director Shri Alpesh Gandhi without appreciating the fact that the payments was more than other directors without justification and it was nothing but payment in lieu of dividend ?"

3. Brief facts relating to the issue of disallowance of commission made by AO and deleted by CIT(A) is that the assessee has paid commission of ₹ 42,11,363/- to Mr. Alpesh Gandhi, who is assessee's Executive Director. The AO disallowed this commission by observing that Alpesh Gandhi is getting double remuneration double than other directors without rendering any service that he is rendered in extra services for payment of this double commission in addition to services rendered as liable for which salary has been paid to him. The AO also noted that no dividend has been paid or declared by the assessee. Hence, he added the commission paid to Alpesh Gandhi by invoking the provisions of



section 36(1)(iii) of the Act. Aggrieved, assessee preferred the appeal before CIT(A). The CIT(A) noted from the submissions of the assessee that the AO itself admitted in his assessment order vide Para 3.3(a), which is reproduced by CIT(A) and for the sake of clarity the same is being reproduced again: -

“(a) Mr. Alpesh Gandhi was already getting twice the remuneration as compare to the other director because of his additional efforts and services rendered for the business of the assessee company. Apparently, the commission was paid to reduce tax liability of the appellant and take out accumulated profits of the company without declaring dividend.”

4. He also relied on the decision of Mumbai Special Bench decision in the case of Dalal Broacha Stock Broking Pvt. Ltd. vs. CIT in ITA No. 5792/Mum/2009. He noted that in this case disallowance of commission was confirmed but for the reason that it was established that extra commission has been rendered but there is no evidence. Aggrieved, against the deletion of commission Revenue preferred the appeal before Tribunal.

5. We have heard the rival contentions and gone through the facts and circumstances of the case. We noted that the Alpesh Gandhi, is an executive director of the assessee company and is paid annual salary of 36 lacs along with variable component of commission computed at the rate of 15% of the net profit earned by the assessee company, which is paid in lieu of functions performed / services rendered. In this year the commission computed on profit was to the tune of ₹ 42,11,363/-. We noted that the variable component of commission was a part of



remuneration package of the executive director as part of all shareholders. This variable commission is based on his performance evaluation and also considering his contribution in meeting the financial performance of the company. It was contended before us that Alpesh Gandhi is a highly qualified person and detail of his qualification, functions performed and services rendered were filed before AO as well as before CIT(A). The CIT(A) has reproduced the functions performed and services rendered in the assessee company apart from the other directors read as under: -

<i>Name of director</i>	<i>Education qualification</i>	<i>Functions performed/ services rendered</i>
<i>Mr. Alpesh Gandhi</i>	<i>Bachelor of Engineering (In Rubber Technology branch), Master of Business Administration (MBA) (in marketing field) from Jamnalal Bajaj Institute of Management studies (JBIMS)</i>	<ul style="list-style-type: none"> • <i>Executive director having responsibility of overall operation and management of the Company</i> • <i>Development of local marketing strategy</i> • <i>New product development</i> • <i>Formulation of pricing policy</i> • <i>Customer relationship management</i> • <i>Business development strategy for overseas market</i> • <i>Attending various exhibitions/ seminars related to product of the Company</i> • <i>Process improvement and technological improvement</i> • <i>Procurement of latest machineries for achieving operational efficiency</i> • <i>Production planning</i> • <i>Financial management</i> • <i>Scouting and evaluation of expansion opportunities.</i>

6. We noted that the sales of assessee company have increased by ₹ 2,15,92,232/- as compared to total sales of FY 2010-11 i.e. by 25.58%. The assessee company filed details that there is an increase in customer basis by 76 customers, where sales are more than of ₹ 50,000/-. It was contended that out of increase in total sales of ₹ 2,15,02,232/- as narrated above the sales of ₹ 1,07,25,036/- i.e. almost 50% is from this



new customers. It was contended that even the export sales have grown by 45.52%. It was also contended that there is substantial increase in profit before tax as compared to earlier and i.e. by 48.23%. In view of this facts, we are of the view that the CIT(A) has rightly deleted the addition and we confirm the same. This issue of Revenue's appeal is dismissed.

7. The second issue in this appeal of Revenue is against the order of CIT(A) deleting the disallowances of interest expenses under section 36(1)(iii) of the Act. For this Revenue has raised the following ground No. 2: -

“2. Whether on the facts and in circumstances of the case and in law, the Ld. CIT(A) was right in deleting the disallowance u/s 36(1)(iii) of the Act to the tune of Rs 24.61.097/- on account of interest expenses without appreciating the fact that assessee could not prove that interest free funds were utilized in capital work in progress?”

8. Brief facts relating to this issue are that the AO made disallowance of interest expenses of ₹ 24,61,097/- by invoking the provisions of section 36(1)(iii) of the Act. Aggrieved, assessee preferred the appeal before CIT(A). The CIT(A) after noting the factual fact that the assessee has more interest free funds available and the investment made in capital work-in-progress is comparatively less amounting to ₹ 2,32,02,582/- as against share capital and reserve and surplus at ₹ 5,30,46,131/-. The CIT(A) considered the details vide Para 5.4 as under: -

“5.4 Decision on Ground No. 3



5.4.1 I have considered the contention of the AO and submissions made by the appellant. I find from the balance sheet of the appellant as at the beginning and end of the relevant P.Y. Records that the interest free fund available with the appellant as at 31.03.2011 & 31.03.2012 were as under:

Particulars	As at 31.03.2011 (Rs.) (Read as 2012)	As at 31.03.2012 (Rs.) (Read as 2011)
Share capital	40,10,000	40,10,000
Reserves & Surplus	4,90,36,131	3,35,72,002
Total	5,30,46,131	3,75,82,002

5.4.2 The capital work in progress and non-business investment of the appellant as at 31.03.2011 & 31.03.2012 were as under (as per the AO):

Particulars	As at 31.03.2011 (Rs.) (Read as 2012)	As at 31.03.2012 (Rs.) (Read as 2011)
CWIP	2,32,02,581	1,78,15,700
Non business investments	36,49,657	23,92,756
Total	2,68,52,239	2,02,08,456

5.4.3 I find that the interest free fund available with the appellant was far in excess of investments in capital work in progress and in non-business investments. Therefore, relying on the decision of the Hon'ble Bombay High Court in the case of Reliance Utilities & Power Ltd. (313 ITR 340) mentioned above, I hold that the disallowance cannot be sustained. Accordingly, I delete the disallowance of Rs. 24,61,097/-. In the result, the ground of appeal is allowed."



On the basis of the above, the CIT(A) deleted the addition. Aggrieved, Revenue is in appeal before us.

9. We have considered the factual aspect and noted that the assessee's own capital i.e. interest free funds available as on 31.03.2012 is ₹ 5,30,46,131/- as against the investment made in capital work in progress at ₹ 2,32,02,581/-. Even non business investment is ₹ 36,49,657/-. It means that the assessee's own interest free funds are more than the investment made in non-business investments. The CIT(A) has rightly deleted the addition. Hence, we confirm the order of CIT(A). This issue of Revenue's appeal is dismissed.

10. The next issue in this appeal of Revenue is against the order of CIT(A) deleting the disallowance of expenses relatable to exempt income by invoking the provisions of section 14A of the Act read with Rule 8D of the Rules, 1962. Even the disallowance was made while computing the book profit under section 115JB of the Act also. For this, Revenue has raised the following ground No. 3 and 4: -

“3. Whether on the facts and in circumstances of the case and in law, the Ld. CIT(A) was right in deleting the disallowance u/s. 14 A r.w. Rule 8 D of the Act to the tune of Rs.1,01,682/- without appreciating the fact that assessee could not prove satisfactorily that own funds were used in buying the investment?

4. Whether on the facts and in circumstances of the case and in law, the Ld. CIT(A) was right in deleting the addition made u/s. 14A rw. Rule 8D(2)(iii) to the tune of Rs. 15,106/- while computing



book profit u/s. 115 JB without appreciating the fact that assessee could not prove satisfactorily that own funds were used in buying the investment?”

11. Brief facts relating to this issue are that the AO has made disallowance of expenses relatable to exempt income by invoking the provisions of section 14A of the Act read with section 8D of the Rules amounting to Rs. 1,16,788/- i.e. under Rule 8D(2)(iii) at ₹ 1,01,682/- being interest and administrative expenses under Rule 8D(2)(iii) at ₹ 15,106/-. The CIT(A) deleted the addition of interest but sustaining the addition of administrative expenses. Now, before us, the learned Counsel for the assessee stated that the assessee has earned the dividend income of ₹ 19,500/- and disallowance should be restricted to the extent of exempt income earned by assessee and this issue is squarely covered by the decision of Hon'ble Bombay High Court in the case of Pr. CIT vs. Ballarpur Industries Limited in Income Tax Appeal No. 51 of 2016, wherein this issue has been considered and finally following the judgment of Hon'ble Delhi High Court in the case of Cheminvest Limited vs. CIT (2015) 378 ITR 33 (Delhi) held as under: -

“On hearing the learned Counsel for the Department and on a perusal of the impugned orders, it appears that both the Authorities have recorded a clear finding of fact that there was no exempt income earned by the assessee. While holding so, the Authorities relied on the judgment of the Delhi High Court in Income Tax Appeal No. 749/2014, which holds that the expression “does not form part of the total income” in Section 14A of the Income Tax Act, 1961 envisages that there should be an actual



receipt of the income, which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. The Income Tax Appellate Tribunal held that the provisions of Section 14A of the Income Tax Act, 1961 would not apply to the facts of this case as no exempt income was received or receivable during the relevant previous year. It is not the case of the Assessing Officer that any actual income was received by the assessee and the same was includible in the total income. In the facts of the case, the Authorities held that since the investments made by the assessee in the sister concerns were not the actual income received by the assessee, they could not have been included in the total income.”

When this was confronted to the learned Departmental Representative he could not controvert the above factual position.

12. As the issue is squarely covered, we are directed the AO to restrict the disallowance of expenses under Rule 8D(2)(ii) and (iii) at ₹ 19,500/-. The provisions of section 14A read with rule 8D of the Rules will not apply, where income is computed on the basis of book profit under section 115JB of the Act as held by special bench of this Tribunal in the case ACIT vs. Vireet Investments (P.) Ltd. [2017] 58 ITR(T) 313 (Delhi - Trib.) (SB). This issue of Revenue's appeal is dismissed.

13. The next issue in this appeal of Revenue is against the order of CIT(A) deleting the disallowance of the claim of contribution towards provident fund and ESIC made beyond the respective due date under



section 36(i) (va) read with section 2(24)(x) of the Act. For this Revenue has raised the following ground No. 5: -

"5. Whether on the facts and in circumstances of the case and in law, the Ld. CIT(A) was right in deleting the disallowance of Rs.69,546/- u/s. 36(1)(va) r.w.s.2(24)(x) of the Act without appreciating the fact that contribution towards Provident Fund made beyond the respective due date?."

14. Brief facts are that the AO disallowed the claim of assessee in regard to payment made on account of employee's contribution to PF and ESIC amounting to ₹ 69,546/-. The CIT(A) deleted the disallowance by noting the actual date of payment. The CIT(A) has reproduced the dates of payments which are as under: -

"4(1) For the year under consideration. The Ld. AO has disallowed following payments of employees contribution to PF/ESIC on the basis that the same were made beyond the respective due dates (and even beyond the grace period) allowed under the relevant statutes covered under section 36(1)(va) read with section 2(24)(x) of the Act, relying on the decision of Hon'ble Mumbai Tribunal in the case of LKP Securities Limited (ITA No. 638/Mum/2012, dated 17.05.2013.):

Employees contribution to ESIC

<i>Month</i>	<i>Amount (₹)</i>	<i>Due date</i>	<i>Payment date</i>
<i>May,2011</i>	<i>7,746</i>	<i>21.06.201</i>	<i>22.06.0211</i>
<i>June, 2011</i>	<i>8,085</i>	<i>21.07.2011</i>	<i>25.07.2011</i>



ITA No. 7401/Mum/2017

August, 2012	7,093	21.09.2011	22.09.2011
February, 2012	5,192	21.03.2012	22.03.2012
Total	28,116	-	-

Employees contribution to PF

Month	Amount (₹)	Due date	Payment date
July 2011	41,430	15.08.2011	20.08.2011

15. We noted that the payments made by assessee on account of PF and ESIC is within the due date of filing of return of income under section 139(1) of the Act, as is evident from the above chart. Hence, we are of the view that the issue is squarely covered by the decision of Hon'ble Bombay High Court in the case of CIT vs. Hindustan Organics Chemicals Ltd. in Income Tax Appeal No. 399 of 2012, dated 11.07.2014. As the issue is squarely covered as the payments made within the due date of filing of return of income on account of Hon'ble Jurisdictional High court decision in the case of Hindustan Organics Chemicals Ltd. (supra), we confirm the order of CIT(A). This issue of Revenue's appeal is dismissed.

16. In the result, the appeal of Revenue is partly allowed in term of the above.

Order pronounced in the open court on 24.05.2019.

Sd/-

(एन. के. प्रधान/ NK PRADHAN)

(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह /MAHAVIR SINGH)

(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 24.05.2019.

सुदीप सरकार, व.निजी सचिव / Sudip Sarkar, Sr.PS

**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.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai