

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G', NEW DELHI**

**BEFORE SH. R. K. PANDA, ACCOUNTANT MEMBER
AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

ITA No.3527/Del/2016
Assessment Year: 2009-10

M/s. CBRE South Asia (P) Ltd., Ground Floor, PTI Building,4 Parliament Street, New Delhi-110005 PAN No. AAACC9308A	Vs	Deputy Commissioner of Income Tax, Circle – 3 (1) New Delhi
(APPELLANT)		(RESPONDENT)

Appellant by	Sh. Gautam Jain, Advocate Sh. Lalit Mohan, Advocate
Respondent by	Sh. S. S. Rana, CIT(DR)

Date of hearing:	06/05/2019
Date of Pronouncement:	28/06/2019

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order dated 31.03.2016 of the CIT(A)-2, New Delhi relating to A. Y. 2009-10.

2. The ground of appeal No.1 to 1.3 raised by the assessee reads as under :-

1. That the learned Commissioner of Income Tax (Appeals)-2, New Delhi has erred both in law and on facts in upholding the disallowance of Rs.6,64,64,442/- representing commission paid to Sh. Anshuman Magazine, director of the appellant company by invoking section 36(1) (ii) of the Act.

1.1 That disallowance sustained under section 36 (1) (ii) of the Act is otherwise is in disregard and disrespect of the order of Hon'ble Tribunal and orders of learned Commissioner of Income Tax (Appeals) for Assessment Year 2007-08 and 2008-09 wherein too, identical disallowances made had been deleted and therefore, the learned Commissioner of Income Tax (Appeals) ought to have respectfully followed the same and as such, the disallowance so upheld is illegal, invalid and wholly unsustainable.

1.2 That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that since Shri Anshuman Magazine as a managing director of the appellant company was to make extensive efforts to obtain and increase the business of the appellant company and devote extra time and as such it was resolved that Shri Anshuman Magazine be paid incentive in the form of commission at 30% of the net profits for each year after adding back depreciation, since Assessment year 2004-05, apart from the basic salary which stood allowed and accepted in preceding years.

1.3 That the learned Commissioner of Income Tax (Appeals) has erred both in law and no facts in recording various adverse inferences without granting any opportunity which are also contrary to facts on record, material placed on record and, are otherwise absolutely unwarranted.

3. Facts of the case, in brief, are that the assessee is a company and engaged in the business of providing real estate consultancy services, site management services, professional advisory services and project management services. It filed its return of income on 28.09.2009 declaring total income of Rs.31,79,41,751/-. Since the assessee has entered into international transaction with its associated enterprises/concerns, the Assessing Officer referred the matter to the TPO for determining the arms length price of the international transactions entered into by the assessee. The TPO vide order dated 26.11.2012 passed order u/s. 92CA (3) determining 'nil' adjustment to the ALP of the international transaction.

4. The Assessing Officer during the course of assessment proceedings observed from the audit report that the assessee company has paid salary and allowances to its director which also includes bonus /ex-gratia allowances paid to Sh. Anshuman Magazine amounting to Rs.6,64,65,442/-. The Assessing Officer noted from the submission filed by the assessee that Sh. Anshuman Magazine is a share holder of the company with 24% share holding and balance share holding is with CB Richard Eills Holding. According to the Assessing Officer as per provisions of section 36 (1) (ii) of the IT Act, 1961, bonus or commission paid to an employee is allowable as deduction if and only if it is not payable as profit or dividend. However, in the case of assessee profit of Rs.26,74,54,304/- has been shown before tax and no dividend has been proposed or distributed among the share

holders who are also directors of the company. He, therefore, inferred that the above amount has been apparently paid as commission and bonus and not as dividend to reduce the income of the company and to avoid dividend distribution tax. He, therefore, confronted the same to the assessee and asked the assessee to explain the justification of the admissibility of bonus / commission to the director. Rejecting the various explanation given by the assessee and observing that the relief granted by the CIT(A) for A. Y. 2007-08 and 2008-09 have not been accepted by the department and appeal has been filed before the Tribunal, the Assessing Officer disallowed the amount of Rs.6,64,65,442/- by invoking the provision of section 36 (1) (ii) of the IT Act, 1961.

5. In appeal the Ld. CIT(A) upheld the action of the Assessing Officer by observing as under :-

4.3.1 I have examined observations made by the AO in the assessment order passed, submissions made by the appellant during the course of appeal, various evidences placed on record, various judgments relied upon by the appellant and also examined the facts of the case. The AO invoked the provisions of Section 36(1)(ii) which provides that any sum paid to an employee as bonus or commission for services rendered is to be deducted in computing the total income, where such sum would not have been payable to him as profits or dividend if it had not been paid as bonus or commission.

4.3.2 The appellant has relied upon the order of the Hon'ble Tribunal in the case of M/s Creative Travel (P) Ltd. vs. ACIT in ITA No. 190/D 2010 for Assessment Year 2006-07 dated 13.05.2011. I have examined this order deeply and in my personal opinion and with great respect to the Hon'ble ITAT, I find that facts of this case and those of the appellant are entirely different. In that case no doubt the other family members were also the shareholders and commission was paid to the director who

was not having the substantial shareholding, whereas in the present case, Mr. Anshuman Magazine was having 99.99% shareholding of the appellant company when the resolution dated 27.5.2003 was passed, and if no such resolution had been passed, even then the entire profits were to go to Shri Anshuman Magazine and his wife (who held the balance shares). This fact cannot be brushed aside that Mr. Anshuman Magazine was holding 99.99% shareholding, and distribution of profit in the shape of commission was with the sole intention to avoid dividend distribution tax. which otherwise was to be paid by the appellant company, if no such resolution had been passed for payment of such commission, which is not permissible as per provisions of section 36(1)(ii) of the Act. The intention of the legislature to bring such provisions on the statute is to prevent companies from diverting their profits as incentive / bonus / commission which otherwise are to be paid to the shareholders as dividend. Therefore, while passing the resolution for payment of commission to the person holding 99.99% shareholding, we have to see the intention for passing such resolution. Any such payment made to the shareholder employee shall reduce the profit of the company for purpose of distributing the dividend and thus there was avoidance of distribution of dividend and hence payment of dividend distribution tax. The question is if Mr. Anshuman would have not been paid this commission, he would still have got more or less the same amount as dividend. Therefore, the present case before me is a clear case where the true profits of the company were distributed to Shri Anshuman under the guise of commission which otherwise he would have received as dividend income. Therefore, provisions of section 36(1)(ii) are clearly attracted in the present case.

4.3.3 I have also examined the judgment relied upon by the appellant of the Hon'ble Delhi Bench of the Tribunal in the case of DCIT vs. Celsius Refrigeration (P) Ltd (1TA No. 446 Del 2010 for Assessment Year 2007-2008 decided on 30 December, 2010). I find that the facts of this case also differ from the case of the appellant. In the case relied upon, there were more than one director who were shareholders and were given the commission according to the territory assigned to them, whereas in the present case, almost entire profits were to be shared by Shri Anshuman Magazine when the said resolution was passed dated 27.5.2003. which appears to have been passed with the sole intention to avoid payment of dividend distribution tax.

A.3.41 have also examined various other case laws referred to by the appellant. However, in view of my above observations, since it is a case where the Director of the appellant company was holding almost entire shareholding of the appellant company, I find that the facts of the appellant company differ from those cases, and in the peculiar facts, the issue of payment of commission to the Managing Director Shri Anshuman Magazine who held 99.99% shares when such resolution for payment of commission was passed, need to be examined considering those circumstances. Therefore, with great respect to the Hon'ble ITAT. I am of the personal opinion that this fact escaped the attention of the Hon'ble I I AT. while deciding the issue in A.Y. 2007-08 and A.Y. 2008-09 in the appellant's case. Further, in para 10 of their order dated 07th March, 2016 for A.Ys 2007-08 & 2008-09 in the case of the appellant company, Hon'ble ITAT have inter-alia observed as follows:-

".....It is noted that the A.O. proceeded to make disallowance on incorrect assumption of fact that no dividend has been distributed amongst the shareholders in the instant year; where as a matter of fact that dividend of Rs.13 90 crores was declared in the instant year..... "

Hence, the facts of the case for the year under appeal are different in the sense that dividend has not been paid by the appellant company despite earning profits before tax of Rs.26.74 crores and rather bonus/commission of Rs.6.64,64,442/- has been paid to Sh. Anshuman Magazine who held 24% of the shares during the year.

4.3.5 The appellant has relied on the orders of the erstwhile CIT(A)-VI. New Delhi, for AY 2007-08 and 2008-09. These orders passed by the then CIT(A)-VI. New Delhi, were challenged by the Revenue before the Hon'ble ITAT, New Delhi. Hon'ble ITAT. New Delhi has decided these orders in favour of the appellant. In any case, the principle of res-judicata is not attracted since each assessment year is separate in itself.

4.3.6 For the assessment year under consideration the appellant company has shown profit of Rs. 26,74.54.304/- before tax. However, no dividend has been proposed or distributed among the shareholders for the assessment year under consideration. For the assessment year under consideration, there were only two shareholders in the appellant company i.e. Mr. Anshuman Magazine holding 24% shareholding and M/s. CB Richard Ellis Holding Limited, holding 76% shareholding of the company. It is not out of place to mention here that as on 27.05.2003 when the resolution was passed for payment of

commission to Shri Anshuman Magazine, the Managing Director, he was having 99.99% shareholding in the company and his wife Smt. Rashmi Magazine was having only 0.01% shareholding i.e. only 1 share. Thereafter, there was a change in shareholding of the appellant company and for the assessment year under consideration. Shri Anshuman Magazine, Managing Director, was holding 24% shares in the appellant company. Though there was profit before payment 01 tax' amounting to Rs. 26,74,54,304/-, yet no dividend was distributed either for the assessment year under consideration or even in the preceding assessment year when the appellant company had profit of Rs. 37.08,83.286/-. In case there had been no such resolution for payment of commission as has been claimed to have been passed, the sum so paid as commission would have been passed to him as dividend and in that case the appellant company would have paid dividend distribution tax on such profits earned, and profit/taxable income of the appellant company would also have further increased by an amount of the so called commission paid to Mr. Anshuman Magazine. However, in order to avoid dividend distribution tax, under the guise of commission paid as per resolution passed, the appellant company has avoided payment of dividend distribution tax. Commission paid to Shri Anshuman Magazine is with the sole intention to reduce the income of the company and to avoid dividend distribution tax.

4.3.7 Provisions of Section 36(1)(ii) were brought on to the statute to prevent such diversion of profits to the shareholders who are other wise to get the same as profit / dividend by virtue of being shareholders of the company. In the present case also the issue is of allowability of commission paid to an employee (director who is also shareholder) as per provisions of section 36(1)(ii) of the Act. In the present case before me. Mr. Anshuman Magazine is not only Managing Director/employee of the appellant company but is also the shareholder in the appellant company. It is observed from the details filed that at the time when the resolution was passed for payment of commission to Shri Anshuman Magazine, he was having 99.99% shares of the appellant company and the balance 0.01% i.e. only one share was held by his wife. Meaning thereby, that the entire profits earned by the appellant company were to go to Shri Anshuman Magazine when the resolution was passed for payment of commission to him. This goes to prove that the said resolution was passed with the sole intention to avoid payment of tax on

distribution of dividend. In case no such commission was paid to Shri Anshuman Magazine, then the commission paid would have been paid to him as distribution of profit i.e. dividend and in that case profits of the appellant company would have increased by the amount of commission claimed by it. Revenue would have got 30% tax on such commission which in fact should not have been allowed having been paid in contravention of the provisions of section 36(1)(ii) of the Act. This issue was first examined only when assessments for AY 2007-08 and AY 2008-09 were taken up under scrutiny and such commission paid was disallowed invoking the provisions of section 36(1)(ii) of the Act. by the AO. However, the additions so made were deleted by the Ld. CIT(A) for these years and the action of the Ld. CIT(A) has been confirmed by the Hon'ble ITAT in the appeals filed by the Department.

4.3.8 For the sake of convenience sub-section (ii) of Section 36(1) of the Act is reproduced as under:-

"(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;)"

If each word of the above sub section is read with the intention of the statute with which it was incorporated in the Act. it can be noticed that:

*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
dividend
if
it had not been paid as bonus or commission:)*

The restriction that such bonus or commission should not have been payable to employee as profits or dividend has been obviously designed to check, inter-alia private companies from avoiding tax by distributing their profits to their members / shareholders as bonus or commission instead of dividends. Therefore, what is to be seen is that when such bonus or commission is paid to an employee who is not to get the same as profit or dividend, then deduction u/s 36(1)(ii) shall be allowed, otherwise not.

4.3.9 However, in the present case before me. if the sum had not been paid as bonus or commission to Shri Anshuman Magazine, in that case since he was not only the employee but also a shareholder, he would have got that as a profit or dividend. Therefore,

provisions of section 36(1)(ii) are clearly attracted in the present case and the amount paid to him as commission should not have been allowed u/s 36(1)(ii) of the Act.

4.3.10 It is also a matter of record that appellant company has paid substantial amount as commission to one of its directors Shri Anshuman Magazine. For this the appellant has relied on the Board resolution passed dated 27.05.2003 (PB 4) which reads as under:-

“RESOLVED that pursuant to Article 24 of the Articles of Association of the Company and applicable provisions, if any, of the Companies Act, 1956, Mr. Anshuman Magazine be and is hereby appointed as the Managing Director of the Company with effect from 1st June 2003 for a period of five (5) years i.e. from 1st June, 2003 till 31st May, 2008 which may be extended further as decided by the Board.”

Thus even according to the above resolution. Mr. Anshuman Magazine was not entitled to payment of any commission after 31^M May, 2008 and therefore, if any commission is paid out of the profits earned by the appellant company for the period 01.06.2008 to 31.03.2009 it is not in consonance with the said resolution passed. No evidence has been brought on record by the appellant that the above resolution was extended for a further period. For this reason also the commission paid to Mr. Anshuman Magazine is not an allowable expense. In any case, such a resolution passed by the Board of a company in favour of a shareholder having substantial shareholding in the company is merely a self-serving, colourable device for evading tax.

*4.3.11 Even otherwise, if any resolution is passed by the Board of Directors which is contrary to law. it cannot bind the Revenue to consider the resolution passed for any payment agreed to be made by virtue of such resolution. This fact is confirmed from the letter issued by the Ministry of Corporate Affairs (MCA) which has been relied upon by the appellant company and is placed in the paper book at Page 110 which has been issued by MCA on request made by the appellant company for waiver of excess managerial remuneration paid to Mr. Anshuman Magazine, Managing Director of the appellant company who is also the share holder of the appellant company. **This letter specifically states that the approval accorded in this letter is under and in respect of the provisions of the Companies Act, 1956 and should not be construed to convey the approval of the***

Central Government or any other statutory authority under it, under any other law or regulations. Therefore, Revenue is not bound to allow any payment which is not allowable under the specific provisions of the I.T. Act.

4.3.12 In fact the resolution passed for allowing commission to the Managing director was pre planned and with the sole intention to avoid the tax liability by claiming an expense which in fact was not allowable to the appellant company. The appellant company claimed commission paid to its managing director as expense and it is argued that there is no loss to the revenue, since there is no difference in maximum rate of tax chargeable in the case of appellant company or in the case of the director Shri Anshuman Magazine, since the tax bracket is same. But the facts are somewhat different. By showing payment made to the Managing Director as commission, appellant company has avoided the dividend distribution tax which would have been paid in case no such expense had been paid/allowed, as in that case profit would have increased, and the tax which is claimed to have been paid by Shri Anshuman Magazine, would have been paid on increased income (actual income) of the appellant company. In addition the increased profits distributed as dividend would also be subjected to dividend distribution tax. In the present case, by passing such a resolution and showing that it is commission for the performance of the director is just a corporate veil, whereas the fact is that the performance achieved is not because of one person but is as a result of the team work of manpower employed in the business. Mr. Anshuman Magazine would have received almost the same amount as dividend at least upto A.Y. 2007-08 which has been given to him by way of commission, but in that case the appellant company would have paid tax on the commission expense which in fact is not to be allowed as per provisions of section 36(i)(ii) of the Act. In addition, it would also have paid dividend distribution tax.

4.3.13 In view of my above observations, this fact cannot be ignored that the commission has been paid to a director who has substantial share holding in the company and such commission so claimed to have been paid which in fact is not allowable as per provisions of section 36(1)(ii). shall be a part of the profit earned by the appellant company. In that case the appellant company would have

had to pay tax on increased profit by the amount of commission expense claimed to have been paid to Shri Anshuman Magazine, and the appellant company would be subject to tax on distribution of dividend as well.

4.3.14 The appellant has stated in para 5.7 of the statement of facts that similar incentive has been paid to other employees of the company which has been allowed as deduction as would be evident from the commission paid to Shri Manish Kashyap to whom incentive is shown to have been paid to the tune of Rs. 3.63.56,842/- based on sales. The fact cannot be overlooked that Mr. Manish Kashyap is not a share holder in the appellant company and therefore, he is not entitled to any dividend. Thus payment made to Mr. Manish Kashyap is not hit by the provisions of section 36(1)(ii) of the Act since he is not a shareholder and is not likely to get any profit of the company. Provisions of section 36(1)(ii) apply in the case of a director substantial share holder only.

4.3.15 Therefore, the provision contained in Section 36(1)(ii) is squarely applicable in the present case to commission paid to Mr. Anshuman Magazine. In order to determine as to how much profit of the appellant company has been diverted under the guise of commission expense claimed to have paid to Mr. Anshuman Magazine (Director/shareholder of the appellant company), the same is worked out as under:-

Income as shown by the appellant	31,79,41,751		
Amount paid to Mr. Anshuman Magazine	6,64,65,442	30%	1,99,39,632,6
Total income of the appellant company	38,44,07,442	30%	11,53,22,158
Add Surcharge		5%	57,66,107.9
Total tax payable			12,10,88,266
Profit for distribution	26,33,18,927		
Share of Anshuman Magazine	6,31,96,543	24%	
	6,64,65,442		
Amount given to Mr. Anshuman as Commission and incentive	3268899		

<i>Difference which could have been allowed as expenses in the hands of the company (Even this was not to be paid as commission since the resolution passed only for five years)</i>			
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4.3.16 *I further find that in the present assessment year under consideration the profits of the appellant company are substantially reduced, which have come down to Rs. 26.74 crores as compared to immediately preceding year wherein the profits are shown at Rs. 37.06 crores despite increase in turnover from Rs.243.14 crores to Rs.280.63 crores. No material regarding the qualifications of Sh. Anshuman Magazine and the efforts made by him to increase the profitability of the company has been adduced by-the AR of the appellant. Therefore. I do not find any force in arguments of the appellant company that the increase in turnover or profits is as a result of Mr. Anshuman Magazine, for which expense purported to be commission paid to him is claimed, and therefore, the addition made by the A.O. disallowing the claim of the appellant company is sustained. These grounds of appeal are therefore, dismissed.*

6. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal.

7. The Id. Counsel for the assessee strongly challenged the order of the CIT(A) in confirming the addition made by the Assessing Officer by invoking the provisions of section 36 (1) (ii) of the IT Act. He submitted that under identical facts and circumstances the Assessing Officer, in the preceding assessment year, had made disallowance by invoking provisions of section 36 (1) (ii) of the IT Act, 1961 and on appeal by the revenue, the Tribunal has dismissed the appeal filed by the revenue. He submitted that the revenue has accepted the order of the

Tribunal and no appeal has been preferred as per his information, since no appeal memo has been served upon the assessee. He submitted that the CIT(A) has not followed the order of the Tribunal on the ground that the principle of re-judicata is not applicable to Income Tax proceedings since each assessment year is separate itself. He submitted that once the facts remain the same then in view of decision of Hon'ble Apex Court in the case of CIT Vs. Excel Industries Ltd. reported in 358 ITR 295, principle of Consistency is to be followed. He drew the attention of the Bench to the following tabular chart showing that identical claim in respect of incentive paid to Sh. Anshuman Magazines, director of the assessee company stood allowed as such :

magazines, director of appellant company stood allowed as such is tabulated hereunder:

A.Y.	Incentive (Rs.)	Salary	Contribution to provident fund (if any)	Other benefit	Total payment	Disallowance if any (Rs.)	Assessment u/s (pages of Paper Book)
2001-02	23,00,000	-	-	-	23,00,000		143(1)
2002-03	28,50,000	-	-	-	28,50,000		143(1)
2003-04	25,00,000		49,22,460		74,22,460		143(3)
2004-05	1,19,48,350		63,46,810		1,82,95,160		143(1)
2005-06	1,91,75,160		77,26,400		2,69,01,560		143(3)
2006-07	3,81,76,000		90,34,880		4,72,10,880		143(1)
2007-08	2,89,55,000		1,17,69,000		4,07,24,000	2,85,55,000	143(3) Addition deleted by CIT(A) (pages 35-55 of PB) and CIT(A) order further affirmed by ITAT (pages 143- 167 of PB) and no appeal

							before High Court
2008-09	6,47,27,888 (Computation of income 168-171 Page of Paper Book)	1,17,69,000	2,16,000	15,000	7,67,27,888 (Page 31 read with Page 22 of PB)	6,47,27,888	143(3) Addition deleted by CIT(A) (pages 56-89 of PB) and CIT(A) order further affirmed by ITAT (pages 143-167 of PB) and no appeal before High Court
2009-10	5,44,65,442 (Computation of income 172-190 Page of Paper Book)	1,17,69,000	2,16,000	15,000	6,64,65,442 (Page 31 read with Page 22 of PB)	6,64,65,442 (Inclusive of Salary) (Issue under consideration)	
2010-11	4,01,84,983	1,15,28,400	2,16,000	39,600	5,19,68,983	--	143(3) (193-194)
2011-12	5,43,68,403	1,35,68,000	4,32,000	39,600	6,84,08,003	--	143(3) (195-197)
2012-13	6,54,63,629	1,15,68,000	4,32,000	39,600	7,75,03,229	--	143(3) (198-199)
2013-14	6,80,72,020	1,15,68,000	4,32,000	39,600	8,01,11,620	--	143(3) (200-201)
2014-15	7,23,67,884	1,15,68,000	4,32,000	39,600	8,44,07,484	--	143(3) (202-206)

8. Relying on various decisions he submitted that in absence of any appeal by the revenue challenging the order of the Tribunal the same is binding. He submitted that the disallowance made by the Assessing Officer and upheld by the CIT(A) is contrary to principle of consistency. He submitted that once the department has accepted the claim in preceding as well as subsequent years then the revenue is bound by the principle of consistency. Further the incentive so paid to Sh. Anshuman Magazine for A. Y. 2004-05 onwards has been assessed as salary even under section 143 (3) of the IT, 1961 Act for various assessment years. For the above proposition, the Ld. Counsel for the assessee drew the attention of the bench to the following table :-

Sr. No.	A. Y.	Incentive (Rs.)	Total Salary (Computation of income at page of paper book)	Assessment u/s. (pages of Paper book)
i)	2003-04	25,00,000	74,22,460	143 (1)
ii)	2004-05	1,19,48,350	1,82,95,160	143 (3) (93)
iii)	2005-06	1,91,75,160	2,69,01,560	143 (1)
iv)	2006-07	3,81,76,000	4,72,10,880	143(3) (98)
v)	2007-08	2,89,55,000	4,07,24,000	143(3)
vi)	2008-09	6,47,27,888	7,67,27,888 (168-171)	143(3) (103)
vii)	2009-10	5,44,65,442	6,62,49,942 (172-190)	143 (3) (105) (Issue under consideration)
viii)	2010-11	4,01,84,983	5,19,68,983	

9. Relying on various decisions he submitted that once taxes have been paid by the director on the income claimed as expenditure by assessee company, no disallowance is permissible validly under the Act. For the above proposition, he relied on the decision of Hon'ble Karnataka High Court in the case of CIT Vs. Swadeshi Internationals reported in 261 Taxman 430. Relying on the decision of Hon'ble Supreme Court in the case of DCIT Vs. Patel Alloy Steel (P) Ltd. reported in 262 Taxman 166 he

submitted that in absence of disallowance made in the preceding years and no change in facts and law, no disallowance could be made in the instant year.

10. He submitted that no payments have been made to the other share holders namely M/s. C.B. Richard Ellis South Asia (P). Ltd. and therefore, section 36(l)(ii) of the Act has no application. He submitted that Hon'ble Delhi High Court in the case of AMD Metplast (P) Ltd. vs. DCIT reported in 341 ITR 563 has held that once incentives has not been disputed in the ratio of shareholding pattern, no disallowance can be made under section 36(l)(ii) of the Act. Referring to the above decision, he submitted that in the said case, the assessee had paid commission of Rs. 25,00,000/- to Shri Ashok Gupta, Managing Director of the assessee company which was disallowed under section 36(l)(ii) of the Act. The Hon'ble High Court held that once the payment has been paid in terms of the Board Resolution and as part of the entitlement to receive commission on the services rendered on which TDS has been deducted and the employees have also paid taxes on the said sum then no disallowance can be made under section 36(1)(ii) of the Act. He drew the attention of the Bench to the following observations of the Hon'ble High Court :

“Dividend has to be paid to all shareholders equally. This position cannot be disputed by the Revenue. Dividend is a return on investment and not salary or part thereof. Herein the consideration in the form of

commission which was paid to Ashok Gupta was for services rendered by him as per terms of appointment as a managing director.”

11. He submitted that similar view has been expressed by the Hon'ble High Court in the case of Controls & Switchgear Contactors Ltd. vs. DCIT reported in 269 CTR 44.

12. Referring to the decision of Hon'ble Delhi High Court in the case of CIT v. Career Launcher India Ltd reported in 358 ITR 179 he submitted that here also following the above judgment, disallowance made was deleted. He submitted that the learned Commissioner of Income Tax (Appeals) however has held that the resolution placed on record could not be accepted as on the date of passing of resolution on 27.05.2003, Sh. Anshuman Magazine was holding 99.99% shareholding and distribution of profits in the shape of commission was done with sole intention to avoid dividend distribution tax which otherwise was to be paid by the assessee company and such finding is wholly misconceived and untenable particularly when on the basis of identical resolution in the preceding assessment year, deduction claimed stands allowed even by the Hon'ble Tribunal and by the learned Commissioner of Income Tax (Appeals). He submitted that in the succeeding year also, identical claim of incentive paid has been allowed as such in assessment framed under section 143(3) of the Act. He submitted that the observation in para 4.3.4 (page 23 of order of CIT(A) that factum of passing of resolution on the date when Sh. Anshuman Magazine held 99.99% shareholding and

escaped attention is wholly misconceived. There is no justification to proceed on such a presumption. In any case, having not filed an appeal against the order of Hon'ble Tribunal, the conclusion is wholly misconceived. Referring to the order of CIT(A) he submitted that it is also held by the learned CIT(A) that the resolution is upto 31.5.2008 and therefore, commission paid out of the profits for the period 1.6.2008 to 31.03.2009 is unsubstantiated. He submitted that here too, once the learned CIT(A) has noted that this sum was part of remuneration paid by the assessee to Sh. Anshuman Magazine for which, waiver of cost remuneration was obtained from Ministry of Corporate Affairs dated 18.7.2011, the conclusion that it is not for services rendered is misconceived. He submitted that identical waiver of cost remuneration was there in assessment year 2008-09 as would be evident from the permission dated 18.7.2011 placed at page 106 of Paper Book and therefore, the assumption is wholly misconceived. In any case, once the assessee has declared the said sum as salary in his hands which stands accepted under section 143(3) of the Act, the basis adopted to disallow the claim of deduction is not in accordance with law and therefore, untenable. He submitted that even the tabulation prepared at page 29 (para 4.3.15) is incorrect. He submitted that the learned Commissioner of Income Tax (Appeals) has taken the income as shown in the return of income and then added the sum paid to Sh. Anshuman Magazine and assumed that total profit available for distribution was Rs. 26.33 crores and thus held that 24% share of Sh. Anshuman Magazine was Rs. 6.31 crores as against

which, he has been paid Rs. 6.64 crores. He submitted that firstly, there is no justification to arrive at such a conclusion. The aforesaid approach is wholly misconceived for the following reasons:

- a) That no remuneration has been paid to any other shareholder and therefore, said sum cannot be deemed as dividend or profit under section 36(l)(ii) of the Act and therefore, sum paid to Sh. Anshuman Magazine stands assessed as salary in the hands of Sh. Anshuman Magazine under section 143(3) of the Act;
- b) Incentive paid in the instant year to Sh. Anshuman Magazine in identical manner stands allowed as deduction including by the order of Hon'ble Tribunal for which, no appeal has been preferred by the appellant;
- c) Identical incentive paid in the succeeding year stands also accepted by the Assessing Officer in assessment framed under section 143(3) of the Act; and,
- d) Identical incentive paid to other employee was also allowed as deduction.

He submitted that even otherwise, a chart or tabulation prepared is based on fundamental misconception and otherwise too, cannot be a ground to assume that sum paid was profit or dividend.

12. The Ld. Counsel for the assessee without prejudice to the above submitted that even otherwise, profit as per profit and loss account was Rs. 26.78 crores and even assuming, the entire sum

is profit and dividend then total sum was Rs. 33.38 crores out of which, if taxes are reduced of Rs. 11.78 crores then net surplus available is Rs. 21.70 crores against which, share of Sh. Anshuman Magazine would be Rs. 5.21 crores and not Rs. 6.64 crores and thus, even otherwise, the preposterous theory propounded by the learned CIT(A) is misconceived. He submitted that since the whole issue is covered by the order of the Tribunal and assessment framed under section 143(3) of the Act and order made in the case of Sh. Anshuman Magazine, the disallowance made is untenable. He accordingly submitted that the addition made by the Assessing Officer and upheld by the CIT(A) should be deleted. The Ld. DR on the other hand heavily relied on the order of the CIT(A). He submitted that the principle of re-judicata is not applicable to income tax proceedings and each year is different. He submitted that the Ld. CIT(A) has distinguished the orders of the preceding years and, therefore, the same should be upheld.

13. We have considered the rival arguments made by both the sides, perused the orders of the authorities below and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the Assessing Officer in the instant case invoking the provisions of section 36 (1) (ii) of the IT Act, 1961, made addition of Rs.6,64,65,442/- to the total income of the assessee being the amount of commission and ex-gratia paid to one of the director Sh. Anshuman Magazine who is a share holder of this company holding 24% share holding. According to the Assessing Officer similar additions made in A. Y.

2007-08 and 2008-09 were deleted by the CIT(A) but the department had not accepted the same and the matter is pending before the Tribunal. He further held that in the instant case no dividend has been declared by the assessee company whereas it has paid salary and other allowances to its directors which also includes bonus / ex-gratia which is nothing but to reduce the taxable income of the assessee company and to avoid dividend distribution tax. We find the Ld. CIT(A) distinguishing the orders of his procedure and the order of the Tribunal upheld the action of the Assessing officer, the reasons for which have already been reproduced in the preceding paragraphs. We find the facts of the impugned assessment year are identical to the facts of the preceding as well as subsequent years. We find the Tribunal in assessee's own case for A. Y. 2007-08, 2008-09 vide ITA No. 709/Del/2012 and 795/Del/2013 order dated 07.03.2016 has deleted such disallowances and the revenue has not filed any appeal against the order of the Tribunal deleting such deletion. The submission of the ld. Counsel for the assessee that in assessment year 2010-11, the incentive of Rs.4,01,84,983/- and salary of Rs.1,15,28,400/- both totaling to Rs.5,29,68,983/- has been allowed in the order passed u/s. 143 (3) could not be controverted by the Ld. DR. Similarly the submission of the Ld. Counsel for the assessee that the Assessing Officer has allowed the payment of Rs.6,84,08,003/- for A. Y. 2011-12, Rs.7,75,03,229/- for A. Y. 2012-13, Rs.8,02,22,620/- for A. Y.2012-13 and Rs.8,44,07,484/- for A. Y. 2014-15 in the order passed u/s. 143 (3) also could not be controverted by the Ld. DR.

Since the commission paid to Sh. Anshuman Magazine, director of the assessee company was deleted by the CIT(A) in the preceding years and the order of the Tribunal dismissing the appeal filed by the revenue has not been challenged by the revenue in the preceding two years and further considering the fact that the Assessing Officer in the orders passed u/s. 143 (3) for subsequent assessment years from 2010-11 to 2014-15 has allowed similar commission/ incentive, therefore, following the rule of consistency, we are of the considered opinion that no disallowance u/s. 36 (1) (ii) of the IT Act is called for in the instant case. We, therefore, set aside the order of the CIT(A) on this issue and allow the grounds of appeal No. 1 to 1.3 raised by the assessee.

14. Ground No.2 to 2.3 are as under :-

2. That the learned Commissioner of Income Tax (Appeals) has further erred both in law and on facts in confirming an addition of Rs.7,77,69,909/- on account of alleged excessive claim of remuneration.

2.1 That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that disallowance pertaining to Assessment year 2008-09 of Rs.3,04,30,061/- could not be disallowed in the instant year as no expenditure has been claimed in the instant year.

2.2 That finding that “any payment made of managerial remuneration to the Managing Director in contravention of the provisions of the Companies Act, even if waived cannot be considered to be an allowable expense under the IT Act, if it was not for the purpose of business of the appellant company and was only a device to reduce the tax liability, which is the case with the

appellant. Therefore, the excess amount of managerial remuneration paid to Shri Anshuman Magazine which amounts to Rs.4,73,39,848/- is not allowable as the same is not relating to the business of the appellant” is factually and legally erroneous and thus untenable.

2.3 That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that managerial remuneration approved by Central Government can be no ground much less valid ground to deny the claim of legitimate expenditure incurred on account of commercial expediency for services rendered in the course of business of the appellant company.

15. Facts of the case, in brief, are that the Assessing Officer during the course of assessment proceedings noted that the assessee has claimed Rs.3,04,30,061/- and Rs.4,73,39,848/-, totaling to Rs.7,77,69,909/- should not on account of remuneration. The Assessing Officer asked the assessee to show cause as to why excess remuneration of Rs.7,77,69,909/- be disallowed for which statutory approval were not obtained by the assessee. In response to the same, the assessee, vide letter dated 13.02.2013 submitted as under :

“The assessee company had paid managerial remuneration in excess of limit specified in the companies Act amounting to Rs.3,04,30,061 and Rs.4,73,39,848 for the year ending 31.03.2008 respectively.

In respect of the same we would like to intimate your good self that the recovery of excess managerial remuneration has been waived off by the Central

Government. Approval letter issued by the Central Government regarding the waiver of recovering such excess managerial remuneration is being enclosed as “Annexure – M” for your kind perusal”.

16. However, the Assessing Officer was not satisfied with the arguments advanced by the assessee. He referred to “Annexure M” which is the letter issued by the Deputy Secretary to the Government of India, Ministry of Corporate Affairs dated 18th July 2011 which is much after the date on which such remuneration has been paid by the assessee company or filing of return. The assessee company failed to provide prior approval of remuneration expenses. In view of the above, the Assessing Officer disallowed the amount of Rs.7,77,69,909/-.

17. In appeal the Ld. CIT(A) upheld the action of the Assessing Officer by observing as under :-

5.4.1 I have examined the observations made by the AO in the impugned assessment order as well as submissions made by the appellant on the above addition made. The addition made by the AO is with regard to excess remuneration paid to Mr. Anshuman Magazine of Rs. 4.73.39.848/- which relates to AY 2009-10 and Rs. 3.04.30.061/- which relates to A.Y. 2008- 09, claimed to be part of payment made to Shri Anshuman Magazine of Rs. 6,47.27.288/- relating to A.Y. 2008-09 and Rs. 6.64.64.442 - relating to the assessment year under consideration. In any case, a claim pertaining to an earlier year cannot be allowed in the year under

appeal and therefore, the amount of Rs. 3.04,30.061/- relating to A.Y. 2008-09 deserves to be disallowed in case it has been made during the assessment year under consideration.

As regards the other amount of Rs. 4,73,39,848/- i.e. the excess remuneration paid to Mr. Anshuman Magazine for the assessment year under consideration. I find that this fact cannot be brushed aside that the payment made of Rs. 4.73.39,848/- claimed by the appellant to be forming part of the payment made of Rs. 6.64.65.442/- for the assessment year under consideration is excess managerial remuneration paid to Shri Anshuman Magazine. Managing Director of the Company. I have also examined the order for waiver issued by the Ministry of Corporate Affairs dated 18th July, 2011. which states clearly that approval accorded in that letter is under and in respect of the provisions of the Companies Act, 1956 and should not be construed to convey the approval of the Central Government or any other statutory authority under it, under any other law or regulations for the time being in force in respect whereof the company will no doubt take appropriate action as required by law.

5.4.3 Thus, any payment made of managerial remuneration to the Managing Director in contravention of the provisions of the Companies Act. even if waived, cannot be considered to be an allowable expense under the I.T. Act if it was not for the purpose of business of the appellant company and was only a device to reduce the tax liability, which is the case with the appellant, as held in the foregoing paras. Therefore, the excess amount of managerial remuneration paid to Shri Anshuman Magazine which amounts to Rs. 4,73,39.848/- is not allowable as the same is not relating to the business of the appellant. However, the A.O. may ensure that no

double addition of the same income is made. This ground of appeal is disposed of accordingly.

18. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal.

19. The Id. Counsel for the assessee strongly challenged the order of the CIT(A) in sustaining the addition so made by the Assessing Officer. The Ld. Counsel for the assessee at the outset drew the attention of the bench to the following table :

Sr. No.	Assessment Year	Amount of Excess Remuneration (in Rs.)	Claimed in Assessment Year	Total Remuneration (Salary, incentives) to Anshuman Magazine	Remarks (pages of paper Book)
i)	2008-09	3,04,30,061 (Included in Rs.7,67,27,888)	2008-09	7,67,27,888 (page 31 of Paper Book)	143(3) Addition deleted by CIT(A) (56-89) and CIT(A) order further affirmed by ITAT (143-167) and no appeal before High Court
ii)	2009-10	4,73,39,848 (Included in Rs. 6,64,65,442)	2009-10 (Year under consideration)	6,64,65,442 (page 31 of Paper Book)	

20. He submitted that the disallowance of Rs.3,04,30.61/- was claimed by the assessee in the preceding assessment year 2008-098 and not in the instant assessment year 2009-10, therefore, the disallowance is patently incorrect.

21. So far as the disallowance of Rs.4,73,39,840/- is concerned he submitted that this is the part of the total remuneration to the managing director which is already disallowed u/s. 36 (1) (ii) of the IT Act and thus amounts to double addition of the same amount. Relying on various decisions he submitted that double addition is not permissible in law. Even otherwise he submitted that the disallowance by the Assessing Officer on the basis that the assessee company failed to provide prior approval of remuneration expenses is not in accordance with law.

22. Relying on various decisions he submitted that mere alleged infractions under other statutes cannot be made a basis to make a disallowance under income tax Act 1961. He further submitted that in absence of satisfaction of conditions u/s. 40 A (2) (b) of the IT Act, 1961 disallowance made is not in accordance with law.

23. The Ld. Counsel for the assessee further submitted that the learned Commissioner of Income Tax (Appeals) has upheld the disallowance on fundamental misconception that any payment made of managerial remuneration to the Managing Director in contravention of the provisions of the Companies Act, even if waived, cannot be considered to be an allowable expense under the Income Tax Act if it was not for the purpose of business of the assessee company and was only a device to reduce the tax liability. He submitted that there is no finding of the Assessing Officer that the expenditure incurred was not for the purpose of business of the assessee. Infact, identical expenditure stood

allowed in the preceding assessment year and succeeding assessment year and therefore, any such suggestion is misconceived. He submitted that once the entire salary stands taxed as income in the hands of Sh. Anshuman Magazine, no disallowance should be made in the instant year. In any case, in absence of any material to suggest that it is not for the purpose of business of assessee, disallowance is wholly uncalled for. He accordingly submitted that the disallowance made by the Assessing Officer and upheld by the CIT(A) should be deleted.

24. The Ld. DR on the other hand strongly relied on the order of the CIT(A).

25. We have considered the rival arguments made by both the sides, perused the orders of the lower authorities and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the Assessing Officer made disallowance to Rs.7,77,69,909/- being excess remuneration paid to the directors. We find the Ld. CIT(A) upheld the action of the Assessing Officer, the reason of which has already been reproduced in the preceding paragraphs. It is the submission of the Ld. Counsel for the assessee that in the assessment year 2008-09 amount of Rs.6,47,27,888/- was disallowed u/s. 36 (1) (ii) of the IT Act, 1961 which included the amount of excess remuneration of Rs.3,04,30,061. Therefore, again the same amount cannot be brought to tax in the impugned assessment year. We find merit in the above argument

of the Id. Counsel for the assessee. From the details furnished by the assessee, it is seen that the amount of Rs.3,04,30,061/- was a part of the amount of Rs.6,47,27,888/- being the amount of disallowance u/s. 36 (1) (ii) of the IT Act, 1961 for A. Y.2 008-09. We, therefore, restore this part of the disallowance to the file of the Assessing Officer for verification and if the above amount was a part of disallowance made u/s. 36 (1) (ii) of the IT Act, 1961 of Rs.4,47,27,888/- then it relates to A. Y. 2008-09 and cannot be disallowed during the current year. The Assessing Officer shall decide the issue as per fact and law after giving due opportunity of being heard to the assessee. We hold and direct accordingly.

26. So far as the amount of Rs.4,73,39,848/- being the excess remuneration paid to Sh. Anshuman Magazine is concerned, we find the assessee has obtained approval of the competent authority though on 18.07.2011 i.e. much after the date on which such remuneration has been paid. In our opinion although the approval has been obtained after date of payment, however it will relate back to the year under consideration. Since the approval was granted by the competent authority vide letter dated 18.07.2011 for three financial at a time i.e. financial year 2007-08, 2008-09 and 2009-10, therefore, it is wrong on the part of the Assessing Officer and the CIT(A) to hold that remuneration is not allowable since the approval has been obtained after the payment of remuneration to the concerned director. We further find that the above amount was a part of Rs.6,64,64,442/- which was disallowed by the Assessing Officer u/s. 36 (1) (ii). However,

we have already deleted such disallowances. We find there is no finding of the Assessing Officer and CIT(A) that the expenditure incurred is not for the purpose of business of the assessee. We find similar expenditure has been allowed by the Assessing Officer in the preceding and succeeding assessment years. Further the amount has already suffered to tax in the hands of Sh. Anshuman Magazine. In view of the above discussion we are of the considered opinion that the disallowance of Rs.4,73,39,848/- is not justified under the facts and circumstances of the case. We, therefore, set aside the order of Ld. CIT(A) on this issue and direct the Assessing Officer to delete the addition. Ground No.2 to 2.3 are accordingly allowed for statistical purpose.

27. In the result, the appeal filed by the assessee is allowed for statistical purpose.

Order pronounced in the open court on 28.06.2019.

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Neha

Date : 28.06.2019

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-
(R.K PANDA)
ACCOUNTANT MEMBER

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	24.06.2019
Date on which the typed draft is placed before the dictating Member	25.06.2019
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	01.07.2019
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	