

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

**Before Sh. H. S. Sidhu, Judicial Member
And
Dr. B. R. R. Kumar, Accountant Member**

ITA No. 857/Del/2018 : Asstt. Year : 2014-15

SRC Aviation Pvt. Ltd., Suite No. 507, G+5 Building, Terminal 1, IGI Airport, New Delhi-110037	Vs	Addl. CIT, Special Range-8, New Delhi-110002
(APPELLANT)		(RESPONDENT)
PAN No. AABCS2455F		

**Assessee by : Sh. Atul Puri, CA &
Ms. Pooja Kakkar, CA
Revenue by : Ms. Ashima Neb, Sr. DR**

Date of Hearing: 01.07.2019

Date of Pronouncement: 01.07.2019

ORDER

Per B. R. R. Kumar, Accountant Member:

The assessee has raised following grounds of appeal:

"1. That the Ld. CIT(A) has erred in misunderstanding the facts of the case.

2. That the Ld. CIT(A) has further erred in confirming the disallowance made by the AO of Rs.7,79,516/- under section 14(A) read with Rule 8D of the Income Tax Rules, 1962 incomplete disregard of the legal position, judicial pronouncements and principle of consistency and the fact that the assessee has itself disallowed the amount considered, attributable to earning exempt income.

3. That the Ld. CIT(A) has further erred in confirming the disallowance made by the AO u/s 36(1)(ii) of bonus paid to Directors of Rs.3,00,00,000/- on assumptions and surmises in complete disregard of the facts, evidence placed on record, explanations offered and has ignored the order of the CIT(A)-14, New Delhi for the A.Y. 2012-13.

4. *Any other ground before or at the time of hearing.*"

2. The assessee company is engaged in the business of Air Chartered Services, Travel Agents, Tour Operators, Air & Transport for crew and the Tourists Aircraft Management and Advisory services to unscheduled overseas persons etc. During the assessment proceedings, it was observed by AO that the assessee has earned dividend income of Rs.93,81,004/- and interest on tax free bonds of Rs.1,73,058/- which has been claimed as exempt and against it, disallowed sum of Rs.1,05,000/- u/s 14A of the IT Act r.w. Rule 8D of IT Rules in the computation of income. The similar issue was adjudicated by the co-ordinate Bench in ITA No. 2215/Del/2010 wherein it was adjudicated as under:

"It is seen that while computing the disallowance, the Assessing Officer has calculated the same as per Rule 8D. The Rule 8D has been held to be inapplicable prior to Assessment Year 2008-09. The impugned assessment year is 2007-08. The learned CIT (A) also has upheld the disallowance only on the basis of Rule 8D which has been held applicable retrospectively by the aforementioned decision of the Special Bench. The aforementioned decision of the Special Bench has been over-ruled by the Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Pvt. Ltd. (supra). Therefore, the very basis on which the disallowance has been made does not exist. However, it is seen that though Rule 8D is not applicable, but the Assessing Officer is duty bound to make the disallowance under Section 14A after considering all the facts and circumstances of the case as observed by Hon'ble Bombay High Court in the aforementioned case of Godrej & Boyce Mfg. Pvt. Ltd. (supra). Therefore, keeping in view the facts and circumstances of the case, we consider it just and proper to restore this issue to the file of Assessing Officer to consider the issue raised in the present appeal denovo as per the provisions of law after giving the assessee a reasonable opportunity of hearing. Therefore, we restore this issue to the file of Assessing Officer to reconsider and re-adjudicate the same after giving the assessee a reasonable opportunity of hearing."

3. During the year, the AO has acted in accordance with the provisions applicable to the assessment year 2008-09 onwards and determine the disallowance in accordance with the provisions of Rule 8D(2). Both the parties fairly accepted for the facts on record. Hence, we decline to interfere with the order of the Ld. CIT(A) on this ground.

4. Regarding the disallowance made by the AO u/s 36(1)(ii) of bonus paid to Directors of Rs.3,00,00,000/-. It was fairly brought to our notice that this matter stands adjudicated in the case of the assessee for the assessment year 2011-12 in ITA No. 1765/Del/2016. The gist of the order relevant to the issue is as under:

"28. In the present case, only two shareholders were holding 50% each and directors of the company have been paid the commission of RS 1 crore each. Had this sum been not paid to those shareholders, then the profit of the company would have been higher by INR 20,000,000 and both of the directors would have been entitled to 50% profit or dividend there from. Therefore in the present case, the payment of bonus or commission is not allowable as deduction under section 36 (1) (ii) of the act in the hands of the assessee company.

29. Support its case the assessee has relied upon the decision of the honourable Delhi High Court in case of CIT vs Carrier launcher India Ltd. The facts of the case as mentioned in paragraph 14 onwards shows that the payment was made to the directors of the company and claimed as it deduction. The same was disallowed by the learned assessing officer under section 36 (1) (ii) of the act. The facts noted in para number 18 clearly shows that that the amount paid to the 2 directors specifically and having regard to their shareholding they would have been entitled much higher amount as dividend then the amounts paid to them as bonus.. Further in para number 19 the honourable High Court also noted that the tribunal has found that having regard to the shareholding of each of the directors they would have got much higher amount has dividend than as bonus and there was no tax avoidance motive. Therefore

the honourable High Court held that the provisions of section 36 (1) (ii) does not prevent the allowance of the above sum. In the present case, it is admitted that both the directors who are paid identical amount of commission were also holding the identical quantum of the shareholding in the above company. As explained, company paid commission of INR 20,000,000, Rs. 1 Crore each to two shareholders, who are also the directors and the shareholder of the company are having equal share. Therefore, it is apparent that the facts stated in the case before the honourable Delhi High Court and the facts before us are quite different. Hence, reliance placed on that decision of the honourable Delhi High Court is misplaced.

30. The assessee has also placed reliance upon the decision of the coordinate bench in ITA number 2201/PN/2012 dated 30/11/2015 in case of anthem infra projects private limited vs joint Commissioner of income tax. We have also carefully perused the facts of that particular case. The facts as stated in paragraph number 16 of the order where the assessee has paid Rs. one crore on account of commission to three main directors. In para number 11 of the order, it is mentioned that the commission was not paid in shareholding pattern but was paid on account of services rendered by the directors of the assessee company. Further in para number 9 it is also mentioned that the remuneration was paid to only 3 directors out of 6 who had substantial shareholding in the company therefore it is apparent that the commission was paid to the directors would not have been earned by them in the capacity of the shareholder as dividend. Therefore, the facts of that case are quite different from the facts before us.

31. Further more in special bench decision of "Dalal Broacha Stock broking V. Additional Commissioner of Income Tax, Mumbai" - (2011) 10 ITR (Trib) 357 (Mumbai) (SB) the assessee company during the relevant year had paid commission to the tune of Rs.40 lakhs to the three working directors. They are the only shareholders of the company and owned the entire share capital. During the assessment proceedings, the Assessing Officer asked the assessee to explain as to why the claim of expenditure on account of the commission should not be disallowed as the assessee earned substantial profits and the same amount could have

been distributed as dividend. The assessee submitted that the commission was not in lieu of profit or dividend as the payments had been made to the directors for the hard work they had put in improving the profits of the company. Since it wanted to improve its net worth to attract FIIs the company was not declaring dividend. The three directors were holding shares at 50%, 25% and 25% and therefore the case the amount of commission had been distributed as dividend, they would not have got the same amount as dividend. It held that the payment of dividend by a company is not compulsory and it is dependent upon the profitability and other conditions of the business. Therefore, in cases, where dividend is not payable, the payment of bonus or commission can be allowed as deduction in case of employee shareholders also under Section 36(1)(ii) as in that case it could not be said that payment of bonus or commission is in lieu of dividend. Thus the provisions of Section 36(1)(ii) are also applicable to share holder employees subject to the condition that payment is not made in lieu of dividend. The provisions of Section 36(1)(ii) can be split in two parts. The first part viz., „any sum paid to an employee as bonus or commission for services rendered“ is an enabling provision. This part applies to all employees. The second part is a disabling provision which provides that „if the sum so paid in lieu of profit or dividend“, it cannot be allowed as deduction. This part applies only to employees who are partners or shareholders. Thus, in so far allowability of expenditure on account of bonus or commission under Section 36(1)(ii) is concerned, it applies to all employees including shareholder employees. The disallowability is restricted only shareholders as only in those cases, payment could be in lieu of profit or dividend. The special bench, therefore, rejected the arguments of the assessee that the provisions of Section 36(1)(ii) apply only to non shareholder employees. The legal position is that any expenditure on account of payment of commission to an employee will be allowable as deduction under the provisions of Section 36(1)(ii) irrespective of the fact whether the employee is a shareholder or not or whether the commission has been paid for some extra services or for the some services. Only condition is that the payment is not in lieu of dividend. In case extra services have been rendered for payment of commission, it will be one of the relevant factors to consider

while deciding whether the case is covered by exception provided in Section 36(1)(ii) i.e., whether the payment of commission is in lieu of dividend. According to us, both the directors would have got the above amount of dividend had there not been any payment of such bonus or commission by the assessee company.

32. Further the claim of the assessee that the issue has been squarely covered by the decision of the coordinate bench in assessee's own case for the assessment year 2007 - 08 is also of no consequence as noted by the learned CIT appeal that the disallowance was under section 40A (2) of the act in that year. Similarly for assessment year 2012 - 13 the learned CIT - A has allowed the claim of the assessee in his appeal order is also of no consequence as because the learned CIT - A has relied upon the decision of the honourable Delhi High Court in case of CIT vs carrier launch a private limited, the facts of that case were quite distinct and different as we have already pointed out. Therefore, we confirm the order of the lower authorities."

5. Since, the issue already stands adjudicated, in the absence of any change in the material facts, we hereby confirm the addition made by the Assessing Officer.

6. In the result, the appeal of the assessee is dismissed.
(Order Pronounced in the Open Court on 01/07/2019).

Sd/-

(H. S. Sidhu)
Judicial Member

Dated: 01/07/2019

Subodh

Copy forwarded to:

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

Sd/-

(B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR