

आयकर अपीलिय अधीकरण, न्यायपीठ – “ए” कोलकाता,
*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “A” KOLKATA*

Before **Shri S.S.Godara, Judicial Member** and
Dr. A.L. Saini, Accountant Member

ITA No.146/Kol/2018
Assessment Year :2011-12

Hira Lal Agarwal C/o Kishore Kumar Lohia, 2 nd Floor, Smritidham Building Opposite Hotel Gate Way, Sevoke Road, Siliguri-734001 [PAN No.ACMPA 4071 B]	V/s.	DCIT, Circle-1, Aayakar Bhawan, Paribahan Nagar, Matigara,Siliguri
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Subash Agarwal, Advocate
प्रत्यर्थी की ओर से/By Respondent	Shri C.J. Singh, JCIT SR-DR
सुनवाई की तारीख/Date of Hearing	03-09-2019
घोषणा की तारीख/Date of Pronouncement	22-11-2019

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

This assessee's appeal for assessment year 2011-12 arises against the Commissioner of Income Tax (Appeals)-Siliguri's order dated 18.12.2017 passed in case No.95/CIT(A)/SLG/2015-16, involving proceedings u/s 143(3) of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties. Case file perused.

2. Learned counsel submits at the outset that the assessee no more wishes to press for his legal ground challenging validity of re-opening. The same is therefore rejected as not pressed.

3. Next comes the latter issue on merits qua correct application of sec. 10(13A) in respect of ***any special allowance granted to an assessee by his employer to meet expenditure actually incurred on payment of rent (by***

whatever name called) **in respect of residential accommodation occupied by him**". There is no dispute that the assessee paid ₹12 lakh to his wife as rent @ ₹1 lakh per month which stands upheld in the CIT(A)'s order under challenge thereby reversing the Assessing Officer's action disallowing the same @ 50% for the reason that payee wife also resided in the very premises.

3. It is in this backdrop of facts that we advert to the remain issue of about correct determination assessee's variable pay of ₹53,75,850/- u/s 1-(13A) of the Act. Both the lower authorities' hold that the impugned variable pay; received in November, 2010 (**as per assessee's salary chart in page of 15 of paper book**), forms part of dearness allowance includible for computing sec.10(13A) exemption. Learned CIT(A) has gone to the extent of holding that above variable pay is nothing but dearness allowance or performance incentive which is received on fixed basis per month.

4. We find no merit in Revenue's arguments supporting the impugned inclusion of assessee's variable pay for the purpose of computing his house rent allowance. His employer M/s OCL India Ltd. submitted its reply dated 27.03.2015 making it clear that the said variable pay is neither dearness allowance nor a commission on fixed percentage of the turnover as under:-

"Subject: Requisition of information in the case of Sri Hira Lal Agarwal, PAN: ACMPA 4071B FOR ay 2011-12-Matter req.

Dear Sir,

This has reference to your above referred letter on the above said subject. Our point-wise response is as under:-

'Variable Pay (VP):- It is a portion of the annual compensation of each executive which is related to and dependent upon the performance of the company / division, team and the individual. VP is linked to the most critical factors for the year leading to achievement of business goals as defined for that year. In our cases, factors such as EBITDA, Production volumes etc., are considered in addition to team as well as individual achievements.'

VP is neither in lieu of DA nor a commission based of fixed % of turnover.

It is paid in accordance with the terms of employment.

Thanking you,

Yours faithfully,

Sd/-D.N.Singh

(D.N.Singh)

Executive Director (Finance) & Chief Financial Officer."

All this make it sufficiently clear that the lower authorities have erred in treating the assessee's variable pay amount pertakng character of dearness allowance despite the same being related to team as well as individual achievements going by the relevant terms of appointment. Hon'ble apex court's decision in *Gestetner Duplicators (P) Ltd. vs. Commissioner of Income Tax* (1979) 117 ITR 1 (SC) settled the law long back that salary; for the purpose of computing sec.10(13A) exemption, means basic salary including dearness allowance and commission based on fixed rates if the terms of the employment so provide. We make it clear that the assessee's terms of employment have nowhere been referred by the lower authorities to this effect. We thus accept the assessee's latter issue seeking to exclude the variable pay of ₹53,75,850/- as part of salary / dearness allowance. The Assessing Officer is directed to consequential computation as per law.

5. This assessee's appeal is partly allowed in above terms.

Order pronounced in the open court 22/11/2019

Sd/-

(लेखा सदस्य)

(A.L.Saini)

(Accountant Member)

Kolkata,

*Dkp

दिनांक:- 22/11/2019 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-Hira Lal Agarwal C/o Kishore Kr. Lohia, 2nd Floor, Smritidham Building Op. Hotel Gate Way, Sevoke Road, Siliguri-734001
2. प्रत्यर्थी/Respondent-DCIT, Cir-1, Aayakar Bhawan, Paribahana Nagar, B Wingh, Matigara, Siliguri-734010
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

सहायक पंजीकार
आयकर अपीलीय अधिकरण, कोलकाता ।