

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'C' NEW DELHI**

**BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

I.T.A. No. 2148/DEL/2015 (A.Y. 2011-12)

DCIT, Circle – 11(1), New Delhi. (APPELLANT)	Vs	M/s. Holtee Consulting Pvt. Ltd., C-Block, 01-03, Imperial Tower, Community Centre, Naraina Vihar, New Delhi (AABCG 1201 H) (RESPONDENT)
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Appellant by	Sh. S. N. Meena, Sr. D.R.
Respondent by	--None--

Date of Hearing	25.11.2019
Date of Pronouncement	25.11.2019

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the Revenue against the order of the Commissioner of Income Tax [Appeals]-4, New Delhi dated 21.01.2015 for Assessment Year 2011-12.

2. The Grounds of appeal are as under :-

1. *Whether on the facts and circumstances of the case & in law, the ld. CIT(A) erred in deleting the disallowance of Rs. 3,35,72,184/- made on account of commission paid to its two directors.*
2. *Whether on the facts and circumstances of the case & in law, the ld. CIT(A) erred in deleting the disallowance of Rs. 72,69,505/- made on account of disallowance u/s 14A r.w.r. 8D.*
3. *Whether on the facts and circumstances of the case & in law, the ld. CIT(A) erred in deleting the disallowance of Rs. 84,22,535/- u/s 40(a)(ia) for non-deduction of TDS.*

4. *The appellant craves leave, to add, alter or amend any ground of appeal raised above at the time of the hearing.”*

3. During the hearing despite giving notice, none appeared for the assessee, therefore, we are proceeding on the basis of assessment order and the order of the CIT(A). The submissions of the assessee before these authorities are taken as the submission before us.

4. The assessee company is engaged in the business of providing Technical and Management Consultancy services. The Assessing Officer observed that the assessee had paid commission to two of its Directors, Sh. Umesh Srivastava, Sh. Sumant Srivastava, to the tune of Rs.1,19,25,068/- and Rs.1,98,75,114/- respectively. The above two Directors held 19.8% and 12.8% shares respectively in the assessee company and such commission expenses were paid over and above the salary paid to them. The Assessing Officer held that such payments were covered within the ambit of section 36(1)(ii), which provides that any sum paid to any employee as bogus or commission for services rendered with the an allowable deduction where such sum would not have been payable to him as profits or dividends. The Assessing Officer held that commission paid to all four directors were covered u/s 40A(2)(b) and accordingly, an amount of Rs.3,35,72,104/- was disallowed. The Assessing Officer further disallowed Rs.72,69,505/- u/s 14A r.w.r. 8D as assessee had made investment for earning dividend income of Rs.3,57,17,899/-. The Assessing Officer also made disallowance of Rs.84,22,535/- in respect of payments made to certain foreign parties by not deducting TDS on such payment.

5. Being aggrieved by the assessment order the assessee filed appeal before the CIT(A) the CIT(A) allowed the appeal of the assessee.

6. The Ld. DR submitted that the Assessing Officer has rightly disallowed excessive commission paid to two of its Directors as per section 36(1)(ii) of the Act as companies should not avoid tax by distributing their profits to their

members/shareholders as bonus or commission instead of dividend. The Ld. DR further submitted that in the instant case, it is clear that the profit which would have been paid otherwise to the Directors as dividend has been diverted in the form of commission. Thus commission paid to directors, shareholders is not allowable u/s 36(1)(ii) of the Act. As regards Ground No.2, the Ld. DR submitted that disallowance u/s 14A is justified as the assessee has total turnover of Rs.100 crore and total investment of the assessee company are of Rs.146.67 crores. The Assessing Officer has given a proper calculation as per Rule 8D. Therefore, the CIT(A) was not right in deleting the said addition. As regards Ground No.3, the Ld. DR submitted that the Assessing Officer rightly made disallowance on account of non-deduction of TDS of payment made to foreign parties as the assessee has engaged the acumen and expertise of the outsiders/non-resident the consideration for which amounts to technical and support services. Thus the payment by the resident assessee in connection with his business in India to a person outside India making use of his expertise in sale of goods in a particular country is nothing but a fee which has been paid by the resident assessee to the outsiders/non-resident for the services rendered by him and can be construed as "fees for technical services".

7. We have heard Ld. DR and perused the submissions of the assessee before the Assessing Officer as well as before the CIT(A). We have also perused all the relevant materials available on record. As regards Ground No.1, the CIT(A) held as under:

"6.2 The Ground No.1 of the appeal is general. Regarding the Ground No.2 of the appeal relating to disallowance of commission paid to the two Executive Directors under Section 36(1)(ii), I find that the issue is directly covered by the decision of the Hon'ble ITAT of Delhi in the case of appellant for A.Y.2005-06, 2006-07, 2008-09 and 2009-10. On careful consideration of the facts of the case, I find that there is no difference in the facts for the current year. Moreover, I find that the very allegation that the appellant has paid dividend in the garb of commission, is factually incorrect as the appellant had, in addition, paid dividend, which is as high as 375%, to its share holders (including to the two executive Directors holding shares) and hence, the very observation of the Ld. AO that the appellant had paid commission instead of dividend the two Executive Directors in violation of

provision of Section 36(1)(ii) is not supported by the facts. The two Executive Directors had tremendous technical and managerial experience and have contributed a great deal to the growth of the business/productivity of the company which is in the nature of providing technical consultancy. The said payment of commission was in pursuance of an agreement with them. Keeping in view the above facts, I hold that the claim of the appellant in respect of the commission paid to the two Directors satisfies all the necessary conditions stipulated under Section 37(1) and is therefore, following the aforesaid order of ITAT, is held to be allowable.”

The Tribunal in assessee’s own case for A.Ys. 2005-06 & 2006-07 being ITA Nos.3878/Del/2010 & 796/Del/2011 dated 25.01.2012 held as under:

“17.3 We have carefully considered the submissions and perused the records. We find that assessee has paid commission to the Directors as part of the remuneration. In the agreement, it was clearly specified that commission is payable at 5% of the net profits of the company. Thus, the payment was duly approved by the Board of Directors. Further, we find that commission was paid in earlier years also and the same was accepted by the Revenue and hence, no disallowance was made.

17.4 We further find that Hon’ble Jurisdictional High Court in the case CIT vs. Dalmia Promoters Developers (P) Ltd. 281 ITR 346 has held that for rejecting the view taken in earlier assessment years, there must be material change in the fact, situation or in law. In this case, clearly there is neither any change in the fact, situation or in law. We agree with the contention of the assessee that the compensation for both the directors were structured in such a way that apart from getting a fixed remuneration for their services rendered, they would also be entitled to receive commission based on the profitability of the company. We also find that assessee has paid taxes at maximum marginal rate. Both the Directors have admitted the payment of commission received and offered the same in their income tax returns and had paid at a maximum marginal rate. This clearly establishes the fact that there has been no tax avoidance motive behind the payment of commission to the directors by the assessee company. We further find that the case law referred by the ld. counsel of the assessee are also germane and support the case of the assessee.

17.5 In the background of the aforesaid discussions and precedents, in our considered opinion, the payment of commission was justified and not disallowable u/s 36(1)(ii) of the IT Act.”

The issue is identical in the present year as well. In this year also both the Directors admitted the payment of commission received and offered the same

in their income tax returns and had paid at a maximum marginal rate. This clearly establishes the fact that there has been no tax avoidance motive behind the payment of commission to the directors by the assessee company. The CIT(A) has taken proper cognizance of these fact. There is no need to interfere with the finding of the CIT(A). Thus Ground No.1 of the Revenue's appeal is dismissed.

8. As regards Ground No.2, the CIT(A) held as under:

“6.3.2 Without prejudice, I find that the appellant had made investment in group companies amounting to Rs.10,16,60,000/- in the previous year relating to AY 2010-11. Such an investment was for the business purpose of commercial expediency. Therefore, in the light of the decision of Hon'ble ITAT Bangalore in the case of Garware Wall Ropes Ltd vs. ACIT (ITA No.5408/Mum/2012), it could not have been considered for disallowance u/s 14A. Secondly, investments in Bonds/ FMPs Rs.93.62 Crores were made, the interest income from which is fully taxable in the hands of the appellant company. Therefore, such investments should have been excluded from the purview of Section 14A. Thirdly, the investment in PMS may yield both taxable and nontaxable incomes. Fourthly, it is also seen that the investment in equity shares made by the appellant in the earlier years amounting to Rs.6,00,690/- remained the same and no further expenses were incurred during the year in respect thereof. Similarly, regarding the investment in Mutual Fund, it is seen that the appellant had continued with the same investments based on the decision taken in the earlier years.

6.6.3 In view of the above facts, it is evident that the Ld. AO has not examined the correctness of the claim of the appellant regarding amount of expenses disallowed by the appellant u/s 14A. Under the circumstances, keeping in view the decision of Hon'ble Delhi High Court in the case of CIT vs. Maxopp Investment 64 DTR 322 (Delhi), in terms of the provision of Section 14A(2), the Ld. AO was not empowered to invoke the provision of Rule 8D without rejecting the correctness of the claim of appellant. I find that under the circumstances, the Hon'ble ITAT Delhi has allowed the appeal on this issue in favour of appellant for AY 2009-10. Keeping in view the above and respectfully following the said decision of the ITAT Delhi, the disallowance made by the Ld. AO under Section 14A read with Rule 8D is deleted.”

The Tribunal in assessee's own case for A.Y. 2008-09 & 2009-10 held as under:

“12. As regards ground No.1 in I.T.A.No. 4563/Del/2012, and ground No.2 in I.T.A.No. 4706/Del/2012 with regard to upholding of partial disallowance u/s 14A, we find that Ld. CIT(A) has not considered the submissions of the assessee regarding break-up of investment which included investment in group companies and also has not considered that a major part of investment in mutual funds was in debt related investments where the investments generally earn fixed income but distribution of income is in the form of dividends. We are of the opinion that fixed maturity plans offered by mutual funds definitely require much less professional expertise as compared for making investments in equity related schemes and therefore, less expenditure is involved in managing such schemes. Moreover before upholding partial disallowance u/s 14A, Ld. CIT(A) should have considered the submissions of assessee that a part of investments were not for earning dividends but were strategic investments. In view of the above, we are of the opinion that the issue of disallowance be readjudicated by the Assessing Officer and the Assessing Officer should decide the disallowance on the basis of his objective findings after giving a reasonable opportunity to the assessee of being heard. In view of the above, the appeal of the assessee in I.T.A.No.4563/Del/2012 is allowed for statistical purposes and the Revenue's appeal in I.T.A.No. 4706/Del/2012 is partly allowed for statistical purposes.”

Since the A.Y. 2011-12 and there is an administrative expenses as well, therefore, matter is remanded back to the file of the Assessing Officer for such a huge investment to be verified. Needless to say the assessee be given opportunity of hearing by following principle of natural justice. Ground No.2 is partly allowed for statistical purposes.

9. As regard Ground No.3, the CIT(A) held as under:

6.4 The Ground No.4 of the appeal relates to disallowance of certain payments made by the appellant to various parties presumably u/s 40(a)(i). I find that the appellant had made payment to the following parties:

<i>Particulars</i>	<i>Amount</i>
<i>Gia Nam Investment Consulting Joint Stock</i>	<i>1,029,170</i>
<i>Bagaza Pius</i>	<i>6,668,080</i>
<i>El Gherani</i>	<i>343,907</i>

Trading engineering group	381,378
Total	8,422,535

Out of this, the payment made to M/s Gia Nam Investment Consulting Joint Stock, Vietnam was made in terms of contract with that company to assist that company in execution of contracts in Vietnam. The said company is a foreign company registered outside India and the technical services (designing services) provided by it were rendered outside India in connection with the 2 mining projects of appellant. As per Explanation-2 below Section 9(l)(vii), the term 'fee for technical services' does not include consideration for any construction, assembly, mining or like project undertaken by the recipient. In the case of the appellant, both the projects in Vietnam were in connection with the mining projects. Therefore, such payment gets excluded from the scope of FTS. Further, as the services by that company were provided outside India, therefore, there was no liability on the appellant to deduct TDS thereon, as undisputedly M/s Gia Nam Investment does not have Permanent Establishment in India. The appellant had also filed Form 15CB/15CA before the AO. Keeping in view the above facts and relying upon the decision in the case of Aqua Omega Services (P) Ltd. vs. ACIT (2013) 31 taxmann.com 179 (Chennai-Trib.) and M/s Ajappa Integrated Project Management Consultants (P) Ltd. vs. ACIT 24 taxmann.com 116 and following the CBDT Circular No.3 dated 2008, it is held that payment made to M/s Gia Nam Investment Consulting Joint Stock was not covered by the provision of Section u/s 195.

6.4.2 Regarding the payment made to M/s Bagaza Pius, Uganda, UAE in terms of the Memorandum of Undertaking signed with that party, the appellant was required to execute Cimerwa Cement project in Rwanda by providing technical and marketing support services for which purpose M/s Bagaza Pius was to provide Market Support Service to the appellant. Undisputedly, such services were provided outside India and keeping in view the Article-7 relating to business profit to the DTAA between India and Uganda, such payment was not covered u/s 195 in the absence of any adverse finding on records to hold that such party had its PE in India, as it did not have any office/branch in India and the services were rendered to the appellant outside India. As per Article 12 of Indo-Uganda DTAA, the services provided by the foreign party cannot be held as services in the nature of providing management, technical and consultancy services, being for the purpose of providing market support services to the appellant hence, following the decision of Hon'ble ITAT Delhi in the case of MRO (India) (P) Ltd. vs. DCIT (Supra), such payment cannot be held as FTS either.

6.4.3 On careful consideration of the facts, I find that the appellant has made payment to M/s TEG (Egypt) and M/s Eltigan (Germany) for

exploring business opportunities for the appellant in Egypt and Tanzania, respectively. None of these companies can be held to have PE in India and it is not the case of the AO. Further, such services cannot be held as Management, technical and consultancy in nature hence, cannot be treated as FTS either. Keeping in view the above, there was no obligation on the appellant to deduct TDS thereon u/s 195. In view of the above, no disallowance u/s 40(a)(i) can be made in respect thereof. Accordingly, this ground is also allowed.”

The Tribunal in A.Y. 2005-06 & 2006-07 held as under:

“17.6 As regards the contention of the Ld. Commissioner of Income Tax (Appeals) that amount is also to be disallowed u/s 40A(2)(a), because the payment to the assessee was unreasonable. We find that the same is not supported by any comparable instance. In what ITA NOS. 3878/Del/2010 & 796/DEL/2011 12 context it was unreasonable has not been brought on record, hence, this point of view is also not sustainable.”

From the perusal of the order of the CIT(A), it can be seen that the companies did not have any PE in India and it is not the case of the Assessing Officer that these companies have PE in India. Further, such services are not in the nature of Management, technical and consultancy, therefore, the same cannot be treated as FTS. Thus, there was no obligation on the assessee to deduct TDS thereon u/s 195. Thus, the CIT(A) rightly held that no disallowance u/s 40(a)(i) can be made. The CIT(A) has given a detailed finding and this issue is also decided in favour of the assessee in previous years, therefore, Ground No.3 is dismissed.

10. In result, appeal of the Revenue is partly allowed for statistical purposes.

Order pronounced in the Open Court on 25th day of November, 2019.

Sd/-

(N. K. BILLAIYA)
ACCOUNTANT MEMBER

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated: 25/11/2019
Priti Yadav, Sr. PS *

Copy forwarded to:

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

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	25.11.2019
Date on which the typed draft is placed before the dictating Member	25.11.2019
Date on which the typed draft is placed before the Other Member	25.11.2019
Date on which the approved draft comes to the Sr. PS/PS	25.11.2019
Date on which the fair order is placed before the Dictating Member for pronouncement	25.11.2019
Date on which the fair order comes back to the Sr. PS/PS	25.11.2019
Date on which the final order is uploaded on the website of ITAT	25.11.2019
Date on which the file goes to the Bench Clerk	25.11.2019
Date on which the file goes to the Head Clerk	