

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE**

**BEFORE SHRI A. K. GARODIA, ACCOUNTANT MEMBER AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

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| ITA No.1627/Bang/2016 |
| Assessment year : 2012-13 |

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| M/s. Sonarome Pvt. Ltd., No.34, 35&36, KIADB Industrial Area, Doddaballapur, Bengaluru – 561 203. PAN : AADCS 9267 P | Vs. | The Deputy Commissioner of Income Tax, Circle – 6(1)(2), Bengaluru. |
| APPELLANT | | RESPONDENT |
| Assessee by | : | Shri. K. Seshadri, CA |
| Revenue by | : | Shri. Manjeet Singh, Addl. CIT (DR)(ITAT), Bengaluru |
| Date of hearing | : | 11.06.2020 |
| Date of Pronouncement | : | 19.06.2020 |

ORDER

Per A.K. Garodia, Accountant Member

This appeal is filed by the assessee and the same is directed against the order of learned CIT(A)-6, Bengaluru, dated 13.06.2016 for the Assessment Year 2012-13. Initially, the assessee raised as many as 11 grounds of appeal but subsequently, the assessee filed concise grounds of appeal containing 3 grounds. These grounds as per the concise grounds of appeal are as under:

1. *The learned Commissioner of Income Tax (Appeals) ("CIT(A)") erred in upholding the disallowance of commission expenditure under section 40(a)(i) of the Act to the tune of 9.69.257 as no tax was deductible at source thereon to the extent of 9.30.746.52 because the said sums were not chargeable to tax in India. while tax was in fact deducted on a sum amounting to X38.511.*
2. *The learned CIT(A) erred in upholding the addition of X1.75.069 on account of bonus and ex-gratia without appreciating that no deductions were claimed for these sums*

in the relevant previous year as they formed a part of the opening balances of such liabilities.

3. *The learned CIT(A) erred in upholding the learned AO's finding that the sales promotion expenditure was in the nature of an unascertained liability in respect of which a deduction could not be allowed under section 37 of the Income Tax Act, 1961.*

2. In the course of hearing, it was submitted by learned AR of the assessee that the issue involved in ground No.1 was decided by learned CIT(A) as per paras 6 and 7 of his order available on page 7 of his order and in these paras, this is the finding of the learned CIT(A) that no declaration with regard to non-maintenance of PE in India were filed in respect of 3 parties namely, M/s. Juice Solutions, M/s. Ali Mahomed & Co., and M/s. Henkel Polymers Ltd. He submitted that on page A28 of the Paper Book is a letter dated 13.06.2016 filed by the assessee before learned CIT(A) on the same date i.e., 13.06.2016 and along with this letter, the assessee has filed a PE declaration form one of the parties viz., M/s. Juice Solutions but this was not considered by CIT(A). Regarding M/s. Henkel Polymers Ltd., it was submitted that this is a domestic party and therefore, no declaration regarding PE was required to be filed from this party. Regarding the remaining one party i.e., M/s. Ali Mahomed & Co., it was submitted that the PE declaration of this party was also filed by the assessee before CIT(A) but he same was also not considered by him. On page 194 of the Paper Book also a declaration from M/s. Juice Solutions is filed in which it is stated that this party is established in the Kingdom of Saudi Arabia and that there is no PE / branch in India. He submitted that since some declarations filed by the assessee were not considered by the learned CIT(A), the issue may be restored back to his file for a fresh decision. Learned DR of the Revenue supported the order of CIT(A).

3. We have considered the rival submissions and we find that it is true that on page 194 of the Paper Book is a PE declaration of M/s. Juice Solutions and on page A28 of the Paper Book also is a letter of the assessee to CIT (A) along with which, a PE declaration of the same party was filed by the assessee before CIT(A) on 13.06.2016. The date of the order of CIT(A) is also same i.e., 13.06.2016 and in this order, it is stated by learned CIT(A) that no declaration with regard to non-maintenance of PE in India were filed in respect of M/s. Juice Solutions, M/s. Ali Mahomed & Co and M/s. Henkel Polymer Co. Ltd. Out of these 3 parties, the PE declaration of one party was very much filed by the assessee before CIT(A) on 13.06.2016 because on page A28 of the Paper Book, the letter is duly received from the Office of the CIT(A)-6 Bengaluru on 13.06.2016 and the order of CIT(A) is also dated 13.06.2016. It may be that this letter was filed by the assessee in Tapal which might have not reached to the file of the CIT(A) on the same day. Regarding other 2 parties also, it may be that the declarations were filed by the assessee but the same did not reach to the file of CIT(A). Hence, we feel it proper to restore this matter back to the file of CIT(A) for a fresh decision by way of a speaking and reasoned order after providing adequate opportunity of being heard to both sides. We order accordingly. Ground No.1 is allowed for statistical purposes.

4. Regarding ground No.2, it was submitted by learned AR of the assessee that on page 92 of the Paper Book, the relevant page of Form 3CD in which the Auditor has certified that on account of Bonus, unpaid amount was Rs.7,40,496/- and on account of Ex-gratia, the unpaid amount is Rs.10,16,010/-. Thereafter, he pointed out that on page 59 of the Paper Book is the relevant page of audited accounts containing note 19 regarding employee benefits in which the amount debited in the present year to P & L A/c in respect of Bonus is Rs.7,77,346/- and on account of Ex-gratia is

Rs.8,44,091/-. He further pointed out that on page 55 of the Paper Book is a note No. 6 containing the details of provisions as per which the Bonus payable is Rs.7,80,496/- and Ex-gratia payable is Rs.10,16,010/- as on 31.03.2012. He submitted that the auditor in Form 3CD by mistake noted these amounts from Balance Sheet but for disallowance under 43B, only that amount is to be considered which was debited to P & L A/c in the current year. At this juncture, the Bench wanted to see the details of these 2 amounts appearing in the Balance Sheet on account of Bonus payable Rs.7,80,496/- and Ex-gratia payable Rs.10,16,010/- to see as to whether this includes any unpaid amount relating to earlier year. In reply, it was submitted by learned AR of the assessee that such details is not readily available but if the matter is restored back to the file of CIT(A), the assessee will provide complete details in this regard. Learned DR of the Revenue supported the order of CIT(A).

5. We have considered the rival submissions. We find that in para 4 of the Assessment Order, this was the contention raised by the assessee before AO that the amount of Rs.7,77,346/- and Rs.8,44,091/- pertains to amount debited to P & L A/c for the Financial Year 2011-12 and the amounts of Rs.7,80,496/- and Rs.10,16,010/- forms part of the closing balance but the AO has stated in the same para that the submission of the assessee is not convincing without indicating any basis for this. Under these facts, we feel it proper to restore back this matter also to the file of CIT(A) for a fresh decision after examining the details of the amount appearing in the Balance Sheet on account of Bonus payable and Ex-gratia payable which should be filed by the assessee before CIT(A) and if the assessee is able to establish that the amount of Bonus payable and Ex-gratia payable as per Balance Sheet includes some amounts relating to earlier year which is not debited in the P & L A/c in the present year then such payable amount of an earlier year should not be included in the disallowance under section 43B because it cannot exceed the

amount of expenditure debited in the P & L A/c in the present year. We therefore, set aside the order of CIT(A) on this issue and restore this matter also to the file of CIT(A) for a fresh decision in the light of above discussion after providing adequate opportunity of being heard to both sides. Ground No.2 is also allowed for statistical purposes.

6. Regarding ground No.3, it was submitted by learned AR of the assessee that in para 5 of the Assessment Order, it is noted by the AO that sales promotion expenses of Rs.54,02,943/- is incurred during the year and it is observed that a sum of Rs.9,05,014/- is only a provision made for the year as seen from the Annex "P" filed by the assessee. It was submitted by learned AR of the assessee that on page 200 is a journal voucher of this amount of Rs.9,05,014/- which is payable to various employees towards incentives on Sales. At this juncture, the Bench wanted to see the details and basis of the computation of this amount payable to various employees as sales incentives because without such details, it cannot be said that this is an ascertained Liability. In reply, it was submitted by learned AR of the assessee that no such detail is available but on pages and 202 and 203 of the Paper Book, the details regarding subsequent payment in Financial Year 2012-13 and thereafter to the extent of Rs.8,97,398/- out of the provision of Rs.9,05,014/- is available and therefore, it cannot be said that this is unascertained Liability. Reliance was placed by him on the judgment of Hon'ble Apex Court rendered in the case of Bharat Earth Movers Vs. CIT as reported in 245 ITR 428, copy available on pages 340 to 346 of the Paper Book. Learned DR of the Revenue supported the order of CIT(A).

7. We have considered the rival submissions. We find that the assessee has furnished only 2 details, 1 is journal voucher in respect of provision in the present year as various amounts shown as payable to various employees

without any working in respect of computation of such payable amounts and the next details filed by the assessee is regarding payment in subsequent years. As per these details, it cannot be ascertained that the amount was in respect of an ascertained Liability. Simply because the provision is paid out in the subsequent year, it cannot be accepted that the provision made in the present year was in respect of an ascertained Liability. In the light of these facts, we now examine the applicability of the judgment of Hon'ble Apex Court rendered in the case of Bharat Earth Movers Vs. CIT (supra) on which reliance has been placed by learned AR of the assessee. We find that in this case, it was held by Hon'ble Apex Court that two things have to be established by the assessee that the liability has been incurred by the assessee in the relevant year and such liability is capable of being estimated with reasonable certainty though the actual quantification may not be possible and if these requirements are satisfied, the liability is not a contingent one. In the present case, assessee has not shown and established that the liability was in fact incurred in the present year and it is capable of being estimated with reasonable certainty because no detail has been furnished regarding the basis of claiming that the liability was incurred in fact in the present year and how it was quantified. Therefore, in our considered opinion, this judgment of Hon'ble Apex Court does not renderer any help to the assessee in the facts of the present case because no detail or evidence has been brought on record by the assessee to establish regarding incurring of the liability and its quantification with reasonable certainty. We therefore, decline to interfere in the order of CIT(A) on this issue. Ground No.3 is rejected.

8. In the result, appeal of the assessee is partly allowed for statistical purposes.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,

Dated: 19th June, 2020.

/NS/

Sd/-
(A.K. GARODIA)
Accountant Member

Copy to:

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| 1. Appellants | 2. Respondent | 3. CIT |
| 4. CIT(A) | 5. DR, ITAT, Bangalore. | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.