

आयकर अपीलीय अधिकरण “एफ” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“F” BENCH, MUMBAI

माननीय श्री महावीर सिंह, उपाध्यक्ष एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI MAHAVIR SINGH, VP AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM
(Hearing Through Video Conferencing Mode)

आयकर अपील सं./ I.T.A. No. 6908/Mum/2019
(निर्धारण वर्ष / Assessment Year: 2016-17)

DCIT CC – 6(1) R. No. 1905, 19 th floor Air India Building, Nariman Point Mumbai-400 021	बनाम/ Vs.	M/s VVF Ltd. Plot No. 109, Opp. Sion(E), Mumbai-400 022
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. AAACV-3847-R		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Revenue by	:	Ms. Usha Gaikwad, Ld. Sr. DR
Assessee by	:	Shri Madhur Aggarwal, Ld. AR

सुनवाई की तारीख/ Date of Hearing	:	09/08/2021
घोषणा की तारीख / Date of Pronouncement	:	09/08/2021

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by revenue for Assessment Year (AY) 2016-17 arises out of the order of learned Commissioner of Income-Tax (Appeals)-54, Mumbai [CIT(A)], dated 23/08/2019 in the matter of assessment framed by learned Assessing Officer (AO) u/s 143(3) on 27/12/2018. The revenue is aggrieved by the fact the addition of Rs.250 Lacs u/s 36(1)(ii) made by Ld. AO while framing the assessment order has been deleted in the impugned order.

Assessment Proceedings

2.1 During assessment proceedings, it transpired that the assessee paid director incentive of Rs.250 Lacs to Shri Rustom Joshi. The Ld. AO proceeded to disallow the same u/s 36(1)(ii) on the premises that Shri Rustom Joshi was holding 68% shareholding jointly with Shri Faraz Joshi. The provisions of Sec.36(1)(ii) provide for allowance of 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.

2.2 The assessee explained that Shri Rustom Joshi was the chairman and Managing Director of the assessee company for over two decades. After demerger of assessee's business on 01/06/2012, Shri Rustom Joshi continued to be the managing director without any remuneration for a period of almost 3 years. The assessee company excelled its business and revealed growth. Therefore, in recognition of his contribution to the business of assessee without drawing any remuneration, the assessee decided to reward Shri Rustom Joshi for his uninterrupted support and effort by paying him special performance incentive of Rs.250 Lacs. For the said purpose, a Board Resolution was passed and the approval from the shareholders was also taken by passing special resolution in the extra-ordinary general meeting (EGM). The relevant extract from minutes of Board meeting and special resolution passed in the EGM was enclosed. Another plea raised was that Shri Rustom Joshi was assessed at the same rate of tax rate as evidenced by computation of income and assessment order of Shri Rustom Joshi.

2.3 However, finding discrepancies in the special resolution, Ld. AO alleged that the special resolution was not passed in fair and transparent

manner and it was only a device to extend the benefits to Shri Rustom Joshi who was a major shareholder. The sum so paid to him, if paid as dividend would have attracted dividend distribution tax.

2.4 The assessee refuted the allegations by submitting that Shri Rustom Joshi provided vital services to the assessee and he was responsible for overall growth of the company. The incentive was paid since no remuneration was paid to him in earlier years. Further, similar payment was not made to other shareholders-cum-directors and therefore, the allegations had no basis.

2.5 However, rejecting assessee's submissions, the sum paid was disallowed and added to the income of the assessee.

Appellate Proceedings

3. The Ld. CIT(A) concurred with assessee's submissions and deleted the impugned additions with following observations: -

5.2 The submissions of the Id. Counsel have been carefully considered. It was explained that the incentive paid to Mr. Rustom Joshi was for his services rendered as Managing Director of the appellant company. He was paid remuneration of Rs.3 crores per annum until the demerger of the company w.e.f 01.06.2012. Thereafter, for almost three years though Mr. Joshi had rendered vital services to the company nothing was paid to him either as remuneration or an incentive or as bonus. In recognition of his services and when the profits of the company doubled within four years of the time, it was decided by a special resolution that Mr. Joshi would be paid special incentive of Rs.2,50,00,000/-. It was also explained that the resolution was passed by members who are independent and who held 75% or more voting rights of total members present and voting as required in provision of section 114 of the Companies Act, 2013. The Id. Counsel also relied upon the judgements of the Hon'ble Delhi High Court in the case of Shriram Pistons and Rings Ltd vs. CIT [171 taxmann 81] and also CIT vs. Autopins (India) [192 ITR 161]. I find sufficient force in the arguments of the Id. Counsel which are reproduced above. The Ld.AO applied section 36(l)(ii) of the IT Act for making the disallowance. Section 36(l)(ii) is reproduced hereunder for ready reference:

Section 36. (1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28—

(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;

5.3 The section talks about bonus or commission paid 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. In this case, there is no dispute with regard to the fact that the amount has been paid to Mr. Joshi for the services rendered by him for a period of three years without taking any remuneration. The same could not have been paid to him as dividend for the reason that there are other directors who have not been paid any dividend or any incentive. Dividend is usually a return on the investment made by a person but in this case what has been paid to Mr. Joshi is in view of the services rendered by him and not a return on the investment made by him. If it was a dividend which was paid in the name of incentive, similar payments would have been made to the other Directors of the company, but this is not the case. No other Director has been paid any incentive as has been admitted by the Assessing Officer himself. The Id. Counsel also explained the rules and clauses for deciding the upper limits of remuneration payable to the directors of the company as is evident from the submissions which have been reproduced above. It is seen that there is no violation of any section of the Companies Act as the assessee company is an unlisted company. The Ld.AO does not dispute the fact that the amount has been paid to Mr. Joshi for the services rendered by him to the appellant company. His only objection seems to be that as he is a shareholder with 34% shareholding in the company the amount would have been paid to him as dividend and the company would have had to pay dividend distribution tax. The company, in order to avoid payment of dividend distribution tax, had made the payment as special incentive to the managing director. This seems to be a far-fetched and misconceived notion of the assessing officer. Mr. Rustom Joshi was drawing remuneration/salary of Rs.3 crores till AY.2012-13 and in view of the demerger and the bad financial condition of the company he had not drawn any remuneration for three years. It was also submitted that he was again paid remuneration from AY. 2018-19. In view of the facts and circumstances of the case, it is held that whatever incentive has been paid to Mr. Rustom Joshi is in view of the services rendered by him and it cannot be hit by the provisions of section 36(I)(ii) of the Income Tax Act. The addition made by the Ld.AO of Rs.2,50,00,000/- u/s. 36(I)(ii) is deleted. This ground of appeal is **Allowed**.

Aggrieved as aforesaid, the revenue is in further appeal before us.

Our findings & Adjudication

4. Upon careful consideration of material facts, it could be observed that other shareholders-cum-directors have not been paid any dividend / incentive during the year. Dividend is usually a return on the investment made by a person. However, in the present case, the incentive has been paid to Shri Rustom Joshi only for the services rendered by him and not a return on the investment made by him. If it was a dividend which was paid in the name of incentive, similar payments would have been made

to the other shareholders of the company. However, this is not the case. The allegation of Ld. AO that there was violation of the provisions of The Companies Act, is not supported by any concrete material on record. The allegation of Ld. AO that dividend was being paid in the guise of incentive, has no legs to stand since the assessee has substantiate the fact that incentive was paid only against services rendered by Shri Rustom Joshi. Therefore, the additions have rightly been deleted.

5. The appeal stands dismissed.

Order pronounced on 09th August, 2021.

Sd/-
(Mahavir Singh)

उपाध्यक्ष / **Vice President**

मुंबई Mumbai; दिनांक Dated : 09/08/2021

Sr.PS, Dhananjay

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.