

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

**BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
AND
SH. YOGESH KUMAR U.S., JUDICIAL MEMBER**

I.T.A. No. 5195/DEL/2018 (A.Y 2015-16)

K. L. Concast Pvt. Ltd. Z-18, Naraina, Loha Mandi, New Delhi PAN No. AAACK0329B (APPELLANT)	Vs	ACIT Circle 14(2) C. R. Building, New Delhi (RESPONDENT)
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Appellant by	Sh. Ashwani Kumar, CA & Sh. Rahul Chourasia, CA
Respondent by	Sh. Mithun Shete, Sr. DR

Date of Hearing	16.03.2022
Date of Pronouncement	24.03.2022

ORDER

PER YOGESH KUMAR U.S., JM

This appeal is filed by the assessee against the order dated 07/06/2018 passed by Commissioner of Income Tax (Appeals)-5, Delhi for Assessment Year 2015-16.

2. The grounds of appeal are as under:-

“ That the order dated 28/07/2017 passed u/s 250 of the Income-Tax Act, 1961 (hereinafter called “the Act”) by the Learned Commissioner of Income-Tax (Appeals)-5, New Delhi is against law and facts on the file in as much as he was not justified to uphold the action of the learned Assistant Commissioner of Income-Tax, Circle-14(2), New Delhi in making addition of Rs. 10,80,000/- on account of increase in salary payments to its Directors during the year under assessment.

3. The brief facts of the case are that, the assessee is a company engaged in the business of trading of shapes and sections of steel. The assessee filed its return of income declaring loss at Rs. 2,77,18,864/- on 31/12/2015, which was processed u/s 143(1) of the Act, subsequently, case was selected for scrutiny through CASS. The notice was issued to the assessee to explain 'why increase in salary paid to Director should not be disallowed in view of sustained losses of Company and also because of this allowances has been made in the previous year'.

4. In response to the notices issued by the AO, the assessee who participated in the assessment proceedings through his representative, submitted his reply on 15/12/2017. The extract of the reply of the assessee filed before the AO is as under:-

“With respect to the increase in salary paid to the Directors, it is submitted that the following amounts have been claimed in the assessment year and in the immediately preceding assessment year towards salary:

Name of the Director	AY 2014-15 (Salary Amt. in Rs.)	A.Y 2015-16 (Salary Amt. in Rs.)
<i>Sh. Ramesh Bardeja</i>	<i>31,20,000</i>	<i>34,80,000</i>
<i>Sh. Parikshit Bardeja</i>	<i>26,40,000</i>	<i>30,00,000</i>
<i>Sh. Prateek Bardeja</i>	<i>26,40,000</i>	<i>30,00,000</i>
<i>% of N.P. to turnover</i>	<i>0.00</i>	<i>0.00</i>

”

5. The Ld. AO found that, the reply given by the assessee was not satisfactory, accordingly passed assessment order on 29/12/2017 by disallowing the expenditure 'increase in salary payments' amounting to Rs. 10,80,000/-, holding that the salary payment is excessive and unreasonable within the meaning of Section 40A(2)(b) of the Act. Accordingly, the income of the assessee has been computed at total loss of Rs. 2,66,38,860/- as against returned loss of Rs. 2,77,18,864/-.

6. As against the assessment order dated 29/12/2017, the assessee has preferred an appeal before Commissioner of Income Tax (Appeal)-5, Delhi ('CIT(A)' for short). The CIT(A) has dismissed the appeal filed by the assessee on 07/06/2018 vide order impugned.

7. Aggrieved by the order dated 07/06/2018 passed by the CIT(A), the assessee has preferred the present appeal on the grounds mentioned above.

8. The Ld. AR has drawn our attention to the order passed by the Coordinate Bench in ITA No. 5378/Del/2017 and submitted that, the issue involved in the present appeal has already been decided in favour of the assessee in assessee's own case and submitted that the present appeal deserves to be allowed.

9. Per contra, Ld. SR. DR submitted that the assessing officer has relied on the judgment of the Hon'ble Gujarat High Court in (1981) 129 ITR 105 (Guj) and contended that the assessment order and the order of the CIT(A) requires no interference.

10. We have heard the rival submission on the issue under consideration, we have also gone through the entire materials available on record and gave our thoughtful consideration. It emerges from the record that, the Board Resolution has been passed by the assessee for approving the salary of the Directors for the year under consideration, the salary drawn by the Directors have been duly taxed at maximum rate which has been corroborated with income tax returns of all the Directors in Page No. 32 to 39 of PB. The Ld. AO has disallowed the salary and bonus paid to the Directors on the ground that salary payment made to the Directors is excessive and unreasonable within the meaning of Section 40A(2)(b) of the Act.

11. In the similar circumstances, even in the AY 2014-15, a sum of Rs. 11,04,000/- has been disallowed by the AO, which was claimed under the provisions of Section 37(1) of the Act on the ground that, onus cast on the assessee company u/s 37(1) of the Act has not been discharged. The said addition has been confirmed by CIT(A) and the assessee travelled to the Tribunal by way of ITA No. 5378/Del/2017. The Coordinate Bench of this Tribunal vide order dated 17/11/2021 allowed the appeal of the assessee by deleting the said disallowance by holding as follows:-

“10. We have carefully considered the rival contentions and perused the orders of the lower authorities. The ld AO noted that during this year the assessee has paid to the directors of Rs. 84 lakhs and bonus of Rs. 13.04 lakhs totaling to Rs. 9744000/-. In earlier Assessment Year 2013-14 assessee has paid salary to directors of the Rs. 72 lakhs and bonus of Rs. 14.40 lakhs /- amount as bonus totaling to Rs. 8640000/-. Therefore, apparently there were an increase in Rs. 12 lakhs in salary and there is decrease of 96000/- in bonus payment, therefore, there was net increase of Rs. 1104000/-. The LD AO noted that in Assessment Year 2013-14 the assessee has incurred a loss of Rs. 6.67 crores whereas the loss in Assessment Year 2014-15 is Rs. 8.18 crores. Therefore, there was no justification of increase in salary. We find that there is roughly increase of 12.5% in the total salary payment made to the directors. The remuneration paid to the directors is supported by the board resolution placed before us. The income tax returns of the directors were also placed before us, which shows that the directors are paying tax at the highest rate in their individual capacity. The LD AO invoked the provision of section 40A (2) of the Act stating that looking to the loss and decrease in

business, such payment is unjustified. Therefore, he disallowed Page | 5 Rs. 1104000/-. We find that if the LD AO is disallowing any sum u/s 40A (2), he has to justify that above expenditure is excessive or unreasonable having regard to the fair market value of the services. No such exercise has been undertaken by the LD AO. Further, with respect to the legitimate needs of the business, he has already allowed a sum of Rs. 8640000/- paid by the assessee that it is for the legitimate needs of the business, how a sum of Rs. 1104000/- is not justified the legitimate needs of the business has not been reasoned. Even otherwise, the financial performance of the company does not entitle LD AO to make any disallowance of fixed salary and bonus paid to the directors, particularly when it is not shown that payment to such directors and consequent remuneration payable to them is linked to the profitability of the company. It is not the case of the LD AO that those directors have not rendered any services to the company. Mere incurring of loss and downturn in business cannot be a reason to disallow the salary and bonus paid to the directors. Even otherwise, the disallowances sustained by the LD CIT (A) u/s 37(1) is also not correct because it is not case of the LD CIT (A) that these expenditure of salary and remuneration to the extent of increase are not wholly and exclusively incurred for the purpose of the business. In the result, we hold that the disallowance made by the LD AO u/s 40A (2) is unjustified. We reverse the orders of the lower authorities and direct the LD AO to delete the disallowance of Rs. 1104000/-. Accordingly, ground No. 1 is allowed.”

12. We respectfully following the order of the Coordinate Bench cited (supra) in assessee's own case for Assessment Year 2015-16, we allow the sole ground of appeal taken by the assessee and direct the AO to delete the disallowance.

13. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the Open Court on this 24th Day of March, 2022

**Sd/-
(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER**

**Sd/-
(YOGESH KUMAR U.S.)
JUDICIAL MEMBER**

Dated: 24/03/2022
*R. Naheed **

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI

