

IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, MUMBAI
BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 62/Mum/2022

(A.Y: 2013-14)

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| ITO 30(1)(1) Room No. 436, 4 th Floor Kautilya Bhavan, BKC G Block, Bandra(East) Mumbai – 400051. | Vs. | M/s Blossom Developers Survey No. 273, Village Dindoshi, Pathanwadi Malad (E), Mumbai – 400097. |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAHFB6147Q | | |
| Appellant | .. | Respondent |

ITA No. 1152/Mum/2022

(A.Y: 2013-14)

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| M/s Blossom Developers Survey No. 273, Village Dindoshi, Pathanwadi Malad (E), Mumbai – 400097. | Vs. | ITO 30(1)(1) Room No. 436, 4 th Floor Kautilya Bhavan, BKC G Block, Bandra Mumbai – 400 051. |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAHFB6147Q | | |
| Appellant | .. | Respondent |

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| Assessee by : | Shri Shyam C. Agrawal, CA |
| Respondent by : | Shri Chetan M. Kacha, SR. AR |

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| Date of Hearing | 14.11.2022 |
| Date of Pronouncement | 25.11.2022 |

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

These are the cross appeals filed by the assessee and revenue against the order of the National Faceless Appeal Centre – Delhi / CIT(A) passed u/s 143(3) and 250 of the Act.

Since the issues in these two appeals are common and identical, hence are clubbed, heard and consolidated order is passed.

For the sake of convenience, we shall take up the revenue appeal in ITA No. 62/Mum/2022 for the A.Y 2013-14 as a lead case and the facts narrated. The revenue has raised the following grounds of appeal:

1. *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing a sum of Rs. 1,80,00,000/- out of Rs. 2,04,00,000/- being excessive salary paid to wives of two partners of the firm involved in the business of construction in terms of section 40A(2)(a) of the Income Tax act, 1961 though salary is also paid to the partners"*

2. *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in allowing a sum of Rs. 16,00,000/- out of Rs. 38,03,000/- being brokerage and commission paid to Mrs. Anaga Joshi, Mrs. Wilma D'souza, Mr. Abhishek Joshi and Mr. Melroy D'souza who are wives of the partner and other related*

person, without giving any proof of service given by them to assessee.

3. *"Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing a sum of Rs. 2,80,000/- made u/s 2(22)(e) of the I.T. Act, 1961.*

4. *"The appellant craves leave to add amend, alter, modify or omit any of the aforesaid grounds of appeal as occasion may arise or demand."*

2. The brief facts of the case are that the assessee is a partnership firm and is engaged in the business of civil construction and development in projects. The assessee has under taken SRA (slum rehabilitee authority) project at Malad, Mumbai. The assessee has filed the return of income for the A.Y 2013-14 on 19.09.2013 disclosing a total income of Rs. 65,49,770/- and the return of income processed u/s 143(1) of the Act. Subsequently the case was selected for scrutiny and notice u/s 143(2) and 142(1) of the Act was issued. In compliance, the Ld.AR of the assessee and the partner of the assessee attended time to time and submitted the information. On perusal of the financial statements, the AO found that the assessee has disclosed the income from business and profession and supported the submissions and

claims with the bills and vouchers and also produced the books of accounts. Further, the AO on perusal of the profit and loss account under the head salary found that the wife of the partners were paid salary of Rs. 1,12,00,000/- each and also there is mentioned in tax audit report u/s 40A(2)(b) in column No. 18 containing the details of interest and remuneration paid. The AO has called for the explanations to substantiate salary payments and also work done by the two persons in the financial year for payment of such huge salary. The AO has dealt on the provisions of Sec. 40A(2)(a) & (b) of the Act and is of the opinion that the expenditure is excessive and the payment is made for certain benefits. Further the AO has considered the fact and the salary paid to the persons in earlier year and therefore out of the total salary paid, the AO has made the disallowance of Rs. 2,04,00,000/- u/s 40A(2)(b) of the Act.

3. The second disputed issue is in respect of Brokerage & Commission paid to related parties, the AO found that the brokerage and commission paid to the relatives and the details were not submitted and made addition of Rs. 38,03,000/-. The AO found that

the assessee firm has received loan and advances of Rs. 6,80,00 from M/s Blossom Project and Investment Pvt Ltd and the two partners of the firm and wives are director and shareholder in M/s. Blossom Project and Investment Pvt Ltd, therefore the AO applied the provisions of Sec. 2(22)(e) of the Act and made addition of Rs.2,80,000/- as deemed dividend. Finally the AO has assessed the total income of Rs. 3,10,32,770/- and passed the order u/s 143(3) of the Act dated 29.03.2015.

4. Aggrieved by the order the assessee has filed an appeal with the CIT(A). Whereas the CIT(A) has considered the grounds of appeal and also the history of the case and the submissions of the assessee and the findings of the scrutiny assessment. The CIT(A) dealt on the facts and also the submissions of the assessee followed by the decision of the Honble Tribunal. Finally the CIT(A) in respect of the remuneration has granted partial relief and in respect of brokerage and commission the CIT(A) has granted marginal relief and on the disputed issue of deemed dividend the CIT(A) has deleted the addition relying on the judicial decisions and partly allowed the

assessee appeal. Aggrieved by the CIT(A) order, the revenue has filed an appeal before the Hon'ble Tribunal.

5. At the time of hearing the Ld. DR submitted that CIT(A) has erred in granting the relief to the assessee irrespective of factual findings and additions made by the A.O.

6. Contra, the Ld. AR though supported the CIT(A) order to the extent of the revenue appeal and has submitted that the assessee has also filed an appeal against the CIT(A) on partial confirmations.

7. We heard the rival submission and perused the material on record. The CIT(A) on the first disputed issue with respect to granting of relief of salaries paid to the wives of the two partners has observed at page 9 Para 6.1 of the order as under and granted the relief:

6.1 Ground 1 & 2

Excessive salary of Rs.2,04,00,000/- paid to the two wives of partners of the Appellant Firm disallowed u/s 40A(2)(a). In this regard I find that the Hon'ble ITAT Mumbai has considered this issue in the case of the Appellant itself for A.Y. 2012-13 in ITA No.

5875/Mum/2016 dated 08/06/2018. The Hon'ble ITAT has observed as under:

"In fact, in the impugned assessment year also the Assessing Officer has accepted a part of the salary paid which demonstrates that the Department does not dispute the fact that the wives of the partners in fact were rendering services to the firm. The dispute is only with regard to the quantum of salary paid. According to the Assessing Officer the salary paid by the assessee to the concerned individuals is high and excessive and accordingly he has estimated the reasonable salary at Rs. 8 lakh each of them.

8. However, a reading of provisions 40A(2)(a) of the Act makes it clear that if the Assessing Officer is of the opinion that any expenditure claimed towards payment made to a related person is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or the benefit derived from such business, he can disallow so much of the expenditure which according to him is excessive or unreasonable. Thus, in terms of the aforesaid provisions, the Assessing Officer must come to a conclusion that the payment made by the assessee is excessive or unreasonable having regard to the fair market value of the goods, services, facilities or the legitimate needs of the benefit derived by the assessee from the business. The aforesaid conclusion has to be reached by the Assessing Officer not in vacuum but on the basis of cogent material brought on record. A reading of the assessment order makes it clear that the Assessing Officer has not brought any such material on record to back the estimation of salary expenditure at Rs. 8 lakh each to the concerned individuals. Of course, the learned

Commissioner (Appeals) has enhanced the payment of salary to the concerned individuals, again on the basis of estimation, to Rs. 30 lakh each. 9. At the same time, as could be seen from the impugned order of the learned Commissioner (Appeals), in assessment year 2010-11, the assessee had paid salary of Rs. 12 lakh each to the concerned individuals and in assessment year 2011-12, the payment of salary to these persons were increased to Rs. 24,50,000 each. Thus, in the impugned assessment year, there is a quantum jump in salary payment to the concerned person as there is an increase of 2.6 times on the salary paid in assessment year 2011-12. The assessee has not brought any material to demonstrate what extra effort or service was rendered by the concerned individuals necessitating such huge increase in salary. Thus, the assessee on its part has also failed to demonstrate that the salary paid in the impugned assessment year is commensurate with the work performed or services rendered by the concerned individuals to the firm. Thus, when neither the claim of the assessee nor the conclusion of the Departmental Authorities regarding the payment of salary to the concerned individuals were supported by cogent material, the reasonableness of such payment has to be determined by applying certain yardsticks and on the basis of material available on record. As could be seen from the facts and material on record, in the assessment year 2010-11 the assessee has paid salary of Rs 12 lakh each to the concerned persons which was increased to 2469 lakh assessment year 2011-12. Thus, there was an increase of two times between the salary paid in assessment year 2010 and 2011112 Applying the same yardstick, in our considered opinion, the reasonable delay payment for the impugned assessment year can be fixed at Rs 50 lakh each as such increase in salary

payment is approximately twice the amount of salary paid in assessment year 2011-12. Thus, the assessee gets a further relief of Rs 40 lakh. Thereby, the disallowance made under section 40A/2) of the Act is restricted to Rs 30 lakh."

In the present assessment year also it is observed paying higher salary to the wives of the partners or Another the claim of the appellant for conclusion drawn by the AO regarding excessive payment of salary to the wives of the partners are supported by cogent materials. Thus, the facts in the present assessment year remains same as that of the A.Y. 2012-13 wherein the Hon'ble ITAT Mumbai (supra) have decided on the issue of reasonableness of such payments by applying certain yardsticks. The Hon'ble ITAT has restricted the salary paid to the wives of partners at Rs. 50 lakhs each which is approximately two times the salary paid to them in A.Y.2011-12. Taking the same yardstick, fix the salary paid to the wives of the partners at Rs.1,00,00,000/- each instead of Rs. 1,12,00,000/- claimed by the Appellant as salary paid to the two wives of the partners of the Firm. Thus, the disallowance u/s 40A(2)(b) is restricted to Rs. 24,00,000/- as against Rs.2,04,00,000/- as determined by the AO. The grounds are, thus, partly allowed.

8. On the second disputed issue raised in respect of brokerage and commission, the CIT(A) has dealt on the Hon'ble Tribunal order and observed at Para 6.2 page 10 and granted partial relief:

6.2. Ground 2 & 3

As regards disallowance out of brokerage and commission paid to the related persons, the Hon'ble ITAT has observed as under:

14. We have considered rival submissions and perused materials on record. As could be seen, the Assessing Officer has disallowed under section 40A(2)(a) of the Act the under mentioned commission payments.

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| <i>1. Anagha D. Joshi</i> | <i>Rs. 9,55,000</i> |
| <i>2. Wilma D'Souza</i> | <i>Rs. 9,50,000</i> |
| <i>3. Melroy D'Souza</i> | <i>Rs. 8,70,000</i> |
| <i>4. Abhishekh Joshi</i> | <i>Rs. 9,25,000</i> |

Total:- Rs. 37,05,000

15. The learned Commissioner (Appeals) has restricted the aforesaid disallowance to Rs. 17,05,000. On a perusal of material on record, it is seen that in the preceding years also, the assessee has paid brokerage/commission to the aforesaid persons which have been allowed by the Department. In fact, in the immediately preceding assessment year i.e., A.Y. 2011-12, an amount of Rs. 9,41,500 was paid to Anagha D. Joshi towards brokerage and commission. In the scrutiny assessment order passed under section 143(3) of the Act on 29th March 2014, the Assessing Officer has allowed the aforesaid payment. Similarly, in case of Wilma D'Souza in the immediately preceding year Le.. AY 2011-12 brokerage/commission of Rs. 9,41,500 was paid and it was accepted by the Assessing Officer in the scrutiny assessment order. In case of Abhishekh Joshi, the amount of brokerage and commission paid in the immediately preceding assessment year was Rs. 9,03,000. Thus, as could be seen from the aforesaid facts, brokerage / commission paid to Anagha D. Joshi, Wilme D'Souza and Abhishek Joshi, in the impugned

assessment year cannot be considered to be either unreasonable or excessive considering the brokerage/commission paid in the assessment year 2011-12 which were allowed by the Assessing Officer in the scrutiny assessment completed under section 143(13) of the Act. That being the case brokerage/commission paid to Anagha D. Joshi, Wilma D'Souza and shakh Josh has to be allowed fully. Thus, we are left with the reasonableness of brokerage/commission payment of Rs. 8,70,000 to Melroy D'Souza. As could be seen from the computation of income of this person placed in paper book, in assessment year 2010-11 no commission was paid and In the assessment year 2011-12 for the first time brokerage and commission of Rs. 3,33,000 was paid to him. Whereas, in the impugned assessment year brokerage/commission of Rs. 8,70,000 has been paid to the said person. Thus there is a huge increase in brokerage commission payment to Melroy D'Souza. The assessee has not brought on record any cogent evidence regarding the services rendered by the concerned person necessitating such increase in commission payment compared to the immediately preceding assessment year. Thus, the concerned person being a related party, the brokerage/commission payment comes within the ambit of section 40A(2)(a) of the Act. That being the case, the reasonableness of payment made by the assessee has to be considered keeping in view the surrounding facts and circumstances of the case. Taking into consideration the fact that in the immediately assessment year an amount of Rs. 3,33,000 was paid as commission to Melroy D'Souza, in our considered opinion, brokerage commission payment of Rs. 4 lakh would be reasonable in the impugned assessment year. Therefore, the disallowance under section 40A(2)(a) of the Act in respect of brokerage

and commission payment is restricted to Rs. 4,70,000. Grounds raised are partly allowed."

It is observed from the above order of Hon'ble ITAT that similar payments were made by the Appellant to these related persons in earlier assessment years as well although the amounts differed. As per the findings of the Hon'ble ITAT, similar payments of Rs.9,41,500/- was paid each to Anagha Joshi and Wilma D'souza in A.Y.2011-12 which has been accepted by the AO in the scrutiny assessment. Similarly, such payment of Rs.9,03,000/- made to Abhishek Joshi in AY 2011-12 has also been accepted by the AO in the scrutiny assessment. On these set of facts, the Hon'ble ITAT has allowed the claim of the Appellant of payments of commission and brokerage of Rs.9,55,000/-, Rs.9,50,000/-, Rs 9,25,000/- to Mrs. Anagha Joshi, Mrs. Wilma D'souza and Mr. Abhishek respectively. As regards such payment of Rs.8,70,000/- to Mr. Melory D'souza, the Hon'ble ITAT has restricted the claim to Rs. 4,00,000/- thus determining the disallowance to Rs.4,70,000/- u/s 40A(2)(a) of the Act.

In this regard, I observed that there is no change in facts of the case. The AO has not brought anything on record as to the basis on which such payments have not been treated as not incurred for the purpose of business when there is no change in the facts of the case. These persons continue to be involved in the business of the Appellant. Except for Mr Melory D'souza, the other three persons have been receiving salary from the Appellant over the years. Mr Melory D'souza has received commission and brokerage of Rs 8,70,000 in A.Y.2012-13 which has been restricted to Rs.4,00,000/- by the Hon'ble ITAT (supra). Since facts in the case have not changed, respectfully following the order of Hon'ble TAT Mumbai in the case of

the Appellant itself (supra), I allow the claim of brokerage and commission paid to Mrs. Anagha Joshi, Mrs. Wilma D'souza and Mr. Abhishek Joshi and restrict such claim to Rs 4,00,000/- in the case of Mr Melory D'souza as against Rs. 9,65,000/- Thus, as against the disallowance made by the AO of Rs.38,03,000/-, confirm the disallowance of Rs.5,65,000/- only (Rs.9 65,000 - Rs.4,00,000). partNCOME The grounds are, thus, partly allowed.

9. Whereas in respect addition made by the AO u/s 2(22)(e) of the Act the CIT(A) relied on the judicial decisions and observed at Para 6.3 at page 12 and deleted the addition:

6.3. Ground 5 & 6

As regards addition of Rs. 280,000/- made u/s 2(22)(e), the AO has listed out whether all the requirements of section 2(22) (e) have been met or not. The Appellant has claimed that it is not a shareholder in the M/s.Blossom Project Investment Pvt Ltd and hence no addition can be made u/s 2(22)(e) of the Act on account of any loan received from M/s. Blossom Project Investment Pvt Ltd.

In this regard find the AO has made the addition on the ground that two partners of the Firm and their wives are shareholders and Directors in M/s. Blossom Project Investment Pvt Ltd. The AO is silent whether the Appellant is a shareholder in M/s. Blossom Project Investment Pvt Ltd. On the other hand, the Appellant has submitted relevant details to demonstrate that it is not a shareholder in M/s. Blossom Project Investment Pvt Ltd. The same finding has been given in the order passed by CIT(A) in the case of the Appellant for A.Y.2012-13

wherein addition made by the AO u/s 2(22) (e) was deleted. On these set of facts, I find that this issue is covered in favour of the Appellant in view of the decision of Hon'ble Jurisdictional High Court of Bombay in the case of CIT vs Jignesh Shah (2014) 54 taxmann.com 293 wherein it has been held that no addition can be made u/s 2(22)(e) in the case of a person who is not a shareholder. Relevant part of the judgement is extracted below:

"9. This Court in the case of Universal Medicare (supra) while approving the decision of the Special Bench of the Tribunal in Bhaumik Colours (supra) inter alia observed that:

"All payments by way of dividend have to be taxed in hands of the recipient of the dividend namely the share holder.

Consequently, the effect of clause (e) of Section 2(22) is to broaden the ambit of the expression 'dividend' by including certain payments which the company has made by way of a loan or advance or payments made on behalf of or for the individual benefit of a shareholder. The definition does not alter the legal position that dividend has to be taxed in the hands of the shareholder."

10. Further, this Court in the case of CIT v. Impact Containers Pvt. Ltd. - 367 ITR 346 while dealing with the issue of deemed dividend categorically held that Section 2(22)(e) of the Act cannot be applied/invoked where the assessee is not a shareholder of the leading company. The objective of Section 2(22)(e) of the Act is only to ensure that the Company in which the public are not substantially interested would not distribute its prosperity amongst shareholders by calling them the loan/advances, as tax would be payable if the same were distributed as dividend.

11. The submission on behalf of the Revenue made before us is that one has to look at the substance of the transaction and that one looks at the substance, then the Respondent-Assessee would be chargeable to tax. This is not acceptable as fiscal status have to be interpreted strictly. We can do no better than meet the submission of the Revenue by inviting attention to the decision of the Supreme t Court in CIT v. Vatika Township (2015) 1 SCC 1 under:- it has been observed as under:

"41.2:- At the same time, it is also mandated that there cannot be imposition of any tax without the authority of law. Such a law has to be unambiguous and should prescribe the liability to pay taxes in clear terms. If the provision concerned of the taxing statute is ambiguous and vague and as susceptible to two interpretations, the interpretation which favours the subjects, as against the Revenue, has to be preferred. This is a well-established principle of statutory interpretation, to help finding out as to whether particular category of assessee is to pay a particular tax or not. No doubt, with the application of this principle, the courts make endeavour to find out the intention of the legislature. At the same time, this very principle is based on "fairness" doctrine as it lays down that if it is not very clear from the provisions of the Act as to whether the particular tax is to be levied to a particular class of persons or not, the subject should not be fastened with any liability to pay tax. This principle also acts as a balancing factor between the two jurisprudential theories of justice - Libertarian theory on the one hand and Kantian theory along with Egalitarian theory propounded by John Rawls on the other hand.

41.3 Tax laws are clearly in derogation of personal rights and property interests and are, therefore, subject to strict

construction, and any ambiguity must be resolved against imposition of the tax.

41.4 Again as United States v. Merraim, the Supreme Court clearly stated at US pp. 187.88 "On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favour of the taxpayer. Gould v. Gould L Ed p. 213: Usp 153. 41.5 As Lord Carins said many years ago in Partington v. Attorney General (LR p. 122)

".... as I understand the principle of all fiscal legislation it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however, apparently within the spirit of the law the case might otherwise appear to be."

Thus on strict interpretation of Section 2(22)(e) of the Act, unless the Respondent-Assessee is the shareholder of the company lending him money, no occasion to apply it can arise.

12. In the present facts, it is an admitted position that Respondent-Assessee is not a shareholder of M/s. NS FinconPvt. Ltd. from whom he has received loan. Therefore, no fault can be found with the decision of the Tribunal in having followed the decision of the High Court in Universal Medicare (supra). This view has been further

reiterated by another Division Bench of this Court in Impact Containers (supra) rendered on 4 July, 2014.

13. We are of the view that as the issue raised by the Revenue stands concluded by the order of this Court, no substantial question of law arises for our consideration. Accordingly, Appeal dismissed. No order as to costs."

In view of facts of the case and respectfully following the decision Hon'ble Jurisdictional High Court of Bombay (supra) delete the addition of Rs.2,80,000-made by the RO us (22(e) of the Act. The Grounds are allowed.

10. The Ld. DR could not controvert the findings of the CIT(A) with any new cogent material or information to take a different view, accordingly we do not find merits in the submissions of the revenue and we uphold the order of the CIT(A) on the disputed issues and dismiss the grounds of appeal of the revenue.

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At the time of hearing, the Ld.Counsel for the assessee submitted that there is a delay in filing the appeal before the Hon'ble Tribunal. We found the facts mentioned are reasonable and the Ld. DR has no specific objections. Accordingly, we condone the delay and admit the appeal.

11. The assessee has raised the following grounds of appeal:

Ground of Appeal

Ground No.1

Disallowance u/s 40A(2)(a) Rs.2400000/-

In the facts and circumstance of the case and in law the Learned Commissioner of Income Tax (Appeal) NFAC erred in confirming the addition to the extent of Rs.2400000/- without appreciating the fact that:

a. The wives of the partners in the appellant firm are well qualified and have been looking after sales and administration of the firm for more than 20 years.

b. Salaries paid to them in earlier years have been accepted by the A.O. and no 1968. Wherein it has been clarified that no disallowance can be made u/s 40A(2) (a) in respect of payments made to relatives and sister concerns where disallowances have been made u/s 40A(2)(a).

c. They are paying tax at the highest rate and there is no loss of revenue to the government. The appellant has relied on Board's Circular No.6P dated 6th July there is no attempt to evade tax. In this regard, the appellant has further placed reliance on the decisions of Hon'ble Supreme Court in the case of "Glaxosmithkline Asia P. Ltd. (2010) 47 DTR65/195 Taxman 35 and the decision of Hon'ble Bombay High Court in the case of CIT Vs. V S Dempo & Co P. Ltd (2011) 196 Taxman 193.

Ground No.2

Confirming addition to the extent of Rs.565000/-

Out of Commission & Brokerage paid to Mr. Melory D'Souza Rs.965000/- without appreciating the fact that:

a. The Commission paid to Mr. Melory D'Souza is reasonable. Mr. Melory D'Souza is assessed to Income Tax. His PAN is 'AHHPD0539R'

Your appellant crave leave to add, amend, alter or delete any or all the above grounds of appeal.

12. At the time of hearing the Ld. AR submitted that the CIT(A) has erred in not allowing the complete relief and erred in confirming addition to the extent of Rs.24 lakhs without appreciating that the qualified persons are looking after the sales and administration and there was no such disallowance in earlier year. Further there is no loss of revenue or there is no necessity to evade the tax. The CIT(A) should have considered these facts and granted the partial relief. On the second disputed issue the CIT(A) erred in confirming the disallowance of Rs.5,65,000/-without appreciating that the commission is reasonable and was paid. Contra, the Ld. DR has objected to the submissions of the Ld. AR and relied on the AO order.

13. We heard the rival submissions and perused the material on record. The contention of the Ld. AR that

the CIT(A) erred in granting only partial relief overlooking the various facts and earlier year it was accepted and there is no disallowance u/s 40A(2)(b) of the Act. The Ld. AR mentioned that the salary paid is reasonable considering the volume of business and also the qualification. When a query was raised to explain the details of work undertaken by these two salaried employees and also commission payments, the Ld. AR could not substantiate with any evidences or information on the nature of work under taken and how it has impact on the business of the assessee. We found that that the CIT(A) has considered the facts and has granted relief and made partial disallowance and relied on the judicial and the Hon'ble Tribunal decisions. Similarly the CIT(A) has considered the facts in respect of brokerage and commission payments disallowance and made disallowance and partial relief with reasoning. Even in this case the Ld. AR could not substantiate with any evidences and the nature of transactions for supporting the claim of payment of brokerage. Further we find that the Hon'ble Tribunal in

assessee's own case for the A.Y 2012-13 dated 08.06.2018 has observed at Para 14 to 16 as under:

14. We have considered rival submissions and perused materials on record. As could be seen, the Assessing Officer has disallowed under section 40A(2)(a) of the Act the under mentioned commission payments.

| | | |
|---|-----------------|-----------|
| 1 | Anagha D. Joshi | 9,55,000 |
| 2 | Wilma D'souza | 9,50,000 |
| 3 | Melroy D'souza | 8,70,000 |
| 4 | Abhishekh Joshi | 9,25,000 |
| | Total | 37,05,000 |

15. The learned Commissioner (Appeals) has restricted the aforesaid disallowance to ` 17,05,000. On a perusal of material on record, it is seen that in the preceding years also, the assessee has paid brokerage / commission to the aforesaid persons which have been allowed by the Department. In fact, in the immediately preceding assessment year i.e., A.Y. 2011-12, an amount of ` 9,41,500 was paid to Anagha D. Joshi towards brokerage and commission. In the scrutiny assessment order passed under section 143(3) of the Act on 29th March 2014, the Assessing Officer has allowed the aforesaid payment. Similarly, in case of Wilma D'Souza in the immediately preceding year i.e., A.Y. 2011- 12, brokerage / commission of ` 9,41,500 was paid and it was accepted by the Assessing Officer in the scrutiny assessment order. In case of Abhishekh Joshi, the amount of brokerage and commission paid in the immediately preceding assessment year was ` 9,03,000. Thus, as could be seen from the aforesaid facts,

brokerage / commission paid to Anagha D. Joshi, Wilma D'Souza and Abhishekh Joshi, in the impugned assessment year cannot be considered to be either unreasonable or excessive considering the brokerage / 12 M/s. Blossom Developers commission paid in the assessment year 2011-12 which were allowed by the Assessing Officer in the scrutiny assessment completed under section 143(3) of the Act. That being the case, brokerage / commission paid to Anagha D. Joshi, Wilma D'Souza and Abhishekh Joshi has to be allowed fully. Thus, we are left with the reasonableness of brokerage / commission payment of ` 8,70,000 to Melroy D'Souza. As could be seen from the computation of income of this person placed in paper book, in assessment year 2010-11 no commission was paid and In the assessment year 2011-12 for the first time brokerage and commission of ` 3,33,000 was paid to him. Whereas, in the impugned assessment year brokerage / commission of ` 8,70,000 has been paid to the said person. Thus, there is a huge increase in brokerage commission payment to Melroy D'Souza. The assessee has not brought on record any cogent evidence regarding the services rendered by the concerned person necessitating such increase in commission payment compared to the immediately preceding assessment year. Thus, the concerned person being a related party, the brokerage / commission payment comes within the ambit of section 40A(2)(a) of the Act. That being the case, the reasonableness of payment made by the assessee has to be considered keeping in view the surrounding facts and circumstances of the case. Taking into consideration the fact that in the immediately assessment year an amount of ` 3,33,000 was paid as commission to Melroy D'Souza, in our considered opinion, 13 M/s. Blossom Developers brokerage commission payment of ` 4 lakh would be

reasonable in the impugned assessment year. Therefore, the disallowance under section 40A(2)(a) of the Act in respect of brokerage and commission payment is restricted to ` 4,70,000. Grounds raised are partly allowed.

16. Ground no.5, being general in nature is dismissed. Accordingly, we do not find the merits in the assessee appeal and is dismissed.

14. In the result, the both appeals filed by the assessee and revenue are dismissed.

Order pronounced in the open court on 25.11.2022.

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 25.11.2022

KRK, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

1.

(Asst. Registrar)