

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'C' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SMT RENU JAUHRI, ACCOUNTANT MEMBER**

**ITA No.3564/Mum/2023
(Assessment Year :2017-18)**

&

**ITA No.3269/Mum/2023
(Assessment Year :2018-19)**

M/s. Creations By Shanagar 34, Auro Ville St. Andrews Road Santacruz (W) Mumbai – 400 054	Vs.	DCIT 22(1), Mumbai Room No.322, 3 rd Floor Piramal Chambers Lalbaug Mumbai – 400 012
PAN/GIR No.AACFC7957L		
(Appellant)	..	(Respondent)

**ITA No.3483/Mum/2023
(Assessment Year :2018-19)**

DCIT 22(1), Mumbai Room No.322, 3 rd Floor Piramal Chambers Lalbaug Mumbai – 400 012	Vs.	M/s. Creations By Shanagar 34, Auro Ville St. Andrews Road Santacruz (W) Mumbai – 400 054
PAN/GIR No. AACFC7957L		
(Appellant)	..	(Respondent)

Assessee by	Shri Nitesh Joshi & Shri Milind Bakhai
Revenue by	Shri Lieder Panicker
Date of Hearing	06/05/2024
Date of Pronouncement	21/05/2024

आदेश / O R D E R**PER AMIT SHUKLA (J.M):**

The aforesaid appeal in ITA No.3564/Mum/2023 has been filed by the assessee against order dated 11/08/2023, passed by NFAC, Delhi for the quantum of assessment passed u/s.143(3) for the A.Y.2017-18; and cross appeal has been filed by the assessee in ITA No.3269/Mum/2023 as well as by the Revenue in ITA No.3483/Mum/2023 against order dated 02/08/2023 passed by NFAC for the quantum of assessment passed u/s.143(3) for the A.Y.2018-19.

2. In ITA No.2017-18 assessee has raised following grounds:-

“1.The Ld. CIT(A) has erred in confirming the action of the Ld. AO in disallowing premium of Rs. 1,00,00,000/- paid on Keyman Insurance Policy on the grounds that it is an investment plan and for the benefit of the partners rather than the appellant. On the facts and in the circumstances of the case and in law, the disallowance made ought to be deleted.

2. Without prejudice to ground no. 1 above, if it is held that premium paid on Keyman Insurance Policy is not deductible expenditure u/s 37(1) of the Act, then in the year of maturity or surrender of the said policy, the difference between premium paid and amount received on maturity/surrender ought to be considered while computing the taxable income.”

3. Similarly in A.Y.2018-19 exactly similar ground has been raised for disallowing premium of Rs.1,00,00,000/- paid on premium insurance policy; whereas Revenue in 2018-19 had challenged the addition in respect of commission paid to foreign entities amounting to Rs.1,82,66,691/-.

4. As a lead case we are taking the appeal for A.Y.2017-18 and our finding given therein will apply *mutatis mutandis* in the assessee's appeal for A.Y.2018-19 also.

5. The brief facts are that assessee is a partnership firm and is engaged in the business of exporting embroidered fabrics and allied products. The ld. AO from the perusal of the profit and loss account noted that assessee has claimed expenses of Rs.1,00,00,000/- towards Keyman's insurance. In response to the show-cause notice assessee submitted that policy commencement date is 31/03/2017 and there are two policies of annual premium of Rs.50,00,000/- each with similar terms and conditions taken with Edelweiss Tokio Life Insurance Co. Ltd. It was submitted that Shri Chetan K Desai in whose name Keyman Insurance policy has been issued is a working partner and he looks after day to day activities of the firm and plays a key role in the client relationships and functioning of the business. In order to protect the firm's business from untimely death of Shri Chetan Desai, the firm has taken two insurance policies with cover of Rs.5,00,00,000/-. However, the ld. AO rejected the assessee's submissions after making following observations:-

"After considering assessee's submission, the policies are not found to be Keyman Insurance Policy as claimed by the assessee for the following reasons:

1 The two policies in the instant case nowhere mention that these are Keyman Insurance Policies.

2. The first and foremost condition to be fulfilled for Kayman insurance that in the insurance policy the proposer as well as the

premium payer is the employer. However, in the Instant case the proposer is not the employer Le the assessee firm. The policies with Edelweiss Tokio Life Insurance Co. Ltd. bearing No. 500040491E & 500040492E are Wealth Ultima policies drawn in the name of Mr. Chetan K Desai. Secondly, the address mentioned on both policies is B-6, Vasant Theosophical Socy, Juhu Tara Road, Near JW Mariott Hotel, Juhu, Mumbai and not the address of the assessee firm. The insurance company has issued the letter in name of Mr. Chetan Desai, not in the name of the assessee (the Firm)

3. As per section 10(10 D) of the Income Tax Act, the keyman insurance policy should be a life Insurance policy. To define the nature of key man insurance policy in terms of life insurance policy, IRDAI has issued special guidelines and circulars which clearly says that it should be a term insurance policy. In assessee's case the said policy is a endowment plan, not a term life insurance policy. Hence it does not fulfill the criteria of keyman life insurance policy. The aim and objective of the benefits provided under Keyman Insurance is to protect the interests of the company in case of the death of the key employee. This beneficial provision cannot be misused to make large scale investments in the garb of life insurance and then claim deduction on it.

4. Further, as per section 10(10D) explanation 1. "for the purpose of this clause. "keyman insurance policy" means a life insurance policy taken by a person on the life of another person who is or was the employee of the first mention person.

Here, it is clear that the insurance policy should be taken by the employer, In this case, the assessee has not taken the policy. Hence does not qualify the requirements of the Income Tax Act

1 Further assessee has claimed that the partner Mr. Chelan Desai has endorsed the said policy in the name of the firm hence all the rights have been transferred to the firm, Assessee's submission has been considered but not found to be acceptable. As per the said endorsement policy there are certain terms and conditions which make it clear that rights are not fully transferred to the firm. As per clause 'o' of the said endorsement document it is written

that the policy will be absolutely assigned in my (Mr. Chetan Desai) favor upon completion of the said minimum lock in clause

2. It is further to be seen that the document which the assessee has submitted in the proceedings is the letter which it has submitted to the Insurance Company and hence its acknowledgement seal is there. The assessee has not provided any document from the side of Insurance Company in which the company has accepted the endorsement. Further, the receipt of premium paid is also addressed in the name of Chetan Desai by the Insurance Company Indicating that they have not accepted such endorsement. Without prejudice to this, such an acceptance would not have changed the allowability of expense for income tax purpose.

3. Further as per clause 'e' of the endorsement document-'any claim arising and paid during the minimum lock in period, my legal heir/ nominee will be entitled to receive the benefit of the policy. Clause 'e'- This long term reward program will be governed by the insurance policy provision at all times.

4. The terms stated above clearly indicate that the ultimate rights of the policy are with the partner or partner's nominee only. Here the nominee is Mrs. Sonal Desai.

5. The assessee has submitted a plain paper declaration of Sonal Desai which says that she is giving her rights as nominee to the assessee (the firm), This letter cannot be considered as documentary evidence to negate the well established facts arising from the policy documents. The keyman can assign the policy to the nominee only when the policy is assigned by the employer to him. Hence, this document is irrelevant as the assessee is not the assigner of the policy.

6. Without prejudice to the point 7, it is to be said that the plain paper declaration/letter are not sacrosanct and can be revoked any time. Such a declaration/letter cannot override the explicit provisions of the policy documents.

7. Assessee claimed that it has shown this type of expenses in earlier year also. The facts and circumstances of that insurance

policy which has got matured may have differed from the present policy taken on 31/3/2017 and hence no parallel can be drawn. Further, it is to be seen that even if one disallowable entry has escaped the rigour of scrutiny assessment in one year and hence same clearly disallowable expenses should be allowed every year cannot be considered.

Without prejudice to the above said point 9, it is observed that in the P& L statement of A.Y 2016-17, the assessee has shown income of Rs. 3,30,65,992/- from HDFC Insurance policy (claimed as keyman insurance in P&L). However, on the other hand, the assessee has also debited expenditure of Rs. 2,60,00,000/- for this keyman policy in the same AY No cogent explanation or rationale has been provided to explain the purpose for which these expenses were claimed. Assessee has not submitted any policy document in support of his claim that expenditure shown in AY 2016-17 was valid and if at all any parallel can be drawn from it for AY 2017-18

1 In keyman insurance policy, nomination can be done only in favour of the company/employer. Here the employer is the assessee (the firm) However, in both the policies for this year, as per Policy Schedule, proposer of the policy is Mr Chetan Desai, Name of the Policyholder, is mentioned as Mr. Chetan K Desai, Name of the life insured on both policies is Mr. Chetan K Desai and in the Nominee Schedule, Name of Nominee is mentioned as Sonali Desai at 100% nomination

2. Technically, in a Keyman Policy, firstly the employer is proposer who then can assign the policy to the Keyman employee. Only after such assignment the Keyman can nominate his family dependents in the policy

However, in the instant case, the keyman (Mr. Chetan Desai) has claimed to have assigned the policy to the assessee (firm) through endorsement letter

Hence, the assessee's contention of assigning the policy by Mr. Chetan K Desai to the assessee firm does not fit in the requisite conditions for keyman insurance policy The assessee's contention did not pass the conditions required for keyman insurance policy

The insurance policy taken by the partner is taken for the benefit of the partners rather than the assessee (the Firm). This is just an investment plan whose ultimate beneficiary is the partner Mr. Chetan Desai or his nominee. This policy is not wholly and exclusively for the business of the assessee. Hence, in view of the above, it is being held that the said policy is not a keyman policy and the expenditure claimed is not allowable.

As the expenditure is of personal nature, not incurred wholly and exclusively for the business of assessee, is not allowed. Accordingly, the expenses on keyman's insurance of Rs. 1,00,00,000/- is disallowed u/s. 37(1) and added to the total income.

Disallowance u/s 37

Rs. 1,00,00,000/-“

6. We have heard both the parties at length, perused the relevant finding given in the impugned orders as well as material referred to before us. Ld. Counsel for the assessee submitted that here in this case two insurance policies were taken from Edelweiss Tokio Life Insurance Co. Ltd. for a risk cover of Rs.5,00,00,000/- each in the name of Shri Chetan Desai who was the main working partner looking after day to day business activity of the firm. Thereafter, there was an endorsement letter wherein Shri Chetan Desai has assigned the policy in favour of the assessee firm and accordingly, upon maturity, the amount will be received by the assessee firm and the same will be offered to tax under the head business income as provided u/s. 2(24)(xi) of the Act. He further pointed out that in fact these policies were surrendered in April 2022 and the amount has been actually offered to tax by the firm in the return of income filed for the A.Y.2023-24. In support of his contention, he has filed an

additional evidence in the form of bank statement highlighting the amount of proceeds received upon surrendering of the policy alongwith copy of income tax return and computation of income alongwith annexures. Thus, this income has already been offered to tax in terms of Section 2(24)(xi) and therefore disallowin the premium amounts to double addition.

7. Regarding allegation of the ld. AO, he submitted that once the endorsement was made to the firm and also accepted by the insurance company and thereafter, the insurance company has acknowledged the said endorsement, then all these allegations of the AO does not stand. It was for this reason alone the amount was finally credited in the account of partnership firm on the surrender of the policy which has been offered to tax. He also drew our attention to Section 38, 39 & 40 of the Insurance Act wherein it has been clearly provided in subsection (4) of Section 39 that a transfer/ assignment of a policy would be made in accordance with Section 38 and any nomination in the policy will automatically cancel the nomination. Even if assessee's wife was a nominee in the original insurance policy but that stood cancelled once there was an assignment of the policy in the name of the firm. He further submitted that even in terms of Section 10(10d) r.w. Explanation 1 of the Act, there is no provision that the policy should not be in the in the name of Keyman and it also includes such policy which has been assigned to a person at any time during the term of policy and therefore, there is no violation of Section 10(10d). Now it is a well settled law for Keyman Insurance policy obtained on the life of

person who subscribed the term against a financial setback which may occur as a result of a premature death of a partner, the expenditure which is laid out for the payment of premium on such a policy is incurred wholly and exclusively for the purpose of business. This has been held so by the **Hon'ble Bombay High Court in the case of B.N. Exports in Income Tax Appeal No.2714 of 2009 judgment and order dated 31/03/2010.**

8. Further, ld. Counsel also drew our attention that after the endorsement and assignment of the policy in the name of the firm of the policy owner is a partnership firm, i.e., Creation By Shanagar which is evident from premium received, copy of which is placed at page 264 of the paper book. Thus, no disallowance could have been made.

9. On the other hand, ld. DR referred to various observations made by the ld. AO as incorporated above and strongly relied by the order of the ld. AO and ld. CIT (A).

10. First of all, there is no dispute that Shri Chetan K Desai was working partner of the firm and the insurance policy was taken in the name of Shri Chetan K Desai and the nominee in the said insurance policy was his wife, Mrs. Sonal Desai. It is also not in dispute that it is a Life Insurance policy and even if Keyman Insurance has been taken in the name of the partner of the partnership firm then also there is no provision that the deduction cannot be allowed on the payment of premium. It is also not in dispute that later on this policy was assigned to the

firm and there is a due acknowledgement of endorsement on the policy document wherein the policy has been assigned to the firm and such endorsement has also been accepted by the insurance company and firm's name on the same policy has been assigned. Further, there is another letter written to the insurance company by Mrs. Sonal Desai who has given an undertaking and a letter to the insurance company that any amount to be paid by the insurance company on account of unfortunate death of Shri Chetan K Desai, the same shall be paid to M/s Creation By Shanagar, i.e., the partnership firm. All these letters were filed before the ld. AO during the course of assessment proceedings in response to the notice issued by him.

11. Section 10(10d) which gives exemption or deduction of any sum received under life insurance policy including Keyman insurance policy, Explanation-1 to Section 10(10d) defines the Keyman Insurance in the following manner:-

Explanation 1. For the purposes of this clause, "Keyman insurance policy" means a life insurance policy taken by a person on the life of another person who is or was the employee of the first-mentioned person or is or was connected in any manner whatsoever with the business of the first-mentioned person [and includes such policy which has been assigned to a person, at any time during the term of the policy, with or without any consideration].”

12. Ergo, Keyman Insurance policy is a life insurance policy taken by a person on the life of a person who was an employee and also imputed such policy which has been assigned to a person at any time during the term of policy with or without any

consideration. Thus, even if the policy was taken in the name of key person and has been assigned to the firm, then also same falls in the definition of said explanation. Apart from that, another allegation by the Id. AO was that the policy was in the nature of investment plan and not pure life insurance policy. First of all, from the bare perusal of the policy documents it is clearly evident that was a life insurance policy and once the assessee has brought the policy under the life insurance scheme, then whether the insurance company is making investment in mutual funds for capital appreciation or under any other investment scheme will not make any difference. In so far as assessee is concerned, it has brought the life insurance policy under Keyman insurance policy on which premium has been paid. Further, even as per the Explanation 1 to Section 10(10d), there are only two conditions which has been mentioned to get deduction, firstly, it should be a life insurance policy; and secondly it should be taken by the assessee on the life of another person who is or was an employee of the assessee. Here in this case, both these conditions are fulfilled. Now, whether IRDA has issued any guidelines as to what should be termed as insurance policy is not relevant as long as policy which has been issued by the insurance company is a life insurance policy and whether the insurance company has invested that insurance money to any wealth plan does not change the colour of the policy.

13. In so far as other allegation made by the Id. AO that insurance was not in the name of firm and was taken by the partner in his own name and his wife was nominee, has no

relevance, once the insurance company has allowed the assignment of the policy to the firm and the money paid as a premium has ultimately been paid by the firm and after the surrender of the policy, the insurance company did paid the money to the firm which has been offered to tax in the subsequent year. All these facts, fully endorsed the contention of the assessee that these insurance policies were in the name of the firm even though insurance initially was taken in the name of the partner. Now, it has been brought on record that in the income tax return for A.Y.2023-24, the amount received on surrender of policy, same has been offered to tax by the firm as per the provisions of 2(24)(xi) of the Act. In light of these facts, the premium paid by the assessee firm in A.Y.2017-18 and 2018-19 is eligible for deduction u/s.37(1). Thus, in view of decision of Hon'ble Bombay High Court in the case of B.N. Exports (supra), accordingly, the claim of deduction is allowed and the grounds raised by the assessee are allowed.

14. In so far as Revenue's appeal for A.Y.2018-19 on account of commission paid to foreign entities, it has been admitted by both the parties that this issue is covered in favour of the assessee by the order of the Tribunal in assessee's own case for A.Y.2016-17. The relevant observation and finding of the Tribunal in this regard reads as under:-

5. *We have heard both the parties and perused the record. We note that the assessee firm is engaged in the business of manufacturing and exporting of embroidered fabrics and allied products. The assessee, after receiving export orders from the agents stationed outside the territory of India, exports its products*

outside India, for which services of agents, the assessee paid commission. The AO noted that the assessee had made payment of Rs.1,61,90,101/- to four (4) agents outside India. The AO further noted that assessee paid commission to those parties, who were the residents of country where the India had entered into Double Taxation Avoidance Agreement (DTAA). The assessee was show-caused as to why the provision of section 195 of the Act should not be made applicable as the parties to whom the commissions were paid were rendering the services in the nature of consultancy, technical/customer relationship services. The assessee filed its reply and stated that none of the parties/agents to whom the assessee has remitted commission payment/paid commission payment had any Permanent Establishment [PE] in India and therefore, it pleaded that they were not liable to tax in India and so deduction of Tax at source was not necessary. The explanation furnished by assessee was not accepted by AO, who held that as per Explanation to section 9(2) of Finance Act, 2007, the income of non-resident shall be deemed to accrue in India and shall be included in total income whether or not the non-resident has a resident or place of business connection in India or non-resident has rendered services in India. The AO by referring to Circular No. 7 of 2009 dated 20.10.2009 disallowed the commission payment paid to non-resident, since no tax was deducted on it.

6. On appeal, the Ld. CIT(A) deleted the addition by relying on the decision of this Tribunal in assessee's own case for earlier years (supra). We note that there is no dispute that the services for which commission has given by assessee were rendered by non-resident agents outside India [i.e. for procuring export orders from customer outside India]. The payment to such non-resident agents are made outside India on account of sale percentage and that the non-resident does not have any geographical or Permanent Establishment in India. It is noted that Tax Treaty exists with the country of residents of non-resident, i.e, residents of non-resident, residents of Italy, France, Greece & Lebanon. The Ld. AR has drawn our attention to the order of this Tribunal in assessee's own case for AY. 2010-11 and AY. 2012-13 and brought to our notice that in those years, the Ld. CIT(A) had examined the agreements with the non-resident agents which disclosed that the foreign agents procured export order from foreign customers based on the

price agreed by the assessee; and based on the export orders procured by the Agents, assessee fixed percentage of commission to the agent at the FOB value of the invoice and foreign currency after the fully payment has been received from the foreign customers. Thus, from the term of agreement, it was noted that nature of services rendered by non-residents agent was for procuring export order of products of assessee and the payments made by assessee to them are in the nature of commission which was specifically mentioned in the agreement. In the light of the aforesaid facts/agreement between assessee and foreign agents for earlier years i.e. AY. 2010-11 & AY. 2011-12 in assessee's own case, on this issue Tribunal upheld the action of Ld. CIT(A) by holding as under: -

“8. We have considered the submission of both the parties and have gone through the orders of authorities below. There is no dispute that the assessee appointed commission agent outside India. The Assessing Officer failed to bring any material on record to show that the services provider has any business place in India or the services were not rendered outside India by those commission agents. The Hon'ble Bombay High Court in CIT vs. Gujarat Reclaim and Rubber Products Ltd. (supra) held that commission earned by non-resident agent who carried on the business of selling Indian goods outside India cannot be said to have deemed to be income which has accrued or arise in India. The Hon'ble jurisdictional High Court followed the decision of Hon'ble Supreme Court in CIT vs. Toshoku Ltd. (158 ITR 525) on identical facts held that commission earned by non-resident who carried business of selling Indian goods outside India cannot be said to have deemed income which has accrued or arising in India. Considering the fact and the legal position as discussed above, we affirm the order of ld. CIT(A). Non contrary facts or law is brought to our notice to take other view.

9. In the result, appeal of Revenue for Assessment Year 2010-11 is dismissed.”

7. Since the Ld. DR could not point out any change in facts or law, we relying on the decision of the Hon'ble Bombay High Court in the case of Gujarat Reclaim and Rubber Products Ltd (ITA. No. 2116 of 2013 & 169 of 2014 dated 08.12.2015) and the Hon'ble Supreme Court decision in the case of CIT Vs. Toshoku Ltd (158 ITR 525) uphold the impugned action of the Ld. CIT(A). It was also

brought to our notice that the AO for AY. 2020-21 taking note of the fact that since department has not filed any appeal before the Hon'ble High Court u/s 260A of the Act against the order of this Tribunal in assessee's own case for earlier years (supra) has allowed the commission payment made to foreign agents without deducting TDS by assessment order dated 19.09.2022 passed u/s 143(3) r.w. section 144B of the Act. Therefore, the revenue appeal stands dismissed."

15. We find that even the ld. CIT (A) has followed the decision of the Tribunal in assessee's own case. Thus, in view of the earlier precedents, in the case of the assessee by the Tribunal wherein the Tribunal has relied upon the decision of the Hon'ble Bombay High Court in the case of Gujarat Reclaim and Rubber Products Ltd and other decisions of the Hon'ble High Court including the decision of the Hon'ble Supreme Court in the case of GE India Technology Cen. P. Ltd. vs CIT reported in 327 ITR 456, we don't find any infirmity in the said order and the same is confirmed.

16. In the result, appeal of the Revenue is dismissed and appeals of the assessee are allowed.

Order pronounced on 21st May, 2024.

Sd/-
(RENU JAUHRI)
ACCOUNTANT MEMBER

Mumbai; Dated 21/05/2024
KARUNA, sr.ps

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai