IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A' : NEW DELHI

BEFORE SHRI G.D. AGRAWAL, VICE PRESIDENT AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA Nos.973/Del/2010, 2382/Del/2013, 3506/Del/2010 & 5375/Del/2013,
Assessment Years : 2006-07 & 2007-08

M/s Botil Oil Tools India Pvt.Ltd., 4th Floor, Monta Building, 4, Bhikaji Cama Place, New Delhi – 110 066. PAN : AAACB0222G.	Vs.	Assistant Commissioner of Income Tax, Circle-3(1), New Delhi.
(Appellant)		(Respondent)

Appellant by : Shri Anil Bhalla, CA.
Respondent by : Shri Sarabjeet Singh, DR.

Date of hearing : 03.05.2016
Date of pronouncement : 10.05.2016

ORDER

PER G.D. AGRAWAL, VP :-

ITA No.973/Del/2010 – Assessee's appeal for AY 2006-07 :-

This appeal by the assessee for the assessment year 2006-07 is directed against the order of learned CIT(A)-VI, New Delhi dated 10th December, 2009.

2. The first ground of the assessee's appeal reads as under:-

> *"The learned Commissioner of Income Tax (Appeals) has erred both on facts and in law in confirming the order of the learned Assessing Officer regarding disallowance of commission and ex-gratia amounting to Rs.49,16,075/- paid to the Directors of the appellant company as part of their remuneration in terms of Section 309 r.w.s. 198, 349, 350 and Schedule XII of the Companies Act, 1956 claimed u/s 37(1) of the Act, by wrongly invoking the provisions of Section 36(1)(ii) of the Income Tax Act, 1961."*

3. We have heard the arguments of both the sides and have perused the material placed before us. We find this issue to be squarely covered in favour of the assessee by the decision of ITAT in assessee's own case for assessment year 2004-05 & 2005-06 vide ITA No.3821/Del/2008 & 2281/Del/2009. The ITAT deleted the disallowance with the following finding:-

> *"7. On a careful consideration of the facts and circumstances of the case and perusal of the papers on record and the orders of the authorities below as well as case laws cited, we hold as follows.*
>
> *8. As per the proposition laid down by the Jurisdictional High Court, in the case of Metaplast P. Ltd. Vs. DCIT 341 ITR 563 (Delhi), Section 36(1)(ii) is not attracted if the payment of commission is part of salary paid by the company in terms of the appointment order, which is approved at the Annual General Meeting.*
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> *9. In the case of one hand, the commission in question is paid as per the terms of appointment and has been approved at the Annual General Meeting of the company held on 15.09.2004. The Annual General Meeting approved the remuneration package of (1) Mr. H.L. Khushalani (2) Mr. Vivek Khushalani and (3) Mrs. Raksha Walia w.e.f. 01.04.2004.*
>
> *10. The approval was granted in accordance with the provisions of Sections 198, 269, 309, 310 and Schedule XIII of the Companies Act 1956.*
>
> *11. Perusal of the resolution demonstrate that the commission in question is nothing but another form of salary which is paid for service rendered. Thus, the order of the ld.CIT(A) has to be upheld.*
>
> *12. The issue is also covered in the decision of the jurisdictional High Court in the case of CIT-1 Vs. Convertech Equipments Pvt.Ltd. – 2012-TIOL-1002-HC-DEL-IT where it is held as follows :-*
>
> *"Moreover, a Division Bench of this Court in Metaplast Pvt.Ltd. v. DCIT, (2012) 341 ITR 563, after referred to the judgment of the Bombay High Court in Loyal Motors Services Company Ltd. v. CIT, (1946) 14 ITR 647 opined that the commission, if found to be paid for services*

rendered by the director as per the terms of the appointment, cannot be said to be distribution of dividend or profits in the guise of commission. It was noticed while commission was paid as a form of remuneration for actual services rendered, dividend is a return of investment and is paid to all its shareholders equally. It was thus held that if the commission is paid for actual services rendered, section 36(1)(ii) will not apply."

13. The ld. Departmental Representative relied on the decision of the Special Bench of the Tribunal in the case of M/s Dalal Broacha Stock Broking Pvt.Ltd. in ITA No.5792/Mum/2009 order dated 22.06.2011.

14. As we have applied the binding decision of the jurisdictional High Court to the facts of the case, we need not consider the decision of the Mumbai Special Bench on the issue.

15. Other objection raised by the ld.D.R. is that Board resolution was not available for the A.Y. 2005-06. Copy of the resolution is produced before us. Hence, this objection is not sustainable.

16. The issues are the same for both the assessment years and hence we uphold the order of the ld.CIT(A) for both the assessment year."

4. Thus, the ITAT has recorded the finding that the remuneration was paid to the directors as approved at the annual general meeting of the company. They have also relied upon the decision of Hon'ble Jurisdictional High Court in the case of Convertech Equipments Pvt.Ltd. (supra). Admittedly, the facts of the year under appeal are identical. In view of the above, we, respectfully following the above decision of ITAT in assessee's own case, hold that the disallowance of remuneration paid to the directors u/s 36(1)(ii) was not justified. The same is deleted.

5. Ground No.2 of the assessee's appeal reads as under:-

"The learned Commissioner of Income Tax (Appeals) has erred both on facts and in law in confirming the action of the learned Assessing Officer in disallowing 25% of royalty

paid allegedly on the ground that the same constitutes benefit of enduring nature and therefore is capital expenditure."

6. At the time of hearing before us, it is submitted by the learned counsel that the assessee company is engaged in the business of manufacturing oil field drilling and production equipment. The assessee has entered into an agreement with M/s Chancellor Oil Took, Inc. for use of technical knowhow. That for use of such technical knowhow, the assessee made a lump sum payment of US$60,000 and also the royalty at the rate of 5% per annum of the net ex-factory sale price of the product. That the lump sum payment of US$60,000 was treated as capital expenditure by the assessee. But the recurring payment of royalty @ 5% of the sale price was claimed as revenue expenditure. That the payment was made for the use of technical knowhow and not for the acquisition of technical knowhow. It was a recurring payment which was to be made till the technical knowhow was to be used by the assessee. That there was no acquisition of any capital asset in the form of any technical knowhow. Therefore, the expenditure of royalty paid on year to year basis is rightly claimed as a revenue expenditure and the Assessing Officer was not justified in disallowing 25% of the royalty. In support of this contention, he relied upon the following decisions:-

(i) CIT Vs. J.K. Synthetics Limited – [2009] 309 ITR 371 (Delhi).
(ii) Climate Systems India Ltd. Vs. CIT – [2009] 319 ITR 113 (Delhi).
(iii) Alembic Chemical Works Co.Ltd. Vs. CIT, Gujarat – [1989] 177 ITR 377 (SC).

7. The learned counsel further submitted that the royalty is being paid by the assessee from assessment year 2004-05 onwards and, in the preceding two years, though the assessment was completed u/s 143(3), the payment of royalty was not disallowed. Thus, when in the initial years the payment of royalty is treated as revenue expenditure,

in the subsequent year, on identical facts, the Revenue cannot take a different view. In support of this contention, he relied upon the decision of Hon'ble Apex Court in the case of Radhasoami Satsang Vs. CIT – [1992] 193 ITR 321 (SC).

8. Learned DR, on the other hand, relied upon the orders of authorities below.

9. We have carefully considered the submissions of both the sides and have perused the material placed before us. Admittedly, the agreement between the assessee and M/s Chancellor Oil Took, Inc. was for use of technology by the assessee. The technology was not transferred to the assessee and the ownership of such technology remained with M/s Chancellor Oil Took, Inc. The assessee was required to make the payment on year to year basis as a percentage of the sale. The payment was to be made continuously for the period for which the technical knowhow was to be used by the assessee. On these facts, the decision of Hon'ble Jurisdictional High Court in the case of Climate Systems India Ltd. (supra) would be squarely applicable wherein the facts were as under:-

> *"The assessee-company engaged in the manufacture and sale of heat exchangers (radiators) entered into technical collaboration agreement with a US company to manufacture radiators with technology owned by the US company. Under the agreement, the assessee was permitted to use the technology for manufacture of upgraded radiators for which the assessee was to make a lump sum payment of US $ 1 million to the US company, which was capitalized in the assessee's books of account and a royalty of 3 per cent of domestic sales and 5 per cent of export sales to the US company for a period of 7 years for using the technology and for availing of technical services. During the previous year relevant to the assessment year 2002-03, the assessee paid to the foreign collaborators royalty calculated at 3 per cent of domestic sales and at 5 per cent of export sales and claimed deduction thereof as business expenditure. The Assessing Officer disallowed it as being of capital nature and this was*

confirmed by the Commissioner (Appeals) as did the Income-tax Appellate Tribunal on the grounds, inter alia, (a) that even after termination of the agreement the assessee could continue to use technical information in production of licensed products and hence the assessee obtained enduring benefit, and (b) that there was nothing to show that any specified interval and thus it was a case of outright transfer of technical know-how."

10. On these facts, their Lordships held as under:-

"Held, allowing the appeal, that under the agreement, payments were to be made by the assessee in two parts : a lump sum fee for transfer of technology (which the assessee had admitted as being of capital nature) and royalty payment in consideration of providing technology services. The payment of royalty depended on the quantum of domestic as well as export sales which would decrease or increase every year depending upon the decrease or increase in the sales. This payment was not because of "transfer" of technology, but for providing "technical services". In such circumstance, the payment of royalty, which was a continuous process, should have been treated as revenue expenditure."

11. The decision of Hon'ble Apex Court in the case of Alembic Chemical Works Co.Ltd. (supra) relied upon by the learned counsel also supports the case of the assessee. Respectfully following the same, we direct that the royalty should be treated as a revenue expenditure and, accordingly, we delete the disallowance made by the Assessing Officer by capitalizing 25% of the royalty expenditure.

ITA No.3506/Del/2010 – Assessee's appeal for AY 2007-08 :-

12. In this year, two grounds have been raised by the assessee and both are identical to the grounds raised by the assessee in assessment year 2006-07. For the detailed discussion while deciding the grounds raised by the assessee in assessment year 2006-07 as above, we allow both the grounds of the assessee's appeal for assessment year 2007-08 and delete the disallowance made by the Assessing Officer out of commission paid to the directors as well as royalty expenditure.

ITA Nos.2386/Del/2013 & 973/Del/2010 – Assessee's appeal for AY 2006-07 & 2007-08 :-

13. Both these appeals for assessment year 2006-07 and 2007-08 respectively are against the penalty levied u/s 271(1)(c) of the Income-tax Act, 1961. The Assessing Officer had levied the penalty u/s 271(1)(c) in respect of disallowance of commission paid to the directors as well as 25% capitalization of royalty expenses. Both these additions have been deleted by us while deciding the assessee's appeal in quantum. Since the addition itself has been deleted, the penalty based upon such addition cannot survive. The same is cancelled.

14. In the result, all the appeals of the assessee are allowed.

Decision pronounced in the open Court on 10.05.2016.

Sd/-	Sd/-
(SUDHANSHU SRIVASTAVA) JUDICIAL MEMBER	(G.D. AGRAWAL) VICE PRESIDENT

VK.

Copy forwarded to: -

1. Appellant : M/s Botil Oil Tools India Pvt.Ltd.,
   4th Floor, Monta Building,
   4, Bhikaji Cama Place, New Delhi – 110 066.
2. Respondent : Assistant Commissioner of Income Tax,
   Circle-3(1), New Delhi.
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar