

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B' NEW DELHI**

**ITA No. 3794/Del./2008
Assessment Year : 2005-06**

**M/s ESCORTS HEART INSTITUTE & RESEARCH CENTRE LTD
OKHLA ROAD, NEW DELHI**

Vs

**ASSTT COMMISSIONER OF INCOME TAX
CENTRAL CIRCLE-3, NEW DELHI**

**ITA No. 37/Del./2009
Assessment Year : 2005-06**

**DY COMMISSIONER OF INCOME TAX
CENTRAL CIRCLE-3, NEW DELHI**

**M/s ESCORTS HEARTS INSTITUTE & RESEARCH CENTRE LTD
OKHLA ROAD, NEW DELHI**

Deepak R Shah, AM and George Mathan, JM

Dated : October 9, 2009

Appellant Rep by: Shri R K Kapoor, CA

Respondent Rep by: Shri Stephen George, CIT, DR

Income tax - Sec 37(1) - Assessee is a hospital - pays heavy premium for keyman insurance policies taken in the name of a super specialist doctor, the MD and the CMD - claims deduction - AO holds since the benefits were given to individuals, and the expenses were incurred by the assessee not for wholly and exclusively for the purpose of business and the fact that no perquisites were shown in the hands of the beneficiaries, it is not allowable deduction - CIT(A) grants part relief - held, merely because the assessee is a specialised hospital, only doctors can run the show successfully. What is also required to run the business successfully is business acumen which come from the top functionaries of the organisation. Profit in any business is a time-tested guiding factor and any dip in it clearly shows its relationship with the persons insured by the assessee - the premium paid for their insurance policies cannot be disallowed - Assessee's appeal allowed

ORDER

Per : Deepak R Shah :

These cross appeals by the assessee and by the revenue are directed against the order of the learned Commissioner of Income-tax (Appeals)-II, New Delhi, dated 31.10.2008, in an appeal against assessment framed under section 143(3) of the Income-tax Act, 1961 (the Act).

2. The Assessing Officer disallowed a sum of Rs.6,12,55,548/- being a premium paid on Keyman Insurance Policies taken in the names of Dr. Naresh Trehan, Chief Cardiac Surgeon, Shri Rajan Nanda, Chairman and Smt. Ritu Nanda, Managing Director of the assessee's company.

3. The assessee is running a hospital particularly for cardiology and cardio vascular diseases. The assessee filed return declaring an income of Rs.19.94 crore. The Assessing Officer noted the premium paid in respect of above referred 3 persons. The Assessing Officer held that in the preceding year as also in this year new policies were taken in their names. The policies have been assigned in their names at a value much less than the amount paid by the assessee in the very next year of taking the policies. The benefit is given to these persons. Therefore, it could not be said that these expenses were incurred wholly and exclusively for the purpose of business. No perquisites were shown in the hands of these 3 persons. The assessee submitted that similar disallowance in earlier year has been allowed by the learned CIT(A). The Assessing Officer held at the order of the learned CIT(A) on this issue was not accepted and an appeal has been filed before the Tribunal. He accordingly in view of the order for earlier years, disallowed the insurance premium on keyman insurance policies taken on the lives of above three persons.

4. Before the learned CIT(A) the assessee submitted that for Assessment Years 2003-04 and 2004-05 against the disallowance made by the Assessing Officer, the learned CIT(A) has deleted the disallowance and the order of the learned CIT(A) has been upheld by the Tribunal also. These 3 persons played crucial role in the business of the assessee and hence to protect the business of the assessee keyman insurance policies were taken and the premiums paid therein in respect thereof are allowable as such.

5. The learned CIT(A) held that Dr. Naresh Trehan, the Chief Surgeon in Cardiology is a key person and hence premium paid in respect of his policy is allowable expenditure. Though the Tribunal has upheld the deletion of disallowance in earlier years, he held that the disallowance was deleted on the ground that profits were drastically reduced consequent to departure of these persons. The learned CIT(A) held that when the assessee is engaged in providing healthcare services in the field of cardiology, Dr. Trehan can be considered as key person. However, the same cannot be said about Shri Rajan Nanda and Smt. Ritu Nanda. He held that they do not have any expertise in the Medical field much less super specialization in heart care. Their departure from company has not affected the professional receipts to any extent The professional receipts in the current year were Rs.226.50 crore as against Rs.188.85 crore in the immediately preceding year. In the subsequent year i.e. in the financial year 2005-06 the receipts are more than Rs. 233.01 crore despite the chairman and managing director Leaving the company. This upward trend continued. Thus there is no diminishing effect on business at all. The reputation of the hospital is built by hard and sincere work rendered by eminent doctors but not out of any business acumen or administrative capability. Premium on keyman insurance is allowed provided the same is taken for a person on whom the entire business of the assessee rests. The intention of legislature is to allow the assessee to compensate the sudden and unforeseen loss to the business due to unforeseen eventualities happening to a person on whom the business of the assessee is solely dependent. In the present case the Chairman and Managing Director have no telling effect on the business despite their leaving the organization. The business has not shown any adverse changes in the subsequent years. For this the profit cannot be taken as guiding factor, but the turnover should be taken as one which reflects the soundness of the assessee's business. Thus the premium on insurance policies taken of Chairman and Managing Director could not be considered as genuine expenditure incurred in the course of carrying on professional activities by the assessee. The claim is made purely to pass on the benefit to the related persons but not out of any commercial expediency. Thus proper facts were not placed before the Tribunal in earlier years and hence in view of these new facts, the claim of assessee in respect of chairman and managing directors is not allowable. He accordingly allowed the claim of Rs. 2,94,64,284/- and disallowed the balance claim of Rs.3,17,91,264/-. The assessee as well as revenue are in further appeal before us.

6. The learned counsel for the assessee Shri R.K. Kapoor submitted that a keyman is always a keyman and the Chairman and Managing Director are equally responsible for the functioning of the company. Though the assessee is super specialty hospital only doctors are not sufficient to run such hospital but it equally requires business acumen and businessman like approach while conducting business. In all the earlier years the claim of the assessee was held allowable whether the policy is in the name of Dr. Trehan or in the case of Shri Rajan Nanda and Smt. Ritu Nanda. No policies are taken during the year. All the policies were taken in the earlier financial year i.e. F.Y. 2002-03 and 2003-04. When the annual premium is payable and when the same was held allowable in earlier year also, there is no reason to disallow the same. Who are the key persons is to be decided by the company or the assessee and not by the Assessing Officer. The learned CIT(A) was wrong in concluding that while considering the adverse changes in business in subsequent year the profit is not a guiding factor but turnover is the only guiding factor. The turnover alone cannot work unless such turnover is likely to result in some profit. Turnover howsoever high, if the same is only a loss making proposal, it will always lack business acumen. In the financial year 2005-06 relevant to Assessment Year 2006-07, when the chairman and managing director resigned from the respective post, though the turnover slightly increased from Rs-226.50 crores to Rs.233.01 crore, the profit before tax reduced from Rs.21.47 crore to Rs.11.51 crore. Even during the financial year 2006-07 when the turnover increased to Rs.246.17 crore, the profit before tax was only Rs.16.39 crore and owing financial year 2007-08 it resulted into loss of Rs.28.56 crore. The CBDT in its Circular have opined that when sum received on redemption of keyman insurance policy is taxable or when the sum is received by the insured person as taxable, the surrendered value of the policy or the sum received is taxable but the premium paid is allowed as business expenditure. He accordingly pleaded that the claim is entirely allowable. Learned DR relied upon assessment order.

7. We have considered the rival submissions. The Tribunal while upholding the deletion of disallowance for Assessment Years 2003-04 and 2004-05. held as under:-

"3. Brief facts are that the assessee is a reputed heart care institute and consisted on its panel of directors consisted of eminent persons like Mr. Rajan Nanda, Mrs. Ritu Nanda and Dr. Naresh Trehan. In order to cover risk, assessee purchased keyman insurance policies on these persons and paid premiums thereon. The AO made queries in respect of payment of keyman insurance premium, assessee relied on Board's Circular no. 762 dated 18-2-1998 and further explained about the importance of these keypersons for the institution. AO, however, disallowed the expenses incurred on these keyman policies.

4. Aggrieved assessee preferred first appeal and represented before CIT(A) as under.

"In this respect it is submitted that the Assessing Officer has examined the issue in detail as many be seen from the discussion in the assessment order. It has been found that the assessee society has taken keyman insurance policies in the name of Dr. Naresh Trehan and Sh. Rajan Nanda every year and these policies huge premiums were paid by the assessee and assigned the same to the beneficiaries in the very next year for a very nominal consideration. This pattern has been followed over a number of years. After detailed examination and analysis of the facts of the case, It was discovered that these policies were not taken for wholly and exclusively for business of the assessee society but with a view to benefiting these two beneficiaries. This is also the spirit of the Circular relied upon by the assessee. The circular of the CBDT clearly spells out that the assessee must establish that the keyman insurance policies were out of business consideration. In this case the assessee has failed to establish that the expenses on key man insurance policies were for business consideration not for the purpose of benefiting

these two persons. In view of this, the addition made on this point is justified and may be confirmed."

4.1. CIT(A) held that the Board's circular was applicable and premium constituted business expenditure. Assessee had paid tax on the surrender value of keyman policies as its income when received. CIT(A) allowed the premium paid on these keyman policies as deduction. Aggrieved, the revenue is in appeal.

5. Learned DR relied on the order of AO and justified that the premium paid was to personally benefit the so called keyman (persons) and was not an allowable business expenditure.

6. Ld. counsel for the assessee on the other hand relied on successive orders of ITAT in assessee's own case for A.Y. 1991-92, 1992-93, 1993-94 and 1997-98 where keyman insurance premium on the policies of such persons were held as allowable. The quotation from Tribunal's order dated 29-5-2001 for A.Y. 1991-92 and 1992-93 reads as under.

"4.4. In both the years, following the finding given in the assessments for the earlier years, the AO had disallowed the insurance premium paid by the assessee company for the personal insurance policies of its Vice Chairman. Following an earlier order, the Id. CIT(A) has deleted the addition. The issue is covered in favour of the assessee by the earlier orders of the Tribunal which have been followed by it in its order for the asst. year 1985-86. The orders of the Id. CIT(A) on this issue are, therefore, affirmed."

7. It was further contended that the consideration of these persons by assessee as keyman is substantiated by the fact that when these persons left the assessee organization, its profits have drastically reduced. Besides, the benefit derived by these persons have been treated as perquisite in respective assessments.

8. We have carefully considered the entire material on record and the rival submissions. Looking at the circumstances it appears that these persons were very important in the assessee organization and when they left their assignments, its profits were drastically reduced. Taking into consideration all the facts and circumstances, respectfully following the Tribunal's order in assessee's own case for earlier years, we hold that CIT(A) has rightly allowed premium on keyman insurance policies. Accordingly, order of CIT(A) on the issue in question for both the years under consideration is upheld."

7.1 From the above, it is clear that all along the premium paid of keyman insurance policy taken on the lives of Dr. Naresh Trehan, Shri Rajan Nanda and Smt Ritu Nanda is always held to be allowable. As rightly contended by the learned AR, while judging the health of any company, it is not only the turnover that is relevant but also its profitability. Merely by achieving higher turnover, one does not gain anything unless the same is to result in profits. A surgeon is good at conducting operation or surgery but may not be competent to run the hospital as a businessman approach will always be lacking in a professional. In such a situation, only a sound businessman can make the organization profitable. Therefore, it is incorrect on part of the learned CIT(A) to hold that such persons cannot be considered to be keyman. The assessee's activity cannot be said to be solely depending on specialized services by doctors and there is no contribution by the chairman and managing director in the profitability. The learned CIT(A) was also wrong in concluding that "profits cannot be taken as guiding factor to analyze the business". The business is always earned on for the purpose of earning income and if profit is not the guiding factor, what else can be a guiding factor as to whether business is well run or not. If a person is always to incur loss even though it may result into achieving higher turnover, the same will never be carried on for long and no one can incur losses for ever and there cannot be an intention for carrying on such business also. Thus the Learned CIT(A) was wrongly guided by the

turnover figure only and not by profit figure. The profitability for subsequent year has shown that when these persons left, the assessee reduced its earning capacity and ended in loss in financial year 2007-08. There is no dispute to the fact that salaries paid to these persons were always held to be allowable. This could not have been allowed unless it is found that they are also equally involved in carrying on the business of the assessee. In such a situation, all the 3 persons can be considered as key persons and insurance premium paid on the keyman insurance policy taken on their lives qualifies for deduction under section 37(1) of the Act.

8. Ground No.3 in appeal by the assessee is against confirming disallowance of Rs.1,77,028/- out of software development expenses. We find that these are not the acquisition of any new software but consultancy charges for software maintenance. Therefore, since no new software was brought in, the expenses are allowable as revenue expenditure.

9. In the result, the appeal of the assessee is allowed and that of the revenue is dismissed.

(Pronounced in the open court on 9.10.2008.)