IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH 'B' DELHI

ITA No.84(Del)2011
Assessment Year: 2007-08

DEPUTY COMMISSIONER OF INCOME TAX
CIRCLE-3(1), NEW DELHI

Vs

M/s CTI SHIPBROKERS INDIA PVT LTD
ENKAY CENTRE, UDYOG VIHAR, GURGAON

A D Jain, JM and Shamim Yahya, AM

Dated: July 14, 2011

Appellant Rep by: Shri Krishna, CIT/DR
Respondents Rep by: Shri Pradeep Dinodia & R K Kapoor,CA

Income Tax - Section 36(1)(ii) - Whether the remuneration paid to the director as salary for services rendered, including bonus and commission are not allowable under the provisions of section 36(1)(ii).

The AO made addition of Rs. 2,07,69,150/- on account of commission and ex-gratia (bonus) paid by the assessee to its Director. The AO noted that the assessee company had shown profit of Rs. 1,88,19,027/- and in the case of Directors, the sum paid as commission and ex-gratia could have been paid as profit, or dividend which had not been done; and that the amount was not allowable under the provisions of section 36(1)(ii) The l CIT(A) deleted the addition. Second Ground -the AO made addition of Rs. 12,00,000/- on account of disallowance of insurance premium due observing that the payment of premium pertained to A.Y 2008-09 and not A.Y 2007-08.The CIT(A) deleted the disallowance.

On Appeal before the Tribunal DR contended that the CIT(A) has erred in deleting the addition correctly made, ignoring the provisions of section 36(1)(ii) which are clearly applicable in the present case. The assessee Counsel contending that the Director was the head of operations of the company, and was earning an annual remuneration of about Rs. 1.5 crores; that over a period of 20 years, he had acquired sufficient knowledge and experience in the business of Ship Brokers; that the remuneration paid to him was salary for services rendered, including bonus and commission.

On appeal, the Tribunal held that,

++ in the present case, as therein, no material or evidence has been brought by the AO to the effect that the commission would have been paid as dividend to the shareholders. It is the Companies Act, 1956, which governs the payment of dividend, containing the limitation and restrictions with regard thereto. The AO cannot user the discretion of the company regarding payment or otherwise of dividend. There is no warrant for the AO to presumption that had the commission being not paid, it would necessarily have been paid as dividend to the shareholders. As such, there is no applicability of section 36(1)(ii) . Further, even the

Department recognizes that the fact of payment alone is essential and the excessiveness thereof can be gone into only under the provisions of section 40A(2). Herein, the AO has not invoked the provisions of section 40A(2) of the Act. The commission paid to the Director was undoubtedly part of his remuneration. Ground 1 rejected;

++ on the Second issue - the period of policy was from 1.4.06 to 31.3.07. The CIT(A) has correctly observed that the amount became due in the year under reference. The said amount was undoubtedly due and asserted. It was on considering these circumstances that the CIT(A) deleted the disallowance.

Revenue's appeal dismissed

ORDER

Per: A D Jain:

This is Department's appeal for the assessment year 2007-08, taking the following grounds:-

"1. In the facts and circumstances of the case, the ld. CIT(A) has erred in law and on facts in deleting addition of Rs. 2,07,69,150/- on account of commission and ex-gratia(bonus) paid to the Director of the company ignoring that provisions of section 36(1)(ii) of the I.T. Act are clearly applicable in this case.

2. In the facts and circumstances of the case, the ld. CIT(A) has erred in law and on facts in deleting addition of Rs. 12,00,000/- on account of disallowance of insurance premium due to Aviva Life Insurance Company ignoring that the deduction is admissible only if the amount of premium is deposited in the previous year which is not the case here.

3. In the facts and circumstances of the case, the ld. CIT(A) has erred in law and on facts in deleting addition of Rs. 16,245/- on account of disallowance of extra depreciation on computer peripherals/accessories ignoring that as per the IT Rules 60% depreciation is allowable only on computer and computer software and not on computer peripherals and accessories."

2. Apropos ground No.1, the AO made addition of Rs. 2,07,69,150/- on account of commission and ex-gratia (bonus) paid by the assessee company to its Director, Shri J.S. Kapur. The assessee had paid total commission of Rs. 19,44,000/- and ex-gratia (bonus) of Rs. 1,88,25,250/- to its Director, Shri J.S. Kapur. The AO noted that the assessee company had shown profit of Rs. 1,88,19,027/- and in the case of Directors, the sum paid as commission and ex-gratia could have been paid as profit, or dividend which had not been done; and that the amount was not allowable under the provisions of section 36(1)(ii) of the I.T. Act.

3. The learned CIT(A) deleted the addition. This has led to ground No.1 being raised before us.

4. The learned DR has contended that the learned CIT(A) has erred in deleting the addition correctly made, ignoring the provisions of section 36(1)(ii) of the Act, which are clearly applicable in the present case.

5. The learned counsel for the assessee has strongly supported the impugned order, contending that Shri J.S. Kapur was the head of operations of the company, Ship Brokers PTE Ltd., Singapore and was earning an annual remuneration of about Rs. 1.5 crores; that over a period of 20 years, he had acquired sufficient knowledge and experience in the business of Ship Brokers; that later, he had started his own company, i.e., the assessee company, as a joint venture with Island Shipbrokers Pte Ltd., Singapore and Capital Shipbrokers Ltd., London; that he was made the Managing Director of the company; that he had 10% share-holding and was to receive Rs. 20,76,925/- as dividend; that as a shareholder employee, he had no vested right to receive dividend unless and until it came from the company; that the remuneration paid to him was salary for services rendered, including bonus and commission; that the commission of Rs. 19,44,000/- pertained to house rent allowance @ Rs. 1,62,000/- per month, forming part of his salary; that the bonus was determined by the other venture programes control 90% holding, on his performance; that the payment of remuneration of Rs. 2.47 crores, including bonus and commission was justifiable, even as per the provisions of section 40A(2) of the I.T. Act; that as such, the disallowance had been incorrectly made; that the ld. CIT(A) has correctly deleted it; and that as such, there being no force therein, the grievance of the Department in this regard be rejected.

6. It is seen that undisputedly, Shri J.S. Kapur held only 10% of the shares of the company. As such, he was a minority shareholder therein. Moreover, dividend of Rs. 1.73 crores had been separately made to him and the payment of commission and ex-gratia (bonus) was not at all connected therewith. The payments made to him were duly approved by the Board of Directors of the company as per the Companies Act. As correctly noted by the ld. CIT(A), in *"ACIT v. Bony Polymers P. Ltd.", 36 SOT 456 (Del)*, it was held, inter alia, that commission will not be allowed as a deduction u/s 36(1)(ii) of the Act if, had it not been so paid, it would be paid profits or dividend; and that this is what is provided u/s 36(1)(ii) of the Act. In the present case, as therein, no material or evidence has been brought by the AO to the effect that the commission would have been paid as dividend to the shareholders. It is the Companies Act, 1956, which governs the payment of dividend, containing the limitation and restrictions with regard thereto. The AO cannot user the discretion of the company regarding payment or otherwise of dividend. There is no warrant for the AO to presumption that had the commission being not paid, it would necessarily have been paid as dividend to the shareholders. As such, there is no applicability of section 36(1)(ii) of the Act, as held in "Bony Polymers P. Ltd." (supra). Further, even the Department recognizes that the fact of payment alone is essential and the excessiveness thereof can be gone into only under the provisions of section 40A(2) of the Act. Herein, the AO has not invoked the provisions of section 40A(2) of the Act. The commission paid to the Director was undoubtedly part of his remuneration, as held in *"Gestetner Duplicators Pvt. Ltd. v. CIT", 117 ITR 1(SC)*, which has been relied on in "Bony Polymers P. Ltd." (supra).

7. Therefore, ground No.1 is found to be without merit and is rejected as such.

8. Coming to ground No.2, the AO made addition of Rs. 12,00,000/- on account of disallowance of insurance premium due to Aviva Life Insurance Co., observing that the date of filing of the premium pertained to assessment year 2008-09; that the assessee had paid premium of Rs. 12,00,000/- to Aviva Life Insurance Co. on 9.4.2007; that the period of the assessment year 2007- 08 was from 1.4.06 to 31.3.07, whereas the date on which the premium was paid, pertained to assessment year 2008-09; and that therefore, the payment of premium pertained to assessment year 2008-09 and not assessment year 2007-08.

9. The learned CIT(A) deleted the disallowance.

10. The ld. DR has contended that while wrongly deleting the disallowance of the insurance premium due to Aviva Life Insurance Co., the ld. CIT(A) has ignored in considering the fact that the deduction is admissible only if the amount of premium was deposited in the previous year; and that in the present case, the deposit has undeniably been made in assessment year 2008-09 and not in assessment year 2007-08.

11. The learned counsel for the assessee, on the other hand, has contended that the policy with Aviva Life Insurance Co. had taken on 31.3.2005; that there-under, the assessee had to pay annual premium of Rs. 12,00,000/-; that the premium was due on 31st March each year and was payable within 30 days from the due date; that the claim of the payment of premium in question was made as having become due on 31.3.07; that the payment was accordingly made within the grace period, i.e., 9.4.07.

12. In this regard, the period of policy was from 1.4.06 to 31.3.07. The ld. CIT(A) has correctly observed that the amount became due in the year under reference. The said amount was undoubtedly due and asserted. It was on considering these circumstances that the ld. CIT(A) correctly deleted the disallowance.

13. Therefore, ground No.2 is rejected.

14. Concerning ground No.3, the assessee claimed depreciation @ 60% on computer accessories and peripherals. The AO, however, observed that only computers and computer software are eligible for depreciation @ 60% and that the said period cannot be extended to computer accessories and peripherals. The AO, as such, restricted depreciation on such items @ 15%. The disallowance of Rs. 16,245/- was thus made.

15. The ld. CIT(A) allowed the assessee's claim, following the decision dated 31.8.2010, rendered by the Hon'ble Delhi High Court in ITA No. 1266/2010, in the case of *"CIT v. BSES Rajdhani Powers Ltd.",* ***2010-TIOL- 636-HC-DEL-IT.***

16. The ld. DR has, in this concern, relied on the assessment order, whereas the learned counsel for the assessee goes by the impugned order.

17. In "BSES Rajdhani Powers Ltd."(supra), it has been held, agreeing with the view taken by the Tribunal, that computer accessories and peripherals form an integral part of the computer system; that in fact, computer accessories and peripherals cannot be used without a computer; and that as such, they are part of the computer system, entitled to depreciation at the higher rate of 60%.

18. No decision contrary to "BSES Rajdhani Powers Ltd."(supra), rendered by the Hon'ble jurisdictional High Court, has been cited before us. As such, the ld. CIT(A) cannot be said to be at fault in "BSES Rajdhani Powers Ltd."(supra).

19. That being so, ground No.3 is rejected.

20. In the result, the appeal filed by the Department is dismissed.

(Order pronounced in the open court on 14.7.2011.)