

IN THE INCOME TAX APPELLATE TRIBUNAL  
(DELHI BENCH 'C' NEW DELHI)

BEFORE SHRI R.P. TOLANI, JUDICIAL MEMBER  
AND  
SHRI T.S. KAPOOR, ACCOUNTANT MEMBER

I.T.A. No.1296,1297 & 1298 /Del/2012  
Assessment year : 2006-07, 2007-08 & 2008-09

M/s G.B. Morrison Travels  
Pvt. Ltd., 10-Community Centre,  
1st Floor, Zamrudpur,  
New Delhi.

DCIT,  
Circle-12 (1),  
New Delhi.

V.

(Appellant)

(Respondent)

**PAN /GIR/No.AAACG-0264-D**

Appellant by : Shri Gopal Nathani, C.A.

Respondent by : Smt. Anusha Khurana, Sr. DR.

ORDER

PER TS KAPOOR, AM:

These are three appeals filed by the assessee against three separate orders of Ld CIT(A) dated 7..2.2011, 1.12.2011 and 5.3.2012 for assessment year 2006-07, 2007-08 & 2008-09 respectively. The grounds raised by the assessee for assessment year 2006-07 are as under:-

1. That the CIT(A) -XV, New Delhi has grossly erred on facts and in circumstances of the case and in law in holding the bonus and commission payment of ₹.5,17,644/- to the Managing Director as payment in lieu of dividend without appreciating that such

payment is for services rendered as per terms of appointment as Executive/Managing Director of the appellant company.

2. That the appellant reserves the right to add, alter or amend any other ground at the time of hearing.

2. The grounds for the assessment year 2007-08 and 2008-09 are same except the change in figure which is ₹.7,40,726/- for assessment year 2007-08 and ₹.9,03,052/- for assessment year 2008-09. These appeals were heard together. They are being disposed off through a consolidated order.

3. The brief facts of the case are that the appellant is a private limited company carrying on business of traveling agent, tour operator and money changing. The books of accounts of the assessee are being audited u/s 44AB of the Income Tax Act, 1961. For assessment year 2006-07, the assessee had claimed a sum of ₹.5,11,644/- as an expense on account of bonus and commission paid to Managing Director of the company. The Assessing Officer during assessment proceedings vide order sheet entry dated 20.8.2008 asked to the assessee to explain how bonus and commission paid to Directors be allowed given the provisions of section 36(1)(ii). In response vide its reply submitted on 25.9.2007, the assessee submitted that the bonus and commission has been paid according to the resolution passed in the Meeting of the Board of Directors and enclosed a copy of such resolution and argued that the same was part of the salary and was not otherwise payable as profit or dividend. However, the Assessing Officer did not accept the submissions of assessee and added back the amount of bonus and commission of ₹.5,17,644/- on the basis that this is an amount which otherwise would have been payable to share holders as dividend and therefore he made addition under section

36(1)(ii) of the Income Tax Act, 1961 . The operative part of Assessing Officer's order is reproduced below:-

“The submission of the assessee have been duly considered and found unacceptable. From clause 16 of Form 3CD of the Audit Report itself it is very clear that the bonus and commission to the Managing Director is not allowable u/s 36(1)(ii) of the Income Tax Act, 1961 . Thus, bonus paid as commission to Director was otherwise payable to him as profit or dividend and was thus not allowable u/s 36(1)(ii) of the Income Tax Act, 1961 . The details filed by the assessee show that the bonus and commission has been paid to Shri Kapil Goswami, Managing Director who was having a shareholding of 17.5.% in the company.

The aforesaid details show that the bonus and commission have been paid to the director who was both an employee as well as a shareholder. Section 36(1)(ii) has been specially inserted to ensure that companies do not avoid tax by distributing their profits to their members/share holders as bonus or commission instead of dividend. In the instant case, it is clear that profit which would have been otherwise paid to the aforesaid Directors as dividend has been diverted in the form of bonus and commission. By diverting the bonus and commission to Director, the assessee has only reduced the corpus available for distribution as dividend. The commission has been worked out as a certain percentage of the profits and so it cannot be said to be a part of salary. Thus, it is clear that the bonus and commission paid to the Managing Director was otherwise payable to him as profit or dividend and this bonus and commission of ₹.5,17,644/- is not allowable as per the provisions of section 36(1)(ii) of the

Income Tax Act, 1961 . Therefore, the sum of ₹.5,17,644/- is disallowed and added to the income of the assessee.”

4. Aggrieved the assessee filed appeal before Ld CIT(A) and submitted the following submissions:-

1. That it had paid ₹.6,000/- towards bonus and ₹.5,11,644/- as commission to its Managing Director Shri Kapil Goswami and these expenses were debited to P&L A/c under the head managerial remuneration.
2. That the company had paid the above amount in terms of resolution passed in the Board Meeting.
3. That share holding of the Managing Director was only 17.5%.
4. That bonus and commission paid to Managing Director of the company are part of the salary as shown in form No.16 issued by the company to the Managing Director.
5. That section 36(1)(ii) does not mention about the disallowance of such payment to the Managing Director and moreover the Assessing Officer has not disputed the reasonableness and commercial expediency of such expenses.
6. The Ld Assessing Officer had disallowed the expenses on the basis of text of clause 16 of Form 3CD of audit report which according to Assessing Officer had stated that bonus and commission for Managing Director is not allowable u/s 36(1)(ii) of the Income Tax Act, 1961 . However, thus is not correct as against clause 16(a) of Form 3CD of Tax audit report, the auditor has clearly mentioned nil amount.
7. That Managing Director has rendered effective and efficient services to the company resulting in increase in net profit of the company and hence being business expenditure, the commission

expenses are allowable u/s 37 of the Income Tax Act, 1961 .  
Reliance was placed on the following judgments:-

1. 115 IR 149 in CIT v. Edward Keventer Private Ltd. (SC).
2. 86 ITR 370 CIT v. Edward Keventer Private Limited (Cal.).
3. 54 ITR 763 in Laxmandas Serjram v. CIT (Guj.).
4. 108 ITR 358 Shahzada Nand & sons v. CIT (SC).
5. 148 ITR 710 in Kashi Prasad Carpets Pvt. Ltd. v. CIT (Alld.).

5. The Ld CIT(A) after hearing the submissions of Ld AR did not agree with the contentions and upheld the order of Assessing Officer. The operative part of Ld CIT(A)'s order is reproduced below:-

“I have considered the findings of the Assessing Officer, submissions of the appellant and facts on record. It is seen that the Managing Director is having share holding 17.50% in the company and so was eligible for substantial profit/dividend from the company. The appellant has also not been able to bring any facts on record regarding the reasonableness of the payments made on account of bonus and commission to the Managing Director. No commercial expediency for the above payments has also been brought on record. Moreover, this ground of appeal on similar facts has been decided by me against the appellant vide order dated 15.12.2010 in the appellant's case for assessment year 2005-06. In view of the findings above, I am in agreement with the views of the Assessing Officer regarding the disallowance made on account of payments of commission and bonus to the Managing Director. This ground of appeal is dismissed.”

6. Aggrieved, the assessee filed appeal before this Tribunal.

7. The Ld AR argued before us that the bonus and commission paid to Managing Director was a regular business expenditure of the company and the assessee has been paying it regularly for the last 20 years. He further argued that Shri Goswami, the Managing Director of the company is receiving commission and bonus as a professional and the amount of commission and bonus is part of salary paid to him. In this respect, he took us to page 102 to 107 where copy of IT Return and computation of income of Shri Goswami was placed. He further brought to our notice an order dated 31.3.2011 passed by Hon'ble Tribunal in its own case for assessment year 2005-06 wherein the case was remitted back to the office of Assessing Officer for computation of difference between dividend payable under the Companies Act and amount of bonus and commission. Our attention was invited to page 139-140 of paper book wherein had directed the Assessing Officer to calculate dividend as per Companies Act and to calculate the difference between the bonus and commission paid and dividend. The Assessing Officer was directed to see that if dividend payable exceeds the amount of bonus and commission, the assessee will not be eligible for deduction u/s 36(1)(ii) of the Act and on the other hand if bonus and commission paid exceeds the amount of dividend payable then the difference between the amount of bonus and commission paid and dividend payable as per law will be allowable as deduction.

8. While delivering the above judgment, the ITAT had followed AMD Metplast Ltd. v. DCIT in I.T.A. No.3934/Del/2009 in order dated 31<sup>st</sup> August, 2010.

9. The Ld AR further brought to our notice that the said decision of AMD Metplast Ltd. (supra) was challenged in the High Court and

Hon'ble Delhi High Court had decided the matter in favour of the assessee. In this respect he took us to page 141-147 where the said order of Hon'ble Delhi High Court was placed. The Ld AR argued that in view of judgment of Hon'ble jurisdictional High Court, the appeal of the assessee should also be allowed.

10. The Ld DR, on the other hand, argued that assessee has not made any commercial expediency and the amount of commission is not reasonable. The Ld AR in his rejoinder submitted that there is no question of reasonableness as the commission has been paid at the same percentage of profit as was being paid in earlier years.

11. We have heard the rival submissions of both the parties and have gone through the material available on record. We have also gone through the judgment of Hon'ble Delhi High Court in the case of AMD Mertplast Ltd. reported in 341 ITR 563. For assessment year 2005-06, the ITAT had followed the case of AMD Metplast Ltd. (supra) which now with the passing of judgment by Hon'ble Delhi High Court has been set aside. The Hon'ble Delhi High Court has held that Managing Director in terms of Board's resolution was entitled to receive commission for services rendered to the company. It was a term of an employment on the basis of which he had rendered services. The operative part of Hon'ble Delhi High Court judgment is reproduced below:-

“Held, allowing the appeal, that A was the managing director and in terms of the board resolution was entitled to receive commission for services rendered to the company. It was a term of employment on the basis of which he had rendered service. Accordingly, he was entitled to the amount. Commission was

treated as a part and parcel of salary and tax had been deducted at source. A was liable to pay tax on both the salary component and the commission. The payment of dividend was made in terms of the Companies Act, 1956. The dividend had to be paid to all shareholders equally. This position could not be disputed by the Revenue. Dividend was a return on investment and not salary or part thereof.”

12. The facts of the present case are similar to the facts of AMD Metplast Pvt. Ltd. and therefore following the judgment of Hon'ble Delhi High Court, we hold that the amount of commission and bonus paid to the Managing Director was an allowable business expenditure. The facts for the assessment year 2007-08 & 2008-09 are same except the difference in the amount. Therefore, all the three appeals filed by the assessee are allowed and decided in favour of the assessee.

13. In the result, the appeals filed by the assessee are allowed.

14. Order pronounced in the open court on the 1st day of June, 2012.

Sd/-  
(R.P. TOLANI)  
JUDICIAL MEMBER

Sd/-  
(T.S. KAPOOR)  
ACCOUNTANT MEMBER

Dt.1 .6.2012.  
HMS

Copy forwarded to:-

1. The appellant
2. The respondent
3. The CIT
4. The CIT (A)-, New Delhi.
5. The DR, ITAT, Loknayak Bhawan, Khan Market, New Delhi.

True copy.

(ITAT, New Delhi).



Date of hearing	16.5.2012
Date of Dictation	30.5.2012
Date of Typing	31.5.2012
Date of order signed by both the Members & pronouncement.	1.6.2012
Date of order & sent to the Bench concerned.	3.6.2012