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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 3rd December, 2012

\+ **ITA 669/2012**

\+ **ITA 670/2012, C.M. APPL. 20042/2012**

COMMISSIONER OF INCOME TAX-I ..... Appellant

Through: Sh. Sanjeev Rajpal, Sr. Standing Counsel.

versus

CONVERTECH EQUPMENTS PVT. LTD. ..... Respondent

Through: Nemo.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V.EASWAR

S. RAVINDRA BHAT, J: (OPEN COURT)

The questions of law sought to be urged by the Revenue in these appeals are as follows: -

ITA 669/2012 (assessment year 2002-03)

> "*Whether the Income Tax Appellate Tribunal (ITAT) was correct in law in deleting the addition of ₹29,42,534/- made by the assessing officer by disallowing the commission paid by it to its two directors which was not allowable as per Section 36(1)(ii) of the Income Tax Act, 1961?*"

ITA 670/2012

(i) "*Whether the Income Tax Appellate Tribunal (ITAT) erred in law in holding that the reopening of the assessment under section 147 of the Income Tax Act, 1961 was without jurisdiction?*"

(ii) *Whether the Income Tax Appellate Tribunal (ITAT) was correct in law in deleting the addition of ₹29,29,948/- made by the assessing officer by disallowing the commission paid by it to its two directors which was not allowable as per Section 36(1)(ii) of the Income Tax Act, 1961?*"

2. The respondent's income tax return for the assessment year 2002-03 was

processed under section 143(1) of the Act; the return for the assessment year 2003-04 was scrutinized and the assessment was made u/s 143(3) on 30.11.2005. The assessing officer noticed that the assessee company paid commission to the tune of ₹29,42,534/- and ₹29,29,948/- to its two directors who were also its major shareholders. He held that such payment was covered by section 36(1)(ii) of the Income Tax Act. In his opinion, the commission would have been payable to the directors as profits or dividend, if it had not been paid as commission. He, therefore, disallowed and added back the commission to the taxable income of the assessee company. The CIT (Appeals), on being approached by the assessee, set-aside the disallowance for the assessment year 2002-03 and for the assessment year 2003-04 held that the reopening of the assessment was without jurisdiction. His order is dated 12.05.2010, which is common to both the years. The revenue appealed to the Tribunal. It was held by the Tribunal in the appeal for the assessment year 2002-03 that the disallowance of the commission was not justified. In respect of the assessment year 2003-04, on the issue relating to the validity of the reopening of the assessment; the Tribunal noticed that the original assessment was completed under section 143(3) and notice for reopening was issued under section 148 on 31.03.2009, more than four years from the end of the relevant assessment year and, therefore, the first proviso to section 147 was applicable. The Tribunal held that the assessee had fully and truly disclosed all material facts relating to the commission payment and the assessing officer, in the reasons recorded for reopening the assessment, had not established any failure on the part of the assessee to disclose full and true particulars because of which income chargeable to tax had escaped assessment. In this view of the matter, the Tribunal held that for the assessment year 2003-04, the reassessment itself was without jurisdiction and in this view of the matter did not consider it necessary to examine the merits of the disallowance under section 36(1)(ii).

3. It is urged on behalf of the revenue that the company allowed the amount in question without declaring dividends on the profits and, therefore, the same was rightly added back under section 36(1)(ii). It is also urged that the Tribunal failed to appreciate that such commission should not be paid or was payable as profit or

dividend and the said provision was designed to check companies from evading tax by distributing its profit or paying dividend in the guise of commission.

4. So far as the merits of the disallowance of the commission are concerned, the Tribunal followed its orders for the assessment years 2004-05 and 2005-06 and in both the instances the assessee's plea had succeeded before the Tribunal. The Tribunal was of the opinion that there was no difference in the facts and no fresh contention was urged by the revenue and, therefore, there was no need to deviate from the earlier orders.

5. This Court has carefully considered the submissions. So far as the assessment year 2003-04 is concerned, the question is one of the validity of reopening the assessment. The Tribunal has found that the assessee has furnished full and true particulars at the time of the original assessment under section 143(3) and there was no failure on its part. The fact of payment of commission to the directors and the fact that they were major shareholders were already on record and the assessing officer gathered these facts only from the perusal of the assessment record. The Tribunal has accordingly held that the reopening of the assessment made after four years from the end of the relevant assessment year, where the original assessment was framed under section 143(3), was invalid. It has not been pointed out before us on behalf of the revenue that these findings of fact are erroneous or were contrary to the material on record. We, therefore, do not think that any substantial question of law arises from the order of the Tribunal for the assessment year 2003-04 on the issue of validity of the reassessment. Since for this year the Tribunal has not adjudicated upon the merits in the view it took of the validity of the reopening of the assessment, the second question of law does not arise for our consideration.

6. So far as the merits of the disallowance under section 36(1)(ii) are concerned for the assessment year 2002-03, the Tribunal's reasoning is to be found in paragraph 2 and 3 of the impugned order. In para 2, the Tribunal has reproduced its earlier orders in ITA No.3473/Del/2007 for the assessment year 2004-05 and after considering the same, held as follows: -

> "*3. When the similar issue arose in AY 2005-06, the ITAT again following its own order for AY 2004-05, upheld the order of the learned CIT(A) deleting the disallowance of commission paid to directors. Admittedly, the facts of the year under consideration are identical. Therefore, respectfully following the above decision of ITAT in assessee's own case, we uphold the order of learned CIT(A) and dismiss the Revenue's appeal.*"

7. This Court is of the opinion that in view of the fact that no fresh circumstances have come to notice to take a different view, no substantial question of law arises on the point of the disallowance under section 36(1)(ii). The decisions of the income tax authorities involved concurrent findings on pure questions of fact. Moreover, a Division Bench of this Court in *Metplast Pvt. Ltd. v. DCIT*, (2012) 341 ITR 563, after referring 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 that 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. This decision was followed by this Court in *CIT v. Career Launcher India Ltd.* (2012) 250 CTR 240 (Del). These decisions apply to the present case. The substantial question of law in ITA No.669/2012 is answered in favour of the assessee.

The appeals and the pending applications are consequently dismissed.

S. RAVINDRA BHAT, J

R.V.EASWAR, J

DECEMBER 03, 2012
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