

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

**ITA No.493/Del/2011
Assessment Year: 2006-07**

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

Vs

**M/s CMR DESIGN AUTOMATION PVT LTD
E-534, GK-II, NEW DELHI
PAN NO:AAACC0012H**

A D Jain, JM and Shamim Yahya, AM

Dated: July 21, 2011

Appellant Rep by: None

Respondents Rep by: Ms Pratima Kaushik, Sr. DR

ORDER

Per: Shamim Yahya:

This appeal by the Revenue is directed against the order of the Ld. Commissioner of Income Tax (Appeals) dated 15.12.2010 pertaining to assessment year 2006-07.

2. The issue raised is that Ld. Commissioner of Income Tax (Appeals) erred in deleting the addition of Rs. 30,00,000/- made on account of disallowance of commission/bonus paid to the Directors of the assessee company ignoring the provisions of section 36(1)(ii) are clearly applicable in this case.

3. In this case, the Assessing Officer noted that during the year under consideration assessee has paid salary and other allowances to its Directors, as per Board Resolutions. The payment also includes 'commission/bonus' of Rs. 30,00,000/- paid to its director of the company namely Shri Mahesh Chandra. Assessing Officer was of the opinion that provision of section 36(1)(ii) are applicable. He noted that Director was also a shareholder in the company. Thus, Assessing Officer observed, it was clear that in case of directors of the company the sum paid as commission and bonus could have been paid as profit or dividend which has not been done. Assessing Officer noted that if the company wanted to compensate the Director of the Company, it should have declared dividend. Assessing Officer relied upon the decision of the Hon'ble Mumbai High Court in the case of *Loyal Motor Service Co. Ltd. vs. C.I.T. 14 ITR 647* and also stated that there was a possibility of the profit being diverted to a shareholder through the means of bonus and commission. He proceeded to make an addition of Rs. 30,00,000/-.

4. Upon assessee's appeal Ld. Commissioner of Income Tax (Appeals) considered the issue and held as under: -

"I have gone through the order of the Ld. AO and the submissions made by the Ld. AR of the assessee. It is without doubt that the remuneration in terms of salary, strictly being paid to Sh. Mahesh Chandra, Director and share holder was only Rs. 25 lacs per annum. This compared very unfavourably with the salary being disbursed in the industry in which the assessee was placed. Importantly, all disbursements to Sh. Mahesh Chandra was cleared by Board Resolutions. Indubitably, the profit of the assessee company has also arisen phenomenally during the year. In other words, the commission and bonus paid to Sh. Mahesh Chandra was an incentive which was directly related to the profitability of the company. TDS was also deducted on the incentives paid to Shri Mahesh Chandra. In such circumstance, I am afraid, the provisions of Section 36(1)(ii) could not have been invoked. In the case of ACIT Vs. Bony Polymers (P) Ltd. (2010) 36 SOT 456 (Del.) it has been held as under:-

"4. We have carefully considered the rival submissions and perused the material on record. We have also gone through the orders of the authorities below as well as the decisions relied upon by the learned AR before us. We have also gone through the written synopsis and paper book filed and relied on by the assessee. We noted that there are two whole-time working directors, namely, Mr. Raj Bhatia and Mrs. Kavita Bhatia with the assessee-company who were paid remuneration. Apart from the fixed remuneration, remuneration was also paid in the form of commission on turnover at the rate of 0.5 per cent. The total amount so paid is Rs. 30lakhs. This remuneration including commission was approved in the general meeting of the shareholders as is clear from the resolution placed in the paper book. We also perused the relevant provision of the Companies Act and noted that under the said Act, the remuneration can be paid to the directors by way of commission also. We find that the pleading made by the assessee (Paper book pages 1, 2, 6, 7 and 68) before the authorities below was that remuneration including commission in question was paid to the whole-time working directors and sales of the assessee-company have increased by 20 per cent. This fact has not been denied by the revenue. We further find from the finding as reproduced in the preceding paragraph of the CIT(A) that the said directors have paid tax on such commission income at the maximum marginal rate and, thus, no tax avoidance motive could be attached from this payment of commission. The assessee has returned income even after paying the commission to the whole-time working directors to the tune of Rs. 2,26,82,259. Income returned by Mr. Raj Kumar Bhatia was Rs. 68,77,967 and by Mrs. Kavita Bhatia was Rs. 78,15,380 after including the commission income of Rs. 15 lakhs each. We also noted that the commission, though at the lesser amount, has been paid to the director in the earlier years also as is clear from the chart of commission placed in the paper book page 31 and it was allowed as a deduction in the assessment of the assessee-company. On specific query from the Bench, Id. AR pointed out that the commission based as percentage of turnover has been paid to both the directors in assessment year 2004-05 also which has been allowed in assessment of the assessee-company. All these facts show that commission payment has been accepted by revenue itself for the purpose of the business of the assessee-company and, thus, there was no question of disallowance of the commission in the year under appeal. It is cardinal principle of law that while judging the commercial expediency of an expense, the matter needs to be looked into from the view of the assessee and not from the point of view of revenue only. This was so held by Supreme Court in the decisions of CIT v. Walchand & Co. P Ltd. [1967J 65 ITR 381 and J.K. Woollen Manufacturers v. CIT [1969] 72 ITR 612. Revenue has raised in its grounds of appeal that the expense to question was hit by section 36(1)(ii) also. We do not agree with this. Section 36(1)(ii) provides that commission will not be allowed as deduction if, had it not been paid so, it would be paid as profits or dividend. There

is no basis or material or evidence brought on record by Assessing Officer to support this contention that the commission would have been paid as dividend to the shareholders. Companies Act, 1956 contains the limitations and restriction in the matter of payment of dividend and such discretion of the company either to pay or not to pay dividend cannot be assumed. Assessing Officer cannot presume that had this commission not been paid, this would have necessarily been paid as dividend to the shareholders. There is no basis for this assumption. It cannot be ignored that the assessee company had substantial profits out of which dividend could be declared if assessee-company so wanted. Thus, there is no basis for applicability of section 36(1) (ii). CBDT Circular No. 551 relied upon Id. AR clearly states that after amendment of 1989, fact of commission payment alone is essential and its excessiveness can be seen under section 40A(2) only We find that applicability of section 40A(2) is not the case of Assessing Officer. Even otherwise, commission paid to the directors was part of remuneration of the directors as Supreme Court has held in the case of Gestetner Duplicators (P.) Ltd. v. CIT [1979J 117 ITR 1 that commission paid as fixed percentage of turnover is nothing but assessable as salary. Thus, section 36(1)(ii) has got no application. Further the contention of the assessee is also duly supported by the decision of Supreme Court in the case of Shahjada Nand & Sons v. CIT [1977J 108 ITR 358 in which the Apex Court held that commission paid to the employees is allowable and there is no need for any contractual obligation or extra services performed by the assessee. We, therefore, are of the opinion that the commission payment of Rs. 30 lakhs to the whole-time working directors of the assessee company disallowed by Assessing Officer was rightly deleted by CIT(A) and, accordingly, we do not find any infirmity in the order of CIT(A). We, therefore, confirm the order of the CIT(A)."

Further, the Delhi High Court in CIT Vs Autopins (India) [1991] 192 ITR 161 had the occasion to consider payment of various kinds of bonus within the contemplation of the payment of Bonus Act, 1965. It was held that such types of bonus as well as ex gratia payment would not fall within the provisions of section 36(1)(ii) of the Act and that they were payments allowable as revenue expenditure having been incurred for the purpose of business expediency. These payments were not the type contemplated by the Payment of Bonus Act. It was held that it was an ex gratia payment or some sort of reward given to an employee for the good work done by him and would therefore, fall within the category of expenditure incurred for the purpose of business expediency and for improving the working of the assessee. Therefore, it would not fall within the meaning of section 36(1)(ii) of the Act but would fall within the ambit of section 37 of the Act.

In view of the decisions of the Delhi Tribunal and the Delhi High Court, as referred above, I am firmly of the opinion that the provisions of Section 36(1)(ii) cannot be invoked in the case. The addition of Rs. 30,00,000/- is deleted."

5. Against this order the revenue is in appeal before us.

6. We have heard the Ld. Departmental Representative. None appeared on behalf of the assessee. We are of the considered opinion that the case can be disposed of by hearing the Ld. Departmental Representative and perusing the records. We find that Ld. Commissioner of Income Tax (Appeals) has found that assessee was paying Shri Mahesh Chandra as share holder a sum of Rs. 25 lacs per annum as salary. This compared very favourably with the salary being disbursed in the industry in which the assessee was placed. Moreover, all disbursements to Sh. Mahesh Chandra was

cleared by Board Resolutions. The profit of the assessee company has also arisen phenomenally during the year. In other words, commission and bonus paid to Sh. Mahesh Chandra was an incentive, which was directly related to the profitability of the company. TDS was also deducted on the incentives paid to Shri Mahesh Chandra. In such circumstances, we agree with the Ld. Commissioner of Income Tax (Appeals) that the provision of section 36(1)(ii) could not have been invoked. The case laws referred viz. *ACIT vs. Bony Polymers (P) Ltd.* 36 SOT 456 and *C.I.T. vs. Autopins (India)* 92 ITR 161 (supra) also support the case of the assessee. Ld. Commissioner of Income Tax (Appeals) has given a correct finding that payments were reward to give employee an incentive for the good work done by him. Thus, these expenses were incurred for the purpose of business expediency and for improving the working of the assessee. In view of the above, we do not find any infirmity or illegality in the order of the Ld. Commissioner of Income Tax (Appeals). Accordingly, we uphold the same.

7. In the result, the appeal filed by the revenue stands dismissed.

(Order pronounced in the open court on 21.7.2011, upon conclusion of hearing.)