

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI BENCH
'A' NEW DELHI**

**BEFORE SH. H. S. SIDHU, JUDICIAL MEMBER, AND
SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER**

**ITA No. 6645/DEL/2016
(Assessment Year - 2011-12)**

ACIT,
Spl. Range-1,
New Delhi

Vs

M/s. A B Pal Electrical Pvt.
Ltd., 1826, Bhagirath Place,
Chandni Chowk, Delhi-06

(APPELLANT)

(PAN : AABCA 1608 G)

(RESPONDENT)

**CO No. 29/DEL/2017
(Arising out of ITA No. 6645/DEL/2016)
(Assessment Year - 2011-12)**

M/s. A B Pal Electrical Pvt. Vs
Ltd., 1826, Bhagirath Place,
Chandni Chowk, Delhi-06
(PAN : AABCA 1608 G)

ACIT,
Spl. Range-1,
New Delhi

(APPELLANT)

(RESPONDENT)

**Assessee by : Sh. Rajkumar, C.A.
Sh. Sumit Goel, C.A.**

Revenue by : Sh. Sanjeev Goel, CIT-D.R.

Date of Hearing : 04.03.2020

Date of Pronouncement : 11.03.2020

ORDER**PER N. K. BILLAIYA, AM**

This appeal by the Revenue and cross objection by the assessee are preferred against the order of the CIT(A) - 1, New Delhi dated 10.10.2016 pertaining to A.Y 2011-12.

2. Substantive grievances of the Revenue read as under:

- 1. Ld. CIT(A) erred in law and on facts in deleting addition of Rs.10,52,65,260/- made on account of suppression of GP made by AO after invoking provisions of section 145(3) of Income Tax Act.*
- 2. Ld CIT(A) erred in law and on facts in deleting disallowance of Rs.73,18,516/- on account of payment of commission to shareholders employees u/s 36(1)(va) of IT Act, 1961.*
- 3. The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal."*

3. Briefly stated, the facts of the case are that the assessee is into the business of reselling of electrical goods. Return of income for the

year under consideration was E-filed on 29.09.2011 declaring income of Rs. 50,01,881/-. Return was selected for scrutiny assessment and accordingly, statutory notices were issued and served upon the assessee.

4. During the course of scrutiny assessment proceedings, the Assessing Officer asked the assessee to confirm the purchases/creditors. The Assessing Officer also issued notices u/s 133(6) of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'] in the cases of 64 parties on test check basis.

5. The assessee furnished confirmations. However, the Assessing Officer noticed that alongwith the confirmations, the assessee did not submit details/ledgers of purchase transactions made during F.Y. 2010-11. The Assessing Officer observed that the assessee has furnished copy of ledger account for F.Y. 2011-12. The Assessing Officer also deputed an Income-tax Inspector for making spot enquiries. According to the Assessing Officer, none of the parties were found existing/traceable at the address specified in the confirmations filed by the assessee.

6. According to the Assessing Officer, enquiries of the Inspector, coupled with the postal enquiries, cast serious doubt upon the very authenticity and genuineness of these confirmations and thereby the very transactions of purchases, recorded in the books against these parties were under serious doubt. The Assessing Officer further found accounting differences of around 10.47 lakhs with M/s Gloster Cables Ltd. for last six years.

7. After pointing out numerous defects and inconsistencies, the Assessing Officer formed a belief that the purchases debited in the trading account are not verifiable/genuine and accounting policies with respect to discounts and selling price are not reliable and suffers from defects. The Assessing Officer further observed that the accounts with the parties are also not correctly maintained/reconciled showing thereby absurd figures.

8. In the light of these facts, the Assessing Officer rejected the books of account u/s 145(3) of the Act and proceeded to estimate profit. The Assessing Officer observed that the gross profit of 3.39% shown by the assessee is very low and estimated the same at 10.5% and made addition of Rs. 10,52,65,260/-.

9. The assessee strongly agitated the addition before the ld. CIT(A). It was strongly contended before the ld. CIT(A) that the Assessing Officer has proceeded on wrong assumption of facts and there is no discrepancy and no bogus purchases/unverifiable purchases. It was brought to the notice of the ld. CIT(A) that the assessee has maintained complete day-to-day stock register, which was examined by the Assessing Officer during the course of scrutiny assessment proceedings.

10. A complete g.p. chart was given and it was brought to the notice of the ld. CIT(A) that book results have been accepted in earlier years and in subsequent years and no addition has been made on account of g.p.

11. After considering the facts and submissions, the ld. CIT(A) observed that in Assessment Year 2010-11, g.p. declared by the assessee and accepted by the revenue was @ 3.08%. The ld. CIT(A) was of the opinion that though the Assessing Officer has rejected the books of account, but has not given any cogent reason for estimating the profit at 10.50%. He, accordingly, deleted the entire addition of Rs. 10,52,65,260/-.

12. Before us, the ld. DR strongly supported the findings of the Assessing Officer and vehemently stated that the ld. CIT(A), while deleting the additions, completely ignored the fact that the ledger account for F.Y. 2010-11 was not submitted by the assessee. It is the say of the ld. DR that the findings of the ld. CIT(A) are completely erroneous on facts. The ld. DR further stated that the assessee has not furnished any quantitative details of trading account and therefore, on the finding of the ld. CIT(A) that sales have been accepted by doubting the purchases, additions cannot be sustained.

13. The ld. DR further stated that merely because the g.p rate in earlier year was accepted by the department, cannot be a reason for deleting the additions, more so, when in earlier years, there were no adverse remarks in relation to purchases. The ld. DR concluded by saying that res judicata is not applicable in Income tax proceedings.

14. Per contra, the ld. counsel for the assessee reiterated what has been stated before the lower authorities. It is the say of the ld. counsel for the assessee that none of the purchases are unverifiable and there is no discrepancy in the balances of M/s Gloster Cables Ltd. The ld. counsel for the assessee once again stated that even if the

books of account were rejected by the Assessing Officer, he cannot estimate the g.p, de hors g.p accepted in the earlier years and in subsequent years.

15. We have given thoughtful consideration to the orders of the authorities below. The undisputed fact is that the ultimate addition made by the Assessing Officer is on account of alleged low g.p. It is true that in doing so, the Assessing Officer tried to point out the alleged discrepancies in the books of account of the assessee and purchases. After carefully perusing the assessment order, the Assessing Officer has alleged the following three discrepancies:

Rs.8,12,76,792/-	As for un-verifiable purchases vide Para 3 of Asstt. Order.
Rs.10,47,804/-	On account of difference in the cl. Bal of 2 parties as per books of assessee vis-a-vs books of said parties vide Para - 4 of Asstt. Oder.
Rs.73,98,994/-	To protect the leakage of revenue by assuming that sales discount to the extent of 0.5% has been allowed excessively/ lowering selling price, thereby calculating 0.5% on total turnover of Rs.147.98 crores vide Para 5 of the asstt. order.
Rs.8,97,23,590/-	

16. A perusal of the detailed summary filed by the assessee shows that the Assessing Officer has added in some cases opening balance and cash payments made during the year and in some cases opening balances have been treated as purchases. In our considered opinion, opening balances relate to the purchases made in earlier years which have been accepted by the Assessing Officer while framing assessment for earlier Assessment Years.

17. From the details, we find that the payments for all the purchases have been made through banking channel in subsequent Assessment Year i.e. 2012-13. Further, we find that total turnover of the assessee during the years is Rs. 147.98 crores and purchases relating to 16 parties marked by the Assessing Officer are only Rs. 2.24 crores which constitute only 1.51% of total turnover.

18. In so far as the report of the Inspector that parties were not found at the given address is concerned, the facts on record show that the purchases were made in F.Y. 2010-11 and assessment proceedings completed in F.Y. 2013-14 and payments have been made in F.Y. 2011-12. Therefore, we find no reason for the assessee to keep a track of whereabouts of its suppliers.

19. In so far as the differences in balances of M/s Gloster Cables Ltd is concerned, as per the details, differences are only in the opening balances which are due to the pending reconciliation of opening balances and it is not the case of the Assessing Officer that there is a cessation of liability. As mentioned elsewhere, the Assessing Officer has finally made additions on account of alleged low g.p. In our considered opinion, even when the books of accounts have been rejected by the Assessing Officer, estimation of profit should be as per the material available on record. Comparative sales and g.p details of previous Assessment Years vis a vis Assessment Year under consideration is as under:

A.Y.	Sales (in crores)	G.P. (declared) (%)	G.P. (assessed) (%)
08-09	101.29	3.08	3.08
09-10	109.70	2.97	2.97
10-11	146.46	3.08	3.08
11-12	147.98	3.39	10.50

20. It would not be out of place to mention here that in all the earlier Assessment Years, assessments have been framed u/s 143(3) of the Act. The g.p of the assessee ranges from 2.97% to 3.08%. We do

not find any reason for adoption of g.p. rate of 10.50%. Considering the facts of the case in hand as discussed hereinabove, we do not find any error or infirmity in the findings of the ld. CIT(A). Ground No. 1 is, accordingly, dismissed.

21. Ground No. 2 relates to the deletion of disallowance of Rs. 73,18,516/- on account of payment of commission to shareholders employees u/s 36(1)(ii) of the Act.

22. During the course of scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has paid commission to the directors and relatives who are also share holders of the assessee company. Payment details are as under:

Name of Directors	Position	Amount of Salary	Amount of Commission	Extent of shareholding
Shri Thaker pal Singh	Managing Director+Major Shareholders	Rs.2,40,000/-	Rs.7,31,852/-	26.82%
Shri Davinder Pal Singh	Director+Major Shareholders	Rs.2,40,000/-	Rs.7,31,852/	26.82%
Shri Gurmeet Singh	Director+Major Shareholders	Rs.2,40,000/-	Rs.7,31,852/	21.26%
Shri Rasvinder Kaur	Director+Major Shareholders	Rs.1,92,000/	Rs.7,31,852/	12.65%

Shri Singh	Gurjeet	Shareholders	Rs.1,92,000/	Rs.7,31,851/-	5.77%
Shri Singh	Jasmeet	Shareholders	Rs.1,92,000/	Rs.7,31,851/-	6.28%
Mrs. Singh	Jyotsna	Shareholders	Rs.1,92,000/	Rs.7,31,852/-	0.1%
Mrs. Kaur	Baljeet	Shareholders	Rs.1,92,000/	Rs.7,31,852/-	0.1%
Shri Singh	Simarpreet	Shareholders	Rs.1,92,000/	Rs.7,31,851/	0.1%
Shri Singh	Manmeet	Shareholders	Rs.1,92,000/-	Rs.7,31,851/	0.06%
Shri Iqbal Singh	-	-	-	-	-
				Rs.73,18,516/	100%
				-	

23. The assessee was asked to show cause as to why the commission paid to directors should not be disallowed in view of the specific provisions of section 36(1)(ii) of the Act. It was explained that remuneration of the directors has been fixed in the form of monthly salary plus annual commission and commission has been paid in terms of resolution passed by the share holders in the meeting held.

24. It was further explained that on similar facts in Assessment Year 2009-10 also, similar commission was paid. The Assessing Officer was of the opinion that the commission paid to the directors would have

been otherwise payable in the form of dividend and to avoid Dividend Distribution Tax, commission has been paid to the directors. The Assessing Officer, therefore, made addition of Rs. 73,18,516/-

25. The assessee agitated the addition before the ld. CIT(A). It was brought to the notice of the ld. CIT(A) that similar disallowance was also made in Assessment Year 2010-11 and the same was deleted by the ld. CIT(A) and similar claims were also allowed in earlier years starting from Assessment Year 2007-08 onwards.

26. After considering the facts and submissions, the ld. CIT(A) held as under:

I have considered the submission of the appellant and observation of the Assessing Officer in the assessment order. It is seen that appellant has paid commission to the shareholders cum Directors during the year @ .075% to the four Directors and 0.050% to the shareholders. The total commission payment comes to 0.5% of the sales turnover. The appellant submitted before me that it has made commission payment to Directors as well as shareholders from A.Y. 2007-08 onwards and the same has been allowed without any disallowance except in the A.Y. 2010-11. In the A.Y. 2010-11, the commission

was allowed on the same rate to the Directors cum shareholders which was disallowed by the AO in the assessment order, however, the said disallowance has been deleted by the CIT(A) vide its appeal no..31/13-14 dated 03.04.2014 with following observations:

“6. I have carefully considered the submissions of the appellant and perused the order passed by the AO. I find that the commission to the director has been paid @0.075% of the total sale w.e.f. 1.4.2006 in pursuance of resolution passed by the board of directors on 18.1.2006. I also find that the AO has allowed the similar commission in the A.Y. 2007-08, 2008-09 & 2009-10 @ 0.075% of the total sales. The assessment order passed u/s 143(3)..... DCIT (supra) has held that where the directors are the employees of the company and receive commission for services rendered to the company as per the resolution passed by the Board, the commission paid to the directors was part of the salary and cannot be considered for the purpose of disallowance u/s 36(1)(ii) of the Act. The Hon’ble High Court has reiterated the above view in the case of CIT vs Carrier Launcher India Ltd. 250 CTR 240. In view of the above facts and circumstances of the case and judicial pronouncement of the jurisdictional High Court, the disallowance made by the AO cannot be sustained and hence the same is directed to be deleted. These grounds of appeal are allowed.”

Since, the facts of this year are identical with the facts of the A.Y. 2010-11 and commission has been allowed to the Directors cum shareholders during the year as was done in A.Y. 2010-11, therefore, the decision of A.Y. 2010-11 of CIT(A)-IV is squarely applicable to the A.Y. 2011-12. Hence, the disallowance of commission payment to Directors cum shareholders is deleted. In the result, this ground of appeal is allowed.”

27. Before us, the ld. DR strongly supported the findings of the Assessing Officer. It is the say of the ld. DR that payment of commission to the directors was made without any documentary evidences of Board's resolution to make such payments. The ld. DR strongly stated that to avoid Dividend Distribution Tax, the assessee has conveniently passed on the profit of the company through commissions to the directors. Strong reliance was placed on the decision of the Hon'ble Mumbai High Court in the case of Motor Service Company Limited 14 ITR 647 and also on the decision of the Tribunal in the case of Dalai Broacha Stock Broking Pvt Ltd 10 ITR 0357 [Trib].

28. Per contra, the ld. counsel for the assessee reiterated what has been stated before the lower authorities and once again stated that similar disallowance was made in Assessment Year 2010-11 which was deleted and also furnished copy of the order of the first appellate authority for Assessment Year 2010-11.

29. We have given thoughtful consideration to the orders of the authorities below. The undisputed fact is that there is no allegation that these persons are not working for the company. In our considered opinion, it is the prerogative of the assessee to decide the remuneration etc to be paid to the persons who work for his company. As per the agreement, six directors, who were also share holders, were paid additional salary termed as 'commission' and there are four employees who are also share holders who also have been paid salary with additional salary termed as 'commission'. The total commission comes to 0.5% of the total turnover. In our humble opinion, considering the nature of the business of the assessee vis a vis the turnover, such payment of commission cannot be doubted. We, therefore, do not find any reason to interfere with the findings of the ld. CIT(A). Thus, Ground No. 2 also stands dismissed.

30. Ground No. 1 of the cross objections filed by the assessee was not pressed. Accordingly, the same is dismissed as not pressed.

31. Ground Nos. 2 and 3 of the cross objections are in support of the findings of the ld. CIT(A) and need no separate adjudication. Accordingly, the cross objections too, stand dismissed.

32. To sum up, in the result, the appeal of the revenue in ITA No.6645/DEL/2016 as well as the cross objections in CO No. 59/DEL/2017 of the assessee stand dismissed.

Order pronounced in the Open Court on 11th March, 2020.

Sd/-

**(H.S. SIDHU)
JUDICIAL MEMBER**

Dated: 11/03/2020

Sd/-

**(N. K. BILLAIYA)
ACCOUNTANT MEMBER**

VI/

Copy forwarded to:

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