

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A" NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
Dr. B.R.R. KUMAR, ACCOUNTANT MEMBER**

ITA. No.4687/DEL/2016
Assessment Year 2012-13

Deputy Commissioner of Income Tax, Circle-1(1), New Delhi.	v.	M/s. Abro Technologies Pvt. Ltd., 109, DSIDC Shed, Okhla Industrial Complex, New Okhla Industrial Area, Phase-II, New Delhi.
TAN/PAN: AAACA0390E (Appellant)		(Respondent)

Appellant by:	Shri Divyanshu Agarwal, Adv. & Shri Akarsh Garg, Adv.		
Respondent by:	Shri Rajesh Kumar, Sr.D.R.		
Date of hearing:	18	02	2020
Date of pronouncement:	25	02	2020

ORDER

PER AMIT SHUKLA, J.M.:

The aforesaid appeal has been filed by the Revenue against the impugned order dated 08.06.2016 passed by Ld. CIT(A)-I, New Delhi for the quantum of assessment passed u/s.143(3) for the Assessment Year 2012-13. In the grounds of appeal, the Revenue has raised following grounds:-

"1. The Ld CIT (A) has erred on facts and in law in deleting disallowance of Rs.1,92,80,954/- being commission on sales paid to the shareholder Director(s).

2 The Ld. CIT (A) has failed to appreciate that the

shareholder director was entitled to dividend in view of accumulated profit available and the commission so paid is clearly prohibited by the provisions of section 36(l)(ii) of Income Tax Act, 1961.”

2. The facts in brief are that the assessee-company is engaged in the business of manufacturing of software sophisticated dynamic balancing equipment different in sizes and performance capabilities. Ld. Assessing Officer from the perusal of the tax audit report, noted that assessee has paid commission to its directors for sums aggregating to Rs.1,92,80,954/-. Ld. Assessing Officer held that in view of said provision of section 36(1)(ii), employees who would otherwise be entitled to receive profit or dividend by virtue of their shareholding and the company has accumulated profits, then the practice of giving bonus or commission cannot be allowed. He noted that company has reserves and surplus of Rs.3,95,74,613/-. Accordingly, he made the disallowance of entire commission paid to the Directors.

3. Before the Ld. CIT(A), it was explained that the commission paid to the Directors was based on percentage of sales turnover and same was approved by the Board of Directors that in accordance with Schedule-V of the Companies Act, 1956, the remuneration paid to the directors were as under:-

- *Commission to Shri Atul Nath: 3% on the total sales including services and 10% on export sales.*

- *Commission to Shri Akhil Nath: 0.5% on the total sales including services and 5% on export sales.*
- *Commission to Shri Ashish Nath: 0.5% on the total sales including services and 5% on export sales.*

Further, copy of agreement entered into by the assessee company with directors on 1st December, 2006 wherein following functions were to be performed by the Directors:-

- *Development of business to achieve the growth, sustainability and smooth running.*
- *Designing of the Machinery according to customer requirement are most economical function to perform smooth running and successful implementation of organisation.*
- *Develop the market base and customer base.*
- *Develop the Indian as well as overseas market to increase the turnover of the company.*
- *Development of Public Relations for increase the visibility of company in public at large.*
- *Conduct the seminar on Balancing Machine on behalf of company.*
- *Conduct Research on development of business and products.*
- *Promote the success of the company for the benefit of its members.*
- *Supervisor of office staff and technical assistance (including conducting staff evaluations)*

In lieu of said duties and functions assessee-company had agreed to pay, additional compensation apart from their

regular compensation, based on turnover in the following manner:-

“Starting from Financial year 2006-07 till the service rendered by the director, the Full Time Working Technical Director shall be paid a Commission based on Sales Turnover as well as Export Turnover with a predefined condition of achieving sales turnover. Initially company agreed to pay the commission at the rate of 1% of the sales and 10% of export turnover. Further the commission will be increased if the company successfully achieve total turnover of Rs. 10 crore within 2 years, Rs.20 crore within 4 years and Rs.30 crore within 6 years to present year than company will pay an increased commission in that year at the rate of 3% of the sales and 10% of export turnover.”

4. It was further submitted that during the year, the sales of the company has increased 44% in comparison to last year and profit of the company has increased by 186%. The turnover of the company has gone up more than Rs.30 crores, therefore, on achieving this turnover the directors Shri Atul Nath was entitled for the commission @ 3% of the sales and 10% of the export turnover. However, the total commission was restricted to 5% of the total turnover. Ld. CIT (A) also noted that the company had paid similar commission to the directors from Assessment Year 2009-10 to 2011-12. It was further brought to the notice that similar commission payment was allowed in the assessment order passed u/s. 143(3) in the Assessment Years 2009-10 and 2010-11 by the Assessing Officer. Further, reliance was placed on the

judgment of Hon'ble Jurisdictional High Court in the case of **AMD Metplast Pvt. Ltd. vs. DCIT, 341 ITR 563** and **CIT vs. Career Launcher India Ltd., (2012) 250 CTR 240 (Del)**. Ld. CIT (A) looking to the entire facts, past history and the law laid down by the Hon'ble Jurisdictional High Court held that the facts of the case are identical to the pronouncement of Hon'ble Jurisdictional High court and commission is allowable.

6. Ld. DR relied upon the observation of the Assessing Officer stated that in terms of Section 36(1)(ii) any kind of commission paid to the Directors who was a shareholder cannot be allowed where they are entitled for dividend and profits of the company.

7. On the other hand, ld. counsel for the assessee has strongly relied upon the order of the Ld. CIT (A) and submitted that this issue is squarely covered by the judgment of Hon'ble High Court (supra).

8. After considering the rival submissions and on perusal of the impugned orders, we find that there is no dispute on fact that the Directors were given commission for promoting sales and increasing the sale of the company by their efforts and over the period of time the assessee's turnover has increased manifold and also the profit. Further, similar commission paid to the Directors in terms of same agreement has been allowed in the past by the Assessing Officer himself in orders passed in scrutiny proceedings u/s 143(3). If

directors in terms of Board resolution are entitled to receive commission for rendering services to the company and if it was in terms of employment on the basis of which they have been rendering services, then such remuneration/commission is part and parcel of salary. It is also not disputed that TDS has been deducted on such commission as salary. Otherwise also, the payment of dividend is made in terms of Companies Act, 1956 which has to be paid to all the shareholders equally and dividend is basically a return of investment and not salary or part thereof. This proposition has been upheld by Hon'ble Jurisdictional High Court in the case of **AMD Metplast Pvt. Ltd. vs. DCIT, 341 ITR 563**, wherein Their Lordships were required to answer the following substantial question of law:

“Whether, the Tribunal is, right in holding that commission of Rs. 25,00,000 paid to Mr. Ashok Gupta, managing director of the assessee cannot be allowed as a deduction in view of section 36(1)(ii) of the Income Tax Act, 1961, and the said amount can be only allowed under section 36(1)(ii) if dividend of Rs. 25,00,000 could not have been paid to Mr. Ashok Gupta.”

Their Lordships after considering the various judgments and the position of law have observed and held as under:

“9. We fail to understand how the aforesaid observations assist and help the Revenue in the factual matrix of the present case. Ashok Gupta is the managing director and in terms of the board resolution is entitled to receive commission for services

rendered to the company. It is a term of employment on the basis of which he had rendered service. Accordingly, he was entitled to the said amount. Commission was treated as a part and parcel of salary and TDS has been deducted. Ashok Gupta was liable to pay tax on both the salary component and the commission. Payment of dividend is made in terms of the companies Act, 1956, Dividend has to be paid to all shareholders equally. This position cannot be disputed by the Revenue. Dividend is a return on investment and not salary or part thereof. Herein the consideration in the form of commission which, was, paid to Ashok Gupta was for services rendered by him as per terms of appointment as a managing director. ”

9. Similar view was taken on the concept of bonus payment following the judgment of AMD Metplast Pvt. Ltd. (supra) in the case of **CIT vs. Carrer Launcher India Ltd. (358 ITR 179)** has decided this issue in favour of the assessee, interpreting section 36(1)(ii). Thus, the order of Ld. CIT (A) which is based on the binding judicial precedent of Hon'ble Jurisdictional High Court, is upheld. Accordingly, the Revenue's appeal is dismissed.

10. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open Court on 25th February, 2020.

Sd/-
[Dr. B.R.R. KUMAR]
ACCOUNTANT MEMBER

Sd/-
[AMIT SHUKLA]
JUDICIAL MEMBER

DATED: 25th February, 2020

PKK: