



IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA no. 35/Mum./2016
(Assessment Year : 2008-09)

Dy. Commissioner of Income Tax
Circle-2(1)(1), Mumbai Appellant

v/s

The Bombay Samachar Pvt. Ltd.
Red House, Sayed Abdulla Brelavi Road
Horniman Circle, Fort Respondent
Mumbai 400 023
PAN - AAAC1340B

ITA no. 7171/Mum./2010
(Assessment Year : 2007-08)

The Bombay Samachar Pvt. Ltd.
Red House, Sayed Abdulla Brelavi Road
Horniman Circle, Fort Appellant
Mumbai 400 023
PAN - AAAC1340B

v/s

Asstt. Commissioner of Income Tax
Circle-2(1)(1), Mumbai Respondent

ITA no. 7141/Mum./2011
(Assessment Year : 2008-09)

The Bombay Samachar Pvt. Ltd.
Red House, Sayed Abdulla Brelavi Road
Horniman Circle, Fort Appellant
Mumbai 400 023
PAN - AAAC1340B

v/s

Dy. Commissioner of Income Tax
Circle-2(1)(1), Mumbai Respondent

ITA no. 1576/Mum./2013
(Assessment Year : 2009-10)

The Bombay Samachar Pvt. Ltd.
Red House, Sayed Abdulla Brelavi Road
Horniman Circle, Fort
Mumbai 400 023
PAN - AAAC1340B

..... Appellant

v/s

Asstt. Commissioner of Income Tax
Circle-2(1)(1), Mumbai

..... Respondent

ITA no. 3949/Mum./2014
(Assessment Year : 2010-11)

The Bombay Samachar Pvt. Ltd.
Red House, Sayed Abdulla Brelavi Road
Horniman Circle, Fort
Mumbai 400 023
PAN - AAAC1340B

..... Appellant

v/s

Dy. Commissioner of Income Tax
Circle-2(1)(1), Mumbai

..... Respondent

Assessee by : Shri Percy Pardiwala, Sr. Counsel
Revenue by : Shri Chaudhary Arun Kumar Singh

Date of Hearing - 04.10.2018

Date of Order - 24.10.2018

ORDER

PER SAKTIJIT DEY, J.M.

This is a bunch of five appeals against five separate orders of the learned Commissioner (Appeals)-4, Mumbai, for the assessment years 2007-08, 2008-09, 2009-10 and 2010-11. Out of this, four appeals

by the assessee arise out of quantum proceedings, whereas, the lone appeal of the Revenue is against deletion of penalty imposed under section 271(1)(c) of the Act for the assessment year 2008-09.

ITA no.7171/Mum./2010 – A.Y. 2007-08

ITA no.7141/Mum./2011 – A.Y. 2008-09

ITA no.1576/Mum./2013 – A.Y. 2009-10

ITA no.3949/Mum./2014 – A.Y. 2010-11

2. The only common issue arising for consideration in these appeals by the assessee is disallowance made under section 40A(2)(a) of the Income Tax Act, 1961 (for short "**the Act**") on account of payment of remuneration to whole time directors. Since, facts relating to the issue in dispute are identical in all the appeals, for the sake of convenience we will advert to the facts as involved in ITA no.7171/Mum./2010.

3. Brief facts are, the assessee company publishes a newspaper in Vernacular language. As stated by the assessee, it is carrying on such activity for more than 150 years. For the assessment year under dispute, the assessee filed its return of income on 29th October 2007, declaring loss of ₹ 1,03,07,332. During the assessment proceedings, the Assessing Officer noticed that the assessee has paid remuneration @ ₹ 48,00,000 each to three whole time directors aggregating to ₹ 1,44,00,000. After calling for further information and verifying them, the Assessing Officer found that in financial year 2003-04, wherein the

assessee had positive income, it has paid remuneration of ₹ 12,50,000 to each director totaling to ₹ 37,50,000. He found that in financial year 2004-05, the remuneration to the aforesaid three directors were increased by 40% i.e. @ ₹ 30,00,000 to each directors. In financial year 2005-06, the remuneration increased by 416% i.e., @ ₹ 52,00,000 to each director and in financial year 2006-07, the assessee has paid ₹ 48,00,000 to each of the director. However, except financial year 2003-04 in the three subsequent financial years the assessee has shown loss. Being of the view that the remuneration paid to the three directors was excessive and unreasonable having regard to the fair market value of the goods, services or facilities for which payment is made as well as the legitimate business needs of the assessee and the benefit derived by or accruing to the assessee, the Assessing Officer called upon the assessee to explain why the remuneration paid to the directors should not be disallowed in terms of section 40A(2)(a) of the Act. Further, the Assessing Officer observed, to escape the rigors of the provisions of section 2(22)(e) of the Act, the assessee has camouflaged the payments made to the directors as remuneration. In response to the query raised by the Assessing Officer, though, the assessee justified the payments made by stating that the directors were having considerable wealth of experience in the newspaper and printing industry and have been working with the newspaper for

several years. It was submitted, the remuneration paid to the directors is not excessive or unreasonable compared to the remuneration paid in the private sector for similar services rendered. The Assessing Officer, however, did not find merit in the submissions of the assessee and held that the payment of remuneration to the director is excessive and unreasonable having regard to the provisions of section 40A(2)(b) of the Act, hence, not allowable. The Assessing Officer observed, in assessment year 2003–04, wherein, the assessee has shown profit of ₹ 2,27,00,000 remuneration of ₹ 21,00,000 was paid to the directors. He observed, in assessment year 2004–05 remuneration was increased by almost 80% to ₹ 37,50,000. He observed, considering the time span and services rendered over a period of time and commensurate rise in **the directors' remuneration** up to assessment year 2007–08 from assessment year 2003–04, which was taken as the base year, increase of 80% would be reasonable for the impugned assessment year. Thus, the Assessing Officer restricted payment of remuneration to three directors at ₹ 36,50,000 as against remuneration paid of ₹ 1,44,00,000. This resulted in disallowance of ₹ 1,06,50,000. Being aggrieved of the aforesaid disallowance, the assessee preferred appeal before the first appellate authority.

4. The learned Commissioner (Appeals), however, sustained the disallowance made by the Assessing Officer. In the like manner, the

Assessing Officer completed assessments for assessment year 2008–09, 2009–10 and 2010–11. The only difference being in the quantum of remuneration allowed by the Assessing Officer at ₹ 48,00,000 as against ₹ 1,44,00,000 claimed by the assessee which resulted in additions of ₹ 1,02,000 in each of these assessment years. However, the fate of the additions made by the Assessing Officer remained the same before the learned Commissioner (Appeals).

5. Shri P.J. Pardiwala, learned Sr. Counsel appearing for the assessee submitted, before invoking the provisions of section 40A(2)(a) of the Act, the Assessing Officer must establish on record that the expenditure incurred by the assessee is excessive or unreasonable having regard to the fair market value of goods, services or facilities for which the payment is made. He submitted, the facts on record would reveal that from the past several years, the assessee had been paying remuneration to these directors irrespective of profit or loss made in each assessment year. He submitted, the facts available on record clearly reveal that payment of remuneration increased from year-to-year right from assessment year 2002–03 and even though there was substantial increase in payment of remuneration to directors in the subsequent assessment years, the Assessing Officer had never objected to increase in remuneration and has allowed deduction on account of remuneration paid even in scrutiny assessments. The

learned Sr. Counsel submitted, compared to the remuneration paid in assessment year 2006-07 which was allowed by the Assessing Officer in scrutiny assessment, the remuneration paid in the impugned assessment year is lesser. Therefore, he submitted, the remuneration paid to directors cannot be considered as excessive or unreasonable. The learned Sr. Counsel drawing our attention to the provisions of section 40A(2) of the Act submitted, before invoking the said provision the Assessing Officer must bring material on record to demonstrate that the payment of remuneration to directors is excessive or unreasonable compared to the market rate of payment for such services. He submitted, no material has been brought on record by the Assessing Officer to establish such fact. He submitted, the only reason for which the Assessing Officer disallowed remuneration in the impugned assessment year is because of loss shown by the assessee. He submitted loss shown by the assessee is due to substantial reduction in advertisement revenue. Therefore, that by itself cannot be a criteria to invoke provisions of section 40A(2) of the Act. The learned Sr. Counsel submitted, the very fact that the assessee had paid remuneration to the concerned directors in the preceding assessment years and at a much higher rate, goes to prove that the remuneration paid in the impugned assessment year is neither excessive nor unreasonable. As regards the observations of the Assessing Officer

that to avoid the mischief of section 2(22)(e) of the Act the assessee has paid remuneration to the directors, the learned Sr. Counsel submitted, such observations of the Assessing Officer is fallacious considering the fact that the three directors to whom remuneration was paid are holding, in total, 15% shares of the company. Whereas, 85% other shareholders are there to whom the assessee would otherwise have to pay dividend. The learned Sr. Counsel submitted, the object behind introducing section 40A(2) to the Act is for preventing evasion of tax. He submitted, in the facts of the present case, there is no such occasion for evasion of tax considering the fact that ultimately the Assessing Officer has determined loss in all the assessment years and moreover the directors to whom remuneration was paid have not only offered such income in the return of income filed by them but they have paid tax at the maximum rate of 30%. Thus, he submitted, by payment of such remuneration there is neither evasion of tax nor leakage of revenue. Thus, he submitted, no disallowance by invoking provisions of section 40A(2) of the Act should be made. In support of his contention, the learned Sr. Counsel relied upon the following decisions: –

- i) *CIT v/s Indo Soudi Services (Travel) Pvt. Ltd., [2009] 310 ITR 306 (Bom.);*
- ii) *CIT v/s V.S. Dempo & Co. Pvt. Ltd., [2011] 336 ITR 209 (Bom.); and*

iii) Chryscapital Investment Advisors (I) Pvt. Ltd. v/s DCIT, [2015] 376 ITR 183 (Del.).

6. The learned Departmental Representative relied upon the observations of the Departmental Authorities. He also relied upon the following decisions: –

- i) Nund & Samont Co. P. Ltd. v/s CIT, [1970] 78 ITR 268 (SC);*
- ii) CIT v/s Shatrunjay Diamonds, [2003] 261 ITR 258 (Bom.) and*
- iii) Shree Laxmi Marketing (P) Ltd. V/S Acit, [2008] 119 ITD 390 (Pn.).*

7. We have considered rival submissions and perused materials on record. We have also applied our mind to the decisions relied upon by both the parties. Before we proceed to decide the validity of the disallowance made under section 40A(2)(a) of the Act in the assessment years under appeal, it is necessary and relevant to look into the provisions contained under section 40A(2) of the Act. On a careful reading of the said provision, it is apparent, in the relevant previous year the assessee did make payment to persons referred to under clause (b) of section 40A(2) of the Act. However, before invoking the provisions of section 40A(2)(a) of the Act, the following conditions have to be satisfied: –

i) The payment made is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made; or

ii) The expenditure incurred is excessive or unreasonable having regard to the legitimate business needs of the **assessee's business; or**

iii) Expenditure incurred is excessive or unreasonable having regard to the benefit derived by or accruing to the assessee from the payment.

8. Keeping in view the aforesaid legal position, if we examine the facts of the present case, it is evident that the assessee had been paying remuneration to the concerned directors from past several years. In fact, the Assessing Officer himself in the assessment order has stated that the remuneration paid to the three directors in assessment year 2003-04 was ₹ 21 lakh, in assessment year 2004-05 is ₹ 37.50 lakh, in assessment year 2005-09 ₹ 90 lakh and in assessment year 2006-07 is ₹ 1.56 crore. Thus, as could be seen from the facts on record, over the years there is incremental increase in payment of remuneration to the directors. It is not a fact that there is a quantum jump in payment of salary in the impugned assessment year only. Further, it is relevant to observe, payment of remuneration

to the directors have been accepted by the Assessing Officer in past assessment years while completing scrutiny assessments under section 143(3) of the Act. This is evident from the copies of the assessment orders for assessment years 2001-02, 2003-04 and 2004-05 placed before us. In fact, while completing the scrutiny assessment for assessment year 2006-07 under section 143(3) of the Act, which is evident from the assessment order dated 16th December 2008, the Assessing Officer has allowed payment of remuneration of ₹ 1.56 crore against loss determined at ₹ 3 16,68,518. Therefore, in comparison to payment of remuneration in assessment year 2006-07 i.e. the immediately preceding assessment year, the payment of remuneration to the directors in the impugned assessment years cannot be considered to be either excessive or unreasonable having regard to the facts and circumstances of the case. Further, while invoking the provisions of section 40A(2)(a) of the Act, the Assessing Officer must bring material on record to demonstrate that the payment made by the assessee is excessive or unreasonable having regard to the market rate for the goods, services, facilities availed or the business needs of the assessee or commensurate with the benefit derived by the assessee. On scanning through the assessment order passed for the impugned assessment year, we do not find any material brought on record by the Assessing Officer to demonstrate that the

payment made by the assessee is excessive and unreasonable having regard to the market rate or business needs or benefit derived by the assessee. As could be seen, the Assessing Officer by simply taking the remuneration paid in assessment year 2003-04 as a base has determined the reasonable remuneration payable to directors. This, in our view, is purely on estimate basis without having any relevance to the actual facts on record including the fact that in the immediately preceding assessment year the assessee has not only paid remuneration of ₹ 1.56 crore to the concerned directors but the Assessing Officer has also allowed such payment in scrutiny assessment. As regards the observations of the Assessing Officer that to avoid the mischief of section 2(22)(e) of the Act, the assessee has camouflaged loan / advances to the directors as remuneration, we do not find any substance in such allegation. Undisputedly, the assessee had been paying remuneration to the concerned directors from past several years. Moreover, from the shareholding pattern of the company, it appears that the total share holding of the aforesaid three directors combined together constitutes only 15%. Therefore, it cannot be said that for escaping the rigors of section 2(22)(e) of the Act the assessee has paid remuneration to the directors. The object behind introduction of section 40A(2) of the Act is for preventing evasion of tax through shifting of profit by making payment to related parties.

Therefore, it is of paramount importance to examine whether the assessee has made payment for evading tax through shifting of profit. In the facts of the present case, it is evident that the assessee had been showing loss continuously for past several years and the Assessing Officer has also accepted loss shown by the assessee. That being the case, there cannot be any intention on the part of the assessee to evade tax by shifting profit. It is equally important to note that the remuneration paid to the directors have been offered by them to tax while filing their individual tax returns for the respective assessment years. This fact is evident from the copies of the income tax returns of the concerned directors filed before us by the learned Sr. Counsel. It is also not disputed that the concerned directors are assessed to tax at the maximum rate of 30%. In the aforesaid facts and circumstances, we are of the considered view that the provisions of section 40A(2) of the Act are not attracted to the payment made to the directors. The decisions relied upon by the learned Sr. Counsel also support our aforesaid view. Whereas, the decisions cited by the learned Departmental Representative are factually distinguishable. Thus, on overall consideration of facts and circumstances of the case, we are of the view that the disallowance made under section 40A(2)(a) of the Act in the impugned assessment years are

unsustainable. Accordingly, we deleted the disallowances made in all the assessment years under appeal. Grounds raised are allowed.

9. In the result, all these appeals are allowed.

ITA no.35/Mum./2016
Revenue's Appeal – A.Y. 2008-09

10. Aforesaid appeal by the Revenue is against deletion of penalty imposed of ₹ 35 lakh under section 271(1)(c) of the Act.

11. Brief facts are, while completing the assessment for the impugned assessment year, out of the total remuneration paid of ₹ 1.44 crore paid to three directors, the Assessing Officer disallowed an amount of ₹ 1.02 crore under section 40A(2)(a) of the Act. On the basis of such disallowance / addition, the Assessing Officer initiated penalty proceedings under section 271(1)(c) of the Act alleging concealment of particulars of income. Though, the assessee objected to initiation of penalty proceedings, however, the Assessing Officer rejecting the objections of the assessee imposed penalty of ₹ 35 lakh under section 271(1)(c) of the Act. The penalty order passed by the Assessing Officer was challenged by the assessee before the first appellate authority.

12. The learned Commissioner (Appeals) after considering the submissions of the assessee in the context of facts and material on record being satisfied that it is merely a disallowance of deduction claimed by the assessee not leading to concealment of income, deleted the penalty imposed under section 271(1)(c) of the Act. While doing so, he relied upon certain judicial precedents, including, the decision of the Hon'ble Supreme Court in CIT v/s Reliance Petroproducts Pvt. Ltd., [2010] 322 ITR 158 (SC).

13. We have considered rival submissions and perused materials on record. Undisputedly, the imposition of penalty under section 271(1)(c) of the Act is on account of part disallowance of remuneration paid to the directors by invoking provisions of section 40A(2)(a) of the Act. It is a fact on record that the assessee had been paying remuneration to the concerned directors from past several years and the Department has also accepted the deduction claimed by the assessee on that account in scrutiny assessments. Even, in the impugned assessment year the Assessing Officer has only disallowed a part of the remuneration by treating it as excessive and unreasonable. Therefore, there is no doubt or dispute with regard to the genuineness of payment made. Therefore, this is a clear case of deduction claimed by the assessee and a part of which was disallowed by the Assessing Officer on estimate basis. That being the case, the assessee cannot be

alleged of concealing the particulars of income. Even otherwise also, **while deciding assessee's** quantum appeal for the impugned assessment year in ITA no.7141/Mum./2011, we have deleted the disallowance made by the Assessing Officer. Therefore, in any case of the matter, penalty imposed under section 271(1)(c) of the Act, could not have survived. In view of the aforesaid, we do not find any reason to interfere with the decision of the learned Commissioner (Appeals). Ground raised is dismissed.

14. **In the result, Revenue's appeal is dismissed.**

15. To sum up, all the appeals of the assessee are allowed, whereas, **Revenue's appeal is dismissed**

Order pronounced in the open Court on

MANOJ KUMAR AGGARWAL
ACCOUNTANT MEMBER

SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 24.10.2018

Copy of the order forwarded to:

The Bombay Samachar Pvt. Ltd.

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

(Sr. Private Secretary)
ITAT, Mumbai

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