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

Date of Decision:- 13.02.2020

+ ITA 96/2020

PRINCIPAL COMMISSIONER OF INCOME TAX, DELHI-2,

..... Appellant

Through: Ms.Vibhooti Malhotra, Senior
Standing Counsel with Mr. Shailender
Singh, Advocate.

versus

MLS CBRE SOUTH ASIA PRIVATE LIMITED Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE SANJEEV NARULA

SANJEEV NARULA, J (Oral):

C.M. No.5764/2020 (exemption)

1. Exemption allowed, subject to all just exceptions.
2. The application stands disposed of.

C.M. No. 5765/2020 (delay in filing)

3. By this application the applicant seeks condonation of delay of 01 day in filing the appeal. For the reasons stated in the application, the delay is condoned.

4. The application stands disposed of in the aforesaid terms.

C.M. No. 5766/2020 (delay in re-filing)

5. By this application the applicant seeks condonation of delay of 87 days in re-filing the appeal. For the reasons stated in the application, the delay is

condoned.

6. The application stands disposed of in the aforesaid terms.

ITA 96/2020

7. The Appellant - Principal Commissioner of Income Tax, has preferred the present appeal under Section 260A of the Income-Tax Act (hereinafter 'the Act') for the Assessment Year (AY) 2009-10, assailing the order passed by the Income-Tax Appellate Tribunal ('ITAT') dated 28.06.2019 in ITA No.3527/DEL/2016, whereby the appeal filed by the Respondent-Assessee has been allowed.

8. Briefly stated, the facts of the case are that the Respondent is a private limited company, wherein, Mr. Anshuman Magazine holds 24% shares and is also an employee and Director of the assessee-Company. The remaining 76% shares are held by CB Richards Ellis holding. The assessee filed its return of income on 28.09.2009, declaring an income of Rs. 31,79,41,751/-. The case of the assessee was selected for scrutiny and a notice under Section 143(1) was issued. Pursuant thereto, an assessment order was framed on 25.12.2010 under Section 143(3) of the Act whereby *inter alia* an addition of Rs.6,64,65,442/- was made by way of disallowance under Section 36(1)(ii) of the Act. In the appeal preferred by the assessee, CIT (A) upheld the aforesaid disallowance, observing that when the assessee-Company passed the resolution dated 27.05.2003 for payment of incentive to the shareholder- Mr. Anshuman Magazine, he held 99.99% shares of the assessee and but for the resolution to pay the commission, the sum so paid would have been passed on to him as dividend. In the eventuality, the

assessee would have paid dividend distribution tax on such profits earned and the profits/ taxable income of the assessee would have also further increased by amount paid as commission to Mr. Anshuman Magazine. In order to avoid dividend distribution tax, the assessee had made the payment under the guise of commission.

9. Further, CIT (A) also held that the excess remuneration paid was without the approval of the Central Government and was, therefore, liable to be disallowed as the same was not for the business purpose of the assessee. On further appeal, ITAT overturned the decision of CIT (A) in favour of the assessee. It was held that in assessee's own case for AY 2007-08 and 2008-09 in respective ITA Nos. 709/Del/2012 and 795/Del/2013, the Tribunal vide order dated 07.03.2016 had deleted such disallowances. Revenue had not preferred any appeal against the order of the Tribunal, and for the subsequent years from 2010-11 to 2014-15, the Assessing Officer had passed orders under Section 143(3) of the Act and allowed the payment of commission/ incentive. The Tribunal further deleted the addition under the head excess remuneration on the ground that there was no reasoning or finding given by the CIT (A) holding that the commission was not for the business purpose of the assessee.

10. Aggrieved by the aforesaid order, revenue has preferred the present appeal. Mr. Shailender Singh, Advocate argues that the Tribunal has erred in reversing the decision of the CIT (A), in as much as, the Tribunal has made wrong observations that CIT (A) has not given a finding to the effect that the excess remuneration was not incurred for the business purpose of the

assessee. He submits that the Tribunal has overlooked the reasoning of the CIT (A) for the disallowance under Section 36(1)(ii) of the Act, where it has been held that the remuneration was to avoid payment of dividend and was not for genuine purposes. This reasoning for disallowance would also hold good for disallowing the expenditure under the head of “excess expenditure”. He further submits that the Tribunal also overlooked the fact that the factual situation in the AY 2009-10 were different from AY 2007-08 and 2008-09, where the assessee had declared dividend.

11. We have given due consideration to the contentions urged by Revenue. The Tribunal has followed the principle of consistency while allowing the appeal of the assessee. It has taken into account the previous assessment orders and given the benefit to the assessee. The relevant portions of the order passed by the ITAT which are extracted herein below:

“13. We have considered the rival arguments made by both the sides, perused the orders of the authorities below and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the Assessing Officer in the instant case invoking the provisions of section 36 (1) (ii) of the IT Act, 1961, made addition of Rs.6,64,65,442/- to the total income of the assessee being the amount of commission and exgratia paid to one of the director Sh. Anshuman Magazine who is a share holder of this company holding 24% share holding. According to the Assessing Officer similar additions made in AY 2007-08 and 2008-09 were deleted by the CIT(A) but the department had not accepted the same and the matter is pending before the Tribunal. He further held that in the instant case no dividend has been declared by the assessee company whereas it has paid salary and other allowances to its directors which also includes bonus / ex-gratia which is nothing but to reduce the taxable income of the assessee company and to avoid dividend

distribution tax. We find the Ld. CIT(A) distinguishing the orders of his procedure and the order of the Tribunal upheld the action of the Assessing officer, the reasons for which have already been reproduced in the preceding paragraphs. We find the facts of the impugned assessment year are identical to the facts of the preceding as well as subsequent years. We find the Tribunal in assessee's own case for A. Y. 2007-08, 2008-09 vide ITA No. 709/Del/2012 and 795/Del/2013 order dated 07.03.2016 has deleted such disallowances and the revenue has not filed any appeal against the order of the Tribunal deleting such deletion. The submission of the ld. Counsel for the assessee that in assessment year 2010-11, the incentive of Rs.4,01,84,983/- and salary of Rs.1,15,28,400/- both totaling to Rs.5,29,68,983/- has been allowed in the order passed u/s. 143 (3) could not be controverted by the Ld. DR. Similarly the submission of the Ld. Counsel for the assessee that the Assessing Officer has allowed the payment of Rs.6,84,08,003/- for A. Y. 2011-12, Rs.7,75,03,229/- for A. Y. 2012-13, Rs.8,02,22,620/- for A. Y.2012-13 and Rs.8,44,07,484/- for A. Y. 2014-15 in the order passed u/s 143 (3) also could not be controverted by the Ld. DR. Since the commission paid to Sh. Anshuman Magazine, director of the assessee company was deleted by the CIT(A) in the preceding years and the order of the Tribunal dismissing the appeal filed by the revenue has not been challenged by the revenue in the preceding two years and further considering the fact that the Assessing Officer in the orders passed u/s. 143 (3) for subsequent assessment years from 2010-11 to 2014-15 has allowed similar commission/ incentive, therefore, following the rule of consistency, we are of the considered opinion that no disallowance u/s. 36 (1) (ii) of the IT Act is called for in the instant case. We, therefore, set aside the order of the CIT(A) on this issue and allow the grounds of appeal No. 1 to 1.3 raised by the assessee.

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25. We have considered the rival arguments made by both the sides, perused the orders of the lower authorities and the paper book filed on behalf of the assessee. We have also considered the

various decisions cited before us. We find the Assessing Officer made disallowance to Rs.7,77,69,909/- being excess remuneration paid to the directors. We find the Ld. CIT(A) upheld the action of the Assessing Officer, the reason of which has already been reproduced in the preceding paragraphs. It is the submission of the Ld. Counsel for the assessee that in the assessment year 2008-09 amount of Rs.6,47,27,888/- was disallowed u/s. 36 (1) (ii) of the IT Act, 1961 which included the amount of excess remuneration of Rs.3,04,30,061. Therefore, again the same amount cannot be brought to tax in the impugned assessment year. We find merit in the above argument of the ld. Counsel for the assessee. From the details furnished by the assessee, it is seen that the amount of Rs.3,04,30,061/- was a part of the amount of Rs.6,47,27,888/- being the amount of disallowance u/s. 36 (1) (ii) of the IT Act, 1961 for A. Y.2 008-09. We, therefore, restore this part of the disallowance to the file of the Assessing Officer for verification and if the above amount was a part of disallowance made u/s. 36 (1) (ii) of the IT Act, 1961 of Rs.4,47,27,888/- then it relates to A. Y. 2008-09 and cannot be disallowed during the current year. The Assessing Officer shall decide the issue as per fact and law after giving due opportunity of being heard to the assessee. We hold and direct accordingly.

26. So far as the amount of Rs.4,73,39,848/- being the excess. Remuneration paid to Sh. Anshuman Magazine is concerned, we find the assessee has obtained approval of the competent authority though on 18.07.2011 i.e. much after the date on which such remuneration has been paid. In our opinion although the approval has been obtained after date of payment, however it will relate back to the year under consideration. Since the approval was granted by the competent authority vide letter dated 18.07.2011 for three financial at a time i.e. financial year 2007- 08, 2008-09 and 2009-10, therefore, it is wrong on the part of the Assessing Officer and the CIT(A) to hold that remuneration is not allowable since the approval has been obtained after the payment of remuneration to the concerned director. We further find that the above amount was a part of Rs.6,64,64,442/- which was disallowed by the Assessing

Officer u/s. 36 (1) (ii). However, we have already deleted such disallowances. We find there is no finding of the Assessing Officer and CIT(A) that the expenditure incurred is not for the purpose of business of the assessee. We find similar expenditure has been allowed by the Assessing Officer in the preceding and succeeding assessment years. Further the amount has already suffered to tax in the hands of Sh. Anshuman Magazine. In view of the above discussion we are of the considered opinion that the disallowance of Rs.4,73,39,848/- is not justified under the facts and circumstances of the case. We, therefore, set aside the order of Ld. CIT(A) on this issue and direct the Assessing Officer to delete the addition. Ground No.2 to 2.3 are accordingly allowed for statistical purpose.

27. In the result, the appeal filed by the assessee is allowed for statistical purpose.”

[Emphasis Supplied]

12. Taking note of the identical claims in respect of the incentive paid to Mr. Anshuman Magazine, Director of the assessee-Company, which stood allowed for the previous years, the Tribunal has allowed the claim of the assessee. The revenue has indeed accepted the claim for the preceding years as well as for the subsequent years and therefore, the incentive paid to Mr. Anshuman Magazine for AY 2004-05 onwards has been assessed as ‘salary’. We find no error in the approach of the Tribunal.

13. We also do not find any merit in the contention of the revenue that the observations of the Tribunal *qua* the findings of the Assessing Officer and CIT(A). Irrespective of the observations of the Tribunal, the fact remains that the reasoning of the CIT (A) for disallowance under Section 36(1)(ii) of

the Act has been consistently rejected by the Tribunal for the previous years. The identical expenditures stood allowed in the preceding years as also in the succeeding assessment years. We are also unable to find any cogent material that would indicate that the expenditure was not for the purpose of the business of the assessee. This factual background does not give rise to any substantial question of law for our consideration.

14. The appeal stands dismissed.

SANJEEV NARULA, J

VIPIN SANGHI, J

FEBRUARY 13, 2020

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