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

\+ ITA 82/2022

PR. COMMISSIONER OF INCOME TAX-1 ..... Appellant

Through: Mr.Sanjay Kumar, senior standing counsel.

versus

BMO ADVISORS PVT. LTD. ..... Respondent

Through: None.

% Date of Decision: 11th April, 2022

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

MANMOHAN, J (Oral):

1. Present appeal has been filed challenging the order dated 25th February, 2020 passed in ITA No. 9626/Del/2019 for the Assessment Year 2015-16.

2. Learned counsel for the Appellant states that no justification was given by the Respondent/assessee regarding the kind of services rendered to earn such a huge amount of bonus to a person specified under Section 40A(2)(b) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'). He states that no business correlation in terms of business output or growth of business relating to the payment was shown by the Respondent/assessee.

3. He emphasizes that there is a distinction between a corporate entity and its directors. He states that if a huge amount is paid as a bonus to the

Directors of a company, the corporate entity itself may not survive. He submits that The Payment of Bonus Act, 1965 prohibits grant of bonus.

4. Learned counsel for the appellant further states that in view of provisions of Section 36(1)(ii) of the Act, the sum paid to an employee as bonus is allowable only when such bonus or commission has been paid for the services rendered. He states that the ITAT has erred in not appreciating that CIT(A) in its order had distinguished the findings of DRP for the Assessment Year 2013- 14 and observed that "*the direction of the DRP has given no finding either from the angle of Bonus Act or section 40A or section 36(1)(ii) nor regarding any correlation between business output and huge payment of bonus. No finding has been given even regarding exigency of making this huge payment in the name of business expenditure. Similar is the case with the CIT(A) 's order for A.Y. 2014-15 which has not given any finding as above. It has simply relied on the direction of DRP in earlier years. Therefore, the reliance on these two orders is not sufficient. "*

5. Having perused the paper book, this Court finds that the disallowances made for similar reasons for the Assessment Years 2013-14 and 2014-15 were directed to be deleted by the DRP as well as CIT(A) and the Appellant had accepted the said decisions.

6. Undoubtedly, the principles of *res-judicata* and *estoppel* are not applicable in taxation matters. However, it has been held that a departure from a finding during the past years would result in a contradictory finding. ***(See: Commissioner of Income Tax vs. Sridev Enterprises (1991) 192 ITR 165)***. In fact, in ***Commissioner of Income Tax vs Excel Industries Ltd (2014) 13 SCC 457***, the Court had observed that it was not appropriate to

allow reconsideration of an issue for a subsequent assessment year if the same "fundamental aspect" permeates in different assessment years.

7. In any event, the interpretation of Section 36(1)(ii) is fairly well settled. The Bombay High Court in ***Loyal Motor Service Company Limited v. Commissioner of Income Tax (1946) 14 ITR 647 (Bom.)*** has held as under:-

> ***"****Now the facts as shown by the reference are that this company was formed by fourteen persons, thirteen of whom were originally owner-drivers of motor vehicles, the fourteenth member contributing in money. The thirteenth not only contributed their motor vehicles but also their services and accordingly become employees of this company. Besides the thirteen there are twenty-eight other employees making a total of forty-one. In the year in question the company granted a bonus at the rate of two months' salary to its forty-one employees and the total sum required to pay this bonus was Rs. 6,084/- of which Rs. 1,954/- went to the twenty-eight other employees and Rs. 4,130/- to the thirteen shareholder employees. It is to be noted that the quantum of bonus paid to each of the shareholder employees was by reference to their salaries and not to their stakes in the company. A tabulated result is set out in the application for this reference and is printed on p. 12 of the record. It is there shown that of the thirteen shareholder employees six employees got less bonus than they would have got as dividends if the sum of Rs. 4,130/- had been distributed by way of additional dividends. Five of them got more bonus than such dividends and in the case of two of them the figure works out the same. That is an accident in the sense that the bonus payment being referential to their wages and the dividends being referential to their shares have no relation to each other. Now the answer to the question referred to us depends on the construction that is to be placed upon para (x) of sub-s. (2) of s.10. It should be noted that the body of this sub-section provides an allowance and the qualifying part of it is by way of exception to that allowance. What is to be allowed is "any sum" paid to an employee as bonus or commission for services rendered and the exception is, where "such sum" would not have been paid to him as profits or dividends if it had*

not been paid as bonus or commission. In the exception the words "such sum" can, in my opinion, only refer to the last and the only antecedent, which is "any sum" paid as commission or bonus. Therefore, unless the commission or bonus would be paid to the assessee as profits or dividends the exception to the allowance does not operate. Mr. Setalvad on behalf of the Commissioner has pointed put with considerable force that strictly construed there can hardly ever be a case which comes within the ambit of the exception. Sir Jamshedji Kangaon behalf of the assessee company suggests two such cases, viz., in the case of what is generally called a one-man company which is not unlawful under the Indian Companies Act, and is also a case in which a company, in declaring a dividend, or a partnership, in declaring division of their profits, say that instead of distributing their profits by way of dividends, or shares of profits, they will distribute the amount to themselves, as salaried employees in their own company or partnership, as bonus. We are construing a taxation statute and the subject is entitled to have such a statue strictly construed in his favour. In my opinion,in placing a strict construction on this subsection, the sum expected under the expression "such sum" must be the same sum as is described by the expression "Any sum paid as bonus or commission", and that an equivalent sum even in the two cases where by accident the bonus and the prospective dividend are the same, is not included in that construction. If that is the construction which is to be placed upon this sub-section, then the answer to the question is, that the whole sum of Rs. 4,130/- paid as bonus to the shareholder employees is allowable as deduction under the provisions of s. 10(2)(x). I answer the question referred to us in the affirmative. The Commissioner must pay the costs of this reference."

Kania, J., in his concurring judgment had elucidated and interpreted Section 10(2)(x) of the Income Tax Act, 1922 and observed as under:

"In my opinion, that the construction of the clause is not correct. The word "such" must refer to what had been previously mentioned in the same clause in connection with the word "sum". To find that out we must look to the first part of the clause. That refers to "any" sum. Reading the clause in that way the plain meaning appears to be that

when a particular amount was paid by way of bonus to an employee, if the same amount would have been paid to him as a shareholder as dividend or profit, the company cannot be allowed a deduction on the ground of payment of bonus. To put it in other words the clause is intended to prevent an escape from taxation by describing a payment as bonus, when in fact ordinarily it should have reached the shareholder as profit or dividend. The argument would be equally applicable in the case of a partnership as in the case of a limited company. This construction leads to no hardship. It does not allow a wrong payment of bonus to escape taxation. In the first instance the bonus in the hands of the employee is liable to be taxed, unless exempted by a special notification. Moreover, the proviso contains conditions under which if a wrong claim is made, the same can be investigated and disallowed. An illustration will perhaps make the position clear. Five persons in a firm realizing that the profits of the year were Rs. 50,000/- and they had an equal share in the profits of the business decide that instead of receiving Rs. 10,000/- each as the share of profits each of them will be paid Rs. 10,000/- as bonus or commission. In such a case the firm, when sought to be assessed, may contend that Rs. 10,000/- were paid as bonus. The contention will be clearly rejected. But the safeguards do not end there. The firm will have to prove to the satisfaction of the taxing authority that five partners were employees, in the first instance. Secondly, that the bonus was a reasonable amount having regard to the pay the employee and the condition of the service. Thirdly, that the profits of the business for the year in question made it reasonable to pay the amount granted as allowance and lastly the general practice in similar business or trade justified the payment of the amount as bonus. It seems to me that the plain reading of the clause means that the profits of a business will not be allowed to be dwindled by merely describing the payment as bonus, if the payment is in lieu of dividend or profit. I do not see any reason why any strained construction should be put on the plain meaning of the words of the clause. I therefore, agree with the learned Chief Justice with regard to the answer to be given to the question referred to us."

8. This Court in ***AMD Metplast Pvt. Ltd. V. DCIT, (2012) 341 ITR 0563*** as well as in ***CIT v. Career Launcher India Ltd., (2013) 358 ITR 0179 (Delhi)*** has upheld grant of bonus by companies to its directors. Consequently, this Court is of the view that there is no bar on payment of bonus and the issue whether bonus is to be granted or not is essentially a question of fact.

9. In the present case, none of the authorities below have opined that grant of bonus to the Directors would either endanger the existence of the corporate entity or was prohibited under The Payment of Bonus Act, 1965 or was not proportionate to the services rendered by the respondent-Director.

10. In fact in the previous assessment years similar payment of bonus to the respondent-Director has been upheld. Consequently, this Court is of the view that consistency of approach, uniformity and certainty must be maintained. Accordingly, this Court is in agreement with the Tribunal's decision that as no distinguishing feature had been brought to its notice, the direction to delete the disallowance in the previous Assessment Years must be followed. In view of the above, no substantial question of law arises for consideration in the present appeal and the same is dismissed.

MANMOHAN, J

DINESH KUMAR SHARMA, J

APRIL 11, 2022
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