

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'डी' अहमदाबाद
IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, AHMEDABAD

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
AND SHRI S.S. GODARA, JUDICIAL MEMBER

आयकर अपील सं./ ITA Nos. 1746, 1747 & 1748/Ahd/2013

निर्धारण वर्ष/Assessment Year: 2007-08, 2009-10 & 2010-11

Market Creators Limited, "Creative Castle", 70, Sampatrao Colony, Productivity Road, Baroda-7 PAN : AABCM 3439 R	Vs.	ITO, Ward 4 (1), Baroda
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
Assessee by :		Smt. Urvashi Shodhan, AR
Revenue by :		Shri Jayant Javeri, Sr DR

सुनवाई की तारीख/Date of Hearing : 07/11/2016

घोषणा की तारीख /Date of Pronouncement: 16/11/2016

आदेश/O R D E R

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:

ITA Nos. 1746, 1747 & 1748/Ahd/2013 are three appeals by the assessee preferred against three separate orders of the CIT(A)-III, Baroda dated 18.04.2013, 19.04.2013 and 18.04.2013 pertaining to AYs 2007-2008, 2009-2010 and 2010-2011 respectively. Since all these appeals have common issues, therefore, they were heard together and are disposed of by this common order for the sake of convenience.

ITA No.1746/Ahd/2013 : AY 2007-2008

2. The first ground relates to the treatment of Rs.2,41,866/- as business income instead of dividend income as claimed by the assessee.

2.1 During the course of scrutiny assessment proceedings, the AO noticed that the assessee has claimed Rs.2,41,866/- as exempt being

dividend income. The assessee was asked to justify its claim. The assessee filed the copy of dividend received account from which the AO noticed that there were debit and credit entries and the surplus credit of Rs.2,41,866/- has been claimed by the assessee as dividend income and accordingly claimed the exemption. The AO was of the firm belief that since the assessee was not holding any investment, therefore, there is no question of earning any dividend income. The AO treated Rs.2,41,866/- as income of the assessee.

2.2 The assessee carried the matter before the CIT(A) and reiterated its contention but without any success.

2.3 Before us, the Counsel for the assessee once again claimed that the amount was received as dividend and therefore should be allowed as exempt from tax. The DR strongly supported the orders of the lower authorities.

2.4 We have carefully perused the orders of the authorities below. The assessee is dealing in shares and securities, which means that it is buying and selling shares for its customers. The shares purchased, often, are kept by the assessee and such shares may have been purchased as cum dividend. The assessee is duty bound to remit the dividend as and when received to the purchasers of the shares. Therefore, there are credit and debit entries in the ledger account. At times, due to the ignorance of the buyers who may not be aware that they have purchased shares as cum dividend and therefore, did not claim the dividend amount from the broker. Because of such ignorance, the amount remained with the assessee. This is nothing but a benefit derived by the assessee from the transactions done in its ordinary course of business. Therefore, such surplus has a direct nexus with the

business of the assessee and therefore, an income of the assessee. The Revenue Authorities have rightly taxed the surplus as income of the assessee. We, therefore, do not find any error or infirmity in the findings of the CIT(A). Ground No.1 is accordingly dismissed.

3. With Ground No.2, the assessee has challenged the disallowance of interest expenses of Rs.18,59,963/-, invoking provisions of Section 40A(2)(b) of the Act.

3.1 While scrutinizing the return of income, the AO found that the assessee has paid interest @ 24% to related persons covered u/s 40A(2)(b) of the Act; whereas, at the same time, the assessee has also paid interest to others @ 8% to 12 %. The assessee was asked to justify the payments of interest @ 24%. The assessee submitted that the nature of business activities carried on by it is so volatile and risky that it has to pay higher rate of interest to some parties. This contention of the assessee did not find any favour with the AO who was of the firm belief that interest payment @ 18% is reasonable and accordingly restricted the interest payment @ 18% and disallowed Rs.18,59,963/-.

3.2 The assessee carried the matter before the CIT(A) but without any success.

3.3 Before us, the Counsel for the assessee vehemently stated that the Revenue Authorities has simply ignored the business exigencies of the assessee. The Counsel for the assessee once again stated that the nature of business activities of the assessee is so volatile that at times it has to pay different rate of interest to different parties as per the needs. The DR strongly supported the findings of the Revenue Authorities.

3.4 We have carefully perused the orders of the authorities below. The interest payment made by the assessee can be understood from the following chart:-

Interest payment covered under 40A(2)(b)

FY 2006-07		AY 2007-08		
Sr. No.	Name of party	Amount Rs. @ 24%	Amount Rs. @ 18%	Difference
1	J.H. Shah (HUF)	20,11,745	15,08,809	5,02,936
2	Mani Market Creators Ltd	53,24,200	39,93,150	13,31,050
3	Raj Acharya	1,03,906	77,930	25,977
	<i>Total</i>	74,39,851	55,79,889	18,59,963

3.5 We have also the benefit of the returned income of the aforementioned payees. A perusal of the returned income of the payees shows that all the payees are assessed at the highest rate of tax. Since both, the payer and payees, are assessed at the same rate of tax, in our considered opinion, there is no basis of any Revenue leakage. Our view is also fortified by the decision of Hon'ble High Court of Gujarat in the case of PWS Engineers Limited in Tax Appeal No. 209 of 2015, wherein the Hon'ble High Court had the occasion to consider the following substantial question of law and held as under:-

"(ii) Whether on the facts and in the circumstances of the case, the Tribunal was right in law and in overlooking the fact that the entire exercise was revenue neutral in nature because the company as well as the Directors were taxable at the same rate and that the Directors had paid off the taxes and taking into consideration it ought not to have confirmed any part of the disallowance made by the authorities ?"

6. We have heard learned counsel for the parties. The question of applicability of Section 40A(2) of the Act to the restricted disallowance of Rs. 47,90,178/- is already concluded by this Court by the said order dated 31.3.2015. We may therefore, proceed on that basis. Despite this, the question that still survives is whether the Revenue can tax the same income in the hands of the company on which the Directors had already paid the tax at the same rate at which the company would have been liable to be assessed. In this context, we

may recall that consistently before Assessing Officer, CIT(Appeals) and Tribunal, the assessee had canvassed that all the four Directors who had received such remuneration, were taxed in the highest bracket of 30%; at the same rate at which the assessee company at the relevant time was assessed. In fact, the assessee had demonstrated before CIT(Appeals) that the tax liability of the company on such disputed remuneration amount was exactly the same as the tax the four Directors had paid to the Revenue. To these factual aspects, even the Revenue has, at no stage raised any dispute. We may therefore, proceed on the basis that the element of excessive remuneration represents that income of the company which was eventually taxed in the hands of the Directors at the same rate at which; had it not been so distributed; would have been taxed in the hands of the company. In that view of the matter, the question of revenue neutrality would immediately arise. A certain income has already been taxed in the hands of the Directors. Permitting the Revenue to tax the same income again at the same rate in the hands of the principal payer would amount to double taxation. Only on this count, we answer question in favour of the appellant-assessee and against Revenue, allow the Appeal and set aside the order of the Tribunal. The Tax Appeal is disposed of accordingly."

3.6 Respectfully following the decision of Hon'ble jurisdictional High Court (supra), we set aside the findings of the CIT(A) and direct the AO to delete the addition of Rs.18,59,963/-. Ground No.2 is accordingly allowed.

4. Ground No.3 relates to levy of interest u/s 234A, 234B and 234C of the Act. The levy of interest is mandatory though consequential. We, therefore, direct the AO to levy the interest as per the provisions of the law.

5. Ground No.4 relates to the initiation of penalty u/s 271(1)(c) of the Act. This ground is premature and accordingly dismissed.

6. In the result, the appeal filed by the assessee is partly allowed.

ITA No.1747/Ahd/2013 : AY 2009-10

7. The first ground relates to the disallowance of turnover charges (transaction charges) of Rs.38,56,887/- paid to the stock exchange by invoking provisions of Section 40(a)(ia) of the Act.

7.1 While scrutinizing the return of income, the AO noticed that the assessee has paid transactions charges of Rs.38,56,887/- to the Bombay Stock Exchange/National Stock Exchange on which no tax has been deducted at source. Drawing support from the decision of the Hon'ble High Court of Bombay in the case of CIT vs. Kotak Securities Limited, [2012] 340 ITR 333 (Bom), the AO made the disallowance.

7.2 The assessee carried the matter before the CIT(A) but without any success.

7.3 Aggrieved by this, the assessee is before us.

7.4 We find that the aforesaid decision of the Hon'ble Bombay High Court has been reversed by the Hon'ble Supreme Court vide order dated 29.03.2016 in Civil Appeal No.3143 of 2016 and 3146 of 2016. The relevant findings of the Hon'ble Supreme Court read as under:-

"9. There is yet another aspect of the matter which, in our considered view, would require a specific notice. The service made available by the Bombay Stock Exchange [BSE Online Trading (BOLT) System] for which the charges in question had been paid by the appellant – assessee are common services that every member of the Stock Exchange is necessarily required to avail of to carry out trading in securities in the Stock Exchange. The view taken by the High Court that a member of the Stock Exchange has an option of trading through an alternative mode is not correct. A member who wants to conduct his daily business in the Stock Exchange has no option but to avail of such services. Each and every transaction by a member involves the use of the services provided by the Stock Exchange for which a member is compulsorily required to pay an additional charge (based on the transaction value) over and above the charges for the membership in the Stock Exchange. The above features of the services provided by the Stock Exchange would make the same a kind of a facility provided by the Stock Exchange for transacting business rather than a technical service provided to one or a section of the members of the Stock Exchange to deal with special situations

faced by such a member(s) or the special needs of such member(s) in the conduct of business in the Stock Exchange. In other words, there is no exclusivity to the services rendered by the Stock Exchange and each and every member has to necessarily avail of such services in the normal course of trading in securities in the Stock Exchange. Such services, therefore, would undoubtedly be appropriate to be termed as facilities provided by the Stock Exchange on payment and does not amount to "technical services" provided by the Stock Exchange, not being services specifically sought for by the user or the consumer. It is the aforesaid latter feature of a service rendered which is the essential hallmark of the expression "technical services" as appearing in Explanation 2 to Section 9(1)(vii) of the Act.

10. For the aforesaid reasons, we hold that the view taken by the Bombay High court that the transaction charges paid to the Bombay Stock Exchange by its members are for 'technical services' rendered is not an appropriate view. Such charges, really, are in the nature of payments made for facilities provided by the Stock Exchange. No TDS on such payments would, therefore, be deductible under Section 194J of the Act.

11. In view of above conclusions, it will not be necessary for us to examine the correctness of the view taken by the Bombay High Court with regard to the issue of the disallowance under Section 40(a)(ia) of the Act. All the appeals, therefore, shall stand disposed in the light of our views and observations as indicated above."

7.5 Since the decision of Hon'ble Bombay High Court relied upon by the Revenue Authorities has been reversed by the Hon'ble Supreme Court, we set aside the findings of the CIT(A) and direct the AO to delete the addition of Rs.38,56,887/-. Ground No.1 is accordingly allowed.

8. Ground No.2 relates to the ad-hoc disallowance @ 50% of the financial charges of Rs.9,37,500/- by invoking provisions of Section 40A(2)(b) of the Act.

8.1 While scrutinizing the return of income, the AO noticed that the assessee has paid financial charges to the persons specified u/s 40A(2)(b) of the Act as under:-

Sr. No.	Name of the person	Relationship	Amount
1	H.D. Shah (HUF)	HUF in which director is interested	Rs.5,25,000
2	J.H. Shah (HUF)	HUF in which director is interested	Rs.7,50,000
3	Kalpesh J. Shah (HUF)	Director	Rs.6,00,000
4	Milan H. Merwana	Brother of Director, Dr. J.H. Shah	Rs.1,75,000
5	Minal H. Merwana	Brother of Director, Dr. J.H. Shah	Rs.1,75,000
6	Kalpana M. Merwana	Wife of Director's brother	Rs.2,62,500
7	Yatish H. Shah	Brother of Director, Dr. J.H. Shah	Rs.1,75,000
8	Yatish H. Shah (HUF)	Brother of Director, Dr. J.H. Shah	Rs.1,75,000
9	Yesha Y. Shah	Wife of Director's Brother	Rs.2,62,500

8.2 The assessee was asked to justify its claim of financial charges. The assessee filed a detailed reply in justification of its claim which was rubbished by the AO. The AO was of the firm belief that 50% of the total payments to three persons namely H.D. Shah (HUF), J.H Shah (HUF) and Kalpesh J. Shah (HUF) is excessive and accordingly made addition of Rs.9,37,500/-.

8.3 The assessee carried the matter before the CIT(A) but without any success.

8.4 Before us, the Counsel for the assessee stated that on identical set of facts the Tribunal in ITA No.2590/Ahd/2012 in assessee's own case has set aside the matter to the files of the AO with specific direction to verify the details as furnished before the Tribunal. The DR simply relied upon the findings of the CIT(A).

8.5 We find force in the contention of the Id. Counsel. The Co-ordinate Bench in ITA No.2590/Ahd/2012 on identical issue has held as under:-

"We have heard the rival submissions, perused the material available on record and gone through the orders of the authorities below. The undisputed fact remains that the payments have been made to the related parties. It is also settled position of law that for invoking the provisions of section 40A(2), the AO should form an opinion that the charges which have been paid to the related parties are unreasonable and excessive. In the present case, the AO had disallowed the claim on the basis that payments of financial charges aggregating to Rs.20,70,000/- to the persons specified under section 40A(2)(b) of the Act is somewhat unreasonable having regard to the legitimate needs of the assessee-company's business vis-a-vis the benefits derived by or accruing to the assessee-company as a result of such payments of financial charges because the basis of quantification of such payments are not clear and instances of utilization of such services do not fully justify the payment This finding of the AO was confirmed by the Id.CIT(A) on the basis that the total bank guarantee for the period 1.4.2007 to 31.3.2008 was Rs.56,500,000/- 1% of such amount comes to Rs.5,65,000/-. Thus, this a reasonable amount to be paid as guarantee commission to the related parties, on the basis of such payments made by the appellant itself in the earlier year. Balance amount allowed by the A.O. amounting to Rs.4,70,000/- can be attributed to the amount paid by the appellant on account of interest free fund provided by the related parties from time to time. In page-4 of the paper-book No.2, the assessee has given the utilization of sources under LLMS guaranteed by the parties to whom the financial charges paid. Since this information was not before the authorities below, we are of the considered view that this issue is to be restored to the file of the AO to decide the same afresh in the light of the information furnished at page No.4 of the paper-book No.2. The AO is directed to decide this issue afresh, after providing reasonable opportunity of being heard to the assessee and verifying the details submitted by the assessee. Thus, this ground of assessee's appeal is allowed for statistical purposes only."

8.6 Respectfully following the findings of the Co-ordinate Bench, we restore this issue to the files of the AO with the same direction for verification similar in lines of AY 2008-09. Ground No.2 is treated as allowed for statistical purposes.

8.7. Ground No.3 relates the disallowance of interest invoking provisions of Section 40A(2)(b) of the Act. An identical issue has been decided by us in ITA No.1746/Ahd/2013 qua Ground No.2 of that appeal. For our detailed discussion therein, we direct the AO to delete the addition of Rs.2,67,833/-. Ground No.3 is accordingly allowed.

9. Ground No.4 relates to the disallowance of depreciation on electrical fittings at Rs.90,992/-.

9.1 On verification of depreciation chart, the AO noticed that the assessee has claimed depreciation @ 15% on electrical installation. The AO was of the opinion that on electrical installation depreciation @ 10% is allowable and accordingly disallowed depreciation of Rs.90,992/-.

9.2 The assessee carried the matter before the CIT(A) and strongly contended that deprecation @ 15% has been claimed not on electrical fittings but on electrical installation which is part of plant and machinery. This contention of the assessee did not find any favour with the CIT(A) who was of the firm belief that since the assessee is not a manufacturing concern but only engaged in the business of trading in shares and securities; therefore, the action of the AO is justifiable and accordingly confirmed the disallowance.

9.3 Aggrieved by this, the assessee is before us.

9.4 The Counsel for the assessee reiterated the claim of deprecation under the block "plant and machinery". Per contra, the DR strongly supported the findings of the Revenue Authorities.

9.5 After giving a thoughtful consideration to the orders of the authorities below vis-à-vis the rival contention, we find that under Rule 5 of the Income-tax Rules, which contains the depreciation table for various block of assets and under Part A(II) depreciation on furniture and fittings is @ 10%. It has been further explained that "electrical fittings" include electrical wiring, switches, sockets, other fittings and fans, etc. In the light of the depreciation table provided under the Income-tax Rules, we do not find any error or infirmity in the findings of the CIT(A). Ground No.4 is accordingly dismissed.

10. Ground No.5 relates the levy of interest. Levy of interest is mandatory though consequential. The AO is directed to charge as per the provisions of the law.

11. Ground No.6 relates to the initiation of penalty u/s 271(1)(c) of the Act. This ground is premature and accordingly dismissed.

12 In the result, the appeal filed by the assessee is partly allowed.

ITA No.1748/Ahd/2013 : AY 2010-11

13. First ground relates to the disallowance of Rs.19,83,919/- being turnover charges (transaction charges) paid to the stock exchanges u/s 40(a)(ia) of the Act. An identical issue has been decided by us in ITA No.1747/Ahd/2013 qua Ground No.1 of that appeal. For our detailed discussion therein, we direct the AO to delete the addition of Rs. 19,83,919/-. Ground No.1 is accordingly allowed.

14. Ground No.2 relates to the ad-hoc disallowance @ 50% of financial charges of Rs.3,15,000/-, invoking provisions of Section 40A(2)(b) of the Act. An identical issue has been decided by us in ITA No.1747/Ahd/2013 qua

Ground No.2 of that appeal. For our detailed discussion therein, we set aside this issue to the files of the AO with similar directions. Ground No.2 is treated as allowed for statistical purposes.

15. Ground No.3 relates to the disallowance of interest expenses of Rs.1,65,365/- by invoking provisions of Section 40A(2)(b) of the Act. An identical issue has been decided by us in ITA No.1746/Ahd/2013 qua Ground No.2 of that appeal. For our detailed discussion therein, we direct the AO to delete the addition of Rs.1,65,365/-. Ground No.3 is allowed.

16. Ground No.4 relates to the disallowance of Rs.90,163/- being depreciation claimed on electrical fittings. A similar issue has been considered and decided by us in ITA No.1747/Ahd/2013 qua Ground No.4 of that appeal. For our detailed discussion therein, we decline to interfere with the findings of the CIT(A). Ground No.4 is accordingly dismissed.

17. Ground No.5 relates to the upholding of the disallowance of exemption claimed on dividend income of Rs.33,739/-. A similar issue has been considered and decided by us in ITA No.1746/Ahd/2013 qua Ground No.1 of that appeal. For our detailed discussion therein, we decline to interfere with the findings of the CIT(A). Ground No.5 is accordingly dismissed.

18. Ground No.6 relates to the levy of interest which is mandatory though consequential. The AO is directed to levy interest as per the provision of the law.

19. Ground No.7 relates to the initiation of penalty proceedings u/s 271(1)(c) of the Act. This ground is premature and accordingly dismissed.

20. In the result, the appeal filed by the assessee is partly allowed.

21. In the combined result, all the appeals filed by the assessee are partly allowed.

Order pronounced in the Court on 16th November, 2016 at Ahmedabad.

Sd/-

**(S.S. GODARA)
JUDICIAL MEMBER**

Ahmedabad; Dated 16/11/2016

By T., P.S.

Sd/-

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

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

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आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad