

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C", NEW DELHI**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
Dr. B.R.R. KUMAR, ACCOUNTANT MEMBER**

ITA No.2564/Del/2013
Assessment Year: 2009-10

DCIT Circle – 11 (1) New Delhi	Vs	Impulse International Pvt. Ltd. M- 70, Greater Kailash New Delhi -110048 PAN No. AAACI7150G
(APPELLANT)		(RESPONDENT)

ITA No.2394/Del/2014
Assessment Year: 2009-10

Impulse International Pvt. Ltd. Plot No.41, Echelon Institutional Area, Sector-32, Gurgaon PAN No. AACCN1760B	Vs	JCIT Range- II Gurgaon
(APPELLANT)		(RESPONDENT)

ITA No.6155 to 6156/Del/2014
Assessment Year: 2010-11

DCIT Circle – 11 (1) New Delhi	Vs	Impulse International Pvt. Ltd. M- 70, Greater Kailash-I New Delhi -110048
(APPELLANT)		(RESPONDENT)

ITA No.5454/Del/2011
Assessment Year: 2006-07

DCIT Circle – 11 (1), Room No.312, C. R. Building New Delhi	Vs	Impulse International Pvt. Ltd. B-12, Nizamudin West, New Delhi -110013 PAN No. AAACI7150G
(APPELLANT)		(RESPONDENT)

ITA No.4994/Del/2015
Assessment Year: 2011-12

ACIT Circle – 12 (1) Room No.405, C. R. Building I. P. Estate, New Delhi	Vs	Impulse International Pvt. Ltd. B-12, Nizamuddin West New Delhi – 110013 PAN No. AAACI7150G
(APPELLANT)		(RESPONDENT)

Revenue by	Sh. Amit Katoch, Sr. DR
Assessee by	Ms. Manisha Sharma, Advocate

Date of hearing:	23/01/2019
Date of Pronouncement:	12/03/2019

ORDER

Per B. R. R. Kumar, AM:

The issues involved in the grounds of the appeals are common in all the cases, hence they are being dealt issue wise instead of ground wise.

Grounds relating to commission to Directors

2. The assessee company is a buying Agent in respect of abroad based clients and engaged in the business of Consultancy and Commission Income.

3. During the assessment year the Assessing Officer observed that the Assessee Company has paid commission expenses which have been in excess of the market rates and disallowed the amount under section 36(1)(ii). The Assessing Officer has considered that an amount of 15% increase is adequate and the remaining amount is held to be unreasonable and excessive and made addition under the provisions of section 40A(2)(b). For the A.Y. 2010-11 the Assessing Officer has also held that the assessee has tried to evade dividend distribution tax under section 115-O by the way of giving the commission which is far more excessive.

4. We have gone through the records before us and the submissions of the Assessee taken before lower authorities.

5. The commission was paid to the Directors namely Shri. Rajiv Suri, Shri. Sunil Arora and Smt. Jyotsna Suri in various years. The qualifications and contributions are as under:

(i) Mr. Rajive Suri-Managing Director

He is the Managing Director of the assessee Company and has over 32 years of experience working in the Apparel Industry and has excellent relations with renowned international retail chains in Europe and America. The services provided by him are as under:

- *Guiding the assessee and providing strategic inputs for the growth and development of the business of the assessee.*
- *Negotiation of the buying agency terms with the Overseas buyers.*
- *Client relationship with Overseas buyers,*
- *Service provided by Mrs. Jyotsna Suri –Director*

(ii). Ms. Jyotsna Suri – Director

She has experience of over 30 years in the Apparel Industry. The services provided by her are as under:

- i. Designing & Development*
- ii. Quality control*

iii Assisting in functional expertise to ensure that the export orders procured from the Overseas buyers are executed in time.

iv. Supply chain management

(iii) Mr. Sunil Arora

He, as a Director has experience of over 25 years in the Apparel Industry and has instrumental in further developing its business. The services provided by are as under:

- Marketing and procurement of export orders.*
- Negotiation of the buying agency terms with the Overseas Buyers*
- Client relationship with the Overseas Buyers*
- Supply chain management*

6. It was submitted that the assessee is in the buying house trade which is more than 40 years old, there are only a few companies which have attained the size of the assessee in terms of the export orders executed and commission earned thereon. It was stated that the assessee is among the top 10 buying houses in India which include global giants like William Connors and Li & Fung which has been possible purely due to the efforts made by the directors and their contacts with the overseas buyers. Considering the contribution made by above directors for the growth and development of business of the assessee and services rendered by them, the assessee has paid the above amount of commission to them.

Further on the allegation that the excess payment of commission is made in lieu of dividend income, it was submitted before the Ld. CIT(A) which is reproduced as under:

"It is submitted that Mr. Rajive Suri, Chairman of the assessee is having experience of over 32 years in the Buying Agency Business and holds 16.52% shares in the assessee while the Managing Director, Mr. Sunil Arora and the director Mrs. Jyotsna Suri held 19.96% and 16.28% shares respectively in the assessee. The assessee has paid commission of Rs.4,56,22,500/- to Mr. Rajive Suri while Commission of Rs.94,01,000/- and Rs.1,17,51,250/- was paid to Mr. Sunil Arora and. Jyotsna Suri, respectively. This itself proves that the commission paid to the directors has no relation to the shares held by them in the assessee.

It is submitted that the Ld. Assessing officer has formed an opinion on an arbitrarily basis without bringing any documentary evidence on record to show that the commission paid to the directors is unreasonable and highly excessive. The Ld Assessing Officer has wrongly and erroneously concluded on assumptions and presumptions that the commission paid to them was for the investment made by them in the assessee and not for the services rendered by them without bringing any documentary evidence on record. The Ld Assessing Officer has failed to appreciate the fact that the commission paid to the directors was for the actual services rendered by them and not for the investment made by them in the assessee. The Ld. A.O. has not held any where in the assessment orders that the two directors did not render services to the assessee".

7. In view of the aforesaid, it is submitted that if commission has been paid to an employee, in lieu of services rendered, same is deductible without any restriction. If such employee happens to be a shareholder, deduction under section 36 (1) (ii) of the Act is also allowed, if bonus or commission was paid in lieu of services rendered by the employee/director and not by way of share of profit.

7.1 It is submitted that the Ld. Assessing Officer has arbitrarily formed an opinion that the commission if not paid, would have been payable as dividend ignoring the fact that the payment of dividend is under the provisions of Companies Act and is within the discretionary powers of the board. A shareholder of a company makes an investment when he purchases shares and is entitled to dividend on the said investment. Dividend is payable as per and in accordance with the provisions of the Companies Act, 1956. The Board proposes payment of dividend and the rate thereof and thereafter it is approved by the shareholders. It is submitted that it is not mandatory to pay dividend and moreover, the Companies Act, 1956 does not stipulate that dividend must be paid. Payment of salary to the directors is for the work and actual services rendered by them to the company. It is a contractual obligation but can be regulated by law. It is further submitted that the nature of the two payments, i.e. "dividend" and "salary" are entirely different.

7.2 It is submitted that there is no basis or material or evidence brought on record by Assessing Officer to support this contention that the commission would have been paid as dividend to the shareholders. Companies Act, 1956 contains the limitations and restriction in the matter of payment of dividend and such discretion of the company either to pay or not to pay dividend cannot be assumed. Assessing Officer cannot presume that had this commission not been paid, this would have necessarily been paid as dividend to the shareholders. There is no basis for this assumption.

8. Ld. DR strongly supported the orders of the Assessing Officer.

9. Primarily we also hold that the Revenue's contention that the assessee is bound by Section 198 and Section 309 of the Companies Act, is not applicable owing to the reading of the relevant provisions. The provisions read as under:

Section 198(1) in The Companies Act, 1956

(1) The total managerial remuneration payable by a public company or a private company which is a subsidiary of a public company, to its directors and its

managing agent, secretaries and treasurers or manager in respect of any financial year shall not exceed eleven per cent. of the net profits of that company for that financial year computed in the manner laid down in sections 349, 350 and 351, except that the remuneration of the directors shall not be deducted from the gross profits: Provided that nothing in this section shall affect the operation of sections 352 to 354 and 356 to 360.

Section 309 in The Companies Act, 1956

309. Remuneration of directors.

(1) The remuneration payable to the directors of a company, including any managing or whole-time director, shall be determined, in accordance with and subject to the provisions of section 198 and this section, either by the articles of the company, or by a resolution or, if the articles so require, by a special resolution, passed by the company in general meeting¹ and the remuneration payable to any such director determined as aforesaid shall be inclusive of the remuneration payable to such director for services rendered by him in any other capacity: Provided that any remuneration for services rendered by any such director in any other capacity shall not be so included if-

(a) the services rendered are of a professional nature, and

(b) in the opinion of the Central Government, the director possesses the requisite qualifications for the practice of, the profession].

9.1 The above provisions of section 198 and 309 are not applicable to the assessee company as the assessee being neither a public company nor a private company which is the subsidiary of a public company hence are not applicable and neither received any payment beyond the provisions of sub section 1 (a) of section 309.

9.2 Further we also find that as per the Board Resolution maximum commission of 27% over the turnover can be paid to the Directors whereas the total payments is only 1.25% of the value of the export orders achieved by them. The Assessing Officer has not brought anything on record nor gathered any evidence about the contribution of the Directors which goes contra to the payments they received. The Assessing Officer has not brought any comparative cases to determine as to how the commission paid to the Directors is excessive. There is no doubt about the qualifications and contribution of the Directors for obtaining the orders and increasing the turnovers. The payment of commission has been the practice of the company for the past seven years. The Directors who have been receiving the commission are also paying tax at the maximum merchant rate so as the company hence no revenue leakage could also be found based on the tax payments. Even the dividend distribution tax in the hands of the company @ 12.5% and tax free in the hands of the recipient would not be give any credence to the alleged surreptitious tax planning. Increase in personal expenses and comparing it with the increase in Directors remuneration cannot be accepted as a methodology to calculate the reasonable remuneration. The company can determine the rates of salary,

remuneration, commission as long as it doesn't infract any law enforce which is the case of the assessee. Hence we hereby delete the addition made by the Assessing Officer and hold that no interference is called for pertaining to the commission paid by the assessee to the Directors.

10. This decision is applicable to all the appeals involving the issue of commission to the Directors under section 40A(2)(b) and 36(1)(ii).

Grounds relating to disallowance under Section 14A:

11. The Assessing Officer observed that the assessee company had received dividend income of Rs.36,67,907/- and when asked to explain as to why disallowance under Rule 8D may not be made, the assessee explained that it had already disallowed an amount of Rs.8,85,254/- u/s 14A. The Assessing Officer however, was not satisfied with the same, who held that the disallowance u/s 14A has to be mandatorily made under Rule 8D. Accordingly, by invoking Rule 8D, disallowed an amount of Rs.9,98,009/- and thereby, made an addition of Rs.1,12,755/-.

12. During the hearing before us, Ld. DR reiterated the contents of the assessment order.

13. We find from the documents submitted before the Revenue, that as per the computation of Income filed, the assessee had made disallowance under Rule 8D, which includes the amount M/s Impulse International Pvt. Ltd. disallowance of Rs.53,326/- under Sub-rule (2)(i), thereof, towards STT being direct expenses incurred for earning dividend income. In respect of administrative efforts, in the absence of any identifiable items, the assessee had adopted disallowance under Sub-rule (2) (iii) equal to 0.5% of "average investment" aggregating to Rs.8,31,928/-. It was submitted the disallowance made by the Ld. AO under Rule 8D(2)(ii) was not called for. It was submitted that the Assessing Officer has taken interest expenses of Rs.1,01,664/- under sub-rule (2)(ii) which include bank charges of Rs.65,401/-, interest expense on car loan of Rs.34,577/- and interest on late deposit of TDS Rs.1,686/-. It was submitted that as none of these expenses had any relationship with earning of dividend income but were directly related to other purposes, there was no justification in the action of the Assessing Officer of applying the provision of Rule 8D(2)(ii).

14. On going through the facts on record we hold that As per the scheme of

Section 14A(2), it is duty cast upon the AO to examine the claim of assessee having regards the account and only where the Assessing Officer is not satisfied, which should be on cogent ground, with the claim of the assessee, that the Assessing Officer should follow the prescribed procedure under Rule 8D. The assessee's plea before the AO was that in respect of an amount of Rs.53,326/- which, being STT payment, is directly related to the dividend income, disallowance was already made by the assessee under Rule 8D(2)(i) while in respect of administrative expenses, it had followed the working as per Rule 8D(2)(iii), whereby an amount of Rs.8,31,928/- was disallowed. The Assessing Officer did not examine this plea in nor could find any fault in the claim of the assessee having regards to its account. The interpretation of the AO regarding the applicability of the provisions of Rule 8D is certainly incorrect and not in accordance with the law as interpreted by the Hon'ble Supreme Court in the case of Maxopp Investment Ltd. Since the AO did not record any satisfaction on regarding the claim of the assessee having its accounts, the AO was not empowered to invoke Rule 8D at the first place. Accordingly, the action of the AO of making disallowance there under is not justified. On facts, the assessee has given details of interest expenses, none of which had any nexus with the dividend income. Accordingly, no disallowance under Rule 8D(2)(ii) was called for. Evidently, the assessee had already made disallowance under sub-clause (i) and (iii) of Rule 8D(2), therefore, no further disallowance was called for u/s 14A. Hence we totally concur with the decision of the Ld. CIT (A) in deleting the addition made under section 14A.

Grounds relating to Short Term Capital Gains:

15. During the assessment proceedings, the Assessing Officer observed that the assessee had earned profit on trading of shares amounting to Rs.9,64,305/- on which short term capital gain was offered to tax. On finding that the assessee was trading in shares on a regular basis and based on the Revenue's stand in the earlier years that the assessee indulges in intra-day trading, the Assessing Officer held the profit on trading of shares be treated as business income.

16. We find that the Ld. CIT(A) has deleted the addition on a factual ground holding that the assessee has already paid tax @30% on the amount of Rs. 9,36,208/- out of the total profits amounting to Rs. 9,64,305/-. Hence there was no need to convert the capital gains into business income. The balance

amount was earned out of sale of securities and mutual funds. Since it was found by the authorities below those deliveries were duly taken and period of holding was substantial, in the absence of any contrary findings on record we hereby decline to interfere in the order of the Ld. CIT(A).

Grounds relating to disallowance of Rent

17. The assessee has paid rent to M/s Impulse India (P) Ltd in respect of the premises at Plot No.41, Sector-32, "Echelon" Institutional Area, Gurgaon,. The Assessing Officer had restricted the rent at the same rate on which another premises was hired by the assessee, at JMD Pacific Square, Sector-15, Gurgaon. It was submitted that the two premises are located at different locations and the premise at Echelon Institutional Area is located at a prime location, therefore, the rent in respect of them could not be compared. Further, in respect of the premise at JMD Pacific Square, Sector-15, Gurgaon, maintenance charges in respect of premises were to be separately borne by the assessee company, of Rs.70,745/- per month, however in the case of the property at Sector-32, Gurgaon, the maintenance charges were included in the rent and if this fact taken into account, there would hardly be any difference between the two premises. The Ld. CIT(A) deleted the addition based on the orders in the case of the assessee for the A.Y. 2007-08 and 2008-09. The Ld. CIT(A) also held that there was no excessive or unreasonable payment to related persons as per the provisions of Section 40A(2)(b). Since we find that the Assessing Officer has not considered the payment of the maintenance charges, location, and applicability of the provisions of Section 40A(2)(b) and since no evidence regarding unreasonableness of the rent paid has been brought on record we hereby decline to interfere in the order of the Ld. CIT(A).

Grounds relating to Keyman Insurance Policy:

18. The provisions of section 28(vi) of the Act read with section 2(24)(xi) relating to bonus on Keyman Insurance Policy includes:

"Any some received under a Keyman Insurance Policy including the sum allocated by way of bonus in such policy."

19. The proceeds from LIC are Exempt under section 10(10D) except in the following 3 cases:

1. If amount is received on a keyman insurance policy.
2. If amount is received from a pension policy.
3. If premium paid is more than 20% of sum assured in any year.

20. In view of above, the proceeds from Insurance company in respect of Keyman Policy will be taxable only on receipt basis. The provisions of section 2(24)(xi) read with section 28(vi), it is evident that the amount of bonus on Keyman Insurance Policy is to be taxed on receipt basis only. Hence the addition made by the Assessing Officer taxing the income on accrual basis cannot be held to be valid in the eyes of the law. Hence we decline to interfere in the order of the Ld. CIT(A).

21. In the result appeal of the assessee is allowed and that of the Revenue's appeal are dismissed

Order pronounced in the open Court on 12 .03.2019.

Sd/-

(KULDIP SINGH)
JUDICIAL MEMBER
Dated: 12-03-2019.

Sd/-

(DR. B. R. R KUMAR)
ACCOUNTANT MEMBER

Copy of order to: -

- 1) The Appellant
- 2) The Respondent
- 3) The CIT
- 4) The CIT(A)
- 5) The DR, I.T.A.T., New Delhi

By Order

Assistant Registrar

ITAT, New Delhi