

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Pronounced on: 06.05.2011

+ **ITA No. 1203/2006 (A.Y. 1995-96)**
ITA No. 955/2006 (A.Y. 1996-97)
ITA No. 98/2007 (A.Y.1997-98)

COMMISSIONER OF INCOME TAX, DEL APPELLANT

- versus -

MODI STONE LTD.

.....RESPONDENT

Advocates who appeared in this case:

For the Appellant : Mr Sanjeev Sabharwal, Sr.
Standing Counsel

For the Respondent: None.

CORAM:-

HON'BLE MR JUSTICE A.K. SIKRI

HON'BLE MR JUSTICE V.K. JAIN

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to the Reporter or not? | No |
| 3. Whether the judgment should be reported in Digest? | No |

V.K. JAIN, J. (ORAL)

1. For the assessment year 1995-96, the respondent/assessee claimed commission payment of Rs4,70,04,000/- as deduction under the head 'commission/discount'. No details of the alleged payments

were furnished to the Assessing Officer, who therefore, disallowed the entire amount. It was noted by the Assessing Officer that in the Assessment Year 1993-94, the Assessing Officer had disallowed such payments to the extent of Rs 1,61,35,839/-. In an appeal filed by the assessee, the Commissioner of Income Tax (Appeals) noted that details of the commission paid along with necessary evidence were not furnished during assessment proceedings in spite of specific opportunity given by the Assessing Officer. He was of the view that since it was the assessee who had claimed this expenditure, the onus was on him to prove it and that he had failed to discharge that onus. He, therefore, maintained disallowance to the extent of commission payment of Rs 23,22,250/- and Rs 1,73,457/-, but, in view of the past record and nature of the commission, export commission of Rs 19,20,478/- and the early retirement discount to the extent of Rs 4,25,87,555/- was allowed, thereby restricting the disallowance to Rs 24,95,707/-.

2. For the assessment year 1996-97, assessee claimed an amount of Rs. 5,68,62,553/- under the head 'discount/commission' in its profit & loss account. In view of the failure of the assessee to furnish any details, the

aforesaid amount was disallowed by the Assessing Officer. Following the order passed in the assessment year 1995-96, the CIT(A) directed the Assessing Officer to disallow the amount of Rs 69,34,824/- and allow the balance amount of Rs 4,99,27,729/-. The appeal filed by the Revenue was dismissed by the Tribunal.

The appeals of the Revenue against the order of Commissioner of Income Tax (Appeals) for the assessment year 1995-96 and 1996-94 were dismissed by ITAT vide common order dated 11th November, 2005 on the ground that the Revenue had not produced any material before the Tribunal to prove that the findings of the CIT(A) were not based on past record.

3. For the assessment year 1997-98, the assessee/respondent claimed a sum of Rs 3,25,04,557/- under the head 'commission/discount' out of which a sum of Rs 5,71,429/- was later offered by it for tax on the ground that the same was reversed in assessment year 1998-99. The balance amount was disallowed by the Assessing Officer finding that the assessee had not furnished any details regarding commission and discount payment. However, in the appeal filed by the assessee, CIT

(A) following his order for the assessment year 1995-96, reduced the addition to Rs 38,10,251/-. In the appeal filed by the Revenue, the Tribunal noted that the expenditure claimed by the plaintiff comprised export commission of Rs 12,70,409/-, which was deleted for the assessment year 1995-96. Rs 13,88,334/- towards District Officer Commission which was allowed for the assessment year 1995-96 and brokerage on TELCO bills amounting to Rs 94,987/- and in view of these details and past history of the case, the appeal filed by the Revenue was dismissed.

4. These appeals by the Revenue were admitted on the following substantial questions of law:

- (1) Whether the Ld. ITAT was justified in law in misplacing the burden of proof in contravention of the settled proposition of law while upholding part deletion of disallowance made by the CIT(A)
- (2) Whether the impugned order of the learned ITAT is vitiated by perversity on account of apparent non application of mind to the observations made by the AO for the relevant year and in the assessment year 1993-94.

5. The assessment orders clearly show that no details of the amount alleged to have been paid towards commission/discount were furnished to him nor was any

evidence produced before him to prove the aforesaid payments. The Commissioner of Income Tax (Appeals) rightly noted that it was for the assessee who had claimed these payments to produce relevant material before the Assessing Officer to satisfy him with respect to these payments. But, strangely, the CIT(A) despite noting that the assessee had not discharged the onus placed on him and had not furnished necessary details, allowed these payments on the basis of the past record and nature of the claim alone. We fail to appreciate how commission of payment/discount in a previous year could by itself and without anything more have been made the basis for allowing such payments for the subsequent years. It is very much possible that the commission/discount paid during the previous assessment year (s) was not paid during assessment years in question or the payment was not to the extent claimed by the assessee. It was obligatory for the assessee to produce relevant evidence before the Assessing Officer to prove the alleged payments, particular when it was specifically called upon to do so and an opportunity was subsequently given to it for this purpose. Once it was found that the onus of proving the alleged payment on the

assessee and he had not produced any evidence to prove those payments, neither CIT(A) nor ITAT could have allowed these payments, without having any material before them to substantiate such payments. The CIT(A) as well as the ITAT, in our view, committed a serious error of law in upholding these payments despite finding that no material had been produced by the assessee to substantiate these payments. The ITAT was not justified in rejecting the appeal of the Revenue on the sole ground that the Department had not produced any material to prove that the findings of CIT(A) were not based on past records. It was for the assessee to prove the alleged payments during the assessment years 1995-96, 1996-97 and 1997-98 and not for the Department to prove otherwise.

6. For the reasons given in the preceding paragraphs, we hold that the ITAT committed an error of law in allowing the aforesaid payments despite onus of proving being on the assessee and no evidence having been produced by the assessee to prove those payments, and thereby misplacing the burden of proof on the Revenue.

Questions of law are accordingly answered in
favour of the Revenue and against the assessee.

(V.K. JAIN)
JUDGE

(A.K. SIKRI)
JUDGE

MAY 06, 2011
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