

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO.2027 OF 2017

Pr. Commissioner of Income Tax-10

...Appellant

vs.

Indofil Industries Limited

...Respondent

Mr. Akhileshwar Sharma for Appellant.

Mr. Harsh M. Kapadia i/b Mr. Balasaheb G. Yewale for Respondent.

**CORAM : K. R. SHRIRAM AND
AMIT B. BORKAR, JJ.**

DATE : 16 DECEMBER 2021.

P. C. :

The following questions of law are proposed in this appeal:

1. Whether the payment in the nature of commission made to directors of the assessee company is liable for tax deduction under Section 194H of the Income Tax Act, 1961 (the said Act) being in the nature of commission ?

2. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT erred in holding that non-deduction of

TDS under Section 194H by the Assessee company on commission payment to the directors is not liable for disallowance under Section 40(a)(ia) of the said Act ?

3. Whether on the facts and circumstances of the case and in Law, the order of the Hon'ble ITAT is perverse in law as it is based on wrong findings of facts ignoring that the assessee company has itself treated the payment as commission expenses in its audited books of accounts and not as part of salary paid to directors ?"

2. The issue herein is regarding disallowance under Section 40(a)(ia) of the said Act for amount of Rs.1,08,00,000/-. The Assessing Officer had noted that Respondent had made a provision for commission for the Chairman and the Managing Director (CMD) of the Company for Rs.1,08,00,000/- at the year end but not deducted TDS under Section 194H of the said Act. The commission was paid to the CMD in the subsequent year, i.e., during the Assessment Year 2010-2011 after deducting TDS. According to Shri Sharma commission provision calls for disallowance under Section 40(a)(ia) in the impugned Assessment Year.

3. Before Commissioner of Income Tax (Appeals) (CIT (A)), respondent had contended that CMD was full time employee of the company and hence this payment was nothing but salary covered by TDS provision under Section 192 and under Section 194H of the said Act which deals with TDS on commission payments. As per Section 192 of the said Act, TDS is deductible from salary payment only at the time of payment and not at the time of making provision and therefore no disallowance is called for in the given circumstances. CIT (A) accepted the contentions of Respondent and allowed this ground of appeal.

4. Shri Sharma has contended that this payment being commission in nature is covered by Section 194H of the said Act and hence TDS was deductible at the time of making provision at the year end and as Respondent had failed to do so, the same called for disallowance under Section 40(A)(ia) of the said Act.

5. Shri Kapadia tendered copy of Form-16 of CMD which is taken on record and pointed out that Form-16 of the CMD for the Assessment Year 2010-2011 showed that commission was part of overall compensation/salary of the CMD and hence TDS in respect thereof is covered under Section 192 of the said Act.

6. Having considered the memo of appeal and the orders annexed thereto and after hearing Shri Sharma and Shri Kapadia, we find that the commission paid to the CMD has been shown as part of salary in Form-16 for Assessment Year 2010-2011. Total salary paid for the Financial Year 2009-2010 as it appears from the impugned order is Rs.1,72,15,959/- which includes commission for Rs.1,08,00,000/- paid by assessee in the Assessment Year in question.

7. Section 192 of the said Act, unlike other TDS provisions require deduction of tax at source under the head "Salary only at the time of payment and not otherwise." We also find that the quantum of accrual of expenses is not disputed by Revenue and Shri Sharma also stated the same. Since Shri Sharma had in fairness stated that the quantum or accrual of expenses is not disputed, there cannot be any perversity in the order passed by CIT(A) or by ITAT in concurring with the findings of CIT (A).

8. ***Commissioner of Income tax, Delhi, Ajmer, Rajasthan and Madhya Bharat vs. Nagri Mills Co. Ltd.***¹, this Court has observed as under:

"We have often wondered why the Income-tax authorities, in a matter such as this where the deduction is obviously a permissible deduction under the Income-tax Act, raise disputes

1 33 ITR 681

as to the year in which the deduction should be allowed. The question as to the year in which a deduction is allowable may be material when the rate of tax chargeable on the assessee in two different years is different; but in the case of income of a company, tax is attracted at a uniform rate, and whether the deduction in respect of bonus was granted in the assessment year 1952-53 or in the assessment year corresponding to the accounting year 1952, that is in the assessment year 1953-54, should be a matter of no consequence to the Department; and one should have thought that the Department would not fritter away its energies in fighting matters of this kind. But, obviously, judging from the references that come up to us every now and then, the Department appears to delight in raising points of this character which do not affect the taxability of the assessee or the tax that the Department is likely to collect from him whether in one year or the other."

9. In our view, the Tribunal has not committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that questions as pressed raises

any substantial question of law.

10. The appeal is devoid of merits and it is dismissed with no order as to costs.

(AMIT B. BORKAR, J)

(K. R. SHRIRAM, J.)

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