IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "A" BENCH, AHMEDABAD

BEFORE MS. SUCHITRA KAMBLE, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No.1048/Ahd/2015
with
CO No. 109/Ahd/2015

Assessment Year: 2010-11

Add. CIT, Range-5 Ahmedabad	**Vs**	M/s Precision Bearing Pvt. Ltd. 28A, Changodar Industrial Estate, Sanand District – Ahmedabad
(Appellant / Revenue)	**.**	(Respondent / Assessee)
PAN: AAACP 9205 H		
Revenue by	Shri S.S. Shukla, Sr. DR/ Shri Vijay Kumar Jaiswal, CIT-DR	
Respondent by	Shri S.R. Shah, AR	
Date of Hearing	11.03.2022/23.06.2022(Virtual)	
Date of Pronouncement	29.06.2022	

आदेश / O R D E R

Per B.M. Biyani, A.M.:

THIS APPEAL:

1. This appeal filed by the revenue is directed against the order dated 15.01.2015 of learned Commissioner of Income-Tax (Appeals)-9, Ahmedabad **["Ld. CIT(A)"]** in Appeal No. CIT(A)-XI/26/ACIT.Cir-5/13-14, which in turn arises out of the order of assessment dated 18.03.2013 passed by the learned Addl. CIT, Range-5, Ahmedabad **["Ld. AO"]** u/s 143(3) of the Income-tax Act, 1961 **["the Act"]** for the Assessment-Year 2010-11. The

assessee has also filed Cross-Objection No. CO/109/Ahd/2015 which is also admitted and being disposed of.

BACKGROUND:

2. Brief facts are such that the assessee is a Private Limited Company. The assessee filed return on 26.09.2010 declaring a total income of Rs. 5,14,90,540/-. The case was selected under scrutiny and statutory notices were issued. Finally, the Ld. AO completed assessment u/s 143(3) of the Act at a total income of Rs. 7,18,09,430/-, after making various disallowances and additions. Being aggrieved, the assessee filed appeal to Ld. CIT(A). The Ld. CIT(A) allowed part-relief. Against the order of Ld. CIT(A), the revenue has filed appeal and the assessee has filed cross-objection and now both parties are before us. We proceed to decide first the Appeal of Revenue and thereafter the Cross-Objection of assessee.

REVENUE'S APPEAL:

3. The revenue has raised following grounds:

"1.1 The ld. CIT(A) has erred in law and on facts in deleting the addition of Rs. 7,96,200/- on account of disallowance of Trade Mark Expenditure and not considering the finding of the AO.

1.2 The CIT(A) has erred in law and on fact in deleting the addition of Rs. 7,96,200/- on account of disallowance of Trade Mark Expenditure without considering that a large portion of this claim includes expenditure incurred in earlier years and not in current year.

1.3 The ld. CIT(A) has erred in law and on facts in deleting the addition of Rs. 7,96,200/- on account of disallowance of Trade Mark Expenditure by relying on the decision of Hon'ble Supreme court in the case of CIT Vs. Finlay Mills Ltd. (1951) 20 ITR 475 (SC), which was rendered prior to the amendment made in the Act for allowing depreciation on intangible assets like know-how, patents, copy rights,

trade marks, license, franchises or any other business or commercial rights of similar nature.

2. ***The CIT(A) has erred in law and on facts in deleting the addition of Rs. 1,37,50,000/- on account of disallowance of commission paid to M/s. Diamond Sea Jewellery LLC, Dubai and not considering the findings of the AO.***

3. ***The CIT(A) has erred in law and on facts in deleting the addition of Rs. 19,52,842/- on account of commission to Venessa Trivino Bujalil, Santa Clara Oscar, Alfredo Marietta Marmetal and Hobert M Fischer and not considering the findings of the AO.***

4. ***The CIT(A) has erred in law and on facts in deleting the addition of Rs. 24,60,000/- on account of Commission of R.K. Sheth, Snehal Sheth and Shrenik Sheth and not considering the findings of the AO.***

5. ***The CIT(A) has erred in law and on facts in deleting the addition of Rs. 4,00,530/- on account of Commission of Ami U. Parikh, Amiben V. shah and Nilima N. shah and not considering the findings of the AO.***

6. ***The CIT(A) has erred in law and on facts in deleting the addition of Rs. 6,70,017/- on account of Commission paid to Ms Kunali K Muchhala and not considering the finding of the AO.***

7. ***On the fact and circumstances of the case, the Ld. CIT(A) ought to have upheld the order of the Assessing officer.***

8. ***It is, therefore, prayed that the order of the Ld. CIT(A) may be set aside and that of the Assessing Officer be restored."***

GROUND NO. 1.1 to 1.3 OF REVENUE:

4. In these Grounds, the issue involved is the disallowance of trade mark expenditure of Rs. 7,96,041/- (Rs. 7,96,200/- mentioned in the Grounds is incorrect).

5. During assessment-proceeding, the Ld. AO observed that the assessee has incurred an expenditure of Rs. 7,96,041/- on registration of trade-mark of its products in different countries and claimed the same as deduction. Before Ld. AO, the assessee placed reliance on the decision of Hon'ble Supreme Court in **Finlay Mills 20 ITR 475** and argued that the Hon'ble Apex Court has already accepted the impugned expenditure as a revenue expenditure and allowed deduction. However, the Ld. AO disallowed deduction on three counts, viz. (i) the expenditure gives the assessee enduring right and therefore it's a capital expenditure; (ii) the decision in **Finlay Mills** was rendered prior to the amendment made in section 32 of the Act from A.Y. 1999-2000 whereby the Parliament has started allowing depreciation on trade-mark; and (iii) most of the expenses included in the sum of Rs. 7,96,041/- are related to the earlier years and not to current year under consideration.

6. During appellate proceeding, the Ld. CIT(A) accepted that the expenditure has been incurred for registration of various trade-marks in different foreign countries only to protect the business-interest of assessee and not for acquisition of any trade-mark. In such a situation, according to the decision of Hon'ble Supreme Court in **Finlay Mills 20 ITR 475**, the expenditure is revenue nature only. The Ld. CIT(A) further held that the amendment made in section 32 from A.Y. 1999-2000 envisages a case where the trade-mark is acquired for a price and not to a case where the assessee has simply taken registration of his own trade-marks. Based on these, the Ld. CIT(A) deleted the disallowance made by Ld. AO. The Ld. CIT(A), however, did not make any comment on the finding of Ld. AO that most of the expenses included in the sum of Rs. 7,96,041/- were related to the earlier years.

7. Before us, the Ld. DR placed strong reliance upon the order of Ld. AO and argued that the expenditure of Rs. 7,96,041/- is rightly disallowed by the Ld. AO for the reasons elaborated in the assessment-order. Hence the Ld. DR requested to uphold the disallowance.

8. On the contrary, the Ld. AR vehemently supported the order of Ld. CIT(A). In addition, the Ld. AR placed strong reliance upon the decision of **ITAT, Ahmedabad in Reckitt Benckiser Healthcare India Ltd. Vs. Addl. CIT, Ahmedabad in ITA No. 3098/Ahd/2013**, wherein it was held thus:

> ***"10. During the course of assessment proceedings, the assessing officer noticed that assessee has incurred an amount of Rs. 66,26,795/- for registering PPL products in foreign countries. The assessee company explained that these expenses have been incurred to enable assessee to register and sell its products in specified territories. The assessing officer observed that the process of getting the product registered is a long drawn process wherein the goods have to pass through series of tests and studies on bio-equivalence and clinical research to the satisfaction of the authority of those countries. Once, the product is registered and approval is granted by the particular country, the assessee can continue to export its goods over a long period of time. Therefore, the assessing officer was of the view that registration of the product clearly entitled the assessee to a benefit of enduring nature in the form of marketing right (intangible assets) to that country. Therefore, the assessing officer has treated these expenses as capital in nature and added to the total income of the assessee.***
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> ***11. Aggrieved assessee filed appeal before the Id. CIT(A). The Id. CIT(A) has allowed the appeal of the assessee stating that product registration expenses are nothing but the registration expenses incurred to get pharmaceutical product registered with local health authorities, association and their counterparts at the foreign destinations.***
>
> ***12. During the course of appellate proceedings before us we have heard both the sides on this issue and perused the material on record. It is noticed that assessee has incurred these expenses for registering its product in various countries to enable the assesee to sell the product in such counties. We observed that in absence of registration, the assessee would not be able to sell the product in the foreign countries as per the regulatory requirement of different countries, it is mandatory to get the product of the assessee registered in respect of counties for the purpose of selling in the overseas markets. Therefore, the finding of the assessing officer that assessee is getting benefit of enduring nature of registration of product has no merit. In the light of the above facts and circumstances we observed that Id. CIT (A) has correctly deleted the impugned addition, therefore, the appeal of the revenue is dismissed on this issue."***

Ld. AR argued that the issue involved in the present appeal is similar to the issue decided in the aforesaid order of ITAT, Ahmedabad Bench and following the same, the expenditure incurred by the assessee deserves deduction.

9. We have considered the rival submissions as well as the material held on record. Our findings and observations are as under:

(i) The expenditure incurred on mere registration of trade-mark is a revenue expenditure in view of the decision of Hon'ble Apex Court in **Finlay Mills 20 ITR 475** as well as co-ordinate bench of **ITAT, Ahmedabad in Reckitt Benckiser Healthcare India Ltd. (supra).**

(ii) The amendment in section 32 from A.Y. 1999-2000 which allows deprecation on various intangible assets (including trade-mark) is applicable only when the cost incurred in respect of trade-mark is in the nature of capital expenditure. This is very much clear from the following extract of **Memorandum to Finance (No. 2) Bill, 1998** given by the Parliament at the time when the amendment was introduced:

"Under the existing provisions, depreciation is allowable when building, plant, machinery or furniture is used by the assessee for the purposes of his business or profession. It is proposed to widen the scope of this section so as to provide that depreciation will also be allowed where intangible assets are owned wholly or partly by the assessee and are used by such assessee for the purposes of his business or profession. Intangible assets, such as know-how, patent rights, copyrights, trade-marks, licences, franchises or any other business or commercial rights of the assessee will form a separate block of assets. As and when any capital expenditure is incurred by an assessee on acquiring such intangible assets the amount of such expenditure will be added to the block of intangible assets and depreciation will be claimed on the written down value at the end of the financial year. As a consequence of this amendment, it is proposed to provide that any expenditure of a capital nature incurred before the 1st April, 1998 on the acquisition of patent rights or copyrights used for the purposes of business shall not qualify for deduction under the said section 35A."

[Underlines supplied]

Therefore if the expenditure is revenue in nature, which is so in the present appeal, this amendment is not applicable.

(iii) The Ld. AO has also observed in the assessment-order that most of the expenses related to the earlier years. To check this aspect, we have perused the details and evidences of the expenditure placed at Page No. 48 to 58 of the Paper-Book. We find that out of the total expenditure of Rs. 7,96,041/, expenditure to the extent of Rs. 6,46,200/- was incurred in earlier year and only a sum of Rs. 1,49,841/- was incurred during the current year under consideration. Therefore, the Ld. AO has correctly recorded a finding in his assessment-order that most of the expenditure was incurred in earlier years. We also observe that the Ld. CIT(A) has not made any observation on this point in his appeal-order. We further observe that the appellant-revenue has forcefully taken a specific plea of this point in Ground No. 1.2. During hearing, the Ld. AR has not made any submission to rebut the observations of Ld. AO or Ground No. 1.2 of the revenue. As submitted earlier, the documents placed at Page No. 48 to 58 of the Paper-Book also demonstrates that out of the total expenditure, a sum of Rs. 6,46,200/- relates to earlier year.

10. In view of above discussion, although we are satisfied that the expenditure of Rs. 7,96,041/- incurred by the assessee on registration of trade-mark is a revenue expenditure and therefore allowable as a deduction, yet we observe that a sum of Rs. 6,46,200/- does not relate to the year under consideration. Therefore, we uphold the disallowance to the extent of Rs. 6,46,200/-. Accordingly, this ground of revenue is partly allowed.

GROUND NO. 2 OF REVENUE:

11. The issue involved in this Ground is the disallowance of commission payment of Rs. 1,37,50,000 to M/s Diamond Sea Jewellery LLC, Dubai.

12. During assessment proceeding, when the Ld. AO asked the assessee to submit details of expenditure, the assessee submitted evidences in the form of (i) agreement with the payee, (ii) debit notes raised by the payee, (iii) statement containing details like name and address of parties to whom sales were made through the payee, the amount of sales, amount of commission, date of payment of commission etc., and (iv) Outward Transaction Remittance Advice. However, the Ld. AO examined certain terms and conditions of the agreement and concluded his dis-satisfaction based on those terms and conditions. The Ld. AO also noted that how M/s Diamond Sea Jewellery LLC, Dubai engaged in jewellery business, can make sale of assessee's products which are industrial bearings? With these reasoning, the Ld. AO disallowed the commission payment.

13. The Ld. CIT(A), however, deleted the disallowance by observing as under:

> ***"Commission to M/s Diamond Sea Jeweller LLC, Dubai:***
> ***Rs. 1,37,50,000/-***
> ***I find that there is already an agreement for commission with this party dated 1/2/2008 which is on record and pursuant to which such commission is paid to the party for the work done by the party. The appellant has given full details regarding commission paid to various parties for the year under consideration at Annexure-A with the written submissions before me which were also before AO and hence also one cannot say that necessary evidences are not filed. The details also give the names of the parties in respect of sales to whom the commission is paid to the agent. The appellant also showed from the search carried out from the google relating to this party showing its profile of its website, which shows that apart from trading in bullion-diamond, this party is also dealing in non-ferrous metals and other products' and 'therefore, the reasoning of the AO that how can a party dealing in Diamond can work as commission agent for the product of the appellant is also answered by the profile of the commission agent M/s. Diamond Sea Jewellery LLC, Dubai.***
>
> ***I have also gone through the decisions cited (supra):***
> ***i) CIT v/s Genesis Comment (P) Ltd. 163 Taxman 482***
> ***ii) CIT v/s Printer House (P) Ltd. 188 Taxman 70***
> ***iii) CIT v/s Septu India (P) Ltd. 305 ITR 295***
> ***iv) ACIT v/s Shree Sajjan Mills Ltd. 115 TTJ 145***

Relied upon by the appellant to canvas proposition that without making any effort by the AO to find out the veracity of such payment particularly when all the relevant evidences and agreements are filed with him, AO cannot justify the disallowance of such commission. In such cases, the disallowances are made only on the presumption and cannot be sustained. I also find considerable force in the contentions -of the AR that the appellant is exporting nearly 70% of its products in different parts of the world and hence such export cannot take place without the services of middle men or agent in the countries outside India. The appellant also produced the evidences of remittance made to such parties and there is no evidence or even allegation by the A.O that such monies have come back to the appellant. The A.O. has not tried to investigate on these aspects at all. The payee is not at all related to the appellant and hence the commission of Rs.1,37,50,000/- paid to M/s Diamond Sea Jewellery LLC, Dubai is held to be incurred for the purpose of business and the same is allowed as such. This part of the ground is accordingly allowed in favour of the appellant."

14. Before us, the Ld. DR repeated the reasoning given by the Ld. AO and argued that the Ld. AO has rightly disallowed the commission expenditure. Hence the disallowance needs to be upheld.

15. Per contra, the Ld. AR contested that the assessee has supplied all documents to the Ld. AO in support of the commission payment and the same are also placed in the Paper-Book. The Ld. AR also argued that the assessee has provided complete invoice-wise details of the sales made by the payee for which the commission was paid as also the outward-remittance-advices issued by the bankers. The Ld. AR further argued that the Ld. AO has not found any weakness in those documents, he has simply looked into certain terms and conditions of the agreement and raised his own doubts and presumptions. Ld. AR further argued that in commercial world, certain conditions like exclusive territory, limitations and obligations of the parties, etc. are incorporated in the agreements as a matter of prudence but those conditions are not always forced or acted upon by the parties and in any case, it is for the parties to look into the actual implementation of those conditions. The Ld. AR argued that as far as assessing authority is

concerned, the factum of services rendered by the payee and payment of commission, are the only aspects to be seen and those have been duly proved by the assessee by clinching evidences. The Ld. AR further argued that the assessee has also provided sufficient material gathered from the website of the payee to demonstrate that the payee is not only engaged in the jewellery business but also in the metal business though the firm's name is M/s Diamond Sea Jewellery LLC, Dubai. Ld. AR also relied upon following decisions and argued loudly that in all these cases, the commission-payment has been allowed as deduction if the assessee has provided primary documents in support of the commission-payment and the AO has not rebutted the same by cogent evidences:

(a) CIT Vs. Genesis Commet (P) Ltd. 163 Taxman 482,
(b) CIT Vs. Printer House (P) Ltd. 188 Taman 70,
(c) CIT Vs. Septu India (P) Ltd. 305 ITR 295
(d) ACIT Vs. Shree Sajjan Mills Ltd. 115 TTJ 145
(e) ITAT Ahmedabad in Jagson Colourchem Ltd. ITA No. 112/A/2017
(f) ITAT Ahmedabad in Shri Rajshekhar J. Aiyer ITA No. 668/A/2016
(g) ITAT Ahmedabad in Ridhi Steels & Tubes Pvt. Ltd. ITA No. 638/A/2015
(h) ITAT Ahmedabad in Shri Indravandan G. Patel ITA No. 372/A/2017

With these submissions, the Ld. AR argued that the assessee has rightly claimed the deduction of commission expenditure and the Ld. CIT(A) has rightly deleted the disallowance made by the Ld. AO. Hence the Ld. AR prayed to uphold the deletion of disallowance.

16. We have considered rival submissions and contentions of both sides and perused the material held on record. We observe that the assessee has submitted all documentary evidences which are required to prove the services rendered by the payee as also the payment of commission and the Ld. AO has not observed any fallacy in those documents. We also observe that the Ld. CIT(A) has considered all evidences and relying on the legal

precedents, deleted the disallowance made by Ld. AO. Since we do not find any infirmity in the order passed by Ld. CIT(A), we uphold the deletion made by Ld. CIT(A). Accordingly, we dismiss this Ground No. 2 of the revenue.

GROUND NO. 3 OF REVENUE:

17. The issue involved in this Ground is the disallowance of commission payment of Rs. 19,52,842/- to Venessa Trivino Bujalil, Santa Clara Oscar, Alfredo Marietta Marmetal and Hobert M Fischer.

18. During assessment proceeding, when the Ld. AO called for the details of expenditure, the assessee submitted evidences consisting of (i) debit notes raised by the payee, (ii) statement containing details like name and address of parties to whom sales were made through the payee, the amount of sales, amount of commission, date of payment of commission etc., and (iii) Outward Transaction Remittance Advice. However, the Ld. AO noted that the assessee has not filed agreements with the payees. Further, the Ld. AO also noted that these payees have rendered services in the territories assigned by the assessee to other agents which raises strong doubt about the rendering of services. Based on these observations, the Ld. AO was not satisfied with the deduction of commission-expenditure claimed by the assessee and hence made disallowance.

19. The Ld. CIT(A), however, deleted the disallowance by observing as under:

> ***"Commission, to Vanessa Trivino, Bujali Santa Clara, Alfredo Marietta Marmetal and Hobart M. Fishcer - Rs.19,52,842/-:***
>
> ***I have carefully considered the facts of the' case, the assessment order in above regard and the evidences filed by the appellant during the course of assessment proceedings as well as appellate proceedings. The appellant has given complete details regarding the details of commission, the parties in respect of sales on which commission is paid, debit/credit notes exchanged between these parties and the rate of commission. It may be in some of the cases, these parties may have sold the goods in the territory meant for M/s***

Diamond Sea Jeweller LLC, Dubai, but that does not mean that the services are not rendered. If at all, there is a grievance for the same, it should be between the parties and the appellant, but that does not mean that the services are not rendered. On-the contrary it proves that services for the sale of goods were rendered for which the commission is paid to the parties. It is also not necessary that in every case there would be agreement for the commission. Further, the reference to M/s Basant Enterprises by the AO is also unwarranted as there was no Commission disallowed in the case of Basant Enterprises during the year under consideration. In view of the above when the appellant has given other details to corroborate the same for the year under consideration, such payment has to be considered as having been made for the purpose of the business. The appellant has given prima facie evidences to corroborate its claim of Commission whereas the AO has not brought any other materials except raising doubts by way of assumption and presumption for which such disallowance cannot be sustained. This party is not related with the appellant and also there is no allegation that the payment of such commission has flown back to the appellant. The appellant's reliance on the following cases is also well founded:
i) CIT v/s Genesis Comment (P) Ltd. 163 Taxman 482
ii) CIT v/s Printer House (P) Ltd: 188 Texmen 70
iii) CIT v/s Septu India (P) Ltd. 305 ITR 295
iv) ACIT v/s Shree Sajjan Mills Ltd.' 115 TTJ 145

Following the same, I direct AO to allow such commission and delete the disallowance. This part of the ground is accordingly allowed.

20. Before us, the Ld. DR supported the order of Ld. AO. He argued that the Ld. AO has rightly disallowed the commission payment because the assessee did not produce the any agreement with the payees. The Ld. DR requested to uphold the disallowance.

21. Per contra, the Ld. AR submitted that the assessee has supplied (i) debit notes raised by the payee, (ii) statement containing details like name and address of parties to whom sales were made through the payee, the amount of sales, amount of commission, date of payment of commission etc., and (iii) Outward Transaction Remittance Advice. According to Ld. AR, the assessee has submitted all documents available in his possession and

the Ld. AO has not found any deficiency. Ld. AR argued that even if the assessee was not able to provide agreement with the payee, the assessee has produced debit notes issues by the payees as also the remittance-advices issued by the bankers. According to Ld. AR, sometimes agreement is not executed or not available but when other evidences are available which prove the factum of services and commission payment, the Ld. AO should take a practical and holistic view of the businesses. With these submissions, the Ld. AR argued that the assessee has incurred commission expenditure and rightly claimed the deduction. Therefore the Ld. AR requested to uphold the deletion of disallowance made by Ld. CIT(A).

22. We have considered rival submissions and contentions of both sides and perused the material held on record. We observe that the assessee has submitted documentary evidences in the form of debit notes issues by the payees as well as the foreign-remittance advices and the Ld. AO has not observed any deficiency in these documents. We also observe that though the assessee has not produced any agreement with the payees, the debit notes are held on record which are duly issued by the payees. These debit notes coupled with the details of sales made through those payees and the outward-remittance-advices prove that the payees have charged commission for services rendered and commission has flowed to them. Being so, we agree with the Ld. CIT(A) that no adverse view should be taken against the assessee. Accordingly, we also dismiss the Ground No. 3 of the revenue.

GROUND NO. 4 OF REVENUE:

23. The issue involved in this Ground is the disallowance of commission payment of Rs. 24,60,000/- to R.K. Sheth, Snehal Sheth and Shrenik Sheth.

24. During assessment proceeding, when the Ld. AO called for the details of expenditure, the assessee submitted evidences consisting of (i) statement containing details like name and address of parties to whom sales were made through the payee, the amount of sales, amount of commission, date of payment of commission etc., (ii) Copy of Ledger A/c, (iii) Bank Statement

reflecting the payments made, and (iv) Copies of Income-tax Returns filed by the payee for A.Y. 2010-11. The Ld. AO noted certain observations that (i) these parties are salaried employees of the assessee and they have received salary as well as commission from the assessee, (ii) they have not received commission from any other person except the assessee, (iii) debit notes issued by these payees have the same format, and (iv) part of the commission paid to all these payees has been made for a single customer viz. M/s Premium Energy Transmission Ltd. Based on these observations, the Ld. AO was not satisfied with the commission-payment made by the assessee and hence made disallowance.

25. The Ld. CIT(A), however, deleted the disallowance by observing as under:

> ***"Commission to R.K. Sheth, Snehal Sheth and Shreriik Sheth Rs. 24,60,000/-:***
>
> ***I have carefully considered the submissions of the appellant, and also gone through the details filed by the appellant as well as findings of the AO in his assessment order in the above regard. In my opinion, it is not necessary that in all the cases of the commission, there would be written agreement with the parties. It is also not necessary that salaried employees of the assessee cannot work as commission agent for the work done by them. The fact that in respect of one party commission is given to three persons is also explained by the appellant that there would be several transactions with the same party for which different employees of the company may take a lead for concluding the contracts and therefore in respect of the same party, different contracts or work done by them, they may be paid commission. The appellant has given full details of commission paid, the sales in respect of which commission is paid, the rate at which commission is paid, copies of the returns of the employees are also filed. None of them have been refuted by the AO. There is also no allegation that monies which are given have flown back to the appellant nor the payees are relatives of the appellant. Under the circumstances, payment of such commission to these parties cannot be disallowed as the appellant has prima facie led the evidences to prove its claim. The AO has not examined any of the parties and has only disallowed on the basis of presumption and assumption, which cannot be done following the ratios of the***

decisions referred in above paras earlier. I accordingly, direct AO to delete the disallowance of commission. This part of ground of appeal is also accordingly allowed."

26. Before us, the Ld. DR supported the order of Ld. AO. Ld. DR argued that the Ld. AO has rightly disallowed the commission-payment for the several reasons mentioned in the assessment-order and therefore the disallowance must be upheld.

27. Per contra, the Ld. AR placed strong reliance on the order of Ld. CIT(A). Ld. AR submitted that the Ld. CIT(A) has given sufficient observations on this issue to prove that the deduction is allowable to the assessee. Hence the Ld. AR, without making further submissions, requested to uphold the deletion of disallowance made by Ld. CIT(A).

28. We have considered the rival submissions and contentions of both sides and perused the material held on record. We observe that the payees are salaried employees of the assessee and the assessee has paid them salary as well as commission. On perusal of the order of Ld. CIT(A), we observe that the Ld. CIT(A) has given sufficient findings on this issue as narrated above and therefore we refrain from repeating. We also observe that the payees are income-tax assessees and they have filed their income-tax returns wherein not only salary income but also the commission-receipts from the assessee have been disclosed and applicable taxes have been paid thereon. Being so, we are satisfied that the commission payment to these parties stand proved by the assessee and the Ld. CIT(A) has rightly deleted the disallowance made by Ld. AO. Therefore, we dismiss the Ground No. 4 of the revenue.

GROUND NO. 5 OF REVENUE:

29. The issue involved in this Ground is the disallowance of commission payment of Rs. 4,00,530/- to Ami U. Parikh, Amiben V. Shah and Nilima N. Shah.

30. During assessment proceeding, the assessee submitted evidences consisting of (i) statement containing details like name and address of parties to whom sales were made through the payee, the amount of sales, amount of commission, date of payment of commission etc., (ii) Copy of Ledger A/c, (iii) Bank Statement reflecting the payments made, and (iv) Copies of Income-tax Returns filed by the payee for A.Y. 2010-11. The Ld. AO noted these three payees are ladies who are closely related to the Key Management Persons as per the tax audit report. The Ld. AO further observed that (i) the assessee does not have agreement with these payees, (ii) out of three lady-payees, two are salaried employees, and (iii) they have not received commission from any other person except the assessee. The Ld. AO categorically observed that despite asking, the assessee has not furnished a single email or copy of correspondence or any contemporary evidence to show that these three ladies acted as agent of the assessee in selling products which entitled them to received commission of Rs. 4,00,530/-. Based on these observations, the Ld. AO was not satisfied with the commission-payment made by the assessee and hence made disallowance.

31. The Ld. CIT(A), however, deleted the disallowance by observing as under:

> ***"Commission 'to Ami U Parikh, Amiben V. Shah and Nilima N. Shah - Rs. 4,OO,530/·***
>
> ***I have carefully considered the rival submissions, gone through the details filed by the appellant and also gone through the findings of the AO in this regard. It is seen that the appellant has filed complete details about the names of the parties for which commission is 'paid, rate of commission, the evidences about remittance made, etc. It is also reflected as income in the hands of the payees. There is no further effort made by the AO to verify the veracity of the above payments against the prima facie claim backed up the evidences filed by the appellant. There is no allegation by AO that the commission paid has flown back to the appellant. These parties are not relatives of the appellant. The appellant has further pointed out that in the earlier assessment year also all these parties were paid commission, which was allowed in scrutiny assessment u/s 143(3) of the Act. Under the circumstances, following the***

decisions mentioned in earlier paragraphs, in this order, the commission is directed to be allowed u/s 37 of the Act. This part of the ground of appeal is also allowed.

32. Before us, the Ld. DR supported the order of Ld. AO. Ld. DR argued that the assessee has paid commission to lady-agents without proving their services. Hence the Ld. AO was justified in disallowing the commission-payment and disallowance must be upheld.

33. Per contra, the Ld. AR placed strong reliance on the order of Ld. CIT(A). Ld. AR submitted that the assessee has given full details for the sales made by the payees. Ld. AR further argued that the payees have submitted income-tax returns and copies thereof are held on record. Ld. AR further submitted that the assessee has paid commission to those payees in past as well and the commission-payment was allowed to the assessee even in scrutiny proceeding conducted by the revenue u/s 143(3). With these submissions, the Ld. CIT(A) has rightly deleted the addition made by the Ld. AO and the action of Ld. CIT(A) must be upheld.

34. As a rejoinder, the Ld. DR submitted that res judicata is not applicable to tax authorities and allowability of commission in past assessment, does not make a rule.

35. We have considered rival submissions and contentions of both sides and perused the material held on record. We observe that the assessee has submitted details of sales made by the payees and also filed the copies of income-tax returns submitted by the payees. We also observe that the identical payment of commission was allowed as a deduction to the assessee in past even while conducting scrutiny proceeding. We observe that though res judicata is not applicable to tax authorities, there has to be a consistency unless there is some significant reason of departure. We also observe that it was within the powers of Ld. AO to examine those payees so as to ascertain the truth, but the Ld. AO has not taken any such action and just raised doubts. Taking into account these aspects, we are of the view

that the Ld. CIT(A) has rightly deleted the disallowance. We do not find any infirmity in the order of Ld. CIT(A). Accordingly, we also dismiss the Ground No. 5 of revenue.

GROUND NO. 6 OF REVENUE:

36. The issue involved in this Ground is the disallowance of commission payment of Rs. 6,70,017/- to Ms Kunali K Muchhala.

37. The observations of Ld. AO, Ld. CIT(A), the submission of Ld. DR and Ld. AR with regard to this Ground are identical to the Ground No. 5 narrated above. Hence we have the same reasoning to conclude that the Ld. CIT(A) has rightly deleted the disallowance made by Ld. AO. Accordingly, we also dismiss this Ground No. 6 of the revenue.

GROUND NO. 7 AND 8 OF REVENUE:

38. Ground No. 7 and 8 are general in nature and do not require any specific adjudication.

ASSESSEE'S CROSS-OBJECTION:

39. We now take up the Cross-Objection of assessee. The assessee has raised following grounds:

> ***"1. The Ld. AO and CIT(A) erred in law and on the facts in not allowing a sum of Rs. 2,04,000/- being fees paid to Registrar of Companies (ROC fees) towards increase in authorize capital of the assessee as revenue expenditure u/s 37 of the Act.***
>
> ***1.1. Without prejudice to above, the ld. CIT(A) ought to have allowed the deduction of the said amount u/s 35D of the Act. It be so held now.***
>
> ***2. The Learned AO as well as CIT(A) erred in law and on facts in disallowing depreciation of Rs. 28,125/- claimed in respect of A/c machines on the ground that A/c machines***

were installed and used for less than 180 days during the year under consideration. It be so held now."

GROUND NO. 1 and 1.1 OF ASSESSEE:

40. In this Ground, the assessee has challenged that the lower authorities have erred in not allowing the deduction of Rs. 2,04,000/- of fee paid to Registrar of Companies (ROC) for increase in authorised capital u/s 37(1). Alternatively, the assessee has requested to allow deduction u/s 35D.

41. The issue is squarely covered by the decision of **Hon'ble Apex Court in Brooke Bond India Ltd. Vs. CIT 224 ITR 798** and **Hon'ble Andhra Pradesh High Court in Vazir Sultan Tobacco Co. Ltd. Vs. CIT 174 ITR 689** where it was held that the expenditure incurred for increase in authorised capital is capital in nature and therefore not allowable as deduction. Respectfully following these decisions, we are of the view that the expenditure of Rs. 2,04,000/- is not allowable as deduction.

42. Ld. AR has raised an alternative ground to allow deduction u/s 35D. But we observe that the said expenditure is not covered by any of the specified expenses prescribed in sub-section (2) of section 35D. Therefore, we are not persuaded to allow deduction of this expenditure. Hence Ground No. 1 and 1.1 of the assessee are dismissed.

GROUND NO. 2 OF ASSESSEE:

43. In this Ground, the assessee has claimed that the lower authorities have erred in disallowing depreciation of Rs. 28,125/- claimed in respect of A/c machines on the ground that A/c machines were installed and used for less than 180 days during the year under consideration.

44. During assessment proceeding, the Ld. AO observed that the assessee purchased A/c machinery on 20/08/2009 for Rs. 3,75,000/- and claimed full depreciation. Ld. AO noted that the assessee has not furnish any evidence to prove that the machine was installed in the first half of the year

and entitled for full depreciation. Based on this, the Ld. AO allowed half-depreciation and disallowed remaining half amounting to Rs. 28,125/-.

45. Ld. CIT(A) agreed with the observations of Ld. AO and confirmed the disallowance.

46. Before us, Ld. AR referred to Page No. 68 of the Paper-Book where the invoice of the impugned machinery is placed. According to Ld. AR, the invoice of machinery is dated 20/08/2009 which proves that the machinery was purchased on 20/08/2009. Thereafter, Ld. AR submitted that the assessee is a company and it has calculated depreciation not only for income-tax, but also for the purposes of Companies Act. In this regard, Ld. AR carried our attention to Page No. 62 of the Paper-Book where a statement of depreciation prepared for Companies Act, is placed. According to Ld. AR, as per this statement, the date of addition is 20/08/2009 and date on which put to use is 15/09/2009 and accordingly depreciation for 197 days was computed even for Companies Act. The Ld. AR further placed a logic that the impugned machinery is A/c Machinery which does not take much time of installation. Ld. AR submitted that this kind of machinery are ready-to-purchase and ready-to-use. Therefore, it is quite illogical to assume that the assessee would have kept it uninstalled till 30/09/2009. With these submissions, the Ld. AR argued that the disallowance made by Ld. AO is unjustified and must be deleted.

47. Per contra, Ld. DR supported the orders of lower authorities.

48. We have considered rival submissions of both sides. We find sufficient substance in the submission of Ld. AR. We note that the assessee is a company whose accounts are audited not only for income-tax purposes but also for Companies Act. Taking into account the fact that the assessee has computed depreciation under companies Act for 197 days, which also is accepted by the revenue for MAT purposes u/s 115JB, we are of the view that no interference should be made in the calculation of depreciation.

Accordingly, we delete the disallowance of Rs. 28,125/- made by Ld. AO. Hence this Ground No. 2 of the assessee is allowed.

DISPOSITION:

49. In the result, the appeal of Revenue as well as Cross-objection of assessee are partly allowed.

Order pronounced in the open court on 29th June, 2022.

Sd/-	**Sd/-**
(SUCHITRA KAMBLE)	**(B.M. BIYANI)**
Judicial Member	Accountant Member

Indore 29th June, 2022

Patel/Sr. PS

Copies to:
(1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad Benches, Ahmedabad