

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD**

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 11459 of 2016-DB

[Arising out of Order-in-Original/Appeal No DMN-EXCUS-000-COM-003-16-17 dated 12.04.2016 passed by Commissioner of Central Excise and Service Tax-DAMAN]

Supreme Treves Pvt Limited

.... Appellant

92-93, Kadaiya Village, Next to Dalwada Sub-station,
Airport Road, NANI DAMAN, GUJARAT

VERSUS

Commissioner of Central Excise & ST, Daman

.... Respondent

3rd Floor, Adarsh Dham Building, Vapi-Daman Road,
Vapi, Opp.Vapi Town Police Station, Vapi
Gujarat -396191

AND

SERVICE TAX Appeal No. 12331 of 2019-DB

[Arising out of Order-in-Original/Appeal No DMN-EXCUS-000-COM-02-19-20 dated 23.05.2019 passed by Commissioner of Central Excise, Customs and Service Tax-DAMAN]

Supreme Treon Pvt. Limited

.... Appellant

92-93, Kadaiya Village, Next to Dalwada Sub-station,
Airport Road, NANI DAMAN, GUJARAT

VERSUS

Commissioner of Central Excise & ST, Daman

.... Respondent

3rd Floor, Adarsh Dham Building, Vapi-Daman Road,
Vapi, Opp.Vapi Town Police Station, Vapi
Gujarat -396191

APPEARANCE :

Shri PM Dave & Shri Mrugesh G. Pandya, Advocates for the Appellant
Shri Prabhat K. Rameshwaram, Addl. Commissioner for the Respondent

**CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)**

DATE OF HEARING : 17.04.2023

DATE OF DECISION: 17.08.2023

FINAL ORDER NO. 11736-11737/2023

C.L. MAHAR :

The common issue involved in both the appeals is whether the remuneration paid by the appellant to directors should be charged to service tax on the reverse charge basis or not.

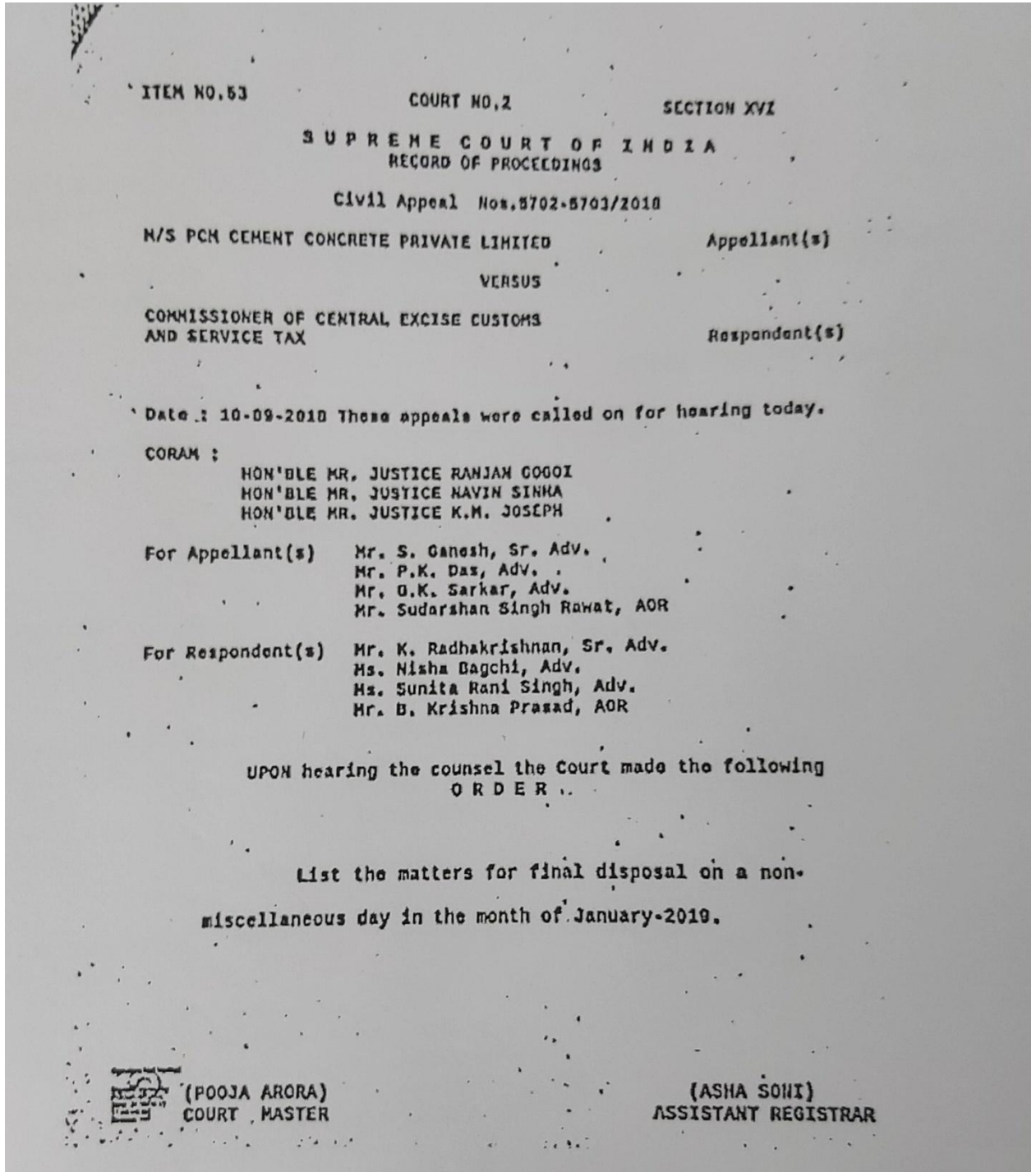
2. It has been the contention of the appellant that the department has misinterpreted the provision of the Company's Act, 1956 in its favour by ignoring the fact that remuneration paid to its Directors is a salary and there is clear-cut relationship of Appellant and its Directors that of employer and employee. The Directors of the appellant are declaring their remuneration under the Income Tax Act, 1961 as "Salaries".

3. The department has erred in interpreting the word 'remuneration' which is paid by the appellant to its Directors in a literally meaning. The amount being paid by the appellant to its Directors is nothing but a salary for all practical purposes. It has also been contended that it is pertinent to note that TDS on such salaries received by various employees including its Directors has duly been deducted and the same is being regularly deposited with the Income Tax department. The learned Advocate has mentioned that the matter has been decided in catena of judgments where it has been held that the remuneration paid to the Directors is nothing but a salary. The Directors which are appointed as per the statutory requirements are employees of the Company. The learned Advocate has relied upon the decision of this Tribunal in the case of *Allied Blenders and Distillers Pvt. Limited vs. CCE & ST, Aurangabad reported in – 2019 (24) GSTL 207 (Tri. Mumbai.)* and *Rent Works India Pvt. Limited vs. CCE, Mumbai reported in 2016 (43) STR 634 (Tri. Mumbai)*.

4. Learned Advocate has also drawn our attention to this bench's decision vide Final Order No. A/11891-11892/2021 dated 24.05.2021 wherein the matter has been decided in the following manner:-

"4. We have carefully considered the submissions made by both the sides and perused the records. We find that the Learned Commissioner despite the submission of the appellants that the remuneration paid by the appellants to the managing director and the executive director of the company was shown as "Salary" and declared in Form-16 which is a income tax return for the salary income decided that the remuneration paid is not a salary but directors remuneration. Therefore, the same is liable to service tax in the hands of the appellant. We find that though in the Income tax return the remuneration was declared as salary income but it is a self declaration. However, whether such income is a salary income or otherwise the same can be established on the basis of employment conditions for employment of directors as company's employees. In the entire proceedings the appellant have not produced the appointment order of the directors as employees containing the terms and conditions of the employment. On the basis of terms and conditions of the employment of directors as employees it can be ascertained whether the directors are employees or otherwise which is the root of the entire issue. Therefore, we are of the view that matter needs to

be reconsidered taking into account not only the position of income tax but also on the basis of terms and conditions of the employment. We also find that the learned Authorized Representative has submitted the status of identical issue in case of M/S PCM CEMENT CONCRETE PVT LTD pending in the Hon'ble Supreme Court. The latest order by the Hon'ble Supreme Court is scanned below:



4.1 From the above status we find that the matter is coming up for final disposal. The Adjudicating Authority may take cognizance of Hon'ble Supreme Court judgment in the above case while passing a de-novo order depending on the facts of the case. All the other issues are kept open.

5. The appeals are allowed by way of remand to the adjudicating authority for passing a fresh de-novo order by following the principles of natural justice."

5. The appellant have approached Hon'ble Gujarat High Court against the above mentioned order of the CESTAT by filing Special Civil Application No. 14552 of 2021 in case of M/s. Supreme Treves Pvt. Limited vs. UOI wherein the following directions have been given by the Hon'ble High Court:-

"In the instant case also, we notice that the approach of the Tribunal is to abdicate its duty of deciding the matter on the merits or to retain the matter till the outcome of the pending matter before the apex court. This approach of tribunal is not proper. We deem it appropriate to direct the tribunal to decide the matter on merits. We further reserve liberty to the parties to raise all contentions as raised by both the sides before this Court. Let the same be decided without further loss of time."

6. The matter has been heard in detail. We find that the short issue involved in the present appeals is that whether the remuneration paid to the Directors by the appellant is chargeable to service tax under reverse charge basis or not. We find that the matter is no longer res-integra as the same has already been decided by this Tribunal. The Kolkata Bench of this Tribunal, in the case of *Bengal Beverages Pvt. Limited vs. CGST & Excise, Howrah* reported in 2020 (11) TMI 622- CESTAT Kolkata has passed the following order:-

"8. In the instant case, the only dispute herein is for payment of remuneration in the nature and form of commission based on percentage of profit to whole time directors, which is a fact on record. Section 2(94) of Companies Act, 2013, duly defines 'whole-time director' to include a director in the whole-time employment of the company. A whole-time Director refers to a Director who has been in employment of the company on a full-time basis and is also entitled to receive remuneration. The certificate issued by the Company Secretary states that the remuneration is given in various form as allowed under the Companies act, 2013. We further find that the position of a whole-time director is a position of significance under the Companies Act. Moreover, a whole-time director is considered and recognized as a 'key managerial personnel' under Section 2(51) of the Companies Act. Further, he is an officer in default [as defined in clause (60) of Section 2] for any violation or non-compliance of the provisions of Companies Act. Thus, in our view, the whole-time Director is essentially an employee of the Company and accordingly, whatever remuneration is being paid in conformity with the provisions of the Companies Act, is pursuant to employer-employee relationship and the mere fact that the whole-time Director is compensated by way of variable pay will not in any manner alter or dilute the position of employer-employee status between the company assessee and the whole-time Director. We are thoroughly convinced that when the very provisions of the Companies Act make whole-time director (as also in capacity of key managerial personnel) responsible for any default/offences, it leads to the conclusion that those directors are employees of the assessee company.

9. Further, the judgment of this Tribunal in the case of *Maithan Alloys Limited vs. Commissioner of C.Ex.&ST., Bolpur* (supra) is squarely applicable to the facts of the case. Further, the *Ld.* Adjudicating authority has also allowed part of the demand on the ground that there exists an employer-employee relationship between the whole time Directors and the appellant assessee, then the ground of confirming the balance demand that the directors have provided service to the company becomes infructuous

and hence cannot survive before the eyes of the law. Since demand of service tax is set aside, penalty and interest are also not sustainable.”

Similarly in the case of Allied Blenders and Distillers Pvt. Limited vs. CCE&ST, Aurangabad reported at 2019 (24) GSTL 207 (Tri. Mumbai), the Mumbai Bench of this Tribunal passed the following order:-

“5. The short issue involved in the present appeal for determination is whether remuneration paid to the Directors by the appellant is chargeable to Service Tax and the appellants are required to discharge Service Tax under reverse charge mechanism in accordance with Notifications No. 45/2012-S.T., dated 7-8-2012 and 46/2012-S.T., dated 7-8-2012. Revenue’s allegation is that the Directors namely, Shri K.R. Chhabria, Shri U.K. Ganguli, Shri Deepak Roy and Shri Jitendra Hemdev, who were paid remuneration during the period July, 2012 to March, 2015 amounting to Rs. 1,01,02,55,057/- by the appellant, Service Tax of Rs. 12,48,67,525/- was required to be discharged by the appellant. Opposing the said contention of the Revenue, the appellant has argued that the amount paid to the said Directors are in the nature of the salary paid to them, since the said Directors are whole time directors and employees of the company, accordingly, it is not a ‘service’ within the definition of ‘service’ prescribed under Section 65B(44) of the Finance Act, 1994.

6. In the negative list Service Tax regime brought into effect from 1-7-2012, service has been defined under Section 65B(44) read as follows: -

SECTION 65B. Interpretations. - In this Chapter, unless the context otherwise requires, -

“service” means any activity carried out by (44) a person for another for consideration, and includes a declared service, but shall not include -

- (a) an activity which constitutes merely, -
 - (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
 - (ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution, or
 - (iii) a transaction in money or actionable claim;
- (b) *a provision of service by an employee to the employer in the course of or in relation to his employment;*
- (c) fees taken in any Court or tribunal established under any law for the time being in force.

7. The appellants are taking shelter of clause (b) of the definition of ‘service’. Advancing the arguments on behalf of the appellant, Ld. Advocate submits that since the relation between the appellant and the four Directors are in the nature of employer

and employee hence, no Service Tax is payable by the appellant on the remuneration paid to these directors which is nothing but 'salary' being paid to an employee.

8. The Ld. Advocate for the appellant referring to various provisions of the Companies Act vehemently argued that these four directors were appointed as full-time/whole time directors of the company, in accordance with the Articles of association and as per resolutions of the Board of Directors (BOD). Under various provisions of the Companies Act, these directors are treated as employees of the company, consequently all the conditions that are applicable to an employee of the company, even though, they participate in the management of the affairs of the company as part of Board of Directors, but also are employees of the company. To appreciate the said argument it is necessary to read the definition of the Director, Managing Director, whole time Director under the Companies Act.

"Director" means a director appointed Sec.2(34) to the Board of a company.

"Managing Director" means a director who, 2(54) by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is entrusted with substantial powers of management of the affairs of the company and includes a director occupying the position of the managing director, by whatever name called.

"whole-time Director" includes a Director 2(94) in the whole time employment of the company;"

"Executive Director" means a whole time director as defined in clause (94) of Section 2 of the Act.

In the present case, the Board of Directors (BOD) are empowered to appoint under clause 93 of the Articles of Association, Managing Director and Whole-time Director with such conditions as may deem fit. It reads as follows : -

93. Managing Director/Whole-time Director/Manager. - Subject to provisions of the Act, the Rules framed thereunder and the approval of the Promoter(s), the Board may from time to time, appoint Managing Director/Whole-time Director/Manager for one or more of the divisions of the business carried on by the Company and to enter into agreement with him in such terms and conditions as they may deem fit.

Also, the appointed Directors could be removed from their post by the Appellant company as per clause 94 of the Articles of Association which is mentioned as below :

94. Removal of Director. - The Company may by an ordinary resolution remove any Director (not being a Director appointed by the Tribunal in pursuance of Section 242 of the Act) in accordance with the provisions of Section 169 of the Act. A Director so removed shall not be re-appointed a Director by the Board of Directors.

9. All the four Directors were appointed by the resolutions passed by the Board of Directors (BOD). The resolution for Mr. Chabria is as below :



**Allied Blenders
& Distillers**

CERTIFIED TRUE COPY OF THE RESOLUTION PASSED AT THE MEETING OF THE BOARD OF DIRECTORS OF THE COMPANY HELD ON 15TH JULY, 2009 AT MUMBAI.

REVISION IN REMUNERATION PAYABLE TO MR. K. R. CHHABRIA – CHAIRMAN OF THE COMPANY.

The Secretary placed before the Board the statement of salary details giving the present salary and the proposed salary payable to Mr. K. R. Chhabria with effect from 1.4.2009. The present salary is Rs. 4,36,71,200/- per annum and the proposed salary is Rs. 4,67,28,248/- per annum thereby there is a net increase of 7% on the present CTC. The board discussed the same and thereafter the following resolution was unanimously passed :-

“RESOLVED THAT the increase in remuneration payable to Mr. K. R. Chhabria from Rs. 4,36,71,200/- per annum to Rs. 4,67,28,248/- per annum i.e. 7% on the present CTC be and is hereby approved as per details given below :-

Particulars	Present Salary Per Month	Present Salary Per Annum.	Proposed Salary Per Month	Proposed Salary Per Annum
TOTAL EARNINGS				
Basic	2000000	24000000	2089200	25070400
HRA	235000	2820000	286000	3432000
Special Pay	146000	1752000	238700	2864400
LTA	250000	3000000	261150	3133800
Total (A)	2631000	31572000	2875050	34500600
OTHER BENEFITS				
Gas & Electricity	25000	300000	25000	300000
Residential Telephone & Mobile	60000	720000	60000	720000
Medical	250000	3000000	250000	3000000
Medical Insurance Premium	166667	2000000	166667	2000000
Life Insurance Premium	250000	3000000	250000	3000000
Premium for Personal Accident	16600	199200	16600	199200
Total (B)	768267	9219200	768267	9219200
RETIREMENT BENEFITS				
Provident Fund	240000	2880000	250704	3008448
Total (C)	240000	2880000	250704	3008448
TOTAL PACKAGE (A + B + C)	3639267	43671200	3894021	46728248
OTHER BENEFITS				
Gratuity		As per Gratuity Act		As per Gratuity Act
Gas & Electricity		Actuals		Actuals
Residential Telephone & Mobile		Actuals		Actuals
Club Fees		Actuals upto a maximum of three clubs.		Actuals upto a maximum of three clubs.
Leave		Four (4) weeks leave in every financial year		Four (4) weeks leave in every financial year

Mr. K. R. Chhabria being interested Director did not participate in the proceedings of this item and abstained from voting thereon.

Certified True Copy
For Allied Blenders And Distillers Private Limited

R. L. Jain
Company Secretary

Allied Blenders And Distillers Pvt. Ltd.

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www.abdindia.com

Similar resolutions have been passed by the BOD for other Director also.

10. We find that the appellant have placed on record the Form-16 issued by the appellant indicating deduction of income tax at source on the salary paid to each of the Directors. Besides, the appellant had also produced the contribution made to the Employees Provident Fund for each of the Directors, as required in case of other employees under the relevant laws. The statement furnished for all the employees by the Appellant reflects the name of the directors also. Copy EPF Return showing the name Mr. K.R. Chhabria in the list of employees is as below :



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Certified True Copy
For Allied Blenders And Distillers Private Limited

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Company Secretary

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11. Similarly, the Form-32 as required to be filed under the Companies Act, with the Registrar of companies, the four directors are shown as executive directors indicating that they are employees of the company.

12. Both sides heavily relied on the judgment of the Hon'ble Supreme Court in the case of *Ram Pershad v. CIT, New Delhi* - (1972) 2 SCC 696 delivered under the Income Tax Act. In the said case, the assessee and his wife owned a large number of shares in a private limited company engaged in the business of running hotels. By an agreement with the company, the assessee was to receive Rs. 2,000/- per month, fixed sum of Rs. 500/- per month as car allowance, 10% of gross profit of the company. For assessment year 1956-57 for which the accounting year is the year ending 30-9-1955, the assessee was assessed in respect of Rs. 53,913/- payable to him as 10% of tire gross profit which he gave up soon after the accounts were finalized but before they were passed by the General meeting of the shareholders. The question before the Hon'ble Supreme Court was whether the 10% gross profit payable to the assessee under the terms of the

agreement appointing him as the managing director is liable to be assessed as 'salary' or under the head 'income from business'. The contention of the assessee in that case was that in order to assess the income as salary it must be held that there was a relation of master and servant between the company and the assessee. It was pleaded that for such a relationship to exist, it must be shown that the employee must be subject to the supervision and control of the employer in respect of the work the employee has to do. Where, however, there is no such supervision or control it will be a relationship of principal and agent or an independent contractor. Their Lordships analyzing the characteristics of master-servant relationship observed as :

"6. There is no doubt that for ascertaining whether a person is a servant or an agent, a rough and ready test is, whether, under the terms of his employment, the employer exercises a supervisory control in respect of the work entrusted to him. A servant acts under the direct control and supervision of his master. An agent, on the other hand, in the exercise of his work is not subject to the direct control or supervision of the principal, though he is bound to exercise his authority in accordance with all lawful orders and instructions which may be given to him from time to time by his principal. But this test is not universal in its application and does not determine in every case, having regard to the nature of employment, that he is a servant. A doctor may be employed as a medical officer and though no control is exercised over him in respect of the manner he should do the work nor in respect of the day to day work, he is required to do, he may nonetheless be a servant if his employment creates a relationship of master and servant. Similar is the case of a chauffeur who is employed to drive the car for his employer. If he is to take the employer or any other person at his request from place 'A' to place 'B' the employer does not supervise the manner in which he drives between those places. Such examples can be multiplied. A person who is engaged to manage a business may be a servant or an agent according to the nature of his service and the authority of his employment. Generally it may be possible to say that the greater the amount of direct control over the person employed, the stronger the conclusion in favour of his being a servant. Similarly the greater the degree of independence the greater the possibility of the services rendered being in the nature of principal and agent. It is not possible to lay down any precise rule of law to distinguish one kind of employment from the other. The nature of the particular business and the nature of the duties of the employee will require to be considered in each case in order to arrive at a conclusion as to whether the person employed is a servant or an agent. In each case the principle for ascertainment remains the same."

Analyzing the facts in issue and applying the said tests their Lordships further observed as :

"14. A perusal of the articles and terms and conditions of the agreement definitely indicate that the assessee was appointed to manage the business of the company in terms of the articles of association and within the powers prescribed therein. Reference may particularly be made to Arts. 139 and 142 to ascertain the nature of the control imposed by the company upon the Managing Director. Under the former the additional work which he can do as an agent or manager of the company can be done on terms and conditions and on such remuneration as can be agreed upon between him and the Directors of the Company and under the latter he had to execute the decisions that may be arrived at by the Board from time to time. The very fact that apart from his being a Managing Director he is given the liberty to work for the company as an agent is indicative of his employment as a Managing Director not 'being that of an agent. Several of the clauses of Article 140 as pointed out by the High Court specifically empower the Board of Directors to exercise control over the Managing Director, such, for instance to accept the title of the property to be sold by the company, providing for the welfare of the employees, the power to appoint attorneys as the Directors think fit, etc. As pointed out earlier under the terms of the agreement he can be removed within the period of 20 years for not discharging the work diligently or if he is found not to be acting in the interest of the company as Managing Director. These terms are inconsistent with the plea that he is an agent of the company and not a servant. *The control which the company exercises over the assessee need not necessarily be one which tells him what to do from day to day. That would be a too narrow view of the test to determine the character of the employment. Nor does supervision imply that it should be a continuous exercise of the power to oversee or superintend the work to be done. The control and*

supervision is exercised and is exercisable in terms of the articles of association by the Board of Directors and the company in its general meeting. As a Managing Director he functions also as a member of the Board of Directors whose collective decisions he has to carry out in terms of the articles of association and he can do nothing which he is not permitted to do. Under s. 17(2) of the Indian Companies Act 1913 Regulation No. 71 of Table A which enjoins that the business of the company shall be managed by the directors is deemed to be continued in the articles of association of the company in identical term or to the same effect. Since the Board of Directors are to manage the business of the Company they have every right to control and supervise the assessee's work whenever they deem it necessary. Every power which is given to the Managing Director therefore emanates from the articles of association which prescribes the limits of the exercise of that power. The powers of the assessee have to be exercised within the terms and limitations prescribed thereunder and subject to the control and supervision of the Directors which in our view is indicative of his being employed as a servant of the company."

(emphasis supplied)

13. The Learned Advocate submits that the Board of Directors exercises control which includes removal of the Director from the post and there may not be a strict day to day supervision of the work of the Director, but the employment of the Directors continue till the Board of Directors desired to do so. It is his contention that the officer of a company as per Sec. 2(60) of the Companies Act, who defaults in compliance with the provisions of the Act is liable for punishment, which includes whole time Directors. Thus, the whole time Directors are amenable to criminal action like an officer of the company.

14. The Revenue, on the other hand, referring to the judgment of Hon'ble Allahabad High Court in the case of *Sardar Harpreet Singh v. Commissioner of Income Tax* - 1990 SCC Online All 929, submitted that merely on deduction of Income Tax at source cannot be considered that the Director and the Company has employer and employee relationship. It is the agreement between the employer i.e. company and the Director would reveal the exact relationship between them. In the present case, no such agreement exists between the employer and the Directors, hence there exists no employer-employee relationship.

15. We do not find merit in the argument of the Revenue inasmuch as during the course of investigation, the statement of Shri Atit Dalai, Vice President (Finance & Accounts) of the appellant company was recorded by the investigating officers on 4-6-2015. Answering the question No. 3. Mr. Dalal informed that there were four directors in the company and they were appointed in accordance with the provisions of Companies Act and Regulation of Article of Association of Company for managing day-to-day affairs of the company. Further answering to question No. 4, he has stated that the company are paying them remuneration which is nothing but salary. All the necessary deductions on account of Provident Fund, Professional Tax and TDS under Section 192 of the Income Tax Act are made as applicable; also they were issuing Form-16 like it is issued to all other employees. Even in the salary return filed by the appellant company before the Income Tax authorities, the director's names have been included. The company does not pay the director's sitting fee to any of the directors. To discredit the said statement, no contrary evidence was produced by the Revenue to establish that the directors are not involved in the day-to-day function of the Company, but participate only in Board Meetings and consequently paid remuneration.

16. Also, from the documents produced by the appellant it is crystal clear that the Directors who are concerned with the management of the company, were declared to all statutory authorities as employees of the company and complied with the provisions of the respective Acts, Rules and Regulations indicating the Director as an employee of the company. No contrary evidence has been brought on record by the Revenue to show that the Directors, who were employee of the appellant received amount which cannot be said as 'salary' but fees paid for being Director of the company. The Income

Tax authorities also assessed the remuneration paid to the said directors as salary, a fact cannot be ignored. The judgments cited by the revenue cannot be applied to the present case as the facts are different and the finding of Income tax authorities accordingly also different in the said case.”

7. Since the facts of the matter in hand are similar to the one as decided by the above mentioned decision of this Tribunal. Following the judicial discipline, we follow the same and hold that impugned order-in-original is without any merit. The appeals are allowed

(Pronounced in the open court on _____)

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)

KL