IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO. I

Appeal No. ST/87204/2017

(Arising out of Order-in-Original No. 68/ST/COMMR/2017 dated 30.03.2017passed by the Commissioner of Central Excise & Service Tax, Aurangabad).

M/s Allied Blenders and Distillers Pvt. Ltd.	Appellant

Vs.

Commissioner of Central Excise & Service Tax, Aurangabad	Respondent

Appearance:

Shri Rohan Shah, Advocate with Ms. Kriti Kalyani, Advocate & Ms. Sparsh Prasad, Advocate	for Appellant

Shri M.K. Sarangi, Jt. Commissioner (AR)	for Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. S. SRIVASTAVA, MEMBER (TECHNICAL)

Date of Hearing: 25.06.2018

Date of Decision: 25.06.2018

ORDER NO. **A/88105/2018**

Per: Dr. D.M. Misra

This is an appeal filed against the Order-in-Original No. 68/ST/COMMR/2017 dated 30.03.2017 passed by the Commissioner of Central Excise& Service Tax, Aurangabad.

2. Briefly stated the facts of the case are that the appellant are registered with the Central Excise Department for providing

taxable services under the category of 'rent a cab service', 'security agency service', 'manpower recruitment and supply agency service', 'transport of goods by road/goods transport agency service', 'business support service', and 'works contract service'. During the course of audit, on scrutiny of their records, it was noticed that the appellant had been receiving services from the directors, but failed to discharge service tax under reverse charge mechanism, on the remuneration paid, in accordance with Notification number 30/2012–ST dated 20.06.2012 and Notification number 45/2012 dated 07.8.2012. Consequently, demand notice was issued to the appellant for recovery of service tax of ₹12,48,67,525/- against the total amount of remuneration of Rs.101,02,55,057/-paid to the directors during the period from July 2012 to March 2015. On adjudication, the demand was confirmed with interest and equal amount of penalty. Hence, the present appeal.

2.1. Learned advocate for the appellant Shri Rohan Shah has submitted that the Ld. Commissioner in the impugned order confirmed the demand on the misconception that director of a company, since involved in the management of the affairs of the company, also being 'malik' of the Company, can never be an employee of the company. He submits that there is no bar under the earlier or present Companies Act,2013 for an employee to be director of the company. It is his contention that the Act recognizes that a director can be in whole time employment of the company which is clear from the definition of 'whole time director' laid down at section 2(94) of the Companies Act. It is his contention that from the definition of Board of Directors (BOD) it is also clear that the board of directors is a body totally different and distinct from the individual directors and should not be confused with the director per se in any circumstances. Referring to the definition and meaning of 'director', laid down at Section 2(34) of the Indian Companies Act, learned advocate has submitted that the director means a director appointed by the Board of the company, which clearly implies that a director acts as the director and is to be treated as a director in relation to his roles and responsibilities as part of the board of the director.

2.2. Further referring to section 2(60) of the companies act, learned advocate has submitted that the whole time director, is an officer of the company which means that he is an employee of the company. The said provision does not include part-time directors. In the present case, all the directors in question are whole time directors of the company and therefore by definition, they are officers of the company. Thus, the services rendered by these directors to the company, for which they were paid remuneration, fall under the category of service rendered by an employee to the employer. Similarly, referring to other provisions of the companies Act, namely, section 269 which deals with appointment of directors and section 197 contemplates that the remuneration paid to the directors can include salary, benefits bonuses, stock options, pension, etc., which are paid by an employer to an employee under the Companies Act, the learned advocate has submitted that from these provisions also it is clear that a director could be an employee of the company. Elaborating his argument, learned advocate has submitted that whole time director would be discharging his functions in twin capacity, one as the member of the board of directors and second as an employee of the company. He has further submitted that the adjudicating authority has failed to appreciate that a person who has been appointed as a director on board of directors can simultaneously be in the whole time employment of the company as is in the case with regard to the directors in question. Such an employee-director would, while acting as an employee, also discharge the functions entrusted upon him by the board of directors and would work under their supervision and control. Whereas, while discharging the functions as a director on the Board of Directors, the employee-director would be a constituent member of the board of directors but the board of directors would exercise supervision and control over the functioning of such employee-director with regard to his duties and functions assigned to him as an employee.

2.3. Referring to other statutes namely income tax act, 1961, employees Provident Fund and Miscellaneous provisions Act, 1952 and Unlisted Companies Issue of Sweat Equity Shares Rules, 2003, the learned advocate has submitted that under the Income Tax act, section 192 provides that any person responsible for payment of salary should deduct income tax on the amount of salary payable; in the present case the appellant have deducted income tax from the salary payable to the directors and issued Form No. 16 for the same. In support of his contention, the learned advocate placed copies of TDS certificate issued by the appellant to the respective directors. Further, the directors while filing their income tax returns, have shown their income earned from the company under the head 'salaries' only. Similarly, under

Employees Provident Fund Act, every company which employs more than 20 employees and an establishment, which is effectively engaged in any industry specified in schedule-I, which includes a distillery, is subject to the provisions of the said Act; and as per section 6 of the said Act an employer shall contribute to the fund, an amount equal to 10% of the basic wages, dearness allowance and retaining allowance. In the present case, the appellant in accordance with the provisions of the said Act, contributed a specified amount to the provident fund of the employee-directors and have also deducted employee's contribution from their salaries. In support of his submission, the learned advocate placed sample copies of the returns filed with the provident fund authority evidencing contribution to the fund as also deduction from the employees' salaries of their share of the provident fund. Also, it is pleaded that under the Unlisted Companies Equity Share Rules, 2003,'employee' has been defined thereunder which means a director of the company, employed as a whole time director or executive director of the company. He has further submitted that the directors in question were indeed whole time directors, who were assigned specific managerial functions and looked after the day-to-day affair of the company and performed the duties assigned to them by the board of directors. Thus the directors were clearly employees who were paid remuneration for the labour. The mere fact that they were also designated as Directors on the board of the company does not militate against their function in the capacity of employee of the company.

2.4. The learned advocate has further submitted that the question as to whether the relationship between two persons is one of employer and employee has to be ascertained from the conditions of employment. He has further submitted that normally the following are present in an employer-employee relationship. The employer's authority of selection of an employee, payment of remuneration, the employers right to control the method of doing the work and the right of suspension/dismissal. In the present case, the company through its board of directors could select any person including a director to act as its employee and entrust the employee specific role to be performed. The remuneration of the said employee-directors was also decided and controlled by the company. The manner and the method to be adopted by the employee-directors for discharging their functions were subject to supervision and guidance of by the board of directors. The company also had complete discretion and freedom to terminate the services of any of the employees and it could divest any of the directors of the employee functions after which it would only remain as director in the board and ceases to become whole time directors/employee. None of the employees or employee-director could claim any kind of protection or privileges qua the company, if their services as employees were terminated. The learned advocate has submitted that the Hon'ble Supreme Court of India analysing the relationship of an employer and employee laid down the same tests with respect to the directors of the company in the case of *Ram Prasad Vs. the Commissioner of Income Tax - (1972) 40 Comp Case 544(SC)* and *Employees State Insurance Corporation Vs. Apex Engineering Private Limited (1998) 1 SCC86.*

2.5. Assailing the impugned order the learned advocate for the appellant has submitted that the adjudicating authority has misunderstood the use of word 'Malik' to address the directors of a company. This observation is too pedantic as to have any legal significance. The directors are never the Malik of the company. The overall management/superintendence of the company is always in the hands of Board of Directors which is different from individual directors. It is also a complete wrong notion that the directors are Malik (owner) of the company; the owners are the said holders. It is this fundamental misconception that the directors (not the share holders) are the owner of the company which has misled the Department into believing that directors cannot be employees. Further, the learned advocate has submitted that the Commissioner has erroneously observed that there are no I wouldn't is to establish that the directors are the employees of the company. It is his contention that there is plethora of documentary evidences which leaves no doubt that the directors in question are not only the employees of the appellant but they were also treated as employees and declared to be so in all the statutory reports/returns submitted to various government agencies as is evident from these documents namely, Form no. 16, in annual reports (statement under section 217 (2A) read with Companies (particulars of employees) Rules, 1975 and forming part of the directors report, the names of the directors in question have been mentioned under the column 'name of employee', along with the designation under the specific column and nature of duty is where they have been described chairman, vice-chairman executive vice-chairman and CEO etc. the appellant directed provident from the salaries paid to the directors like it is done for other employee and reported the same to the provident fund authorities.

2.6 Learned advocate for the appellant has further submitted that the demand notice issued invoking extended period of limitation is not sustainable as no specific allegation of suppression has been brought out in the show cause notice nor in the impugned order. He has submitted that the amount paid as remuneration to the respective directors have been reflected in their returns filed with the Registrar of companies and also reflected in the respective balance sheets. It is his contention that whether service tax is required to be discharged on the remuneration paid to the whole time directors after 01.7. 2012 is a question of law and subject to interpretation, therefore, allegation of suppression cannot be sustained.

3. Per contra, the learned A.R. for the Revenue has submitted that the words, 'employer', 'employee' and 'salary' have not been defined under the Finance Act, 1994, Income Tax Act, 1961 nor under the Companies Act, 1956. In Section 17 of Income Tax Act only what salary includes has been specified. Further, the provisions of Companies Act, 1956 is not dealing with employer-employee relationship. In case of Employees Provident Funds Act, 1952, 'employee' has been defined to mean any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of a factory and who gets his wages directly or indirectly from the employer, and includes any person employed by or through a contractor in or in connection

with the work of the factory. In case of Employees Provident Funds and Miscellaneous Provisions Act, 1952, 'employee' has been defined mostly on similar lines, whereas 'employer' has been defined to include 'managing director'.

3.1 He has contended that the plea of the appellant that the Directors are being paid salary, HRA, PF and Form-16 issued after deduction of TDS, hence be treated as an employee, is not correct, as the employer- employee relation is not supported by the Article of Association/Memorandum of Association nor any separate agreement between the company and these Directors. He has submitted that from the Form-32, nothing is clear about the terms, scope, duties and responsibilities of employment and degree of supervisions and control. Further, as per the EPF contribution, statutory provident fund (PF) is being deducted from the salary of Chairman's remuneration, 15% PPF for Mr. Deepak Roy, whereas no PF for Mr. Ganguli Utpal was deducted, which show that PF contribution cannot be considered as one criteria to decide the relationship of employer and employee. He has further submitted that Form-16 cannot be considered as conclusive proof of employer-employee relationship. It is his contention that in the negative list of Service Tax regime, w.e.f 01.7.2012, the appellants are eligible to exemption only if they prove with the documents and substance that the persons in fact are employee of the company. In support, the learned AR referred to the judgment of Hon'ble Allahabad High Court in the case of *Sandip Kohli Vs. CIT vide order dt.19th July2012 in Income Tax Appeal Nos20-29 of 2001* submitted that the standard deduction claimed from the remuneration paid to the director was not allowed considering nonexistence of employer-employee relationship. Further, referring to the judgment of the Hon'ble Supreme Court in the case of *Ram Pershad Vs. CIT – (1972) 2 SCC 696*, he has submitted that considering the Articles of Association, the Hon'ble Supreme Court has observed that the servant acts under the direct control and supervision of his masters and it is not a case in case of Agent, greater the amount of direct control over the person employed, stronger the conclusion in favour of him as a servant. It is his contention that merely receipt of remuneration for holding office did not necessarily give rise to the relationship of master and servant. Referring to the observation of the judgment of Hon'ble Supreme Court in Fortis Healthcare Ltd. – 2016-SCC Online ITAT 3382, the learned AR submitted that while distinguishing the "contract for service" and "contract of service", it was observed that there exist no employer and employee relationship. The ITAT in the said case has observed that by not allowing to work elsewhere does not mean that their relationship is that of master and servant. He has further submitted that the Director *per se* are entitled to remuneration as per the Companies Act, 1956 and the appellants had not submitted any evidence showing bifurcation of the amount received for working as Director and also as an employee. The claim of the appellant that there is no remuneration of Director is without substance. It is his contention that under the Negative List Service Tax regime, effective from July, 2012, services rendered by Director are liable to Service Tax, and whether the same service or work rendered arising out of terms of employment needs to be established. He has argued that Board's Circular 2009 is not relevant to the scenario after 2012 during negative list service tax regime, hence, not applicable.

4. Heard both sides and perused the records.

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-ST dated 7.8.2012 and 46/2012-ST 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 JitendraHemdev, 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' with in 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 01.7.2012, service has been defined under Section 65B(44) read as follows: -

> **SECTION 65B. Interpretations.**— In this Chapter, unless the context otherwise requires,—
>
> 44) "service" means any activity carried out by 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. .

> Sec.2(34) "Director" means a director appointed to the Board of a company.
>
> 2(54)"Managing Director" means a director who, 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.
>
> 2(94)"whole-time Director" includes a Director 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.
Registered Office : 394/C Ground Floor, Lamington Chambers, Lamington Road, Mumbai - 400004, India. T. : +91-22-6777 9777 F. : +91-22-6777 9725
www.abdindia.com

Similar resolutions have been passed by the BOD for other Directors 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:

EMPLOYEES' PROVIDENT FUND ORGANISATION, BANDRAMUMBAI-I
ELECTRONIC CHALLAN CUM RETURN (ECR)
FOR THE WAGE MONTH OF (08/2014) AND RETURN MONTH (09/2014)

3

ESTABLISHMENT ID : MHBAN0048896000
NAME OF ESTABLISHMENT : ALLIED BLENDERS AND DISTILLERS PVT LTD
TRRN : 3101409010700

Employer E-Sewa
ECR UPLOADED 12/09/2014 17:40:04

PART A-MEMBERS' WAGE DETAILS

Sl. No.	Member Id	Member Name	EPF Wages	EPS Wages	EPF Contribution (EE Share) due	EPF Contribution (EE Share) being remitted	EPS Contribution due	EPS Contribution being remitted	Diff EPF and EPS Contribution (ER Share) due	Diff EPF and EPS Contribution (ER Share) being remitted	NCP Days	Refund of Advances
1	0000001	KISHORE CHHABRIA	18419300	0	4420632	4420632	0	0	2210316	2210316	0	0
2	0000002	NEESHA CHHABRIA	159500	6500	38280	38280	541	541	18599	18599	0	0
3	0000003	RESHAM CHHABRIA HEMDEV	169400	6500	40656	40656	541	541	19787	19787	0	0
4	0000005	RAVINDRA GANORIKAR	34100	6500	4092	4092	541	541	3551	3551	0	0
5	0000006	ULHAS DASHRATHE	96900	6500	23256	23256	541	541	11087	11087	0	0
6	0000007	RADHAKRISHANA SHETTY	0	0	0	0	0	0	0	0	0	0
7	0000011	VILAS AUTI	54700	6500	13128	13128	541	541	6023	6023	0	0
8	0000014	MAHAROUKH DOCTOR	91600	6500	21984	21984	541	541	10451	10451	0	0
9	0000015	MANIKANDAN K V NAIR	23100	6500	2772	2772	541	541	2231	2231	0	0
10	0000016	GIRISH BHATT	0	0	0	0	0	0	0	0	0	0
11	0000017	VIJAY NAWATHE	30400	6500	3648	3648	541	541	3107	3107	0	0
12	0000018	RAMESH DESHMUKH	30100	6500	3612	3612	541	541	3071	3071	0	0
13	0000022	IQBAL AHMED	0	0	0	0	0	0	0	0	0	0
14	0000023	SAJAL CHAKRAVORTY	0	0	0	0	0	0	0	0	0	0
15	0000024	RATAN LAL JAIN	317900	0	76296	76296	0	0	38148	38148	0	0
16	0000031	VALUYAVEETIL BALKRISHNAN	68700	0	8244	8244	0	0	8244	8244	0	0
17	0000032	SUNIL KRIPALANI	68700	6500	16488	16488	541	541	7703	7703	0	0
18	0000035	SATISH KUMAR JAIN	24300	6500	5832	5832	541	541	2375	2375	0	0
19	0000036	ARUN KUMAR BANSAL	65200	6500	15648	15648	541	541	7283	7283	0	0
20	0000039	SUHAS NARAYANGAONKAR	0	0	0	0	0	0	0	0	0	0
21	0000040	C MADHUSUDHANA REDDY	20200	6500	2424	2424	541	541	1883	1883	0	0
22	0000042	MAHESH VASANT JADHAV	42800	6500	7276	7276	541	541	4595	4595	0	0
23	0000047	SANKAR DAS	24400	6500	2928	2928	541	541	2387	2387	0	0
24	0000048	VISHWAS GAWAND	35000	6500	8400	8400	541	541	3659	3659	0	0
25	0000049	PRIYA DEVENDRA TYAGI	27000	6500	6480	6480	541	541	2699	2699	0	0
26	0000052	GAUTAM KUMAR GUPTA	20200	6500	2424	2424	541	541	1883	1883	0	0
27	0000057	JITESH VACHANI	23400	6500	2808	2808	541	541	2267	2267	0	0
28	0000063	DINESH CHHABRA	25600	6500	6144	6144	541	541	2531	2531	0	0
29	0000064	DEVIDAS I BABU	82500	6500	19800	19800	541	541	9359	9359	0	0
30	0000065	SHRIDHAR SAKHARAM PALAW	0	0	0	0	0	0	0	0	0	0
31	0000067	RAJANI SUNIL NAIR	29100	6500	3492	3492	541	541	2951	2951	0	0
32	0000068	MAHESH KULKARNI	35700	6500	4284	4284	541	541	3743	3743	0	0
33	0000074	R S VISHWESHAR	17900	6500	2148	2148	541	541	1607	1607	0	0
34	0000076	K K BALDEVAN	19900	6500	4776	4776	541	541	1847	1847	0	0
35	0000077	NAGESH DESHPANDE	68400	6500	16416	16416	541	541	7667	7667	0	0
36	0000080	U MADHUSOODHANAN	32000	6500	3840	3840	541	541	3299	3299	0	0
37	0000082	PRAKASH R PANDYA	115300	0	13836	13836	0	0	13836	13836	0	0
38	0000083	RAMESH DHURE	29200	6500	7008	7008	541	541	2963	2963	0	0
39	0000084	HARISH CHADHA	28300	6500	6792	6792	541	541	2855	2855	0	0
40	0000086	RAJESH KUMAR BAJAJ	52200	6500	12528	12528	541	541	5723	5723	0	0
41	0000087	PILLI JAYARAM	21100	6500	2532	2532	541	541	1991	1991	0	0

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 judgement of the Hon'ble Supreme Court in the case of Ram Pershad Vs. CIT, New Delhi – (1972) 2 SCC 696 delivered under the Income Tax Act. In the said case, the assesse 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 assesse was to receive ₹2000/- per month, fixed sum of ₹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 assesse was assessed in respect of ₹53,913/- payable to him as 10% of the 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 assesse. 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 em-ployed, 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 Art. 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 crone. 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 Vs. 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 in as much as during the course of investigation, the statement of Shri Atit Dalal, Vice President (Finance & Accounts) of the appellant company was recorded by the investigating officers on 04.06.2015. 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.

17. In these circumstances, we do not find merit in the impugned order. Consequently, the impugned order is set aside and the appeal is allowed.

(Operative portion of the order pronounced in Court)

(S. Srivastava)
Member (Technical)

(Dr. D.M. Misra)
Member (Judicial)

Sinha