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CHARTERED ACCOUNTANTS

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Communiqué

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VERENDRA KALRA & CO
CHARTERED ACCOUNTANTS

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No TDS deductible on interest payable on NCDs/FDs is less than INR 5000

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The main issue is with respect to the chargeability of TDS on non-convertible debentures and FDR below INR 5,000.

Ruling

Having gone through the judgment and orders passed by the Tribunal as well as the High Court, we are of the opinion that no error has been committed by the Tribunal and/or the High Court on the chargeability of TDS amount on non-convertible debentures and fixed deposit of the value less than INR 5,000. Both, the Tribunal as well as the High Court have concurrently found that on non-convertible debentures and fixed deposit of the value less than the given value, there shall not be any TDS leviable. The Apex Court held that we are in complete agreement with the view taken by the Tribunal as well as the High Court and stated that once, there is no liability to deduct TDS on non-convertible debentures and fixed deposit of the value less than 5,000, there is no question of charging any interest.

Source: SC in the case of CIT (TDS) vs Jai Prakash Associates Ltd. vide [2022] 144 taxmann.com 24 (SC) on October 19,2022

Interpretation of word charity for “charitable purpose” u/s 2(15)

Facts

The primary question which falls for consideration is the correct interpretation of the proviso to Section 2(15). The DGIT (Exemptions), CIT in various states, and other officials of the IT Department have appealed the decisions of various High Courts, which have held that the carrying on of any trade, commerce, or business, is not a per se bar or disqualification for a GPU category charitable trust to claim to be such, precluding its tax-exempt status under the IT Act.

Ruling

SC clarified the residuary provisions of section 2(15) as under:

- An assessee advancing general public utility cannot engage itself in any trade, commerce or business, or provide service in relation thereto for any consideration
- In the course of achieving the object of general public utility, the concerned trust, society, or other such organization, can carry on trade, commerce or business or provide services in relation thereto for consideration, provided that (i) the activities of trade, commerce or business are connected the achievement of its objects of GPU; and (ii) the receipt from such business or commercial activity or service in relation thereto, does not exceed the quantified limit (i.e. 20% of total receipts of the previous year, w.e.f. 01.04.2016)
- The charging of any amount towards consideration for such an activity (advancing general public utility), which is on cost-basis or nominally above cost, cannot be considered to be “trade, commerce, or business” or any services in relation thereto. the Court has clarified through illustrations what kind of services or goods provided on cost or nominal basis would normally be excluded from the mischief of trade, commerce, or business, in the body of the judgment.

SC further stated that the assessing authorities must on a yearly basis, scrutinize the record to discern whether the nature of the assessee’s activities amount to “trade, commerce or business” based on its receipts and income (i.e., whether the amounts charged are on cost-basis, or significantly higher). If it is found that they are in the nature of “trade, commerce or business”, then it must be examined whether the quantified limit (as amended from time to time) in proviso to Section 2(15), has been breached, thus disentitling them to exemption.

Source: SC in the case of ACIT (Exemptions) vs Ahmedabad Urban Development Authority vide [2022] 143 taxmann.com 278 (SC) on October 19,2022

Initiation of Search proceedings are valid if Revenue had recorded cogent reasons based on information in possession

Facts

The company is engaged in the manufacture of brewing and distilling of liquor, SNJ Breweries (primary assessee). The genesis of the Writ Petitions are the searches conducted under Section 132 of the Act between 06.08.2019 and 11.08.2019 and consequential proceedings thereafter, culminating in the passing of the assessment orders. The assessee raised the under mentioned issues before the Ld. CIT(A) against the assessment order:

- validity of search under Section 132 are unwarranted and illegal, insofar as the books maintained by all the petitioners concerned are correct and complete and the ·returns of income filed thus far make a full disclosure of all income earned
- centralization of assessments under Section 127
- Notices issued under Section 153A and 15C
- Validity of attachment orders issued under Section 281B
- Challenge to notices under Section 143(2) and orders of assessment under 143(3)

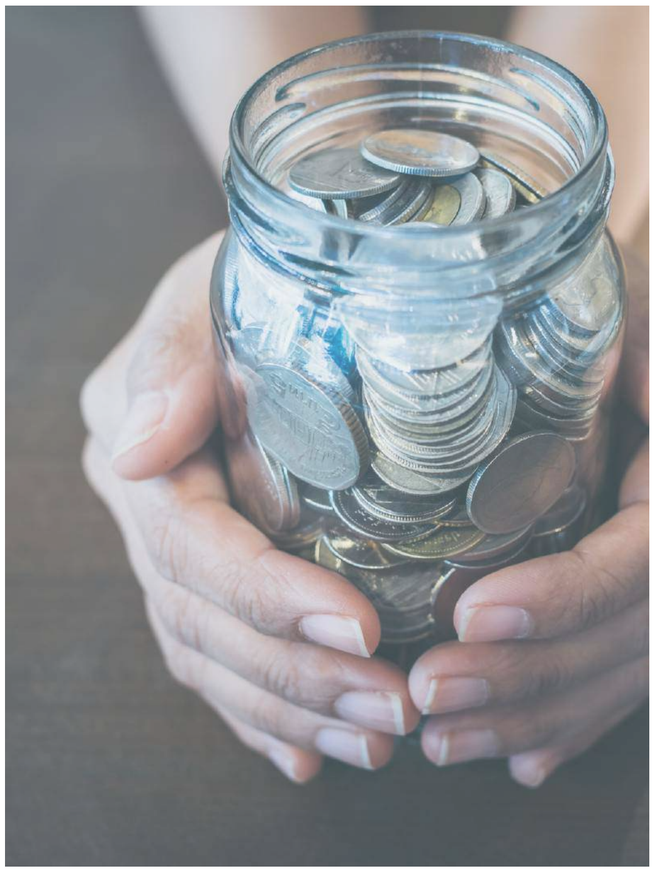
The assessee stated that present proceedings constitute a roving enquiry and there was no 'information' in the possession of the Department that would justify invocation of powers under Section 132.

Ruling

- On a wholistic appreciation of this aspect of the matter, HC held that bearing in mind the factual disputes involved, this is not the appropriate forum to address this issue and hence reserve the right of the petitioner to approach the Civil Courts/any other appropriate forum to establish (i) availability and disabling of CCTV in the searched premises and common areas and (ii) delay and procrastination on the part of the respondents in permitting the family to seek medical assistance, and seek compensation/redressal, if so inclined.
- HC stated that on perusal of the files, there is no doubt that sufficient opportunity has been afforded to the petitioners prior to the passing of the impugned orders.On the aspect of non-service, I it constitutes an irregularity in procedure, but one that may be cured by supplying a copy of the order now. The reasons for centralization have admittedly been communicated to the petitioners even in the notices. The majority have not responded to the notices. Moreover, the reasons for centralization do reveal that the consolidation proposed is for reasons of administrative efficiency and convenience and there has been no denial of this aspect of the matter by the petitioners. In light of the discussion above, these writ petitions are dismissed.
- HC rejected notices issue raised on account of validity of issued u/s 153A and 153C stated that this is protect against, and prevent a situation where the notices are issued too proximate to the expiry of limitation leading to a hurried framing of assessment and that the assessment is not based upon incriminating material. Such arguments are indeed available to assessee's, but subsequent to the framing of the assessment itself, that would enable an examination of the material brought on record in order to test such submissions. The challenge to notices issued under Section 153A and 153C is thereby rejected.
- For validity of attachment orders issued under Section 281B, HC held that Subsection (2) of Section 281 B states that every provisional attachment shall have effect only for a period of 6 months from date of order of provisional attachment, though the proviso permits the period to be extended for reasons to be recorded in writing. Such extensions, in total, are not to exceed two years pending proceedings or 60 days after the date of order of assessment/reassessment, whichever is later. In the given case, there is lack of clarity on the number of extensions and the periods that such extensions covered. Thus, and in light of the aforesaid ambiguity, we would merely reiterate the provisions of Section 281B. As no material has been placed before the Court to the effect that the extensions are contrary to statute, the submissions of the petitioners are rejected.
- HC held that no arguments have been advanced by either party in regard to these Writ Petitions and in view of the same the challenge to notices under Section 153A & 153C as well as the Declaration sought challenging the search are hereby dismissed. Further, there is no legal infirmity in the present impugned notices and orders of assessment and hence the same are confirmed.

Source: HC, Madras in the case of Chandran Somasundaram vs Principal Director of Income Tax vide [2022] 145 taxmann.com 6 (Madras) on October 20, 2022

HC applies “lifting of corporate veil” to deny exemption u/s 11 to educational trust receiving capitation fees disguised as donations from sister trusts



Facts

All these tax case appeals are filed by the Revenue assailing the orders passed by the ITAT, Chennai in favour of the assessee’s. The respondent Sri Venkateswara Educational and Health Trust is an assessee registered themselves as Charitable Trust u/s 12A(a) had filed their return of income admitting 'nil' income for AY 2011-12. The case of the assessee was selected for scrutiny wherein it was unfolded that INR 9.90 crores was received by the assessee as corpus donation against which, elaborate exercise was undertaken by the Assessing Officer by issuing summons to various persons and their sworn statements were recorded. The AO concluded the assessment specifying that the assessee utilized transfer of capitation fees received from the students and thereby virtually sold education for a price and such a practice of receiving donation and/or capitation fee as a condition precedent for admitting a student is opposed to the provisions of the Tamil Nadu Educational Institutions. The enquiry also unfolded that the Assessee demanded and insisted the parents of the students, who wish to get admission for their children, to pay capitation fee to the other trust in the name of their relatives or friends of the parents, but not in their name. While so, the AO held that the amount of non-voluntary contribution i.e., capitation fees received of INR 3.60 crores was treated as income not eligible for exemption u/s 11 and taxed protectively in the hands of the assessee at the rate applicable to an AOP and accordingly, passed the order. CIT(A) decided the case in favour of the assessee. Revenue preferred an appeal before ITAT who dismissed the Revenue’s appeal against which the Revenue is in appeal before the HC.

Ruling

HC held that despite the fact that there are State laws making it penal to collect capitation fee and the repeated dictum of various Courts including the Apex Court, the menace of capitation fee could not be curtailed, forget eradication. Education is a means to achieve equality. It not only instils confidence in the mind of the student, but also is a tool to eradicate exploitation. It offers employment opportunity, besides helping in churning oneself into a better person. The development of a country is to be weighed in terms of the educated.

Privatization of education aids in collection of Capitation Fee. HC stated that the CG and SG will have to thrive to ensure that all those who deserve, but are unable to get admission in educational institutions for want of funds, are accommodated to pursue education and take appropriate steps to eradicate the collection of capitation fee. In addition to this, HC also stated that the web-portal has to be maintained and regulated by the National Informatics Centre (NIC) and the Information Technology and Digital Services Department, Government of Tamil Nadu; and the SG is directed to publish the details about the web-portal in the English as well as vernacular newspapers at the time of admission. HC also mentioned that a pamphlet should be compulsorily given to the students and their parents at the time of counselling informing them about the availability of the web-portal stated above. Apart from that, in view of the fact that the present appeals filed by the Revenue are allowed, it is natural that (i) The Assessing Authority shall proceed further on the basis of the orders of assessment of tax, which are the subject matter of these appeals. (ii) The Assessing Authority shall also proceed further for cancellation of registration certificate issued to the Assessees/trusts under Section 12A of the Act thereby not to treat the respondents as charitable institutions any longer.

Source: HC, Madras in the case of CIT vs MAC Public Charitable Trust vide [2022] 144 taxmann.com 54 (Madras) on October 31, 2022

As per CBDT's instruction 1914, 20% is to be computed with respect to total disputed demand and not with respect to outstanding demand as specified u/s 156

Facts

The assessee applicant seeks a stay on tax and interest demands, raised as a result of assessment order u/s 143(3) r.w.s. 144C, for AY 2019-20, aggregating to INR. 1031.46 crores. The AO disposed of the assessee's stay petition and directed him to pay "the requisite taxed, as per Board's instruction 1914, being 20% of outstanding demand as per notice u/s 156". The Ld. Counsel of the assessee submitted that the basis of such computation can only be disputed demand and the assessee has already paid INR 261.37 crores, out of the disputed tax liability, which is more than 20% of the disputed tax liability. The assessee held that having paid more than 20% of the disputed demand, the AO ought to have stayed the balance disputed demands.

Ruling

ITAT held that once the AO takes a view that in terms of the CBDT instructions, 20% of demand is to be paid by the assessee and the balance demand can, by implication, be stayed during the pendency of the first appeal, such a computation of 20% has to be with respect to total disputed demand, and not with respect to the outstanding demand specified u/s 156. ITAT, therefore, deem it fit and proper to remit the matter to the file of the AO, for the limited purposes of verification whether 20% of the disputed demand is paid, and if so, pass an appropriate order granting the stay to the assessee on such conditions as deemed appropriate. However, if for whatever reasons, the AO passes an adverse order, he shall not take any coercive action against the assessee for two weeks from the service of such order, so as not to pre-empt the remedial measures that the assessee may seek to pursue against the same.

Source: ITAT, Mumbai in the case of eBay Singapore Services (P.) Ltd. vs DCIT vide [2022] 143 taxmann.com 78 (Mumbai- Trib.) on October 03, 2022

No additions can be made u/s 36(1)(iii) in respect of interest not debited to P&L A/c and capitalized as preoperative expenses

Facts

The assessee company engaged construction business, filed its return declaring Nil income. A search operation was carried out in the case of Samira Group and notice u/s 153A was issued to the assessee, in response to which, assessee again filed Nil return. During the course of proceedings, AO observed that assessee had taken a sum of INR 4.64 crores as cash loan and had repaid loan in cash amounting to INR 1.89 crores. AO treated both the sums as violation of section 269SS r.w.s 271D and 269TT r.w.s. 271E respectively. Considering these cash loan taken and repaid, AO further made an addition of INR 1.01 crores on account of interest paid on cash loan taken. During the assessment proceedings, AO further observed that the assessee incurred interest of INR 17.17 lacs as interest on loan (other than cash loan). However, as no business has been commenced in the relevant AY and assessee treated this amount of interest as preoperative expenses and debited the same to BS for capitalization to WIP. Further, no interest has been charged to P&L Account of the assessee. AO further noticed that total unsecured loan as on 31-03-2010 was INR 1.18 crores out of which, the assessee further gave loan to sister concern amounting to INR 84.48 lacs. AO worked out the proportional amount of interest and disallowed INR 12.24 lacs u/s 36(1)(iii). Aggrieved with this order of AO, assessee filed an appeal before the Ld. CIT(A) Mumbai. Who deleted the addition of Rs. 1.01 crores on the ground that the same has already been added in the hands of the sister concern but the addition of INR 12.24 lacs Ld. CIT(A) also sustained and upheld the order of AO. 5. Against this order of Ld. CIT(A) filed this appeal before ITAT.

Ruling

ITAT in the present case held as under:

- Genuineness of the loan taken, and interest paid thereon is not under challenge.
- Out of total unsecured loan amounting to INR 1.18 crore, INR 84.48 lacs is transferred to its sister concern.
- Whatever be the amount of interest, assessee has not charged the same to its P&L Account u/s 36(1)(iii).
- Other than unsecured loan of INR 1.18 crores, assessee has its own fund amounting to INR 45.12 lacs. While calculating proportionate disallowance this amount of own funds is not considered by the authorities.
- Even if for the time being version of authorities below is accepted, still no addition to the total income of the assessee can be made as the assessee has not charged any interest to its P&L Account.

ITAT relied on the decision of Hon'ble jurisdictional High Court in the case of Reliance Utility and Power Ltd 313 ITR 340(Bom.) and directed the AO to delete the addition of interest expenses u/s 36(1)(iii) after considering assessee's own funds.

Source: ITAT, Mumbai in the case of Samira Constructions (India) Ltd. vs DCIT (Central Circle) vide [2022] 144 taxmann.com 150 (Mumbai- Trib.) on October 06, 2022

Deduction u/s 54 of investment made in new house available up to the date of filing belated return/revised return

Facts

The assessee had filed her return declaring total income of INR 3.20 lacs. The case of the assessee was selected for scrutiny under CASS to examine large deduction claimed u/s 54. During the course of proceeding, it was observed by the AO that assessee has sold immovable property on 26-05-11 for INR 1.7 crores and purchased a new property on 30-04-13 for INR 1.66 crores. AO observed that assessee has failed to deposit the amount in CGAS and also failed to purchase House Property before the due date of filing of return as per section 139(1) i.e. 31.07.2012 based on which, AO issued a show-cause that why INR 1.20 crores should not be taxed under the head LTCG. During the course of hearing, assessee relied upon the judgment in the case of CIT Vs. Miss. Jagriti Aggarwal (2011) 339 ITR 610 (P&H) whereas AO relied upon the literal interpretation of section 54 which speaks about section 139(1) only. AO was not convinced with the argument advanced by the assessee in her favour and disallowed the claim of the assessee. Being aggrieved, assessee preferred an appeal before the Ld. CIT (A) who affirmed the view of AO. Against this order of Ld. CIT (A), assessee has preferred this appeal.

Ruling

ITAT relied upon the ruling of Hon'ble Supreme Court in Xavier J. Pulikkal v. DCIT vide [2016] 242 Taxman 59/73 taxmann.com 34, wherein it was concluded that the assessee in the case before us is entitled to claim exemption u/s 54 to the extent she had invested towards the purchase of new residential property under consideration up to the date of filing of belated return under section 139(4) i.e. 31-03-14. Section 54(2) provides for an interesting proposition that the amount of capital gains which is not appropriated by the assessee for prescribed purposes within one year before; or on or before the due date of filing of return of income under section 139, shall be deposited in the CGAS. It needs to be emphasized that the literal reading of section 54(2) provides for the two dates i.e. the due date under section 139 and the due date under section 139(1).

Pertinently, section 139 cannot be said to mean only section 139(1), but it means all sub-sections of section 139. ITAT held that in this case before us assessee purchased new property well before the deadline given in section 139(4) i.e. 30-04-13 for INR 1.67 crores which is much in excess of LTCG of INR 1.20 crores. ITAT therefore set-aside the order of the CIT(A) and vacate the disallowance of the assessee's claim of exemption under section 54.

Source: ITAT, Mumbai in the case of Dr. Dharmista Mehta vs ITO vide [2022] 144 taxmann.com 136 (Mumbai- Trib.) on October 12, 2022

Cash deposit sourced from agricultural income in cash reported in ITR; No Addition u/s 68 is sustainable

Facts

The assessee is the MD of the company, M/s. MPS Steel Castings Pvt. Ltd. who filed his return admitting income of INR 13.78 lacs. Subsequently, the case was reopened by issuing a notice u/s 148. During the course of assessment proceedings, the AO asked the assessee about cash deposit of INR 4.40 lacs to which the assessee duly explained that agricultural income of preceding previous year of INR 13.50 lacs as reported in the ITR was retained in cash out of which INR 4.40 lacs was deposited in bank. The AO was of the opinion that how the previous year agricultural income still available with the assessee and by not accepting the explanation of the assessee, proceeded with the addition u/s 68. On appeal, the ld. CIT(A) confirmed the addition. On being aggrieved, the assessee is in appeal before the Tribunal.

Ruling

When the appeal was taken up for hearing, none appeared on behalf of the assessee. Hence, ITAT proceeded to decide the appeal on merits after hearing the Department's Representative. The Ld. ITAT held that neither the AO nor the Ld. CIT(A) disputed the agricultural income of previous assessment year of INR 13.50 lacs. ITAT opined that out of agricultural income which was left with the assessee, the amount of INR 4.40 lacs was deposited in the bank account. ITAT held that the assessee had duly explained the source. Therefore, the addition made by the AO and confirmed by the ld. CIT(A) cannot be sustained. Accordingly, the order of the ld. CIT(A) was set aside and the addition made by the AO were deleted.

Source: ITAT, Chennai in the case of P. Prabhu vs ACIT, Corporate Circle-2 vide [2022] 144 taxmann.com 172 (Chennai-Trib.) on October 19, 2022

When three necessary ingredients of a credit, i.e. existence, means and genuineness of transaction with creditors was established, addition u/s 68 is fully justified

Facts

The assessee is a private limited company with a share capital of INR 1 lac and reserves and surplus aggregating to INR 7,866. The case of the assessee company was selected for scrutiny assessment and the matter was probed further by the AO, it was noticed that the assessee has made purchases of textile items, i.e. fabrics, worth INR 19.22 crores from a large number of entities, and sold all these goods to three entities for amounts aggregating to INR 19.26 crores. The AO also noted that there was no proof of delivery of fabric, that no expenses were debited on account of transportation expenses and that there is no explanation for such inconsistencies. It was also noticed that barring confirmation of purchases from four parties which were all sister concerns and group companies of the assessee company, all the notices served to the purported sellers of fabrics came back unserved with remarks like “not known”, “not found” and “left” etc. The assessee was confronted with these facts and called upon to explain the position. The explanation of the assessee was that these vendors are small parties who primarily work from tables spaces mostly in Bhiwadi and their addresses also keep changing, that the good supplied by them was found to be defective and that, as per trade practices, the goods are directly picked up by our buyers from the vendors, and as such, there is no question of payment for transportation etc. The AO rejected these contentions and proceeded to make an addition of INR 19.22 crores. The assessee preferred an appeal before the Ld. CIT(A) who decided the appeal in favour of the assessee. The Department aggrieved with the order passed by the Ld. CIT(A) preferred this appeal before the ITAT.

Ruling

Ld. Tribunal held that the assessee was unable to file any confirmation from the persons from whom such purchases were purportedly made even though there is a mention about some confirmations having been filed by these persons in the next year but even those confirmations were not produced. There is nothing available with the Tribunal to establish identity of these persons; no payments have been made to them, and there is no evidence before us about the current status of amounts payable to them. All that is being reiterated are the self-serving statements, based on sweeping generalizations, unverified statements, and without any supporting evidence. The onus is on the assessee to prove the identity of these persons, the means of these persons to have allowed these credits to the assessee, and the genuineness of the transactions leading to these credits. On each of these counts, the assessee has miserably failed in discharging his onus. The factual foundation of the case of the assessee is devoid of any substance or merits. The credits appearing in the books of the assessee, with respect to the purported purchase of goods on credit, in our considered view, are, therefore, not at all reasonably explained, and the AO was, therefore, fully justified in making the impugned addition of INR 19.22 crores u/s 68. The addition made by the Assessing Officer was restored.

Source: ITAT, Mumbai in the case of ITO vs Solid Machinery Co. (P) Ltd. vide [2022] 143 taxmann.com 293 (Mumbai- Trib.) on October 19, 2022

Bonus/commission paid to employee not being a partner or a shareholder can't be disallowed u/s 36(1)(ii)

Source: ITAT, Delhi in the case of Karam Singh Malik vs ITO vide [2022] 144 taxmann.com 5 (Delhi- Trib.) on October 25, 2022

Facts

The assessee filed his return of income declaring income of INR 13.50 lacs. In course of assessment proceeding, the AO, while verifying the return of income and financial statement found that the assessee is engaged in the business of providing placement and contract labour services and providing manpower solutions as per requirement. On perusing the Audit Report, AO noticed that the assessee has claimed deduction of INR 27.27 lacs, being bonus paid to employees. Being of the view that such payment is in violation of provision contained under section 36(1)(ii), the AO disallowed this amount. The disallowance so made, was sustained by Ld. CIT(A). Against the order passed by the CIT(A), the assessee before the Ld. Tribunal relied on the decision of Special Bench of the Tribunal in case of M/s. Dalal Broacha Stock Broking Pvt. Ltd. v. Addl. CIT, in ITA No. 5792/Mum/2009 and submitted that the payment of bonus to employees cannot be equated with profits or dividend payable. The assessee has furnished certificate (i.e. additional evidence) dated 15th February, 2019 issued by the same Auditor acknowledging the mistake in reporting the bonus paid to the employee.

Ruling

ITAT held that considering the fact that this document was filed as additional evidence for the first time before him, the AO is directed to factually verify the certificate issued by the Auditor and allow the deduction. This is so because, in case of M/s. Dalal Broacha Stock Broking Pvt. Ltd. (supra), the Special Bench of the Tribunal, after analyzing the provisions of section 36(1)(ii), has held that any sum paid to an employee as bonus or commission for services rendered has to be allowed as deduction as the reasonableness of the payment or adequacy of services rendered by the employee are not relevant factors in deciding the allowability of deduction. The Bench has held that disabling provision of section 36(1)(ii), which provides that "if the sum so paid is in lieu of profit or dividend" applies only to employees who are partners or shareholders. In the facts of the present appeal, there is no finding that the employees are either partners or shareholders of the assessee. That being the case, assessee's claim was allowed.

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