आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'सी', मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM
&
SHRI AMARJIT SINGH, JM

आयकर अपील सं./**ITA Nos.4439,4657&4658/Mum/2009**
ITA No.1741&6322/Mum/2010,

(**निर्धारण वर्ष /** Assessment Years :2003-2004 to 2007-2008)

ACIT-19(3), Mumbai	Vs.	M/s Petroleum India International,5-C, Keshava, Bandra (E), Mumbai-400051
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AAAAP 0017 B**		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

AND

आयकर अपील सं./**ITA Nos.2686&6421/Mum/2012**

(**निर्धारण वर्ष /** Assessment Years :2008-09 & 2009-10)

ADCIT-19(3), Mumbai	Vs.	M/s Petroleum India International,5-C, Keshava, Bandra (E), Mumbai-400051
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AAAAP 0017 B**		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

राजस्व **की ओर से** /Revenue by : Shri Deepkant Prasad
निर्धारिती **की ओर से** /Assessee by : Shri Niraj Seth

सुनवाई की तारीख **/ Date of Hearing : 28/09/2015**
घोषणा की तारीख**/Date of Pronouncement 20/11/2015**

आदेश / O R D E R

***PER R.C.SHARMA (A.M)*:**

These the appeals filed by the revenue against the order of CIT(A), Mumbai, for the assessment year 2003-2004 to 2009-2010, in the matter of order passed u/s.143(3) of the I.T. Act.

2. Common grounds have been taken in all the years under consideration, therefore, all the appeals were heard together and are now decided by this consolidated order.

3. Rival contentions have been heard and record perused. WE shall take the appeal for assessment year 2003-2004 as a lead appeal. Facts in brief are that the assessee is a consortium of several public and private companies in Petroleum sector as its members. It is engaged in the business of providing operation assistance and technical back-up to foreign companies. During the scrutiny assessment the AO made disallowance u/s.40(a)(iii) on the plea that non-deduction tax. The CIT(A) deleted the disallowance by following the order of the Tribunal in assessee's own case dated 5-9-2008 for the assessment year 2003-04.

4. From the record we found that after considering the assessee's case, the Tribunal by its consolidated order dated 5-9-2008 decided this issue in assessee's favour. The assessee has filed a copy of the Tribunal's order. The findings of the Tribunal appears in para 5 of the said order are as under :-

> *"5. We have considered the rival submissions carefully. We find that the basic facts of the case are not in dispute. We find that the issue of applicability of provision of Sec 40(a)(iii) of the Act is covered in favour of the assessee with the decision of the Mumbai Tribunal in assessee's own case for the Assessment years 1989-90, 1990-91 and 1991-92 (supra) wherein the Tribunal on identical facts has decided the issue in favour of the assessee. We hold that the Tribunal after considering all the facts of the case and the pleading of the parties and the relevant case law cited at the bar has concluded that it cannot be stated that the seconded personnel were not the employees of the assessee company and so the foreign allowance paid to them by the assessee company cannot be considered as part of salary and so provisions of Sec 40(a)(iii)*

> *are not applicable. Tribunal has noted that similar situation arose in the case of Emil Webber 200 ITR 483 wherein he was deputed by a foreign company to an Indian company and the Hon'ble Supreme Court held that overseas allowances were not chargeable under the head "Salary" and therefore, Sec 40(a)(iii) does not apply. Tribunal has noted that similar views are endorsed by the Hon'ble Kerala High Court in the case of CIT Vs G Eroppino Giovanni 196 ITR 618. The facts of the cases before us being identical with the facts of the case of the assessee in the earlier years 1989-90, 1990-91 and 1991-92 and we being in agreement with the decision of the Tribunal in assessee's own case for the earlier Assessment years 1989-90 to 1991-92 (supra), decide the issue in favour of the assessee and the grounds of appeal of revenue regarding the issue are dismissed."*

As the facts in earlier years in respect of the disallowance u/s 40(a)(iii) considered by the Tribunal in the assessee's own case are same, respectfully following the said decision of the Tribunal, we uphold the decision of CIT(A) in deleting the said disallowance. The Hon'ble Bombay High Court has also dismissed the appeal of the revenue on this issue in assessee's own case in Income Tax Appeal No.3653/2009.

5. The next grievance of the revenue relates to relief granted u/s.91 of the Act. The AO observed that assessee has not fulfilled the conditions specified in Section 91(1). By the impugned order, the CIT(A) allowed the relief u/s.91(1) of the Act by following the order of Tribunal dated 5-9-2008 for the assessment year 2003-04.

6. We have considered rival contentions and found that this ground of appeal was also the subject matter of appeals in earlier assessment years before the Tribunal in which the facts were same as in the year under this appeal. After considering the similar facts and explanation, the Tribunal has allowed the appeal by its order dated 5-9-2008. Our attention was

drawn at para 12 of the order of the Tribunal, wherein it was observed as under :-

> *"12. We have considered the rival submissions carefully. We find that the language of Sec 91(1) of the Act is un-ambiguous on the issue, which provides that where the assessee proves that in respect of his income which accrued or arose during that previous year outside India and he has paid in any country with which there is no agreement u/s 90 for the relief or avoidance of double taxation, he shall be entitled to deduction from the Indian Income Tax payable by him of a sum calculated on such doubly taxed income. We find that nowhere in the provision of sec 91 (1) of the Act, it is provided that the payment of taxes outside India shall be during the relevant previous year itself The purpose of this provision of Sec 91 (1) of the Act is to provide relief in a case where the assessee has paid the taxes outside the country, not to subject such assessee to double taxation on the same income. If the interpretation put forward by the Ld CIT DR is accepted, it shall render the provision of Sec 91 (1) itself as redundant. We find that the assessee has discharged its onus of proving that it has in fact made the payment of taxes in Kuwait in subsequent periods. The CIT(A) has recorded the dates and amount of payment of taxes in Kuwait by the assessee and has recorded that the assessee has furnished before him the original documents evidencing these payments and the same have also been furnished before the Assessing Officer and has been verified by him. There is no material before us to controvert these findings of the CIT(A). in these facts of the case; we hold that the assessee is entitled to relief u/s 91 (1) of the Act and the order of the CIT(A) is confirmed and the ground of appeal of revenue is dismissed."*

In view of the above mentioned categorical findings of the Tribunal, we follow its decision and uphold that the assessee is entitled to the double taxation relief u/s.91 of the Act. The Hon'ble Bombay High Court has dismissed the appeal of the department on this issue vide appeal No.3653/2009, which is also placed in the paper book.

7. The next grievance of the revenue relates to treating the interest income as income from other sources. Facts in this regard are that in the course of its business, assessee was required to give

bonds/guarantees/LCs while bidding for various mega projects. For giving such bonds/guarantees/LCs, the assessee was required to keep funds readily available to be given as collateral securities for the bidding for the mega projects,. Interest was received on such earmarked funds that were required to be kept readily available for bidding for projects by giving bonds/guarantees/LCs. The AO's observations on this issue are in Paras 5.1 to 5.3 of the order. The assssee's claim that the interest was assessable under the head "business income' was rejected by the AO in view of the decision of the Hon'ble Supreme Court in Tuticorin Alkali's case on the footing that the said decision was also followed by the Hon'ble Madras High Court in 240 ITR 24.

8. By the impugned order the CIT(A) held that interest income is to be assessed as income from business. Precise observation of the CIT(A) was as under :-

> *"The facts stated in Para 6.3.1 above show that the interest received by the appellant on the funds earmarked and kept aside for mega business projects was inextricably connected with its business activities.*
>
> *The appellant has submitted that, in terms of the ratio of the decision of the jurisdictional High Court, once it is established that the deposits on which the interest was earned represented the amounts kept apart for the purpose of business, the interest income ought to be assessed as business income and not as income from other sources. I have gone through the facts of appellant's case as mentioned in its reply dated December 22, 2005 which are extracted in para 5.1 of the assessment Order. If these facts are viewed in the context of the said ratio of the jurisdictional High Court decision, it appears that in the appellant's case also, the inextricable nexus between its business and the deposits kept apart for the said purpose is established.*

According to the appellant, the decisions referred' to in the Order of Assessment are distinguishable on facts and are therefore, to be read in light of the Supreme Court decision in CIT v Karnal Co-operative Sugar Mills Ltd [2000} 243 ITR 2 (SC). In particular, the appellant has drawn my attention to the following observations made by the Supreme Court,

In the present case, the assessee had deposited money to open a letter of credit for the purchase of the machinery required for setting up its plant in terms of the assessee's agreement with the supplier. It was on the moneys so deposited that some interest has been earned. This is, therefore, not a case where any surplus share capital money which is lying idle has been deposited in the 'bank for the purpose of earning interest. The deposit of money in the present case is directly linked with the purchase of plant and machinery. Hence, any income earned on such deposit is incidental to the acquisition of assets for the setting up of the plant and machinery. In this view of the matter the ratio laid down by this court in Tuticorin Alkali Chemicals and Fertilizers Limited v CIT [1997] 227 ITR 172, will not be attracted. The more appropriate decision in the factual situation in the present case is in Bokaro Steel Ltd [1999] 236 ITR 315 (SC). (emphasis supplied)

In view of the abovementioned categorical observations of the Supreme Court, I consider that the appellant deserves the benefit of the ratio of the abovementioned Supreme Court decision in 243 ITR 2 in which Tuticorin Alkali case 227 ITR 172 has been referred and correctly distinguished. The Supreme Court has also observed that the more appropriate decision in the case like that of the appellant is its Bokaro Steel decision reported in 236 ITR 315 (SC).

I have also gone through the South India Shipping Corporation Ltd. Vs. CIT(1999) 240 ITR 24 (Mad). This decision is based on the Supreme Court's decision in Tuticorin Alkali Chemicals & Fertilizers Ltd v CIT (1997) 227 ITR 172 (SC). It may be noted that the Supreme Court in this case dealt with the question of assessability of interest on investment of "surplus funds". In the appellant's case, however, the interest was not received on "investment of surplus funds".

The interest was received on the funds that were required to be earmarked for bidding of mega projects. Thus, interest on such funds that were earmarked for biding for mega projects were inextricably linked with the appellant's business. It is clear from the appellant's facts that the interest on such funds was neither with the purpose of nor in the nature of earning interest on investment, simplicitor of surplus funds. Such interest was indeed distinguishable as interest on funds inextricably connected with the appellant's business activities. In this connection, the appellant has relied on the above quoted observations of the Supreme Court in

CIT v Karnal Co-op Sugar Mills Ltd [2000J 243 ITR 2 (SC). In that decision, the Supreme Court has rightly distinguished its own decision in Tuticotin's case and held that in the cases like that of the appellant, Bokaro Steel decision [1999) 236 ITR 315 (SC) would be applicable.

Having regard to the above, the appellant has submitted that its claim be allowed on this ground following the said decision of the Supreme Court in 243 ITR 2 that is binding as the law of the land in terms of Article 141 of the Constitution of India.

6.3.4 Hence taking into account the facts and circumstances specific to this case and the case laws referred as well as distinguished in this order I hold that the interest income is to be assessed under the business head."

9. We have considered the rival contention and found that the funds placed with the bank were inextricably related with the business of the assessee and was under business compulsion. It was not a surplus fund which was deposited by the assessee for earning interest income. In the facts of instant case, we found that proposition of law laid down by the jurisdictional High Court is applicable to the facts of the case, insofar as there is an inextricable nexus between assessee's business and the deposits kept apart for the said purpose of business, which is clearly established. The CIT(A) has elaborately dealt with the issue and held that putting in bank for getting letter of credit/ bank guarantee was inextricably linked with the business of assessee, therefore, interest earned thereon are assessable as business income. The proposition of law laid down by the Hon'ble Bombay High Court in the case of Indo Swiss Jewels Ltd., 284 ITR 389 (Bom) and also the decision of Hon'ble Supreme Court in the case of Karnal Co-operative Sugal Mills Ltd., 243 ITR 2(SC) are applicable to the facts of assessee's case. The detailed finding recorded

by the CIT(A) has not been controverted. Accordingly, we do not find any reason to interfere in the order of the CIT(A) for treating the interest income as business income"" in place of " income from other sources"".

10. The next grievance of Revenue relates to the treatment of foreign exchange fluctuation. We found that the observations of AO on this issue are found in para 5.4 of his order. The facts show that the sum of Rs.88.99 lacs was credited to the assessee's profit and loss account as gain due to fluctuations in foreign exchange. In the earlier assessment years too, this issue was involved, namely, whether the gain from foreign exchange fluctuations was assessable under the head business income. It was fairly conceded by ld. AR that matter was restored to the file of AO by the Tribunal in assessee's own case in the assessment year 2003-04 vide order dated 28-9-2012. Respectfully following the order of the Tribunal in assessee's own case, we set aside the order of the CIT(A) on this issue and matter is restored back to the file of AO for deciding in terms of directions given by the Tribunal in its order dated 28-9-2012 for the assessment year 2003-04. We direct accordingly.

11. The deduction claimed by the assessee u/s 80HHC of the Act was declined by the A.O. after having observed at para 10 of his order for want of evidence in support of the figures adopted for calculation of 80HHC and no proof in support of export realization hae been filed by the assessee. By the impugned order, the ld. CIT(A) allowed the assessee's claim by

observing that the assessee has satisfied the requirement of section 80HHC of the Act.

12. We have considered the rival contentions and perused the records. We found that without controverting the precise observation of the A.O., the ld. CIT(A) deleted the disallowance made by the A.O. In the interest of justice, we restore this issue to the file of the A.O. for the deciding the same a fresh after considering the documents filed before the ld.CIT(A) to justify the claim of deduction u/s 80HHC of the Act.

13. The assessee's claim of deduction u/s 80HHE of the Act was declined by the A.O. by observing at para 9 of his order. As per the A.O., the assessee did not file any evidence in support of the eligible amount of deduction u/s 80HHE of the Act. Without controverting the finding of the A.O., the ld. CIT(A) has allowed the claim of assessee. In the interest of justice, we restore this issue back to the file of the A.O. for deciding the issue afresh after examining the documents filed by the assessee.

14. The A.O. also disallowed the claim of deduction u/s 80HHB of the Act after having observing at para 8.1 to 8.7 of his order according to which the assessee has not prepared any balance sheet in respect of this project. By the impugned order, the ld. CIT(A) allowed the claim since the assessee fulfilled the conditions of section 80HHB of the Act. It appears that these details were not available before the A.O., therefore, in the interest of justice, we restore this issue also to the file of the A.O. for

deciding the same afresh after giving sufficient opportunity of being heard to the assessee.

15. The next grievance of the revenue relates to deleting disallowance of Rs.3420/- on account of business gifts. The CIT(A) has deleted the disallowance by observing that expenditure was indeed for the purpose of the assessee's business and for no other purpose. This finding of the CIT(A) was not controverted by the ld. DR by bringing any positive material on record. Accordingly, we do not find any reason to interfere in the order of CIT(A) for deleting the disallowance on account of business gift.

16. **In the result, all appeals of revenue are allowed in part, in terms indicated hereinabove.**

Order pronounced in the open court on this 20/11/2015.

Sd/-	**Sd/-**
(AMARJIT SINGH)	**(R.C.SHARMA)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक Dated 20/11/2015

प्र.कु.मि/pkm, नि.स/ PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार
(Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**