

**IN THE INCOME TAX APPELLATE TRIBUNAL  
(DELHI BENCH 'F' : NEW DELHI)**

**BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER  
and  
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.5708/Del./2014  
(ASSESSMENT YEAR : 2010-11)**

DCIT, Circle 14 (1), vs. M/s. Power Machines India Ltd.,  
New Delhi. LGF – 69 – 70, Vijaya Building,  
17, Barakhamba Road,  
New Delhi – 110 001.

**(PAN : AABCP7860M)**

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Manoj Gupta, FCA  
REVENUE BY : Smt. Paramita Tripathy, CIT DR

Date of Hearing : 21.09.2017  
Date of Order : 28.09.2017

**ORDER**

**PER KULDIP SINGH, JUDICIAL MEMBER :**

The appellant, Deputy Commissioner of Income-tax, Circle 14 (1), New Delhi (hereinafter referred to as 'the Revenue'), by filing the present appeal, sought to set aside the impugned order dated 21.07.2014 passed by the Commissioner of Income-tax-XVII, New Delhi qua the assessment year 2010-11 on the grounds inter alia that :-

***“1. On the facts and circumstances of the case, the Ld. CIT (A) has erred in deleting the addition***

***of Rs.4,66,18,556/- made by the AO u/s 40(a)(i) of the Act ignoring the fact that the assessee company has not deducted TDS on commission paid to the Foreign Banker in lieu of Bank Guarantee.***

***2. On the facts and circumstances of the case, the Ld. CIT (A) has erred in deleting the above addition by relying upon the decision in earlier years in assessee's own case ignoring the fact the department is in appeal in those years. Hence, the matter is still sub-judice."***

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : During scrutiny proceedings, the Assessing Officer noticed that the assessee company has paid Rs.4,66,18,556/- on account of bank guarantee commission to a foreign banker without deducting tax at source. Submissions made by the assessee company that no payment has been made by the holding company to the assessee company nor the holding company was deprived of any funds with guarantee was issued by VTB Bank and the interest is compensation to the creditors for being deprived of the use of its money. AO found the submissions made by assessee not tenable and proceeded to hold that the assessee is liable to deduct tax on the payment of Rs.4,66,18,556/- to VTB Bank but has failed to do so and thereby disallowed an amount of Rs.4,66,18,556/- by invoking the provisions contained u/s 40(a)(i) of the Income-tax Act, 1961.

3. Assessee carried the matter by way of filing appeal before the Id. CIT (A) who has allowed the appeal by following the order passed by Id. CIT (A) in assessee's own case for AYs 2006-07, 2007-08, 2008-09 & 2009-10. Feeling aggrieved, the Revenue has come up before the Tribunal by way of challenging the impugned order passed by Id. CIT (A).

4. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

5. Undisputedly, identical issue has come up before the *coordinate Bench of the Tribunal in assessee's own case for AYs 2006-07, 2007-08 & 2008-09 order dated 05.02.2016* and same has been decided in favour of the assessee by returning following findings :-

**“8. Ground No.3 of I.T.A.No. 3834/Del/2009 (A.Y. 2006-07) and Ground No.1 of I.T.A.Nos. 53 and 1815/Del/2011 (A.Yrs. 2007-08 & 2008-09):**

*Undisputedly, assessee company claimed Rs.5,20,56,831/-, Rs.5,52,49,559/- and Rs.4,77,71,123/- on account of bank guarantee commission having been paid to a foreign bank on behalf of holding company of the assessee qua Assessment Years 2006-07, 2007-08 & 2008-09 respectively and the same have been disallowed by the Assessing Officers u/s 40(a)(1) of the Act because of non deduction of tax at source (TDS) paid in India.*

**8.1** *The Assessing Officer after declaring the bank guarantee commission paid by the assessee company in India to a foreign bank as interest u/s 2(28A) of the Act, disallowed the same u/s 40(a)(1) of the Act but his decision has been reversed by Ld. CIT(A) vide impugned order, which is now under challenge before the Tribunal.*

**8.2** *Undisputedly, VTB bank is a foreign bank situated outside the territorial jurisdiction of India having no PE in India nor having any business connections in India VTB bank makes the Canara Bank to issue bank guarantee by tendering its own counter guarantee meaning thereby the contract for providing bank guarantee has been entered into between the appellant company and VTB Bank Russia; that VTB Bank has rendered all the services from outside India; that the assessee company has paid bank guarantee commission to a non resident bank i.e. VTB Bank, Russia having no PE in India.*

**8.3** *Now, the first question arises for determination is, 'as to whether the assessee company was liable to deduct the tax at source (TDS) on bank guarantee commission paid in India to VTB Bank, a foreign bank.' Since, the Assessing Officer by invoking provisions contained u/s 40(a)(1) of the Act, disallowed the amount paid by the assessee company as bank guarantee commission to a foreign bank treating the same as interest, we would have to decide first, "as to whether the bank guarantee commission paid by the assessee company to a foreign bank can be treated as interest under the Act making it obligatory for the assessee company to deduct the tax at source (TDS)?" For finding out the answer to the aforesaid question, we are required to decide first, 'as to whether the assessee company was liable to deduct the tax at source (TDS) on bank guarantee commission paid in India to VTB Bank, a foreign bank'.*

**8.4** *When the assessee company has placed on record for perusal of the revenue authorities cogent*

*material that it has paid bank guarantee commission to a foreign bank, the Assessing Officer could not lay hands on any material to treat the bank guarantee commission as interest or deemed interest alleged to be paid by the assessee company to the foreign bank. Moreover, there is no dispute that the assessee company has not borrowed any funds from VTB Bank, Russia on which, it was required to pay the interest. Section 2(28A) of the Act defines the 'interest' paid in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized. On the other hand, 'commission' is a specified sum in terms of percentage to be paid to an agent or salesman for services rendered. Since in this case, VTB Bank, Russia got bank guarantee issued by Canara Bank by tendering its own counter guarantee and charged the commission thereon irrespective of the fact that the bank guarantee has been utilized or not, we are of the considered view that by any stretch of imagination even the bank guarantee commission cannot be treated as interest as decided by the Assessing Officer.*

*8.5 Now, the next question arises for determination is, 'as to whether assessee company was liable to deduct the tax at source on the bank guarantee commission paid to VTB bank u/s 195 of the Act'.*

*8.6 In order to find out the answer to the aforesaid question, first of all, it is required to be decided, 'as to whether sum payable on account of bank guarantee commission by the assessee company to VTB bank is chargeable to tax under the Act?' When the Revenue authorities have failed to lay hands on any cogent material that the bank guarantee commission paid by the assessee company paid on account of business transaction between assessee company and VTB bank particularly in the*

***face of the fact that VTB bank has no PE in India, the question of attracting provision contained u/s 195 of the Act does not arise. In other words, when the assessee company has directly made the payments to VTB bank, Russia through its banker in India, no income can be said to have accrued or arisen in India to the VTB bank u/s 4, 5 and 9 of the Act. So, in the given circumstances, Assessee Company was not liable to deduct the tax at source on the bank guarantee commission paid to a foreign bank. Finding no illegality or perversity in the findings returned by the Ld. CIT(A) on this issue, Ground No.3 of I.T.A. No. 3834/Del/2009 (Assessment Year 2006-07) and Ground No.1 of I.T.A. Nos. 53 and 1815/Del/2011 (Assessment Years 2007-08 & 2008-09) are determined against the Revenue.”***

6. Furthermore, the Revenue had challenged the order passed by coordinate Bench of the Tribunal in assessee's own case for AYs 2006-07, 2007-08 & 2008-09 order dated 05.02.2016 before the Hon'ble High Court of Delhi and the appeals filed by the Revenue bearing Nos.ITA 399/2016, ITA 400/2016 and ITA 426/2016 have been dismissed vide order dated 28.07.2016 by Hon'ble High Court by making following observations :-

***“3. one common question that is urged by the Revenue is regarding the ITAT having upheld the order of the Commissioner of Income Tax (Appeals) ('CIT(A)') who deleted the addition made by the Assessing Officer ('AO') on account of the commission paid on the bank guarantee issued by the VTB bank. As pointed out by the CIT(A), there was no warrant for treating the bank guarantee commission as a payment of interest in terms of Section 2(28A) of the Act. The bank guarantee***

*commission paid to the foreign bank could not have been disallowed under Section 40(a)(i) of the Act on the above basis. The Court is unable to find any legal infirmity in the above determination by the CIT(A) which has been affirmed by the ITAT.”*

7. In view of what has been discussed above and following the decisions rendered by the coordinate Bench of the Tribunal, affirmed by the Hon'ble Delhi High Court, the bank guarantee commission paid to VTB Bank, a foreign Bank, cannot be disallowed u/s 40(a)(i) of the Act. So, we find no illegality or perversity in the impugned order passed by the Id. CIT (A), hence the appeal filed by the Revenue is hereby dismissed.

**Order pronounced in open court on this 28<sup>th</sup> day of September, 2017.**

**Sd/-  
(N.K. SAINI)  
ACCOUNTANT MEMBER**

**sd/-  
(KULDIP SINGH)  
JUDICIAL MEMBER**

**Dated the 28<sup>th</sup> day of September, 2017  
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT (A)-XVII, New Delhi.
- 5.CIT(ITAT), New Delhi.

**AR, ITAT  
NEW DELHI.**