

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

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER

ITA No. 1424/Mum/2011,(A.Y 2007-08)
ITA No. 4336/Mum/2011,(A.Y 2008-09)

American Hotel & Lodging
Educational Institute,
Asha House, 28, Suren Road,
Andheri(E), Mumbai 400 093
PAN:AAAAE0097J

..... Appellant

Vs.

The Asstt. Director of Income Tax
(International Taxation) – 1(1),
1st Floor, Scindia House,
Ballard Pier, N.M.Road,
Mumbai- 400 038

.... Respondent

ITA No. 4932/Mum/2011,(A.Y 2008-09)

The Asstt. Director of Income Tax
(International Taxation) – 1(1),
1st Floor, Scindia House,
Ballard Pier, N.M.Road,
Mumbai- 400 038

.... Appellant

Vs.

American Hotel & Lodging
Educational Institute,
Asha House, 28, Suren Road,
Andheri(E), Mumbai 400 093
PAN:AAAAE0097J

..... Respondent

Assessee by : Shri Mayur Kisnadwala
Revenue by : Shri Rajesh Kumar Yadav

Date of hearing : 25/10/2017
Date of pronouncement : 27/10/2017

ORDER

PER G.S.PANNU,A.M:

The captioned are three appeals, two by the assessee and one by the Revenue, pertaining to assessment years 2007-08 and 2008-09 and since they relate to the same assessee and involves certain common issues, they have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity.

2. In both the assessment years a substantive common issue relates to assessee's claim for exemption under section 10(23C)(vi) of the Income Tax Act, 1961 (in short "the Act"). We may first take up the appeal of the assessee for assessment year 2007-08, in ITA No. 1424/Mum/2011, which is directed against an order passed by CIT(A)-10 Mumbai dated 29/10/2010, which in turn arises out of an order passed by the Assessing Officer under section 143(3) of the Act dated 05/11/2009.

3. In brief, the relevant facts are that the assessee is a tax resident of United States of America. The taxable unit before us is a branch of The American Hotel & Lodging Educational Institute, a non-profit organization set up in the USA in the year 1970. For the assessment year under consideration it filed a return of income declaring total income at 'Nil', after claiming its entire income as exempt under

section 10(23C)(vi) of the Act. The activities of the branch included conducting various courses, certification programmes, seminars, workshops and other programmes in hospitality management and operations, providing educational and training materials, course materials, etc., providing training, course materials and instructional resources to the in-house faculty of various institutions. For all such activities, assessee branch charges a fee and after deducting the expenses the net surplus is remitted to the Head Office. The Assessing Officer has denied the claim of exemption for the reasons stated in the order, in particular it has emphasized that in the past years too the said exemption has been denied. The Assessing Officer referred to the assessment year 1999-2000, wherein on identical facts, assessee's claim for exemption was denied. Another aspect was regarding the claim of expenses incurred by the Head Office on behalf of the Indian Branch amounting to Rs.3,91,43,781/-, which was also denied in line with the stand of the assessing authority in the past years. As a consequence, the total income of the assessee was computed at Rs.4,68,44,961/- i.e. surplus depicted in the Income and Expenditure Account. In coming to such conclusion, the Assessing Officer noted that the CBDT vide its order dated 12/10/2004 had rejected assessee's application seeking approval for exemption under section 10(23C)(vi) of the Act. The CIT(A) has also affirmed the stand of the Assessing Officer, against which assessee is in further appeal before the Tribunal.

4. Before us, the Ld. Representative for the assessee explained that for the block of assessment years 1999-2000 to 2006-07, the CBDT had granted approval to the assessee in terms of section 10(23C)(vi) of the

Act. Secondly, it was pointed out that so far as the captioned assessments 2007-08 and 2008-09 are concerned, assessee had filed an application to the CBDT for grant of approval on 09/05/2005 and 27/03/2008 respectively, which are still pending for disposal by the CBDT. Thirdly, it is pointed out that vide its order dated 09/05/2008, the Hon'ble Supreme Court in assessee's own case for the earlier years while observing that assessee had fulfilled the threshold condition of actual existence of institution, remitted the matter to the CBDT for fresh consideration as per law. In particular, para 40 of the judgment of the Hon'ble Supreme Court has been emphasized, which reads as under:-

"40 In the light of what is stated above, we set aside order dated 12/10/2004 passed by CBDT for fresh consideration in accordance with law. We may clarify that, in this case, appellant has fulfilled the threshold pre-condition of actual existence of an educational institution under section 10(23C)(vi) and, therefore, on that count CBDT will not reject the approval application."

It is pointed out that till now no order has been passed by the CBDT. In so far as assessment years 2000-01 to 2002-03 are concerned, it was pointed out that the Tribunal vide ITA Nos.2106 to 2108/Mum/2007 dated 27/04/2011 had set-aside the issues to the file of the Assessing Officer for denovo assessment and as a consequence, the Assessing Officer completed the assessment holding that assessee had fulfilled the conditions prescribed in section 10(23C)(vi) of the Act and assessed total income at 'Nil'. It is further pointed out that so far as the assessment years 2003-04 to 2006-07 are concerned, vide ITA Nos.151 to 154/Mum/2008, the Tribunal had set-aside the issue again to the file of Assessing Officer for denovo assessment. It has been contended that the appeals be kept pending till the CBDT dispose off assessee's

applications as per directions of the Hon'ble Supreme Court dated 09/05/2008(supra).

5. Considering the aforesaid background and in view of the fact that the facts and circumstances in the instant year stand on similar footing to those of the earlier years, it was put across to the parties as to why not the matter be restored back to the file of Assessing Officer as no useful purpose would be served by keeping the appeals pending in the ITAT. The Ld. Representative for the assessee had no objection to the same but pointed out that in spite of regular follow up with CBDT for giving effect to the order of the Hon'ble Supreme Court, the application for approval has not been disposed off.

6. In our considered opinion, it would be in the fitness of things, the matter is restored back to the file Assessing Officer to make the assessment afresh, of course after awaiting the order of the CBDT on assessee's application for grant of approval under section 10(23C)(vi) of the Act, as has been directed by the Hon'ble Supreme Court in its order dated 09/05/2008(supra). The Assessing Officer is further directed to ascertain, at the earliest, the status of assessee's application pending before the CBDT and in the course of such an exercise he ought to bring it to the notice of the CBDT the statutory time limit, if any, applicable to make the ensuing assessment, so that the disposal of the application pending with the CBDT is carried out expeditiously. Needless to mention, the assessee is expected to render appropriate co-operation to the income-tax authorities in the matter.

6.1 Even on the claim of expenses incurred by the Head Office on behalf of its Indian Branch, the matter is sent back to the Assessing

Officer to be adjudicated afresh in accordance with law only after awaiting the outcome of the assessee's application pending with the CBDT. Thus, we hereby set-aside the order of the CIT(A) and restore the matter to the file of the Assessing Officer to make a denovo assessment in accordance with law, after affording the assessee a reasonable opportunity of being heard. Thus, for assessment year 2007-08, the appeal of the assessee is allowed for statistical purposes.

7. In so far as assessment year 2008-09 is concerned, assessee as well as Revenue are in appeal before us by way of cross-appeals against the order of the CIT(A)-10, Mumbai dated 23/03/2011, which in turn arises out of an order passed by the Assessing Officer under section 143(3) of the Act dated 23/12/2010.

8. In so far as the appeal of the assessee is concerned, the facts and circumstances and the disputes are identical to those considered by us in assessee's appeal for assessment year 2007-08 in the earlier paras and, therefore, our decision in ITA No.1424/Mum/2011 shall apply *mutatis mutandis* in the appeal for assessment year 2007-08 also.

9. In so far as the appeal of the Revenue is concerned, the solitary Ground of appeal raised reads as under:-

"On the facts in the circumstances of the case and in law, the Ld. CIT(Appeals) erred in holding that payment made towards books cannot be treated as royalty ignoring the facts that the books were exclusively designed for the assessee and, therefore, the payments were in the nature of royalty/fees for technical services."

9.1 The facts relevant with regard to the impugned dispute are that it was noticed by the Assessing Officer that the assessee had remitted a

sum of Rs.2,30,60,283/- to Head Office as cost of books and services like printing of books. The Assessing Officer further noticed that assessee did not furnish any evidence to substantiate its claim in respect of cost of books. Instead, the claim of the assessee was that cost of such books and printing material be considered for the claim under section 10(23C)(vi) of the Act. The Assessing Officer concluded that the books in question were proprietary materials of the assessee and that they are not off-the-shelf books readily available in the market. The Assessing Officer has also observed that such books/material are prepared solely for distribution to the students and, therefore, the cost incurred thereof would constitute payments in the nature of royalty/fee for technical services to the Head Office. Since assessee had not deducted any tax at source, the Assessing Officer disallowed the expenditure. On this aspect, the CIT(A) has differed with the Assessing Officer and noted that the books belong to the Head Office, who had supplied it to the branch for distribution among the students in India. The CIT(A) further concluded that the books sent by the Head Office to the branch does not 'make available' or supply or transfer of any technical services to the branch and, therefore, the same could not be considered as a fee for technical services within the meaning of Article 12(4) of Double Taxation Avoidance Agreement between India and USA. The findings of the CIT(A) are as under:-

“ 6.3. I find that the HO has supplied the books to the appellant branch for distribution among students in India. The books belongs HO on which expenditure is incurred by the Head Office. However the cost of books is apportioned to branch in proportionate of cost for which the CPA has given the cost of material supplied. Further, I find that the AO himself allowed deduction of cost of books amounting to Rs.3,56,567 towards cost of books on the basis of evidence submitted by the appellant. It is also seen that books made available to branch by HO does not make

available the technology hence, it cannot be considered as fees for technical services within the meaning of Article 12(4) of Double Taxation Avoidance Agreement In the light of above the observation of the AO is without any basis . Hence the payment made towards books cannot be treated as royalty /fees for technical services. This ground is therefore allowed."

9.2 Against the aforesaid, the Revenue is in appeal before us. So however, there is no cogent reasoning or material brought out by the Revenue, which would require us to interfere with order of the CIT(A). Thus, on this aspect the order of the CIT(A) is affirmed.

9.3 Thus, in so far as the appeal of the Revenue is concerned, the same is dismissed.

10. In the result, so far as the appeals of the assessee are concerned, they are allowed for statistical purposes and the appeal of the Revenue is dismissed.

Order pronounced in the open court on 27/10/2017.

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
ACCOCUNTANT MEMBER

Mumbai, Dated 27/10/2017

Vm, Sr. PS

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai