

आय अधकरण, "बी+यायपीठ, चेनई  
PELLATE TRIBUNAL 'B' BENCH, CHENNAI

पी चं पूजार लेखा सदय एवं पी धुवु आर.एल रेडी, यायक सदय के सम  
Before Shri Chandra Poojari, Accountant Member &  
Shri Duvvuru RL Reddy, Judicial Member

आयकर अपील सं./I.T.A.No.513/Mds/2017

अधारण वष/Assessment Year:2011-12

M/s. Anand Transport Pvt. Ltd.,  
No. 1, 9<sup>th</sup> Street, Dr. Radha Krishnan  
Salai, Mylapore, Chennai 600 004.  
[PAN: AAJCA2111N]

Vs. The Deputy Commissioner of  
Income Tax,  
Corporate Circle I(1),  
Chennai 600 006.

(अपीलाथ /Appellant)

(अयथ/Respondent)

अपीलाथ क ओर से / Appellant by : Shri G. Baskar, Advocate

अयथ क ओर से/Respondent by : Shri B. Koteeswara Rao, CIT

सुनवाई क तारख/ Date of hearing : 29.05.2017

घोषणा क तारख /Date of Pronouncement : 28.07.2017

### आदेश / O R D E R

#### PER DUVVURU RL REDDY, JUDICIAL MEMBER:

This appeal filed by the assessee is directed against the order of the Id. Commissioner of Income Tax (Appeals) 5, Chennai dated 21.01.2017 relevant to the assessment year 2011-12. The assessee has raised two effective grounds, viz., (i) the Id. CIT(A) has erred in confirming the disallowance made by invoking the provisions of section 40(a)(i) of the Income Tax Act, 1961 [Act+ in short] and (ii) the Id. CIT(A) has erred in

of interest in respect of amounts advanced to sister concern.

2. Brief facts of the case are that the assessee has filed the return of income on 30.09.2011 declaring total income of .7,10,47,325/-. While completing the assessment under section 143(3) of the Act, the Assessing Officer has assessed the taxable income at .37,06,18,392/- by making various disallowances.

3. With regard to the payments made to M/s. Jaladhi Overseas Pte Ltd., Singapore, the assessee has entered into an agreement with Global Coal and Mining Pvt. Ltd. for transportation of coal from Paradeep Port to Chennai Port. To that effect, the assessee has entered into an agreement dated 07.09.2008 for the transportation of coal through sea with M/s. Jaladhi Overseas Pte Ltd., Singapore. This contract was entered for transporting of the coal solely between two Indian ports, i.e., Paradeep and Chennai. Towards the transportation charges, the assessee company has paid .29,59,00,931/-. When the assessee was specifically asked for TDS on transportation charges paid, it was the submission of the assessee that the income of M/s. Jaladhi Overseas Pte Ltd. is not taxable as per Indo-Singapore treaty specifically relating to Article 7 and Article 8. After considering the submissions of the assessee, the Assessing Officer invoked the provisions of section 40(a)(i) of the Act and disallowed transportation

since the assessee has not deducted TDS under section 195 of the Act.

3. The assessee carried the matter in appeal before the Id. CIT(A) and made various submissions. After considering the submissions of the assessee, the Id. CIT(A) confirmed the disallowance made under section 40(a)(i) of the Act.

4. On being aggrieved, the assessee is in appeal before the Tribunal. The Id. Counsel for the assessee has vehemently argued that the authorities below have ignored the decision of the Hon<sup>ble</sup> Jurisdictional High Court in assessee's own case for the earlier assessment year, wherein similar disallowance was deleted. When the payee has no PE in India, the question of deduction of TDS does not arise and pleaded that the disallowance made under section 40(a)(i) of the Act should be deleted. On the other hand, the Id. DR strongly supported the orders of authorities below.

5. We have heard both sides, perused the materials available on record and gone through the orders of authorities below. The assessee has paid .29,59,00,931/- to for transporting of the coal solely between two Indian ports, i.e., Paradeep and Chennai to M/s. Jaladhi Overseas Pte Ltd. and it was the submission of the assessee that the said transportation charge is not taxable as per Indo-Singapore treaty specifically relating to Article 7 and

Income Tax Inspector states that there may be existence of PE for M/s. Jaladhi Overseas Pte Ltd. in India. The Assessing Officer verified the details filed by the assessee and found that the charter agreement of the assessee dated 07.09.2008 show a signature on behalf of the vessel owner as %Bothra+. However, we find that the Assessing Officer has not made any extensive enquiry with appropriate authorities to ensure that the foreign company has PE in India. After considering the submissions of the assessee, the Id. CIT(A) has given the following findings:

*7.4.6 In Vodafone South Ltd vs Deputy Director of Income-tax (International Taxation), Circle -1(1), Bangalore [2015] 53 taxmann.com 441 (Bangalore - Trib) the Hon'ble ITAT Bangalore Bench 'B' held that - "Under section 195 onus is upon payer to prove that payments did not involve element of income.*

*Where Double taxation relief agreement exists withholding of tax is an area of domestic law, and sum chargeable to tax is to be considered with an angle of domestic law, unless payee is there to demonstrate that he is not chargeable under DTAA either by himself or through a payer Further, provisions of DTAA would not automatically attract in defense of payer and rights as available to payee under Treaty to defend itself in an Income-tax assessment proceedings are not available to assessee as payer in equal force."*

*7.5 From the above case-laws it is evident that in case the assessee feels that no tax is required to be deducted at source or required to be deducted at a lower rate, then it is required to obtain such certificate under section 195(2) from the Assessing Officer or for non-deduction of tax at source, the Assessing Officer is fully justified in refusing deduction claimed by the payer/assessee for such payments under section 40(a)(i).*

*7.6 The issue in the present appeal before the CIT(A) originating from the Assessment Order is not rejection of application for certificate u/s 195(2) but the disallowance of Rs.29,59,00,931/- u/s 40 (a)(i) in the absence of certificate u/s 195(2).*

certificate under section 195(2) for the F.Y 2010-11 relevant to the A.Y 2011-12.

*Certificate issued u/s.195(2) for one F.Y. is not applicable for other F.Ys. Grant of Certificate u/s.195(2) on application is not in perpetuity because there could be factual variations from year to year, for which the assessee has to apply to the Assessing Officer and obtain the Certificate.*

*Hence respectfully following the above stated case-laws, the disallowance u/s 40(a)(i) is upheld.”*

From the above findings of the Id. CIT(A), it is clear that the Id. CIT(A) has not bothered to give a finding as to whether the payee M/s. JOPL has PE in India or not?

6. In assessee's own case in Writ Appeal No. 952 of 2013, M.P. No. 1 of 2013, W.P. No. 11360 of 2013 and M.P. No. 2 of 2013 for the assessment year 2010-11, the Honble High Court of Madras vide order dated 05.02.2014 quashed the order dated 29.03.2013 relating to assessment year 2010-11 insofar as it relates to the disallowance under section 40(a)(i) of the Act for non-deduction of tax at source in terms of 195(1) in the light of the order of the DIT dated 24.03.2010 holding that there is no obligation on the assessee to deduct tax at source under section 195 for the financial year 2009-10 relevant to the assessment year 2010-11 explicitly indicates that in that relevant assessment year, the Revisional Authority has given a concrete findings that the payee M/s. JOPL is a non-resident company registered and assessed to tax in Singapore as per the certificate dated 11.05.2009, issued

of Singapore and on that context it was held that section 44AB of the Act is not applicable to the facts of the case.

Whereas, in the assessment year under consideration, the Assessing Officer has observed from the charter agreement of the assessee dated 07.09.2008 that the said agreement was signed by %Bothra+ on behalf of the vessel owner. The copy of the charter agreement was not available before us. Under the above facts and circumstances, we direct the Assessing Officer to verify after making enquiry with appropriate authority as to whether the payee M/s. JOPL has PE in India or not and decide the issue afresh in accordance with law after allowing opportunity of hearing to the assessee.

7. With regard the issue of disallowance of interest on the amount paid to sister concern, the Assessing Officer has observed that the interest free loans advanced by the assessee to sister concerned was spent for non-business purpose and when the assessee was asked to furnish details, before the Assessing Officer the assessee has submitted an agreement entered between M/s. P.R. Developers and Builders and M/s. MGM Logistics for the joint development of residential property entered on January 2008 and a loan agreement entered between M/s. MGM Logistics and M/s. P.R. Developers and Builders (PRDBL) entered on 25.2.2010 and a letter dated 20.2.2013 sent by M/s. MGM Logistics to M/s. P.R. Developers and Builders Ltd., addendum to loan agreement on 05.03.2013 for additional

identification and acquisition of ship. Upon perusal of the above, the Assessing Officer found that agreements are totally vague, unspecific with regard to identified activity to be carried. For instance, in the agreement for cooperation in reality projects, it was stated that it is agreement for joint development of residential property, but while mentioning the real estate infrastructure development areas, the entire gamut of real estate development was brought in from commercial complex to warehouse constructions. Further in the said agreement, the advances are not given for a specific project identified for a specific location for which the land is in possession of PRDBL or the identified land in which the development is going to happen. The crux of the agreement is an unsecured interest free loan of . 52 crores given to M/s. PRDBL to commence the project and acquisition of land. This agreement is just a colorable agreement in order to bring the loan under the premise of business expediency. The subsequent dropping of the reality projects and conversion of reality agreement into a loan agreement and further addition of identifying and purchase of ships, all supports the transaction between M/s. MGM Logistics and M/s. PRDBL., in substance, is mere an unsecured interest free loan in the form of various commercial agreements changed from time to time. Even the loan given by M/s. MGM Logistics and M/s. PRDBL, has no commercial interest or commercial expediency. In that case the loan given by M/s. Anand Transport to M/s. MGM Logistics for furtherance of loan to M/s. PRDBL, the question of

[Click Here to upgrade to  
Unlimited Pages and Expanded Features](#)

Commercial prudence does not arise at all to the assessee. And to the said agreements between M/s. MGM Logistics and M/s. PRDBL, the assessee is not a party or privy to it. The loan granted is purely for the benefit of M/s. PRDBL and neither serves the business of M/s. MGM Logistics nor the assessee. The loan granted neither secured against any specific project or land to be developed nor the fund was deposited in an escrow account for utilization in the direction of the specified purpose. The assessee company was asked to produce application of fund out of the interest free loan by PRDBL in order to verify the so called business expediency, the assessee has failed to do so. Accordingly, the interest expenses claimed by the assessee to the tune of ₹ 36,30,176/- was disallowed and added the same to the total income under the head 'Business income'

8. On appeal, since there was no direct nexus between the borrowing and the advance of funds to the sister concern, the Id. CIT(A) confirmed the disallowance of interest expenditure.

9. Before the Tribunal also, the assessee company has not produced application of fund out of the interest free loan by PRDBL or any nexus between the borrowings and utilization of loan amounts by sister concern

[Click Here to upgrade to  
Unlimited Pages and Expanded Features](#)

less expediency. Hence, the ground raised by  
the Assessee is dismissed.

10. In the result, the appeal filed by the assessee is partly allowed for  
statistical purposes.

Order pronounced on the 28<sup>th</sup> July, 2017 at Chennai.

Sd/-  
(CHANDRA POOJARI)  
ACCOUNTANT MEMBER

Sd/-  
(DUVVURU RL REDDY)  
JUDICIAL MEMBER

Chennai, Dated, the 28.07.2017

Vm/-

आदेश क० प्रतिलिपि अपेक्षित/Copy to: 1. अपीलार्थी/Appellant, 2. प्रत्यर्थी/  
Respondent, 3. आयकर आयुक्त (अपील)/CIT(A), 4. आयकर आयुक्त/CIT,  
5. वित्तीय प्रशासक/DR & 6. गार्डफाइल/GF.