IN THE INCOME TAX APPELLATE TRIBUNAL
BENGALURU BENCH 'A', BENGALURU

BEFORE SHRI. A. K. GARODIA, ACCOUNTANT MEMBER

AND

SHRI. LALIET KUMAR, JUDICIAL MEMBER

I.T.A No.1701/Bang/2016)
(Assessment Year : 2011-12)

M/s. Tanglin Developments Ltd,
No.23/2, Coffeeday Square,
Vittal Malya Road, Bengaluru 560 001 .. Appellant
PAN : AABCT0356N

v.

Deputy Commissioner of Income-tax,
Circle 12(4), Bengaluru .. Respondent

Assessee by : Shri. C. Ramesh, CA
Revenue by : Shri. B. R Ramesh, JCIT

Heard on : 16.11.2017
Pronounced on : 25.01.2018

O R D E R

PER LALIET KUMAR, JUDICIAL MEMBER :

The present appeal is filed by the assessee against the order of the CIT (A)-7, Bengaluru, dt.08.07.2016, for the assessment year 2011-12.

02. The assessee has raised the following grounds of appeal :

1. The order of the learned Commissioner of Income Tax (Appeals) is opposed to the facts of the case and law applicable to it.

2. The learned Commissioner of Income Tax (Appeals) erred in confirming the addition of Rs.2,11,860/- alleged to have been interest received from Mangalore Electric Supply Co., Ltd ignoring the fact that, the interest on power deposit does not relate to the appellant.

3. The learned Commissioner of Income Tax (Appeals) erred in confirming the addition of Rs.37,02,233/- consequent to disallowance of expenditure incurred under "flood relief project", ignoring the fact that, the expenditure was in the nature of commercial expediency and was allowable under the provisions of the act.

4. The learned Commissioner of Income Tax (Appeals) erred in confirming the addition of Rs.37,02,233/- consequent to disallowance of expenditure incurred under "flood relief project", drawing inference from amendments to the provisions of section 37(1) of the act in regard to corporate social responsibility ignoring the fact that, the position of law relied upon was consequent to an amendment from 01.04.2015 and was not applicable to the A.Y.2011-12.

5. The learned Commissioner of Income Tax (Appeals) erred in confirming the disallowance of professional and consultancy charges of Rs.69,90,000/- paid to Sri.Ravi Singh a non-resident for the reason that, taxes were not deducted at source under the provisions of the act, ignoring the fact that, as per the provisions of the act r.w. Articles of DTAA with USA there was no tax deductible at source on this payment and hence the expenditure could not have been disallowed.

6. The learned Commissioner of Income Tax (Appeals) erred in confirming disallowance of Rs.62,073/- U/s.40(a)(ia) of the act, ignoring the position of law laid down in the following decisions.

   i) CIT Vs. Vector Shipping Services (P) Ltd (2013) 357 ITR 642 (Allahabad)

   ii) Ushodaya Enterprises Ltd V. DCIT (2015) 60 Taxmann.com 85 (Hyderabad-Trib).

   iii) Sri Narayana Moorthy Travels V. ITO (2015) 61 Taxmann.com 341 (Chennai-Trib)

03. Ground no.1 is general in nature. Ground no.2 pertains to interest income of Rs.2,11,860/- towards interest received from Mangalore Electric Supply Co. (MESCOM for short). It is the case of the assessee that the assessee, owner of STP at SEZ Mangalore. The building is let out to M/s. Mphasis. The income received from Mphasis was shown as revenue in the books of account under the head 'licence fee'. The assessee has deposited certain amount as security deposit with MESCOM, for which the assessee has received interest of Rs.2,11,860/- and taxes were deducted at source u/s.194A of the Act. It is the case of the assessee that as the assessee owned the building and as per the record of MESCOM the security deposit was in the name of the assessee, therefore the interest was deducted at source by MESCOM and was shown in 26AS of the company. However, it is the case of the assessee that MESCOM while issuing the bills to the tenant had adjusted the interest accrued on the on the deposit against the electricity dues payable by the tenant and issued bill for the remaining balance amount. Therefore the assessee submitted that the tenant, namely Mphasis has stood benefitted to the extent of the interest. However, the AO was not convinced and added the interest to the income of the assessee and the same was upheld by the CIT (A).

04. Before us the same argument was addressed and it was submitted that the deposit was made to MESCOM by the landlord (assessee) and the amount deposited by the assessee was recovered by the assessee from the tenant and therefore, though the TDS was

deducted in the name of the assessee, but the interest belongs to the tenant. The Ld. DR on the other hand relies upon the order passed by the CIT(A).

05. We have heard the rival contentions and perused the record. It is not disputed that as per 26AS, the interest income of Rs.2,11,860/- accrued on the deposit made by the assessee. However for the purposes of appreciating the contention of the assessee, it was incumbent upon the assessee to produce evidence in any form of any document showing that the amount initially paid as deposit with Electricity Company/ MESCOM was recovered by the assessee from the tenant. No such evidence was produced before us or shown during the course of argument. Therefore, argument of the assessee is rejected as the person who had made the security deposit would only be entitled to not only the interest accrued on the security deposit but also refund of the security deposit. It was the inter se arrangement between the tenant and the owner as to how the benefit had been passed to the tenant by the assessee. But for the purpose of IT Act, income will be chargeable in the hands of the person in whose favour interest is accrued, unless otherwise is proved. In the light of the above, ground no.2 is dismissed.

06. Ground nos.3 and 4 pertain to the expenditure on flood relief project to the tune of Rs.37,02,233/-. In this regard, it was the submission before us by the Ld. AR that during the year 2010-11, major portion of Karnataka, especially the northern region had faced

unprecedented floods which resulted in loss of human lives and properties. The assessee stood to the call of the nation and gave huge relief in the form of food, clothing etc., The assessee has also built low-cost houses to the flood affected people and the documents pertaining to such construction were produced. It was the case of the assessee that the entire expenditure was incurred for the benefit of the people at large in the State of Karnataka. Hence such expenditure was required to be treated as incurred wholly and exclusively for the benefit of the business of assessee. It was submitted that the conclusion of the AO in para 3 and the decision of the CIT (A) in para 7.4 are without any merit. The Ld. AR relies upon the judgment of the Hon'ble jurisdictional High Court in the case of CIT v. Infosys Technologies Ltd [(2014) 360 ITR 714], as well as on the decision of the ITAT, Raipur Bench in ITA No.99/BLPR/2012, dt.23.06.2016 in the case of ACIT v. Jindal Power Ltd.

07. On the other hand, the Ld. DR submitted that there is no commercial expediency for allowing this expenditure u/s.37 of the Act, as there the expenditure incurred is not directly relatable to the business of the assessee.

08. We have heard the rival contentions and perused the record as also the case laws relied upon by the Ld. AR. Though it is correct that the expenditure was incurred in relation to granting relief to the citizens at large, on account of flood havoc in Bagalkot district of North Karnataka. However the same cannot be allowed being done

on account of commercial expediency. The principle mentioned in section 37, are required to be applied, i.e., unless there is a commercial expediency for incurring the expenses and the expenses are incurred wholly and exclusively for the purposes of business of the assessee, it cannot be allowed. In view of the above, we do not find any merit in the contention of the assessee. Ground nos.3 and 4 are dismissed.

09. Ground no.5 pertains to disallowance of professional charges paid to an NRI to an extent of Rs.69,90,000/-. The AO has disallowed the professional charges and has given the following reasoning :

> *4.3. On consideration, the contention of the assessee company is found to be not acceptable. First of all the income of Shri. Ravi Singh has accrued or arisen in India and hence TDS provisions are very much applicable even if he is a resident. Secondly, the nature of expenditure incurred cannot be treated as revenue in nature. Therefore the aforesaid amount of Rs.69,90,000/- is not an allowable expenditure. Hence the same is disallowed and added to the returned income of the assessee company.*

10. The CIT (A) has upheld the finding given by the AO in para 9.6 to the following effect :

> *9.6. Further, since assessee failed to deduct tax at source in relation to payments made, it cannot be allowed as expenditure as provisions of section 40(a)(ia) of the Act get attracted. The tax is to be deducted at the time of payment or credit, whichever is earlier. It is also the primary responsibility of the appellant, being the deductor, for ensuring the collection and deposit of the tax due from a non-resident recipient. Accordingly, respectfully, considering the*

judgments, the undersigned is of the view that the ground taken by the appellant on this issue is liable to be dismissed and the addition made by the AO is sustained.

11. The assessee before us relied upon pages 24 to 27 of the paper book which is in the form of a Consultancy Service Agreement entered between the assessee and B. Ravi Singh, for providing the consultancy services for setting up of the software technology park and for which the consultancy services were rendered, so as to make it energy conservation efficient. In our view, the conclusion recorded by the first appellate authority was on the terms that as per the provisions of DTAA, the services rendered by B. Ravi Singh was in the nature of FTS and therefore the tax is required to be deducted on interest, at the time of credit of such income to the account of the payee. It was also held that as the same was not done by the payer (assessee), therefore, the whole of the amount is liable to be deducted. The grievance before us was two-fold, viz., the CIT (A) has on its own decided the issue of applicability of DTAA without seeking a remand report from the AO and the CIT (A) has not given an opportunity to this effect. In our view, the submissions of the assessee dt.16.12.2015, in the appellate proceedings were reproduced in verbatim by the CIT (A) in para 9.1 of the CIT (A)'s order :

9.1 The submission of the appellant filed on 16.12.2015 is reproduced verbatim:

(i) We submit that, the professional Sri. Ravi Singh is a non-resident. His permanent address is at No.701, Horse Shoe Trail, Franklin Lakes, NJ 07 417, USA. The said person does not have any establishment in India.

Professional charges paid to Sri. Ravi Singh is governed by Article-15 of DTAA with United States of America. The Article – 15 is reproduced hereunder: -

"Article – 15 – Independent personal services – 1. Income derived by a person who is an individual or firm of individuals (other than a company) who is a resident of a Contracting State from the performance in the other Contracting State of Professional services or other independent activities of a similar character shall be taxable only in the first mentioned State except in the following circumstances when such income may also be taxed in the other Contracting State:

(a) If such person has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other State; or

(b) If the person's stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 90 days in the relevant taxable year.

2. The term "professional services" includes independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants."

As per the article 15 of DTAA extracted above the professional charges are taxable at USA and not in India. The person did not have a permanent place of business in India and the income is therefore not taxable in India.

Since, no taxes are deductible in India there is no tax deductible at source under the provisions of section 195 of the act. We rely on the decision of Hon'ble Supreme Court in the case of GE India Technology Centre (P) Ltd V. CIT & Another (2010) 327 ITR 456 (SC), wherein it is held that, when there is no tax payable under the provisions of the act, in India, no taxes need be deducted at source.

We submit that, the Assessing Officer is not correct in holding that, taxes were deductible at source on the payments above. We also submit that, the Assessing Officer has erred in disallowing the expenditure for the reason that, no taxes were deducted at source on the said expenditure. Since, no taxes were deductible, the provisions of section 40(a)(i) of the act has no application and hence no disallowance could have been made.

(ii) The Assessing Officer has also stated that, the expenditure is not revenue in nature.

We submit that, the professional Sri. Ravi Singh is an expert in setting up software technology parks. The services were utilized by the company for the said purpose. The main activity of the company is setting up software technology parks and earning income by letting out the same. The total investment of the company in fixed assets is in the range of around 300 crores. Under the circumstances, the expenditure incurred is for the purpose of this activity and allowable as revenue.

The Assessing Officer states that, the expenditure is not revenue in nature. We submit that, the company has already started its business activity and the professional charges incurred do

not create any independent asset of enduring nature. The expenditure is incurred in connection with business and also revenue in nature.

Further, the revenue earned by the appellant in this activity right from 31.03.2011 to 31.03.2015 is as under: -

Year Ending	31.03.2011 Rs.	31.03.2012 Rs.	31.03.2013 Rs.	31.03.2014 Rs.	31.03.2015 Rs.
Gross Revenue	55,88,44,719	66,40,99,046	76,04,67,695	82,70,77,528	103,74,30,940

We submit that for the year ending 31st March 2011, the gross revenue was Rs.55.88 Crores, which has increased to Rs.103.74 Crores as on 31.03.2015. Considering the quantum of revenue earned, we submit that the expenditure is reasonable.

We also submit that, there is no basis for the Assessing Officer to conclude that the expenditure is not revenue in nature.

We request the Hon'ble Commissioner of Income Tax (Appeals) to kindly consider the submissions above and delete the addition consequent to the disallowance of expenditure of Rs.69,90,000/-.

In view of the above, we are of the opinion that as the CIT (A) is having coterminous power, therefore the CIT (A) was within its right to take a view contrary to the view taken by the AO. Moreover once the assessee himself has explained in para 9.1 that the professional charges are taxable in USA and not in India. However for the purposes of bringing the services within FTS it is essential for the CIT(A) to bring on record that technical services were make available in India to the assessee by B. Ravi Singh under the provision of DTAA, nothing has been done by the CIT to discharge this legal obligation hence in our considered view the assessee was not duty bound to deduct the TDS. Further it is settled position of law that the DTAA provision , if beneficial to Assessee shall be given effect in

case of conflict with Income Tax Act . Therefore the order of lower authorities are cancelled on this aspect. Accordingly, ground no.5 is allowed .

12. Ground no.6 is not pressed and hence dismissed.

13. In the result, appeal of the assessee is dismissed.

Sd/- Sd/-

(A. K. GARODIA) (LALIET KUMAR)
ACCOUNTANT MEMBER JUDICIAL MEMBER

Bengaluru
Dated : 25.01.2018

MCN*

Copy to:

1. The assessee
2. The Assessing Officer
3. The Commissioner of Income-tax
4. Commissioner of Income-tax(A)
5. DR
6. GF, ITAT, Bangalore

By Order

SENIOR PRIVATE SECRETARY