IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH 'B' KOLKATA

[Before Hon'ble Shri N.V.Vasudevan, JM & Shri Waseem Ahmed, AM]

ITA No.2090/Kol/2016
Assessment Year : 2010-11

A.C.I.T., Circle-4(1) Kolkata	-versus-	M/s Gillanders Arbuthnot & Co.Ltd., Kolkata (PAN:AAACG 9832 F)
(Appellant)		(Respondent)

For the Appellant: Shri S.Dasgupta, Addl.CIT(DR)
For the Respondent: None

Date of Hearing : 12.02.2018.
Date of Pronouncement : 01.03.2018.

ORDER

PER N.V.VASUDEVAN, JM:

This is an appeal by the Revenue against the order dated 27.07.2016 of C.I.T-(A)-17, Kolkata relating to A.Y.2010-11.

2. Ground No.1 raised by the revenue reads as follows :-

"1. That on the facts and in the circumstances of the case and in law Ld.CIT(A) erred in allowing deduction in respect of employee's contribution to PF and ESI without considering the provisions stipulated in Sec.36(1)(va)."

3. The Assessee is a company engaged in the business of growing, manufacturing and sale of tea. From the Tax Audit Report filed by the assessee along with the return of income the AO noticed that the employee' contribution to provident fund in respect of tea division of the assessee amounting to Rs.7,00,683/- was deposited beyond the due date prescribed under the relevant law governing contribution to provident fund. The AO invoked the provision of section 36(1)(va) of the Income Tax Act, 1961 (Act) r.w.s.43B of the Act and added a sum of Rs.7,00,683/- to the total income of the assessee on the ground that employees share of contribution was paid beyond the due date and hence should not be allowed as deduction while computing income as per the provisions of Sec.43B of the Act.

4. Before the CIT(A), the assessee pointed out that the contributions were paid within the grace period of five days allowed for deposit of employees share of contribution to Provident fund. Therefore, the addition made by the AO was not justified. The CIT(A) held that if employees contribution had been paid on or before the due date of filing the return of income then the same should be allowed.

5. Aggrieved by the order of CIT(A) the revenue has raised ground no.1 before the tribunal.

6. None appeared on behalf of the assessee. At the time of hearing it was brought to our notice that the Hon'ble Calcutta High Court has also taken the view that employees' contribution to PF paid on or before the due date of filing the return of income u/s 139(1) of the Act should be allowed as deduction. In this regard the decision of the Hon'ble Calcutta High Court in the case of M/s. Akzo Nobel India Ltd. Vs CIT in ITA 110 of 2011 order dated 14.06.2016 and in the case of CIT vs Vijayshree Ltd., of the Hon'ble Calcutta High Court in GA No.2607 of 2011 order dated 06.09.2011 was filed before us. In the order in the case of Vijayshree Ltd., (supra), the Hon'ble Calcutta High Court held as follows :

> *"The only issue involved in this appeal is as to whether the deletion of the addition by the Assessing Officer on account of Employees'Contribution to ESI and PF by invoking the provision of Section 36(1)(va) read with Section 2(24)(x) of the Act was correct or not. It appears that the Tribunal below, in View of the decision of the Supreme Court in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd., reported in 2009 Vol.390 ITR 306, held that the deletion was justified.*
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> *Being dissatisfied, the Revenue has come up with the present appeal.*
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> *After hearing Mr. Sinha, learned advocate, appearing on behalf of the appellant and after going through the decision of the Supreme Court in the case of Commissioner of Income Tax vs. Alom Extrusion Ltd., we find that the Supreme Court in the aforesaid case has held that the amendment to the second proviso to the Sec. 43(B) of the Income Tax Act, as introduced by Finance Act, 2003, was curative in nat.ure and is required to be applied retrospectively with effect from 1 st April, 1988.*

Such being the position, the deletion of the amount paid by the Employees' Contribution beyond due date was deductible by invoking the aforesaid amended provisions of Section 43(B) of the Act.

We, therefore, find that no substantial question of law is involved in this appeal and consequently, we dismiss this appeal."

7. In view of the aforesaid decision of the Hon'ble Calcutta High Court, we do not find any merits in the ground raised by the revenue and accordingly the same is dismissed. Ground No.1 raised by the revenue is dismissed.

8. Ground No.2 raised by the revenue reads as follows :-

" 2. That on the facts and circumstances of the case and in law Ld.CIT(A) has erred in allowing puja expenses and temple expenses since such expenses are non-business expenditure and the assessee could not establish the nexus between the necessity of such expenditure and the business carried on by the assessee company."

9. The assessee besides growing and manufacturing of tea was also engaged in the business of real estate and trading . The AO disallowed a sum of Rs.35,040/- which was puja expenses incurred in the trading division of the assessee. The AO also disallowed a sum of Rs.2,48,179/- which was a payment to temple. These expenses were incurred in the textile division of the assessee. In the Micco division of the puja expenses Rs.2.84,312/- was disallowed. In the Cotton Mill division puja expenses of Rs.26,166/- was disallowed.

10. On appeal by the assessee the CIT(A) deleted the addition of puja expenses of Rs..2,84,312/- in the micco division , Rs.26,166/- in the cotton mill division and Rs.35,040/- in the trading division. The AO had made the disallowance on the ground that these expenses have no nexus with the business of the assesee. The CIT(A) however followed the decision rendered in assessee's own case for A.Y.2007-08 in ITA No.589/Kol/2012 order dated 19.12.2013 wherein it was held that such expenses

are incurred to keep harmony among the assessee's employees and therefore have to be considered as business expenses.

11. Aggrieved by the order of (CIT(A) the revenue has raised ground no.2 before the Tribunal.

12. We are of the view that there is no merit in ground no.2 raised by the revenue in view of the decision of the tribunal rendered in assessee's own case for A.Y.2007-08 referred to by the CIT(A) in his order. Ground No.2 raised by the revenue is accordingly dismissed.

13. Ground No.3 raised by the revenue reads as follows :-

> *"3. That on the facts and circumstances of the case and in law Ld.CIT(A) has erred in deleting the addition of Rs.11,50,740/- made u/s40(a)(ia) for non-deduction of tax at source in view of the judgement given by the Apex Court in the case of M/s. Transmission Corporation of India reported in 239 ITR 587."*

14. The AO disallowed a sum of Rs.11,50,740/- which was commission paid by the assessee to persons who are not residents in India and who rendered services outside India. The AO made the disallowance for the reason that the assessee did not deduct tax at source on the aforesaid payment and had invoked the provision of section 40(a)(ia) of the Act which lays down that any payment of commission without deduction of Tax at source as per the provisions of sec. 194H of the Act would result in the commission expense not being allowed as deduction in computing income from business.

15. On appeal by the assessee, the CIT(A) deleted the addition made by the AO for the reason that commission income did not accrue or arise to the agents in India because services were rendered outside India. The CIT(A) also held that the agents did not have a permanent establishment in India and therefore the commission was not taxable in their hands. Since the commission was not chargeable in their hands there was no obligation to deduct tax at source. The following were the relevant observations of the CIT(A) :

"Decision : It is observed that this issue is covered by the decision of the Hon'ble ITAT Kolkata 'A 'Bench in ITA No.905/Kol/2013 order dated 29.02.2016 for assessment year 2009-10 wherein it has been held as under :

"At the outset, Ld. Counsel/or the assessee relied on the decision of Co-ordinate Bench of this Tribunal in assessee's own case in ITA No. 589/K/2012/or AY 2007-08 dated 19.12.2013, wherein Tribunal has allowed as under:

"7. We have heard rival contentions and gone through facts and circumstances of the case. We find that Assessing Officer treated the commission paid to foreign agent as non allowable expenses as assessee failed to deduct TDS and he disallowed the commission to the extent of Rs. 1135554/- . Aggrieved, assessee preferred appeal be/ore CIT(A), who allowed the claim of assessee by observing vide para - 7.1 of his order as under.-

"7.1 It is seen that AO made this disallowance on the basis of Supreme Court decision in case of M/s. Transmission Corporation of India reported in 239 ITR 587 wherein it was held that only way to escape liability is to get no deduction certificate or lower rate deduction certificate from AO. Appellant on the other hand has submitted that this issue was further clarified by Hon 'ble Supreme Court in case 0/ GE India Technology Centre P Ltd. vs. CIT in 44 DTR Supreme Court 201, in which Supreme Court has clarified that obligation to deduct tax at source arises u/s. 194 only when there is any sum chargeable under the Act. And CBDT circular has also clarified, that TDS provision will not applied in case where such income is not taxable in India. In this case, as the income doe not arise in India and the commission is paid to those foreign agents, who have no permanent establishment or business place in India and services are also rendered outside India. It is very clear that no tax is deductible in case where the non-resident agents operate outside the country and no part of his income arises in India. In view of the Circular No. 23 and 786, the company was under no obligation to deduct tax and as provision u/s. 40(a)(ia) does not apply, the disallowance made by the AO is directed to be deleted. "

We find that assessee's claim was that the commission paid to foreign agents, who are not having permanent establishment business place in India and they are providing services outside India and even the payment is directly made outside India in foreign exchange. According to assessee, assessee's income does not accrue or arise in India and once income does not accrue or arise in India, the assessee is not liable to deduct TDS on foreign payments. According to him, this is covered by the decision of Hon 'ble Supreme Court in the case of GE India Technology Centre P. Ltd. vs. CIT 44 DTR. 201 (SC). As the issue is covered in favour of assessee by the decision of Hon 'ble Supreme Court, we have no reason to interfere in the order of CIT (A) and we confirm the same. This issue of revenue's appeal is also dismissed. "

As the issue is covered in assessee's own case in AY 2007-08, we confirm the order of CIT (A). Accordingly, this issue of Revenue's appeal is dismissed. "

Respectfully following the above decisions of the Jurisdictional Tribunal, I am, therefore, of the view that section 40(a)(i) is not applicable in this case for commission paid. I, therefore, direct the AO to delete the disallowance of Rs.11,50,740/-. "

16. Aggrieved by the order of CIT(A) the revenue has raised ground no.3 before the tribunal.

17. We are of the view that the decision rendered by the tribunal on identical facts in A.Y.2007-08 is squarely applicable to the present A.Y.2010-11. Besides the above we find that the assessee has also placed reliance on the Circular No.786, dated 07.02.2000 which reads as follows :-

"Where the non-resident agent operates outside the country, no part of his income arises in India, and since the payment is usually remitted directly abroad, it cannot be held to have been received by or on behalf of the agent in India. Such payments were therefore, held to be not taxable in India. This clarification still prevails, in view of the fact that the relevant sections [Section 5(2) and section 9] have not undergone any change in this regard. No tax is therefore deductible under section 195 from export commission and other related charges payable to such a non- resident for services rendered outside India - Circular No. 786, dated 07.02.2000."

18. Though the aforesaid Circular has been withdrawn by CBDT by Circular No.7 dated 22.10.2009, yet the principle laid down in the said circular is applicable to the facts of the present case. If commisison does nt accrue or arise in India, the same is not taxable in Inia. In view of the above we find no merits in ground no.3 raised by the revenue. Grounds no.3 raised by the revenue is dismissed.

19. Ground No..4 raised by the revenue reads as follows :-

"4. That on the facts and circumstances of the case and in law Ld.CIT(A) has erred in deleting the addition made under Nursery expenses have always been held as capital in nature and as per law, as the said expenditure utilized for developing nursery and providing plants and shade trees for the tea garden."

20. The AO disallowed the claim of the assessee for deduction of a sum of Rs..67,12,313/- incurred by the assessee under the head ‘nursery expenses’. According to the AO the expenditure in question was incurred to develop the nursery which is mainly intended to be used for a long term purpose to provide plants and shady trees for tea gardens. The AO therefore concluded that the expenditure was capital expenditure.

21. On appeal by the assessee the CIT(A) found that on identical issue the tribunal in assessee’s own case in A.Y.2009-10 deleted similar addition made by the AO observing as follows :-

> “ The issue is covered by the Hon'ble ITAT Kolkata Bench 'A' in ITA No. 905/K0l/2013 dated 29.02.2016 wherein it has been held as under:
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> > *"We find that the assessee has incurred expenditure for re-plantation in the existing area and plants grown in the nursery were used for replacement of dead plants within the plantation area. This fact has not been denied by revenue before CIT (A) or before us now. The AO also noted that this is re-plantation in the existing area and replacement of dead plants but by going through the volume of expenditure he made disallowance and Hon 'ble Jurisdictional High Court in the case of Tasati Tea Ltd. (supra) has considered the issue and allowed the claim of replacement of plants in existing area against dead plants by observing as under:*
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> *"But however we are not inclined to interfere with the order allowing the expenditure of Rs. 468615/- as a revenue expenditure, though on different ground, in as much as if the plants are raised and maintained in a nursery for being utilized for the purpose of replantation without any expansion of the plantation area or replantation in an abandoned area, then it cannot be said to be a capital expenditure. Capital expenditure involves an investment increasing the capital for higher profit. The expansion means extension of plantation to an additional area. An area already abandoned, if replanted would be an expansion of the area under cultivation for the previous year concerned. The maintenance of an area already under cultivation cannot be treated to be an expansion of the plantation not can it be treated to be an investment or expansion adding to the capital already invested. On the other hand, it would be maintenance of the plantation itself and, therefore, is revenue expenditure.*
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> *In view of the above facts and circumstances and following the case law of Hon 'ble Jurisdictional High Court in the case of Tasati Tea Ltd., we uphold the order of CIT(A) and this issue of Revenue's appeal is dismissed.*

Respectfully following the tribunal decision the AO is directed to delete the addition of Rs. 6712313/- added on account of Capital expenditure. This ground of appeal of the assessee is hereby allowed for statistical purposes."

Following the order of the tribunal the CIT(A) deleted the addition made by the AO.

22. Before us the ld. DR relied on the order of the AO. We are of the view that in the light of the admitted factual position that expenses were incurred on plants and for replantation without any expansion of plantation area or replantation in an abandoned area, the expenditure in question cannot be regarded as a capital expenditure. We find no merits in ground no.4 raised by the revenue. Accordingly ground no.4 is dismissed.

23. In the result the appeal by the revenue is dismissed.

Order pronounced in the open Court on 01.03.2018.

Sd/-	Sd/-
[Waseem Ahmed]	[N.V.Vasudevan]
Accountant Member	Judicial Member

Dated : 01.03.2018.

[RG Sr.PS]

Copy of the order forwarded to:

1M/s. Gillanders Arbuthnot & Co.Ltd., Duncan House, 4th Floor, 31, N.S.Road, Kolkata-700001.
2 A.C.I.T., Circle-4(1), Kolkata.
3. C.I.T.(A)-17, Kolkata 4. C.I.T.-2, Kolkata..
5. CIT(DR), Kolkata Benches, Kolkata.

True Copy

By order,

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches