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

BEFORE SHRI D.T. GARASIA, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA No.5315/M/2013
Assessment Year: 2007-08

Dy. Commissioner of Income-Tax 1(3), Centre-1, 28th Floor, World Trade Centre, Cuffe Parade, Mumbai – 400 005	Vs.	Mr. Ashwini Manmohan Kakkar, 11-B, Jolly Maker Apartment, Cuffee Parade, Colaba, Mumbai – 400 005 **PAN: AACPK9698Q**
(Appellant)		(Respondent)

Present for:
Assessee by : Dr. K. Shivaram, A.R. &
Shri Rahul Hakani, A.R.

Revenue by : Shri Rajesh Kumar Yadav, D.R.

Date of Hearing : 11.01.2018
Date of Pronouncement : 09.02.2018

O R D E R

Per D.T. GARASIA, Judicial Member:

The present appeal has been preferred by the Revenue against the order dated 08.03.2013 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2007-08.

2. The short facts of the case are as under:

During the previous year relating to A.Y. 2007-08 assessee had received an amount of 10,74,260/- Euro from Thomas Cook, UK.

The said amount has been disclosed by the assessee in the return of income as capital receipt. The amount of 10,74,260 Euro was received by the assessee under the agreement dated 30.1.2006. As per the said agreement the assessee received Euro 724,260 on termination of Consultancy Agreement and Euro 350,000 towards Commitments. The assessee had entered into a Consultancy Agreement with Thomas Cook, UK vide agreement dated 3.7.2000. The said agreement was amended by written agreement dated 12.5.2005. The Consultancy Agreement was terminated by Thomas Cook, UK w.e.f. 31.7.2006. In the preceding years, the income from consultancy income received from Thomas Cook, UK was assessed under the head 'Income from Business or Profession'. The assessee had claimed deduction u/s. 8ORRA on such income received in terms of the approval granted by the CBDT. Thomas Cook AG had made written commitment with the assessee dated 15.9.2005 for certain support with Thomas Cook -AG's activities in India. The said commitment was also terminated vide agreement dated 30.1.2006. The compensation, for termination of consultancy agreement has been disclosed as a capital receipt in so far as the source of income from consultancy business was entirely sterilized. The termination has crippled, impaired and paralyzed the source of income and accordingly the entire amount has been claimed to be not in the nature of income u/s.2(24) the Act. As per the written commitment agreement, Thomas Cook, AG had no legal obligation to compensate the assessee. Under the termination agreement dated 30.1.2006 the assessee has assured that he has no claim of whatever nature, against

Thomas Cook, AG resulting from or in connection in any legal or contractual relationship with Thomas Cook, AG. Thus the Compensation received for termination of written commitment was for not raising any claims against Thomas Cook, AG as also for sterilization of income. The assessee has relied upon various decisions. The Assessing Officer (hereinafter referred to as the AO) was of a view that compensation receipt for termination of consultancy agreement and commitment agreement as taxable u/s. 28(i) and s. 28(U) of the Act.

3. Matter carried to the Ld. CIT(A) and the Ld. CIT(A) has allowed the claim by observing as under:

> "4.16 I have considered the A.O.'s order as well as the appellant's A/R submission. I have also taken note of judicial pronouncements cited by the appellant's A/R in his submission extracted as above. Having considered all the facts of the case I find that there is not even iota of evidence brought forth by the Assessing Officer in his assessment order to suggest that the Appellant had an agency of contract. In the face of this, I am inclined to agree that the Thomas Cook agreements involved a principal to principal relationship. The characteristics of income earned by the Appellant from these agreements have been assessed by the Assessing Officer as consultancy income and not commission. According to the Appellant, even the CBDT has accorded approval to these contracts in prior years as consulting agreements u/s 8ORRA of the Act. In fact, if the contracts were commission contracts, the CBDT would never have granted approval as the approval is given only to a 'technician' defined in that section i.e. section 8ORRA of the Act. The decision of the Bombay High Court, in the case of Daruvala Bros. P. Ltd. vs. CIT [1971] 80 ITR 213 {Bom}, cited by the Appellant also support the appellant's contention. Here, the Hon'ble Bombay High Court has held that for invoking the provisions of section 28 (ii)(c), it is essential that the person concerned must be holding an agency in India. If the relationship be other than an agency, these provisions cannot be attracted. Therefore, in absence of any agency contract with the Thomas Cook companies, I consider it proper and appropriate to hold that the provisions of section 28 (ii)(c) are also not attracted in the Appellant's case in the aforesaid facts of the appellant's case.
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> 4.17 In the light of the above findings, I consider it proper and appropriate to hold that the compensations of Rs. 6,08,15,350 received by the

> Appellant from the Thomas Cook companies cannot be taxed either under section 28 (ii)(a) or section 28 (ii)(b) or section 28 (iii)(c) of the Income Tax Act, 1961. I am also in agreement with the Appellant that the compensation cannot be taxed even u/s 28 (i) as 'profits or gains from business' as the amount is a capital receipt. The provisions of section 28 (i) are meant to tax revenue incomes and not capital receipts. By termination of the contracts, the Appellant has veritably lost his source of consultancy income. The Appellant has correctly relied on the decisions of the Supreme Court in the case of Kettlewell Bullen and Co Ltd. vs. CIT 53 ITR 261 {SC} and Oberoi Hotels Ltd. vs. CIT 236 ITR 903 {SC}. These decisions have held when the compensation paid is relatable to the loss of source of income, the compensation is a capital receipt and not taxable as income. This legal position has also been concurred by the Assessing Officer in his assessment order. His only disagreement was that the compensations was taxable u\s 28 (ii)(a), 28 (ii)(b) and 28 (ii)(c), which I have earlier held as incorrect. Therefore, respectfully following the Supreme Court decisions cited above, I hold that the compensations of Rs.6,08,15,350 received by the Appellant from the Thomas Cook companies cannot be taxed as income as the same are capital receipts. Accordingly I consider it proper and appropriate to hold that the addition of Rs.6,08,15,350/- made by the A.O. in the appellant's income is incorrect and unjustified. Thus, the addition so made by the A.O. is deleted. Accordingly this ground of appeal is allowed in favour of the Appellant."

4. The Ld. D.R. submitted that assessee has received an amount of Rs.6,08,15,350/- as compensation on account of compensation of consultancy agreement. There was consultancy agreement between assessee and Thomas Cook. Thereafter, in this consultancy agreement there was commitment and assessee's obligation and claim against TC India and thereafter there was final settlement which is in the assessment order. The agreement says that Mr. Ashwini Kakkar, the assessee, was employed by Thomas Cook-India to run this operation as Managing Director. The agreement makes it clear that assessee was rendering services to all concerns of Thomas Cook for India operations as such he had considerable influence over the operations of the said company. The assessee was appointed as Managing Director of Thomas Cook on 19.05.05. The assessee was

compensated for the termination of his services by both TC-UK and TC —Germany. Therefore, assessee has received compensation which is chargeable under section 28 of the Income Tax Act. Section 28(ii) says that "any compensation or other payment due to or received by,—

(*a*) any person, by whatever name called, managing the whole or substantially the whole of the affairs of an Indian company, at or in connection with the termination of his management or the modification of the terms and conditions relating thereto;

(*b*) any person, by whatever name called, managing the whole or substantially the whole of the affairs in India of any other company, at or in connection with the termination of his office or the modification of the terms and conditions relating thereto;

(*c*) any person, by whatever name called, holding an agency in India for any part of the activities relating to the business of any other person, at or in connection with the termination of the agency or the modification of the terms and conditions relating thereto;

As per section 28(a) assessee has received compensation on termination of his agreement with the management, assessee has received the compensation which is chargeable under this section is the termination of agreement. The assessee has received the payment is nothing but compensation on account of termination of management contract and as per the decision of Hon'ble Kolkata High Court in the case of Development of Industries (India) Ltd. vs. CIT (1968) 68 ITR 320 (Cal) (HC) wherein the High Court has held that termination used as contemplates termination of agreement in several manners contemplated under Contract Act. Therefore, Ld. CIT(A) looking to the nature of compensation received by the assessee has deleted the addition.

5. The Ld. A.R. submitted that assessee is an employee of Thomas Cook, India and received the salary from Thomas Cook

India Ltd. and it was assessed under the head "Income from salary". Assessee had consultancy agreement with Thomas Cook, UK and consultancy income was offered as income from "Business and profession". The assessee has commitment agreement with Thomas Cook, Germany and assessee has received the compensation of Rs.6,08,15,530/- on termination of commitment agreement with Thomas Cook, UK. The commitment agreement between Thomas Cook AG and assessee is to assist sale of Thomas Cook AG India Ltd. The assessee has received the compensation not under section 28(iii) on the ground that assessee is not managing the whole the affairs in India of two foreign company. Assessee is only managing and consulting both the foreign companies for their won managers in India managing the affairs of respective companies. The two foreign companies have contract with foreign company which is approved under section 80RRA. Thus the provisions of section 28(iii) cannot be availed to tax the compensation on termination of facts of the present case. The Ld. A.R. also submitted that the compensation is linked to unexpired period is only a measure for unexpired period. Therefore, agreement entered into purely for rendering consultancy services and agreement was between principal and principal. Therefore, it is not taxable under section 28(i) or section 28(ii). He relied upon the decision of Hon'ble Madras High Court in the case of CIT vs. Seshasayeé Bros. Pvt. Ltd. 239 ITR 471 and the decision of Hon'ble Supreme Court in the case of Oberoi Hotel Pvt. Ltd. v CIT 236 ITR 903 (SC).

6. We have heard the rival contentions of both the parties. Looking to the facts and circumstances of the case, we find that the assessee has received the compensation from Thomas Cook,UK and Thomas Cook AG Germany both are foreign countries. We find that in this case assessee was employed by Thomas Cook India to run its operation as managing director. The tripartite agreement makes it clear that assessee was rendering services to all concerns of Thomas Cook for India operations as such he had considerable influence over the operations of the said company. The agreement was accepted on 19.05.05. Assessee was appointed as Managing Director of Thomas Cook India having substantial power of management. The consultancy agreement with UK was terminated w.e.f. 31.07.06 and the compensation of Euro 724366 was payable to the assessee. With the same agreement assessee's commitment agreement was terminated with the compensation of 3,50,000 Euro payable to assessee in short and assessee has received compensation of Rs.6,08,15,350/-. The assessee has received this compensation is a loss of income. We find that section 28(ii) states that any compensation received by any person whatever name called, managing the whole or substantially the whole of the affairs of an Indian company, at or in connection with the termination of his management or the modification of the terms and conditions relating thereto. And secondly section 28(ii)(c) states that any person is received any compensation by termination of his management they are liable to tax as business gain from the profession. Therefore, the AO held in this case that the assessee was receiving the

compensation but we find that section 28 is not applicable because assessee is not managing whole or substantially appears in India of two foreign companies. The assessee is only a management consultancy. Both the foreign companies have their own managers in India managing the affairs of respective companies. The CBDT has also accorded approval to such contract with foreign companies under section 80RRA which is on page 63. Therefore, the provisions of section 28(ii) cannot be invoked. We find that similar issue had come up before Hon'ble Madras High Court in the case of CIT vs. Seshasayeé Bros. Pvt. Ltd. (supra) wherein the High Court has held as under:

> "9. Mr. S. V. Subramaniam, learned counsel, contended that the amount was paid under the agreement and not for the termination of the agreement. He referred to the observation of the Tribunal that in the event of termination of the agreement, the assessee was entitled to be paid in advance the remuneration for the unexpired portion of the period of agreement. But we are not able to accept the contention advanced on behalf of the Revenue. As already said the compensation paid did not represent the remuneration for unexpired period. The clause providing for a fixed amount of damages has fixed the amount of damages that would be payable in the event of the termination of the agreement. The clause merely affords a measure to quantify the amount of compensation that would be payable in the event of termination of the agreement. Further, the compensation also did not represent the remuneration for the past services rendered by the assessee. According to us, it is not permissible to draw an inference that the amount paid represented the remuneration that would be payable for the unexpired period of the agreement. The clause was previously inserted as in terrorem to provide against the breach of the contract and the compensation received cannot be regarded as a revenue receipt. As a matter of fact, the Assessing Officer as well as the first appellate authority have proceeded on the basis that the amount received was a capital receipt and it was only before the Tribunal, that a contention was raised by the Revenue that the amount was a revenue receipt which was rightly negatived by the Tribunal.
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> 10. The finding of the Appellate Tribunal is that by termination of the contract, the profit making structure of the assessee was affected and that the termination of the contract involved loss to the assessee of an enduring trading asset. In other words, the finding of the Tribunal is that by virtue of the cancellation or the extinction of the contract the trading structure of the assessee was impaired and it

is not the case of the Revenue that the agreement entered into by the assessee was in the course of carrying on its business. Hence, it cannot be said that the termination of the contract was a normal incident of the business of the assessee. As already seen, the cancellation of the contract has impaired the trading structure of the assessee which has resulted in a loss to the source of income to the assessee. Therefore, the payment made to the assessee for the cancellation of the contract was rightly held by the Appellate Tribunal to be a capital asset (receipt).

11. In so far as the third question is concerned, it relates to the application of section 28(ii)(c) of the Income-tax Act. Section 28(ii)(c) of the Act provides that if any compensation or other payment was received by any person, by whatever name called, holding an agency in India for any part of the activities relating to the business of any other person, at or in connection with the termination of the agency or the modification of the terms and conditions relating to it, the amount received would be regarded as profits and gains of business carried on by it. The section, a reading of it, shows that it aims at an agency agreement, and the prerequisite for the applicability of the section is that there must be an agency agreement. The assessee was appointed as a consultant and on a perusal of the agreement, the Appellate Tribunal recorded a finding that the agreement was purely one of consultancy service and what is contemplated in the agreement is between principal and principal……."

7. We find that in assessee's case the assessee has received the compensation for unexpired period only as manager for computing compensation. The assessee had agreement with only consultancy services. Therefore, respectfully following the same, we hold that assessee has received the compensation and it is to be treated as capital receipt and it cannot be taxable under section 28(i) or section 28(ii) of the Act. The Ld. CIT(A) has discussed this issue in detail in his order. Therefore, we are of the view that Ld. CIT(A) is justified and our interference is not required.

8. Next ground is with regard to income received by the assessee of Rs.2,07,926/- which is exempt under the Act. The AO disallowed Rs.3,25,289/- as expenditure incurred in addition to the exempt income. The assessee has applied the formula prescribed under rule 8D(2).

9. Matter carried to the Ld. CIT(A) and the Ld. CIT(A) has partly allowed by observing as under:

> "5.3. I have considered the A.O.'s order as well as the appellant's submission. Having considered both, I find merits in the arguments of the appellant that application of rule 8D is not justified in the year under consideration. As it is clearly held by the Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. co. Ltd. that application of rule 8D is from A.Y.-08-09 onwards, hence I am of the considered view that the A.O. was not justified in applying rule 8D in the instant case in the year under consideration. However it is noticed that the Hon'ble Bombay High Court has specifically held that the AO should provide reasonable opportunity to the appellant while working out the disallowance on account of expenditure i.e. direct/indirect both on account of exempt income, which are not forming part of total income. In view of the jurisdictional High Court decision, I consider it proper and appropriate to direct the AO to provide reasonable opportunity to the appellant and work out the total expenditure i.e. direct and indirect both in relation to exempt income and make the disallowance in accordance to the decision of the jurisdictional High Court in the case of MIs. Godrej & Boyce Mfg. Co. Ltd. Accordingly this ground of appeal is partly allowed."

10. We have heard the rival contentions of both the parties. Looking to the direction given by the Ld. CIT(A) we find that the Ld. CIT(A) has held that rule 8D prior to A.Y. 2008-09 is not applicable as per the decision of Hon'ble Bombay High Court in the case of "Godrej & Boyce Manufacturing Co. Ltd. Vs. DCIT [(2010) 328 ITR 81 (Bom)]". Therefore, we do not find any infirmity in the order of the Ld. CIT(A) and our interference is not required.

11. In the result, departmental appeal is dismissed.

Order pronounced in the open court on 09.02.2018.

Sd/-	**Sd/-**
(Rajesh Kumar)	**(D.T. Garasia)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 09.02.2018.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.