

आयकर अपीलीय अधीकरण, न्यायपीठ – “A” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA
 [Before Shri P.M. Jagtap, AM & Shri A.T. Varkey, JM]

I.T.A. No. 1290/Kol/2014
Assessment Year: 2010-11

I.T.O., Ward-5(3), Kolkata	Vs.	M/s Bengal NRI Complex Ltd. (PAN : AABC8119M)
Appellant		Respondent

&

I.T.A. No. 1088/Kol/2014
Assessment Year: 2010-11

M/s Bengal NRI Complex Ltd.	Vs.	I.T.O., Ward-5(3), Kolkata
Appellant		Respondent

Date of Hearing	21.12.2017
Date of Pronouncement	16. 03.2018
For the Revenue	S/Shri G. Mallikarjuna, CIT & P. K. Mondal, Addl. CIT
For the Assessee	Shri D. S. Damle, FCA

ORDER

Per Shri A.T.Varkey, JM

Both these cross appeals filed by the revenue and the assessee are against the order of Ld. CIT(A)-6, Kolkata dated 26.03.2014 for AY 2010-11. Since common facts and issues are involved in both the appeals they are taken and disposed off by this common order.

2. Ground No. 1 of the assessee’s appeal is as under:

For that on the facts and in the circumstances of the case, the ld. CIT(Appeals) erred in confirming the disallowance of Rs.1,11,19,501/- out of ‘drawing expenses’ in respect of purchase of drawings from ACTA International PTE Ltd, Singapore. The observations made in this regard are wrong and incorrect. On a proper consideration of the facts of the case, he should have found that on purchase of drawings no TDS was deductible.

2.1 Ground No. 1 of the Revenue’s appeal is as under:

That on the facts and in the circumstances of the case, the ld. CIT(Appeals) erred in holding that TDS was not applicable on drawing to UAE, Dubai and as such disallowance u/s 40(a)(ia) was not warranted, ignoring that payment of Rs.63,07,123/- to UAE (Dubai) was fees for technical service in nature on which tax was required to be deducted u/s 195, but not deducted and as such, provision of disallowance u/s 40(a)(ia) was rightly invoked.

2.2 Both these grounds deal with the common issue of the assessee's liability to deduct tax u/s 195 of the Act. In Ground No. 1 of the assessee has objected to disallowance of the cost of purchase of drawings made from M/s ACTA International Pte Ltd, Singapore ('ACTA Singapore'). Ground No. 1 of the Revenue's appeal concerns the relief allowed by CIT (A) in respect of the disallowance of payment for purchase of drawings from Mr. PredagError of Dubai ('PD, Dubai'). Briefly stated the facts are that the assessee is a joint sector company wherein the Government of West Bengal holds 26% stake. The assessee is engaged in the business of developing residential housing project in East Kolkata. In the relevant year the assessee was developing a real estate project on the outskirts of Kolkata comprising of seven residential towers, bungalows, row houses and a club house along with covered car park. In respect of the said project, the assessee was following project completion method for revenue recognition. Since the project was not complete in the relevant year, like in the past years, all construction and related costs were carried to Project Work-in-Progress A/c at the year end. In the year under consideration the increase in Project WIP comprising construction cost was Rs.50,44,89,596/- being the construction costs incurred during the year. Before the Ld. Assessing Officer ('AO') the assessee had furnished the details of construction related expenses incurred during the year along with the details of taxes deducted at source. In Para 2.1 of the assessment order, the AO observed that the assessee had debited cost of drawings of Rs.1,74,26,624/-. From the details furnished he gathered that the drawings costs comprised of payments of Rs.62,07,123/- & Rs.1,11,19,501/- made to PD Dubai and ACTA Singapore respectively. The AO noted that the assessee had not deducted tax from these payments on the premise that the payments were made for outright purchase of drawings from these parties. However since no details were furnished by the assessee, the Ld. AO disallowed the entire expenditure of Rs.1,74,26,624/- under Section 40(a)(ia) of the Act.

2.3 Aggrieved, assessee preferred appeal before the Ld. CIT(A), who deleted the disallowance of Rs.62,07,123/- made in respect of payments made to PD, Dubai and upheld the disallowance of payment of Rs.1,11,19,501/- made to ACTA Singapore. Aggrieved, both the assessee and the Revenue are in further appeal before us.

2.4 We have heard the rival submissions and perused the materials placed on record. At the time of hearing the Ld. AR of the assessee furnished a written argument in support of the grounds raised in the assessee's appeal. With regard the payment made by the assessee to ATCA, Singapore, the Ld. AR claimed that the payment in question did not fall within the purview of "fees for technical services" as defined in Article 12 of the DTAA between India & Singapore. The Ld. AR specifically referred to Paragraph 4 of Article 12 and submitted that under none of the clauses, particularly clause (c), which ostensibly appeared to be the basis for conclusion of CIT(A), did the payment in question qualify as "fees for technical services". The assessee placed reliance on the decision of coordinate Bench of ITAT, Pune in the case of **Brahma Corp Hotels & Resorts Limited (61 taxmann.com 186)**.

2.5 On the other hand the Id. DR appearing on behalf of the Revenue vehemently supported the order of the lower authorities and argued that the payment indeed qualified as "technical fee" within Article 12(4) of the India-Singapore DTAA. We note that the Ld. CIT(A) had held that the outright purchase of drawings from ACTA, Singapore came within the definition of "fees for technical services" set out in Explanation 2 to Section 9(1)(vii) of the I. T. Act as well as Article 12 of the DTAA between India & Singapore. The Ld. CIT(A) observed that although in the agreements with the non-resident the scope & object was described to be product procurement but from the description of the so-called "product", the Ld. CIT(A) gathered that it was not a case of purchase of readymade product. Rather the assessee had engaged an architect concern to design and customize concept/design as per requirements of the assessee for executing its East Kolkata Housing Project. The Ld. CIT(A) therefore concluded that the payment made by the assessee for engaging experts for preparing & supply of specialized design qualified as "fees for technical services" both under the domestic provisions of the Act as well as the tax treaty between India &

Singapore. The CIT(A) therefore held that payment made to ACTA Singapore was liable for tax deduction u/s 195 of the Act.

2.6 As regards the payments made for purchase of drawings from PD, Dubai; the Ld. DR supported the remand report furnished by the AO. The Ld. AR, on the other hand, submitted that although the Ld. CIT(A) rightly deleted the said addition but the relevant & applicable Article of the DTAA between India & UAE which the CIT (A) should have invoked was Article – 14 : Independent Personal Services and not Article 22 : Other Income.

2.7 We find that the assessee had entered into agreement with ACTA Singapore for providing technical drawings & designs specifically in relation its East Kolkata housing project. From the terms of the agreement, it appeared that it was a case of outright purchase of drawings & designs by the assessee. Clause (1) of the Agreement defined the nature of contract wherein it was categorically stated that the Vendor would create & export the product. Clause (2) of the Agreement further stated that the Vendor would create the product in Singapore and export the same to India. The product specification, stages of creation & development were specified in Appendix 1 of the Agreement. The drawings & designs supplied by ATCA Singapore contained only the dimensional designs according to which the assessee constructed the buildings at its East Kolkata Housing Project. Article 12(4) of the tax treaty between India & Singapore defines the term “fees for technical services” as follows:-

“The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services :

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or

(b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein ; or

(c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.”

2.8 From the above we note that it is the Revenue's case that the payment made by the assessee for purchase of drawings & designs from the architect firm of Singapore came within the ambit of clause (c) of Article 12(4) of the tax treaty. Careful reading of Article 12(4)(c) however shows that in order to bring a payment within its ambit, it is not sufficient that the payment should be towards development; transfer & supply of technical plan or design but additionally as a result of transfer & supply of technical plan or design, the recipient should also be able to apply the technology contained therein. Therefore under the tax treaty with Singapore, supply of drawings & designs simpliciter is not sufficient to qualify as “fees for technical services” but it should also be coupled with transfer of technology so that the recipient can also use technology contained therein without recourse to the person supplying the designs or drawings. In the present case no doubt as the Ld. CIT(A) rightly noted that ACTA Singapore was developing and transferring drawings & designs to the assessee but the Ld. CIT(A) as well as the Ld. DR was unable to bring to our notice any material or fact which showed that consequent to development & supply of drawings & designs, the assessee also acquired any technology contained in the drawings. In fact from the facts of the case it is apparent that the payee only designed & developed dimensional designs for a specific housing project. The payment made to ATCA Singapore was for project specific designs which the assessee was to use only for the particular project. Although the assessee purchased the drawings & designs but it did not involve transfer of any technology. We are therefore in agreement with the Ld. AR's contentions that the payment in question did not fall within the definition of Article 12(4) of the DTAA between India & Singapore.

2.9 We find that identical question was dealt by the co-ordinate Bench of the Tribunal, Pune in the case of **Brahma Corp Hotels & Resorts Limited (supra)** wherein the Hon'ble Tribunal held as follows:

6. We have heard the submissions made by the representatives of rival sides and have perused the impugned order. We have also examined the decisions on which the ld. AR has relied. We will first take up the appeals of the assessee. The Commissioner of Income Tax (Appeals) has held that the payments made to Singapore parties fall within the ambit of 'fees for technical services'. The Singapore parties have transferred architectural designs to the assessee. The Singapore parties also permitted the assessee to apply technology of whatever nature contained in designs and plans. The payments are covered and taxable under second limb of Clause (c) of Article 12(4). The Commissioner of Income Tax (Appeals) has also drawn support from India-USA DTAA which is similar to India-Singapore DTAA. Before we proceed with the issue it would be essential to examine Article 12(4) & (5) of India-Singapore DTAA. The same is reproduced here-in-under:

'4. The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services :

- (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or
- (b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein ; or
- (c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.

For the purposes of (b) and (c) above, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person.

5. Notwithstanding paragraph 4, "fees for technical services" does not include payments :

- (a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property other than a sale described in paragraph 3 (a) ;
- (b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic ;
- (c) for teaching in or by educational institutions ;

- (d) *for services for the personal use of the individual or individuals making the payment;*
- (e) *to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 14 ;*
- (f) *for services rendered in connection with an installation or structure used for the exploration or exploitation of natural resources referred in paragraph 2(j) of Article 5;*
- (g) *for services referred to in paragraphs 4 and 5 of Article 5.'*

7. The main emphasis of the Revenue is that the transfer of architectural designs and plans by the Singapore parties amounts to transfer of technical know-how technology to the assessee. The assessee has placed on record the agreement entered between the assessee and Andy Fisher Workshop Pte. Ltd., Singapore. The said agreement gives the detail of scope of work, schedule of payment of fees, responsibilities of the parties, pre-conditions for termination of agreement, general conditions, copyrights etc. According to the agreement, the Singapore firm has to make concept design. On approval of the concept design the consultant has to commence with schematic design. The next stage is detailed designing of the project. At the time of execution, the consultant would review the construction for material selection and ensure design intent is maintained. The fees is to be paid to the consultant based on completion of work stage. The consultant would visit the site for meetings, presentations and review of the projects. The Clause 15 of the agreement speaks about copyright. The same reads as under:

"The Copyright in all documents and drawings prepared by the Design Consultant and in any work executed there from remain the property of the Design Consultant. In any occasion this appointment is terminated and fees of the Design Consultant gets resolved fully, the Client may continue to utilize drawings/information of the Design Consultant for the purpose of continuing and completing the Project on the Site."

8. A perusal of Clause 15 clearly shows that the copyright of all documents and drawings prepared by the overseas consultant will remain with the consultant. In the case of termination of agreement, upon payment and settlement of fees the assessee is at liberty to utilize drawings/information with respect to the project on the site. Thus, the designs and plans made by the consultant are projects specific. Therefore, in our considered view there is no transfer of any technology, technical know-how or technical designs which the assessee can utilize subsequently in other projects. The Architectural design/drawings are project specific. The assessee cannot take advantage of same in other projects.

9. *The assessee has separately entered into a design agreement with M/s. FBEYE International Pte. Ltd., Singapore. The said agreement also lists the covenants with respect to scope of service and work, payment of fees, liabilities, etc. A perusal of the agreement shows that the firm shall make designs according to the assessee's requirement in respect of a particular project. There has been no transfer of any technology or technical design which would result in enduring benefit to the assessee or the payment of which would take the colour of payment of 'fees for technical services'. Relevant extract of the agreement which deals with development of design and documents reads as under:*

"Design Development Phase:

1. *Based on the approved Conceptual Design and adjustments authorized by the client, the designer shall prepare design development drawings suitable for preliminary pricing by the client's quantity surveyor.*
2. *Designer shall provide, on client's confirmation, eight (8) coloured renderings of the interior spaces. Any additional renderings requested by the client are US\$2,000 each and a reimbursable expense paid 50% deposit is required in advance.*
3. *Designer shall coordinate with the Clients appointed lighting designer to refine the reflected ceiling plans and fixture layouts.*
4. *Designer shall provide design development documentation for the project king mock-up room. The designer shall coordinate with the client, architect and operator to insure that the designed area represents the finished product*

CONTRACT DOCUMENTS PHASE

Construction Documents

- (1) *Based on the approved initial Design Development submissions, designer shall prepare documentation consisting of drawings details and specifications to set forth in sufficient detail the requirements for the special finishes of the Project Areas.*
- (2) *Designer shall prepare a colour finish schedule and prepare a corresponding finish notebook including samples of all applies finishes and materials.*
- (3) *Designer shall prepare material specifications of interior specialty items and finishes for inclusion into Architect's project manual.*
- (4) *These drawings, details and specifications will be sufficient to convey the entire design intent, but it is intended and it will be required that they be supplemented by the Architect and Quantity Surveyor and incorporated into*

their documents for tendering and construction purposes.

- (5) *Designer shall be responsible for explaining design intent and construction drawings to Contractor selected by Client and technical presentation.*
- (6) *The phase of work will be deemed as being completed upon submission of the aforementioned drawing and information by Designer and Client's review and written approval."*

10. *According to the agreement the designer shall review and take appropriate steps to ensure that the construction is carried out according to the design and plan. Thus, it is unambiguously clear from the agreement that the designs and plans supplied by the oversea consultant are for the particular project, for which their services have been engaged.*

11. *The assessee in support of his contention placed reliance on the judgment of Hon'ble Madras High Court and various decisions of the Tribunal. The issue whether the payment made to the consultant par take the character of 'fees for technical services' depends on facts and circumstances of each case. **Where in rendering of any service there is no transfer of technology, technical know-how or any technical knowledge or skill that assessee cannot apply in furtherance of his business objects, the payments for same in our opinion does not fall within the scope of 'fees for technical services'.** Once, the payments are held not to be in the nature of 'fees for technical' services there is no point in travelling to the next step to ascertain whether they are exempt in view of DTAA between the two countries or not. Since, we have held that the payments made to Singapore parties are not in the 'nature of royalties or fees for technical services', we are of the opinion that no purpose would be served by referring to Article 12 of India-Singapore DTAA to see whether such payments are taxable or exempt. In view of the above, both the appeals filed by the assessee are allowed."*

2.10 Having regard the facts of the present case and the reasons set out above and following the above decision of the Tribunal, Pune (supra), we are of the considered view that the purchase of drawings & designs by the assessee from ATCA Singapore did not qualify as "fees for technical services" within Article 12(4) of the tax treaty between India & Singapore because no facts are brought on record by the Revenue that as a consequence of supply of project specific designs, there was transfer of any technology. In that view of the matter the payment of Rs.1,11,19,501/- was not chargeable to tax in India and hence the assessee did not have any obligation to deduct tax at source. The disallowance under Section 40(a)(i) was therefore not warranted. Accordingly the disallowance of

Rs.1,11,19,501/- being amount paid to ATCA Singapore is hereby deleted. Ground No. 1 of the assessee's appeal is allowed.

2.11 With regard to the payments made to PD Dubai, we find that the assessee had purchased the drawings from an individual, Mr. PredagError who was resident of UAE. In these circumstances we agree with the Ld. AR of the assessee that the relevant applicable Article for ascertaining the taxability of the payment was Article 14 and not Article 22 of the DTAA between India & UAE. Article 14 of the DTAA – Independent Personal Services reads as under:

“1. Income derived by an individual who is a resident of a Contracting State from the performance of professional services or other independent activities of a similar character shall be taxable only in that State except in the following circumstances when such income may also be taxed in the other Contracting State :

(a) if he 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 his stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 90 days in the relevant fiscal year, in that case, only so much of the income, as is derived from his activities, performed in that other State may be taxed in that other State.

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.

2.12 From plain reading of Article 14, we find that the right to tax the income from professional activities by the resident of Dubai vested with the Contracting State of the payee, i.e. UAE alone and not the Source Country i.e. India. It therefore follows that in the present case the sum of Rs.63,07,123/- paid for procurement of drawings to PD, Dubai was taxable in UAE alone. Since the payment in question was not liable to tax in India, there is no question of making any disallowance under Section 40(a)(i) of the Act. The Ld. CIT(A)'s action of deleting the disallowance of Rs.63,07,123/- is therefore upheld, but on modified grounds, as discussed.

3. Ground No. 2 of the assessee's appeal read as under:

For that on the facts and in the circumstances of the case, the ld. CIT(Appeals) was wrong in confirming the disallowance of Rs.45,000/- out of 'advertisement and publicity expenses'. The observation made in this regard are wrong and incorrect.

3.1 In the course of hearing, the Ld. AR of the assessee did not press this ground. Ground No. 2 is there dismissed as not pressed.

4. Ground No. 3 of the assessee's appeal read as under:

For that on the facts and in the circumstances of the case, the ld. CIT(Appeals) was wrong in confirming the disallowance of Rs.16,72,607/- out of payment of Director's remuneration. On a proper consideration of the facts of the case, he should have found that the payment was made for the business need of the company, it is an allowable expenses. The observations made in this regard by the CIT(Appeals) are wrong and incorrect.

4.1 Briefly stated, the assessee which is a joint sector company had appointed Shri Shrawan Kumar Todi as its Managing Director in 2004. For the relevant year the assessee company paid the Managing Director's remuneration of Rs.17,88,000/-. In the audit report it was stated that managerial remuneration allowable under Companies Act, 1956 was Rs.1,15,963/-. The Ld. AO required the assessee to explain as to why the excess payment of Rs.16,72,607/- [17,88,000 – 1,15,963] for which permission was not received from Central Government should be allowed as deduction from profits of the business. In absence of any cogent response from the assessee only the excess sum of Rs.16,72,607/- was disallowed by the Ld. AO. Aggrieved, assessee preferred appeal before the Ld. CIT(A), who upheld the disallowance of Rs.16,72,607/- following the decision of Supreme Court in the case of **Nonsuch Tea Estate Ltd Vs CIT (98 ITR 189)**. Aggrieved, the assessee is in further appeal before us.

4.2 We have heard the rival submissions and perused the material placed in the paper book, from which we find that Mr. Todi was appointed as its Managing Director in 2004 for a period of three years. Remuneration paid to Mr. Todi was allowed as deduction in the income-tax assessments of these three years. The Board of the assessee thereafter

reappointed Mr. Todi in 2007 for a further period of 5 years on the same remuneration. Application was made to Ministry of Corporate Affairs to give consent to the terms of re-appointment of the Managing Director. By letter dated 06.09.2007, the MCA approved the appointment of the Managing Director for a period of 2 years i.e. from 01.04.2007 to 31.03.2009. The authorities below held that since the terms of appointment of the Managing Director for the relevant FY 2009-10 was not approved by the Central Government and the auditors had certified allowable remuneration only at Rs.1,15,963/-, the excess sum of Rs.16,72,607/- paid to Managing Director was not allowable as deduction from the profits of the business.

4.3 In the course of hearing the Ld. AR of the assessee vehemently opposed the action of the lower authorities. Referring to the communications & correspondences at Pages 75 to 100 of the paper book, the Ld. AR explained that the approval for the terms of appointment was sought from MCA as per Schedule XIV of Companies Act because the assessee did not possess sufficient profits during the project execution period. It was explained that in the letter dated 06.09.2007, the MCA had approved the appointment for a period of 2 years but that did not in any manner suggest that MCA had specifically rejected the terms of appointment of Managing Director for subsequent three years which inter alia included the relevant FY 2009-10. Upon expiry of 2 years, an application for extension for the terms of appointment was filed with MCA in April 2009. In response few more documents were called by MCA, which were furnished by the assessee. Thereafter, the MCA did not any adverse communication rejecting the terms of MD's appointment for the unexpired period and therefore in absence of any negative communication, the Managing Director continued to render service as contracted in 2007 even after the expiry of the period of two years. The Ld. AR submitted that the lower authorities did not dispute the fact that Mr. Todi indeed provided his services as the Managing Director of the company for relevant AY 2009-10 and rendered the services in terms of his appointment. It was further submitted that in all the past income-tax assessments the remuneration paid to Managing Director was allowed as deduction on the terms as approved by the Board & shareholders. Since the same set of facts permeated through the years, there was no reason for disallowing the remuneration paid to

Managing Director during the relevant year. The Ld. AR of the assessee placed reliance on the decisions of Calcutta High Court in the case of **CIT Vs Timplite India Ltd (207 ITR 729)**&**CIT Vs Dipak Corporation (P) Ltd (111 ITR 452)** and Madras High Court in the case of **CIT Vs SreeRajendra Mills Ltd(93 ITR 122)**. The Ld. AR further submitted that the judgment of Supreme Court relied upon by the CIT(A) was distinguishable on facts. The Ld. DR on the other hand supported the order of the lower authorities.

4.4 We find that the limited issue for our consideration is whether where the terms of appointment was not expressly approved by the Central Government as per the provisions of Companies Act, 1956, is the remuneration paid to Managing Director allowable as deduction. In the facts of the present case, we find that Mr. Todi was working as Managing Director of the assessee since 2004. The terms of the appointment were approved and ratified by the Board of Directors and the shareholders respectively. The Ministry of Corporate Affairs had approved the terms of appointment for the period 2007-2009. Subsequent to 2009, although the assessee made an application for extension of the terms of appointment, it was not rejected by the Ministry of Corporate Affairs after obtaining documents requisitioned. We find that neither the Ld. AO nor the Ld. CIT(A) disputed the fact that Mr. Todi was the Managing Director of the assessee company and rendered services in terms of his appointment & therefore the AO himself allowed deduction for remuneration of Rs.1,15,963/-. We further find that the judgment of the Supreme Court in the case of **Nosuch Tea Estate Ltd Vs CIT (supra)** relied upon by the CIT(A) was distinguishable on facts. In that case, in the prior years, the assessee did not claim deduction for Managing Agent's remuneration since the terms of its appointment were not approved by Central Government. Upon receiving the approval in the relevant year which was granted with retrospective effect, the assessee claimed the deduction for the remuneration for the relevant year as well as for the prior years. The Ld. AO disallowed the remuneration pertaining to earlier years, treating it to be in the nature of prior period expenditure. On the contrary, it was the assessee's case that until the appointment was approved it could not account for the remuneration of Managing Agent. On appeal the Supreme Court allowed the assessee's case. As such, we find that the dispute between the parties before the Supreme

Court pertained to the year of the allowabiltyof expenditure and not aboutallowability of expenditure per se.

4.5 Instead we find that the reliance placed by the assessee on the judgment of the Calcutta High Court in the case of **CIT Vs Tinplate India Ltd (207 ITR 729)** is relevant. In that case the Central Government had specifically declined to approve the terms of appointment of Director under the Companies Act. However such refusal was communicated subsequent to availment of services of the Director. On these facts the High Court upheld the allowability of deduction of remuneration paid to Director. The relevant extracts of the judgment is as under:

“The facts relating to the second question are that in the assessment year under consideration, the Income-tax Officer also disallowed Rs. 1,18,654, being the remuneration of Shri A. Chakraborty ex-managing director of the assessee-company on the ground that the appointment of Shri Chakraborty was not approved by the Central Government.

Against the said order of the Income-tax Officer, the assessee went in appeal before the Commissioner of Income-tax (Appeals). The Commissioner of Income-tax (Appeals) held that the Income-tax Officer was justified in coming to the conclusion that the salary and perquisites paid to Shri Chakraborty were not admissible for deduction. The Commissioner of Income-tax (Appeals), however, directed the Income-tax Officer to verify the actual amount of salary and perquisite paid to Shri Chakraborty for the period from January 1, 1978, to July 28, 1978, and restrict the disallowance to the actual salary and perquisite paid to Shri Chakraborty.

The Tribunal was of the view that the actual salary paid for the services rendered by the managing director for the period from January 1, 1978, to July 28, 1978, to the extent of Rs. 65,421 is to be allowed as deduction in computing the assessee's income in terms of section 37 of the Act.

Our attention has been drawn to the decision of this court in the case of CIT v. Dipak Corporation Pvt. Ltd. [1978] 111 ITR 452 . There this court held that the deduction as claimed by the assessee was allowable as business expenditure incurred for the purpose of paying salary to the employees. This court relied on the decision of the Madras High Court in the case of CIT v. SreeRajendra Mills Ltd. [1974] 93 ITR 122 . The managing director was appointed by the company but he rendered services and also was paid remuneration. Subsequently, the Central Government did not approve the appointment of the managing director. In the meantime the managing director rendered services for which remuneration was paid. Accordingly, the actual salary paid for the services rendered by the managing

director cannot be disallowed on the ground that the Central Government did not approve his appointment. If one has been rightly or wrongly appointed and such appointment is dependent on the Central Government, remuneration for the services rendered between the time of appointment and the date when the approval was refused cannot be denied to such employee who discharged his duties and responsibilities as the managing director of the company.

We are of the view that the Tribunal was justified in allowing the actual salary paid to the managing director.

For the reasons aforesaid, we answer the second question in this reference in the affirmative and in favour of the assessee.”

4.6 We note that in the present case the appellant company has made all endeavors for approval from the Ministry of Corporate Affairs and the managing director in question has been continued as the managing director from year 2004 onwards and his remuneration has been allowed as deduction from then continuously. In the year 2007 the managing director was appointed for five years of which two years from 2007 to 2009 was in fact approved by the Ministry of Corporate Affairs. When the assessee company took up the matter with the Ministry they in turn asked for certain documents to be furnished which was duly complied with the assessee company. Thereafter without refusing or approving the appointment of the managing director the Ministry did not respond at all and mean while the managing director Mr. S.K.Todi continued to discharge his services as per the appointment and has drawn salary, which needs to be allowed. Therefore relying on the jurisdictional High Court's decision (supra) we are inclined to allow remuneration drawn by the assessee and allow this ground of appeal preferred by the assessee.

5. Ground No. 2 of the Revenue's appeal is as follows:

That on the facts and in the circumstances of the case, the ld. CIT(Appeals) erred in holding that expenditure of Rs.2,00,000/- on account of advertisement was business expenditure, ignoring the fact that no evidences produced by the assessee to this effect prove that this expense was incidental to the business of the assessee.

5.1 In the course of assessment the Ld. AO noted that the advertisement expenses of Rs.61,34,373/- inter alia comprised of payment of Rs.2,00,000/- made to Bilat Bangla Utsav. The Ld. AO noted that the aforesaid payment was made by the assessee towards sponsorship of a charity based programme in 1stBilat Bangla Utsav and had deducted TDS thereof. The AO however held that the assessee was unable to explain as to how these expenses related to and were exclusively necessary for the purposes of business and therefore disallowed the expenditure. Aggrieved, assessee preferred appeal before the Ld. CIT(A), who after considering the submissions of the assessee and material placed on record, deleted the disallowance made by the Ld. AO. Aggrieved, the Revenue is in further appeal before us

5.2 The Ld. DR strongly relied on the Ld. AO's order in support of the Revenue's case on this issue while the Ld. AR for the assessee strongly supported the impugned order of the Ld. CIT(A) giving relief to the assessee on this issue and submitted that the observations recorded by the Ld. CIT(A) in this context at Para 6.2 & 6.3 of his impugned order may be taken into consideration.

5.3 We have considered the rival submissions and also perused the relevant material available on record. As noted by us, the assessee company was developing a residential township project in East Kolkata. The flats and bungalows being developed were marketed primarily to non-resident Indians. The 1stBilat Bangla Utsav organized in London, was meant to cater to the non-resident Bengali diaspora residing there. The assessee had therefore sponsored the aforesaid programme with a view to advertise and obtain publicity for its residential project in United Kingdom. Having regard to these facts, we find that the assessee had sufficiently discharged its onus to prove that the sponsorship expenses of Rs.2,00,000/- paid to Bilat Bangla Utsav was incurred in the course of and for the purposes of its business. The order of the Ld. CIT(A) deleting the disallowance of advertisement expenses to the extent of Rs.2,00,000/- is therefore upheld. Ground No. 2 of the Revenue's appeal is therefore dismissed.

6. Ground No.3 of the Revenue's appeal is as under:

That on the facts and in the circumstances of the case, the ld. CIT(Appeals) erred in holding that the expenses of Rs.61,46,712/- on account of load testing machine was revenue expenditure, ignoring the fact that load testing machine has got benefit of enduring nature which is for a long period hence, this expense was rightly treated as capital expenditure.

6.1 As noted by the Ld. AO in the impugned assessment, the assessee had debited Rs.1,83,91,705/- under the head Land Development Expenses. From the details furnished, the AO observed that the assessee had purchased a load testing machine from M/s Loadtest Asia Pte Ltd for an aggregate sum of Rs.72,31,426/- & claimed it as revenue expenditure. The Ld. AO however was of the view that the sum so expended was capital in nature and which should have been capitalized as part of the block of Plant & Machinery. The assessee submitted before the Ld. AO that the machine was sub-merged in the wet land at the time of testing with no scope of recovery and/or reuse and therefore it was a revenue expenditure. The Ld. AO however held that no evidence to substantiate the aforesaid claim was furnished before him. The AO further held that the moment when the assessee acquired the fixed asset it was required to capitalize it and the fact that the machine got damaged or sub-merged subsequently was irrelevant to alter the nature of expenditure. After allowing for depreciation @ 15%, the Ld. AO disallowed the balance sum of Rs.61,46,712/- [72,31,426 – 10,84,714]. Aggrieved, assessee preferred appeal before the Ld. CIT(A), who after considering the submissions of the assessee, material placed on record and remand report furnished by the Ld. AO, held that the expenditure in question was revenue in nature and therefore deleted the addition made by the Ld. AO. Aggrieved, the Revenue is in further appeal before us.

6.2 Before us, the Ld. DR relied on the Ld. AO observations in the assessment order as well as the remand report justifying the impugned disallowance. On the other hand the Ld. AR relied on the order of the Ld. CIT(A). We note that before the Ld. CIT(A) the assessee had furnished a detailed explanation setting out the nature, purpose & end use of load testing equipment. According to Ld. AR the equipment was a one-time use machine and once it got embedded in the test pile, it was no longer recoverable. In that sense it was an expendable item. The Ld. AR of the assessee also referred to detailed literature obtained from the

manufacturer on this particular type of machine along with a certificate from a Chartered Engineer confirming that it was a 'one time' use equipment. Having taken note of these facts and material on record, Ld. CIT(A) deleted the addition made by the Ld. AO by observing as under:

“10.5 I have considered the facts of the case. The assessing officer had, in the assessment, treated the expenditure in respect of load testing equipment to be capital in nature. It is true that the expenditure was incurred for purchase of load testing machine. However, as explained by the appellant, it is not the machinery which is used as a fixed asset. Rather it is for one time use, because at the time of testing the machinery gets imbedded in the pile to be tested. In the certificate dated 05.03.2013, Shri S.N.Sil, Chartered Engineer has certified that it was 'one time use machinery', which is imbedded in the pile to be tested at the time of casting. Therefore, he has explained the mode of operation and concluded by observing that such machineries are sacrificial in nature for each pile and are for one time use only, since these get imbedded in the piles shaft and cannot be retrieved. The literature of the machine published by the manufacturer also supports this claim. In my opinion, the assessing officer was not correct in rejecting the certificate issued by Chartered Engineer summarily just because he is not a government approved engineer. There is no requirement anywhere under the I.T. Act or Rules that such evidence is to be accepted only if the engineer is approved by government. Moreover, as mentioned earlier, the literature of the machine also supports the certificate given by the Chartered Engineer as it has been mentioned therein, that the machinery is sacrificial in nature. The assessing officer has allowed depreciation on the machinery. Thus, he has accepted that machinery was used for the purpose of the appellant's business. Here, it may be mentioned that clause (3) of section 32 states that in the case of any building, machinery, plant or furniture in respect of which depreciation is claimed and allowed under clause (1) and is sold, discarded, demolished or destroyed in the previous year, the amount by which the money is payable in respect of such building, machinery, plant or furniture together with the amount of scrapped value if any falls short of their written down value thereof shall be allowable as deduction. Therefore, if the view of the assessing officer is accepted and the machinery is treated as fixed asset, the appellant would be entitled to claim write off of the written down value in the subsequent year. Overall, the allowance would be revenue neutral. However, as mentioned earlier, the case of the appellant is that the machinery was not part of fixed asset but expenditure towards land developing. The material on record supports the contention of the appellant. Considering all these facts, I am of the view that the expenditure under consideration is allowable as revenue expenditure. The disallowance of Rs.61,46,712/- is accordingly deleted.”

6.3 We note that, apart from relying on the Ld. AO's observations in the assessment order, the Ld. DR was not able to bring any material on record to controvert the findings of the Ld. CIT(A). In view of the above, we find that the machine in question was utilized to

test the load bearing capacity of the deep pile foundation laid for construction of tall building towers. For carrying out the load bearing capacity tests the equipment was embedded in the pile shaft and concrete poured in the test pile was allowed to be cured for 14 days. Once equipment was ready for testing, the machine was internally pressurized through instrumentation cables for conducting the load test. The machine in question was sacrificial in nature because once equipment was submerged in the concrete pile; it could not be retrieved. Having regard to these peculiar facts, we are of the considered view that the payment made by the assessee for purchasing load bearing equipment for conducting test regarding load bearing capacity of the piles was constructing was in the nature of revenue expenditure and therefore formed part of the land development cost. The Ld. CIT(A)'s action of deleting the disallowance of Rs.61,46,712/- is therefore justified & accordingly upheld. Ground No. 3 of the Revenue's appeal is therefore dismissed.

7. Ground No.4 of the Revenue's appeal is as under:

That on the facts and in the circumstances of the case, the ld. CIT(Appeals) erred in deleting the disallowance of Rs.8,15,20,814/- relying on the submission of the assessee that the payment of tax on tax on TDS was made but due to inadvertent error as wrong assessment year was quoted on challans, ignoring the fact that the payment of tax on account of TDS was for different period which is evident from the face of challans and as such expenses of Rs.8,15,20,814/- was rightly disallowed u/s 40(a)(ia).

7.1 In Para 1.1 of the assessment order, the Ld. AO carried out verification with regard to the taxes deducted by the assessee from various expenses vis-à-vis the TDS returns and the respective challans. On verification, the Ld. AO noted that although the tax was deducted at source from the expenditure aggregating to Rs.8,15,20,814/-, but the same was deposited through challans bearing AY 2011-12. Complete details of these expenses along with corresponding challans were enumerated in the table at Para 1.1 of the assessment order. Before the Ld. AO, the assessee explained that these was an inadvertent error of mentioning wrong year in the challans and that the TDS was deducted on the expenses of Rs.8,15,20,814/-. The assessee further submitted that it had filed necessary applications with

the concerned TDS officer to get the mistake rectified. The Ld. AO however observed that till the passing of the assessment order, the assessee was unable to furnish any rectified challans and accordingly disallowed the expenditure of Rs.8,15,20,814/- under Section 40(a)(ia) of the Act. Aggrieved, assessee preferred appeal before the Ld. CIT(A), who after considering the submissions of the assessee and material available on record deleted the disallowance made by the Ld. AO. Aggrieved, the Revenue is in further appeal before us

7.2 The Ld. DR strongly relied on the AO's order in support of the revenue's case on this issue while the learned counsel for the assessee strongly supported the impugned order of the Ld. CIT(A) giving relief to the assessee on this issue. The Ld. AR of the assessee submitted that the taxes deducted from expenditure of Rs.8,15,20,814/- was indeed paid to the credit of the Government within the permitted time and the only error committed by the assessee was that it had mentioned the wrong assessment year while filling the challan for making payment of the taxes deducted at source. The Ld. AR further clarified that although the wrong assessment year was mentioned in the challans but the fact remained that in the Form 16As generated from the NSDL system for the Income-tax Department as well as the Form 26AS of the payees reflected the credit of such taxes paid for the AY 2010-11. In this regard the Ld. AR referred to the email communication from Assistant Director Systems TDS CPC wherein it was confirmed that the credit for the challans deposited on 29.05.2010 was granted for AY 2010-11 and not AY 2011-12. Referring to provisions of Section 40(a)(ia), the Ld. AR of the assessee therefore submitted that this Section could be invoked only where taxes were not deducted or after having been deducted were not paid. In the facts of present case, the taxes were deducted from the expenditure of Rs.8,15,20,814/- and also paid to the credit of Government within the time permitted in Rule 30. Even the payees got the credit of the taxes deducted at source in the relevant AY 2010-11. In the circumstances a mere mistake of mentioning wrong assessment year i.e. AY 2011-12 in place of AY 2010-11, was of no relevance to justify disallowance under Section 40(a)(ia) of the Act. The Ld. AR further submitted that the observations recorded by the Ld. CIT(A) in this context at Para 14.4 of his impugned order may also be taken into consideration. The relevant findings of the Ld. CIT(A) were as follows:

“14.4 I have considered the submission made. It is undisputed that the appellant had made TDS of the amounts relating to the payments under consideration. The deducted tax had also been deposited in the government account. However, as explained by the appellant, while depositing the tax, the assessment year on the challan has been wrongly mentioned as AY 2011-12 instead of AY 2010-11 which is a clerical error and this resulted in mismatch because of which TDS amount was not being reflected in the appellant’s account for the AY 2010-11. However all other evidences points to the fact that the amount under consideration related to AY 2010-11 only. The TDS is duly appearing in Form No. 26AS of the deductees in the correct year. Form No. 16A generated through the departmental system also shows the assessment year to be AY 2010-11. Even the Assistant Director (Systems) has, as per the copy of e-mail produced by the appellant, confirmed that the challans were credited in FY 2009-10. The assessing officer has not disputed any of these facts. He has only referred to the fact that the amount mentioned in TDS challan was not AY 2010-11 and the error has not been corrected. It has been explained by the appellant that it has made repeated efforts to do the necessary correction. But the correction could not be made due to the problem in system. However the AD(System) has confirmed on email that the challan pertained to FY 2009-10 relating to assessment year under appeal. Thus, all the surrounding facts and circumstances indicate that TDS under consideration was for AY 2010-11 only and not AY 2011-12. Merely because there was a clerical error in mentioning the correct assessment year on the challans, it cannot alter the fact that the appellant had duly deducted and deposited the tax in government account in accordance with TDS provision u/s 194C of the Act. Therefore, no disallowance can be made merely because of wrongly mentioned of the assessment year in the challan. Disallowance made u/s 40(a)(ia) of the I.T. Act, 1961 of Rs.8,25,20,814/- is accordingly deleted.”

7.3 Before us the Revenue was not able to bring any material on record to controvert the findings of the Ld. CIT(A). Admittedly the assessee had deducted taxes on expenses of Rs.8,15,20,814/- and also paid it to the Government. The assessee had only committed a mistake while filling the challans dated 29.05.2010 for payment of taxes deducted at source on the expenses pertaining to Financial Year 2009-10 relevant to Assessment Year 2010-11 while filing the challan instead of AY 2010-11 it was wrongly mentioned to be AY 2011-12. The facts on record however show that the payees were given the credit for the taxes paid in AY 2010-11 and in the TDS certificates generated by the system of the I. T. Dept. the credit for taxes was reflected in AY 2010-11. Even the Assistant Director (Systems), CPC confirmed that the challans were given credit for the AY 2010-11. Having regard to these facts, we are of the considered view that the assessee had duly deducted and paid the taxes on expenses of Rs.8,15,20,814/- and therefore no disallowance was warranted under Section 40(a)(ia) of the Act as there was no violation as contemplated in the said provision.

The action of the Ld. CIT(A) deleting the disallowance of Rs.8,15,20,814/- is therefore upheld. Ground No. 4 of the Revenue's appeal is therefore dismissed.

8. Ground No. 5 of the Revenue's appeal is as under:

That on the facts and in the circumstances of the case, the ld. CIT(Appeals) erred in holding that the disallowance of expenses under the advertisement of Rs.3,00,000/- was not warranted as payments were made through account payee cheques, ignoring the fact that the payee had denied rendered any service on account of advertisement and only payment made through payee cheque does not certify the genuineness of transactions as payee had denied having rendered any services to the assessee.

8.1 Briefly stated, the Ld. AO in the course of assessment noted that the assessee had paid Rs.3,00,000/- to M/s Disha Production & Media Pvt Ltd which was debited under the head 'Advertisement & Publicity'. Upon conducting verification u/s 133(6), the payee denied having any transaction with the assessee and further stated that no amount was payable to or receivable from the assessee. The assessee was therefore required to explain its position, to which the assessee furnished copy of invoice received from M/s Disha Production & Media Pvt Ltd along with the details of payment made to it through banking channel. The Ld. AO however not being satisfied with the assessee's explanation disallowed the advertisement expenses of Rs.3,00,000/- treating it to be bogus. Aggrieved, assessee preferred appeal before the Ld. CIT(A), who after considering the submissions of the assessee and material made available deleted the disallowance made by the Ld. AO by observing as under:

"7.2 I have considered the facts of the case. The disallowance relates to expenditure stated to be incurred towards cost of advertisement in a publication to be published by Disha Production (P) Ltd at the time of Durga Puja in London. The party has denied the transaction. However the appellant has produced supporting documents such as invoice issued by the party, details of payments made through account payee cheques, bank statement etc. It has been informed that these details were also produced before the assessing officer. The assessing officer however, made the disallowance based solely on the reply from the said party. While the fact that the counter-party has denied the transaction, does raise a doubt on the genuineness of the transaction, that cannot be sole determinant factor. Rather it casts heavy onus upon the assessee to establish the genuineness of the transaction. When the appellant was informed about the denial, the appellant has produced

documentary evidences, such as the invoice issued by the party and cheque etc. The payment was through account payee cheque, which is duly appearing in bank statement. The assessing officer has not conducted any further enquiry in the matter. Under the circumstances mentioned above, I am of the view that the onus to prove the genuineness of the claim has been discharged by the appellant. The disallowance of Rs.3,00,000/- is therefore deleted. The assessing officer, however, if deemed fit, inform the assessing officer of the payee regarding the above payment.”

Aggrieved, the Revenue is in further appeal before us.

8.2 The Ld. DR appearing on behalf of the Revenue strongly relied on the Ld. AO's order in support of the revenue's case on this issue. The Ld. DR submitted that the fact that the payee had denied of having any transaction with the assessee substantiated the fact that the advertisement expenditure claimed by the assessee was bogus. On the other hand the Ld. AR for the assessee strongly supported the impugned order of the Ld. CIT(A) giving relief to the assessee on this issue and submitted that the observations recorded by the Ld. CIT(A) in Para 7.2 of his impugned order may be taken into consideration.

8.3 We have considered the rival submissions and also perused the relevant material available on record. We find that before lower authorities the assessee had furnished copy of the invoice dated 15.09.2009 raised by M/s Disha Production & Media Pvt Ltd upon the assessee towards cost of full-page advertisement in their publication "IcorEkdin". In discharge of this invoice, the assessee had issued an account payee cheque bearing No. 1805972 dated 19.09.2009 which was en-cashed by the payee. The bank statement evidencing the clearance of payment was furnished both before the Ld. AO as well as Ld. CIT(A). Having regard to these facts, we find that the assessee had provided impeachable evidence before the Ld. AO to substantiate the incurrence of the advertisement expenses. We agree with the finding of the Ld. CIT(A) that the fact that the payee had denied having any transaction with the assessee did raise doubt on the genuineness of the transaction but that statement alone could not be sufficient to treat the expenses as bogus, particularly in the light of the specific evidence substantiating the incurrence of expenditure furnished by the assessee. In such case, the duty was cast on the Ld. AO to make further enquiries in the

matter which we find was not carried out by the Ld. AO either in the course of assessment or in the remand proceedings. For the reasons set out in the foregoing, we find that the Revenue has not been able to point out any infirmity in the findings of the Ld. CIT(A) and in that view of the matter the action of the Ld. CIT(A) deleting the disallowance of advertisement expenditure of Rs.3,00,000/- is upheld. Ground No. 5 is therefore dismissed.

9. In the result, the assessee's appeal is partly allowed and the Revenue's appeal is dismissed.

Order is pronounced in the open court on 16th March 2018

Sd/-
(P.M. Jagtap)
Accountant Member

Sd/-
(Aby. T. Varkey)
Judicial Member

Dated : 16/03/2018

RG.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – M/s Bengal NRI Complex Ltd., 24, R.N.Mukherjee Road, Kolkata-700001, 2nd Floor
- 2 Respondent – I.T.O., Ward-5(3), Kolkata.
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy,

By order,

Sr. Pvt. Secretary