

**IN THE INCOME TAX APPELLATE TRIBUNAL,
BANGALORE BENCH 'C' - SMC**

BEFORE SHRI N.V VASUDEVAN, JUDICIAL MEMBER

ITA Nos.2077 & 2078/Bang/2017
(Asst. Years - 2013-14 & 2014-15)

Regulus Infrastructure
Management Consultancy Pvt. Ltd.,
No.3, Lavelle Road,
Bengaluru. . Appellant

Vs.

The Income-tax Officer,
Ward-5(1)(4),
Bengaluru. . Respondent

Appellant by : Shri Ramadhyani, C.A
Respondent by : Shri K.N Dhandapani, JCIT

Date of Hearing : 07-3-2018
Date of Pronouncement : 28-3-2018

ORDER

PER N.V VASUDEVAN, JUDICIAL MEMBER :

These are appeals filed by the assessee against the orders of the Commissioner of Income-tax (Appeals) - V, Bengaluru both dated 31.7.2017 relating to the Assessment Years 2013-14 and 2014-15.

2. The assessee is a company engaged in the business of providing management services such as housekeeping and security services to malls, residential and commercial buildings. For assessment year 2013-14, assessee filed return of income declaring Nil income and claimed that loss of Rs.5,75,490 and unabsorbed depreciation of Rs.4,20,131, in all a sum of Rs.9,95,622/- has to be allowed to be

carried forward for set off against income for subsequent Assessment year. For assessment year 2014-15, return of the income was filed declaring loss of Rs.2,03,303 and unabsorbed depreciation of Rs.4,63,021 in all a sum of Rs.6,66,324/- has to be allowed to be carried forward for set off against income of subsequent Assessment year.

3. In the course of assessment proceedings, the AO noticed that assessee had paid a sum of Rs.33,92,698/- to M/s Gangothri Water Supply in assessment year 2013-14 and a sum of Rs.39,33,528/- in assessment year 2014-15. According to the AO, the aforesaid payment made by the assessee to M/s Gangothri Water Supply was payment to a contractor for carrying out work and therefore the assessee ought to have deducted tax at source on the aforesaid payment as per the provisions of Sec.194-C of the Act. According to the AO, the assessee did not deduct tax at source on such payment and therefore, the sum paid to M/s Gangothri Water Supply was liable to be added to the total income in view of the provisions of sec. 40(a)(ia) of the Act. As per the provision of sec. 40(a)(ia) of the Act, where tax is deductible on payment and if tax has not been deducted by an assessee, then the sum paid/payable, if it is claimed as an expenditure in computing income from business, it will not be allowed as deduction to an assessee.

4. The plea of the assessee before the AO was that (i) the sum paid to M/s Gangothri Water Supply was not claimed as a deduction by the assessee in computing income from business. (ii) The Assessee was obliged as per the agreement with its clients to provide water by purchasing water at actual cost. The clients of the Assessee reimburse the cost of procuring water. Since water was purchased to provide the same to the client, there was no obligation to deduct tax at source at the time of making payment for purchase of water. The further submissions of the assessee was that as per the Karnataka VAT Act, 2003 [the KVAT Act], purchase of water is in the nature of purchase of 'goods' and accordingly ought not to attract the

provisions of section 194C of the Act. The learned AO grossly erred in considering supply and sale of water as a 'service' that has the element of implicit contract. As per the KVAT Act, 'Goods' means all kinds of movable property (other than newspaper, actionable claims, stocks and shares and securities) and includes livestock, all materials, commodities and articles (including goods, as goods or in some other form) involved in the execution of a works contract or those goods to be used in the fitting Out, improvement or repair of movable property, and all growing crops, grass or things attached to, or forming part of the land which are agreed to be severed before sale or under the contract of sale. Water has been classified as 'Goods' in the KVAT Act and as per entry number 54 of the first schedule [dealing with exempted 'goods'] of the KVAT Act, water, other than (i) aerated, mineral, distilled, medicinal, ionic, battery and de-mineralised water; and (ii) water sold in sealed containers are exempted from VAT. Further, aerated water has also been classified as input tax restricted 'goods' in the fifth schedule of the KVAT Act. 'Goods' not falling in the first schedule or in schedule 2, 3 or 4 are taxable at the rate of 14.5%. As such, water, not covered by the first schedule, is taxable under the KVAT Act at 14.5%. Accordingly, as supply of water is essentially in the nature of supply of goods for sale and as per the CBDT Circular No. 13/2006, dated 13th December 2006, wherein it has been clarified that the provisions of section 194C would apply in respect of a contract for supply of any article or thing as per prescribed specifications only if it is a contract for work and not a contract for sale, the payment in question does not fall within the ambit of Sec.194C of the Act and therefore there was no obligation on the part of the Assessee to deduct tax at source.

5. The Assessing Officer however rejected the claim of the assessee as above and added sum paid to M/s Gangothri Water Supply to the total income of the assessee by invoking the provisions of sec. 40(a)(ia) of the Act. On appeal by the assessee, the CIT(A) upheld the order of the AO. The CIT(A) found that in AY 2013-14, the Assessee had collected more sum from its clients than what it had paid

towards the water charges to Gangothri Water Supply and such excess was shown as income in its profit and loss account which proved that though the Assessee has not shown gross receipts and payments but has shown the net receipt on purchase of water. He therefore held that the Assessee had impliedly claimed water charges as deduction while computing its income from business. The CIT(A) held that the purpose of Section 40(a)(ia) is to ensure the recovery of tax. Therefore, the action of the Assessing Officer invoking provisions of Sec.40(a)(ia) was upheld by the CIT(A). On the argument of the Assessee that the sum paid to Gangothri Water supply was a payment for purchase of water and therefore provisions of Sec.194C of the Act will not apply, the CIT(A) held since the Assessee collected amount in excess of the purchase price of water, it was not a case of contract of supply but a contract for carrying out work.

6. Similar order was passed by the CIT(A) for assessment year 2014-15 also, though there was no excess price received by the Assessee from its clients over and above the sum the Assessee paid to Gangotri Water supply.

7. Aggrieved by the orders of the CIT(A), assessee has preferred the present appeals before the Tribunal.

8. The grounds of appeal raised by the assessee reads as follows:-

“1. On the facts and circumstances of the case, there is no justification for the Commissioner of Income Tax (Appeals) to confirm the order of the Assessing Officer in disallowing a sum of Rs.39,33,528/- representing water charges paid to M/s. Gangothri Water Supply (Gangothri) under section 40(a) (ia) of the Income Tax Act, 1961 (Act).

2. The Commissioner of Income Tax (Appeals) erred in not appreciating the contentions of the Company that the payment made to Gangothri represents consideration for pure supply of goods and is accordingly not a payment for carrying any work (including supply of

labor), in pursuance to a contract between the appellant and Gangotri and is covered by circular No. 13, 2006 dated December 13, 2006 issued by the Central Board of Direct Taxes. Accordingly, in the opinion of the appellant, the provisions of section 194C of the Act is not at all applicable to the payment under consideration.

3. *Without prejudice to the foregoing contentions, even assuming but without admitting that the provisions of section 194C of the Act is applicable to the payment made to Gangotri, the Commissioner of Income Tax (Appeals) erred in not appreciating the contentions of the Company that the appellant merely collected monies from the occupants of the various premises where it was rendering property management services and handed over the same to the vendor, that it was merely functioning as a representative of the property occupants in collecting and making the payment, that no expenditure had been recognized in the Profit and Loss Account on this account and that there is no expense incurred by the appellant attracting the provisions of section 40(a) (ia) of the Act. The appellant denies that it collected any monies from the property occupants in excess of that defrayed Gangotri and made a surplus in the transaction as observed by the Commissioner of Income- Tax (Appeals).*

Your appellant seeks leave to add to, to amend any of the foregoing grounds as and when considered necessary/at the time of hearing.”

9. The assessee has filed an application for admission of the following additional grounds:-

“ADDITIONAL GROUNDS OF APPEAL

2.0 On the facts and circumstances of the case, the learned Commissioner of Income Tax (Appeals) erred in not considering ground no.3 raised in respect of not setting of current year losses and depreciation allowance aggregating to Rs.9,95,622/against the addition made, on the ground that the same is miscellaneous and general in nature and did not need separate adjudication.”

10. In support of the plea for admission of additional ground, it has been submitted he assessee filed its return of income showing a loss of Rs.9,95,622/- for the assessment year 2013-14. The Assessing Officer completed the assessment on 16.3.2016 determining the total income at Rs 33,92,700. The assessee filed a rectification application under section 154 of the Income Tax Act, 1961 on 11.04.2016 for non-

consideration of loss for the year of Rs.9,95,622/The same is yet to be disposed off. Aggrieved by the order of the Assessing Officer, the assessee preferred an appeal to the Commissioner of Income Tax, Appeals V, Bangalore. Ground of appeal 3 was in respect of the Assessing Officer's action in not setting off the returned loss against the addition made. The Commissioner of Income Tax, Appeals while disposing off the appeal did not adjudicate ground 3 on the contention that this ground was miscellaneous and general in nature and did not need separate adjudication. The assessee preferred an appeal before the honourable income tax appellate tribunal. Due to oversight, the action of the Commissioner of Income Tax, Appeals in not adjudicating ground 3 was not included in the grounds of appeal filed. Accordingly, the assessee has justified its claim for admission of the additional grounds of appeal.

11. Similar application for admission of additional ground has been filed in assessment year 2014-15 also.

12. I am of the view that the additional ground sought to be raised by the assessee arises out of the order of the CIT(A) and is therefore admitted for adjudication.

13. I have heard the submissions of the Id AR and Id DR. As far as the question whether the money paid to M/s Gangothri Water Supply was claimed as a deduction by the assessee in computing income from business is concerned, I find from the ledger account of water charges from the period 1/4/2012 to 31/3/2013 (a copy of which placed at page 7 to 11 of the assessee's paper book) for assessment year 2013-14, that the assessee had purchased water from M/s Gangothri Water Supply. The assessee as per the terms of the agreement with a client had to supply water to the commercial establishment of the customer. Perusal of the ledger account of water charges shows that there were 3 customers to whom the assessee had debited the cost of water procurement from M/s Gangothri Water Supply namely –

- 1) NXP Semiconductors India Pvt. Ltd.,
- 2) Pace Micro Technology (India) Pvt. Ltd.,
- 3) Philips Electronics India Ltd.,

14. A copy of the agreement between the assessee and Philips Electronics India Ltd., is available at page No.92 to 116 of the assessee's paper book. As per this agreement, the assessee has to render various services to Philips Electronics India Ltd., as set out in exhibit A in the agreement. The assessee has to maintain adequate supply of water to the commercial establishment. Clause 4.2 of the agreement on supply of water reads as follows:-

.....
“4.2 Electricity and Water Charges

a. The Client shall pay electricity charges levied by Bangalore Electricity Supply Company or any successor-in-interest or assign thereof ("BESCOM") at actuals, based on the connected load and in accordance with the relevant meter readings, or such other basis as agreed by the pares, to the Service Provider who shall, upon receipt, and in any event no later than the due date for payment, pay the monies received from the Client to BESCOM.

*b. The Client shall pay water charges levied by the Bangalore Water Supply and Sewerage Board or any successor-in-interest or assign thereof ("BWSSB")/ or any other parties supplying water at **actuals**, based on consumption and in accordance with the relevant meter readings, or such other basis as agreed by the parties, to the Set-vice Provider who shall, upon receipt, and in any event, no later than the due date for payment, pay the monies received from the Client to BWSSB/any other parties supplying water.”*

15. I find from the aforesaid clause in the agreement that the assessee has to supply water and the actual cost in providing water alone can be recovered by the assessee form the client. In other words, there is no element of consideration over and above the actual cost of procuring water are reimbursed by the client. In the ledger account of water charges, the total money paid or payable to M/s Gangothri

Water Supply was sum of Rs.33,92,698/-. Whereas the assessee has received from 3 of his clients for whom water was supplied, a sum of Rs.31,84,684/-. There is thus an excess sum of Rs.91,986/- received by the assessee. It is from this entry that the Revenue authorities have concluded that the assessee was getting a markup on supply of water. In my opinion this conclusion drawn by the Revenue authorities cannot be sustained. It is clear from the terms of the agreement between the assessee and his client that water charges will be recovered at actuals by the assessee from his clients. As to why there is difference between the amount received by the assessee from the clients and the amount paid to M/s Gangothri Water Supply was explained by the Id counsel for the assessee as an excess payment received which the clients did not claim from the assessee. In assessment year 2014-15, there is no such excess and the debit and credit in the water charges account tally. This proves the case of the assessee and there is no markup in procuring and supplying water by the assessee to his clients and, therefore, I am of the view that the contention put forth by the assessee that the water charges paid to M/s Gangothri Water Supply was never claimed by the assessee as a deduction in the profit and loss account and, therefore, the same cannot be subject matter of addition u/s 40a(ia) of the Act, has to be accepted. I am therefore of the view that the addition made in both the assessment years cannot be sustained and the same is directed to be deleted.

16. As far as the argument of the Id AR that the provision of sec. 194C of the Act are not attracted in a case of transaction of sale, I am of the view that the contentions to be put forth by the Id counsel for the assessee in this regard are also acceptable. Section 194C Explanation (iv) which defines 'work' for the sec. 194C of the Act specifically excludes supply of a product according to the requirements of the customers by using material purchased from a person other than such customers. Water in the present case was purchased by the assessee not from the customers but from a 3rd party and supplied to its clients. Therefore, the price paid for purchase of

water in my view cannot be construed as a payment for payment to a contractor for carrying out any work.

17. I am therefore of the view even on this basis the impugned disallowance u/s 40a(ia) of the Act cannot be sustained. I, therefore, allow the appeals of the assessee for assessment year 2013-14 and 2014-15 also.

18. As far as additional ground of appeal raised by the assessee is concerned, I am of the view that the return of loss(business loss and unabsorbed depreciation) filed by the assessee had to be considered by the AO and if the return of loss is accepted, the same should be allowed to be carried forward in accordance with law. Since in the present case, the addition in the assessment was only on account of disallowance u/s 40a(ia) of the Act and since such disallowance has been deleted, the loss returned by the assessee has to be accepted and the loss should be permitted to be carried forward for set off in future in accordance with provisions of the Act. I accordingly direct the AO to determine the loss and allow the carry forward of the loss in accordance with law.

19. In the result, both the appeals are allowed.

Order pronounced in the open court on **28th March, 2018.**

Sd/-
(N.V VASUDEVAN)
JUDICIAL MEMBER

Bangalore

Dated : 28/3/2018

Vms

Copy to :

1. The Assessee 2. The Revenue
- 3.The CIT concerned.
- 4.The CIT(A) concerned.
- 5.DR 6.GF

By order

Sr. Private Secretary, ITAT, Bangalore.

1. Date of Dictation
2. Date on which the typed draft is placed before the dictating Member
3. Date on which the approved draft comes to Sr. P. S.....
4. Date on which the fair order is placed before the dictating Member
5. Date on which the fair order comes back to the Sr. P.S.
6. Date of uploading the order on website.....
7. If not uploaded, furnish the reason for doing so
8. Date on which the file goes to the Bench Clerk
9. Date on which order goes for Xerox & endorsement.....
10. Date on which the file goes to the Head Clerk
11. The date on which the file goes to the Assistant Registrar for signature on the order
12. The date on which the file goes to dispatch section for dispatch of the Tribunal Order
13. Date of Despatch of Order.