



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

BEFORE SHRI R.C.SHARMA, AM

&

SHRI RAM LAL NEGI, JM

ITA No.4872/Mum/2015

(Assessment Year: 2012-13)

ITA No. 4340/Mum/2015

(Assessment Year: 2010-11)

&

ITA No. 4873/Mum/2015

(Assessment Year: 2011-12)

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| Dy. Commissioner Income Tax – 14(1)(2), Room No.475, 4 th Floor Aayakar Bhavan M.K. Road Mumbai – 400 020 | of | Vs. | M/s. Commtel Networks Pvt. Ltd., 23, White Castle, 34-35, Union Park Chembur, Mumbai – 400 071 |
| PAN/GIR No. | | | AAACC8966G |
| Appellant) | | .. | Respondent) |

| | |
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| Revenue by | Shri Rajat Mittal |
| Assessee by | Shri P. Daniel |
| Date of Hearing | 14/06/2018 |
| Date of Pronouncement | 19/06/2018 |

आदेश / ORDER

PER R.C.SHARMA (A.M):

These are the appeals filed by Revenue against the order of CIT(A)-22, Mumbai dated 12/06/2015 for the A.Y.2010-11, 2011-12 and 2012-13 in the matter of order passed i/s.143(3) of the Income Tax Act, 1961.

2. Common grievance of Revenue in all the years relates to deletion of addition made by AO on account of retention money.

3. Precise grounds taken by Revenue in the A.Y.2012-13 reads as under:-

1. *"On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the addition on account of retention money without appreciating the facts that the assessee had received the entire consideration and no contractual money was retained by its customers."*

2. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in relying on the decision of Hon'ble Bombay High Court in the case of M/s Associated Capsules P Ltd.286 ITR 596(BOM) in which the money was retained and hence the facts of the case are clearly distinguishable."*

3. *"The appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of appeal."*

4. *"The appellant prays that the order of CIT(A) on the above ground be set-aside and that of the assessing officer be restored."*

4. Rival contentions have been heard and record perused.

5. Facts in brief are that the assessee is primarily engaged in the business of design, engineering, integrated testing, supply, installation and commissioning of state of the art telecommunication systems. The assessee undertakes various turnkey projects for supply, engineering, integrated testing, installation and commissioning of high end telecommunication systems and related technology solutions for its valued customers across different industries like oil & gas, power, railways, etc.,

6. During the course of scrutiny assessment, A.O. had found that assessee had retention money in the books of accounts. Retention money

means when contractor executes the work of the contractee, contractee deducts certain amount of money for any contingency, this money will be retained with the contractee till the conditions are fulfilled after the completion of the work also. This amount is called as retention money. During the assessment year 2012-13 A.O. had found that in account amount of Rs.3,92,24,878/- was mentioned as retention money. Already A.O. had added Rs.57,94,454/- in the addition in A.Y.2009-10 and Rs.67,38,171/- is part of addition of A.Y.2011-12 after taking both the amounts from the retention money available in the accounts, A.O. had added Rs.2,66,92,253/- on the ground that retention money will be accruing to the assessee and it has to be assessed in this assessment year.

7. By the impugned order, CIT(A) deleted the addition after observing as under:-

3.3 I have considered the facts and circumstances of the case. During the year under consideration A.O. had added Rs.2,66,92,253/- of retention money which is in the accounts of the appellant on the ground that as appellant had completed this contract the retention money has to be assessed only in the year when the contract was completed. As this contract were completed in which retention money was held by the contractee, this money will be accrued to the appellant according to A.O. However, appellant in its submissions states that retention money accrues only when it is paid by the contractee to them. Further appellant relied on Bombay High Court decision where identical issue was discussed in the case of CIT vs. Associated Cables P. Ltd. 286 ITR 596 (Bom) wherein it is held as under;

"In this case Hon'ble Bombay High Court dismissed the Revenue's appeal holding as under:

2. *The question of law sought to be raised in this appeal is as to whether the retention money could be considered to be income of the assessee in the year in which the amount was retained. The Tribunal has referred to a judgement of the Tribunal in Associated Cables (P) Ltd. vs. Dy. CIT (1994) 49 TTJ (Bom)(TM) 191 : (1994) 206 ITR 48 (Bom)(TM)(AT). Mr. Sathe appearing for the respondent has however, drawn our attention to two judgements viz. of Calcutta High Court and the Madras High Court. The Calcutta High Court judgement is reported in the case of CIT vs. Simplex Concrete Piles (India) P. Ltd.(1989) 79 CTR (Cal) 71: (1989) 179 ITR 8 (Cal). A division Bench of the Calcutta High Court in that matter has held that the payment of retention money in the case of contract is deferred and is contingent on satisfactory completion of contract work. Right to receive the retention money is accrued only after the obligations under the contract are fulfilled and, therefore, it would not amount to an income of the assessee in the year in which the amount is retained. The other judgement relied upon is in the case of CIT vs. Ignified Boilers (I) Ltd. (2006) 203 CTR (Mad) 458 : (2006) 283 ITR 295 (Mad). In that judgement also, a Division Bench of the Madras High Court has held that the amount retained does not accrue to the assessee and therefore, the assessee would not be liable.*

23. *In view of what is stated above, there is no reason to entertain the appeal. Appeal is dismissed." ' (Emphasis Supplied)*

The aforesaid appeal arose from the Tribunal's order in Associated Cables (P) Ltd. vs. DOT CIT (2994) 48 ITD 141 (Bom)(TM), wherein the assessee, a manufacturer of speciality cables, was to receive 90% of the sale price upon dispatch of goods and the balance 10% was to be released by its customers against a performance bank guarantee covering the warranty period. On these facts, the assessee claimed that though the 10% of the sale value was received by it on furnishing a bank guarantee, the same did not accrue to it as there was no unconditional right to receive that amount because of the significant risk arising from the contingency of the buyer invoking the bank guarantee. When the matter reached the Hon'ble Tribunal, there was a cleavage of opinion between the two learned Members constituting the Bench. While the learned Judicial member held against the assessee the learned Accountant Member held in favour of the assessee. On a

reference to the Third Member it was held as under: ".....,/ have to agree with the learned Accountant Member that as long as the performance guarantee remains and is enforceable without notice to the assessee, the income from the retention money cannot be recognized. Consequently, I have to agree with the learned Accountant member that the retention money of 10% has to be excluded in computing the total income under the period of guarantee is over....."

(Emphasis Supplied)

*Following the above decision of Bombay High Court which referred various decision of the other Courts where it held that right to receive retention money accrued only after the conditions under the contract are fulfilled, it will not accrue till that conditions are fulfilled. This income will be assessed as assessee's income only when contractee fulfills all the conditions of the contract and pays the amount. In view of the above decision of the various High Courts, addition of the retention money of Rs. 2,66,92,253/- is deleted. This ground of appeal is **allowed**.*

8. Revenue is in further appeal before us against the above order of CIT(A).

9. It was argued by learned DR that retention money was duly received by the assessee against the bank guarantee, therefore, CIT(A) was not justified in deleting the same. Reliance was placed on the decision of Co-ordinate Bench in case of Emerson Network Power India Pvt. Ltd., 27 SOT 593, wherein it was held that retention money accrued in the year the work is completed, accordingly the same is liable to tax in the very same year.

10. Learned DR further invited our attention to the decision of Bombay High Court in the case of Associated Capsules Pvt. Ltd., 286 ITR 596, by relying on which, the CIT(A) has deleted the addition. Learned DR further

contended that Co-ordinate Bench in case of Emerson Network Power India Pvt. Ltd., (supra) have duly considered the decision of Bombay High Court and after considering the same decided the issue in Revenue's favour. Accordingly, he prayed that order of the AO should be upheld.

11. On the other hand, learned AR firstly argued on the principle of consistency and contended that from the Asst. year 2003-04 to A. Y. 2009-10, the assessee's method was accepted by the department and in Asstt. Year 2004-05 there was a Scrutiny assessment. As per learned AR even though Res judicata does not apply to tax proceedings. Again each assessment year being a Unit, what is decided in one year may not apply in the following year, but where a fundamental aspect permeating through the different Assessment Years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not at all be appropriate to allow the position to be changed in a subsequent year". Parashuram Pottery Works Ltd. v. I.T.O. (1977) 106ITR 1 (SC). Quoted in C.I.Tv. Excel industries Ltd (2013) 38 Taxman.com (SC) (P.B. page 34 at page 40). Also relies on C.I.T. v. Gopal Purohit (2011) 336 ITR 287 (Bom).

12. Further, learned AR argued on the accrual of income in respect of retention money and contended that it has been held by a number of Courts that Retention Money accrues only when the performance period

has been successfully completed and the Bank guarantees have been released. Reliance was placed on the following cases:

- 1. C.I.T. v. Associated Cables Ltd. (Bombay H.C.) (2006) 286 ITR 596 (Bom)*
- 2. Associated Cables P. Ltd. v. Dy. C.I.T. (1994) 48 ITR 596 (Bom) (TM)*
- 3. Amarshiv Construction (P). Ltd. v. Dy. C.I.T. (2014) 45 Taxmann.com 429 (Guj)*
- 4. C.I.T. v. Ignifluid Boilers (I) Ltd. (2006) 283 ITR 295 (Mad)*

13. He further argued that there is no tax loss to the Revenue (Year of Taxability not material). The assessee is in 30% bracket all along. Earlier year's retention is taxed in this year and this year's retention is taxed in the subsequent years. Hence there is no loss of revenue. In this connection learned AR relied on 1. C.I.T. v. Excel Industries Ltd (2013) 358 ITR 295 (SC) 2. C.I.T. v. Nagri Mills Co. Ltd. (1958) 33 ITR 681 (Bom)

14. He further argued on the effect of accounting treatment and contended that if the income does not result at all, they cannot be taxed. For this purpose reliance was placed on the decision of Supreme Court in case of Kedarnath Jute Mfg. Co. Ltd., (1971) 82 ITR 363, Birla Gwalior Pvt. Ltd., (1973) 89 ITR 266, 273(SC) and Sulej Cotton Mills Ltd., (1979) 116 1,5. Reliance was also placed on the decision of the Hon'ble Supreme Court in the judgement delivered on 23.03.2015 in Taparia Tools Ltd. v. CIT [Civil Appeal No. 6366-6368 of 2013] reiterated the

above principles. It is well settled that income is to be computed as per the provisions of the law, and it is not necessary that law should follow the footsteps of accountancy. Income-tax law does not march step by step in the divergent footprint of the accountancy profession. [See - Tuticorin Alkali Chemicals & Fertilizers Ltd. v. CIT (1997) 227 ITR 172 (SC)]. He further contended that the facts of the assessee's case are distinguishable from the facts of the decision in case of Emerson Network Power India Pvt. Ltd., (supra) as relied on by learned DR, and are more closure to the facts of M/s. Associated Cables Pvt. Ltd., (supra) and Commtel Networks Pvt. Ltd., (supra). The distinguishing features of the assessee's case vis-à-vis the case relied by learned DR and AR was indicated as below.

| | Associated Cables Pvt. Ltd. | Commtel Networks Pvt. Ltd. | Emerson Network |
|-----------------------------|--|--|---|
| Nature of business/activity | Manufacture of instrumentation cables for the specification of the customers | Design, engineering, integration, testing, supply, installation and commissioning state of the art telecommunication system as per customers' specific requirements. | Manufacturing and supplying standard equipment (UPS) without receiving specifications from the customers |
| Terms of contracts | - 10% of the price on acceptance of contract; - 80% of the price on presentation of the despatch documents of the goods; | - Terms of contract varies from project to project, payments are made on milestone basis, but typically, in such projects 10% of the total contract value is | - In spite of the promise made to the Hon'ble Bench, the assessee did not produce tender documents or other terms and conditions of |

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| | -Balance 10% on receipt and acceptance of the goods subject to a performance and workmanship bank guarantee. | either actually retained until the expiry of the defect liability period; or alternatively, released on furnishing irrevocable Performance Bank Guarantee of equivalent amount that would expire after defect liability period. | supplies and installations and commissioning. Hence, specific terms of contracts are not borne out of the Tribunal's order. - However, as noted by the Hon'ble Bench, as per the Purchase Order, the assessee was entitled to 100% of the payment after pre-despatch inspection of goods at works. - Installations and commissioning charges were also paid at the time of supply |
| Impact of AS-9 | The Hon'ble TM referred to AS-9 on 'Revenue Recognition' - particularly Para 11 (ii) and held that even though the assessee had received the balance amount of 10%, the bank guarantee for performance clearly shows that the receipt was at the risk of losing the amount if there was any defect. | Facts in the assessee's case are identical to those in the case of Associated Cables (supra) | Since the assessee has received the full payment, there is no uncertainty as to ultimate collection of the amount though it has given performance bank guarantee. Therefore, the Tribunal held that as per AS-9, revenue was to be recognized. This view is contrary to the TM decision in Associated Cables (supra). As per Delhi High Court, judgment in P.C. Puri vs. CIT 151 ITR 584, a decision |

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| | | | rendered by TM has force of decision of SB |
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15. We have considered rival contentions and carefully gone through the orders of the authorities below. We had also deliberated on the various judicial pronouncements referred by lower authorities in their respective orders as well as cited by learned AR and DR during the course of hearing before us in the context of factual matrix of the case. Only the issue for our consideration is as to year in which retention money to be taxed (Retention money of 10% of Contract Value) to be taxed in the year of completion of contract or when the performance guarantee period is over and the contractee releases the payment.

16. We had carefully gone through the terms of contracts executed by the assessee with contractee i.e., ONGC. The contracts show that the right to receive the retention money of the respective projects, did not accrue to, or vest in, the assessee during the previous year ended 31.3.2012, because the same in terms of time fell beyond that year. Therefore, the retention moneys did not accrue to the assessee during that year, notwithstanding the accounting as revenue in the books of account on completion of work of the respective projects. Accordingly, considering the terms of the contract, unless assessee satisfies the customers as to the performance of the work, during the pre-fixed period after completion

of the contract, the assessee has no right to receive retention money. However, AO has failed to appreciate the legal position and erroneously comparing this legal obligation in a manner to post sale warranty obligations. In the post sale warranty obligations the suppliers right to receive the sale consideration is never at stake because he fully collects the same at the time of completion of sale; nor does he give any performance bank guarantee to the customer. His only obligation is to provide after-sales service, and in case he falls therein, the only recourse to the customer is to sue him for the damages; there is absolutely no impact whatsoever on the accrual of sale consideration. But in the assessee's case the client either physically retains the retention money or gets PBG in lieu thereof, which he can unilaterally invoke even without recourse to the assessee and recover the retention money directly from the bank. The conditions of the PBG would clearly show the assessee's precarious position vis-a-vis the customer in this matter. The assessee had submitted relevant terms & conditions of PBG issued by Citi bank to ONGC. Accordingly, even though retention money is physically released against the PEG, the risk does not abate until the PEG expires or is cancelled by the customer. Therefore, during this period the assessee does not have right to receive the retention money as contemplated in the judgement in E. D. Sassoon Ltd. (supra) therefore, there was no

accrual qua the retention money in the previous year relevant to the A. Y.2012-13.

17. As per our considered view, the Accounting treatment given by the assessee in its books of account cannot decide the accrual of income in law. It is now well settled that accounting entries are not determinative of taxability of income or deductibility of any expenditure. A mere book keeping entry cannot be income unless income has actually resulted. If income does not result at all, there cannot be a tax, even though in book keeping an entry is made about a hypothetical income. Various judicial pronouncements cited by learned AR as quoted above support this contention. Furthermore, income is to be computed as per the provisions of law, and it is not necessary that law should follow the footsteps of accountancy. Income-tax law does not march step by step in the divergent footprint of the accountancy profession - Tuticorin Alkali Chemicals & Fertilizers Ltd. vs. CIT (1997) 227 ITR 172 (SC).

18. In view of the above, merely because retention money was accounted for in the books of accounts that same cannot be brought in the tax net without income having been accrued to the assessee. Furthermore, the assessee is consistently following the above practice for the retention moneys year after year since the A. Y.2003-04 and onwards. In the A. Y.2004 05, the then AO after examining the claim in detail and on consideration of detailed submissions, accepted the same. For the

first time in A.Y.2010-11 **this claim was** rejected. It is true that the principles of res judicata do not apply **to tax** assessments, yet there ought to be uniformity of treatment and consistency when facts and circumstances are identical. In this context reliance is placed on the decision of the Hon'ble Bombay High Court in CIT vs. Gopal Purohit (2011) 336ITR 287 (Bom).

19. After comparing the early return income of the assessee vis-à-vis rate of tax, even after exclusion of retention money does not confer on the assessee any permanent" tax benefit, but it is only a deferment of tax liability. There is no issue that it is taxable / income; the only crucial question is whether it is taxable in the year in which (the relevant work is completed, or in the year in which it accrues to the assessee as per the law when the right to receive vest in it. In other words, this issue is whether the sum is taxable in one or the other year. Such an issue, really speaking, is not material in case of a company, where the income is always taxed at a flat rate.

20. While deciding the issue, the CIT(A) has relied on the decision of Bombay High Court in case of Associated Cables Pvt. Ltd., wherein also assessee was engaged in the very similar activity and retention money was held to be taxable only in the year of receipt and not in the year when the project is completed. In this case, Hon'ble Bombay High Court held that right to receive retention money accrued only after the

conditions under the contract are fulfilled, it will not accrue till that conditions are fulfilled. This income will be assessed as assessee's income only when contractee fulfills all the conditions of the contract and pays the amount.

21. We are also in agreement with the contention of learned AR that principle of consistency is required to be followed unless facts are different in subsequent years. In the instant case before us, we found that from the assessment year 2003-04 to the assessment year 2009-10, assessee's method was accepted by the Department, moreover in the A.Y. 2004-05, there was scrutiny assessment wherein after having a detailed discussion, the CIT(A) accepted assessee's contention regarding retention money. Even for each assessment year being separate unit, what is decided in one year may not apply in the following year, but where a fundamental aspect permeating through the different Assessment Years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not at all be appropriate to allow the position to be changed in a subsequent year". Parashuram Pottery Works Ltd. (1977) 106ITR 1 (SC). Excel industries Ltd (2013) 38 Taxman.com (SC) and Gopal Purohit (2011) 336 ITR 287 (Bom).

22. Furthermore, in addition to the Hon'ble Bombay High Court in the case of Associated Cables Ltd., (supra), Gujarat High Court in case of

Amarshiv Construction (P) Ltd., 45 Taxmann.com 429 and Madras High Court in case of Ignifluid Boilers (I) Ltd., 283 ITR 295 and also in the case of East Coast Constructions Ind. Ltd., 160 Taxmann 399 held that retention money accrues only when the performance period has been successfully completed and the Bank guarantees have been released. We categorically observe that the facts of the assessee's case is identical to that of the case of the Associated Cables Ltd. Associated Cables were also doing manufacturing Cables as per specifications of the Contractee. Assessee is involved in Design, Engineering, integration, testing, supply, installation and commissioning state of the art telecommunication system as per customers' specific requirements. Every fact is identical to the facts of the case of Associated Cables Ltd is identical to the facts in respect of assessee's case.

23. Furthermore, we observe that assessee is in the 30% bracket in all the years under consideration. Earlier years retention money is taxed in this year and this year's retention is taxed in the subsequent years. Hence there is no loss of revenue. Therefore, the treatment adopted by the assessee should not be declined. Our view is supported by the decision of Hon'ble Supreme Court in case of Excel Industries Ltd., 358 ITR 295 and by the Jurisdictional High Court in case of Nagri Mills Co. Ltd., 33 IT 681. Furthermore, we also observe that the accounting treatment given by the assessee in its Books of account cannot decide the accrual of income in

law. It is now well settled that accounting entries are not determinative of taxability of income or deductibility of any expenditure. A mere book keeping entry cannot be income unless income has actually resulted. If income does not result at all, there cannot be a tax, even though in book keeping an entry is made about a 'hypothetical income.'

24. The decision of Hon'ble Supreme Court in case of Shoorji Vallabhdas & Co., 46 ITR 144, Kedarnath Jute Mfg. Co. Ltd., (1971) 82 ITR 363, Birla Gwalior Pvt. Ltd., (1973) 89 ITR 266, 273(SC) and Sulej Cotton Mills Ltd., (1979) 116 1,5 supports our contention. Further recent decision of Hon'ble Supreme Court in case of Taparia Tools Ltd., dated 23/03/2015 reiterated the above principle. In view of the above, merely because retention money is accounted for in the books of account, that by itself does not make it taxable in A.Y. 2010-11 when in law the same cannot be said to have accrued in that year as discussed above.

25. We further observe that the facts of the assessee's case and that of Associated Cables (supra) is identical as narrated below.

| Associated Cables Ltd. | Assessee |
|--|--|
| The assessee was a Company engaged in the manufacture of instrumentation cables as per the specifications of the Customers. | Assessee is involved in Design, Engineering, integration, testing, supply, installation and commissioning state of the art telecommunication system as per <u>customers' specific requirements</u> |
| The contract provided that 10% of the price shall be paid on acceptance of the Contract and 80% of the price on presentation of the despatch of goods and the balance 10% on receipt and acceptance of goods subject to a performance and workmanship Bank | Terms of Contract varies from project to project, payments are made on milestone basis, but typically, in such projects 10 % of the total contract value is either actually retained until the expiry of the defect liability period; or alternatively, released on furnishing irrevocable |

| | |
|------------------------|--|
| guarantee for that 10% | Performance Bank Guarantee of equivalent amount that would expire after defect liability period. |
|------------------------|--|

26. We had also carefully gone through the comparative features brought on record by learned AR that in respect to the facts of the instance case vis-à-vis the facts of Emerson Network Power India Pvt. Ltd., (supra) as relied on by learned DR, we are in agreement that the facts of Emerson Network Power India Pvt. Ltd., (supra) is distinguishable. In view of the above discussion, we do not find any infirmity in the order of CIT(A) for directing the AO to tax the retention money in the year of actual receipt and not in the year of completion of contract.

26. In the result appeal of the Revenue is dismissed.

27. The facts and circumstances in all the years under consideration are perimetiria, following the reasoning given hereinabove, we do not find any infirmity in the order of CIT(A).

28. In the result all the appeals of the Revenue are dismissed.

Order pronounced in the open court on this 19/06/2018

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 19/06/2018
Karuna Sr.PS

*ITA Nos.4872/Mum/2015,
4340/Mum/2015 & 4873/Mum/2015
M/s. Commtel Networks Pvt. Ltd.,*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai