

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "L", MUMBAI**

**BEFORE SHRI R.C. SHARMA, HON'BLE ACCOUNTANT MEMBER AND
SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER**

ITA NO.1485/MUM/2011 (A.Y: 2005-06)

M/s. B.S.R & Co.
Lodha Excellus, 1st Floor,
Apollo Mills Compound,
N.M. Joshi Marg, Mahalakshmi,
Mumbai – 400 011

v. A.C.I.T Circle – 11(2)
Aayakar Bhavan,
M.K. Road,
Mumbai-400 020

PAN: AAafb 9852 F

(Appellant)

(Respondent)

ITA NO.1068/MUM/2011 (A.Y: 2005-06)

A.C.I.T Circle – 11(2)
Room No. 479, 4th Floor
Aayakar Bhavan, M.K. Road,
Mumbai-400 020

v. M/s. B.S.R & Co.
Lodha Excellus, 1st Floor,
Apollo Mills Compound,
N.M. Joshi Marg, Mahalakshmi,
Mumbai – 400 011

PAN: AAafb 9852 F

(Appellant)

(Respondent)

**Assessee by : Shri Arijit Chakravarty &
Shri Abhishek Tilak**

Department by : Shri Saurabh Deshpande

Date of Hearing : 11.05.2018

Date of Pronouncement : 03.08.2018

ORDER**PER C.N. PRASAD (JM)**

1. These two appeals are filed by the assessee and the Revenue against the order of the Ld. Commissioner of Income Tax (Appeals) – 3, Mumbai dated 11.11.2010 for the Assessment Year 2005-06.

2. Assessee has raised the following grounds in its appeal: -

“1) *On the facts and circumstances of the case and in law the Commissioner of Income tax (Appeals) erred in upholding the disallowance under Section 40(a)(i) of the Income tax Act, 1961 of ₹.77,22,510/- being professional fees paid to KPMG LLP, United Kingdom.*

2) *On the facts and circumstances of the case and in law the Commissioner of Income tax (Appeals) erred in upholding the disallowance to the extent of ₹.1,00,000/- on an adhoc basis in respect of staff welfare expenses.*

3) *On the facts and circumstances of the case and in law the Commissioner of Income tax (Appeals) erred in upholding the disallowance of ₹.78,704/- being interest paid on service tax.*

4) *On the facts and circumstances of the case and in law the Commissioner of Income tax (Appeals) erred in upholding the disallowance of ₹.1,00,000/- on an adhoc basis in respect of miscellaneous expenses.*

5) *On the facts and circumstances of the case and in law the Commissioner of Income tax (Appeals) erred in upholding the disallowance of ₹.2,00,000/- on an adhoc basis in respect of seminars and conference expenses and meeting expenses.”*

3. The first ground of appeal is relating to upholding the disallowance made u/s. 40(a)(i) of the Income-Tax Act in respect of the professional fees of ₹.77,22,510/- paid to KPMG LLP, United Kingdom. At the outset,

Learned Counsel for the assessee submitted that identical issue arose for the Assessment Years 2004-05, 2007-08 & 2009-10 and the Tribunal by various orders deleted the disallowance u/s. 40(a)(i) of the Act. Ld. Counsel for the assessee invited our attention to the order of this Tribunal for the Assessment Year 2009-10 in ITA.No. 1917/Mum/2013 dated 06.05.2016 which is reported as ACIT v. BSR & Co. [70 taxmann.com 69] and submitted that the Tribunal held that, KPMG LLP, United Kingdom does not have permanent establishment in India and therefore assessee is not liable to deduct TDS on such payments and hence no disallowance u/s. 40(a)(i) is warranted.

4. Ld. DR fairly submitted that the issue has been decided in favour of the assessee.

5. On hearing the rival submissions and on a perusal of the Tribunal order in assessee's own case for the Assessment Year 2009-10, we find that identical issue came up before the Tribunal and the Tribunal in its order in Para No. 5 and Para No. 5.1 held as under: -

"5. In the above background, we have carefully considered the rival submissions. Pertinently, the issue revolves around the payments made by the assessee to certain non-resident entities for professional services rendered by them outside India. It has been consistently explained by the assessee that the services of such entities were availed during the course of the execution of engagements of assessee firm. The assessee firm did not deduct the tax at source and, therefore, the Assessing Officer invoked the provisions of section 40(a)(i) of the Act and disallowed such expenditure. The details of the entities alongwith the amounts paid

have been culled out by the Assessing Officer in Para-3 of the assessment order and the same is not being repeated for the sake of brevity. The payments have been made to 12 different professional entities based in 10 different countries. In so far as the payments that are made to KPMG LLP, USA and KPMG LLP, Canada are concerned, the same has been made on account of professional services rendered in relation to taxation and transfer pricing. Undisputedly, the professional services have been rendered by the aforesaid entities outside India. The stand of the Revenue is that such services are in the nature of 'fee for technical services' and, therefore, tax was liable to be deducted at source in India. Factually speaking, the aforesaid stand of the Revenue is devoid of any support because there is no material to establish that any technical knowledge, skill, etc. has been made available to the assessee so as to consider it as falling within the purview of Article-12 of Indo-US Double Taxation Avoidance Agreement. It is also an established fact that such non-resident recipients do not have permanent establishment in India and, therefore, in the said background the same can, at best, be treated as independent personal services covered by Article-15 of the Indo-US Double Taxation Avoidance Agreement. As a consequence, and in the absence of any fixed base in India, such income cannot be held chargeable to tax in India so as to require deduction of tax at source. Therefore, invoking of section 40(a)(i) of the Act to disallow such expenditure is not tenable.

5.1 In so far as payments to KPMG LLP, UK and KPMG USMCG Ltd. UK are concerned, herein also the said entities do not have permanent establishment in India. The CIT(Appeals) has found that such entities are eligible for the benefit of Article -15 of Indo-US Double Taxation Avoidance Agreement dealing with independent personal services and hence, payments are not chargeable to tax in India so as to require deduction of tax at source. The aforesaid findings have not been disputed before us on the basis of any cogent material and, therefore, we hereby affirm the same. Consequently, invoking of section 40(a)(i) in the context of aforesaid payments is also not justified.”

6. As could be seen from the above the Tribunal considered the payment made to KPMG LLP, UK and KPMG USMCG Ltd. UK and the liability to deduct TDS on such payment and the Tribunal held that the said entities do not have permanent establishment in India and Ld.CIT(A) found that such entities are eligible for the benefit of Article-15 of the Indo-US Double Taxation Avoidance Agreement dealing with independent

personal services and therefore payments are not chargeable to tax in India so as to require the assessee to deduct TDS on the professional charges paid to the above entities. Facts being identical respectfully following the said decision we allow the Ground No.1 of the assessee.

7. In so far as the ground Nos. 2, 4 & 5 are concerned Ld. Counsel for the assessee submitted that an adhoc disallowance was made by the Assessing Officer on the expenses incurred by the assessee towards staff welfare, seminars/conferences and meetings expenses and miscellaneous expenses which was upheld by the Ld.CIT(A).

8. Learned Counsel for the assessee submitted that the Assessing Officer did not doubt the genuineness of the expenses but an adhoc disallowance was made only for the reason that the assessee could not furnish the complete vouchers and bills. Ld. Counsel for the assessee submitted that the total staff welfare expenses incurred by the assessee was to the tune of ₹.72,39,561/- out of which ₹.2,00,000/- was disallowed by the Assessing Officer. Learned Counsel for the assessee submitted that assessee furnished details in respect of expenses incurred for more than ₹.1,50,000/- which amounted to 98.25% of the total amount and the balance constitute only 1.75% which was stated as the "other amounts". The Assessing Officer did not call for details on "other amounts" and the

disallowance made by the Assessing Officer is without any specific finding and only based on surmises and conjectures. Similarly, he submitted that the adhoc disallowance of ₹.1,00,000/- each made from Miscellaneous expenses and Seminars/Conference and meetings expenses without any specific finding that the particular expenditure was not incurred for the purpose of business but only made observation that proper bills and vouchers were not furnished. Ld. Counsel for the assessee placed reliance on the decision of the Agra Bench of the Tribunal in the case of PNC construction Co. Ltd., v. DCIT [144 ITD 577] and the decision of the Hon'ble Gujarat High Court in the case of CIT v. Vallbh Glass Works Ltd., [38 taxmann.com 177] in support of his contentions.

9. Ld. DR vehemently supported the orders of the authorities below.

10. We have heard the rival submissions, perused the orders of the authorities below and the case laws relied on. On a perusal of the Assessment Order, we find that adhoc disallowance from the heads staff welfare, miscellaneous expenses, seminars/conference and meetings expenses was made by the Assessing Officer observing that complete vouchers were not furnished other than this observation there is no specific finding by the Assessing Officer that the expenses was not incurred by the assessee for the purpose of business nor the genuineness

of the expenses was doubted by him. We also find that there is no specific allegation by the Assessing Officer as to which item or for which expenditure the vouchers were not produced other than a general observation that complete details were not furnished.

11. In the case of PNC construction Co. Ltd., v. DCIT (supra) the Tribunal held that mere failure to file relevant vouchers as required by the Assessing Officer cannot be the basis for making disallowance unless it is found that the expenditure was not incurred wholly and exclusively for the purpose of business.

12. In the case of CIT v. Vallbh Glass Works Ltd., (supra) the Hon'ble Gujarat High Court held that no question of law arose for consideration on merits on the decision of the Tribunal wherein the Tribunal upheld the order of the Ld.CIT(A) who has held that when the audited accounts were available with regard to the expenses claimed by the assessee and in the absence of any adverse comments of the auditors no disallowance out of such expenses should be made.

13. In view of the above and in the absence of any specific defects pointed out by the Assessing Officer in making adhoc disallowance other than general observation that complete vouchers were not furnished, we hold that there should not be any disallowance on adhoc basis, thus we

direct the Assessing Officer to delete the adhoc disallowance made towards staff welfare, miscellaneous expenses, seminar/conference and meetings expenses. Ground Nos.2, 4 & 5 are allowed.

14. Coming to Ground No.3, Ld. Counsel for the assessee submitted that Assessing Officer disallowed interest paid on service tax observing that the same is penal in nature and not an allowable expenditure and the same is upheld by the Ld.CIT(A). Ld. Counsel for the assessee placing reliance on the decision of the Delhi Bench in the case of DCIT v. Messee Dusseldorf India (P.) Ltd., [129 TTJ 81] and the decision in the case of M/s. Remfry & Sugar Consultants v. ACIT in ITA.No. 5887/Del/2011 dated 20.07.2012, submitted that the Tribunal considered similar issue as to whether the interest paid for delay in payment of service tax would amount to penalty for infraction of law or is only compensatory and allowable as deduction in computing the income of the assessee and held that, interest paid by the assessee for the delayed payment of service tax is compensatory and has the same character as service tax and therefore same is allowable as deduction.

15. Ld. DR vehemently supported the orders of the authorities below.

16. We have heard the rival submissions, perused the orders of the authorities below and the case laws relied on. Assessing Officer while

completing the assessment noticed that assessee made payment of interest for delay in payment of service tax and this was disallowed by the Assessing Officer observing that the same is penal in nature and not an allowable expenditure which was confirmed by the Ld.CIT(A). Before us, it is contended that such interest payment on delayed remittance of service tax is only compensatory in nature and is supported by the decision of the Delhi Bench. On a perusal of the decisions relied on by the Ld. Counsel for the assessee, we find that the Tribunal held that interest on service tax is compensatory in nature and not penal in nature and is therefore allowable expenditure. On a perusal of the Explanation to Section 37(1) of the Act which says that any expenditure incurred by an assessee for any purpose which is an offense or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or professions and no deduction or allowance shall be made in respect of such expenditure. Here the assessee made payment of interest for the delay in payment of service tax which in our considered view it is not an expenditure incurred for the purpose of any offence or prohibited by law. Thus, respectfully following the said decision we direct the Assessing Officer to delete the disallowance made towards interest for delay in payment of service tax. Ground No. 3 is allowed.

17. Coming to the appeal of the Revenue the grounds are as under: -

- “1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) Mumbai has erred in deleting the addition of Rs. 2,96,82,130/-and Rs.1,30,98,983/- made on account of cash calls and professional indemnity insurance respectively.
2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) Mumbai has erred in depriving the AO to exercise his power under Rule 46A while accepting new evidence regarding Brokers confirmation.
3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) Mumbai has erred in coming to the conclusion that the services rendered by KPMG International Ltd. are not taxable under Indo-UK DTAA.
4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) Mumbai has erred in coming to the conclusion that there is no element of income in the remittance made to M/s. KPMG International.
5. The appellant prays that the order of CIT(Appeals) on the above grounds be set aside and that of the Assessing Officer restored.”

18. At the time of hearing both the parties fairly submitted that the issue in appeal is decided in favour of the assessee in assessee's own case in ITA.No. 2493/Mum/2012 & CO. No. 97/Mum/2013 dated 07.04.2017 for the Assessment Year 2001-02. In view of the submissions of both the parties the grounds raised by the Revenue are dismissed.

19. In the result, appeal of the assessee is allowed and appeal of the Revenue is dismissed.

Order pronounced in the open court on the 03rd August, 2018

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

Mumbai / Dated 03/08/2018
Giridhar, SPS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

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.

//True Copy//

BY ORDER

(Asst. Registrar)
ITAT, Mum