

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH 'C' KOLKATA

[Before Hon'ble Shri S.S.Godara, JM & Dr.A.L.Saini, AM]

ITA No.1741/Kol/2016
Assessment Years : 2008-09

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|---------------------------------------------------------------------------------|----------|-------------------------------------------------------|
| M/s Boulevard Services Pvt. Ltd. Kolkata (PAN: AABCB0666P) (Appellant) | -versus- | A.C.I.T., Circle-2(1), Kolkata (Respondent) |
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ITA No.1577/Kol/2017
Assessment Year : 2008-09

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|-------------------------------------------------------|----------|--------------------------------------------------------------------------------|
| A.C.I.T., Circle-2(1), .Kolkata (Appellant) | -versus- | M/s Boulevard Services Pvt.Ltd Kolkata (PAN: AABCB0666P) (Respondent) |
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ITA Nos.2070/Kol/2016
Assessment Year : 2008-09

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| A.C.I.T., Circle-2(1), Kolkata (Appellant) | -versus- | M/s Boulevard Services Pvt.Ltd Kolkata (PAN: AABCB0666P) (Respondent) |
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ITA Nos.1742&1743/Kol/2016
Assessment Years: 2009-10 & 2010-11

| | | |
|---------------------------------------------------------------------------------|----------|-------------------------------------------------------|
| M/s Boulevard Services Pvt. Ltd. Kolkata (PAN: AABCB0666P) (Appellant) | -versus- | A.C.I.T., Circle-2(1), Kolkata (Respondent) |
|---------------------------------------------------------------------------------|----------|-------------------------------------------------------|

ITA Nos.1752& 1753/Kol/2016
Assessment Year : 2009-10 & 2010-11

| | | |
|------------------------------------------------------|----------|--------------------------------------------------------------------------------|
| A.C.I.T., Circle-2(1), Kolkata (Appellant) | -versus- | M/s Boulevard Services Pvt.Ltd Kolkata (PAN: AABCB0666P) (Respondent) |
|------------------------------------------------------|----------|--------------------------------------------------------------------------------|

For the Department: Shri G.Mallikarjuna, DR & Shri Saurabh Kumar, Addl.CIT, Sr.DR
For the Assessee: Shri A.K.Tibrewal, FCA

Date of Hearing : 12.07.2018.
Date of Pronouncement : 24.08.2018.

ORDER

PER S.S.GODARA, JM:

The instant batch is of seven cases. We start with first A.Y.2008-09. The assessee and Revenue have filed their cross appeals ITA 1741/Kol/2016 and ITA No.1577/Kol/2017 against the CIT(A)-11, Kolkata's order dated 02.08.2016 passed in Appeal No.ITA No.517/CIT(A)-11/Cir.-8/R&T/14-15/Kol involving proceedings u/s 143(3) of the Income Tax Act, 1961 (the 'Act') . The Revenue's latter appeal ITA No.1577/Kol/2017 arises from the very CIT(A)'s order dated 02.08.2016 in appeal No. ITA No.517/CIT(A)-11/Cir.-8/R&T/14-15/Kol involving the same nature of assessment proceedings. Next assessment year 2009-10 involves assessee's and Revenue's cross appeals arising against the CIT(A)-11, Kolkata's order dated 30.06.2016 passed in Appeal No.518/CIT(A)-11/14-15/Cir.8/R&T/Kol involving regular assessment proceedings. The next assessment year is A.Y.2010-11 contains assessee's and Revenue's cross appeals ITA No.1743/Kol/2016 and 1753/Kol/2016 directed against the very same CIT(A)-11, Kolkata's order dated 30.06.2016 passed in 519/CIT(A)-11/14-15/Cir.8/R&T/Kol involving similar regular assessment proceedings.

Heard both the parties. Case files perused.

We proceed assessment year wise for the sake of convenience and brevity.

A.Y.2008-09 :-

2. We come to assessee's appeal ITA No.1741/Kol/2016. Its first substantive ground pleads that the CIT(A) has erred in law as well as on facts in disallowing lease

tax of Rs.8,76,283/- u/s 43B of the Act. The ld. Counsel states very fairly that the tax payer does not wish to press its instant first substantive ground. The same is therefore declined as not pressed.

3. The assessee's second substantive ground challenges correctness of both the lower authorities assessing its interest income of Rs.36,03,129/- derived from its associate companies to be assessable as income from other sources than as business income; in the course of assessment and the lower appellate proceedings. Page-5 para-3.7 reveals that the CIT(A) affirms the assessment findings to this effect that the impugned interest income taxable as income from other sources. Learned counsel vehemently contends during the course of hearing that the assessee had advanced monies in question to its group sister concerns during the course of regular business only culminating in the interest income under issue which is to be taxed under the head business income only. He quotes hon'ble apex court's decision in C.A.74/2007 dated 16.09.2015 CIT vs Dalmia Promoters & Developers (P)Ltd. We find no force in the tax payers instant substantive grievance. It emerges first of all that there is no material on record indicating such interest to be assessee's business activity as per its object clauses. There is no evidence before us as to whether the transaction in question had made in trading head or not. We make it clear that the hon'ble Gujarat High Court in (2006) 283 ITR 402 Nirma Industries vs DCIT holds that interest on trading transaction forms very much part of revenue activity. No such facts however are forthcoming from the instant case file. Assessee's reliance on hon'ble apex court's decision hereinabove is also without any merit. The said appeal before their lordships arose from hon'ble Delhi high court's decision in CIT vs Dalmia Promoters Developers Pvt. Ltd. [2006] 281 ITR 346 (Delhi) wherein the concerned assessee had very much demonstrated in para-5 that the interest income in issue was an integral part of its business activity since having direct link with real estate business representing margin money and change of land use. We make it clear that there are no such facts emanating from the case records. We therefore uphold both the lower authorities action treating the assessee's interest income as income from other sources. We also

direct the Assessing Officer to apply netting formula in assessment of the impugned interest income as per law after affording adequate opportunity of hearing to the tax payer.

4. The assessee's next substantive grievance as pleaded in its 3rd to 5th substantive ground is that the CIT(A) has erred in dismissing its additional ground raised with regard to suo moto disallowance of interest and fee of Rs.6,40,58,418/- made inadvertently while filing the return for the impugned assessment year mainly on the ground that no such issue arose from the assessment order dated 31.12.2010. Both the learned representatives are in unison during the course of hearing that the CIT(A) has followed his detailed discussion in latter two assessment years findings. We are then taken to the lower appellate order in the said latter two assessment years. The said findings also reject the assessee's plea against identical suo moto action computing disallowance/interest of Rs.85794,105/- in A.Y.2009-10 and Rs.98926318 in A.Y.2010-11 regarding interest on loans for the purpose of its business. The Revenue's vehement contention before us is that such an additional ground cannot be allowed to be raised in lower appellate proceedings since there is no disallowance in assessment order to this effect. We find no merit in the instant arguments raised at Revenue's behest. We first of all make it clear that the tax payer's claim is that the amount in question had been wrongly capitalised as cost of investment of unquoted shares as per Accounting Standard (AS-16). It is an admitted fact that the same has not been entertained at all by the CIT(A) so as to culminate into any detailed discussion on merits. The question as to whether an assessee can raise such additional ground for the first time during the course of lower appellate proceedings or not has already been adjudicated by hon'ble Gujarat high court in CIT vs Mitesh Impex 270 CTR 66 as follows :

"5. Having heard learned counsel for the parties and having perused documents on record, we do not see any error in the view of the Tribunal. The question of disallowance under section 14A of the Act has been examined on the basis of materials on record. The Tribunal found that the assessee's interest free funds

far exceeded its interest free investments. The Tribunal relied on the decisions of this

court in case of this very assessee concerning similar issues in the later assessment years, against which we are informed that the Special Leave Petition has been dismissed.

6. Regarding a claim contrary to the disclosures in the return, the Tribunal relied on the decision of Supreme Court in the case of the National Thermal Power (supra) to observe that the purpose of assessment is to tax real income. This court taking note of the decisions of Supreme Court in case of Goetze India Limited v. CIT, reported in 284 ITR 323 and National Thermal Power (supra) a in case of Mitesh Impex had observed as under:

“38. It thus becomes clear that the decision of the Supreme Court in the case of Goetze (India) Ltd. vs. Commissioner of Income-tax (supra) is confined to the powers of the assessing officer and accepting a claim without revised return. This is what Supreme Court observed in the said judgment while distinguishing the in the case of National Thermal Power Co. Ltd. vs. Commissioner of Income-tax (supra) and that is how various High Courts have viewed the dictum of the decisions in the case of Goetze (India) Ltd. vs. Commissioner of Income-tax (supra). When it comes to the power of Appellate Commissioner or he Tribunal, the Courts have recognised their jurisdiction to entertain a new ground or a legal contention. A ground would have a reference to an argument touching a question of fact or a question of or mixed question of law or facts. A legal contention would ordinarily be a pure question of law without raising any dispute about the facts. Not only such additional ground or contention, the Courts have also, as noted above, recognized the powers of the Appellate Commissioner and the Tribunal to entertain a new claim for the first time though not made before the assessing officer. Income Tax proceedings are not strictly speaking adversarial in nature and the intention of the Revenue would be to tax real income.

39. This is primarily on the premise that if a claim though available in law is not made either inadvertently or on account of erroneous belief of complex legal position, such claim cannot be shut out for all times to come, merely because it is raised for the first time before the appellate authority without resorting to revising the return before the assessing officer.

40. Therefore, any ground, legal contention or even a claim would be permissible to be raised for the first time before the appellate authority or the Tribunal when facts necessary to examine such ground, contention or claim are already on record. In such a case the situation would be akin to allowing a pure question of law to be raised at any stage of the proceedings. This is precisely what has

happened in the present case. The Appellate Commissioner and the Tribunal did not need to nor did they travel beyond the materials already on record, in order to examine the claims of the assessee for deductions under section 80IB of the Act.”

5. We rely on the above detailed discussion to conclude that the CIT(A) as well as this tribunal may entertain such an additional ground raising both questions of law or fact or mixed question of both for the first time as per hon'ble apex court's decision in National Thermal Power Co. (supra). We reiterate that income tax proceedings are not strictly adversarial in nature wherein the Revenue's aim is tax the real income than that based on omissions and commissions. We again quote hon'ble Gujarat high court's decision that if a claim is available for an assessee to be raised under the law; is not made either inadvertently or on account of erroneous plea, the same cannot be allowed to be shut down for all times merely because it is raised for the first time before an appellate authority and that too, without filing a revised return before the Assessing Officer. We also keep in mind the hon'ble apex court's decision in 283 ITR 329 making it clear that powers of appellate authorities under the Act for admitting such additional grounds are not impinged upon by the same in absence of a revised return filed before the Assessing Officer. We accordingly accept assessee's instant three substantive grounds in principle and remit the issue back to the Assessing Officer for afresh adjudication as per law without commenting anything on merits of the issue. This main appeal ITA No.1741/Kol/2016 is partly accepted for statistical purposes.

6. The Revenue's appeal ITA No.1577/Kol/2017 has raised two substantive grounds. The former one pleads that the CIT(A) has erred in law as well as on facts in deleting disallowance of brokerage expenses of Rs.12,05,562/- after admitting fresh additional evidence in violation of Rule 46A of the Income Tax Rules. The CIT(A)' findings under challenge qua the instant substantive ground read as under :-

“Assessee had claimed expenses of Rs.1,30.169/- on account of brokerage payment to Shri Rajesh Kumar Baid and another amount of Rs.10.75,393/- as

brokerage payment to City Info Property Services (P) Ltd. Assessing Officer has held that these payments were made for leasing out of. space at BIPL Omega building. As building is not owned by the assessee, the brokerage amount of Rs.12,05,562/- has been disallowed, as not connected with business. Appellant has explained that brokerage claimed by assessee is only in respect of furniture and fixtures let out by appellant has produced copies of confirmation dated 19/07/2016 from Sri Rajesh Kumar Baid and confirmation dt. Nil from Gtyinfo Property Services Pvt. Ltd. In view of the above, addition of Rs.12,05,562/- is deleted. “

7. It emerges from a perusal of the above extracted findings that the CIT(A) has nowhere admitted any additional evidence as claimed at the Revenue's behest. He has accepted assessee's claim whose details are available already on record that brokerage in question is only in respect of furniture and fixtures let out much earlier as supported by confirmation from the payees concerned. We find no merit in Revenue's instant former substantive ground therefore.

8. The Revenue's latter substantive ground seeks to restore the Assessing Officer's action disallowing depreciation of Rs.3,76,80,957/- as deleted during the course of the lower appellate proceedings with the following detailed discussion :-

“Ground of appeal nos.7(a) & (b)-

Assessing Officer-has disallowed Rs.3,76,80,957/- out of depreciation of some let out furniture and fittings holding that addition to 'the respective block of fixed assets was made on the last day of the Financial Year. It is further held that assessee failed to furnish any evidence regarding putting these assets to use in the current Financial Year. In appeal proceedings, assessee has submitted that these assets have been given on hire since September, 2007 and rent is received on these furniture and plant & machinery. Furniture & other Plant & machineries (A.C.s. etc.) were continuously being provided as per agreement with the clients. During this period their accounting was being done under the head 'Capital 'work-in-progress' and on 31.03.2008 completed items were transferred to the assets account. Assessee has furnished supporting evidences, like bills etc.

I have carefully considered the facts of the case and the submissions of the assessee. as the furniture and plant & machineries were acquired and fitted at client's premises, these were already put to use. Rental receipts of the assessee has increased over time as new furniture and plant & machineries were put in place. Simply because these assets were transferred from 'work-in-progress' to

'Assets' account on the last day of the year, would not deprive the assessee of their lawful claim of depreciation. Hence, addition of Rs.3,76,80,957/- is deleted.”

9. We have heard learned Departmental Representative vehemently contending that the CIT(A) has erred in law as well as on facts in deleting the impugned depreciation disallowance. His case is that the assets in issue were nowhere put to use in the F.Y.2007-08. It emerges that this assessee is a company engaged in business of hiring charges derived from letting out plant and machinery as well as furniture and fixtures to different parties. It has clearly proved to have given these assets for hire since September, 2007 in lieu of charging rent. The relevant agreement to this effect already stands considered by the CIT(A). The Revenue's main grievance that the assets had not been put to use in F.Y.2007-08 has no merit therefore. Its last plea that the assessee has made a book entry is of no consequence as it has come on record that these assets had been merely transferred from “work in progress” to “assets” account on the last day of the year also does not help the Revenue's cause since going against the basic fact of the very assets put to use in September, 2007. The Revenue's instant latter grievance as well as the main appeal ITA No.1577/Kol/2017 stands declined.

10. The Revenue's second appeal ITA No.2070/Kol/2016 raises sole substantive grievance challenging the CIT(A)'s findings reversing the Assessing Officer's action disallowing interest expenditure u/ s 36(1)(iii) of the Act. Its vehement contention during the course of hearing that the assessee putting its assets to use on the last day of the financial year 2007-08 as emanated in the Tax Audit Report. Both the representatives are ad idem that we have also rejected the very plea in the foregoing paragraphs. The Revenue's instant grievance as well as the main appeal ITA No.2070/Kol/2016 fails therefore.

11. We now come to A.Y.2009-10. The assessee's appeal is ITA No.1742/Kol/2016. Its sole substantive grievance pleaded in three substantive grounds raised in the appeal is that the CIT(A) has erred in law as well as on facts in not

admitting its additional ground with regard to suo moto disallowance of interest of Rs.857942105 inadvertently made under misconception of law while filing return in the impugned assessment year. Both the learned representatives inform us that we have already accepted identical grievance in A.Y.2008-09 thereby restoring the issue back to the Assessing Officer. We follow our said detailed discussion mutadis mutandis to adopt the very course of action herein as well. The assessee's grievance raised in the instant appeal is restored back to the Assessing Officer for detailed adjudication in the consequential proceedings. This appeal ITA No.1742/Kol/2016 is accepted for statistical purposes.

12. The Revenue's appeal ITA No.1752/Kol/2016 seeks to revive section 14 r.w. Rule 8 disallowance of Rs.15,00,160/- made by the AO and deleted in the lower appellate proceedings. Suffice to say, the tax effect involved is less than Rs.20 lakhs as per the CBDT latest circular prescribing the said minimum threshold limit. This Revenue's appeal ITA No.1752/Kol/2016 is dismissed for involving lower than the prescribed minimum tax effect.

13. We are now left with assessee's appeal ITA No.1743/Kol/2016 raising two substantive grounds in challenging the CIT(A) in not admitting this additional ground challenging correctness of suo moto interest disallowance of Rs.9,89,26,318/-; is accepted for statistical purposes in view of our foregoing detailed discussion in ITA No.2070/Kol/2016 in A.Y.2008-09 dealing with corresponding issue. The Revenue's cross appeal ITA No.1753/Kol/2016 seeking to revive section 14A r.w. Rule 8D disallowance of Rs.30,00,160/- is dismissed for involving lower than the prescribed minimum tax effect of Rs.20 lakhs as per CBDT Circular No.3/2018 issued on 11/07/2018.

14. Thus, Assessee's appeal ITA No.1741/Kol/2016 is partly accepted for statistical purposes and ITA Nos.1742&1743/Kol/2016 are accepted for statistical purposes and Revenue's appeals ITA No.1577/Kol/2017, ITA No.2070/Kol/2016, ITA Nos.1752&1753/Kol/2016 are dismissed.

Order pronounced in the Court on 24/08/2018.

Sd/-
[Dr.A.L.Saini]
Accountant Member

Sd/-
[S.S.Godara]
Judicial Member

Dated : 24/08/2018.

[RG Sr.PS]

Copy of the order forwarded to:

1.M/s Boulevard Services Pvt. Ltd., Ground Floor, Building Beta, Bengal Intelligent Park, Block EP & GP Sector-V, Salt Lake Electronics Complex, Kolkata-700091.

2. I.T.O., Ward-26(1), Kolkata.

3. C.I.T.(A)-7, Kolkata 4. C.I.T-9, Kolkata

5. CIT(DR), Kolkata Benches, Kolkata.

True Copy

By order,

Senior Private Secretary
Head of Office/D.D.O, ITAT Kolkata Benches