

**IN THE INCOME TAX APPELLATE TRIBUNAL "H", BENCH MUMBAI
BEFORE SHRI SANDEEP GOSAIN, JM & SHRI N.K.PRADHAN, AM**

ITA No.4387/Mum/2016
(Assessment Year: 2010-11)

Fedex Express Transportation and Supply Chain Services (India) Private Limited ('FETSCS') [Fedex Express Services India Private Limited merged with FETSCS with effect from 1 October 2013] Boomerang, Unit No. 801, Wing-A, 8 th Floor, Chandivali Farm Road, Andheri (East), Mumbai- 400 072	Vs.	The Deputy Commissioner of Income-tax (OSD)-8(1) Room No. 210, 2 nd Floor, Aayakar Bhavan, M.K. Road, Mumbai-400 020
PAN/GIR No.		AABCF6516A
(Assessee)	..	(Revenue)

&

ITA No.4199/Mum/2016
(Assessment Year: 2010-11)

Dy. Commissioner of Income Tax-9(3)(1) Room No. 260A, 2 nd Floor, Aayakar Bhavan, M.K. Road, Mumbai-400 020	Vs.	Fedex Express Transportation and Supply Chain Services (India) Private Limited ('FETSCS') [Fedex Express Services India Private Limited merged with FETSCS with effect from 1 October 2013] Boomerang, Unit No. 801, Wing-A, 8 th Floor, Chandivali Farm Road, Andheri (East), Mumbai- 400 072
PAN/GIR No.		AABCF6516A
(Assessee)	..	(Revenue)

Assessee by	Shri Hirali Desai, A.R
Revenue by	Shri Sachchidanand Dube , D.R
Date of Hearing	05.09.2018
Date of Pronouncement	26.09.2018

आदेश / ORDER

PER SANDEEP GOSAIN (J.M):

The Present two Appeals have been filed by the assessee as well as revenue is directed against the order of Commissioner of Income Tax (Appeals)-16, Mumbai each dated 31.03.2016 respectively.

2. Since, the facts raised in both the appeals filed by the assessee as well as the revenue are identical, therefore for the sake of convenience; they are clubbed, heard and disposed of by this consolidated order.

ITA No. 4387/M/2016.

3. First of all we take up assessee's appeal in ITA No.4387/M/2016 on the grounds mentioned herein below:-

Aggrieved by the order passed by the learned Commissioner of Income-tax (Appeals)-2016, Mumbai [learned CIT(A) under Section 250 of the Income-tax Act, 1961 ('the Act') dated 31 March 2016, received by the Appellant on 26 April 2016 ('the Appellate Order'), and based on the facts and circumstances of the case, the Appellant respectfully submits that the learned CIT(A) has erred on the following ground:

1. Disallowance under Section 43B of the Act amounting to Rs 58,10,265/-.

On the facts and in the circumstances of the case and in law, the learned AO erred in applying the provisions of Section 43B of the Act to the impugned provision for leave encashment.

It is prayed that the disallowance of provision for leave encashment of Rs 58, 10,265 under Section 43B of the Act be deleted.

The Appellant craves leave for a hearing in this matter before disposing off the said Appeal and leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at or prior to hearing of the appeal, so as to enable the learned ITAT to decide this appeal according to law.

For the above and other grounds and reasons which may be submitted during the course of hearing of this appeal, the Appellant requests that the appeal be allowed as prayed and justice be rendered.

4. This ground raised by the assessee relates to challenging the order of Ld. CIT(A) in holding the disallowance under Sec. 43B of the Act.

5. At the very outset, Ld. A.R submitted before us that this ground is covered by the decision of Coordinate Bench of Hon'ble ITAT in ITA No. 7409/Mum/12 & 3088/Mum/14 in assessee's own case. The operative portion is contained in para no. 6 to 7 of the order of Hon'ble ITAT and the same is reproduced below:-

“6. *We have heard both the counsel and perused the records. We find that this issue is covered against the assessee by several case laws including that in the assessee's group case in ITA No. 1475/Mum/2012 in the case of Fedex Express (India) Ltd. Vs. ACIT vide order dated 20.03.13. In this case, the Tribunal has held as under:*

4. We have perused the records and considered matter carefully. The dispute raised is regarding allowability of deduction on account of leave encashment on the basis of provisions made in the accounts. The AO, disallowed the claim on the ground that leave encashment has to be allowed on payment basis u/s 43B(f) The assessee has argued that Hon'ble High Court of Kolkata in case of Exide Industries (Supra) have struck down the provisions of section 43B(f) and therefore, the said provisions is not applicable and claim has to be allowed. However, we note that the judgment of Hon'ble High Court had been challenged by the revenue before the Supreme Court which had stayed the operation of judgment and has held that during the pendency of the appeal, the assessee has to pay tax as if section 43B(f) was on statute book. Therefore, claim of the assessee could not be allowed on the basis of judgment of Kolkata High Court in case of Exide Industries Ltd. (Supra). In view of the judgment the Supreme Court (Supra) the provisions of section 43B(f) have to be taken as part of the statute while considering the claim of deduction on account of leave encashment. We therefore see no infirmity in the order of CIT(A) confirming the disallowance made by A.O and the same is therefore, upheld.

7. Respectfully following the precedent as above, we do not find any infirmity in the order of the assessing officer. Accordingly, we uphold the same.”

6. Considering the above decision of ITAT in assessee's own case, wherein identical ground has already been decided in favour of assessee, we dismiss this ground.

7. In the net result the appeal filed by the assessee stands dismissed.

ITA No. 4199/M/2016.

8. Now we take up revenue's appeal in ITA No.4199/M/2016 for AY 2010-11 on the grounds mentioned herein below:-

- “1. Whether on the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in allowing depreciation on computer software of Rs.1.11 crore ignoring the facts that no TDS was deducted and therefore the assessee had failed to comply with the provision of section 40(a)(ia) of the I.T. Act.
2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that the provision of section 40(a)(i) of the I.T. Act cannot be applied for rejecting the claim of the assessee u/s. 32 of the Act, ignoring the decision of the Hon'ble ITAT-E Bench, Mumbai in the case of Spaco Carburettors (I) Limited wherein it has been held by the Hon'ble ITAT that even if an expenditure or allowance comes within the purview of all the section from 30 to 38 as well as section 40, the provisions of section 40 shall prevail.”

9. At the very outset, Ld. A.R submitted before us that this ground is covered by the decision of Coordinate Bench of Hon'ble ITAT in ITA No. 7409/Mum/12 & 3088/Mum/14 in assessee's own case. The operative portion is contained in para no.11 to 14 of the order of Hon'ble ITAT and the same is reproduced below:-

We have heard both the counsel and perused the records. The ld. Counsel of the assessee submitted that provisions of Sec. 40(a)(ia) are not at all attracted in this case, as the said amount has not been claimed as revenue expenditure. Hence, he submitted that there is no question of disallowing depreciation claimed on the capital item so acquired. For this proposition, he placed reliance upon following case laws:

Sr. No.	Decisions	Citation
1.	CIT Vs. Mark Auto Industries Ltd.	[358 ITR 43 (P &HHQ)]
2.	SAB Miller India Ltd. Vs. ACIT	[155 ITD 1093 (Mumbai Trib.)]
3.	Sonic Biochem Extractions (P) Ltd. Vs. ITO	[23 ITR (T) 447 (Mumbai Trib.)]
4.	SKOL Breweries Ltd. Vs. ACIT	[28 ITR (T) 465 (Mumbai Trib.)]
5.	Kawasaki Microelectronics Inc. Vs. DDIT (IT)	[60 tamxann.com 259 (Bang. Trib.)]
6.	Jaguar Enterprises Vs. DCIT	[33 ITR (T) 483 (Delhi Trib.)]

14. Upon careful consideration, we find that in the above case laws it has duly been held that when the payment is in the realm of capital expenditure and expenditure is not claimed as revenue expenditure, the provisions of section 40(a)(ia) are not applicable. In this regard, we may gainfully refer to the decision of Hon'ble Punjab and Haryana High Court in the case of CIT vs. Mark Auto Industries Ltd. (supra). In this case the question considered by the honourable High Court was as under: 7

(ii) Whether on the facts and in the circumstances of the case Ld. ITAT is right in law in upholding the order of Ld. CIT(A), that the provision of Section 40(a)(i) of Income Tax Act, 1961 are not applicable to payments of Technical know-how, simply because only part of it is written off by the assessee, each year by way of depreciation u/s 32 of Income Tax Act, 1961?

13. The Hon'ble High Court answered the above question as under: 6. Learned counsel for the revenue was unable to substantiate that in the absence of any requirement of law for making deduction of tax out of the expenditure on technical know-how which was capitalized and no amount was claimed as revenue expenditure, the deduction could be disallowed under Section 40(a)(i) of the Act. Accordingly, no infirmity could be found in the order passed by the Tribunal which may warrant interference by this Court. Thus, both the questions are answered against the revenue and in favour of the assessee.

14. Similar proposition was also held by the respective decisions of tribunal as above. Following the above said precedents, we are of the considered opinion that adverse inference drawn for lack of deduction of TDS in this case is not sustainable, inasmuch as the payment was made in respect of capital expenditure. Hence, following the above said precedents, we hold that assessee's claim for depreciation was justified.

10. Respectfully following the precedent as above, we do not find any infirmity in the order of Ld. CIT(A). Accordingly, we uphold the same.

11. In the result, the appeal filed by the revenue stands dismissed.
12. The appeal filed by the assessee and the revenue are dismissed.

Order pronounced in the open court on 26.09.2018

Sd/-

(N.K. Pradhan)

लेखासदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 26.09.2018

Sd/-

(Sandeep Gosain)

न्यायिकसदस्य / Judicial Member

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,
उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai