

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E', NEW DELHI
BEFORE SH. H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 2575/Del/2016
Assessment Year: 2010-11

ACIT, CIRCLE 10(2), NEW DELHI	Vs.	M/S GRAZIANO TRASMISSION INDIA PVT. LTD., INDUSTRIAL SHED NO. D-8 (BASEMENT), DSIDC PACKAGING COMPLEX, KIRTI NAGAR, NEW DELHI - 110 015 (PAN: AAACG4258M)
(Appellant)		(Respondent)

Department by	Ms. Rinku Singh, Sr. DR
Assessee by	None

ORDER

PER H.S. SIDHU, JM

This appeal is filed by the Revenue against the Order dated 4.2.2016 passed by the Ld. CIT(A)-16, New Delhi relating to assessment year 2010-11 on the following grounds:-

- i. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in reducing the disallowance of Rs. 11,87,056/- made on account of provision of LTA (Leave Travel Allowance) ignoring the fact that the assessee is following the mercantile

system of accounting and provisions is not an allowable expenditure.

- ii. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in deleting the disallowance of Rs. 88,91,816/- made on account of non-deduction of TDS on the payment made to M/s Graziano Transmission North America, USA holding the same as commission ignoring the fact that the payment is actually in the nature of fee for technical services and the assessee only named the same as commission to enjoy the tax benefit.
- iii. The appellant craves leave for reserving the right to amend, modify, add or forego any ground(s) of appeal at any time before or during the hearing of appeal.

2. The brief facts of the case are that assessee company has filed the return of income on 30.9.2010 declaring total income of Rs. 19,97,49,488/-. The case of the assessee was selected for scrutiny and notice under section 143(2) of the Income Tax Act, 1961 (in short "Act") was issued on 09.4.2012. Again notice u/s. 143(2) of the Act alongwith questionnaire under section 142(1) of the Act was issued on 2.9.2013. In response to the same, the assessee's A.R. appeared and filed the requisite details. Thereafter, the AO observed that assessee has debited Rs. 11,87,056/- towards provision for LTA expenses in the P&L account

and therefore, the assessee company was asked to file the details of these expenses. In compliance of the same, assessee company filed its reply on 28.2.2014. After considering the reply of the assessee, AO observed that assessee company is claiming these expenses as a provisions and actual expenses in this regard has not been incurred as evident from the submission of the assessee itself. He further observed that as hypothetical expenses are not allowable as per section 37 of the I.T. Act and also in the instant case of the assessee no expenses for LTA has been actually incurred. Therefore, Rs. 11,87,056/- was disallowed u/s. 37 of the Act and added back to the income of the assessee company. Further, AO observed that the assessee company had paid an amount of Rs. 88,91,816/- to M/s Graziano Trasmissioni North America USA and the assessee was asked to explain as to why the payment made to M/s Graziano Trasmissioni North America USA be not treated as royalty / fees for technical services in light of the services offered by the said company. The assessee company was further asked to explain as to why no TDS was deducted on the payment made to the said company. In compliance thereto the assessee company did not file any reply. Therefore, as per the provisions of the Act and in accordance with judicial pronouncement on the issue in dispute, the AO observed that assessee was liable to deduct TDS on export commission of Rs. 89,91,816 paid to non-resident / outsiders. Since assessee did not deduct the TDS as per provision of the section 195 of the Act, therefore, total deduction of expenditure of Rs. 88,91,816/- on export commission, as claimed by

assessee, was disallowed and added back to the taxable income of the assessee for the AY 2010-11. Accordingly, the AO assessed the income of the assessee at Rs. 22,10,20,170/- u/s.143(3) of the Act dated 28.2.2014. Against the assessment order, assessee appealed before the Ld. CIT(A), who vide his impugned order dated 04.2.2016 has allowed the appeal of the assessee. Aggrieved with the impugned order, Revenue is in appeal before the Tribunal.

3. In this case, Notice of hearing to the assessee was sent by the Registered AD post, in spite of the same, assessee, nor its authorized representative appeared to prosecute the matter in dispute, nor filed any application for adjournment. Keeping in view the facts and circumstances of the present case and the issue involved in the present Appeal, we are of the view that no useful purpose would be served to issue notice again and again to the assessee, therefore, we are deciding the present appeal exparte qua assessee, after hearing the Ld. DR and perusing the records.

4. On the other hand, Ld. DR relied upon the order of the Assessing Officer.

5. We have heard Ld. DR and perused the records especially the impugned order. As regard ground no. 1 relating to addition of Rs. 11,87,056/- is concerned, we find that Ld. CIT(A) has elaborately discussed the issue at page no. 43-44 of the impugned order. For the

sake of clarity, we are reproducing herewith the relevant findings of the Ld. CIT(A) as under:-

"I have perused the assessment order as well as the submission of the Ld. AR. It is seen that assessee has debited Rs. 11,87,056/- towards LTA. The AO has treated as hypothetical expenses. However, the main contention of the Ld. AR that the LTA is paid to the employees every year and it is also contended that this is a certain liability and for his the Ld. AR has relied on case of Bharat Earth Moves 245 ITR 428 SC and Vinitec Corporation 278 ITR 337 Delhi High Court. Apart from this the Ld. AR has also brought to my notice that the same expenditure was allowed by the AO in his order u/s. 143(3) for AY 2009-10 and AY 2011-12. So in other words, it is preceding year as well as the succeeding year the claim of the appellant has been accepted. The Ld. AR has contended that the principle of consistency demands that the claim of the appellant should be accepted in this year also. Considering the judicial pronouncement as discussed above as well as the principle of consistency the claim of the

assessee is accepted and addition on account of LTA of Rs. 11,87,056/- is deleted."

5.1 After perusing the aforesaid findings of the Ld. CIT(A), we are of the considered view that there is no infirmity in the aforesaid finding of the Ld. CIT(A), hence, we uphold the same and accordingly reject the ground no. 1 raised by the Revenue.

5.2 As regards ground no. 2 relating to disallowance of Rs. 88,91,816/- is concerned, after perusing the duties and obligations as mentioned at page no. 44 to 46 of the impugned order, we find that the agent is not providing any technical services to the assessee. The agent is acting only commission agent and procuring the orders for the assessee and to inform the assessee for any infringement of rights. Even if the same is considered as business income of the commission agent same is not taxable in India as the foreign entity does not have any PE or BC in India. The commission is being entertained in the foreign company in the foreign country. No part of its income accrue or arise in India. Nor it is making available any technical knowledge, experience, skill, knowhow etc. to the assessee. Hence, Ld. CIT(A) has rightly held that the case of the assessee is identical to the decision of the Hon'ble Delhi High Court in the case of DIT vs. Guy Carpenter and Company Ltd. (ITA No. 202/2012)- Hon'ble Delhi High Court and the ITAT, Hyderabad and deleted the addition of Rs. 88,91,816/-. In view of above, we are of the considered view that Ld. CIT(A) has passed a well reasoned order which does not

need any interference on our part, hence, we uphold the action of the Ld. CIT(A) on the issue in dispute and reject the ground no. 2 raised by the Revenue.

6. In the result, the Appeal of the Revenue is dismissed.

Order pronounced on 09-01-2019.

Sd/-

Sd/-

**[PRASHANT MAHARISHI]
ACCOUNTANT MEMBER**

**[H.S. SIDHU]
JUDICIAL MEMBER**

Date:09/01/2019

SRBhatnagar

Copy forwarded to: -

1. Appellant 2. Respondent 3. CIT 4. CIT (A) 5. DR, ITAT

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By Order,

Assistant Registrar, ITAT, Delhi Benches

