आयकर अपील□य अ□धकरण, अहमदाबाद □यायपीठ 'D' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, AHMEDABAD

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
& M/s. MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No.2844/Ahd/2015

(**□नधार□ण वष□** / Assessment Year : 2012-13)

Etain Renewables Ltd. (Earlier known as ETAIN IMMODO RENEWABLE LTD.) A-1, Skylark, Satellite Road, Ahmedabad- 380 015	**बनाम**/ Vs.	**DCIT,** Cir-2(1)(1), Ahmedabad
□थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAC CE6 631 N		
(अपीलाथ□ /**Appellant**)	..	(□□यथ□ / **Respondent**)

अपीलाथ□ ओर से /**Appellant by :**	Shri Prakash D. Shah, AR
□□यथ□ क□ ओर से / **Respondent by:**	Shri T. Shankar, Sr. DR

सुनवाई क□ तार□ख / **Date of Hearing**	13/03/2019
घोषणा क□ तार□ख /**Date of pronouncement**	29/03/2019

आदेश/O R D E R

PER WASEEM AHMED - AM:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Commissioner of Income Tax(Appeals)-2, Ahmedabad [Ld.CIT in short] dated 17/08/2015 arising in the matter of assessment order passed under s.143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dated 16/03/2015 relevant to the Assessment Year (AY) 2012-2013.

2. The assessee has raised the following grounds of appeal:

"1. That the Ld. CIT(A) has erred in law and facts by confirming the addition of Employees Contribution to Provident fund of Rs. 46,529/- and therefore the Ld. AO should be directed to delete the said addition of Rs. 46,529/-, while computing the total income.

2. That the CIT(A) has erred in law and facts by confirming the disallowance eof Commission Payment to Foreign Agent of Rs. 49,25,451/- and therefore the Ld. AO should be directed to allow the said claim of Rs. 49,25,451/-, while computing the total income."

3. At the outset, the Ld. AR for the assessee before us submitted that he had been instructed by the assessee not to press Ground No. 1 raised by it. Therefore we dismiss the same as not pressed.

4. The 2nd issue raised by the assessee is that the Ld. CIT (A) erred in confirming the addition made by the AO for the commission paid to the foreign agent and professional charges aggregating to Rs. 49,25,451/- only.

5. The facts of the case are that the assessee in the present case is a Limited Company and engaged in the business of EPC contract for solar, Photovoltaic Project for Grid-Connected Applications.

5.1 The assessee during the year under consideration debited in the books of account a sum of Rs. 48,88,513/- on account of foreign commission expenses paid to Immedo Solar SA, (one of the shareholders of the company) based outside India.

5.2 The assessee to justify its commission expense filed form 15CA/CB and invoices issued by the party. The assessee further submitted that recipient does not have any permanent establishment in India and services were rendered outside India. Accordingly, the income to foreign agent as commission does not accrue/ arise or deemed to accrue/arise in India. Therefore there was no liability to deduct the TDS on the payment to such commission agent.

6. However, the AO observed that foreign commission expenses paid by the assessee do not establish the nexus with the business of it (assessee). There was no agreement between the assessee and the foreign agent. Therefore there was no clarity about the services rendered by the commission agent.

6.1 The assessee also paid the commission to the foreign agent without the deduction of the TDS under section 195 of the Act.

6.2 In view of the above, AO disagreed with the contention of the assessee by observing that there was no proper justification and evidence given by the assessee to support its transaction. Accordingly, the AO disallowed the expenditure.

6.3 The assessee has paid a sum of Rs. 36,938/- on account of professional fees for development of business in South Africa but failed to file the supporting evidence.

6.4 In view of the above facts the AO disallowed Rs. 49,25,451/- (Rs. 48,88,513/- + Rs. 36,938/-) in aggregate for the reasons as discussed above and on account of non-deduction of TDS under section 40(a)(i) of the Act. Hence the amount was disallowed and added to the total income of the assessee.

7. Aggrieved assessee preferred an appeal before the Ld. CIT (A). The assessee before the Ld. CIT (A) submitted that the sum of Rs. 48,88,513/- relates to the commission paid for import of materials from Spain.

7.1 The assessee further filed certain copies of printout of the e-mails related to the communication with Immodo Solar SA to justify the business nexus.

7.2 Similarly, the assessee submitted that the payment of Rs. 36,938/- was made on account of professional fee for the exhibition held outside India.

8. However, The Ld. CIT (A) observed as follows:

i. The commission paid to foreign agent relates to the project work of M/s Palace Solar Energy Pvt Ltd and the assessee had no relation with such project.

ii. The assessee also failed to prove the genuineness of the transaction by filing the necessary supporting evidence.

iii. The assessee filed additional documents without complying the provisions of rule 46A of Income Tax Rules.

8.1 In view of the above facts the Ld. CIT (A) did not consider the additional evidence and accordingly confirmed the disallowance made by the AO.

8.2. Similarly the Ld. CIT (A) also disallowed the sum of Rs. 36,938/- on account of professional fees paid by the assessee without deduction of TDS. Therefore the Ld. CIT (A) confirmed the disallowance made by the AO.

9. Being aggrieved by the order of the Ld. CIT (A), the assessee is in appeal before us.

10. The Ld. AR before us filed a paper book running from pages 1 to 100 and submitted that the assessee had filed additional documents before the Ld. CIT (A) which were rejected as these additional documents were not supported on the basis of the application under rule 46A of Income Tax Rule. But the Ld. CIT (A) without giving the opportunity to the assessee to rectify the defect for filing the additional documents has confirmed the order of the AO.

10.1 The Ld. AR also submitted that the Ld. CIT (A) on the one hand rejected the additional documents, but on the other hand, he has made a reference to such

documents while rejecting the ground of appeal of the assessee. Therefore there is a contradiction in the observation and finding of the Ld. CIT (A).

10.2 The Ld. AR also submitted that the AO had made the addition of the commission expenses without issuing the final show cause notice to the assessee. As such the AO has not made any requisition during the assessment proceedings for the relevant documents to justify the commission expenses.

In view of the above, the Ld. AR for the assessee requested the bench to restore the issue to the file of the AO for fresh adjudication in the light of the additional documents as discussed above and as per the provisions of law.

11. On the contrary the Ld. DR before us agreed to restore the issue but to the file of Ld. CIT (A). As such the Ld. DR opposed to restoring the issue to the file of the AO for fresh adjudication.

12. We have heard the rival contentions and perused the materials available on record. Admittedly the assessee has filed additional documents before the Ld. CIT (A) which were rejected by him on the ground that there was no separate application filed by the assessee for the admission of the additional documents under rule 46A of Income Tax Rule.

12.1 There is no dispute that these additional documents were important to decide the issue on hand and there was no separate application filed by the assessee for the admission of such additional documents as mandated under rule 46A of Income Tax Rule.

12.2 From the preceding discussion we note that the Ld. CIT (A) while deciding the issue for the commission paid to the overseas commission agent has made the reference to the additional documents filed by the assessee. This fact can be

verified from the relevant extract of the order of the Ld. CIT (A) which is reproduced as under:

> *"It is also noticed that along with submission dated 07.08.2015, appellant filed print out copy of emails between Immodo solar SA and appellant which also do not speak much about the business connection vis-à-vis commission payment. These documents were not submitted to the AO in the assessment proceedings and first time produced in the appellate proceedings. These are in the nature of additional evidence for which no written request for admission under Rule 46A has been made. Thus, the procedure laid down in the rules have not followed and those have not been considered while deciding the issue under those have not been considered while deciding the issue under consideration. In view of the above, the disallowance made by the AO for various reasons given in the assessment order is found correct and justified and the same is confirmed."*

12.3. From the above discussion, there remains no ambiguity that the Ld. CIT (A) erred in making the reference to the additional documents filed by the assessee while deciding the issue on merit. Thus we find a contradiction between the observation and the finding of the Ld. CIT (A).

12.4 It is settled law that the Ld. CIT (A) can admit the fresh/additional evidences after providing the opportunity to the AO as mandated under rule 46A of Income Tax Rule. But in the case on hand the Ld. CIT (A) erred in making the reference to these additional evidences without providing the opportunity to the AO.

Besides the above, we also note that the ld. CIT-A in the interest of justice & fair play should have provided the opportunity to the assessee to rectify the defect in filing the additional documents. Therefore, we are of the view that the matter needs to be examined afresh.

12.5 Now the question arises whether the issue should be set aside the file of Ld. CIT (A) or the AO for fresh adjudication as per the provisions of law. Under the present facts and circumstances, we note that the Ld. CIT (A) has already made reference in this order to these additional documents and after that rejected the

appeal of the assessee. Accordingly, we apprehend that if the matter is restored back to the file of Ld. CIT (A), he will reject the contention of the assessee as he has already applied his mind on such additional evidences against the provision of law.

In view of the above, we are inclined to restore the impugned issue to the file of the AO for fresh adjudication without getting influenced by the finding of the Ld. CIT (A) as discussed in his order as per the provisions of law. Hence the ground of appeal of the assessee is allowed for statistical purpose.

13. The 3rd issue raised by the assessee is that the Ld. CIT (A) erred in confirming the addition made by the AO for Rs. 64,78,651/- on account of professional fees paid u/s 37 of the Act.

14. The issue under consideration is that assessee during the year paid professional fees to the following parties.

i.	KPMG Advisory Services Pvt Ltd	Rs. 9,40,128/-
ii.	KPMG India Pvt Ltd	Rs. 55,38,523/-

15. The assessee explained that KPMG was facilitating in the supply of the solar project to Palace Solar Energy Pvt. Ltd (for short PSEPL). Therefore the said payment was made to KPMG for facilitating the sale of the project.

15.1. The assessee in support of its claim also filed the following documents:

i. Copy of bank statement
ii. Copy of cheque
iii. Copy of agreement and appointment letter

16. However, the AO during the assessment proceedings observed as under:

i. The assessee company was incorporated during the year and huge payment was made to the above parties in the first year of incorporation.

ii. The letter of engagement filed by assessee shows that it was made between KPMG and PSEPL. As such KPMG has generated the sales for PSEPL rather than for the assessee.

iii. The letter of engagement was signed by one person namely Shri Siddartha Bhandari on behalf of both PSEPL and the assessee.

iv. There was nothing mentioned in relation to terms of payments by the assessee to KPMG.

v. The assessee failed to produce sufficient documents evidencing nexus with its business viz a viz payment to KPMG to justify any sales effected by KPMG on behalf of the assessee for which aforesaid payment was made.

In view of the above facts, the AO found that payments made by the assessee on account of professional fees were on behalf of the related party and therefore the said expenditure was not related with the business of the assessee.

16.7 Hence the AO by applying the provision of section 37 r.w.s 40A(2)(b) of the Act disallowed the same and added to the total income of the assessee.

17. Aggrieved assessee preferred an appeal before the Ld. CIT (A).

17.1 The assessee before the Ld. CIT (A) submitted that payment made to KPMG for sale of the project to PSEPL in connection with the business. Accordingly, the assessee prayed for the deletion of the addition made by the AO.

17.2 However, Ld. CIT (A) observed that the assessee failed to prove whether the said expenditure was incurred for the purpose of business or in relation to business and accordingly dismissed the appeal.

18. Being aggrieved assessee preferred an appeal before us.

19. The Ld. AR for the assessee before us submitted that the payment was made by it in connection with its business activities. The Ld. AR in support of his claim drew our attention on the letter of engagement issued by the KPMG which was signed by the assessee, PSEPL and the KPMG, placed on pages 27 to 39 of the paper book.

19.1 The Ld. AR also drew attention on the invoices issued by the KPMG which are placed on pages 91 to 96 of the paper book.

19.2 The Ld. AR also drew our attention to the agreement between the assessee and PSEPL which is placed on pages 40 to 90 of the paper book.

19.3 On the contrary, the Ld. DR before us submitted that the assessee and PSEPL are related parties as evident from the letter of engagement issued by the KPMG which was signed by the common person on behalf of the assessee and PSEPL. Therefore there was not any requirement of the 3rd person for the sales by the assessee to the PSEPL.

20. The Ld. DR also submitted that the assessee had not furnished the sufficient details regarding the payment made by the assessee to KPMG Advisory Pvt Ltd except the copy of the invoice.

20.1 Similarly, the payment made to KPMG India Ltd was also not in connection with the business activities of the assessee.

21. We have heard the rival contentions and perused the materials available on record. In the instant case, the assessee has made the payment to the KPMG for Rs. 64,78,651/- on account of facilitating services provided by it. As per the assessee, all the services rendered by KPMG are governed by the letter of engagement which is placed on the paper book filed before us. There is also no dispute about the identity and the genuineness of the transaction. However, the issue which needs to be adjudicated whether such payment was made by the assessee in the course of business activities.

21.1 As per the order of the AO, it appears that the assessee has sold the solar project to PSEPL and in this connection, KPMG has rendered the services to the assessee. This fact can be verified from the relevant portion of assesseeôs submission recorded in the order of the AO which is extracted below:

> *"4) In this regard, we have to submit that the said payments to KPMG are for sales of project to Palace Solar Energy Private Ltd,, who has undertaken the solar project of Gujarat Government and KPMG has felicitated in the rf the said solar project (15MW Solar Power),"*

21.2 However, the agreement between the assessee and PSEPL reveals the fact that PSEPL has engaged the assessee for the execution of the solar project. The relevant extract of the copy of the agreement is reproduced as under:

> *"This Engineering, Procurement and Construction (EPC) Contract is executed on 5th November 2011 by and between*
>
> *Electrotherm Immodo Renewables Ltd., a Company incorporated under the Companies Act 1956, hawing its Registered Office at A-l, Skylark Apartment, Satellite Road, Satellite, Ahmedabad-380 015 (hereinafter referred to as "EPC Contractor" or "Contractor" which expression, unless repugnant to the context or meaning thereof shall be deemed to Include Its successors and permitted assigns) and of the First Part.*

AND

Palace Solar Energy Private Limited , a Company incorporated under the Companies Act 1956, having its Registered Office at, 201, Akruti Erica, Shraddhanand Road, Near NavinbhaiThakkar Hall, Ville Parle (East), Mumbal-400 046 (hereinafter referred to as "Employer", which expression, unless repugnant to the context or meaning thereof shall be deemed to Include its successors and permitted assigns) of the Second Part."

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"E. Based on the above representation the Employer has engaged the EPC Contractor for the purpose of engineering, procurement and construction of the Solar Infrastructure as required by the Employer."

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

"The Employer is interested in engineering and constructing the Solar Infrastructure. In order to construct the Solar Infrastructure, the Employer has engaged the EPC Contractor who shall provide the services of engineering, procurement and the construction of the Solar Infrastructure as required by the Employer."

1.3 SCOPE OF THE AGREEMENT

The Contractor shall be responsible for the following

- *Turnkey EPC of the Solar PV Project by 31st Dec 2011*
- *Comprehensive O&M for 7 years post the commercial operation date*
- *Interconnection at 66 kV to the GETCO transmission network at project substation by 31st Dec 2011.*
- *Spares as per the practice shall be included in the EPC cost as per Annexure O*
- *The Contractor shall be responsible to adhere to the Works Program as detailed hereinafter.*
- *The Contractor shall carry on all the activities as detailed In Site clearance list as per Annexure D.*
- *The Contractor shall be responsible for successful commissioning of the Solar Plant and generating electricity as per a 15 MWp plant.*

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"3.1.2 The Contractor shall execute the Works within the Time for commencement and Completion".

21.3 On perusal of the above contract, there remains no ambiguity that the assessee has been assigned some contract for the execution by PSEPL. Thus it is clear that there was no sale made by the assessee to PSPEL.

In view of the above, we are of the opinion that the matter needs to be examined afresh by the AO in the interest of justice and fair play. Therefore we are setting aside the issue to the file of AO for de novo assessment as per the provisions of law. Hence the ground of appeal of the assessee is allowed for statistical purposes.

22. In the result the appeal of the assessee is partly allowed for the statistical purposes.

This Order pronounced in Open Court on 29 /3/2019

-Sd-	**-Sd-**
(MS.MADHUMITA ROY)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad; Dated 29/03/2019

टी.सी.नायर, व.नि.स./T.C. NAIR, Sr. PS

आदेश क□□तिलिपि अ□षित/Copy of the Order forwarded to :

1. अपीलाथ□/ The Appellant
2. □□थ□/ The Respondent.
3. संबंधित आयकर आयु□/ Concerned CIT
4. आयकर आयु□(अपील) / The CIT-4, Ahmedabad
5. विभागीय □□तिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गाड□फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad