THE INCOME TAX APPELLATE TRIBUNAL
"E" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

I.T.A. No. 1452/Mum/2015 (Assessment Year 2010-11)

Transtonnelstory Afcons Joint Venture Afcons House, 16, Shah Industrial Estate Veera Desai Road Azad Nagar PO Andheri (West) Mumbai-400 053. PAN : AACAT0119N	Vs.	ACIT, Circle-20(3) Piramal Chambers Parel East Mumbai-400 012.
(Appellant)		(Respondent)

Assessee by	S/Shri J.D. Mistry, Madhur Agarwal & Mayur Kisnadwala
Department by	Shri Choudhary Arun Kumar Singh
Date of Hearing	18.2.2019
Date of Pronouncement	14.5.2019

O R D E R

Per Shamim Yahya (AM) :

This appeal by the assessee is directed against the order of learned CIT(A) dated 6.1.2013 pertains to A.Y. 2010-11. Grounds of appeal read as under :-

Being aggrieved by the order dated December 5, 2014 passed by the learned Commissioner of Income tax (Appeals) 37, Mumbai [Commissioner (Appeals)] upholding/confirming the additions/ disallowances made by the learned Assessing Officer 20(3), Mumbai (AO), the appellant objects to the order on the following among other grounds of appeal, which may please be considered without prejudice to one another:

Unbilled revenue

1. On the facts and circumstances of the case and in law, the learned Commissioner (Appeals) erred in confirming the order of the AO in holding that the appellant has only received the mobilisation advance and no work is undertaken by the appellant during the relevant

assessment year, ignoring the unbilled revenue recognized in the books of accounts.

Setting up/ Commencement of business

2. On the facts and circumstances of the case and in law, the learned Commissioner (Appeals) erred in holding that the business is set up on 12th March 2010.

3. On the facts and circumstances of the case and in law, the Commissioner (Appeals) erred in directing the AO to allow only pro rata expenses of Mr. I. Bannerjee

4. On the facts and circumstances of the case and in law, the learned Commissioner (Appeals) erred in upholding the action of the AO in not allowing an amount of Rs. 1,16,72,900 being expenditure incurred towards technical consultancy charges under section 37(1),

4.1 Without prejudice to the above, on the facts and circumstances of the case and in law, the learned Commissioner (Appeals) ought to have directed the AO to consider expenditure towards technical consultancy charges of Rs. 1,16,72,900 as work-in-progress to be allowed as deduction in the year in which income is recognised from the contract.

Non grant of TDS credit on mobilization advance

5. On the facts and circumstances of the case and in law, the learned Commissioner (Appeals) erred in upholding action of the AO in not granting credit for TDS of Rs.2,12,54,129 on the mobilization advance of Rs. 93,79,58,000 received from KMRCL during the relevant assessment year.

5.1 Without prejudice to the above, on the facts and circumstances of the case and in law, the learned Commissioner (Appeals) ought to have directed the AO to allow credit for TDS in subsequent assessment years in proportion to the mobilization advance recovered against appellant's legitimate dues and offered to tax in such subsequent assessment years.

Head of Income for Interest income

6. On the facts and circumstances of the case and in law, the learned AO erred in assessing interest received of Rs. 4,52,073 on mobilization advance as Afcons as "Income from Other Sources" instead of "Business Income"

Interest under sections 234B, 234C and 234D

7. On the facts and circumstances of the case and in law, the learned Commissioner (Appeals) erred in not directing the AO to delete the interest of Rs. 15,081 levied under section 234B.

8. On the facts and circumstances of the case and in law, the learned Commissioner (Appeals) erred in not directing the AO to delete the interest of Rs. 1,34,964 levied under section 234C.

9. On the facts and circumstances of the case and in law, the learned Commissioner (Appeals) erred in not directing the AO to delete the interest of Rs.7,03,483 levied j under section 234D.

2. Brief facts are as under :-

The facts of the case are that the assessee, an AOP, e-filed its return for income for A.Y. 2010-11 on 25/09/2010 declaring total income of Rs.1,21,25,000/-. The return was processed and selected for scrutiny. During scrutiny proceedings, the AO observed that the assessee had executed a contract agreement dated 20/03/2010 with the Kolkata Metro Rail Corporation and thereafter obtained the right to receive "mobilization advance' of Rs. 93,79,58,QOO/-. The AO also noted that the assessee had credited an amount of Rs. 133.63 lakhs to the P&L Account but observed that the same could not be treated as revenue receipt since the assessee had not billed the KMRCL and the KMRCL had not adjusted any amount against the mobilisation advance. The assessee contended that as it was the initial stage of the contract, it had recognised revenue equivalent to the cost/expenses incurred till the end of the financial year as per Accounting Standards. The AO however noted that the submissions of the assessee reflected that the assessee had only prepared claim for mobilisation advance No. UGI/1 and invoice No. MOB/ADV/1 on 23/03/2010 for mobilisation advance of Rs. 93,79,58,000/- and that on receipt of the advance had given an amount of Rs. 91,67,93,872/- on 30/03/2010 to M/s Afcons Infrastructure Ltd. As regards Accounting Standard 7, the AO observed that it was not notified by the Govt. of India and concluded that in such circumstances the amount credited by the

assessee to the P&.L Account could not be assessed as income for the year under consideration. During scrutiny proceedings, the AO also observed that the assessee had not given details of expenses of Rs. 116.73 crores paid as 'technical consultancy' charges or explained the nature of services rendered by the recipient and as such the amount could not be held as being wholly and exclusively for the purpose of business. The AO further examined the expenses claimed by the assessee, and as regards expenses on account of audit fees, observed that TDS had not been deducted on the amount was therefore not allowable u/s 40(a)(ia). In addition, the amount debited as bank guarantee expenses was disallowed by the AO noting that this sum was paid before the commencement of the project and therefore was to be capitalised. Similarly, travelling and professional expenses were disallowed in the absence of details and observing that the same were incurred before the commencement of the project. The AO also observed that the assessee had claimed credit for Rs,2,12,54,129/- (the amount of TDS done by the KMRCL against the mobilisation advance) even though no regular billing was done and only unbilled revenue was credited to the P&L Account and that this was in violation of section 199 and Rule 37A. Assessment was completed vide order dated 31/12/2012 withdrawing credit for TDS of Rs.2,12,54,129/-; disallowing expenses of Rs. 1,33,63,443/-and audit fees of Rs. 33,090/-/The present appeal is filed against this assessment order.

3. The assessee carried the matter to learned CIT(A) and pursuant to learned CIT(A)'s order on the above issues, assessee has filed the appeal before us and raised the ground as deleted above.

4. At the outset, learned Counsel of the assessee submitted that he shall not be pressing ground No. 1 to 4 relating to adverse inference of unbilled revenue and setting up/commencement of business.

5. Learned Counsel of the assessee submitted that he shall not be pressing ground No. 6. He submitted that the assessee shall be contesting only ground

No. 5 and 5.1 above relating to non grant of TDS credit on mobilization advance.

6. In accordance with submission of learned counsel ground relating to unbilled revenue and setting up/commencement of business as contained in ground No. 1 to 4 are dismissed as not pressed. In respect of ground No. 6 relating to treatment of interest as income from other sources instead of business income is also dismissed as not pressed.

7. We now adjudicate the issue contained in Ground No. 5 & 5.1 relating to non-grant of TDS credit on mobilization advance. At the cost of repetition we may reproduce grounds as below :-

Non grant of TDS credit on mobilization advance

5. On the facts and circumstances of the case and in law, the learned Commissioner (Appeals) erred in upholding action of the AO in not granting credit for TDS of Rs.2,12,54,129 on the mobilization advance of Rs. 93,79,58,000 received from KMRCL during the relevant assessment year.

5.1 Without prejudice to the above, on the facts and circumstances of the case and in law, the learned Commissioner (Appeals) ought to have directed the AO to allow credit for TDS in subsequent assessment years in proportion to the mobilization advance recovered against appellant's legitimate dues and offered to tax in such subsequent assessment years.

8. Assessing Officer's action on this issue is summarized as under :-

During the course of assessment proceedings, the AO noted that the appellant had claimed TDS of Rs. 2,13,56,569/- deducted by KMRCL on mobilisation advance of Rs. 93,79,58,0007-. The AO observed that no regular billing was done by the appellant and unbilled revenue had simply been credited to the P&L account of appellant with the billed party being debited through book entry. The AO further noted that no income was therefore assessable in the hands of the appellant for the year under consideration and credit for TDS had been claimed in violation of section 199 and Rule 37BA. For these reasons the AO asked the appellant to explain why the credit of TDS of Rs. 2,13,56,5597- should not be withdrawn. The appellant submitted that it was engaged in the activity of construction of metro works and as per the general practice in the industry, the tenure of such contracts

being extensive and requiring considerable outlay, mobilisation advance was given as a short-term loan. It was stated that such mobilisation advance was not in the nature of income since the same was of the nature of a temporary loan and was given against the bank guarantees offered by the appellant. It was further stated that in case credit for TDS was not allowed in the A.Y. under consideration, the same should be allowed in the subsequent assessment years in proportion to the advance recovered by KMRCL in those years. The AO however held that it was incorrect to say that the mobilisation advance was in the nature of short-term loan and that the appellant's contention that this was not on account of any contractual dues, was not correct inasmuch as the same was paid on account of contractual obligations as per clause 11.2.1 of the contract. The AO further noted that tax was correctly deducted on this amount as per section 194C and observed that as per Section 199 and Rule 37BA credit could only be claimed when corresponding income was offered to tax. In the present case, the AO noted that work had not commenced, no certificate to this effect was issued by the Engineer referred to in the contract and the contract itself was signed only about 10 days before the end of the financial year and as such the claim for credit of TDS was not acceptable. Accordingly, he withdrew credit for TDS of Rs. 2,12,54,129/-.

9. Against the above order, assessee preferred appeal before learned CIT(A). After elaborately referring to the submission of the assessee learned CIT(A) upheld the action of the Assessing Officer by observing as under :-

"6.3.1 I have carefully considered the facts as they emerge from the impugned order and the submissions of the appellant. I have perused the account of the appellant in the books of KMRCL for F.Y. 2009-10 which reads as follows:

appellant in the books of KMRCL for F.Y. 2009-10 which reads as follows:

Kolkata Metro Rail Corporation Ltd 4th& 5th Floor, Munshi Premchand, Sarani, Kolkata – 21					
Mobilisation Advance – Transtonnelstroy Afcons JV Ledger Account 1-Apr-2009 to 31-Mar-2010					
Date	**Particulars**	**Vch Type**	**Vch No**	**Debit**	**Credit**
29-03-10	Cr Loan – JICA Mob Adv Bill for UG1 Tender Vide no. Mob/Adv/1 dt 23.03.10 paid by JICA on 29.03.10	Journal	184	93,79,58,000.00	
				93,79,58,000.00	
	Dr Closing Balance				93,79,58,000.00
				93,79,58,000.00	**93,79,58,000.00**

It is seen that during the year under consideration, no bill has been raised by the appellant and that only a single entry has been passed crediting the amount of Rs.93,79,58,000/- to the appellant. In the balance sheet of the appellant as on 31/03/2010, the amount of Rs. 93,79,58,O00/- is shown as 'Other Liabilities.'

6.3.2 In this context, it is seen that the terminology used under the agreement by KMRCL was "recovery of advance" and not "adjustment of advance" (refer clause 11.2.5 above in extract reproduced in appellant's submissions above).In appeal, the appellant has stated that the TDS was wrongly deducted by KMRCL on an amount which was loan and not any advance for future contractual dues. However, the appellant has been unable to show why in that case, it did not ask KMRCL to revise its TDS return and claim refund u/s 200A of the I.T. Act or why it did not repay the mobilization advance to KMRCL only to the extent of net amount received after deduction of TDS? It also needs to be noted that if indeed TDS was wrongly deducted, there is no reason why Assessing Officer should have allowed claim of such TDS to the appellant anyway. Moreover, by claiming credit for TDS in the of income, appellant has clearly shown that in its view, the mobilization advance Is adjustable against future contractual dues irrespective of the provisions in agreement with KMRCL. This aspect is relevant because appellant was entitled to receive contractual dues from KMRCL subsequently and therefore the mobilization advance was adjustable against such dues irrespective of the repayable nature of mobilization advance. As per section 199 of the I.T.Act read with rule 37BA(3) of the I.T.Rules, TDS credit is to be allowed only in respect of the assessment year in which such income is assessable. In other words, if the appellant has not created any contractual dues till 31st March for the Financial Year, relevant to the A.Y. under appeal, the question of adjusting any part of mobilization advance towards any contractual income does not arise. Therefore there cannot be any claim of TDS also. The appellant's alternative contention that the credit of TDS should be allowed in proportion to the extent of revenue recognised in the subsequent years is a claim that requires verification of facts of the succeeding assessment years and accordingly cannot be adjudicated in this appeal. As far as claim of credit of TDS on mobilization advance in subsequent years is concerned, it is for the appellant to make or revise its claim in the returns of income filed for subsequent years when the corresponding income is reflected as contractual receipt. In view of these facts, the withdrawal of TDS by the, A.O. is upheld and the grounds raised by the appellant are dismissed".

10. Against the above order, assessee is in appeal before us.

11. We have heard both the counsel and perused the records. At outset, learned Counsel of the assessee submitted that this issue is covered in favour of the assessee by the decision of ITAT in the case of ACIT Vs. M/s. Patel Engineering Ltd. (ITA No. 6605/Mum/2013 vide order dated 18.11.2015).

12. Per contra, learned Departmental Representative submitted that the above decision of the ITAT is not applicable in the facts of the case. In this connection he relied upon the order of learned CIT(A).

13. Upon careful consideration we may carefully refer to the decision of ITAT relied upon by learned counsel in the case of Patel Engineering Ltd. (supra), in which ITAT has adjudicated the issue as under :-

> *30. The AO did not allow credit of TDS in respect of advances received.*
>
> *31. By the impugned order the CIT(A) confirmed the action of the AO after observing as under :-*
>
> > *"11. 1 On a consideration of this ground no relief can be afforded to the appellant since credit for TDS will be granted as and when the income is offered to tax. The appellant requires credit of Rs. 2,73,73,1621/- deducted from the advances received. It has been pointed out by the A. 0 that TDS on advance have regularly been disallowed in the earlier years and the appellant is on further appeal. Consistent with the stand taken in earlier years the A.O has not allowed credit with respect to the TDS on advances. However,, the A.O has himself agreed that the corresponding income for TDS advances amounting to Rs. 1,44,41,2621/- has been offered as income during the current year. Hence to the said extent, appellant is eligible for grant of credit of TOS as per law. The A.O will grant credit, subject to the same not having been granted in the earlier years."*
>
> *32. We have considered rival contentions and found that in terms of the contract agreement, the assessee receives advances/loans on which the payer deducts tax at source. Such loans and advances can broadly be classified as (i) Site Mobilisation loan granted to enable the assessee to mobilise the work site i.e. create access roads, mobilise men, equipments, establish and set up site office, etc., (ii) Machinery Mobilisation loan granted to enable the assessee to purchase machineries and equipments needed to carry out the subsequent work on the site and (iii) Advance against work and material given to the*

assessee to help it in procuring material and against the work in progress on the site. Whereas in the first two cases, it is a capital receipt in the nature of loan not connected to any work carried out by the contractor, the third one is an advance in the revenue field. In all the above cases, the Principal uniformly deducts tax at source u/s 194C of the Act. From the record we found that the AO has discussed this on pages 18-21 of the assessment order and citing section 199 has disallowed credit of TDS of Rs1,29,31,900I- as the advances pertaining thereto are not credited to the profit and loss account during the year. The ClT(A), on page 73-74 para 11 of her order, concurred with the view of the AO. As per terms of various contract agreements under which Site Mobilisation Loan and the Machinery Mobilisation Loan I advances, mostly on interest ranging from @ 12% to 18% pa., have been granted against bank guarantee, In the balance sheet, such contractee advance mobilisation loan is reflected as loan funds under the head Contractee advances as a liability. Such loan can never be the income of the assessee, neither in present or in future; deduction of such loan advance from running bills is only a practical and convenient way to recover the loan. Such mobilisation loan being a capital receipt, there was no legal obligation on the part of the contractee to deduct tax at source u/s 1940. If tax has been deducted at source, the credit for such TDS has to be allowed in the year of deduction itself, In ACIT v. Peddu Srinivas Rao ITA 324Nizag12009 mobilisation advance was received and on identical facts it was held that credit for such TDS should be given in the year of deduction of TDS itself. This decision was followed in Zelan Projects Pvt. Ltd. v. DCIT ITA 1361/Hyd/2013 fel::pBS--ee]. Similarly, in Arvind Murjani Brands (P.) Ltd. vs. ITO 21 Taxmanncom 131 (Mum) E, it was held that where tax is deducted at source on an amount which is not at all chargeable to tax, command of section199 will have to be harmoniously and pragmatically read as providing for allowing credit for tax deducted at source in the year of receipt of amount, in which the tax was deducted at source.

33. In respect of advance against work and material, we found that the said advance is reflected as a reduction from construction work in progress, which itself is valued at contract rates i.e. selling price. In other words, the income pertaining to such advance is already impregnated in the work in progress offered for tax during the impugned year itself. The Tribunal in ACIT v. Patel KNR Joint Venture ITA 5230/Mum/2012, on identical facts, following Toyo Engineering Ltd., decided in favour of the assessee. Respectfully following the decision of the coordinate bench in the case of associate concern of the assessee vis-à-vis other decisions referred above, we direct the AO to allow the credit for TDS in year of deduction itself. We direct accordingly."

14. Upon careful consideration we find that authorities below have passed a self contradictory order in this case. On one hand it is the case of authorities below that assessee has not billed any revenue, so assessee credit in P&L account of income has been rejected. It has been mentioned that only a sum of Rs. 93,79,58,000/-mentioned as loan receipt in the balance sheet as liability is acceptable figure. These facts are elaborately detailed by learned CIT(A) after obtaining the remand report in paragraph 6.1.10 of his order as under :-

> *From the above details, it is clear that no work has been undertaken by the appellant in the process of execution of the contract before the close of F.Y. 2009-10 and that in the said period, the appellant has only received mobilization advance. The above data also makes it evident that it is only during F.Y. 2010-11 that the mobilization advance has been adjusted to the extent of Rs. 2,71,45,967/- and the first bills have been raised by the appellant".*

15. Once it is the case of the Revenue that assessee has not commenced any business during the assessment year, it has not made any bill for the work done and revenue recognition is rejected and authorities below emphasized that only a sum of Rs. 93,79,58,000/- being the mobilization advance reflected in the balance sheet in liability is an acceptable figure, then how can it be said that the TDS deducted by the payer i.e. is correct is beyond comprehension.

16. These facts clearly indicate that on the facts and circumstances of the case, the payer had wrongly deducted TDS on this sum paid as mobilization advance. As held by the ITAT in M/s. Patel Engineering (supra), wherein it was expounded that the mobilization advance was not an income and that credit for any TDS on the same should be given in the year of TDS itself. We note that the authorities below have denied the assessee's request on various technicalities that the assessee should have made an application etc. for wrong deduction of TDS in this regard. In our considered opinion such mechanical approach of the Revenue is not justified. In this regard we draw support from Hon'ble Apex Court decision in the case of CIT Vs. Shelly products and others (261 ITR 367) wherein it was held that assessee was entitled to refund excess tax paid out of abundant caution or owing to error or non-taxability. The

common law maxim of aprobate and reprobate mandates that such a contradictory approach and shifting stands are not permissible. This view was reiterated by Hon'ble Apex Court in Paras Rampuria Suitings Pvt. Ltd. Vs. Official Liquidator (Civil Appeal No. 10322 of 2017 dated 8.10.2018).

17. In the background of aforesaid discussion and precedent from the aforesaid ITAT decision and the Hon'ble Apex Court decision, we are of the considered opinion that the assessee deserves to succeed on this issue and accordingly we direct the Assessing Officer to give the credit for the TDS.

In the result, the appeal is partly allowed.

Order has been pronounced in the Court on 16.5.2019.

Sd/-	Sd/-
(AMARJIT SINGH)	(SHAMIM YAHYA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 16/5/2019

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)

PS ITAT, Mumbai