IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES 'C', NEW DELHI

Before Sh. H. S. Sidhu, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 4673/Del/2016 : Asstt. Year : 2012-13

ACIT, Central Circle-15, New Delhi-110055	Vs	M/s HAL Offshore Ltd., 25, Bazar Lane, Bengali Market, New Delhi-110001
(APPELLANT)		**(RESPONDENT)**
PAN No. AAACH3144B		

ITA No. 2081/Del/2016 : Asstt. Year : 2012-13

M/s HAL Offshore Ltd., C/o M/s RRA Taxindia, D-28, South Extension, Part-I, New Delhi-110049	Vs	DCIT, Circle-12(1), New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AAACH3144B		

Assessee by : Sh. Somil Agarwal, CA
Revenue by : Sh. Amit Katoch, Sr. DR

Date of Hearing: 22.07.2019		**Date of Pronouncement: 23.07.2019**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal is directed against the order passed by the ld. CIT (A)-16, New Delhi in the case of the order passed u/s 143(3) of the Income tax Act, 1961 by the Assessing Officer dated 30.09.2014 determining total income at Rs.6,84,66,740/- as against returned income of Rs. 6,06,00,520/-.

2. The ground no. 1 & 2 taken by the assessee pertains to addition u/s 41(1) of the Act of Rs.508,583/- during the assessment proceedings the

Assessing Officer noted that there are static creditors which have neither been written off nor the amount have been paid in the subsequent period. The alleged creditors are as under:-

Party Name	*A.Y.2010-2011 (Rs.)*	*A.Y.2011-2012 (Rs.)*	*A.Y. 2012-2013 (Rs.)*
Bogerd Martin (India) Pvt. Ltd	*83,231*	*83,231*	*83,231.00*
Gauges Bourdon (India) Pvt. Ltd.	*178,785*	*178,785*	*178,785.00*
Machinery Sales Corporation	*14,832*	*14,832*	*14,832.00*
Super Marine Insulation Works	*231,735*	*231,735*	*231,735.00*
Total	*508,583/-*	*508,583/-*	*508,583/-*

3. The revenue on record held that the assesee could not furnish any confirmation from the traders. Therefore the assessing officer resorting to section 41(1) treated as them ceased liability. The Ld AR during the appellate proceedings contended that these creditors are shown as outstanding liability in the balance sheet. The assessee acknowledges his liability to pay and therefore the liability still exists and the provisions of section 41(1) of the I.T. Act. From the detailed submitted it is seen that the credit balances are from the parties mentioned above are outstanding for more than three years. While the revenue held that no payment have been made to the parties till date. The ld. AR contended that the outstanding credits cannot be unilaterally written off as non-payable by the Revenue as the assessee is liable to pay these amounts as and when demanded. It was also argued that the action of the Revenue is not tenable in the light of the judgment of Hon'ble Madras High Court in the case of Tamil Nadu Warehousing Corporation 292 ITR 310 and the judgment of Hon'ble Gujarat High Court in the case of Ambika Mills Ltd. 54 ITR 167. It was argued that the liability is being acknowledged by the assessee in their books of account and hence cannot be treated u/s 41(1) of the Act. Further, the assessee is also submitted the confirmations in the

paper book at page 7, 8 & 9. The ld. DR supported the orders of the authorities below. He argued that the assessment order and the order of ld. CIT (A) categorically denied the filing of confirmations from the creditors.

4. We have gone through the arguments, judgments quoted and the facts on record. We find that during the assessment proceedings, the assessee has submitted a list of sundry creditors more than three years consisting of 15 parties, out of which 11 parties have been paid in the financial year 2013-14 and amount pertaining to one party namely, ICRA has been written off as not payable. Regarding the four parties disputed before us, the assessee has transferred these amounts to OSV claim payable as on 31.03.2014 which means that the company has filed its claim statement for the OSV Contract which is reflected in claim receivable. The matter is still under settlement by the OEC appointed by Company and ONGCL. The creditors represent amount payable to be paid only against the amount recoverable from ONGCL on settlement. These creditors are for various material/services rendered by them during the contract which is also a matter of dispute raised by ONGCL, and hence the company will pay them only once its claims are settled with ONGCL. The record also shows that the confirmations have not been filed before the Revenue authorities whereas it was vehemently argued by the ld. AR that the confirmations were made available before the Revenue authorities. Hence, Keeping in view, entirety of the fact, the matter is remanded back to the file of the Assessing Officer for the limited purpose of examining the settlement by the OEC and ONGCL by taking the confirmations filed on record and take a view in accordance with the provisions of law.

5. Ground No. 3 taken up by the assessee pertains to disallowance on account of Festival expenditure of Rs.6,78,200/-. The AO noted that the

bulk of expenditure have been incurred in cash for purchases for distributions of various gift items to the employees and professionals. The AO further noted that the distribution of the items was not ascertainable from the record and they cannot be held to be incurred for the purpose of business only. The AO is therefore disallowed 25% of the expense i.e. Rs.6,78,200/- for being not incurred for business purpose. The ld. CIT (A) confirmed the disallowance on the grounds that there were purchase of gold coins too. During the appellate proceedings, before us the AR has taken us through the copies of invoices, vouchers etc. It was also argued that there was increased turnover and also increased profit during the year and hence increase in the festival expenditure cannot be treated as disallowable expenditure. It was argued that the books of account have been duly audited and no discrepancy was found out by the Revenue. The ld. AR also argued that without bringing anything on record the disallowance made by the Assessing Officer on adhoc basis cannot be sustained. The ld. DR relied on the orders of the ld. CIT (A).

6. We have gone through the facts on record and find that the only reason, the Revenue authorities disallowed is the "increase" in expenses without any iota of evidence or cogent reason. Keeping in view, the judgments of Hon'ble Apex Court in the case of Dhakeswari Cotton Mills Ltd. Vs CIT 26 ITR 775, Sayaji Iron & Engg. Co. Vs CIT (Guj.) 253 ITR 749 and DCIT Vs Haryana Oxygen Ltd. 76 ITD 32 (Del.), we hereby hold that the disallowance made by the Assessing Officer cannot be legally sustained.

7. Ground No. 4 pertains to disallowance on account of legal and professional expenses. The Revenue disallowed the payment of Rs. 64,000/- made to R.N. Kalra and Rs.75,000/- to M.C. Panda as no TDS has been deductible on these expenses. It was argued by the ld. AR that

Mr. R.N. Kalra & Mr. M.C. Panda were the arbitrators for the case between ONGCL and assessee company. They were not rendering any service to the assessee company. They were appointed by ONGCL to mediate between both. Since there services were in the nature of court procedure for out of court settlement, TDS was not deducted on the payment made to them. As per Sec 194J of the Income Tax Act "Professional services" means "services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board for the purposes of section 44AA or of this section". Thus, arbitration is not covered u/s 194J and hence TDS is not required to be deducted on such payments, therefore, provision of 40(a)(ia) not applicable on the same. The ld. DR, Sh. Amit Katoch argued that the arbitration activities are legal in nature and hence TDS liability arises on the payments made to arbitrators.

8. Heard the arguments of both the parties and perused the material available on record. Arbitration, a form of alternative dispute resolution (ADR), is a way to resolve disputes outside the courts. The dispute will be decided by one or more persons the "arbitrators", "arbiters" or "arbitral tribunal", which renders the "arbitration award". The arbitral Tribunal is not a court in the traditional sense but provides services to resolve disputes that arise out of agreements between members, organizations or private parties. The arbitrators are empanelled and are choosen by the mutual consent of the parties. The arbitration fee is also determined by and paid by both the parties were availing the arbitration award. The fee is paid to arbitrators who perform the legal functions. Hence, it cannot be said that the company is not getting the services of the arbitrators and dealing with their disputes regarding the contracts etc. Since, the amount is in the nature of professional services sought by the

legal professionals involved in the profession/occupation/vocation of arbitration, the amount is liable to TDS as per the provisions of Section 194J of the Act. We also find the case laws referred by the ld. AR have no applicability on the facts of the case. Hence, keeping in view, the provisions of the Act, we uphold the decision of the ld. CIT (A) on this ground.

9. Ground No.5 & 6 pertains to disallowance on account of vessel repair & maintenance u/s 40(a)(ia). Brief facts of the issue are that the assessee company has made following payments for repair & maintenance without deducting TDS:

(I) Ahm Marine LLC Rs.77,295/-
(II) DPS Offshore Rs.3,24,607/-
(III) Fugro Seastar AS/Fugro Statellite Positioning AS Rs.3,01,725/ -
(IV) Fugro Seastar AS/ Fugro Statellite Positioning AS Rs.3,21,840/-
(V) Fugro Seastar AS/ Fugro Statelllte Positioning AS Rs.3,21,840/ -
(VI) Fugro Seastar AS/Fugro Statellite Positioning AS Rs.16,82,856/-

10. Before us, it was argued that the amount paid to Ahm Marine LLC of Rs.77,295/- is on account of visa charges and hence no TDS is deductible. We accept the arguments of the ld. AR on this issue that no TDS is deductible on this amount. Regarding the DPS Offshore and Fugro Seastar AS, it was submitted that the assessee has hired trans receiver which is a part of acoustic tracking system, global positioning system installed on the vessel. It was argued placed on the judgment on ONGC Vs CIT 376 ITR 036 that these are ancillary works related to prospecting, extraction, production of mineral oils and payment made by the assessee by the non-resident company are assessed under Section 44BB of the Act and hence the profits are deemed to be 10% of the aggregate amount specified. He further relied on the Circular No.3/2015 dated 12.02.2015 of CBDT Ld. DR supported the order of the lower authorities.

11. Heard the arguments of both the parties and perused the material available on record.

Section 195 reads as under:

> *"(1) Any person responsible for paying to a non-resident not being a company, or to a foreign company, any interest [1][***] or any other sum chargeable under the provisions of this Act (not being income chargeable under the head Salaries) shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :*
>
> *Provided that in the case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode:"*

Section 44AB reads as under:

> *"Special provision for computing, profits and gains in connection with the business of exploration, etc., of mineral oils.*
>
> *'44BB (1) Notwithstanding .anything to the contrary contained in sections 28 to 41 and sections 43 and 43A, in the case of an assessee engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils, a sum equal to ten per cent. of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head Profits and gains of business or profession":*
>
> *Provided that this sub-section shall not apply in a case where the provisions of secti6h 42 or section 44D or section 115A or section 293A apply for the purposes of computing profits or gains or any other income referred to in those sections.*
>
> *(2) The amounts referred to in sub-section (1) shall be the following, namely:—*
>
> *(a) the amount paid or payable (whether in or out of India) to the assessee or to any person on his behalf on account of the provision of services, and facilities in connection with, or supply of plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils in India; and*
>
> *(b) the amount received or deemed to be received in India by or on behalf of the assessee on account of the provision of services facilities connection with, or supply of plant and machinery on hire Used, or to be used, in the prospecting for, or extraction or production of, mineral oils outside India.*

Expanation,—For the purposes of this section—

(i) "plant" includes ships, aircraft, vehicles, drilling units, scientific apparatus and equipment, used for the purposes of the said Business;

(ii) "mineral oil" includes petroleum and natural gas."

Section 40(a)(ia) reads as under:

*"Notwithstanding anything to the contrary in **Sections 30 to 38,** the following amounts **shall not be deducted** in computing the income chargeable under the head **"Profits and gains of business or profession", –***

(a) in the case of any assessee –(i)

(ia) [thirty per cent of any sum payable to a resident], on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, [has not been paid on or before the due date specified in sub-section (1) of Section 139;]."

13. The circular No.3/2015 dtd. 12-2-2015 reads as under:

"Section 40(a)(i) of the Act stipulates that in computing the income chargeable under the head "Profits or gains of business or profession", any interest, royalty, fees for technical services or other sum chargeable under this Act either payable in India to a non-resident (not being a company)/a foreign company or payable outside India, shall not be allowed as a deduction, if there has been a failure in deduction or in payment of tax deducted in respect of such amounts Under Chapter XVII-B of the Act.

2. Disallowance regarding 'other sum chargeable' under section 40(a)(i) is triggered when the deductor fails to withhold tax as per provisions of section 195 of the Act. Doubts have been raised about the interpretation of the term 'other sum chargeable' i.e. whether this term refers to the whole sum being remitted or only the portion representing the sum chargeable to income-tax under relevant provisions of the Act.

3. Central Board of Direct Taxes has already issued Instruction No. 02/2014 dated 26.02.2014 (F.No. 500/33/2013-FTD-l) regarding deduction of tax at source under sub-section (1) of section 195 read with section 201 of the Act relating to payments made to non-residents in cases where no application is filed by the deductor for determining the sum so chargeable under sub-section (2) of section 195 of the Act. Vide this Instruction, Board has clarified that in cases where tax is not deducted at source under section 195 of the Act, the Assessing Officer shall determine the appropriate portion of the sum chargeable to tax, as mentioned in sub-section (1) of section 195, to ascertain the tax-liability on which the deductor shall be deemed to be an assessee in default under section 201 of the Act. It has been further clarified that such appropriate portion of the said sum will depend on the facts and circumstances of each case taking into account the nature of remittances, income component therein or any other fact relevant to determine such appropriate proportion.

4. As disallowance of amount under section 40(a)(i) of the Act in case of a deductor is interlinked with the sum chargeable under the Act as mentioned in section 195 of the Act for the purposes of tax deduction at source, the Central Board of Direct Taxes, in exercise of powers conferred under section 119 of the Act, hereby clarifies that for the purpose of making disallowance of 'other sum chargeable' under section 40(a)(i) of the Act, he appropriate portion of the sum which is chargeable to tax under the Act shall form the basis of such disallowance and shall be the same as determined by the Assessing Officer having jurisdiction for the purpose of sub-section (1) of section 195 of the Act as per Instruction No. 2/2014 dated 26.02.2014 of CBDT. Further, where determination of 'other sum chargeable' has been made under sub-sections (2), (3) or (7) of section 195 of the Act, such a determination will form the basis for disallowance, if any, under section 40(a)(i) of the Act."

14. A concurrent reading of Section 195, 44BB, 40(a)(ia) of the Act and the Circular 3/2015 of CBDT pertaining to "other some chargeable under this Act" give rise to the sum chargeable of Rs.295,287/-. Hence, the disallowance is limited to the extent of Rs.295,287/- being the 10% of the deemed profits of the recipient company.

15. The solitary ground taken up by the Revenue pertains to deletion of Rs. 4,06,94,480/- by the ld. CIT (A) on account of difference between depreciation as per Companies Act and Income Tax Act for a sum amounting to Rs. 14,57,45,877/- instead of Rs. 18,64,40,357/- respectively while calculating total income as per section 115JB on the ground that assessee had adopted the rate of depreciation as per Income Tax Act instead of Companies Act in Profit & Loss Account. During the hearing before us, it was argued that no adjustment/ addition could be made to the amount of Book Profit u/s 115JB of the Act on account of the difference between depreciation as per Income Tax Act and as per Companies Act. Only those adjustment are permissible to the net profit shown as per profit and loss account which are given under Explanation (1) to Section 115JB. Depreciation has been charged in P&L A/c as per Income Tax rate and this very P&L A/c has been placed before shareholder in AGM. Section 115JB clearly points out that every assessee while preparing annual accounts including P& L A/c, the rates adopted for

calculation of depreciation should be the same as have been adopted for the purpose of preparing such accounts laid before the company at its AGM. It is not the case of Ld. AO that depreciation provided in P& L A/c are not at the same rates provided for the purpose of its P&L A/c being laid before AGM. We find that the assessee has claimed depreciation of Rs.18,64,40,357/- in the P&L A/c and the same amount has been taken into consideration while determining the book profit.

16. The first proviso to sub-section 2 of section 115JB of Income tax Act, 1961 as under:-

> *"Provided that while preparing the annual accounts including profit and loss account:-*
>
> *i) The accounting policies;*
>
> *ii) The accounting standards adopted for preparing such accounts including profit and loss account;*
>
> *iii) The method and rates adopted for calculating the depreciation shall be the same as have been adopted for the purpose of preparing such accounts including profit and loss account and laid before the company at its annual general meeting in accordance with the provisions of section 210 of the Companies Act, 1956 (1 of 1956)."*

17. According to the first proviso to section 115JB(2), the accounting policies, the accounting standards adopted for preparing such accounts, the method and rates of depreciation which have been adopted for preparation of the profit and loss account laid before the annual general meeting, should be followed while preparing profit and loss account for the purpose of computing book profit under section 115JB.

18. Based on the direct provisions of the Income Tax Act and judgments in the case of Malayala Manorama Co. Ltd. vs. CIT 300 ITR 0251, (SC) and CIT vs. Prakash Industries Ltd. 324 ITR 0391(P&H), the addition made by the Assessing Officer on account of adjustment in computation u/s 115JB is hereby deleted.

19. In the result, the appeal of the assessee is partly allowed and appeal of the Revenue is dismissed.

(Order Pronounced in the Open Court on 23/07/2019).

Sd/-	Sd/-
(H. S. Sidhu)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 23/07/2019

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR