

IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES “ C ” BENCH: BANGALORE

**BEFORE SHRI JASON P BOAZ, ACCOUNTANT MEMBER
AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER**

ITA. No.1635/Bang/2017
(Assessment Year: 2010-11)

M/s. Talisma Corporation Private Limited, 3 rd Floor, Olympia / Building No.1, Bagmane Tech Park, C V Raman Nagar, Byrasandra Post, Bangalore-560 093 PAN: AABCT 1052F	Vs.	Jt. Commissioner of Income Tax (OSD), Circle 7(1)(1), Bangalore.
(Appellant)		(Respondent)

Assessee By:	Shri Sharath Rao, C.A.
Revenue By:	Smt. P. Renuga Devi, Addl. CIT (D.R)

Date of Hearing :	27.08.2019
Date of Pronouncement :	04.09.2019

ORDER

PER SHRI PAVAN KUMAR GADALE, JM :

The assessee has filed an appeal against the order of Commissioner of Income Tax (Appeals)-7, Bangalore passed u/s. 143(3) r.w.s. 144C and u/s. 250 of the Income Tax Act, 1961 (the Act) and raised the following grounds of appeal :

1. Non-Adjudication of Ground No. 1 and Ground 3 as per Form 35

The learned Commissioner of Income-tax ['CIT(A)'] has erred in not-adjudicating the Ground no. 1 and Ground no. 3 raised before the learned CIT(A) vide Form 35 on Short credit of TDS and revision in the amount of carry forward of losses.

Notwithstanding and without prejudice to the above, the Appellant raises the following grounds before the Honorable Tribunal:

2. Proportionate disallowance of TDS credit- Rs. 23,34,311

- a) The learned CIT(A) has erred in disallowing TDS credit to the extent of Rs.23,34,311 on the ground that corresponding income in respect of said TDS credit as reflected in Annual tax statement (Form 26AS) has not been offered to tax in the AY 2010-11.
- b) The learned CIT(A) ought to have observed that the income pertaining to TDS credit of Rs.23,34,311 was already offered to tax in earlier years and the credit of taxes deducted by the payer is reflected in the current year which could due to the payer deducting taxes in the current year.
- c) The learned CIT(A) ought to have appreciated that if such credit is not allowed in the current year, the Company would be deprived of such credit which is not claimed in the earlier years.

3. Disallowance of provisional audit fees due to non-deduction of tax at source – Rs.9,00,000

- a) The learned CIT(A) has erred in disallowing the year-end audit fees provision of Rs.9,00,000 on account of non-deduction of tax at source.
- b) The existence or accrual of income in the hands of the payee is a pre-condition to fasten the liability of tax deduction at source in the hands of the payer.
- c) The Company submits that provision for audit fees created is a mere provision made in the books of accounts at the year-end and no income had accrued to the payees
- d) The learned CIT(A) ought to have observed that liability towards audit fees has not crystalized and hence no tax is deductible at source on such provision.
- e) The learned CIT(A) ought to have appreciated the recent jurisdictional ruling wherein it was held that that tax not be deducted at source on year-end provision based on the following observations:
 - The Hon'ble ITAT opined that "the liability to deduct tax at source arises only when there is accrual of income in the hands of the payee." It further relied on the decision of Hon'ble SC ruling in the case of GE India Technology Centre Pvt. Ltd. [327 ITR 456] wherein it was held that if payment was not assessable to tax then there was no question of TDS being deducted.

- The Hon'ble ITAT further held that no income had accrued in the hands of the payee considering the fact that the provisions made at year-end were reversed in the beginning of the next accounting year. The Hon'ble ITAT relied on Hon'ble SC ruling in the case of CIT vs. Shoorji Vallabhdas & Co. [46 ITR 144] wherein it was held that "Mere entries in the books of accounts does not establish the accrual of income in the hands of the payee."

- Based on the above, the Hon'ble ITAT held that "there was no liability in the hands of the assessee company to deduct TDS, merely on the provisions made at the year end. Hence, the assessee company cannot be treated as 'assessee in default' for not deducting tax at source.

4. Carried Forward of Loss

- a) The learned CIT(A) ought to have issued directions to the learned AO to verify and rightly adopt the unabsorbed depreciation in the assessment order after considering the rectification orders passed for AY 2005-06 to 2008-09
- b) The learned CIT(A) ought to have directed the learned AO to consider the rectified orders of AY 2005-06 to AY 2008-09 and also the favourable verdict from the Honourable High Court of Karnataka allowing the claim of product development expenditure as a deduction under section 35(1)(iv) of the Act to state the correct amount of carried forward unabsorbed depreciation.

2. The Brief facts of the case are that the assessee is engaged in Software Development and software products, sales and service and filed the Return of Income for the Asst. Year 2010-11 on 5.10.2010 disclosing NIL income after claiming deduction under Section 10AA of the Act and set off brought forward losses. Subsequently, the assessee filed a revised return on 31.3.2012 and the Return of Income was processed and the case was selected for scrutiny and Notice under Section 143(2) and 142(1) of the Act were issued. In response, the learned Authorised Representative of the assessee appeared from time to time and furnished the clarifications. Since the assessee has international transactions the Id. Assessing Officer with the prior approval of the CIT, Bangalore referred to Transfer Pricing Officer (TPO) and the TPO has passed the order under Section 92CA of the Act on 30.01.2014 with no adjustment in respect of international transactions entered with Associated Enterprises (AEs). The Assessing Officer on perusal of the financial statements found that the assessee has not deducted TDS required under Section 194J of the Act on Audit fee and made addition applying the provisions of Section 40a(ia) of the Act and with other adjustments determined the total income of Rs.NIL after adjusting the depreciation / loss and passed the order under Section 143(3) r.w.s. 144C of the Act dt.17.3.2014. Aggrieved by the

order, the assessee filed an appeal with the learned CIT (Appeals) whereas the learned CIT (Appeals) concurred with the action of the Assessing Officer and dismissed the assessee's appeal. Aggrieved by the order of the learned CIT (Appeals), the assessee filed an appeal before the Tribunal.

3. At the time of hearing, the ld. AR submitted that the learned CIT (Appeals) has not adjudicated Grounds of appeal No.1 & 3 in respect of proportionate disallowance of TDS credit and carry forward of losses because the assessee has submitted application for rectification before the Assessing Officer. Similarly CIT (Appeals) confirmed the disallowance of provision for audit fees for non-deduction of tax. The learned Authorised Representative emphasized that the assessee has not paid the amount and accounting entry was reversed in the subsequent assessment year and hence there is no requirement of deduction of TDS and prayed for allowing the appeal. Contra, the learned Departmental Representative supported the orders of CIT (Appeals).

4. We heard the rival submissions and perused the material on record. On the first ground of appeal, the ld. AR submitted that the learned CIT (Appeals) has not adjudicated Ground Nos.1 and 3. The assessee has filed an application for rectification before Assessing Officer and is of the opinion that the assessee intend to withdraw the appeal on above grounds of appeal whereas the learned Authorised Representative vehemently argued that there is no such mention of withdrawal and the assessee has prima facie good case and prayed for one more opportunity before the CIT (Appeals) to substantiate the facts with evidence. We considering the submissions and the findings of the CIT (Appeals), are inclined to provide one more opportunity to the assessee as the CIT (Appeals) has not adjudicated the grounds of appeal in respect of proportionate disallowance of TDS and carry forward of unabsorbed depreciation. Accordingly, we restore these

grounds of appeal raised to the file of CIT (Appeals) to adjudicate on merit and pass a reasonable order and further the assessee should be provided adequate opportunity of hearing and co-operate in submitting the information for early disposal of appeal and the grounds of appeal of assessee are allowed for statistical purposes.

5. On the other disputed issue of disallowance of provision for audit fees, the learned Authorised Representative's contention that the Assessing Officer has disallowed the expenditure as no tax has been deducted (TDS) on provision for Audit fee the learned Authorised Representative submitted that TDS is deductible only when income is chargeable to tax and by making the provision in the Books of Account no income is accrued to the payee and therefore the TDS provisions are not applicable. Further the provision made in the present assessment year has been reversed in a subsequent assessment year as no income is accrued to the payee in the assessment year under consideration. The learned Authorised Representative referred to page 110 of Paper Book where the assessee has substantiated that the provision of audit fees of Rs.7 lakhs and Rs.2 lakhs as on 31.3.2010 was reversed in April, 2010 and supported with evidence in paper book. We on perusal of the order of Assessing Officer find at page 2 para 5, the Assessing Officer has made above addition as the assessee could not produce any details. The contentions of the learned Authorised Representative that no income has accrued to the payee therefore no TDS is deducted cannot be accepted. But the facts are clear that the assessee has claimed deduction in the Profit and Loss account and was not added in the computation of income, we find learned CIT (Appeals) having considered the facts and circumstances and legal provisions and submissions has taken a reasonable view and confirmed the addition which we are not inclined to interfere

and upheld the same. Accordingly the ground of appeal of the assessee is dismissed.

6. In the result, the assessee's appeal is partly allowed for statistical purposes.

Order pronounced in the open court on 4th September, 2019.

Sd/-

(JASON P BOAZ)
ACCOUNTANT MEMBER

Sd/-

(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Dated: 04.09.2019.

*Reddy GP

Copy to

1. The appellant
2. The Respondent
3. CIT (A)
4. Pr. CIT
5. DR, ITAT, Bangalore.
6. Guard File

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore