IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 2389/MUM/2018
Assessment Year: 2014-15

M/s Sai Global Ltd., 11/12, Swastik Disa Business Park, Behind, Vadhani Industrial Estate, L.B.S. Marg, Opp. Damodar Park, Ghatkopar West, Mumbai-400034. **PAN No. AAACQ0580A** **Appellant**	Vs.	Income Tax Officer 14(3)(3), Mumbai, AayakarBhavan, M.K. Road, Mumbai-400020. **Respondent**

Assessee by : Mr. Haridas Bhat, AR
Revenue by : Mr. Chaudhary Arun Kumar Singh, DR

Date of Hearing : 31/07/2019
Date of pronouncement : 22/10/2019

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2014-15. The appeal is directed against the order of the Commissioner of Income Tax-22, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3)of the Income Tax Act 1961, (the 'Act').

2. The 1st ground of appeal

1. On the facts and circumstances of the case and in law, CIT(A) erred in confirming the disallowance of the foreign exchange loss of Rs.77,63,177/- instead of Rs.75,01,304/- reversed by the revised return, thereby disallowing Rs.2,61,873/-without giving any opportunity to give explanation.
2. The AO erred in not appreciating the fact that;-
   a. The assessee has reversed all the foreign exchange loss on capital account and claimed only the revenue accounts.
   b. The details of revenue loss was submitted before the AO as well as CIT(A), who has ignored the same and passed the order
3. The appellant, therefore, prays that disallowance of Rs.2,61,873/- made on foreign exchange loss may please be deleted.

3. Briefly stated, the facts of the case are that the assessee is engaged in the business of quality endorsement, technical audits and issue of certificates and it filed its return of income for the assessment year (AY) 2014-15 on 29.11.2014 declaring loss for the current year of Rs.83,56,157/-. The assessee has debited foreign exchange fluctuation loss of Rs.77,63,177/- in the profit and loss account for the year under consideration. During the course of assessment proceedings, the Assessing Officer (AO) asked the assessee to file complete details of the above loss with the justification for allowing the same as revenue expenditure. In response to it, the assessee *vide* letter dated 09.08.2016 submitted :

> "As per disallowance in previous assessment year scrutiny we already filed the revised return for AY 2014-15 on 21.11.2015 revising the Foreign Exchange Fluctuation loss of Rs.75,01,304/-"

The AO observed that originally the assessee had filed return of income for the assessment year (AY) 2014-15 on 29.11.2014 declaring loss for the current year at Rs.83,56,157/-. During the course of assessment proceedings, the assessee filed a revised return of income on 21.11.2015 reversing foreign exchange loss of Rs.75,01,304/- after receiving notice u/s 143(2) dated 23.09.2015. The AO further held that the assessee has reversed exchange fluctuation loss of Rs.75,01,304/-, whereas it has debited the foreign exchange fluctuation loss of Rs.77,63,177/- in the P&L account. Further observing that the assessee is following mercantile system of accounting, the AO disallowed the claim of foreign exchange loss of Rs.77,63,177/- on the ground that the expenditure claimed has not crystallized.

4. In appeal, the Ld. CIT(A) observed that during the appellate proceedings, except for stating that foreign exchange loss was charged to the revenue account as per Accounting Standard-11, no further details or explanation were filed by the assessee. The assessee itself has reversed an amount of Rs.75,01,304/- being not allowable as revenue expenditure. No explanation has been given as to why only part and not the whole of the loss debited to the P&L account was reversed or how the nature of loss of Rs.2,61,873/- not reversed was different from that of the loss reversed. Thus the Ld. CIT(A) confirmed the disallowance of Rs.77,63,177/- made by the AO.

5. Before us, the Ld. counsel for the assessee submits that the appellant has claimed foreign exchange loss of Rs.77,63,177/- in the original return of income. Thereafter, it *suo motu* filed the revised return

and reversed Rs.75,01,304/- which was on account of the HO account, thereby effectively claimed forex loss of Rs.2,61,873/- . However, the AO disallowed Rs.2,61,873/- without giving any opportunity to the assessee to file explanation, if any.

On the other hand, the Ld. Departmental Representative (DR) submits that the order passed by the CIT(A) which is based on the facts of the case, be confirmed.

6. We have heard the rival submissions and perused the relevant materials on record. In the instant case, it is found that the AO disallowed the foreign exchange loss of Rs.2,61,873/- without giving any opportunity to the assessee to explain its case. In the instant case, it is ascertainable from the accounts filed by the assessee that the expenses of forex loss booked following AS-11 is an allowable expenditure. More so, because of the ratio laid down in *Woodward Governer India P. Ltd.* 312 ITR 254 (SC). Therefore, we delete the disallowance of Rs.2,61,873/- made by the AO on foreign exchange loss and allow the 1st ground of appeal.

7. <u>The 2nd ground of appeal</u>

1. On the facts and circumstances of the case and in law, the CIT(A) erred in confirming the disallowance of Rs.7,17,803/- foreign remittances made to nonresidents u/s 40(a)(i) of the Act without withholding the taxes.
2. The AO erred in not appreciating the fact that -
   a. The AO has merely noted that the same are professional fees and made the additions whereas ignored the facts that the same are

covered under relevant Article of Independent Personal Services or business profits under the treaty.

b. The AO has made addition based on the order of earlier years and not given any reason for making the disallowance.

c. The party wise details were submitted alongwith the Chart of applicability of DTAA, CIT(A) did not ask for any further details like TRC and confirmed the additions citing the lack of details.

3. Your appellant therefore prays that the disallowance of Rs.7,17,803/- u/s 40(a)(ia) being foreign remittances made to non-residents on account of not withholding the taxes may please be deleted.

8. During the course of assessment proceedings, the AO asked the assessee to furnish the details of professional fees paid along with proof of TDS made to the Government Treasury. From the details filed by the assessee, the AO found that TDS has not been made on payments of Rs.7,17,803/-. In response to a query raised by the AO to explain why disallowance should not be made on account of non-deduction of TDS on payment of professional fees to non-residents, the assessee *vide l*etter dated 16.12.2016 submitted :

> "Professional fees are paid to Non-Resident without deducting any withholding tax, this is because as per DTAA with respective countries state that if there is no permanent Establishment of the company providing service in India then there is no liability of deducting the TDS."

However, the AO was not convinced with the above explanation of the assessee and following the order for earlier assessment years, disallowed the above sum of Rs.7,17,803/- u/s 40(a)(ia) of the Act.

9. In appeal, the Ld. CIT(A) confirmed the above disallowance for the reason that the relevant party-wise payments made, the nature of such

payments/services rendered by the payees, tax residency certificates etc. were not filed by the assessee before the AO.

10. Before us, the Ld. counsel submits that the AO has only considered the content of the Certificate issued and ignored the actual facts of the transaction. It is further stated that the assessee gets the audit certification work done by the said foreign entities, where none of the skills are parted with the assessee and it is done based on their license to certify the same, and thus do not part with any rights, or skills. Further, the Ld. counsel submits the following details :

USA	Included services	Not covered since it is not technical or consultancy services and does not allow any enjoyment of right, property or information, and does not make available any technical knowledge, experience, skill, know how or process
THAILAND	Independent personal services	The entity does not have any fixed base, and the certification is made from that country directly
UK	Fees for Technical services	Not covered since it is not technical or consultancy services and does not allow any enjoyment of the right, property or information
SPAIN	Fees for Technical services/ Independent personal services	The entity does not have any fixed base, and the certification is made from that country directly.

Drawing our attention to the above Chart, the Ld. counsel submits that no withholding tax is applicable on the transaction made.

Without prejudice to the above, it is stated that even in the unlikely situation if the withholding tax is applicable, only the income attributable to tax in India will qualify for the disallowance u/s 40(a)(i) of the Act and the disallowance, if any shall be restricted to the profit attributable to India. Thus it is argued that the profit attributable is *nil* since the said certificates are billed in India to the ultimate clients with the mark up which is the profit attributable to Indian operations, which are earned in India.

11. On the other hand, the Ld. DR submits that as the assessee failed to file the relevant party-wise payments made, the nature of such payments/services rendered by the payees, tax residency certificates before the AO and CIT(A). Thus it is stated by him the order passed by the AO disallowing Rs.7,17,803/- u/s 40(a)(ia) be confirmed.

12. We have heard the rival submissions and perused the relevant materials on record. In the instant case, the full details with regard to the payments like the nature of such payments/services rendered by the payees, tax residency certificates were not filed by the assessee either before the AO or CIT(A). In this context, the relevant treaty provisions of the DTAA are also to be examined by the AO. But such treaty provisions cannot be examined in isolation. Details regarding payments are to be filed. Therefore, we set aside the order of the Ld. CIT(A) and restore the matter to the file of the AO to make an order afresh after giving reasonable opportunity of being heard to the assessee. We direct the assessee to file the relevant documents/evidence before the AO. Thus the 2nd ground of appeal is allowed for statistical purposes.

13. In the result, the appeal is partly allowed.

Order pronounced in the open Court on 22/10/2019.

Sd/-	Sd/-
(SAKTIJIT DEY)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 22/10/2019
Rahul Sharma, Sr. P.S.

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//

(Sr. Private Secretary)
ITAT, Mumbai