

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES : "B", BANGALORE**

**BEFORE SHRI B.R.BASKARAN, ACCOUNTANT MEMBER
AND**

SMT. BEENA PILLAI, JUDICIAL MEMBER

**ITA No.760(Bang)/2019
(Assessment Year : 2013-14)**

M/s EL Measure India Pvt.Ltd.,
No.755, 4th Phase, Yelahanka New Town,
Bngalore-560 064
Pan No.AABCE7676E

Appellant

Vs

The Deputy Commissioner of Income Tax,
Cicle-2(1)(1),
Bangalore

Respondent

**Appellant by : Shri Narendra Kumar Jain, Advocate
Revenue by : Shri M. Narasimha Raju, JCIT-DR**

Date of hearing : 05-12-2019

Date of pronouncement : 13-12-2019

ORDER

PER SMT BEENA PILLAI, JUDICIAL MEMBER:

Present appeal has been filed by assessee against order dated 27/11/18 passed by Ld.CIT (A)-2, Bangalore for assessment year 2013-14 on following grounds of appeal:

General grounds

1. *The order of Honourable Commissioner of Income Tax (Appeals)-2 (hereinafter referred as "CIT(A)" for brevity) to the extent prejudicial to the Appellant is bad in law and is liable to be quashed.*

GROUND RELATING TO DISALLOWANCE OF EXHIBITION CHARGES U/S 40(a)(i):

2. *The learned CIT(A) has erred in conforming the action of Assessing Officer ('AO') in:*

a. *disallowing a sum of Rs. 10,64,075/- paid towards exhibition charges to non-residents for events held outside India on the ground that tax has not been deducted at source;*

b. *not appreciating the fact that when the impugned payment towards exhibition charges are not chargeable to tax in India as per the provisions of Income Tax Act, 1961 and respective tax treaty, there is no requirement of deduction of tax at source under section 195(1) of the Act;*

c. *concluding that the Appellant has failed to make an application before the AO u/s 195(2) of the Act, without appreciating the fact that there is no such requirement when the payment is not chargeable to tax in India as per the provisions of Income Tax Act, 1961 and respective tax treaty; and*

d. *furnishing or non-furnishing of Form 15CA does not determine whether the Appellant is liable to withhold tax.*

GROUND RELATING TO INTEREST U/S 234B & U/S 234C:

3. *The CIT(A) and the AO have erred in levying interest under section 234B of Rs. 2,35,745/- and under section 234C of Rs.1,35,193/- respectively. On the facts and in the circumstances of the case, interest under section 234B and 234C is excessive. The Appellant denies its liability to pay interest under section 234B and 234C.*

The Appellant submits that each of the above grounds/ sub-grounds are independent and without prejudice to one another.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal, so as to Enable the ITAT to decide the appeal according to law.

2 .Brief facts of the case are as under:

Assessee filed its return of income for year under consideration declaring total income of Rs.89,27,750/- on 29/09/13. Subsequently revised return was filed on 21/06/14. Notice under section 142(1) was issued in response to which representative of assessee appeared before Ld.AO and furnished details as called for. Ld.AO observed that assessee is engaged in manufacturing digital panel, meters and providing energy management solution.

It was observed that assessee debited sum of Rs.34,27,061/- as sales promotion expenses during the year. Ld.AO observed that amongst the payments, no TDS was deducted on Rs.9,13,841/- and Rs.1,50,234/- paid as exhibition charges. Assessee was called upon to provide explanation as to why these amounts should not be disallowed under section 40a(ia) of the Act. It was submitted that these amounts were paid to non-resident towards exhibition charges for which TDS was not deductible. Ld.AO rejected submissions of assessee and disallowed sum of Rs.10,64,075/- under section 40a(ia) of the Act.

2.1 Aggrieved by addition made by Ld. AO, assessee preferred appeal before Ld.CIT(A).

3. Ld.CIT(A) observed that assessee failed to provide any substantiation regarding the exact expenditure incurred and parties to whom payment have been made, any proof of residence and applicability of non-deduction of tax on these payments. It was

also observed by Ld. CIT (A) that assessee failed to file Form 15 CA. He thus upheld disallowance made by Ld. AO.

3.1. Aggrieved by order of Ld. CIT (A) assessee is in appeal before us now.

4. At the outset Ld.AR submitted that there is delay of 65 days in filing present appeal before this *Tribunal*. The reason for delay stated by assessee is on account of oversight by security personnel who failed to communicate the order as soon as it was received. In affidavit dated 10/04/19 by Managing Director. It is submitted that security personnel did not hand over order of Ld.CIT (A) to accounts department, and it was noticed during annual cleanup of files where documents were in cabin of security personnel on 25/03/19. Ld.AR submitted that substantial Justice would be denied in the event delay is not condoned and appeal is not heard on merits. Placing reliance upon decision of this *Tribunal* in case of *Wipro Chandrika Pvt.Ltd.*, in *TS-7-ITAT-2019 (Bang.)* Ld.AR submitted that substantial Justice should prevail over technical considerations. He thus requested for delay to be condoned as it was not intentional.

4.1 Ld. DR however opposed the application for condonation of delay.

4.2 We observe that contents of affidavit filed by managing director reveals reason why appeal could not be filed on time. It has been submitted by Ld.AR that it was neither willful nor intentional to file appeal before this *Tribunal* belatedly.

5. At the outset, we refer to principles that needs to be kept in mind while considering application for condonation of delay as emphasised by *Hon'ble Supreme Court* in case of *Collector, Land Acquisition vs Mst. Katiji & Ors. (1987) 167 ITR 471*. *Hon'ble Supreme Court* emphasised that substantial Justice should prevail over technical consideration and that a litigant does not stand to be benefited by lodging the appeal late. *Hon'ble Supreme Court* also explained that a pedantic approach should be adopted and the doctrine must be applied in a rational commonsense and pragmatic manner.

5.1 Keeping in view aforesaid principles as laid down by *Hon'ble Supreme Court* and having regard to circumstances explained in the affidavit, we condoned delay in filing of present appeal.

5.2 The only issue raised before us, is in respect of disallowance made under section 40(A)(ia) of the Act.

It has been submitted that sum of Rs.10,64,075/- was paid exhibition charges to two nonresidents for event held outside India in South Africa and UAE. Ld.AR submitted that, payments were made for facilities provided abroad by nonresidents that is, special pavilion design, enhanced catalogue, Web entry and customers made rented cubicles on-site and insurance at the exhibition Centre. He submitted that said payments are in the nature of business profit, under Article 7 of DTAA between India - South Africa and India - UAE which provides that the business profit of an enterprise is taxable in contracting state, only if the enterprise

carries on business through a permanent establishment situated in that contracting state. Ld.AR submitted that, the non-resident companies did not have any permanent establishment in India and therefore, the payments made by assessee towards exhibition charges to these non-residents would not be taxable in India. He thus submitted that remittances were towards facilities provided by these non-resident outside India to assessee and the same was in the nature of business income of non-resident beneficiary which had no permanent establishment in India and therefore, obligation to deduct tax do not arise under such circumstances.

6. On the contrary Ld. SR.DR placed reliance upon observations of Ld. CIT (A). It has been submitted by Ld. SR.DR that the moment there is a remittance the obligation to deduct tax at source arises and it was not permissible for payer to contend that payment made to nonresidents did not give rise to income which is taxable in India.

7. We have perused submissions advanced by both sides in light of records placed before us.

7.1 Ld.AR placed reliance upon decision of *Hon'ble Supreme Court* in case of *GE India Technology Cen. (P) Ltd vs CIT* reported in (2010) 193 *Taxmann* 234. Hon'ble Supreme Court had analysed identical issue wherein Hon'ble court observed that:

"The most important expression in section 195 (1) consists of the words "chargeable under the provisions of the act". A person paying interest or any other sum to a non-resident is not liable to deduct tax

if such item is not chargeable to tax under income tax act. For instance, where there is no obligation on the part of the payer and no right to receive the sum by the recipient and that the payment does not arise out of any contract or obligation between the payer and the recipient but is made voluntarily, such payments cannot be regarded as income under the income tax act. It may be noted that section 195 contemplates not merely amounts, the whole of which are pure income payments, it also covers composite payments which has an element of income embedded or incorporated in them. Thus where an amount is payable to a non-resident, the payer is under an obligation to deduct TES in respect of such composite payments. The obligation to deduct TAS is, however, limited to the appropriate portion of income chargeable under the act forming part of the gross sum of money payable to the non-resident. The obligation being limited to the appropriate portion of income flows from the words used in section 195 (1), namely, "chargeable under the provisions of the act". It is for this reason that vide circular No. 728 dated 30/10/95 that the CBDT has clarified that the tax deducted can take into consideration the effect of DTAA in respect of payment of royalties and technical fees while deducting TAS."

7.2 In the present facts of the case, it is not at all the issue raised by Ld.AO that there exist permanent establishment in India of nonresidents to whom payments have been made by assessee. Therefore we are unable to accept submissions of Ld. CIT DR that assessee should have deducted tax at source under section 195 (1)

on the 1st instance itself. Further, there is nothing brought on record by learned authorities below which indicates existence of PE of non-residents to whom payments have been made by assessee without deducting TDS. Also that revenue could not establish that sums payable to non-resident are chargeable to tax in India.

Respectfully following the ratio laid down by Hon'ble Supreme Court in case of *GE India Technology Cen. (P) Ltd vs CIT (supra)*, we allow the ground raised by assessee.

In the result appeal filed by assessee stands allowed.

Order pronounced in the open court on 13-12-2019.

Sd/-

(B.R.BASKARAN)
ACCOUNTANT MEMBER

Dated: 13-1-2019

***am**

Copy of the Order forwarded to:

- 1.Appellant;
- 2.Respondent;
- 3.CIT;
- 4.CIT(A);
5. DR
6. ITO (TDS)
- 7.Guard File

Sd/-

(BEENA PILLAI)
JUDICIAL MEMBER

By Order
Asst. Registrar