IN THE INCOME TAX APPELLATE TRIBUNAL
"B"BENCH: BANGALORE

BEFORE SHRI B. R. BASKARAN, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA Nos.161&162/Bang/2019
AssessmentYears:2009-10 & 2010-11

M/s. Timken Engineering & Research India Pvt. Ltd. #39-42, Phase II, Electronic City Bangalore-560100 **PAN NO : AABCT2265L**	**Vs.**	Deputy Commissioner of Income-tax Circle 12(4) Bangalore
APPELLANT		**RESPONDENT**

Appellant by	**:**	Shri AliasgarRampurwala, A.R.
Respondent by	**:**	Shri Priyadarshi Mishra, D.R.

Date of Hearing	**:**	13.03.2020
Date of Pronouncement	**:**	29.04.2020

O R D E R

PERB.R. BASKARAN, ACCOUNTANT MEMBER:

Both the appeals of the assessee are directed against the orders passed by Ld CIT(A)-7, Bengaluru and they relate to the assessment years 2009-10 and 2010-11. Both the appeals were heard together and hence they are being disposed of by this common order, for the sake of convenience.

2. Common issues urged in these appeals are:-

(a) Disallowance of expenses for non-deduction of tax on the tax portion of salary paid to expatriate employees borne by the assessee.

(b) Disallowance of payment made for purchase of application software u/s 40(a)(ia) of the Act for non-deduction of tax at source.

(c) Disallowance of custom duty charges paid on de-bonding of capital goods treating the same as Capital expenditure.

(d) Levy of interest u/s 234B, 234C and 234D of the Act.

3. Following additional issues are urged in the appeal filed for AY 2009-10

(i) Disallowance of payments made towards broadband connectivity charges on account of non-deduction of tax at source.

(ii) Disallowance of payments made to Timken USA on account of non-deduction of tax at source.

(iii) Disallowance of interest paid on belated payment of Statutory dues treating the same as penal in nature.

4. Following additional issue is urged in the appeal filed for AY 2010-11.

(i) Disallowance of year end provisions towards Communication expenses, Professional expenses on account of non-deduction of tax at source.

5. The assessee is engaged in the business of providing Engineering & Research services for bearings and related products and Global transactional services.

6. We shall first take up the common issues urged in both the years under consideration. The first common issue is addition made on account of non-deduction of tax at source from income-tax payable on salary of expatriate employees, which was borne by the assessee. The Ld A.R submitted that the assessee has actually deducted tax at source from the income-tax payable on the salary of expatriate employees. He further submitted that the employees have also considered the income tax borne by the assessee as perquisites. The Ld D.R, on the contrary, submitted that the submission of the assessee is contrary to the observations made by the tax authorities and accordingly submitted that the same needs to be verified at the end of the assessing officer.

7. We find merit in the submissions made by Ld D.R. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and restore the same to the file of the assessing officer for examining it afresh by duly considering the explanations and evidences that may be furnished by the assessee.

8. The next common issue relates to the disallowance of software purchases u/s 40(a)(ia) of the Act. The Ld. A.R. submitted that the assessee had capitalized the software purchases and claimed depreciation thereon. The A.O. took the view that payment towards software purchases are in the nature of royalty liable for deduction of tax at source. The facts relating to AY 2009-10 are that the assessee had purchased software to the tune of Rs.82.87 lakhs and capitalized the same. Accordingly, it has claimed depreciation thereon. The AO noticed that the assessee had deducted TDS on an

amount of Rs.43.74 lakhs. The assessee had claimed depreciation on the above said amount of Rs.43.74 lakhs @ 60% which worked out to Rs.26.25 lakhs. Accordingly, the A.O. gave set off of depreciation claimed on the software purchases on whichTDS had been deducted and accordingly disallowed a sum of Rs.56.62 lakhs (Rs.82.87 – Rs.26.25). The Ld. CIT(A) also confirmed the same.

9. The Ld. A.R. submitted that the assessee has not claimed software purchases as expenditure in the profit & loss account and capitalized the same. Accordingly the assessee has claimed depreciation there on @ 60%. Accordingly, he submitted that the tax authorities are not justified in disallowing an amount which is not claimed in the profit & loss account. The Ld. A.R. further submitted that the depreciation is statutory allowance and hence there is no cash outgo. Accordingly, he submitted that the depreciation claim cannot be disallowed u/s 40(a)(ia) of the Act. In this regard, he placed reliance on the decision rendered by Hon'ble Punjab & Haryana High Court in the case of CIT Vs. Mark Auto Industries Ltd. (2013) 358 ITR 43 and also certain other decisions.

10. We heard Ld. D.R. on this issue and perused the record. Since the assessee has capitalized the software expenditure and claimed depreciation there on, the amount debited to Profit & loss account is only the above said depreciation. As per the decision rendered by Hon'ble Punjab & Haryana High Court in the case of Mark Auto Industries Ltd. (supra), provisions of section 40(a)(ia) of the Act is not applicable to an item which is not claimed as expenditure in the books of accounts. The Mumbai Bench of ITAT in the case of SAB Miller India Ltd. (155 ITD 1093) has expressed

the view that the provisions of section 40(a)(ia) of the Act are not attracted to depreciation, since it is not an outgoing expenditure. Accordingly, we find merit in the submissions of the assessee. Accordingly, we are of the view that the disallowance made by the A.O. is not correct in law. Accordingly, we set aside the order passed by the Ld. CIT(A) on this issue in both the years and direct the A.O. to delete the disallowance made in both the years on account of software purchases.

11. The next issue relates to disallowance of custom duty charges paid on de-bonding of capital goods treating the same as capital expenditure. The Ld. A.R. submitted that the assessee had imported certain capital assets for its export-oriented unit without paying custom duty. When it removed the capital goods from export-oriented unit, it paid custom duty charges and claimed the same as revenue expenditure. The A.O. took the view that the custom duty so paid is capital in nature and accordingly, disallowed the same. The Ld. CIT(A) also confirmed the same.

12. Before us, the assessee placed reliance on the decision rendered by Hon'ble Allahabad High Court in the case of CIT Vs. Jindal Polyester Ltd. (2017) 397 ITR 282 in order to contend that the custom duty charges so paid is allowable as deduction.

13. We heard Ld. D.R. and perused the record. In the case of Jindal Polyester Ltd. (supra), the Hon'ble High Court has noted that the ITAT had accepted the plea of the assessee regarding custom duty paid on de-bonding by holding that the assessee is entitled to deduction either by way of depreciation or by way of

deduction on entire expenditure as revenue expenditure. The Hon'ble High Court accepted the alternative proposal of allowing the above said amount as revenue expenditure.

14. In the instant case, it is not clear as to whether the value of goods on which the custom duty was paid was treated by the assessee as capital expenditure or as revenue expenditure. In our view, the custom duty paid should take the colour of goods for which it was paid. If the assessee had capitalized the value of goods, then the custom duty paid should also be capitalized and depreciation should be allowed thereon. Since this fact requires verification, we set aside the order passed by the Ld. CIT(A) on this issue in both the years and restore the same to the file of the A.O. for examining it afresh by considering all relevant details.

15. The next common issue relates to charging of interest u/s 234B, 234C & 234D of the Act. Charging of interest is consequential in nature and hence this ground does not require adjudication.

16. We shall now take up the issues urged by the assessee in assessment year 2009-10. The first issue relates to disallowance of payments made towards broad band connectivity charges on account of non-deduction of tax at source. Since the assessee did not deduct tax on broad band connectivity charges, the A.O. disallowed the same u/s 40(a)(ia) of the Act.

17. We heard the parties on this issue and perused the record. The Ld. A.R. placed his reliance on the order passed by ITAT in his

own case for the assessment year 2008-09 in ITA No.335/Bang/2013 dated 10.5.2019. However, we notice that the provisions of section 9(1)(vi) of the Act has been amended by Finance Act, 2012 with retrospective effect from 1.6.1976 by inserting Explanation 4 to Explanation 6. The provisions of sec.9(1)(vi) deal with the "Income" by way of royalty. As per Explanation 6, the expression "Process" used in section 9(1)(vi) of the Act includes and shall be deemed to have always included transmission by satellite (including up linking, amplification, conversion for down linking of any signal), cable, optic fibre, or by any other similar technology, whether or not such process is secret. We notice that the decision in AY 2008-09 was rendered by the co-ordinate bench without considering the Explanation 6 to sec.9(1)(vi) of the Act. In view of the above said Explanation 6, the broad band connectivity charges shall be covered by the definition of royalty.

18. The Ld. D.R. submitted that the Hon'ble Karnataka High Court, in the case of CIT Vs. CGI Information Systems and Management Consultants Pvt. Ltd. (2014) 48 taxmann.com 264, has held that intra net facilities provided by a non-resident company and used by the assessee by making payment would amount to royalty. In view of the above said decision of Hon'ble Karnataka High Court and also Explanation 6 inserted to section 9(1)(vi) of the Act, the payment made towards broad band connectivity would fall under the definition of "Royalty". Since the assessee has not deducted tax at source, we are of the view that the tax authorities are justified in making disallowance of the same u/s 40(a)(ia) of the Act.

19. The next issue urged in assessment year 2009-10 relates to disallowance of payments made to Timken, USA on account of non-deduction of tax at source. At the time of hearing, the Ld. A.R. did not press this ground and accordingly, the same is dismissed as not pressed.

20. The next issue relates to disallowance of interest paid on belated payment of statutory dues by treating them as penalty. During the year under consideration, the assessee has paid interest on the following statutory payments on account of belated remittance.

a) Interest on service tax – Rs.66,290/-
b) De-bonding charges – Rs.1,30,838/-
c) Interest on penalty towards land transfer – Rs.91,531/-
d) Interest on TDS – Rs.5,989/-

The A.O. disallowed the above said amounts treating them as penal in nature. The Ld. CIT(A) also confirmed the same.

21. At the time of hearing, the assessee did not press the disallowance of interest and penalty towards land transfer. Accordingly, the addition made by the A.O. on this amount is confirmed. The Ld. A.R. submitted that the assessee had suo moto disallowed the interest on TDS of Rs.5,989/- and hence the disallowance made by the A.O. of this amount would result in double disallowance. We restore this issue to the file of the A.O. for examining the claim of the assessee and if the assessee had already disallowed the amount, then there is no requirement of disallowing the same again.

22. The interest paid on de-bonding charges needs to be set aside to the file of the A.O, since the issue relating to payment of de-bonding charges has been restored to the file of the A.O by us in the earlier paragraphs. Accordingly, we restore this issue to the file of the A.O. The remaining amount relates to interest paid on belated payment of Service tax. The Ld. A.R. placed reliance on the decision of Bangalore bench of ITAT in the case of Velankani Informations Systems Ltd. (2018) 173 ITD 19, wherein the coordinate bench has taken the view that the interest paid on delated deposit of service tax is not penal in nature and is eligible for deduction u/s 37(1) of the Act. Following the above said decision, we set aside the order passed by the Ld. CIT(A) and direct the A.O. to allow deduction of interest paid on service tax.

23. We shall now take up the individual issues urged by the assessee in AY 2010-11, viz., disallowance of year end provisions on account of non-deduction of tax at source from them. The facts relating thereto are that the AO noticed that the assessee had made year end provision for following expenses:

Communication expenses	Rs.13,92,918/-
Legal and Professional fee	Rs.18,22,983/-

However, the assessee had not deducted tax at source from the above said payments. Hence the AO disallowed them u/s 40(a)(ia) of the Act. The Ld CIT(A) also confirmed the same.

24. Before us, the Ld A.R placed his reliance on the decision rendered by Hon'ble Gujarat High Court in the case of Sanghi Infrastructure Ltd (2018)(96 taxmann.com 370) and submitted that the Hon'ble Gujarat High Court has held in the above said case that

there is no requirement to deduct tax at source from the provisions made.

25. We have gone through the above said order and we notice that the Hon'ble Gujarat High Court expressed the above said view by observing that the provision was a contingent liability. In the instant case, the provision so made was allowed by the AO u/s 37(1) and hence it was not a contingent liability. Hence we are of the view that the assessee cannot take support of the above said decision.

26. An identical issue was considered by the Chennai bench of Tribunal in the case of Dishnet Wireless Ltd (2015) (60 taxmann.com 329) (123 DTR (Trib.) 153) and the Tribunal has held as under. The assessee before the Chennai bench was providing telecommunication services. It made yearend provisions for various expenses on estimated basis. It was contended by the assessee that the payees details are not available in respect of some of the provisions made and hence the provisions of sec.40(a)(ia) should not be invoked for non-deduction of tax at source. The Chennai bench of Tribunal has held as under:-

> **"24.** Now coming to the issue of year-end provisions, the contention of the assessee is that it is engaged in various services like address verifications, credit certification, content development etc. The assessee claims that provisions are made on estimation basis since it is not identifiable as to what amount has to be paid to the service providers. In case of new service

connections, the assessee has to necessarily verify the customers' address and identification. The claim of the assessee is that in the last month of the financial year, it is not known how many customer verifications have been completed and the exact amount required to be paid. However, on the basis of the past experience, the assessee is making an overall provision for incurring this expenditure. From the order of the CIT(Appeals) it appears that apart from identification and address verification, the assessee has also made provision towards ICU charges and lease line expenses, etc. From the order of the CIT(Appeals) it appears that the assessee also has to pay the various other service providers for providing value added service to its subscribers like daily horoscopes, astrology, songs, wallpaper downloads, cricket scores, etc. Admittedly, the assessee made arrangement with other service providers for providing these kind of value added services. There may be justification with regard to the expenditure for availing the services of identification and verification for the last month of financial year, since the assessee may not have the exact details on verification done by the concerned persons and the amount required to be paid. However, in respect of the downloads and value added service, etc. the entire details may be available in the system. **Therefore, this Tribunal is of the considered opinion that wherever the particulars and details available and amount payable could be quantified, the assessee has to necessarily deduct tax. In respect of value added services like**

daily horoscopes, astrology, customer acquisition forms are all from specific service providers and these value added services are monitored by system. Therefore, even on the last day of financial year, the assessee could very well ascertain the actual quantification of the amount payable and the identity of the payee to whom the amount has to be paid. To that extent, the contention of the assessee that the payee may not be identified may not be justified. The exact facts need to be examined. However, this Tribunal is of the considered opinion that the matter needs to be reconsidered by the Assessing Officer. In other words, the Assessing Officer has to examine whether the payment to the party /payee is identifiable on the last day of financial year and whether the quantum payable by the assessee is also quantified on the last date of financial year. In case, the Assessing Officer finds that the payee could not be identified on the last day of financial year and the amount payable also could not be ascertained, the assessee may not require to deduct tax in respect of that provision. However, in case the payee is identified and quantum is also ascertainable on the last day of the financial year, this Tribunal is of the considered opinion that the assessee has to necessarily deduct tax at source. Since the details are not available on record, the orders of the lower authorities are set aside and the issue of year-end provision is remitted back to the file of the Assessing Officer. The Assessing Officer shall re-examine the issue afresh

as indicated above and thereafter decide the issue in accordance with law after giving reasonable opportunity to the assessee."

It can be noticed from the highlighted portion that the Tribunal has expressed the view that the TDS has to be necessarily deducted when the payee details are available in respect of expenditure for which provision was made. The co-ordinate Bangalore bench has also expressed the view in the case of IBM India P Ltd (2015) (59 taxmann.com 107) that the TDS provisions shall apply to the year end provisions. However, if the payee is not identified when the provision is made, then it would be difficult to comply with the provisions of TDS, since the furnishing of payee details along with PAN number is essential while filing Statement of TDS. Hence, we agree the view expressed by Chennai bench of Tribunal in the case of Dishnet Wireless Ltd (supra). Accordingly, we hold that the assessee is liable to deduct tax at source in respect of yearend provisions, wherever the payee is identifiable and the provisions of sec.40(a)(ia) shall apply accordingly. Since this issue requires verification of facts in the light of above directions, this issue is restored to the file of assessing officer.

27. In the result, both the appeals of the assessee are treated as partly allowed.

Order pronounced in the open court on 29.04.2020.

Sd/-	**Sd/-**
(Beena Pillai)	**(B.R. Baskaran)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 29th April, 2020.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.