

IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH : BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No.2022/Bang/2019
Assessment year: 2015-16

Mach Aero Components Pvt Ltd., 3 rd Floor, Unit No.410, Prestige Plaza, Mandalkunte Mother Dairy Road, Chikka Bommasandra, Yelhanka, Bangalore – 560 095. PAN: AAECM 4481A	Vs.	The Principal Commissioner of Income-tax, Range 4, Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri K.P. Srinivas, CA
Respondent by	:	Shri Muzaffar Hussain, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	22.06.2021
Date of Pronouncement	:	25.06.2021

ORDER

Per Chandra Poojari, Accountant Member

This appeal by the assessee is directed against the order of Principal CIT, Bengaluru-4, Bengaluru [PCIT] passed u/s. 263 of the Income-tax Act, 1961 [the Act] dated 25.7.2018.

2. The PCIT on verification of the case records noticed that the assessment concluded by the AO for A.Y. 2015-16 on 10.11.2017 u/s 143(3) of the Act is erroneous and prejudicial to the interest of revenue for the following reasons:-

1. From clause No. 23 of Form 3CD under the heading 'Particulars of payment made to persons specified in Section 40A(2)(b), the assessee has made commission payment of Rs.48,31,7131- to its associate enterprises M/s Aero Finance Management, France. However, the assessee has not deducted tax u/s 195 on the commission payments.
 2. A sum of Rs. 4,04,847/- has been debited to the profit and loss account being interest on delayed payment of taxes. However, the assessee has not disallowed the same while computing total income.
 3. In the P&L a/c the assessee has debited a sum of Rs.11,69,036/- towards Entry Tax. The expenditure towards interest on entry tax is capital in nature as the same is incurred on capital items like machinery and other equipments. Hence, the same needs to be disallowed u/s 37 of the IT Act.
 4. In Form 3CD, clause 34 (c) under the heading 'Details of interest payable under section 201(1A) the assessee has paid interest amounting to Rs. 2,65,638/- but has failed to disallow the same in its computation.
3. The PCIT was of the view that the AO has failed to conduct adequate enquiries regarding the above issues and has failed to bring the correct income to tax while completing the assessment u/s 143(3). Therefore, show-cause notice was issued to the assessee. In response thereto the AR of the assessee Ms. Susan Mathew, CA appeared on 23.07.2019 and submitted written submissions which are summarised as under.
4. The assessee objected for initiation of proceedings u/s 263 as the order passed by the assessing authority is not erroneous or prejudicial to the interests of revenue except to the extent of Rs. 1,15,024/- (being penalty paid for late payment of tax) inadvertently omitted to be disallowed in the computation of total income.

5. Regarding applicability of TDS on commission paid to non-resident of Rs.48,31,713 it was submitted that as per Sec 9(1)(i) of the Act, 1961, income shall be deemed to accrue or arise in India only if the income is reasonably attributable to the business operations carried out by the non-resident vendor in India. In this case, the vendor has not carried out any operations in India. The non-resident vendor has helped the assessee company in sourcing customers in Philippines and USA. No services were rendered by the vendor in India. As there is no income that can be deemed to accrue or arise in India both as per the provisions of the Income tax Act and as per the provisions of DTAA, no TDS was made against this marketing expenditure incurred by the company. Hence there is no non-compliance with the provisions of Sec 195 warranting any disallowance of expenditure u/s 40a(i) of the Income tax Act, 1961.

6. Regarding interest on delayed payment of taxes of Rs.4,04,847/-, it was submitted that an amount of Rs.76,646/- relates to payment of TDS u/s 195A and is not in the nature of interest. This was inadvertently accounted as interest expenses in the books due to oversight. Interest on delayed payment of TDS and indirect taxes is only compensatory in nature and is therefore eligible for deduction u/s 37 as a business expenditure. The assessee relied on the Hon'ble Supreme Court in the case of *Prakash Cotton Mills Pvt. Ltd. Vs CIT 11993] 201 ITR 684 (SC.)*.

7. Regarding interest on delayed payment of Entry tax Rs.11,69,036/-, it was submitted that penalty on entry tax amounting to Rs.1,15,0241-, was inadvertently omitted to be disallowed u/s 37 and was erroneously claimed as an allowable expenditure. Thus the same may be considered for disallowance. All interest costs incurred on assets after the asset is put to use is a revenue expenditure. As assets were put to use in the respective years and interest is for delayed payment, all this expenditure is revenue in nature. Moreover, proviso to Sec.36(1)(iii) is with reference to money

borrowed for the purpose of acquisition of asset and not in respect of delay in payment of an indirect tax. Interest on delayed payment' of indirect tax is covered by the decision of the Hon'ble Supreme Court as mentioned above.

8. Regarding interest paid u/s 201(1A) of Rs.2,65,638/- reported in Clause 34(c) of Form 3CD, it was submitted that out of Rs.2,65,638/- reported in Form 3CD, an amount of Rs. 1,98,433/- was paid in AY 2015-16 and Rs.67,205/- was paid in AY 2016-17 at the time of filing e-TDS returns for Q4 of AY 2015-16. An amount of Rs.1,72,634/- being interest on delayed remittance of TDS debited to statement of profit and loss in AY 2016-17 has been already disallowed by the Assessing Officer during the course of the assessment proceedings of AY 2016-17. An amount already disallowed in assessment cannot be disallowed again through proceedings u/s.263. It was reiterated that the interest paid on delayed payment of taxes is only compensatory in nature and is therefore eligible for deduction u/s 37 as business expenditure.

9. However, the PCIT was of the view that during the assessment proceedings, the AO has not carried out any verification on the above issues. The AO has not disallowed the TDS payment of Rs.76,656 claimed under the head interest on delayed payment of taxes and penalty on entry tax amounting to Rs.1,15,024/-which is prima facie disallowable. The same was accepted by the assessee as inadvertent mistake and the assessee company itself requested for disallowance of these amounts under the 263 proceedings. This clearly shows that the AO has not applied his mind to this aspect and accepted the claim of the assessee in a mechanical manner.

10. Further, the assessee has paid marketing commission to M/s Aero Finance Mangement, France without deducting tax at source as required

u/s 195 of 1.T.Act, 1961. The assessee submitted that there the non-resident vendor rendered services outside India and the vendor has no permanent establishment in India, therefore, the TDS provisions of section 195 are not applicable. In the case of SKF Boilers and Driers Pvt. Ltd, Authority for Advance Ruling (Incometax), New Delhi in A.A.R. No. 983-984 of 2010 dated 22.02.2012 held as under:

"Under section 9(1)(i), income accruing or arising directly or indirectly, through or from any business connection in India or source of income in India shall be deemed to accrue or arise in India. We are concerned with the source of income of the two non-resident agents who had earned commission from the business activity of the applicant. Sections 5 and 9 of the Act thus proceed on the assumption that income has a situs and the situs has to be determined according to the general principles of law. The words 'accrue' or 'arise' occurring in section 5 have more or less a synonymous sense and income is said to accrue or arise when the right to receive it comes into existence. No doubt the agents rendered services abroad and have solicited orders, but the right to receive the commission arises in India when the order is executed by the applicant in India. The fact that the agents have rendered services abroad in the form of soliciting the orders and the commission is to be remitted to them abroad are wholly irrelevant for the purpose of determining the sites of their income. We follow the ruling of this Authority in Rajiv Malhotra AAR 671 of 2005, 234 ITR 564. We therefore hold that the income arising on account of commission payable to the two agents is deemed to accrue and arise in India, and is tenable under the Act in view of the specific provision of Section 5(2)(b) read with section 9(1)(i) of the Act. The provision of section 195 would apply, and the rate of tar will be as provided under the Finance Act for the relevant year."

11. Therefore, the PCIT observed that logically there is a prima facie case for application of the provisions of section 195 to the marketing commission paid by the assessee and the same needs to be disallowed u/s 40(a)(i).

12. In respect of total interest paid on taxes of Rs. 4,04,847/- the assessee submitted an amount of its. 76,656 relates to TDS payment u/s 195A and requested to disallow the same. Regarding the balance amount the assessee contended that the same is compensatory in nature and allowable u/s 37 of the I.T.Act. Regarding interest on TDS also the assessee submitted that the same is compensatory in nature and allowable u/s 37 of the 1.T.Act. In this regard, the PCIT was of the view that the AO should bear in mind the decision of Hon'ble Supreme Court in the case of ***Bharat Commerce & Industries Ltd. v. CIT (239 ITR 733) (SC)*** .

13. In respect of interest u/s 201(1A) of Rs.2,65,638 also the assessee submitted that the same is compensatory in nature and allowable u/s 37 of the I.T. Act. In the case of ***CIT vs Chennai Properties (239 ITR 435)*** it was held that the amount required to be deducted is the amount payable as income-tax. The interest paid for the period of delay takes colour from the nature of the principal amount required to be paid. The principal amount here would be the income-tax and the interest payable for delayed payment is the consequence of failure to pay the tax and in the circumstances, in the nature of a penalty though not described as such in Sub-section (IA) of Section 201 of the Act. The fact that the income-tax required to be remitted was not income-tax payable by the assessee, but is ultimately for the benefit of and to the credit of the recipient of the income on whose behalf that tax is payable does not in any manner alter the character of the payment, namely, its character as income tax. If income-tax itself is not a permissible deduction under Section 37, any interest payable for default committed by the assessee in discharging his statutory obligation under the Income-tax. Act, which is calculated with reference to the tax on income, cannot be allowed as deduction. The interest paid under Section 201(1A) of the Act, therefore, would not assume the character of business expenditure

and cannot be regarded as a compensatory payment as contended by learned counsel for the assessee.

14. In the above case the Hon'ble Madras High Court distinguished the *Prakash Cotton Mills Pvt Ltd. vs CIT (1993)(201 ITR 684)(SC)* in which the court was concerned with an indirect tax payable by the assessee in the course of its business and admissible as business expenditure. Further liability for interest which had been incurred by the assessee therein was regarded as compensatory in nature and allowable as business expenditure.

15. In respect of allowability of entry tax the assessee submitted that the penalty on entry tax amounting to Rs.1,15,024 may be considered for disallowance and balance amount of Rs.10,51,837 may be allowed as revenue expenditure as the assets are capitalised in the respective years and the interest on delayed payment of entry tax incurred subsequently in the year under consideration. The PCIT observed that the contention of assessee is not acceptable and the entry tax and interest on entry tax pertaining to capital assets needs to be capitalised irrespective of the year in which it was incurred and directed the AO to verify this aspect and disallow accordingly.

16. Based on the above facts, the PCIT was of the view that no enquiry was conducted by the AO which renders the order erroneous and prejudicial to the interest of revenue and concluded that there was non-application of mind by the AO and the twin conditions as contemplated in sec. 263 were satisfied in the present case. Consequently, the assessment was set aside to the file of the AO with a direction to the AO to examine the aforesaid issues and redo the assessment afresh as per law after affording reasonable opportunity of being heard to the assessee. Against this, the assessee is in appeal before us.

17. We have heard both the parties and perused the material on record. In this case, the PCIT took up the issue u/s. 263 of the Act after giving due opportunity of being heard to the assessee. He set aside the order of AO and directed him to examine the aforesaid issues and to redo the assessment afresh.

18. At the time of hearing, it is pointed out by the Id. AR that the assessee is only challenging the issues on merits which is not decided by the Id. PCIT and he has only remitted the matter back to the AO for fresh consideration in his order u/s. 263 of the Act. As such, the Id. AR conceded that the issue raised by the assessee is pending before the AO for passing consequential order to the order passed u/s. 263 of the Act. He submitted that the appeal may be dismissed, as not pressed, with liberty to challenge the issues on merits, after passing the consequential order by the AO. We accede to the request of the Id. AR. Accordingly, the appeal of the assessee is dismissed as not pressed and the issues raised by the assessee on merits are kept open.

19. In the result, the appeal by the assessee is dismissed as withdrawn.

Pronounced in the open court on this 25th day of June, 2021.

Sd/-
(BEENA PILLAI)
JUDICIAL MEMBER

Sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 25th June, 2021.

/Desai S Murthy /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.