IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E' NEW DELHI

SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER
AND
SHRI B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA No.3178/Del/2017
Assessment Year: 2012-13

ACIT, Circle 18(2), **New Delhi**	vs	Noida Software Technology Park Ltd., Scindia Villa, Sarojini Nagar, Ring Road, New Delhi AABCN0137F

Assessee by None
Revenue by Shri Gaurav Pundir, Sr. DR

Date of Hearing 08-09-2021
Date of Pronouncement 08-09-2021

ORDER

PER K. NARASIMHA CHARY, JM:

Challenging the order dated 15/02/2017 passed by the learned Commissioner of Income Tax (Appeals)-38, New Delhi ("Ld. CIT(A)"), in the case of M/s Noida Software Technology Park Ltd ("the assessee"), for the assessment year 2012-13, Revenue preferred this appeal.

2. Assessee is a company engaged in the business of teleport earth station providing up-linking services, DSNG assembling integration and trading in software and other products. For the assessment year 2012-13

they have filed their return of income on 27/9/2012 declaring an income of Rs. 81, 96, 620/-. By order dated 31/3/2015, learned Assessing Officer assessed income of the assessee at Rs. 3, 34, 20, 894/-by making certain additions. Insofar as this appeal, we are concerned with the addition of Rs. 2,43,04,731/- under section 40(a)(i) of the Act on account of non-deduction of tax at source on the payment of transponder charges under section 195 of the Income Tax Act, 1961 (for short "the Act") on the transponder charges paid/payable to M/s Intelsat Global Sales &Marketing Ltd and M/s Singapore Telecommunications Ltd., and Rs.8,91,305/-by invoking section 14A of the Act read with Rule 8D of the Rules.

3. Aggrieved by such additions, assessee preferred appeal before the Ld. CIT(A) and the Ld. CIT(A) by way of impugned order deleted both the additions. Revenue is, therefore, before us in this appeal.

4. When the matter is called, neither the assessee nor any authorised representative entered appearance. It could be seen from the record that the notice sent to the address given in form No. 36 is returned with the endorsement of the postal servant that the addressee left. If the assessee is available in such address, such notice should have been served on the assessee. If for any reason, the assessee is not available there, it is for the assessee to make arrangements for service of such notice by furnishing the address where the assessee would be available, or to deliver it to some authorised person, or by making request to the postal department to detain the mail till the assessee claims the same. Since the assessee does not seem to have adopted any of these methods, we are the considered opinion that no time could be granted. Basing on the record we proceed to hear the counsel for Revenue and decide the matter on merits.

5. It is the submission on behalf of the Revenue the transponder charges are in the nature of royalty and in view of the retrospective insertion of explanation 6 to clause (vi) to subsection (1) of section 9 of the Act w.e.f. 1/6/1976 the assessee is liable to deduct the tax at source.

6. It could be seen from the record that before the Ld. CIT(A) assessee contended that the definition of "Royalty" was changed by Finance Act, 2012 by adding explanation 4, 5 & 6 to section 9 (1) of the Act with retrospective from 1/6/1976 and therefore, while the assessee was writing the books of accounts for the Financial Year 2011-12, the amended provision was not there in the Act and therefore, it was not possible for the assessee to comply with such retrospective amendment.

7. We have gone through the record in the light of the submissions made on either side. Learned Assessing Officer was of the opinion that the assessee was required to deduct the tax at source on the payment of transponder charges and TDS compliance under section 195 of the Act thereon; and that since the assessee failed to deduct the tax under section 195 of the Act read with section 9 of the Act on transponder charges paid/payable to M/s Intelsat Global Sales and Marketing Company and M/s Singapore Telecommunications Ltd, the amounts of Rs. 2,37,95,163/-and Rs. 5,09,568/-respectively were disallowed under section 40(a)(i) of the Act.

8. It is not in dispute that as on the date of the assessee writing their books of accounts for the Financial Year 2011-12, the amended provision of section 9 was not there in the statute book. It is only by Finance Act, 2012 and amendment is brought in section 9 (1) by inserting explanations 4, 5

and 6 to section 9 (1) of the Act with retrospective effect from 1/6/1976. As has been held by the Mumbai Bench of the Tribunal in the case of CIT vs. DA Jhaveri by order dated 30/11/2016 the taxability of a sum in the hands of the payer on account of a subsequent retrospective amendment would expose the payer of money to an impossible situation of requiring deduction of tax at source on the anterior date of payment of such income, whereas it would not be so in case of the recipient of such an amount. Law does not require the performance of an impossible task. It remains an undisputed fact that in the absence of this amendment, the impugned income was not subject to tax deduction in India as per the prevailing legal position when the payments were made.

9. Ld. CIT(A) in her order followed the decision rendered by the Mumbai Bench of the Tribunal in the case of D.A. Jhaveri (supra) while granting relief to the assessee. In these circumstances, we are also of the considered opinion that since law does not require the performance of an impossible task, the impugned order does not suffer any illegality or irregularity and in our practical realization of the difficulty of the assessee, we uphold the findings of the Ld. CIT(A). Grounds No. 1 and 2 of the Revenue's appeal are, therefore, divoid of any merit and accordingly dismissed.

10. Now coming to the addition of Rs. 8, 91, 305/-under section 14A of the Act read with Rule 8D of the Rules, the assessee has been pleading consistently before the authorities below that for the year under consideration the assessee did not earn any income from the investments made, and therefore, no disallowance could be made. Assessee also placed

reliance on a Catena of decisions including the addition of the Hon'ble jurisdictional High Court in the case of CIT vs. Holcim India Private Limited.

11. In the opinion of the learned Assessing Officer irrespective of the fact of assessee earning any exempt income, inasmuch as the assessee has been taking commercial decisions which require necessarily some amount of expenditure, in the best understanding of the legislative intent, provisions under section 14A of the Act read with Rule 8D of the Rules have to be invoked. Ld. CIT(A) followed the decision of the Hon'ble jurisdictional High Court in the case of Cheminvest Ltd vs. CIT by order dated 2/9/2015 wherein it was held that section 14A will not apply if no income is received or receivable during the relevant previous year.

12. So long as there is no dispute of fact in respect of the assessee not earning any exempt income during the year under consideration, the decisions of the Hon'ble jurisdictional High Court in the cases of Cheminvest (supra) and CIT vs. Holcim India Pvt. Ltd. 90 CCH 81 (Del) (HC) are applicable and it was held in these decisions that Section 14A cannot be invoked when no exempt income was earned. Further, in the case of Joint Investments P. Ltd. vs. CIT (2015) 372 ITR 694 the Hon'ble court held that the disallowance of expenditure u/s 14A of the Act cannot exceed the amount of tax exempt income.

13. In view of these undisputed facts and the settled position of law, we do not find any penalty city in the findings of the Ld. CIT(A) and uphold the same. Consequently we dismiss grounds No. 3 and 4 of Revenue's appeal.

14. In the result, appeal of the Revenue is dismissed.

Order pronounced in the Open Court on 08-09-2021.

Sd/-	Sd/-
(B.R.R. KUMAR)	**(K. NARASIMHA CHARY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: **08-09-2021**