

**IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "E": NEW DELHI]**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through Video Conferencing)**

ITA. No. 3528/Del/2017
(Assessment Year : 2009-10)

ACIT, Circle : 16 (2), New Delhi. (Appellant)	Vs.	M/s. McCann Erickson India Pvt. Ltd., 204 – 206, Tolstoy Marg, New Delhi – 110 001. PAN: AAAC0835D (Respondent)
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Assessee by :	Shri Sanjesh Kumar Jawarani, C. A.;
Department by:	Ms. Paramita M. Biswas [CIT] – D. R.;
Date of Hearing :	20/09/2021
Date of pronouncement :	07/10/2021

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by the ACIT, Circle 16 (2), New Delhi, [The Id AO] in the case of M/s. McCann Erickson India Pvt. Ltd. [Assessee/ Respondent] against the order passed by the Id. Commissioner of Income Tax (Appeals)-6, New Delhi, [the Id CIT (A)] dated 24.03.2017 for assessment year [AY] 2009-10.

2. The Revenue has raised the following 12 grounds of appeal as under:-

“1. Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in deleting the disallowance of Rs. 1051,45000/- out of ‘direct cost’ claimed by the assessee without considering a fact that the assessee had failed to discharge its onus by furnishing necessary details in respect of ‘direct cost’ claimed during the year?

2. Whether on facts and in circumstances of the case, the Ld. CIT(A) is

legally justified in deleting the disallowance of Rs. 10,51,45,000/- out of 'direct cost' claimed by the assessee solely on the basis of self-serving claim of the assessee and by ignoring detailed findings of the Assessing Officer (the AO) in assessment order?

3. Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in allowing relief to the assessee on the issue of 'disallowance of direct cost' by accepting self-serving new claims and documents filed by the assessee even when the assessee had not fulfilled conditions as laid down under Rule 46 A of the Income Tax Rule, 1*962 (the Rule) and by ignoring the finding of the AO in his remand report against acceptance of additional evidence?

4. Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in deleting the addition of Rs. 2,29,14,392/- u/s 41 (1) of the Income Tax Act, 1961 (the Act) by ignoring finding of facts recorded by the AO that these liabilities were outstanding since long, recovery of these liabilities by creditors was time barred and lack of any evidence that the liability was actually payable?

5. Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in holding that the assessee was at liberty to offer tax on cessation of liability u/s 41(1) of the Act as per its convenience in any assessment year irrespective of facts of the case?

6. Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in deleting the addition of Rs. 2,29,14,392/- u/s 41(1) of the Act on the ground that some of the liabilities were offered to tax u/s 41(1) of the Act in subsequent assessment years?

7. Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in deleting disallowance of club membership fee of Rs. 5,88,765/- by ignoring detailed findings recorded by the AO in the assessment order and a fact that the assessee had not discharged its initial onus u/s 37(1) of the Act by not furnishing any credible evidence that expenditure was actually laid out wholly and exclusively during the course of the business of the assessee?

8. Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in deleting disallowance of Rs. 5,98,150/- u/s 40 A(2) of the Act on account of legal fee paid to related party without considering a fact that the assessee had failed to discharge its onus to furnish any credible evidence regarding nature of service rendered by the party and also to prove that it had actually incurred expenses for the purpose of business of the assessee?

9. Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in deleting disallowance of Rs. 3,629/- u/s 14A of the Act r.w. R 8D of the Rule without considering legislative intent of introducing section 14A by the Finance Act 2001 as clarified by the CBDT Circular No. 5/2014 dated 10.02.2014?

10. Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in not upholding the disallowance u/s 14A of the Act amounting to Rs. 3,629/- even when section 14A of the Act stipulates mandatory computation of direct and indirect expenses relating to the income not forming part of total income under all the clauses (i),(ii) and (iii)

of Rule 8D(2) of the Rule?

11. Whether on facts and in circumstances of the case, the Ld. CIT (A) is legally justified in not upholding the disallowance u/s 14A of the Act r.w. R 8D of the Rule without considering legal principles that allowability/disallowability of expenditure under the Act is not conditional upon the earning of the income as upheld by Hon'ble Supreme Court in case of CIT Vs Rajendra Prasad Moody (1978) 115ITR 519?

12. Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in allowing relief to the assessee on the basis of its earlier order in the assessee own case despite the fact that principle of res-judicate is not applicable to Income Tax proceedings as each assessment year is a separate year?

13. That the appellant craves leave to add, amend, alter or forgo any ground/(s) of appeal either before or at the time of hearing of the appeal. “

3. The fact shows that assessee is a Pvt. Ltd. company engaged in the business of providing advertising services and is 100% subsidiary of M/s. McCann Erickson Worldwide, USA.
4. The assessee filed its return of income on 30th September, 2010 declaring total income of Rs. 21,43,98,844/-. The case of the assessee was picked up for scrutiny. The assessee has entered into international transactions, which were referred to TPO. Vide order dated 22.11.2012 no Transfer Pricing (TP) adjustments were proposed.
5. During the course of assessment proceedings the books of accounts were produced, which were verified by the Assessing Officer. He held that there are many defects in the same. Therefore, he rejected the same.
 - a. Assessing Officer noted that as per ITS details the gross revenue of the assessee is Rs.217.14 crores whereas the assessee has disclosed only Rs.83.54 crores as receipt in the profit and loss account. The assessee submitted that assessee records the net income in the profit and loss account. It was stated that assessee is an advertising agency. Referring to Note No. 14 of annual accounts, it was stated that advertising commission and service fee is income from job completed on behalf of clients and same is disclosed net of direct cost. This practice is followed by the assessee for past 25 years since its incorporation. Vide letter dated 25th February, 2013 assessee submitted the details of gross billing of Rs.293.53 crores and direct cost of Rs.210.95 crores and net revenue disclosed of Rs.83.54 crores

in the profit and loss account. Assessee also submitted the bills as well as the details of the direct cost. Assessee also submitted that this is the industry practice by substantiating by submitting balance sheet of three other advertising agencies. It was also stated that the assessee is assessed accepting the above method by submitting the assessment orders for the earlier years. The Id. Assessing Officer noted that the claim of the assessee that gross profit and net profit rate of assessee are almost identical to the earlier years is not acceptable as this issue was not examined by the Assessing Officer in earlier years. Therefore, he invoked the provisions of Section 143(3) of the Act and made a disallowance of 5% of the direct cost claimed by the assessee resulting into addition of Rs. 10,51,45,000/-.

- b. Ld AO further noted that there are certain credit balances which are outstanding for more than 36 months and, therefore, he treated the same as income of the assessee on account of cessation of liability and added a sum of Rs.2,29,14,392/-.
- c. He further disallowed a sum of Rs.81,53,053/- being the payment to the global account cost to M/s. McCann Erickson Worldwide, New York, on which no tax was deducted at source. He further made an addition of Rs.49,89,989/- being the payment of license fee to M/s. McCann Erickson Worldwide, New York, on which no tax is deducted.
- d. He also disallowed a sum of Rs.5,88,765/- being the expenses incurred by the assessee on club membership paid by the assessee holding that same is not allowable under Section 37(1) of the Act.
- e. He further stated that the depreciation claimed by the assessee on purchase and sale of printers, scanners etc. is not allowable at 60% and further soft-ware license purchased are also not eligible for depreciation at 60% as same were not purchased along with source code. Thus, he disallowed the depreciation of Rs.1,24,035/-.
- f. Assessee has paid legal fee to Mr. C. R. Dua, who is partner of M/s. Dua Associates, a lawyer, Rs.5,98,150/-. As Mr Dua is also one of the directors of the company, Assessing Officer disallowed the above sum by invoking the provisions of Section 40A(2) of the Act.

g. Assessing Officer disallowed Rs.3,629/- under Section 14A of the Act despite net exempt income earned by the assessee.

Consequently, the total income was assessed at Rs. 35,69,15,857/-by passing assessment order under Section 144 of the Act on 26.03.2013.

6. Assessee preferred an appeal before the Id. CIT (Appeals) who passed order on 24th of March 2017 partly allowing the appeal of the assessee. Thus, the Id. Assessing Officer is aggrieved by various disallowances deleted by the Id. CIT (Appeals) and has filed this appeal.
7. Both the parties are heard at length on various grounds.
8. We have carefully considered the rival contentions and perused the orders of lower authorities.
9. Ground Nos. 1-3 of the appeal are against the disallowance of the direct cost on ad-hoc basis by 5%. The Id. CIT (Appeals) after considering the submission of the assessee, remand report filed by the Assessing Officer and admission of the additional evidences filed by the assessee, deleted the above disallowance. The Id. CIT (Appeals) considered the industry norms of accounting of advertisement commission net of direct cost and also the consistent practice followed by the assessee, which is accepted by revenue in assessee's own case in earlier years. He further noted that the data reflected in 26AS and the books of accounts of the assessee shows no difference and in fact assessee has disclosed the higher gross receipts compared to the data shown in Form No. 26AS. The accounts of the assessee were subject to tax audit and further subject to transfer pricing provisions which remained unscathed. The assessee has submitted the evidence containing 181 pages along with the invoices and bank statements to show the cost of service and proof of payment before him. He further noted that the rejection of the books of accounts by the Assessing Officer is not correct as in the past assessment it is accepted. He further noted that in the immediately succeeding assessment year i.e. assessment year 2010-11 the same Assessing Officer has completed the assessment without making any such disallowances accepting this practice. Therefore, he deleted the ad-hoc disallowance of 5% of the direct cost. The Id. DR could not show us any infirmity in the order of the Id. CIT (Appeals) and, therefore, we uphold his order and dismiss ground Nos. 1-3 of the appeal.

10. Grounds Nos. 4–6 are with respect to the deletion of the addition of the liabilities. The Id. CIT (Appeals) deleted the above addition after considering the submission of the assessee and additional evidence admitted. He noted that on re-conciliation of the audited accounts all income are treated as income and written back in subsequent years from assessment year 2010-11 to assessment year 2014-15. Thus, this sum is already offered by the assessee in subsequent years when the same has been written back. Even otherwise, merely because the amount is outstanding for more than three years, it does not provide evidence that the liability of payment has ceased so far as liability of payer is concerned. Even otherwise these amount were disclosed in the balance sheet year to year as payable by the assessee. The Id. DR could not show us any infirmity in the order of the Id. CIT (Appeals) and also could not show us any reason that merely because the liabilities are outstanding for more than three years, despite they becoming time-barred, the liability of the assessee ceases, and same can be taxed u/s 41 (1) of the act. Thus, we do not find any infirmity in the order of the Id. CIT (Appeals) in deleting the above addition. Accordingly, grounds Nos. 4–6 of the appeal are dismissed.
11. Ground No. 7 is with respect to the disallowance of club membership fee deleted by the Id. CIT (A). The assessee has paid an Indian hotel membership fee for Mr. Praseon Joshi of Rs.2,80,900/-, membership of ITC for Mr. Govind Pandey of Rs.7,865/- and further Waterstone Club membership fee for Mr. Govind Pandey of Rs.3,00,000/-. The claim of the assessee is these are only annual subscription fees and are allowable under Section 37(1) of the Act. The Id. CIT (Appeals) deleted the above addition following the decision of the Hon'ble Bombay High Court in Otis Elevator Co. Ltd. (1992) 195 ITR 682 (Bom). The Id. DR could not show us that any such fee is paid for life membership fees of those clubs and such membership is not used for the purposes of the business of the assessee. In view of this, we confirm the order of the Id. CIT (Appeals) deleting the above disallowances. Thus, ground No. 7 of the appeal is dismissed.
12. Ground No. 8 is with respect to the professional fees paid to M/s. Dua Associates, a leading law firm, whose partner, Shri C. R. Dua is also director of the assessee company. The Id. Assessing Officer applied the provisions of

Section 40A(2) of the Act for making the above disallowance. The ld. CIT (Appeals) in para 3.7.2 has recorded the detailed services provided by the above company and the failure of the Assessing Officer to show how the above payment was excessive or un-reasonable. For the provisions of Section 40A(2) of the Act the disallowance can be made if the services are not for the business need of the assessee or are excessive or un-reasonable. The ld. Assessing Officer has not brought any material on record to prove this. Therefore, we confirm the order of the ld. CIT (Appeals) in deleting the disallowance of Rs.5,98,150/-. Thus, ground No. 8 of the appeal is dismissed.

13. Ground Nos. 9–11 of the appeal are against deletion of disallowance under Section 14A of the Act. The fact shows that assessee has not received any exempt income during the year. Therefore, the issue is squarely covered in favour of the assessee by the decision of the Hon'ble Delhi High Court in Cheminvest Limited Vs. CIT 378 ITR 33 holding that disallowance under Section 14A of the Act could not be made if no exempt income has been received. The ld. CIT (Appeals) has deleted the disallowance following the above judicial precedents, which cannot be found fault with. Accordingly ground Nos. 9–11 of the appeal are dismissed.

14. In the result appeal filed by the ld. Assessing Officer is dismissed.

Order pronounced in the open court on : 7/10/2021.

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated : 7/10/2021.

MEHTA

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1. Appellant;
2. Respondent
3. CIT
4. CIT (Appeals)

5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	7.10.2021
Date on which the typed draft is placed before the dictating member	7.10.2021
Date on which the typed draft is placed before the other member	7.10.2021
Date on which the approved draft comes to the Sr. PS/ PS	7.10.2021
Date on which the fair order is placed before the dictating member for pronouncement	7.10.2021
Date on which the fair order comes back to the Sr. PS/ PS	7.10.2021
Date on which the final order is uploaded on the website of ITAT	7.10.2021
date on which the file goes to the Bench Clerk	7.10.2021
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	