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

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

ITA No.3216/Bang/2018
Assessment year: 2009-10

Shell MRPL Aviation Fuels & Services Ltd., (formerly Shell MRPL Aviation Fuels & Services Pvt. Ltd.), No.102, Prestige Sigma, Vittal Mallya Road, Bangalore – 560 001. **PAN: AALCS 7003B**	Vs.	The Deputy Commissioner of Income Tax, Circle 6(1)(1), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri K.R. Vasudevan, Advocate
Respondent by	:	Shri Priyadarshi Mishra, Addl.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	15.02.2022
Date of Pronouncement	:	15.02.2022

O R D E R

Per Chandra Poojari, Accountant Member

This appeal by the assessee is directed against the order dated 17.9.2018 of the CIT(Appeals)-7, Bengaluru for the assessment year 2009-10 on the following grounds:-

> "1. The order of the learned Commissioner of Income Tax (Appeals) [hereinafter referred as C1T(A)) is not justified in law and against the facts and circumstances of the case.

2. Rejection of additional evidences

2.1 The learned CIT(A) erred in law and in facts in rejecting the additional evidences furnished by the Appellant.

2.2 The learned CIT(A) ought to have observed that the Appellant has demonstrated the sufficient cause as required under Rule 46A for admission of additional evidence and hence such evidences are admissible.

2.3 The learned CIT(A) ought to have admitted the additional evidences especially considering he has confirmed the various additions made by the learned Assessing Officer {`learned AO') on the premise of lack of documentary evidences supporting the claim.

3. Disallowance of interest paid for delayed remittance of Service Tax- Rs.4,315 (Tax effect — Rs. 1,333)

3.1 The learned CIT(A) erred in law and on facts in confirming the disallowance of interest for delayed remittance of service tax treating the same as penal in nature.

3.2 The learned CIT(A) ought to have observed that the interest for delayed payment of service tax is compensatory in nature and hence, allowable as deduction.

4. Disallowance of expenses pertaining to earning of exempt income under section 14A - Rs.1,44,74,249 (Tax effect — Rs. 44,72,543)

4.1 The learned CIT(A) erred in law and on facts by upholding disallowance of an amount of Rs. 1,14,74,249 under section 14A of the Act, read with Rule 8D of the Income-tax Rules, 1962 ("the Rules").

4.2 The learned CIT(A) ought to have observed that section 14A read with Rule 8D cannot be invoked if the Appellant has not incurred any expenditure to earn the exempt income.

4.3 The learned CIT(A) erred in not setting aside the order of the learned AO invoking the provisions of section 14A read with Rule 8D without establishing a direct and proximate connection between the expenses incurred and the exempt income earned by the Appellant.

4.4 The learned CIT(A) ought to have appreciated that Rule 8D can be applied only when the learned AO has recorded his dissatisfaction with regard to correctness of the claim of expenditure in relation to income which does not form part of total income.

4.5 The learned C1T(A) ought have observed that there is no nexus between other finance charges and the funds utilized for making investments, as the other finance charges consists of bank charges paid on availing working capital loans.

4.6 The learned CIT(A) ought to have appreciated that the working capital loan in foreign currency availed by the Appellant had been used to make the payment to foreign creditors, while the investments yielding exempt income were made out of surplus funds.

4.7 The learned C1T(A) erred in concluding that no separate books are maintained for investment in mutual fund and hence the contention of the Appellant that investments are made out of surplus fund is not accepted.

4.8 The learned CIT(A) erred in disregarding the evidences furnished by the Appellant during the course of proceedings before him but, upheld the disallowances made by the learned AO for lack of documentary evidences supporting the claim.

5. Disallowance of provision for signing incentive- Rs.50,00,000 (Tax effect — Rs. 15,45,000)

5.1 The learned CIT(A) erred in law and on facts by disallowing the provision for signing incentive as unknown liability/ provisional in nature.

5.2 The learned CIT(A) erred in upholding the disallowances primarily on the ground that there is no outgo of money towards signing incentive in real terms and the same was only by way of a credit note.

5.3 The learned CIT(A) has failed to appreciate that the Appellant has accounted and offered to tax the entire amount of sales without claiming any deduction towards the signing incentives.

5.4 The learned CIT(A) failed to appreciate the fact that as per the terms of the agreement with the customer, the liability to make payment of incentives arises upon achieving the prescribed sales milestone.

5.5 The learned CIT(A) erred in disregarding the evidences furnished by the Appellant during the course of proceedings before him but, upheld the disallowances made by the learned AO for lack of documentary evidences supporting the claim.

6. Disallowance of professional charges as pre-operative expenses- Rs.13,03,304 (Tax effect — Rs. 4,02,721)

6.1 The CIT(A) erred in disallowing the consulting fees paid for obtaining registration under various legislation as pre-operative expenses.

6.2 The learned CIT(A) has failed to appreciate that these expenses are incurred after the incorporation of the Appellant and hence, are not in the nature of pre-operative expenses.

7. Disallowance for non-deduction of TDS on Salary- Rs. 95,00,000 (Tax effect — Rs. 29,35,500):

7.1 The learned CIT(A) has erred in enhancing the disallowance towards reimbursement of salary expenses amounting to Rs. 95,00,000 for non-deduction of tax at source.

7.2 Notwithstanding and without prejudice to the above, the learned CIT(A) ought to have appreciated that the Appellant is eligible to claim deduction in the year in which tax is deducted and remitted to the government

7.3 The CIT(A) erred in not directing the learned AO to grant deduction in the year in which taxes are deducted and remitted to the government.

8. Disallowance for non-deduction of TDS for sponsorship- Rs.4,20,600 (Tax effect — Rs. 1,29,965)

8.1 The learned CIT(A) erred on facts in disallowing provision for sponsorship fees for non-deduction of tax at source.

8.2 The learned CIT(A) ought to have observed that the due date for payment of TDS to the credit of government for the month of March was 30th of April. The learned CIT(A) erred in disallowing the provision without taking cognisance that the transaction was cancelled on 17 April 2009 and hence, there was no requirement to deduct tax at source.

8.3 The learned CIT(A) erred in disregarding the evidences furnished by the Appellant during the course of proceedings before him but, upheld the disallowances made by the learned AO for lack of documentary evidences supporting the claim.

9. Disallowance of Commission expenditure- Rs. 36,10,000 (Tax effect Rs. 11,15,490)

9.1 The learned CIT(A) erred in disallowing of commission on account of non-deduction tax at source.

9.2 The learned CIT(A) has erred in concluding that the payment of commission is chargeable to tax in India.

9.3 The learned CIT(A) failed to appreciate that the payee has carried on its activities outside India.

9.4 Notwithstanding and without prejudice to the above, the learned CIT(A) ought to have appreciated that the

payments were not taxable in India by virtue of the provisions of the Double Taxation Avoidance Agreement between India and United Kingdom.

9.5 The learned CIT(A) erred in disregarding the evidences furnished by the Appellant during the course of proceedings before him but, upheld the disallowances made by the learned AO for lack of documentary evidences supporting the claim.

The Appellant craves leave to add, alter, rescind and modify the grounds herein above or produce further documents, facts and evidence before or at the time of hearing of this appeal.

For the above and any other grounds which may be raised at the time of hearing, it is prayed that necessary relief may be provided."

2. The facts of the case are that the assessee company is a joint venture between Mangalore Refinery and Petrochemicals Limited ('MRPL') (a PSU and subsidiary of ONGC Limited) and Shell Gas B.V., NL. The assessee is in the business of trading in Aviation Turbine Fuel (ATF) and supplies ATF to domestic as well as international airlines. It supplies ATF to its customers like Air India, etc. both at domestic as well as at international locations.

3. The ld. AR submitted that the issues involved in the appeal are as follows:-

i) Interest for delayed remittance of Service Tax – Ground No. 3
ii) Disallowance u/s 14A of the Act – Ground No. 4
iii) Disallowance of provision for signing incentive - Ground No. 5
iv) Professional charges as pre-operative expenses - Ground No. 6
v) Non-deduction of TDS on salary - Ground No. 7
vi) Non-deduction of TDS for sponsorship - Ground No. 8
vii) Disallowance of commission expenditure - Ground No. 9

4. Ground No.3 is with regard to disallowance of interest paid for delayed remittance of Service Tax of Rs.4,315. The assessee had paid interest of Rs.4,315 on account of late payment of service tax during the FY 2008-09 and claimed it as expenses allowable u/s. 37 of the Income-tax Act, 1961 [the Act], being compensatory in nature. The AO disallowed the same on the ground that the interest is penal in nature and not allowable u/s. 37 of the Act. The CIT(Appeals) confirmed the action of the AO. Against this, the assessee is in appeal before us.

5. We have heard both the parties and perused the material on record. The ld. AR submitted that in the issue is covered by the decision of Bangalore Tribunal in the case of *Velankani Information Systems Ltd. v. DCIT, 97 taxmann.com 599 (Bangalore - Trib.)* wherein it was held that interest on delayed remittance of service tax is an allowable expenditure in para 19 & 20 of the order, which is as follows:-

> "19. We have given a careful consideration to the rival submissions. As far as payment of interest on delayed payment of service tax is concerned, it is clear from the decision of the Hon'ble Gujarat High Court in the case of Kaypee Mechanical India (P) Ltd. (supra) that service tax and interest paid on delayed deposit of service tax had to be allowed as a deduction. The Hon'ble Gujarat High Court took the view that payment of interest was only compensatory in nature and would not be in the nature of penalty which would be hit by Explanation to section 37(1) of the Act. Therefore, the same had to be allowed as a deduction. As far as the plea of the ld. DR by placing reliance on the decision of the Hon'ble Supreme Court in the case of Star India (P) Ltd. (supra)is concerned, we are of the view that the reliance placed by the ld. DR on the aforesaid decision will not help the case of the revenue. In the case of Star India (P) Ltd. (supra), the facts were that the appellant was a company incorporated under the Companies Act, 1956, and carried on business in India. It is the agent of M/s. Satellite Television Asian Region Limited, Hong Kong (referred to as "Star", Hong Kong). The business of Star was to telecast channels from satellites

situated outside India. Some of the channels are available and enjoyed by the customers in India. According to the appellant, it does not broadcast, but merely sells time slots for advertisement and obtain sponsors for the serials, programmes or live events, etc. Thus, when the service of broadcasting was introduced in the Finance Act, 1994 as a taxable service with effect from 16-7-2001, by the Finance Act, 2001, the appellant disputed its liability to make any payment of service tax on the ground that it did not, in fact, broadcast. The Commissioner, however, held against the appellant. The appellant appealed before the Commissioner (Appeals). While the appeal was pending, the Finance Act, 2001, was amended by the Finance Act, 2002. The effect of the amendment, inter alia, was to make an agent, such as the appellant, liable to pay service tax as broadcaster. The question before the Hon'ble Supreme Court was, can a liability be fastened on an assessee with retrospective effect? The Hon'ble Supreme Court held that retrospective civil liability can be created by legislation and there is a prohibition only to create an offence retrospectively. It is in this context that the Hon'ble Supreme Court had made the following observations in para 8 of its decision. Para 7 & para 8 have to be read together, which reads as follows:—

> "7. In any event, it is clear from the language of the validation clause, as quoted by us earlier, that the liability was extended not by way of clarification but by way of amendment to the Finance Act with retrospective effect. It is well established that while it is permissible for the Legislature to retrospectively legislate, such, retrospectivity is normally not permissible to create an offence retrospectively. There were clearly judgments, decrees or orders of courts and Tribunals or other authorities, which required to be neutralised by the validation clause. We can only assume that the judgments, decree or orders, etc., had, in fact, held that persons situate like the appellants were not liable as service providers. This is also clear from the Explanation to the valuation section which says that no act or acts on the part of any person shall be punishable as an offence which would not have been so punishable if the section had not come into force.

> 8. The liability to pay interest would only arise on default and is really in the nature of a quasi-punishment. Such liability although created retrospectively could not entail the punishment of payment of interest with retrospective effect."
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> 20. The observations of the Hon'ble Supreme Court in para 8 is only in the context of a question, whether there can be criminal liability imposed by retrospective law. The above observations cannot be read to mean that interest paid on delayed deposit of service tax is penal in nature and therefore cannot be allowed as a deduction under Explanation to section 37(1) of the Act. We, therefore, hold and direct that the deduction of interest on delayed deposit of service tax amounting to Rs.56,11,697 should be allowed as a deduction."

6. In view of the above order of the Tribunal, we are inclined to allow the grounds of the assessee on this issue.

7. Ground No.4 is with regard to disallowance of expenses pertaining to earning of exempt income u/s. 14A. The AO disallowed a sum of Rs.1,44,74,249 u/s. 14A of the Act as the assessee had earned exempt income, but did not disallow the relatable expenditure u/s. 14A r.w. Rule 8D. The CIT(Appeals) confirmed the disallowance. Against this, the assessee is in appeal before us.

8. We have heard both the parties and perused the material on record. Similar issue came for consideration before the Tribunal in assessee's own case in ITA No.790/Bang/2018 by order dated 16.11.2018 wherein it was held as under:-

> "9. The main ground which needs to be adjudicated is ground No.1 raised by the assessee. As far as ground No. 1 of the assessee is concerned, it is clear that the CIT(A) has not taken note of the written submission filed by the assessee dated 23/8/2017 along with annexure. The ld. counsel for the assessee by taking us through the relevant annexure to the written submission dated 23/8/2017 wanted

to demonstrate that the borrowed funds on which interest was paid by the assessee was used only for the purpose of business and not to make investment which yielded the tax free income. The ld. DR pointed out that the documents which are annexure to written statement dated 23/8/2017 were not filed before the AO and the assessee therefore ought to have filed along with application for admission of additional evidence in terms of Rule 46A of the Rules. Since the Assessee has not made such application before CIT(A), the same should not be taken cognizance. We are of the view that since the CIT(A) has not made any reference to the written submission dated 23/8/2017, the argument of the ld DR cannot be accepted. Had the CIT(A) made a reference to the written submission dated 23/8/2017 and supporting documents filed along with those submissions and refused to admit those documents as additional evidence, then the plea of the learned DR would be of some substance.

10. As we have already observed in the written submission dated 23/8/2017, the assessee has specifically referred to the fact that the CIT(A) in the earlier hearing had directed the assessee to file the documents which were being filed along with the written submission. In terms of Rule 46A(4), the CIT(A) has power to call upon the assessee to produce certain documents with a view to enable him to dispose off the appeal or for any other substantial cause. Since the submissions have not taken cognizance of CIT(A), we are of the view that it would be just an appropriate to set aside the order of the CIT(A) and remand the issue of disallowance u/s 14A of the Act for fresh consideration by the CIT(A) after affording opportunity of being heard to the assessee on the admissibility of additional evidence filed by the assessee before the CIT(A) in accordance with law and thereafter adjudicate on the issue of disallowance u/s.14A of the Act. The grounds of appeal are treated as allowed for statistical purposes."

9. In view of the above order of the Tribunal, we are inclined to remit this issue to the file of CIT(Appeals) for fresh decision in accordance with law.

10. Ground No.5 is regarding disallowance of provision for signing incentive. The assessee had debited Rs. 50,00,000 towards signing incentive payable to its customer Jet Airways (being its first customer), pursuant to an agreement. Under the said agreement, it was under a contractual obligation to provide signing incentive in the nature of discount on invoices raised on Jet Airways. The assessee had not added back this provision while computing taxable profits for AY 2009-10, since the provision was an ascertained liability and was created under the contractual agreement entered.

11. The AO, while determining the total income, has disallowed such provision considering that such provision is created on an ad-hoc basis in order to meet any unknown liability. The CIT(A) confirmed the disallowance. Against this, the assessee is in appeal before us.

12. The Ld. AR submitted that the AO has erred by disallowing the provision for signing incentive as unascertained liability. He failed to appreciate that the amount is to be allowed as discount on invoice raised on Jet Airways. Hence, the deduction of tax at source is not applicable. The AO also failed to appreciate that the said amount is **an actual liability** as per the agreement between the assessee and Jet Airways and not a provision for an unknown expenditure.

13. He submitted that as per clause 7 of the agreement between Jet Airways and the assessee dated 9th June, 2008, the Appellant shall provide for a one-time signing incentive of INR 1,00,00,000 to Jet Airways which will be adjustable in two tranches viz., 50% against the payments in the first billing cycle and the balance 50% against the payments in the fourth month billing cycle. By virtue of the aforesaid agreement, incentive of INR 50,00,000 was provided to Jet Airways by the assessee in FY 2008-09 itself against the initial billing cycle. The balance incentive of INR.

50,00,000 was provided to Jet Airways in the subsequent year, based on mutual understanding between the parties.

14. In light of the above, the ld. AR submitted that the provision for signing incentive is not in the nature of provision for unascertained liability. It is a liability created against a contractual obligation, under the agreement entered into with Jet Airways. The facts related to the transaction have not been appreciated properly by the lower authorities. Therefore the claim of the assessee has to be allowed.

15. The ld. DR submitted that the assessee was not able to substantiate the claim with evidence including bills, invoices, break-up of expenses and TDS thereof. Thus, the AO added back the same holding that it is a provisional liability.

16. We have heard both the parties and perused the material on record. In this case, the CIT(Appeals) observed that clause 7 of the agreement dated 9.6.2008 provides for offer of Rs.1 crore to Jet Airways as an one time signature bonus. The clause is reproduced below:-

> "As a gesture of respect for its launch customer in India, Shell MRPL Aviation is please to offer a one-time Signature Bonus of Rs.1 crore to Jet Airways. The amount will be paid by way of credit note at the beginning of the contract period, half of which can be adjusted by Jet Airways against their payments in the first billing cycle and the balance half can be adjusted in the fourth month billing cycle."

17. Therefore, the CIT(Appeals) observed that there is no basis for or justification for the assessee to debit an amount of Rs.50 lakhs in its P&L account for the year. The claim of the assessee is contradictory to the terms of the agreement. The assessee did not bring any material on record to prove such a supposition. He therefore sustained the disallowance made by the AO.

18. We have heard both the parties on the issue. Before us also, the assessee was not able to demonstrate that the said amount was an ascertained liability in the assessment year under consideration so as to claim it as a deduction. The claim of the assessee is not coming from the agreement entered into by it with Jet Airways cited *supra*. For the year under consideration, it is only an unascertained liability which cannot be allowed as a deduction. Being so, we do not find any infirmity in the order of the CIT(Appeals) and confirm the same.

19. Ground No.6 is regarding disallowance of professional charges as - pre-operative expenses. The assessee had incurred expenses amounting to INR 16,29,130 towards professional fees in relation to the following:-

- Incorporation of the Company – INR 40,000;
- Obtaining registration under various Indirect tax Laws and Foreign Trade Policy - INR 15,38,950 and
- Assistance in obtaining Permanent Account Number ('PAN') and Tax Account Number ('TAN') – INR 50,180

20. Copy of the invoices of professional charges incurred in this connection is placed at Page No. 113 to 122 of PB.

21. The AO has disallowed such professional fees incurred on the ground that these are pre-operative expenses. Further, the AO restricted the deduction towards these professional fees to one-fifth of the expenses incurred (i.e., INR 3,25,836) on the ground that these expenses are covered under the provisions of section 35D of the Act and should be allowable accordingly.

22. The CIT(A) confirmed the disallowance on the ground that these expenses are of such nature that they have enduring benefit and hence capital in nature. Against this, the assessee is in appeal before us.

23. The ld. AR submitted that the AO has erred in not appreciating the fact that out of the above amount of INR 16,29,130, only an amount of INR 40,000 is pre-operative expenses on account of professional fees in connection with the incorporation of the Company. The assessee had already added back such amount of INR 40,000 while computing taxable profits for AY 2009-10 and had claimed only one-fifth of such amount as a deduction us/. 35D of the Act. Hence, there ought to be no further adjustments for the said sum of INR 40,000.

24. He submitted that with respect to the balance professional fees of INR 15,89,130, it was submitted that the AO has erred in disallowing the consulting fees paid for obtaining registration under various Acts as pre-operative expenses. These expenses are incurred after the incorporation of the Company and also post its commencement of business and hence, are not pre-operative in nature.

25. The ld. AR further submitted that the AO has failed to appreciate that these expenses do not fall within the scope of section 35D and hence cannot be termed as preliminary expenditure. Pending the obtainment of PAN, TAN, indirect tax and other statutory registrations does not refrain the assessee from commencing its operations. The procedures for obtaining the aforesaid registrations were carried out after the operations of assessee's business had commenced. Accordingly, these expenses are not, in principal, pre-operative expenses. In this regard, it is submitted that the assessee had entered into an "Aviation Commercial Services Agreement" with "Shell Aviation Limited" (SAV) on 16th April 2008. Under this agreement, SAV acts as a point of contact between Shell MRPL and overseas affiliates for selling and distribution of ATF, to customers of Shell MRPL in overseas; and to customers of foreign affiliates in India.

26. The assessee had obtained the registrations under various statues after the afore-mentioned date i.e., 16th April 2008, mainly in the month of May 2008. The AO has erred in holding that the professional fees incurred for obtaining the various statutory registrations is pre-operative in nature by not considering that such registrations were obtained after commencement of operations by the assessee. Obtaining such statutory registrations ensures smooth functioning of the business activities. Hence, the professional fees incurred for obtaining such registrations are incidental to the business of the assessee. In this regard, copies of the various statutory registration certificates are at placed in the Paper Book.

27. As explained above, the facts related to the transaction have not been appreciated properly by the lower authorities. An amount of Rs 40,000 has been already considered as pre-operative expense by the assessee and the balance amounts have been incurred only after commencement of business and hence are allowable expenses. Hence, these professional charges (of INR 15,89,130) are incurred wholly & exclusively for the business of the assessee and allowable as deduction u/s 37.

28. The ld. DR supported the orders of lower authorities.

29. At the time of hearing, the ld. AR submitted that out of the above expenditure, certain expenditure is incurred after incorporation of the assessee company which are incurred in the ordinary course of business activities of the assessee and cannot be termed as pre-operative expenses and should be allowed in its entirety. In our opinion, the assessee has to furnish details with regard to its expenditure and thereafter the AO has to examine it whether it is incurred after incorporation of the company. Accordingly, the issue is remitted to the file of AO fresh consideration.

30. Ground No.7 is regarding non-deduction of tax on salary of Rs.19,02,048. The assessee had entered into a service agreement with Shell India, whereby two employees viz, Mr. Sanjay Samuel Varkey and Mr. Kaul of Shell India were deputed to Shell MRPL (assessee), during the FY 2008-09, to render the services as per the agreement. During the FY 2008-09, assessee had accounted the expenses of INR 95,00,000 towards the aforesaid services in terms of the agreement with Shell India. However, Shell MRPL, inadvertently, did not withhold tax on such expenses in FY 2008-09 at the time of crediting such sums to the account of Shell India in its books. However, assessee subsequently withheld the applicable taxes, on such amount payable to Shell India in FY 2010-11 i.e., in the year of making the payment of service fees to Shell India. Further, the assessee had also remitted the interest on late deduction of tax at source on such service fees, along with the remittance of tax. **The assessee had not added back the amount of such expenses while computing taxable profits for FY 2008-09. Further, no deduction for such expenses was claimed by the assessee while computing the taxable profits for FY 2010-11, i.e., the year in which tax on such expenses was deducted at source and actually remitted to the Government.**

31. The AO while determining the total income has disallowed INR 19,02,048 out of the abovementioned service fee of INR 95,00,000, on the ground that tax has not been deducted at source by assessee on the payment of such amount.

32. The ld. AR submitted that the assessee was required to deduct tax at source on the total expense of INR 95,00,000 incurred by it being in the nature of service fees payable to Shell India under the service agreement. It is submitted that assessee had subsequently withheld the applicable taxes on the total amount of service fee of INR 95,00,000 accrued in AY

2009-10; and had remitted the same to the Government along with the applicable interest for delay in withholding of taxes. **As explained above, the facts related to the transaction have not been appreciated properly by the lower authorities. No deduction for such expenses has been claimed by the assessee in the year under consideration.** Since the assessee had complied with the provisions of TDS subsequently and in such subsequent year of complying with the provisions, no further deduction towards such expenses was claimed, it was submitted that the deduction claimed (INR 95,00,000) should be allowed from the total income for the AY 2009-10.

33. The ld. DR relied on the orders of lower authorities.

34. At the time of hearing, the ld. AR further made a submission that the CIT(Appeals) enhanced the assessment to Rs.95 lakhs without giving a notice of enhancement, though AO disallowed a sum of Rs.19,02,048. In our opinion, whether the assessee deducted TDS or not is to be verified by the AO after going through the documents relating to the issue of non-deduction of TDS and to the extent salary is subject to TDS, it has to be allowed as deduction. Accordingly, the issue is remitted to the AO for fresh consideration.

35. Ground NO.9 is with regard to disallowance for non-deduction of TDS on Sponsorship towards Airport and Airline Expo event of Rs.4,20,600.

36. The assessee received an invoice dated 10.3.2009 for Rs.4,41,200 for sponsorship towards Airport and Airline Expo Event. Out of the above only 50% i.e., Rs. 2,20,600 was due upto 31st March 2009 for which assessee paid an amount of Rs. 2,18,101, after deducting tax at source of Rs. 2,499 u/s. 194C (i.e., at the rate of 1% plus applicable surcharge and

cess). The balance 50% amount of Rs. 2,20,600was not due for payment as on 31st March, 2009 and hence, the same was shown as a liability in the books of assessee as on that date. However, tax of Rs.2,500 was deducted at source on such amount during March 2009 on accrual basis.

37. However, subsequently the total fees were waived off and the event organizers had refunded the above amount paid by assessee (i.e., INR 2,18,101), in April 2009. Based on this, the Company had reversed the whole amount of sponsorship expenses during FY 2009-10, as accounted in FY 2008-09. **Hence, effectively no expense was accounted in the books towards such sponsorship expenses**.

38. The due date for remittance of TDS for the month of March 2009 was 30th April 2009. As stated above, since the deal for such sponsorship got cancelled in April 2009, the TDS on such sponsorship expense was also reversed in April 2009.

39. The AO, while determining the total income, has disallowed Rs.4,20,600 on the ground that tax has not been deducted at source by assessee on such amount. The CIT(Appeals) confirmed the action of the AO.

40. The ld. AR submitted that the AO failed to appreciate the fact that as per invoice dated March 10, 2009 only INR 2,20,600 (i.e., 50%) was due upto March 31, 2009. The balance amount of INR 2,20,600 had not accrued for the FY 2008-09. The assessee had deducted tax at source of Rs.4,999 on such sponsorship expenses accounted in the books. The assessee had paid only INR 2,18,101 (being 50%) to the party and the balance amount of INR 2,18,100 was shown as payable in the books as on 31st March, 2009. Copy of the bank payment voucher and the details of creditors as on 31stMarch 2009 is at ***Annexure 6B*** of Paper Book.

41. Without prejudice to the above, the AO has failed to appreciate the fact that, in principle, no expense in the nature of sponsorship was actually incurred by the assessee as 50%of the sponsorship fees paid was refunded to the assessee and the balance 50% of the sponsorship expense was reversed in the books on cancellation of the contract. Copy of the ledger accounts of sponsorship expenses and TDS on sponsorship expenses for the period March 2009 to March 2010 is at ***Annexure 6C*** of Paper Book. Thus, it was submitted that effectively no expense was accounted in the books towards such sponsorship expenses and hence the question of disallowance does not arise.

42. The ld. DR relied on the orders of lower authorities.

43. We have heard both the parties on this issue and perused the material on record. The contention of the ld. AR is that the said amount has not been paid in the assessment year under consideration. Being so, there is no question of deduction of TDS. In our opinion, this has to be examined at the end of the AO. Accordingly, this issue is remitted to the AO to verify whether any expenditure was incurred towards sponsorship fees and on cancellation of the contract balance 50% was reversed in the books of the assessee as claimed by the assessee. If the amount is paid towards sponsorship without TDS, then only it has to be disallowed. With these observations, the issue is remitted to the file of the AO.

44. Ground No.9 is regarding disallowance of commission expenditure. The assessee had incurred INR 36,10,000 as commission expenses as per the agreement with Shell Aviation ventures. The AO while computing the total income, disallowed such commission expenses on the ground that these are not genuine expenses. The CIT(Appeals) confirmed the same.

45. The Ld. AR submitted that the commission is paid as per the agreement between the Appellant and Shell Aviation Ventures (UK). The assessee was itself in receipt of commission as per the agreement and the same was offered to tax. The AO erred in holding that no tax was withheld at source for the commission payment. As per Article 7 of India UK Taxation Avoidance Agreement (DTAA), such commission, payable by the Delivering Company to the Contracting Company located outside India on supply of aviation products, was in the nature of business profits in the hands of recipient. As the entire operations of the recipient were carried out outside India and there was no business connection of the recipient in India as contemplated in Section 9(1)(i) of the Income Tax Act, 1961 no income accrued or arose in India to the payee. As per section 195 of the Act, tax is required to be withheld at source only when the income is chargeable to tax in India. Since there was no taxable income, no tax was withheld at source. The agreement between assessee and Shell Aviation Ventures for such commission expenses is at ***Annexure 4B*** of the paper book. Copy of the ledger account of Delco commission for the FY 2008-09, credit notes for such Delco commission and bank payment vouchers/bank payment advice are at ***Annexure 8*** of the Paper Book. It is submitted that the entire operations of the recipient were carried out outside India and hence the source of income is outside India has not been examined by the lower authorities. In light of the above, the ld. AR submitted that such commission expenses are genuine expenditure which is actually incurred by the assessee and therefore, be allowed as a deduction.

46. The ld. DR submitted that the source of income is in India and sale of aviation fuel is in India, therefore the same is liable for TDS which is not done by the assessee. Being so, it is disallowed.

47. We have heard both the parties on the issue. This expenditure was disallowed on two reasons i.e., genuineness of expenditure and non-deduction of tax at source. Firstly, the assessee has to prove the genuineness of expenditure, then only the question of TDS arises. In the present case, the assessee has not been able to show the genuineness of expenditure. In view of this, we remit this issue to the file of AO to examine the genuineness of expenditure. Once the assessee proves the genuineness of expenditure, then the AO has to examine whether the said amount is liable for TDS or not. With these observations, the issue is remitted to the AO for fresh decision.

48. The first ground is with regard to non-admission of additional evidence furnished by the assessee before the CIT(Appeals). The ld. AR submitted that assessee filed certain additional evidence which was not considered by the CIT(Appeals). Since we have remitted the connected issues to the file of Assessing Officer for fresh consideration, the assessee is at liberty to place all the additional evidence before him to support its claim.

49. In the result, the appeal by the assessee is partly allowed for statistical purposes.

Pronounced in the open court on this 15th day of February, 2022.

Sd/-	Sd/-
(BEENA PILLAI)	(CHANDRA POOJARI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Bangalore,
Dated, the 15th February, 2022.

/*Desai S Murthy /*

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.