IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "SMC": NEW DELHI

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No. 1501/DEL/2021
[Assessment Year: 2017-18

Trulymadly Matchmakers Private Limited, 9, Okhla Industrial Estate, Phase-3, New Delhi-110020 PAN- AAECT5696G	**Vs**	**Income-tax Officer, Ward-25(4), New Delhi.**
APPELLANT		**RESPONDENT**
Appellant by	**Sh. Manoneet Dalal, Adv. & Sh. Anshul Kumar, CA**	
Respondent by	**Sh. Om Prakash, Sr. DR**	
Date of hearing	**12.01.2022**	
Date of pronouncement	**31.03.2022**	

O R D E R

PER KUL BHARAT, JM:

This appeal, by the assessee, is directed against the order of the learned Commissioner of Income-tax (Appeals)-9, New Delhi, dated 22.09.2020, pertaining to the assessment year 2017-18. The assessee has raised following grounds of appeal:

"1 That the Ld. CIT (A) has erred in Law and on facts in upholding the action of the Ld. AO in making an addition of Rs. 17,83,947/- on account of

payment made to parties without deduction of tax u/s 195 of the Act, without considering the facts and circumstances of the transactions, and completely ignoring the documents submitted by the Appellant which in itself are capable of explaining the nature of the transactions.

1.1 That the Ld. CIT(A) failed to consider the copies of agreement of the Appellant with the parties submitted by the Appellant which clearly evidences the nature of the transactions.

1.2 That the Ld. CIT(A) has erred in alleging that the Appellant has not submitted the agreements with the parties, despite the fact that the Appellant had submitted the terms and conditions agreed with the online platforms with whom the impugned transactions were made.

1.3 That the Ld. CIT(A) has erred in not deciding upon the nature of the transactions as to how tax was required to be withheld under section 195 of the Act.

1.4 That the Ld. CIT(A) erred in facts and in law in upholding the disallowance by doubting the genuineness of the claim rather than deciding upon the allegation of the Ld. AO that payments were to be subjected to withholding tax under section 195 of the Act.

2 That the Ld CIT (A) has erred in Law and on facts in upholding the action of the Ld. AO in making an addition of Rs. 3,42,631 /- on account of late deposit of PF and ESI without appreciating the judicial pronouncements of various courts in favor of the Appellant.

2.1 That the Ld. CIT(A) has erred in facts and in law in not appreciating the settled principle of law that wherever two views are possible in respect of any provision of law, then the view that is favorable to the assessee is required to be upheld.

3. That the Ld. CIT(A) has erred on facts and in law in upholding the addition of Rs. 37,868 alleging the same to be prior period expenses without properly appreciating the facts of the case.

4. The appellant reserves his right to add or delete any grounds of appeal at the time of hearing."

2. The facts giving rise to the present appeal are that the assessee filed its return of income on 30.11.2017 through electronic mode declaring income of Rs. 8,49,663/-. The case was selected for scrutiny under CASS. Subsequently the Assessing officer proceeded to frame assessment u/s 143(3) of the Income-tax Act, 1961, hereinafter referred to as the "Act". Thereby the Assessing Officer made addition of Rs. 37,868/- on account of claim of TDS as expenditure made in the Profit & Loss account of Rs. 37,868/-. Further, the Assessing Officer noticed that the assessee had made various payments in the nature of commission and professional fees. However, no tax was deducted. In response to the query raised by the Assessing Officer, the assessee stated that tax was not deductible. However, explanation of the assessee was not found acceptable by the assessing authority. He, therefore, made addition of Rs. 17,83,947/-. The Assessing Officer further observed that the assessee has not deposited the employees' contribution as stipulated under the respective Act. Therefore, he made disallowance of Rs. 3,42,631/-. Hence, the Assessing Officer assessed income at Rs. 30,14,110/- against the declared income of Rs. 8,49,663/-. Aggrieved against the assessee preferred appeal before learned CIT(Appeals), who also sustained the addition and dismissed the appeal of the assessee. Now the assessee is in appeal before this Tribunal.

3. Ground no. 1 to 1.4 of the assessee's appeal is against making addition of Rs. 17,83,000/- on account of payment made to the parties without deduction of tax u/s 195 of the Act.

4. Learned counsel for the assessee submitted that a sum of Rs. 17,83,000/- was paid to the three parties, namely, Apple iOS, Google and LinkedIn. In respect of Apple iOS, App was used by customer through Apple iOS interface and the fee was first collected by Apple Ireland Ltd. and paid to the appellant after deduction of commission/fee by Apple Ireland Ltd. An amount of Rs. 10,87,483/- was paid by the assessee. He contended that in respect of Google, a sum of Rs. 6,27,801/- was paid. He further contended that in respect of LinkedIn a sum of Rs. 68,663/- was paid. Learned counsel further reiterated the submissions as made in the synopsis filed by the assessee. For the sake of clarity the relevant portion of Brief Synopsis is reproduced hereunder:

> "GROUNDS NO. 1.1.1.1.2.1.3 AND 1.4
>
> 4. Disallowance on account of non-deduction of TPS on payments to non-residents
>
> ***Google and Apple***
>
> 4.1. Google and Apple, both act as online marketplaces (through Android and iOS platforms) where the mobile application of the Appellant is list for download by the users.
>
> 4.2. The users pay for certain value-added services used through the

mobile application of the Appellant, the revenue for which is first collected by Google and Apple.

4.3 Both Google and Apple charge a commission/fee, based on the revenue generated from the users of the mobile application.

4.4 There is no technical, consultancy or managerial service being provided by Google or Apple to the Appellant, and as such the payments were not chargeable to tax in India under any provision of the Act.

LinkedIn.com

4.5 The payment made to Linkedin.com were for job postings and finding appropriate candidate for various openings in the company.

4.6 The payment to Linkedin.com was purely advisement income in the hands of nonresident, and as such the same was not chargeable to tax in India.

Conclusion by Ld. AO

4.7 In assessment order, the Ld. AO held the TDS was applicable on such payments. However, the Ld. AO failed to point out any reason whatsoever as to under which provision of the Act, the income of the non-residents was chargeable to tax in India. The Ld. AO alleged that the Appellant has not furnished documentary evidence to clarify the nature of the transactions, despite the fact that the detailed business model of the Appellant and the nature of the transactions were duly explained during the course of assessment proceedings, *(refer page 5 of the assessment order)*

Conclusion by Ld. CIT(A)

4.8 During the first appellate proceedings, the Appellant furnished the copies of the terms of and conditions of the Google, Apple and Linkedln, whereby the nature of the transactions has been clearly provided for.

4.9 However, the Ld. CIT(A) conveniently ignored the documentary evidence. The Ld. CIT(A) also did not provide any opinion/decision on the nature of transactions and the allegation of the Ld. AO that such payments were subject to TDS in India.

4.10 The Ld. CIT(A) rejected the appeal merely stating that that onus is on the Appellant to prove the genuineness of the claim. The Ld. CIT(A) failed to provide any reason whatsoever as to how the genuineness of the claim was not proved.

4.11 The Ld. CIT(A) also failed to give any reason as to why TDS should have been deducted on the impugned payments made to Google, Apple and Linkedln.com, and under which provisions of the Act such payments could be said to chargeable to tax in India.

Prayer

4.12 The Appellant has clearly explained the nature of the transactions with supporting evidence in the form of terms and conditions with the said parties.

4.13 The onus to prove that the TDS was liable to be deducted on such payments lies with the department, which onus the department has failed to discharge.

4.14 The payments are in the nature of commission and advertisement fee which can neither be classified as fee for technical services nor as royalty. Thus, the payments are not chargeable to tax in India and thus, there arose no liability on the Appellant to deduct TDS thereon.

4.15 It is humbly prayed before the Hon'ble Bench to delete the addition in its entirety.

5. Learned Sr. DR opposed the submissions and supported the orders of the authorities below. He submitted that the assessee has made payment, therefore, as

per Section 195 of the Act, the assessee was required to deduct tax, which he failed to deduct. Therefore, the Assessing Officer has rightly disallowed the expenditure.

6. I have heard the rival submissions and perused the material available on record. The short question that needs to be determined is whether the payment made by the assessee to different service providers would attract deduction of tax u/s 195 of the Act. The contention of the assessee is that it was not liable to deduct tax as the payments were in the case of Apple iOS, the App was used by customers through Apple iOS interface and the fee was first collected by Apple Ireland Ltd. and paid to the appellant after deduction of commission/fee by Apple Ireland ltd. Similarly, in the case of Google also, the mobile app of the appellant was also available to Android users through Google. In this case also Google collected the payments from the Android users. It also charged collection charges/ fee for collection of payment and remitting the same to the appellant. However, in the case of LinkedIn, the payment was made to LinkedIn for job posting only, which is in the nature of advertisement. It is further contended that there was no technical consultancy or managerial service being provided by Google or Apple to the appellant, and such payments were not chargeable to tax in India under any provision of the Act. And in the case of LinkedIn the payment was purely advertisement income in the hands of non-resident. The issue whether any tax would be deductible u/s 195 of the Act, depends upon the nature of payment a

person makes. In the case in hand it is the case of the assessee that in respect of the transactions in question, provisions of Section 195 of the Act do not apply. I find that the authorities below have not adverted to this core objection of the assessee. Therefore, the impugned order is set aside on the issue of deductibility of tax qua the payments made to non-residents in relation to the aforementioned transactions in question. This issue is hereby restored to the file of the Assessing Officer for determination with following directions:

(i) The Assessing officer would verify the facts and determine whether provisions of Section 195 are applicable;

(ii) The Assessing Officer would dispose of all objections, pleas and submissions of the assessee by way of speaking order;

(iii) Needless to say the Assessing officer would afford adequate opportunity to the assessee.

This ground of assessee's appeal is allowed for statistical purpose only.

7. Ground no. 2 and 2.1 is against the addition of Rs. 3,42,631/- made on account of disallowance of PF & ESI contribution, deposited by the assessee late as stipulated under the respective Acts.

8. Learned counsel for the assessee reiterated the submissions as made in the Brief Synopsis. For the sake of clarity the relevant portion of Brief Synopsis is reproduced hereunder:

"GROUND NO. 2 and 2.1

5. Disallowance on alleged delayed payment of PF and ESI amounting to INR 3,42,631 where the payment has been made before the filing of tax return

5.1 The Appellant had paid/deposited provident fund and ESI amounting to INR 3,42,631 after due date in the relevant Acts but before the due date of filing of the income tax return.

5.2 The issue is squarely covered by the judgement of the Hon'ble SMC Bench of Delhi Trib. in the cases of Yogi Ji Technoequip v DCIT, CPC [2021] 129 taxmann.com 313, order dated 30 July 2021 and in Azamgarh Steel & Power [ITA No. 1626 of 2020], order dated 31 May 2021.

5.3 The Hon'ble SMC Bench of Delhi Tribunal, in the case of Azamgarh Steel & Power *(supra),* while deciding the issue in favor of the assessee relied on the judgments of Hon'ble Delhi High Court in the cases of CIT v. AIMIL Ltd. [2010] 321 ITR 508 (Del.), and Pr. CIT v. Pro Interactive Service (India) (P.) Ltd. ITA No. 983/2018.

5.4 The SMC Bench of Delhi Tribunal also held that it is settled law that when two judgments are available giving different views then the judgment which is in favour of the assessee shall apply as held in case of Vegetable Products Ltd. 82 ITR 192 by the Hon'ble Supreme Court.

5.5 The issue at hand is squarely covered in the favor of the Appellant and it is humbly prayed to kindly delete the addition in its entirety.

9. Learned Sr. DR opposed the submissions and supported the orders of the authorities below.

10. I have heard rival submissions, perused the material on record and gone through the orders of authorities below. The issue is regarding disallowance of Rs.

3,42,661/- on account of delay in depositing of employees' contribution to Provident Fund/ ESI. In my considered view, this issue is covered in favour of the assessee by the judgment of the Hon'ble Jurisdictional Delhi High Court in the case of CIT Vs. AIMIL Ltd. (2010) 321 ITR 508 as also the judgment in the case M/s Pro Interactive Services (India) Pvt. Ltd. in ITA no. 983/2018.

11. The Hon'ble Jurisdictional Delhi High Court in case of CIT vs. AIMIL Ltd. (2010) 321 ITR 508 (Delhi), has held as under:

> *"If the employees' contribution is not deposited by the due date prescribed under the relevant Acts and is deposited late, the employer not only pays interest on delayed payment but can incur penalties also, for which specific provisions are made in the Provident Fund Act as well as the ESI Act. Therefore, the Act permits the employer to make the deposit with some delays, subject to the aforesaid consequences. In so far as the Income-tax Act is concerned, the assessee can get the benefit if the actual payment is made before the return is filed, as per the principle laid down by the Supreme Court in Vinay Cement [2009] 313 ITR (St.) 1."*

12. The Hon'ble Jurisdictional Delhi High Court in the case of Pr.CIT Vs. M/s Pro Interactive Services (India) Pvt. Ltd. in ITA no. 983/2018 vide order dated 10.09.2018 in ITA no. 983/2018 has held as under:

> *"In view of the judgment of the Division Bench of Delhi High Court in Commissioner of Income Tax Vs. Aimil Limited (2010) 321 ITR 508 (Del.), the issue is covered against the Revenue and, therefore, no substantial question of law arises for consideration in this appeal.*
>
> *The legislative intent was/is to ensure that the amount paid is allowed as an expenditure only when payment is actually made. We do not think that the legislative intent and objective is to treat belated payment of employee's provident fund (EPD) and employee's State Insurance Scheme (ESI) as deemed income of employer under section 2(24)(x) of the Act."*

13. Therefore, respectfully following the binding precedent, I hereby delete the addition. Ground no. 2 & 2.1 stand allowed.

14. Ground no. 3 is against addition of Rs. 37,868/- on account of prior period expenses.

15. At the time of hearing learned counsel for the assessee submitted that he does not wish to press the ground. Therefore, ground no. 3 of the assessee's appeal is dismissed as not pressed.

16. Ground no. 4 of assessee's appeal is general in nature and requires no adjudication.

17. In the result appeal of the assessee is partly allowed for statistical purposes.

Sd/-
(KUL BHARAT)
JUDICIAL MEMBER

Dated: 31.03.2022.
MP
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI