IN THE INCOME TAX APPELLATE TRIBUNAL DELHI

(DELHI BENCH 'D' : NEW DELHI)

BEFORE SH. R.K.PANDA, ACCOUNTANT MEMBER
AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.1616/Del/2020
(Assessment Year : 2015-16)

M/s. Kema India Private Limited, 2nd Floor, Elegance Tower, Jasola District Centre, Old Mathura Road,, New Delhi PAN – AAECK5438P	Vs.	ITO Ward-14(3), New Delhi
(APPELLANT)		**(RESPONDENT)**

Assessee by	Shri Jeetan Nagpal, Pallavi, CA
Revenue by	Shri Sanjay Kr., Sr. DR

Date of hearing:	21.03.2022
Date of Pronouncement:	31.03.2022

ORDER

PER ANUBHAV SHARMA, JM:

The appeal is preferred by the assessee against the order dated 31.07.2019 in appeal no. Del/CIT(A)-5/0286/17-18 for the assessment year 2015-16 passed by the Commissioner of Income Tax (Appeals)-5 (hereinafter referred as the Ld. FAA in appeal against order dated 30.12.2017 passed by ITO, Ward no. 14(3) Delhi

(hereinafter referred to as the Ld. AO) u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the "Act").

2. At the outset, arguments were heard in regard to delay of 337 days in filing of present appeal and counsel for appellant submitted that appellant is a subsidiary of foreign company and as Indian subsidiary it did not have any business since 2014. Therefore, the parent company had taken a decision to wind up the appellant company. The order of Ld. CIT(A) was received by the appellant in September, 2019 and thereafter it was taken up at appropriate managerial for possible examination and consequences. However, due to Covid 19 Pandemic the decision got delayed. He relied judgment of Hon'ble Supreme Court of India in Collector Land Acquisition vs. Mst. Katiji 1997 taxman.com 1072 (SC) to contend that for substantial justice technical considerations cannot be sustained and party should be given all reasonable opportunities to contest on merits.

2.1 On the other hand Ld. Sr. DR submitted that the grounds submitted are not sufficient and merely because of internal delays to take a decision whether to file appeal or not, the delay in filing appeal by huge margin of 337 days cannot be allowed.

2.3 In regard to delay in filing of the appeal the bench is of considered opinion that as a matter of admitted fact the appellant is not showing any revenue from financial year 2014-15 onwards. Certainly when the parent company is considering closer of business and all activities there would not be many resources with the appellant to take a final call in regard to the matters as important as tax litigation. The impugned order of Ld. CIT(A) is dated 31.07.2019 and a judicial notice can be taken of the fact that the Covid 19 pandemic crisis had surfaced by the end of December, 2019. Thus, it is an appropriate case where not only there is sufficient

cause shown but otherwise for the ends of done appeal be heard on merits. **Therefore, delay condonation application of the assessee is allowed.**

3. Coming to the merits, the brief facts are that the appellant is a Private Limited Company engaged in the business of energy supply, environment and quality assurance wherein it acts as consultants and technical advisors. The return for the assessment year 2015-16 was taken up for scrutiny through CASS and statutory notice u/s 143(2) and subsequent notice u/s 142(1) were issued to the assessee and the ld. AO had made various additions including the disputed addition of Rs. 1,80,69,098/- on the basis that it was observed that in Form no. 26AS of the assessee that there is a credit of Rs. 1,80,69,098/- from M/s. Coastal Gujarat Power Limited and on same amount TDS @ 10% has been deducted u/s 194J of the Act by M/s. Coastal Gujarat Power Limited and assessee has claimed the refund of Rs. 18,06,970/- on this deducted amount but on perusal of P & L Account of the assessee it was observed that the assessee had not taken this amount as revenue receipt or revenue from operations. The Ld. AO observed that the assessee has been maintaining the books of accounts on mercantile basis. When the assessee received the payment, the amount received was the income of the year during which such amount was received. Under these circumstances the whole amount of Rs. 1,80,69,098/-was added in the total income of the assessee.

4. In appeal the Ld. F.A.A. had considered the challenge of the addition and held in para no. 7.2 and para no. 7.3 of the its order as under :

> *"7.2 On going through the above details, it is clear that the appellant has shown this amount as revenue in the earlier years. However, AO is directed to verify the same from the profit & loss account of earlier years and after being satisfied with the veracity that this has been duly disclosed as revenue, the same is to be allowed.*

Further, it is observed that as per revenue shown in the profit & loss account, Rs. 4,47,11,666/- has been mentioned for the total cumulative receipts, however, as per Form 26AS, Rs. 4,47,45,696/- has been shown as total receipts. Therefore, there is a difference of Rs. 34,030/-, which is not shown as income/revenue in any of the years and hence the same is sustained as addition.

7.3 Further, the appellant has claimed credit of TDS forthe year under consideration, though no corresponding income has been disclosed. Therefore, in view of the provisions of section 199 of the Act and looking to the fact that no income has been offered for tax during the year under consideration, the appellant is not entitled for the credits of TDS amounting to Rs. 18,06,910/-. Therefore, the credit for the said TDS is not allowed to the appellant. With these remarks, the appeal is partly allowed on this ground."

5. Now before the tribunal the assessee has filed appeal on the following grounds :-

"1. That on the facts and circumstances of the case and in law, the impugned order is based upon conjectures and incorrect application of law, and therefore, is bad in law.

2. That on the facts and circumstances of the case and in law, the Hon'ble CIT(A)/ the Ld. AO have grossly erred in not allowing the credit of TDS amounting to Rs. 18,06,910/- inter alia because-

2.1 The documentary evidence in support TDS claim is as per Form 26AS, which were produced by the Appellant, but not appreciated either by the Hon'ble CIT(A) or the Ld. AO.

2.2 It is not disputed that income corresponding to such TDS has already been offered to tax in the preceding years.

2.3 Rejection of TDS claim is against the legislative intent of section 199 of the Act.

3. That the Hon'ble CIT(A) has erred in upholding the levy of interest u/s 234D of the Act."

6. Heard the counsel for appellant/ assessee and the ld. Sr. DR. On behalf of the assessee, Ld. Counsel submitted that it is a settled proposition of law that the credit of TDS can be claimed only on receipt of TDS certificate in the light of provisions of Section 199 of the Act read with Rule 37 BA of the Income Tax Rules. In this context, he relied the judgment Hon'ble Punjab & Haryana High Court in the case of **Commissioner of Income Tax vs. Abbott Agency Ludhiana (2014) 224 taxmann 350.** He relied judgment of ITAT Delhi Bench in case of Escorts Limited vs. DCIT Circle 11(1) reported in 15 SOT 368 to contend that the revenue cannot refuse to give credit merely by contending that the income had not been disclosed in return filed by assessee. Ld. Counsel relied judgment of Delhi ITAT in case of DCIT, Circle 4 (1) vs. M/s. Lloyd Insulation India Ltd. ITA no. 2400/Del/2011 to contend that the nexus between TDS and the corresponding income element is only notional / conceptual. Ld. Counsel submitted that income corresponding to the TDS claim made by the appellant has already been offered to tax in earlier years. So, the appellant cannot be denied the credit of TDS made on such income.

6.1 On the other hand, ld. Sr. DR relied upon the order of ld. FAA.

7. Giving thoughtful consideration to the arguments and the matter on record it will be appropriate to reproduce the provisions of Section 199 of the Act and Rule 37 BA of the IT Rules, 1962 as below :-

*"**199**. (1) Any deduction made in accordance with the foregoing provisions of this Chapter and paid to the Central Government shall be treated as a payment of tax on behalf of the person from whose income the deduction was made, or of the owner of the security, or of the depositor or of the owner of property or of the unit-holder, or of the shareholder, as the case may be.*

(2) Any sum referred to in sub-section (1A) of section 192 and paid to the Central Government shall be treated as the tax paid on behalf of the person in respect of whose income such payment of tax has been made.

(3) The Board may, for the purposes of giving credit in respect of tax deducted or tax paid in terms of the provisions of this Chapter, make such rules as may be necessary, including the rules for the purposes of giving credit to a person other than those referred to in sub-section (1) and sub-section (2) and also the assessment year for which such credit may be given.

***"Rule 37BA.** (1) Credit for tax deducted at source and paid to the Central Government in accordance with the provisions of Chapter XVII, shall be given to the person to whom payment has been made or credit has been given (hereinafter referred to as deductee) on the basis of information relating to deduction of tax furnished by the deductor to the income-tax authority or the person authorised by such authority.*

(2) [(i) Where under any provisions of the Act, the whole or any part of the income on which tax has been deducted at source is assessable in the hands of a person other than the deductee, credit for the whole or any part of the tax deducted at source, as the case may be, shall be given to the other person and not to the deductee :

***Provided** that the deductee files a declaration with the deductor and the deductor reports the tax deduction in the name of the other person in the information relating to deduction of tax referred to in sub-rule (1).]*

(ii) The declaration filed by the deductee under clause (i) shall contain the name, address, permanent account number of the person to whom credit is to be given, payment or credit in relation to which credit is to be given and reasons for giving credit to such person.

(iii) The deductor shall issue the certificate for deduction of tax at source in the name of the person in whose name credit is shown in the information relating to deduction of tax referred to in sub-rule (1) and shall keep the declaration in his safe custody.

(3) (i) Credit for tax deducted at source and paid to the Central Government, shall be given for the assessment year for which such income is assessable.

(ii) Where tax has been deducted at source and paid to the Central Government and the income is assessable over a number of years, credit for tax deducted at source shall be allowed across those years in the same proportion in which the income is assessable to tax.

[1][(3A) Notwithstanding anything contained in sub-rule (1), sub-rule (2) or sub-rule (3), for the purposes of section 194N, credit for tax deducted at source shall be given to the person from whose account tax is deducted and paid to the Central Government account for the assessment year relevant to the previous year in which such tax deduction is made.]

(4) Credit for tax deducted at source and paid to the account of the Central Government shall be granted on the basis of—

(i) the information relating to deduction of tax furnished by the deductor to the income-tax authority or the person authorised by such authority; and

(ii) the information in the return of income in respect of the claim for the credit,

subject to verification in accordance with the risk management strategy formulated by the Board from time to time."

8. These provisions establish that the amount of tax deducted at source by the payer is treated as payment of tax on behalf of the payee and the credit for such tax deducted and paid is allowed for the assessment year for which such sum is assessable. The ld. F.A.A. has allowed ground no. 3 of the appellant while directing Ld. AO to verify the fact if appellant had offered revenue to tax in the earlier years and based upon same consider the deletion but at the same time disallowed the credit for the TDS for the reason that no income has been offered for tax during the year under consideration.

8.1 The Bench is of considered view that the provisions of Section 199 of the Act and Rule 37 BA of the IT Rules do not in any way require that it is only on offering income assessable to tax in that year, the credit for TDS can be allowed. Meaning thereby that, even if the income offered is NIL, then also credit of TDS can be given as the claim of credit is not in the form of an adjustment or a deduction from taxable income but TDS being one of the modes of payment of tax, give rise to a claim of refund which can very well be raised in a case where there is no assessable income in the corresponding year.

8.2 It is coming up from record that appellant offered a total revenue of Rs 4,47,11,66 in AY 2012-13 and 2013-14, which stand accepted by the revenue. In these two FYs Rs 2,66,76,599 were reflected in the Form 26AS and in present FY no income was reflected as per P&L Account but Rs 1,80,69,097 was mentioned in the form 26AS. Thus, there was discrepancy of Rs 34,030/- in total revenue offered to tax by the appellant and that reflected in Form 26AS. This difference has been sustained by the Ld. FAA while being justified in directing the Ld. AO to verify the Revenue offered to Tax in earlier years and on satisfaction, the same is to be allowed. Ld. AR has submitted before this Bench, that findings of Ld. FAA in regard to this difference of Rs 34,030/-, is not disputed.

8.3 Thus, in the present case where the assessee has claimed to have offered the revenues for tax in previous years and the Ld. F.A.A. has directed Ld. AO to verify the same and Revenue does not dispute the fact that in present assessment year, in the form no. 26AS of the appellant, Rs. 18,06,910/- TDS was made by M/s. Coastal Gujarat Power Ltd., the assessee is entitled to its credit by way of refund, in spite of not offering any income for tax, arising from P & L Account, in present assessment year. Ld. FAA erred in making the credit dependent on offering of taxable income only. Thus, the ground no. 1 and 2 arising out of disallowing the credit of TDS amounting to Rs. 18,06,910/- deserve merit.

9. In regard to ground no. 3, the Bench is of considered opinion that as the ground no. 1 and 2 are decided in favour of the assessee, no case of any levy of interest is made out accordingly this ground no. 3 is decided in favour of the assessee for statistical purposes.

10. As a consequence of above discussion, **the appeal of the assessee is allowed** with direction to the Ld. AO to allow the credit of TDS amounting to Rs.

18,06,910/- to the assessee for the assessment year 2015-16 when the revenue offered to tax in earlier years stands verified as per directions of Ld. FAA.

Order pronounced in open court on this 31st day of March, 2022.

Sd/-	Sd/-
(R.K.PANDA)	**(ANUBHAV SHARMA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Date:- 31 .03.2022
Binita, SR.P.S

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI