

आयकर अपीलिय अधिकरण, 'बी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH: CHENNAI

श्री वी. दुर्गा राव, माननीय न्यायिक सदस्य एवं
श्री जी. मंजूनाथा, माननीय लेखा सदस्य के समक्ष
BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER AND
SHRI G. MANJUNATHA, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.1812/Chny/2019 &
ITA No.3142/Chny/2019 &
ITA No.185/Chny/2020
निर्धारण वर्ष /Assessment Years: 2009-10 & 2010-11 & 2012-13

The DCIT / JCIT (OSD),
Corporate Circle-1(1),
Chennai

(अपीलार्थी/Appellant)

v. M/s.Aban Offshore Ltd.,
113, Janpriya Crest,
Pantheon Road,
Egmore, Chennai-600 008.
[PAN: AAACA 3012 H]
(प्रत्यर्थी/Respondent)

आयकर अपील सं./ITA No.3063/Chny/2019
निर्धारण वर्ष /Assessment Year: 2010-11

M/s.Aban Offshore Ltd.,
113, Janpriya Crest, Pantheon Road,
Egmore, Chennai-600 008.

[PAN: AAACA 3012 H]
(अपीलार्थी/Appellant)

v. The Dy. Commissioner-
of Income Tax,
Corporate Circle-1(1),
Chennai.

(प्रत्यर्थी/Respondent)

Department by : Mr.M.Rajan, CIT
Assessee by : Mr.P.Murali Mohan, CA
सुनवाई की तारीख/Date of Hearing : 12.01.2022
घोषणा की तारीख /Date of Pronouncement : 06.04.2022

आदेश / ORDER

PER G. MANJUNATHA, ACCOUNTANT MEMBER:

These three appeals filed by the Revenue for the AYs 2009-10, 2010-11 & 2012-13 and one appeal filed by the assessee for the AY 2010-11 are directed against separate, but identical orders of the Commissioner of

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2.1. The brief facts of the case are that the assessee is a Public Ltd. Co. engaged in the business of providing offshore drilling and production services to companies engaged in exploration, development and production of oil and gas, both in domestic and international markets. The company is also engaged in the ownership and operation of wind turbines for generation of wind power in India. The assessee had filed the return of income for the AY 2009-10 on 25.09.2009 admitting a total income of Rs.460,05,54,964/-. The assessment has been completed u/s.143(3) of the Act, on 07.05.2013 determining a total income of Rs.544,15,89,339/-. The case has been, subsequently, re-opened u/s.147 of the Act, on the basis of reasons recorded. As per which, income chargeable to tax has been escaped assessment on account of payment made to M/s.India Offshore Inc. amounting to Rs.22,48,29,847/-. In response to the notice u/s.148 of the Act, the assessee company vide letter dated 25.04.2016, has requested to treat the original return of income filed on 25.09.2009, as returned filed in response to the notice u/s.148 of the Act.

2.2. The case has been taken up for scrutiny and during the course of assessment proceedings, the AO called upon the assessee to justify the genuineness of payment made to M/s.India Offshore Inc. towards management fees, with necessary evidences. The AO after considering necessary submissions and also taken note of various facts, opined that payment made by the assessee to M/s.India Offshore Inc. is not genuine

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17. As a result of the above discussions, the genuineness and commercial expediency of the payment made to India Offshore Inc. is not proved by the assessee. Hence, the entire expenses of Rs.22,48,29,847/- has to be disallowed u/s.37 of the Income-tax Act and added back to the total income of the assessee.

2.3 Being aggrieved by the assessment order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee has challenged the re-opening of assessment on the ground of change of opinion. The assessee had also challenged the disallowance of management fees paid to M/s.India Offshore Inc. in light of various evidences and also in light of the decision of the ITAT in the assessee's own case for the AYS 2010-11 & 2011-12. The Ld.CIT(A) after considering the relevant submissions of the assessee, rejected the legal ground taken by the assessee challenging re-opening of assessment. However, deleted the additions made by the AO towards disallowance of management fees and directed the AO to verify the evidences filed by the assessee, including the agreement filed by the assessee for payment of management fees. Aggrieved by the order of the Ld.CIT(A), the Revenue is in appeal before us.

2.4 The Ld.DR, submitted that the Ld.CIT(A) failed to appreciate the fact that the disallowance of management fees was not made by following TDS provisions, but for lack of genuineness and commercial expediency, as detailed by the AO in the assessment order. The Ld.DR further submitted that the Ld.CIT(A) failed to appreciate the fact that the assessee had failed to provide any proof related to services rendered as per the agreement and

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The payment made to M/s.India Offshore Inc. was approved by the Ministry of Commerce & Industry, Department of Industrial Policy & Promotion. The assessee has paid the amount after deducting applicable TDS as per the provisions of Sec.195 of the Act. The assessee had also filed necessary evidences including agreement between the parties for rendering services. Further, the ITAT had considered the very same issue for the earlier assessment years and after considering the necessary evidences filed by the assessee, held that expenditure was incurred in terms of agreement entered into by the assessee and M/s.India Offshore Inc. vide agreement dated 15.12.1986 and further, the said agreement was renewed from time to time. The relevant findings of the Tribunal are as under:

Admittedly, this expenditure was incurred in terms of agreement entered into by the assessee and India Offshore Inc. vide agreement dated 15.12.1986, which was extended up to before the authorities and the Tribunal in earlier years and there was no addition on this count. The payment has been made originally, vide agreement dated 15.12.1986 and it was further extended up to 15.12.2014. Therefore, there is no question of raising invoices for each assessment year and the payment is made in terms of approved agreement. Further. In our opinion, the genuineness agreement cannot be questioned by the assessing authorities when it is duly approved by the Central Govt, Ministry of Commerce and Industry, Department of Industrial Policy and Promotion and by the Reserve Bank of India as well. It is brought on record that Ministry of Commerce and Industry, Department of Industrial Policy and Promotion approved this payment vide their letter dated 25.4.2005. It is also brought on record that the payment made Indian Offshore Inc., was subjected to withholding taxes u/s 195 of the Act and TDS was duly deducted and deposited in the Govt. Bank as seen from Form 16A place on paper book at page 204. When the department has given "No Objection Certificate" for remittance made to Indian Offshore Inc., for earlier years which is placed on record at page Nos.211-212 of the paper book. Further, it is brought on record that there was no addition in earlier assessment years as evident from the copies filed before us for the! assessment years 2005-06 to 2008-09 which is kept on record at pages 1 to 146 of the paper book. Therefore, it is not possible to hold that the payment is not genuine"

2.7 In this view of the matter and consistent with view taken by the co-ordinate Bench in the assessee's own case for the AYs 2010-11 & 2011-12, we are of the considered view that there is no error in the reasons given by the Ld.CIT(A) to delete the additions made towards disallowance of

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9. *The Ld. CIT (A) ought to have appreciated the fact that the appellant had already submitted the entire evidences to the AO during the scrutiny proceedings and a copy of break-up of the dry docking expenses on 26.02.2014.*

10. *The AO ought to have appreciated the fact that the information provided in notes to accounts is only limited to value of imports calculated on GIF for raw materials, components and spares and capital goods whereas while making additions to Drill Ship, assessee has incurred various other expenditure towards services charges and others which are not reportable under notes to accounts.*

11. *The Ld. CIT (A) erred in not deleting the addition made by the AO u/s 37(1) of the Act claimed towards Fluctuation in Foreign Currency Exchange Rate of Rs.74,36,07,565/-.*

12. *The Ld. CIT (A) ought to have appreciated the fact that the appellant had already submitted the entire evidences to the AO during the scrutiny proceedings and a copy of break-up of the dry docking expenses on 24.01.2014.*

13. *The Ld. CIT (A) erred in invoking the provisions of section 43A of the Income Tax act without the transaction being satisfying the provisions laid down in the section.*

14. *The Ld CIT (A) ought to have appreciated the fact that the asset must be acquired from outside India and the asset must be acquired for the purpose of business and profession for Section 43A to be applicable.*

15. *The Ld CIT (A) ought to have appreciated the fact that in case of Capital account transactions not covered under the provisions of Section 43A of the Act and of monetary items, the exchange loss and gains due to fluctuation in exchange rates are to be treated as per the applicable GAAP principles.*

16. *The Ld. CIT (A) ought to have appreciated the fact that as per the GAAP principles read along with Revised AS-11 the transactions in the nature of monetary items and are of capita] nature not covered under the provisions of sections 43A are of revenue in nature and corresponding effect of exchange differences are to be accorded in the Profit and Loss Account.*

17. *The Ld. CIT (A) failed to appreciate that the method followed by the assessee being based on the guidance of the Institute of Chartered Accountants of India, is very scientific and considered every aspect of the transaction and is being followed on consistent basis.*

18. *The appellant may add, alter or modify any other points to the grounds of appeal at any time before or at the time of hearing of the appeal.*

3.1 The Revenue has raised the following grounds of appeal in ITA

No.3142/Chny/2019:

1. *The order of the learned CIT(A) is contrary to law, facts and circumstances of the case.*

2. *The learned CIT(A) erred in giving relief on the issue of disallowance made u/s 40(a)(i) in connection with the amount paid to M/s. Haledon International Corporation by placing reliance on order of Hon'ble ITAT in assessee's own case for A Y 2012-13 without appreciating the fact that in AY 2012-13 Hon'ble ITAT only remitted the issue to AO to verify afresh and after due verification by AO the addition on similar issue was sustained?*

3. *The Ld. CIT(A), has erred in not calling for a remand report on the issue of disallowance u/s 32?*

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04.01.2018 giving effect to the order of the Tribunal in Miscellaneous Petition Nos.67 & 68/Chny/2017 dated 27.11.2017 and determined total income at Rs.473,20,55,367/-. The assessee carried the matter in appeal before the Ld.CIT(A) and the Ld.CIT(A) vide its order dated 31.12.2018 ruled out the order favored the issue in favour of the assessee.

3.3 The case has been, subsequently, re-opened u/s.147 of the Act, for the reasons recorded, as per which, income chargeable to tax had been escaped assessment on account of payments made by the assessee to certain non-residents without deduction of Tax at source, difference in foreign exchange currency outflow and consequential depreciation claimed at 20% on the difference amount and further deduction allowed towards foreign exchange fluctuation loss. In response to the notice, the assessee filed return of income and requested the reasons for re-opening of assessment. The assessee had also filed objection for re-opening of assessment and the same has been disposed off vide speaking order dated 17.12.2018. Further, notice u/s.143(2) of the Act, was served on the assessee and calling for objections, if any, for proposed re-opening of assessment on the issue of disallowance of certain payments made to non-residents u/s.40(a)(i) of the Act, for failure to deduct TDS u/s.195 of the Act. The AO had also called upon the assessee to explain its case with reference to disallowance of depreciation on difference in foreign exchange currency outflow and also deduction claimed towards Forex loss and after

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Corporation, does not come under the definition of fees for technical services as defined u/s.9(1)(vii) of the Act and thus, the assessee does not require to deduct TDS and consequently, payments cannot be disallowed u/s.40(a)(i) of the Act. As regards disallowance of depreciation on difference in foreign exchange currency outflow, the Ld.CIT(A) set aside the issue to the file of the AO and direct the AO to re-examine the claim with reference to various documents and bills filed by the assessee. However, sustained additions towards disallowance of Forex loss on the ground that the Forex loss incurred on account of fluctuation in foreign currency loans availed for acquisition of capital assets, should be capitalized as part of cost of assets. Hence, disallowed the loss claimed by the assessee. Aggrieved by the order of the Ld.CIT(A), the assessee as well as the Revenue are in appeal before us.

4. The first issue that came up for our consideration from Ground Nos.1-7 of the assessee's appeal is validity of re-assessment order passed by the AO. The Ld.AR for the assessee submitted that re-assessment order passed by the AO u/s.143(3) r.w.s.147 of the Act is invalid, because, the AO had issued notice u/s.148 of the Act, on the last day of time limit prescribed under the Act. The Ld.AR further submitted that re-opening of assessment beyond the period of four years is not permissible, where there is no failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. In this regard, relied upon certain judicial

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assessment on account of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment and thus, we are of the considered view that there is no merit in the arguments of the assessee that re-opening of assessment after a period of four years is invalid, when there is no failure on the part of the assessee. The case laws relied upon by the assessee in this regard are considered and opined that facts for those cases are different from the facts of the present case and thus, not considered. Hence, ground taken by the assessee challenging validity of re-opening of assessment are rejected.

5. The next issue that came up for our consideration from Ground Nos.11-17 of the assessee's appeal is additions towards disallowance of loss on Foreign Currency Exchange Rate of Rs.74,36,07,565/-. During the year under consideration, the assessee had debited an amount of Rs.74,36,07,565/- towards foreign exchange loss. The AO had disallowed Forex loss on the ground that Forex loss on loans/liabilities relating to fixed assets shall be capitalized and cannot be allowed as Revenue expenditure. The AO further opined that the assessee had also failed to furnish necessary evidences to prove that Forex loss is on account of Revenue expenditure and thus, disallowed total Forex loss debited into the P & L A/c u/s.37(1) of the Act.

5.1 The Ld.AR for the assessee submitted that the Ld.CIT(A) erred in not deleting the additions made by the AO u/s.37(1) of the Act, towards Forex

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after considering the relevant facts has rightly disallowed the loss on account of foreign exchange and thus, the order of the Ld.CIT(A), should be upheld.

5.3 We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The AO has made disallowance towards Forex loss on the basis of notes on accounts for the relevant Financial Year. As per which, the assessee stated in the notes to accounts that foreign currency transactions and derivatives on account of difference in foreign currency loans/liabilities relating to fixed assets are accounting in the P & L A/c. According to the AO, the assessee could not file any evidences to justify its arguments that Forex loss does not come under provisions of Sec.43A of the Act and further, the loans/liabilities relating to fixed assets are acquired within India. It was the explanation of the assessee before the AO & the Ld.CIT(A) that Forex loss incurred on account of fluctuation in foreign currency loans/liabilities is not for acquiring any asset from a country outside India. Further, the assessee claims that provisions of Sec.43A of the Act, can be invoked only when the loss incurred on loans/liabilities towards acquisition of asset from a country outside India.

5.4 We have given our thoughtful consideration to the reasons given by the AO in light of various arguments advanced by the assessee and we find that the AO disallowed Forex loss on the ground that the assessee could

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Accounting loss arising on foreign exchange fluctuation and as per which, changes in exchange rates vis-à-vis mandatory items in foreign exchange to be taken into account for computing profit/loss on the balance sheet date. Therefore, an enterprise has to report the outstanding liability relating to import of raw materials using closing rate of exchange and any difference / loss or gain arising on conversion of the said liability at the closing rate should be recognized in the P&L A/c for the reporting period. Further, exchange gain or loss would be capital in nature if the foreign currency was held as an asset. We further noted that in the present case, foreign fluctuation loss incurred by the tax payers, has no nexus or relation with the asset purchased. Once a particular expenditure has been wholly and exclusively incurred for the purpose of business, the same needs to be allowed as deduction. In the present case, although assessee claims to have furnished various evidences to prove Forex loss incurred on account of fluctuation in foreign exchange, is not related to acquisition of any asset from a country outside India and hence, it cannot be added to cost of asset in terms of Sec.43A of the Act, but the fact brought on record by the AO shows that the assessee has not filed any evidences. Therefore, we are of the considered view that although in principle we agree with the stand taken by the assessee to treat Forex loss on loans/liabilities is a Revenue in nature, but whether the facts with regard to the nature of loans/liabilities and the purpose of such loan whether the loans have been taken for acquisition of an asset from a country outside India or for regular business

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u/s.195 of the Act and consequently, impugned payment cannot be disallowed u/s.40(a)(i) of the Act.

6.1 We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. An identical issue has been considered by the Tribunal, in the assessee's own case for the AY 2015-16 in IT (TP) A No.86/Chny/2019 for the AY 2015-16, wherein, by following its earlier decision for the AY 2012-13, held that twin conditions of rendering services in India and utilization of such services in India are not satisfied to bring the impugned payment within the definition of fee for technical services as per Sec.9(1)(vii) of the Act read with explanation and thus, the question of deduction of TDS on said payments does not arise. The relevant findings of the Tribunal are as under:

31. The similar issue has been considered by the Co-ordinate Bench of the Tribunal in assessee's own case for AY 2012-13 in ITA No.450/Mds/2017 dated 19.06.2017, wherein the Hon'ble Tribunal has remitted the matter back to the file of AO by observing as under:

"12. We have heard both the parties and perused the material on record. The Explanation incorporated in Section 9 declares that "where the income is deemed to accrue or arise in India under clause (v), (vi) and (vii) and sub-sec.(1), such income shall be included in the total income of the non-resident, whether or not be resident as a residence or place of business or business connection in India". The plain reading of the said provisions suggests that criterion of residence, place of business or business connection of a non-resident in India has been done away with for fastening the tax liability. However, the criteria of rendering service in India and the utilization of the service in India to attract tax liability u/s.9(i)(vii) remained untouched and unaffected by the Explanation to Section 9 of the Act and outside India. Therefore, the twin criterion of rendering of services in India and utilization of services in India become evidently necessary condition to deduct tax. However, in respect of the said payments, the rendering of services being purely off shore and outside India, the whatever paid towards the said services does not attract tax liability.

12.1 In view of the above, we are inclined to remit the issue to the file of the Assessing Officer to examine the issue afresh in the light of the above order along with the concerned DTAA and decide thereupon. The issue is partly allowed for statistical purposes."

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7.1 We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The assessee has made additions to fixed assets amounting to Rs.162,13,60,953/- on which depreciation @20% was claimed. The AO made additions only on the ground that the assessee could not file necessary evidences, including the invoices for purchase or acquisition of fixed assets. According to the AO, although the assessee claims to have acquired assets amounting to Rs.162.13 Crs. but in the notes to accounts, the assessee claims to have incurred expenditure in foreign currency amounting to Rs.99,24,48,470/-. Therefore, the difference between Rs.162.13 Crs. and Rs.99.25 Crs. has been treated as non-genuine and disallowed depreciation claimed by the assessee. The assessee claimed that it has filed all evidences to prove acquisition of asset and further, amount reported in notes to accounts, is only on the basis of actual remittances of foreign currency during the relevant Financial Year which is nothing to do with additions made to fixed assets. The assessee further claims that additions made to fixed assets, is supported by necessary Invoices. The facts are contradictory. The AO records that the assessee did not file any evidences, whereas, the assessee claims that it has filed all evidences. The facts need to be verified. Hence, we set aside the issue to the file of the AO and direct the AO to re-examine the claim of the assessee in light of various evidences filed to prove additions made to fixed assets. In case, the AO finds that the assessee has

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u/s.40(a)(i) of the Act, on the ground that the impugned payment comes under the definition of fee for technical services u/s.9(1)(vii) of the Act. It was the explanation of the assessee before the lower authorities that payment made to M/s.Haledon International Corporation, Dubai, was towards operation expenditure incurred in respect of operation of rigs in Iran and further, the services were rendered outside India and the payments were also made in outside India. Therefore, unless the impugned payment made to non-resident is taxable in India, the assessee does not require to deduct TDS u/s.195 of the Act and consequently, impugned payment cannot be disallowed u/s.40(a)(i) of the Act.

8.2 We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. An identical issue has been considered by the Tribunal, in the assessee's own case for the AY 2015-16 in IT (TP) A No.86/Chny/2019 for the AY 2015-16, wherein, by following its earlier decision for the AY 2012-13, held that twin conditions of rendering services in India and utilization of such services in India are not satisfied to bring the impugned payment within the definition of fee for technical services as per Sec.9(1)(vii) of the Act read with explanation and thus, the question of deduction of TDS on said payments does not arise. The relevant findings of the Tribunal are as under:

31. The similar issue has been considered by the Co-ordinate Bench of the Tribunal in assessee's own case for AY 2012-13 in ITA No.450/Mds/2017 dated 19.06.2017, wherein the Hon'ble Tribunal has remitted the matter back to the file of AO by observing as under:

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view that the question of admission of additional evidences by the Ld.CIT(A) and violation of Rule 46A of Income Tax Rules, 1962, does not arise and hence, we reject the ground taken by the Revenue.

8.4. In this view of the matter and consistent with view taken by the co-ordinate Bench, we set aside the issue to the file of the AO and direct the AO to re-consider the issue in light of the directions given by the Tribunal for the earlier years and decide the issue in accordance with law.

8.5. In the result, appeal filed by the Revenue in ITA No.185/Chny/2020 for the AY 2012-13 is dismissed.

Order pronounced on the 06th day of April, 2022, in Chennai.

Sd/-

(वी. दुर्गा राव)

(V. DURGA RAO)

न्यायिक सदस्य/**JUDICIAL MEMBER**

चेन्नई/Chennai,

दिनांक/Dated: 06th April, 2022.

TLN

Sd/-

(जी. मंजूनाथा)

(G. MANJUNATHA)

लेखा सदस्य/**ACCOUNTANT MEMBER**

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF