

**IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD “D” BENCH, AHMEDABAD**

**BEFORE MS. SUCHITRA KAMBLE, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER**

**ITA No.938/Ahd/2016
Assessment Year: 2012-13**

Jupiter Comtex Private Limited Plot No. 510, Phase IV, GIDC Vatva, Mehmdabad Road, Vatva, Ahmedabad	Vs.	DCIT Circle 2(1)(2), Ahmedabad
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: AABCJ 9321 K		
Assessee by	Shri D.K. Parikh, AR	
Revenue by	Shri Purushottam Kumar, Sr. DR	
Date of Hearing	15.03.2022	
Date of Pronouncement	25.05.2022	

आदेश / O R D E R

Per B.M. Biyani, A.M.:

THIS APPEAL:

1. This appeal filed by the assessee is directed against the order dated 10.03.2016 of learned Commissioner of Income-Tax (Appeals)-2, Ahmedabad [**Ld. CIT(A)**], which in turn arises out of the order of assessment dated 26.12.2014 passed by the learned DCIT, Circle-2(1)(2), Ahmedabad [**Ld. AO**] u/s 143(3) of the Income-tax Act, 1961 [**the Act**] for the Assessment-Year 2012-13.

BACKGROUND:

2. Brief facts are such that the assessee filed return declaring a total income of Rs. 32,05,616/-. The case was selected under scrutiny and statutory notices were issued. Finally the Ld. AO completed assessment u/s 143(3) of the Act and determined total income at Rs. 42,41,067/-, after making disallowances of certain expenses. Being aggrieved by the order of assessment, the assessee filed appeal to Ld. CIT(A). The Ld. CIT(A) allowed part-relief. Still being aggrieved by the order of Ld. CIT(A), the assessee has filed this appeal and now before us.

GROUNDS:

3. The assessee has raised following grounds:

“1) The learned CIT(A) has erred in law and on facts in confirming the action of AO in disallowing the commission expenses amounting to Rs. 9,66,471/- paid to non-resident agents u/s 40(a)(i) of the Act.

2) The learned CIT (A) also erred both in law and on facts in observing that AO had called for details of services rendered by the agent, when the function of such services in the form of procurement of orders outside India was never an issue before AO. The disallowance of commission on altogether new ground without any notice is erroneous and against principle of law.

3) The learned CIT(A) has erred in law and on facts in confirming the action of AO in disallowing employees contributions towards PF and ESIC amounting to Rs. 52,798/- u/s 36(1)(va), considering that the payment is not made within due date.

4) Both the lower authorities have passed the respective orders without properly appreciating the fact and that they further erred in grossly ignoring various submissions, examinations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order.”

ISSUES:

4. Precisely stated, the following issues emanate from the various Grounds raised by the assessee:

- (i) Disallowance of commission payment of Rs. 9,66,471/- made to foreign agents, and
- (ii) Disallowance of employees' contribution to Provident Fund (PF) and Employee State Insurance (ESI) of Rs. 52,798/- u/s 36(1)(va).

ISSUE No. 1 – COMMISSION PAYMENT TO FOREIGN AGENTS:

5. Facts *qua* this issue are such that during assessment-proceeding, the Ld. AO observed that the assessee has paid a total commission of Rs. 54,86,733/- and claimed as business-deduction. The Ld. AO asked the assessee to furnish the details alongwith documentary evidences of this commission payment. In response, the assessee submitted the Ledger A/c of commission expenditure but did not submit any other evidence. On perusal of Ledger A/c, the Ld. AO observed that the assessee has paid a part of the commission aggregating to Rs. 9,66,471/- to foreign agents without deducting tax at source. The Ld. AO asked the assessee to explain the reason of non-deduction of tax at source. The assessee submitted analysis of section 5, 195 and 9(1)(i) to justify that the tax was not required to be deducted out of the commission payment to foreign agents. The Ld. AO, however, made his own analysis of section 5, 195 and 9(1)(i) and also relied upon the CBDT Circular No. 7 / 2009 dated 22.10.2009 and arrived at a conclusion that the assessee has committed an error in not deducting tax at source. The Ld. AO, therefore, invoked section 40(a)(i) and disallowed the commission payment of Rs. 9,66,471/-.

6. During first-appeal, the Ld. CIT(A) agreed with the observations of Ld. AO. Further, the Ld. CIT(A) also observed that the assessee has not supplied, during assessment proceeding or even appellate proceeding before him, any evidence to prove that the foreign agents have rendered services

outside India; that the agents do not have any permanent establishment or business connection in India; and that section 195 is not applicable. In absence of the relevant evidences, the Ld. CIT(A) concluded that the commission payment to foreign agents for services rendered outside India is not verifiable. With these observations, the Ld. CIT(A) confirmed the disallowance made by Ld. AO.

7. Before us, the Ld. AR has submitted a Paper-Book containing Page No. 1 to 82, duly signed and certified by the assessee. On perusal of the same, we observe that Page No. 1 to 66 are certified to be filed or presented before the Ld. AO and CIT(A). However, in relation to Page No. 67 to 82, the assessee has submitted thus:

“Page No. 67 to 82 – Details regarding Foreign Commission payment not submitted to AO since the same was not called for. Now submitted herewith since CIT(A) has enhanced the assessment by applying Sec. 37”.

On further examination, we observe that the assessee has placed (i) details of commission-payment to foreign agents, (ii) copies of the agreements entered into between the assessee and foreign agents, (iii) copies of the Debit Notes raised by foreign agents, and (iv) copies of the Remittance-Advices issued by the banks through which the commission was remitted out of India. These documents are submitted before us for the first time and they were not provided to the lower authorities. The Ld. AR contended that the Ld. AO has made disallowance merely on the basis of his own understanding of section 5, 195 and 9(1)(i) and CBDT Circular and thereby invoking section 40(a)(i). According to Ld. AR, the Ld. AO did not raise any doubt about the service rendered by the foreign agents outside India and therefore the assessee was not persuaded to submit these documentary evidences (which are now filed at Page No. 67 to 82 of the Paper-Book) during assessment-proceeding. The Ld. AR further argued that during the first-appellate proceeding, the Ld. CIT(A) has given much weightage to non-

submission of documentary evidences and thereby concluded against the assessee. According to Ld. AR, the Ld. CIT(A) ought to have confined only to the legal analysis of section 5, 195 and 9(1)(i) which was the premise of disallowance adopted by Ld. AO. The Ld. AR also submitted that there are innumerable decisions where it has been held that the commission paid to foreign agents outside India is not chargeable to tax in India and hence TDS is not required u/s 195. With these submissions, the Ld. AR argued that the Ld. AO has wrongly invoked section 40(a)(i) and made disallowance, which needs to be deleted.

8. Per contra, the Ld. DR supported the orders of lower authorities. The Ld. DR argued that both of the lower authorities have adequately dealt with the facts and material available before them as well as the legal provisions and thereafter made or confirmed the disallowance. Hence no interference is required in the orders of lower authorities. The Ld. DR, accordingly, prayed to uphold the disallowance.

9. We have considered the rival submissions of both sides and also perused the material held on record. At the outset we observe that the papers placed at Page No. 67 to 82 of the Paper-Book filed by the assessee, are the additional evidences filed for the first time before us and never filed before the lower authorities. In this regard, we refer Rule 18(4) of the Appellate Tribunal Rules, 1963 which prescribes thus:

“The additional evidence, if any, shall not form part of the same paper-book. If any party desires to file additional evidence, then the same shall be filed by way of a separate paper-book containing such particulars as are referred to in sub-rule (3) accompanied by an application stating the reasons for filing such additional evidence.”

Thereafter Rule 18(7) prescribes thus:

“Paper/paper books not conforming to the above rules are liable to be ignored”.

We observe that in the present case, the requirements prescribed in Rule 18(4) in so far as the papers placed at Page No. 67 to 82 of the Paper-Book (i.e. additional evidences) are concerned, are not complied with and therefore Rule 18(7) mandates us to ignore these papers. Hence we do not take cognizance of those papers. However, on perusal of the assessment-order passed by Ld. AO, we observe that the Ld. AO has made the impugned disallowance on the basis of section 5, 195 and 9(1)(i) and CBDT Circular and not made a serious attempt to verify the services rendered by foreign agents outside India. Hence the Ld. AR has weightage in contending that the assessee was not persuaded to produce the documentary evidences before Ld. AO. But nevertheless we feel that when the Ld. AO called upon the assessee to submit the details with documentary evidences of commission-payment, the assessee must have submitted all documentary evidences, more so when the Ld. AO re-confronted the assessee vide letter dated 14/12/2014 about the reason of non-deduction of tax at source. We feel that just by submitting an explanation of legal provisions but not supporting his case by the corroborative evidences to prove the factual matrix, the submissions of assessee cannot be said to be adequate. We also find that the Ld. CIT(A) has also noted on more than one occasion in the his order that the assessee has not submitted evidences. As submitted earlier, the assessee has now submitted additional evidences before us but we are constrained to ignore the same in terms of Rule 18(4) read with Rule 18(7) of the Appellate Tribunal Rules, 1963. However, having regard to the fact that the Ld. AO has confined to the legal analysis only and not confronted the assessee to submit documentary evidences which were very much necessary even for legal analysis, we feel that the assessee has not been able to prove his contentions fully before the Ld. AO. Therefore in the interest of justice, we feel it appropriate that the assessee should be given one more opportunity to produce documents before the Ld. AO. This will also help the Ld. AO to examine those documents and come to a correct conclusion. Being so, we think it appropriate to remit this matter back to the file to the Ld. AO. The assessee shall produce those documents before the Ld. AO and the Ld.

AO shall take a view in accordance with the law. Accordingly, this issue is allowed for statistical purpose.

ISSUE No. 2 – EMPLOYEES’ CONTRIBUTION TO PF /ESI:

10. The second issue is the disallowance of Rs. 52,798/- on account of late payment of Employees’ Contribution to PF/ESI after the due dates under the applicable laws.

11. The issue is squarely covered against the assessee by Hon’ble jurisdictional High Court’s judgment in the case of **CIT vs. Gujarat State Road Transport Corporation, 366 ITR 170 (Guj.)**, wherein it is categorically held that in the case of delayed deposit of employees’ contribution to PF, the same will not be deductible in computing taxable income under the head “Income from Business or Profession”. The law declared by this decision of Hon’ble jurisdictional High Court is binding on us. Respectfully following the decision of Hon’ble jurisdictional High Court in the case of **Gujarat State Road Transport Corporation (supra)**, we do not find any merit in the claim of assessee. Therefore, we dismiss the grievance of assessee.

DISPOSITION:

12. In the result, this appeal of Assessee is partly allowed for statistical purpose.

Order pronounced in the open court on 25th May, 2022.

Sd/-

(SUCHITRA KAMBLE)
Judicial Member

Sd/-

(B.M. BIYANI)
Accountant Member

Ahmedabad 25th May, 2022

Patel/Sr. PS

*Copies to: (1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File*

By order

*Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad Benches, Ahmedabad*