IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'G' NEW DELHI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA No.4637/Del/2017
Assessment Year: 2011-12

Addl. CIT, Special Range-9, New Delhi	**Vs.**	M/s. Vserve Business Solution Pvt. Ltd., 605-610, Bestech Business Tower, Sector-48, Gurgaon
		PAN :AADCV2076K
(Appellant)		**(Respondent)**

Appellant by	Sh. Vishal Kalra, Adv.
Respondent by	Sh. Umesh Takyar, Sr. DR

Date of hearing	10.03.2022
Date of pronouncement	31.03.2022

ORDER

PER SAKTIJIT DEY, JM:

This is an appeal by the Revenue against order dated 21.02.2017 of learned Commissioner of Income Tax (Appeals)-13, New Delhi, for the assessment year 2011-12.

2. The grounds raised by the Revenue are as under:

1. *On the facts and circumstances of the case the Ld. CIT(A) has erred in directing the AO to allow relief u/s 90 of the I.T. Act without appreciating the fact that the assessee never claimed such relief in the income filed and never revised the return.*

2. *On the facts and circumstances of the case the Ld. CIT(A) has erred in ignoring the fact that the assessee never furnished any details/evidences required for claiming relief u/s 90 of the I.T. Act before the AO.*
3. *On the facts and circumstances of the case the Ld. CIT(A) has erred in deleting the additions made u/s 2 (22)(e) of the I.T. Act without appreciating the fact that interest free loan was received by the assessee company and all the conditions stipulated in sec. 2 (22)(e) are fulfilled.*

3. The first issue which arises for consideration is, whether the assessee is eligible to claim deduction/set off of income tax paid in Unites States of America (USA) against the tax payable in India.

4. Briefly the facts are, the assessee is a resident company stated to be engaged in the business of development of software. During the year under consideration the assessee had rendered software development services to customers in USA and earned Revenue. Since, a part of such services was rendered by the assessee onsite, corresponding income was offered to tax in USA and tax at the appropriate rate was also paid in USA. In the return of income filed for the impugned assessment year in India, the assessee declared nil income under the normal provisions after claiming deduction under section 10A of the Act. However, assessee declared book profit of Rs.4,94,18,810/- under section 115JB of the Act and paid tax thereon. In course of assessment proceeding, the assessee in written submission filed before the

Assessing Officer claimed relief from double taxation under Article 25 of India – USA Double Taxation Avoidance Agreement (DTAA), insofar as the tax paid in USA. However, the Assessing Officer rejected assessee's claim on the ground that such claim was not made either in the original return of income or by way of filing revised return of income. Further, he observed, the assessee did not furnish any certificate from the foreign tax authorities in terms with section 90 of the Act. Accordingly, he rejected assessee's claim.

5. Learned Commissioner (Appeals) having appreciated assessee's submissions, observed that the assessee could not have claimed the relief in the original return of income as the assessee had filed its return of income in USA and paid tax thereon on 27.08.2013. Whereas, the original return of income was filed in India on 30.11.2011. Further, noticing that the assessee has paid tax on the same income both in USA and in India, learned Commissioner (Appeals) held that assessee is entitled to relief from double taxation under Article 25 of the India – USA DTAA. While coming to such conclusion, he also observed that in assessment year 2012-13, the Assessing Officer has himself allowed relief from double taxation to the extent of taxes

paid in USA while passing the assessment order under section 143(3) of the Act under identical facts and circumstances. Accordingly, he accepted assessee's claim.

6. Before us, learned Departmental Representative submitted, the assessee has to claim credit for double taxation by filing Form No. 67 before the Assessing Officer, which assessee did not file. Further, he submitted, the assessee has not paid any tax on the income which is exempt under section 10A. Therefore, question of allowing relief from double taxation does not arise. Without prejudice, he submitted, in assessee's case there cannot be any double taxation as assessee's tax has been computed under section 115JB and the assessee is eligible to claim credit of such tax in future. Thus, he submitted, assessee's claim cannot be allowed.

7. Learned counsel for the assessee submitted, the assessee did furnish Form No. 67 before the Assessing Officer in course of assessment proceeding. He submitted, the only reason the Assessing Officer did not allow assessee's claim is, it was not claimed in the return of income. As regards the submissions of learned Departmental Representative that the assessee had not paid tax on the income assessed in USA, learned counsel

submitted, assessee has claimed proportionate tax credit in respect of income taxable in India. Finally, he submitted, under identical facts and circumstances, the Assessing Officer himself has allowed foreign tax credit while completing assessment in assessment year 2012-13.

8. We have considered rival submissions and perused materials on record. Undisputedly, in course of assessment proceedings, the assessee did make a claim for availing credit of tax paid in USA under Article 25 of India – USA DTAA. The Assessing Officer has rejected assessee's claim on the following three reasons:

(1) The relief was not claimed either in the original return of income or by filing revised return of income.
(2) No certificate/order from the foreign authorities in terms of section 90 was furnished.
(3) The assessee has paid tax under section 115JB of the Act.

9. In so far as the first reasoning of the Assessing Officer is concerned, now it is fairly sell settled that, though, the Assessing Officer may not entertain any fresh claim of the assessee which is not made either in the return of income or by way of revised return of income, however, the appellate authorities can entertain such claim. Therefore, in our view, learned Commissioner

(Appeals) was justified in entertaining assessee's claim in this regard. So far as the second reasoning is concerned, learned Commissioner (Appeals) has recorded a factual finding that the assessee has paid tax on the same income, both in USA and India. The aforesaid finding of the learned Commissioner (Appeals) remains uncontroverted. As regards the third reasoning of the Assessing Officer, on a reading of Article 25 of India – USA DTAA, we do not find any difference between the tax paid on normal provisions and under section 115JB of the Act. Undisputedly, while completing the assessment, the Assessing Officer has computed tax liability under section 115JB of the Act at 18%. Thus, the assessee has paid tax in India irrespective of the fact, whether in respect of income assessed under normal provisions or under section 115JB. Therefore, going by the letter and spirit of Article 25 of India – USA DTAA, assessee remains entitled to claim benefit on double taxation. In any case of the matter, the second proviso to section 115JAA(2A) of the Act, subsequently introduced in the statute with effect from 01.04.2018 clears the doubt. Viewed from aforesaid perspective, we do not find any infirmity in the decision of learned Commissioner (Appeals).

10. The next issue which arises for consideration is deletion of addition made under section 2(22)(e) of the Act allegedly representing deemed dividend.

11. Briefly the facts are, in course of assessment proceeding, the Assessing Officer noticed that in the year under consideration, the assessee has received interest free unsecured loan from Intersoft Data Labs Pvt. Ltd., wherein a shareholder is common. Thus, invoking the provisions of section 2(22)(e) of the Act, the Assessing Officer treated the interest free loan of Rs.11,05,240/- as the deemed dividend and added back to the income of the assessee.

12. Learned Commissioner (Appeals) being convinced with the fact that the assessee is not a share holder in the company from which the interest free loan was received deleted the addition.

13. Having considered rival submissions and perused the materials on record, we wholly agree with the decisions of learned Commissioner (Appeals) that the interest free loan received by the assessee cannot be treated as deemed dividend under section 2(22)(e) of the Act. Facts on record clearly reveal that the Assessing Officer has not disputed the fact that the assessee is not a share holder in Intersoft Data Labs Labs Pvt. Ltd. which

provided interest free loans to the assessee only because the assessee as well as lender entity are having a common shareholder the Assessing Officer has treated the amount received as deemed dividend. Now, it is fairly well settled that the provisions of section 2(22)(e) of the Act can be invoked in respect of shareholder. In view of the aforesaid, we uphold the decision of learned Commissioner (Appeals).

14. In the result, the appeal is dismissed.

Order pronounced in the open court on 31st May, 2022

Sd/-	***Sd/-***
(DR. B.R.R. KUMAR)	**(SAKTIJIT DEY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 31st May, 2022.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi