IN THE INCOME TAX APPELLATE TRIBUNAL

"J" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no. 3656/Mum./2016
(Assessment Year : 2009–10)

SOTC Travel Services Private Ltd.,
(Now Merged with Travel Corporation
(India) Limited),
8th Floor, Urmi Estate 'A',
95, G.K. Marg, Lower Parel (W),
Mumbai - 400013
PAN – AAACT6856C ……. Applicant

v/s

Dy. Commissioner of Income Tax,
Range 3(3)(1),
(Present in charge-DCIT 3(3)(1),
Aaykar Bhavan, Mumbai - 400020 ……. Respondent

Assessee by : Shri Madhur Agrawal &
Shri Jay Bhansali
Revenue by : Shri Chetan M. Kacha

Date of Hearing – 30.09.2022	Date of Order – 10.10.2022

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned order dated 29.02.2016 passed under section 250 of the Income Tax Act, 1961 ('*the Act*') by learned Commissioner of Income Tax (Appeals) – 56, Mumbai ['*learned CIT(A)*'], for the assessment year 2009 – 10.

2. The present appeal has been listed for hearing before us pursuant to the order dated 05/08/2022, passed by the Co–ordinate Bench of the Tribunal in SOTC Travel Services Private Ltd. v/s DCIT, M.A. no.127/ Mum./2021 (in ITA no.3656/Mum./2016, for the assessment year 2009–10), whereby, the earlier order dated 15.12.2020, passed under section 254(1) of the Act was recalled and appeal was directed to be re–fixed for hearing.

3. In this appeal, the assessee has raised following grounds:–

"1 Addition on account of reimbursement of expenses to AE as per order of TPO

"(i) The Ld. CIT (A) erred in law and facts in upholding order of Transfer Pricing Officer (TPO)/AO making adjustment of Rs. 6,94,24,899/- to income on account of reimbursement of expenses to AE by determining ALP at Rs. Nil. The reasons given by him for doing so are wrong, contrary to the facts of the case and against the provisions of law.

(ii) The CIT (A) erred in law and facts in upholding order of Transfer Pricing Officer (TPOVAO treating reimbursement of expenses as payment for services rendered by AE. The reasons given by him for doing so are wrong, contrary to the facts of the case and against the provisions of law.

(iii) The Ld. CIT (A) ought to have held that there is no need to find ALP of reimbursement of expenses as there is no income content and it has not resulted into any direct or tangible benefit to the assessee.

(iv) The Ld. CIT (A) erred in law and facts in upholding the order of A.O. in alternatively disallowing reimbursement of expenses u/s 40(a)(ia) of the Act for non-deduction of TDS. The reasons given by him for doing so are wrong, contrary to the facts of the case and against provisions of law.

2. Disallowance of MTM Loss

(i) The Ld. CIT (A) erred in law and facts in upholding order of AO treating Mark to Market Loss of Rs. 4,60,56,154/- on year end open forward contracts as speculation loss on the ground that it is not a crystallized loss and notional in nature. The reasons given by him for doing so are wrong, contrary to the facts of the case and against the provisions of law.

(ii) The Ld. CIT (A) ought to have accepted the contention of the assessee that Mark to Market loss in open foreign exchange contract provided as per accounting policies consistently followed and as per prescribed accounting standard is allowable as an expenditure for the year

(iii) The Ld. CIT (A) failed to appreciate that department has not disputed when there was profit in such transactions offered for tax and Mark to Market Profit/Loss is reversed in the accounts at the beginning of the

year and actual profit/loss is accounted on crystallization of contract and hence Mark to Market loss cannot be deemed as speculation loss or notional loss.

3. Disallowance u/s 14 A

(i) The Ld. CIT (A) erred in law and facts in upholding the disallowance of Rs. 11,28,076/-(14,02,557-2,74,481) out of expenses u/s 14A of the Act. The reasons given by him for doing so are wrong, contrary to the facts of the case and against the provisions of law.

(ii) The Ld. CIT (A) erred in law and facts in upholding the disallowance of Rs. 11,28,076/- out of expenses u/s 14A of the Act, with reference to investment made in subsidiary companies in addition to Rs. 2,74,481/- disallowed by the assessee in the return of income. The reasons given by him for doing so are wrong, contrary to the facts of the case and against the provisions of law."

4. The issue arising in ground no. 1, raised in assessee's appeal, is pertaining to transfer pricing adjustment on account of reimbursement of expenses to Associated Enterprise ('*AE*').

5. The brief facts of the case pertaining to this issue are: The assessee is engaged in the business of Tour Operators, Ticketing and other travel related services. For the year under consideration, the assessee filed its original return of income on 30.09.2009 declaring loss of Rs. 13,03,66,534. The return of income was subsequently revised on 31.03.2011 declaring current year loss of Rs. 12,64,10,325. During the course of assessment proceedings, reference was made to the Transfer Pricing Officer ('*TPO*') for determination of arm's length price of international transactions entered into by the assessee. During the course of transfer pricing assessment proceedings, the assessee was asked to provide the details of reimbursement made by the assessee to its AEs. In reply, assessee submitted that the expenses amounting to Rs. 6,94,24,899 were reimbursed to the AE pertaining to the pilot project, wherein the AE was involved in the

process of implementation of FITA (future business and IT architecture), standardisation set across the KUONI Group Worldwide. The TPO vide order dated 30.11.2012 passed under section 92CA(3) of the Act held that the assessee has not proved that the services availed were essential and beneficial for its business. The TPO further held that the assessee has not been able to submit any credible evidence to prove that any services has been rendered by the AE. Accordingly, the TPO determined the arm's length price of the international transaction of reimbursement of expenses to AE as Nil and proposed an adjustment of Rs. 6,94,24,899/- to the international transaction undertaken by the assessee. In conformity, the Assessing Officer (*'AO'*), inter alia, passed the order under section 143(3) read with section 144C(3) of the Act.

6. The learned CIT(A) vide impugned order dated 29.02.2016 dismissed the appeal filed by the assessee on this issue. Being aggrieved, the assessee is in appeal before us.

7. Having considered the submissions of both the sides and perused the material available on record, we find that during the course of assessment proceedings, the assessee was asked to file the details of TDS deducted while making such reimbursement of expenses. The assessee was also asked to show cause as to why disallowance under section 40(a)(ia) of the Act be not made in case no TDS has been deducted by the assessee while making such payments. In response, assessee submitted that out of total payment of Rs. 6,94,24,899/-, the assessee has already suo-moto

disallowed Rs. 5,99,10,554/- in computation of its total income on account of non-deduction of TDS. The assessee further submitted that the balance expenditure of Rs. 95,14,345/- (i.e. Rs. 6,94,24,899 – Rs. 5,99,10,554/-) no TDS was deducted by the assessee. Accordingly, the AO vide order dated 29.05.2014 passed under Section 143(3) read with Section 144C(3) of the Act disallowed the balance amount of Rs. 95,14,345/- under section 40(a)(ia) of the Act, since the assessee has suo-moto disallowed the remaining payment of Rs. 5,99,10,554/-, due to non-deduction of tax at source. The AO observed that since the entire amount of Rs. 6,94,24,899/- has already been disallowed by the TPO and added to the total income of the assessee, separate addition under section 40(a)(ia) of the Act was not made. The AO further held that if the addition proposed by the TPO under section 92CA(3) is deleted in subsequent appellate proceedings, then the entire payment of Rs. 6,94,24,899/- is not allowable under Section 40(a)(ia) of the Act and accordingly added to the total income.

8. During the course of hearing, learned Authorised Representative ('*learned AR*') submitted that in subsequent years assessee has deducted requisite tax at source and therefore, such sum would become allowable in the subsequent year. Accordingly, it was submitted that there is no objection if entire amount of Rs. 6,94,24,899/- is disallowed under section 40(a)(ia) of the Act in the year under consideration. On the other hand, learned Departmental Representative ('*learned DR*') vehemently relied upon the orders passed by the lower authorities.

9. Since, in the present case, it is an accepted fact that no TDS has been deducted in respect of payment of Rs. 5,99,10,554/-, therefore, the same is disallowable under section 40(a)(ia) of the Act. Further, in respect of balance payment of Rs. 95,14,345/- nothing has been brought on record to show that tax was deducted at source. Accordingly, the balance payment is also disallowable under section 40(a)(ia) of the Act. It is plea of the assessee that in subsequent year the requisite tax has been deducted and, therefore, expenditure may be allowed as deduction in the subsequent year. Further, we find that the TPO has also made adjustment of Rs 6,94,24,899/- in absence of proof of rendition and benefit of the services to the assessee. In view of the above submission, we deem it appropriate to direct the AO to disallow the expenditure in this year by invoking the provisions of section 40(a)(ia) of the Act. The AO is further directed to examine the claim of the assessee for deduction in subsequent year as per law. In view of the aforesaid, the adjudication of transfer pricing adjustment on account of reimbursement of expenses to AE becomes academic in nature in the year under consideration, since, the same would make no difference to the assessed income of the assessee, as the said expenditure has already been held to the disallowable under section 40(a)(ia) of the Act, even in view of the submissions of the assessee. The issue of transfer pricing adjustment can be examined in the assessment year in which this expenditure is claimed by the assessee. We order accordingly. As a result, ground no. 1 raised in assessee's appeal is allowed for statistical purpose.

10. The issue arising in ground No. 2, raised in assessee's appeal, is pertaining to disallowance of Mark to Market loss.

11. The brief facts of the case pertaining to this issue are: During the course of assessment proceedings, on perusal of Profit & Loss Accounts and various details filed by the assessee, it was observed that assessee has debited a sum of Rs. 27,61,01,141/- on account of foreign exchange loss. Accordingly, the assessee was asked to submit the details of the same along with amounts claimed by it on account of Mark to Market loss. The AO vide order dated 29.05.2014 disallowed Mark to Market loss of Rs. 4,60,56,154/- by treating the same as notional loss arising from recording the forex transactions on Mark to Market basis. The learned CIT(A) vide impugned order dismissed the appeal filed by the assessee on this issue. Being aggrieved, the assessee is in appeal before us.

12. During the course of hearing, learned AR submitted that loss arising from forex transaction recorded on Mark to Market basis is an allowable expenditure and the same is not speculative in nature. On the other hand, learned DR vehemently relied upon the orders passed by the lower authorities.

13. We have considered the rival submissions and perused the material available on record. As per the assessee, it is travel agent and tour operator having business all over the globe and hence its business is impacted by variations in currency rates. Around 50% of the transactions are in foreign currency and therefore the foreign exchange risks are hedged using forward

contracts on the basis of underlying purchases, sale contracts and there are no speculative contracts.

14. The Revenue has disallowed the loss arising on account of foreign exchange forward contract as a notional loss. We find that in CIT vs. D. Chetan & Company (2017) 390 ITR 36 (Bom.), following question of law came for consideration before the Hon'ble jurisdictional High Court:

> *"Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the addition of 'Mark to Market' Loss of Rs. 78,10,000/- made by the Assessing Officer on account of disallowance of loss on foreign exchange forward contract loss and not appreciating the fact that the said loss was a notional loss and hence cannot be allowed.?"*

15. While deciding the same, the Hon'ble jurisdictional High Court observed as under:

> *"7. The impugned order of the Tribunal has, while upholding the finding of the CIT (Appeals), independently come to the conclusion that the transaction entered into by the Respondent assessee is not in the nature of speculative activities. Further the hedging transactions were entered into so as to cover variation in foreign exchange rate which would impact its business of import and export of diamonds. These concurrent finding of facts are not shown to be perverse in any manner In fact, the Assessing Officer also in the Assessment Order does not find that the transaction entered into by the Respondent assessee was speculative in nature. It further holds that at no point of time did Revenue challenge the assertion of the Respondent assessee that the activity of entering into forward contract was in the regular course of its business only to safeguard against the loss on account of foreign exchange variation. Even before the Tribunal, we find that there was no submission recorded on behalf of the Revenue that the Respondent assessee should be called upon to explain the nature of its transactions. Thus, the submission now being made is without any foundation as the stand of the assessee on facts was never disputed. So far as the reliance on Accounting Standard-11 is concerned, it would not by itself determine whether the activity was a part of the Respondent-assessee's regular business transaction or it was a speculative transaction. On present facts, it was never the Revenue's contention that*

the transaction was speculative but only disallowed on the ground that it was notional. Lastly, the reliance placed on the decision in S Vinodkumar Diamonds (P) Ltd. (supra) in the Revenue's favour would not by itself govern the issues arising herein. This is so as every decision is rendered in the context of the facts which anise before the authority for adjudication. Mere conclusion in favour of the Revenue in another case by itself would not entitle a party to have an identical relief in this case. In fact, if the Revenue was of the view that the facts in S. Vinodkumar (supra) are identical/similar to the present facts, then reliance would have been placed by the Revenue upon it at the hearing before the Tribunal The impugned order does not indicate any such reliance. It appears that in S. Vinodkumar Diamonds (P) Ltd (supra), the Tribunal held the forward contract on facts before it to be speculative in nature in view of Section 43(5) of the Act. However, it appears that the decision of this court in CIT v Badridas Gauridu (P) Ltd [2003] 261 ITR 256/[2004] 134 Taxman 376 (Mum.) was not brought to the notice of the Tribunal when it rendered its decision in S. Vinodkumar Diamonds (P) Ltd. (supra). In the above case, this court has held that forward contract in foreign exchange when incidental to carrying on business of cotton exporter and done to cover up losses on account of differences in foreign exchange valuations, would not be speculative activity but a business activity."

16. As is evident from the record, in the present case, the Revenue has disallowed the foreign exchange loss on the basis that the same is notional in nature. It is also not been denied that these contracts are entered into by the assessee in the course of its business of travel agent and tour operator. Therefore, respectfully following the aforesaid decision of Hon'ble jurisdictional High Court, we direct the AO to delete the addition made on account of disallowance of Mark to Market loss. As a result, ground no. 2 raised in assessee's appeal is allowed.

17. The issue arising in ground no. 3, raised in assessee's appeal, is pertaining to disallowance under Section 14A of the Act.

18. The brief facts of the case pertaining to this issue are: During the year under consideration, the assessee earned dividend income of Rs. 75,456, which was claimed as exempt from tax. Further, the assessee has invested in tax free bonds on which it has claimed interest income of Rs. 10,20,966/- as exempt from tax. In the revised return of income, the assessee suo-moto made disallowance of Rs. 4,23,716/- under section 14A of the Act. The AO vide assessment order dated 29.05.2014 made a disallowance of Rs. 21,65,141/- under section 14A read with Rule 8D of the Income Tax Rules. Since, the assessee has already made a suo-moto disallowance of Rs. 4,23,716/-, the disallowance under section 14A read with Rule 8D was restricted to Rs. 17,41,425/-. The learned CIT(A) vide impugned order restricted the disallowance made under section 14A of the Act to Rs. 14,02,557/-. Being aggrieved, the assessee is in appeal before us.

19. During the course of hearing, learned AR urged that only those investments which yielded exempt income during the year should be considered for computation of disallowance under section 14A of the Act. On the other hand, learned DR relied upon the orders passed by the lower authorities.

20. We have considered the rival submissions and perused the material available on record. We find that the claim of the assessee is supported by the decision of the Special Bench of the Tribunal in the case of ACIT vs. Vireet Investment (P) Ltd. (2017) 165 ITD 27 (Delhi-Trib.), wherein it was held that only those investments are to be considered for computing

average value of investments, which yield exempt income during the year. Accordingly, we direct the AO to only considered those investments for the purpose of computation of disallowance under section 14A read with Rule 8D of the Rules, which yield exempt income during the year. As a result, ground No. 3 raised in assessee's appeal is allowed for statistical purpose.

21. In the result, appeal by the assesse is allowed for statistical purpose.

Order pronounced in the open court on 10.10.2022.

Sd/-	**Sd/-**
PRAMOD KUMAR	**SANDEEP SINGH KARHAIL**
VICE PRESIDENT	**JUDICIAL MEMBER**

MUMBAI, DATED: 10.10.2022

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Alindra, PS

Assistant Registrar
ITAT, Mumbai