

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

**BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

ITA No.248/Del/2018
Assessment Year: 2012-13

And

ITA No.249/Del/2018
Assessment Year: 2013-14

And

ITA No.250/Del/2018
Assessment Year: 2014-15

Formula One World Championship Ltd., United Kingdom, N 2 ST Jame's Market, London SW1Y4AH, UK	Vs.	DCIT, International Taxation, Noida
PAN :AABCF8009Q		
(Appellant)		(Respondent)

Appellant by	Sh. Percy Pardiwalla, Sr. Advocate Sh. Nirmal Sarada, CA
Respondent by	Sh. Gangadhar Panda, CIT(DR)

Date of hearing	27.10.2022
Date of pronouncement	26.12.2022

ORDER

PER SAKTIJIT DEY, JM:

Captioned appeals by the same assessee arise out of final assessment orders passed by the Assessing Officer under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (for short 'the Act') pertaining to assessment years 2012-13, 2013-14

and 2014-15, in pursuance to directions of learned Dispute Resolution Panel (DRP).

2. Common grounds raised by the assessee in all these appeals are as under:

1. *On the facts and in the circumstances of the case and in law, the learned AO has completely disregarded the observations of the Hon'ble Supreme Court of India which has held that Jaypee Associates Limited ('JAL') has a liability to withhold taxes in respect of payment made to the Appellant and hence erred in not granting credit to the Appellant of such taxes already deposited by JAL.*
2. *On the facts and in the circumstances of the case and in law, the learned AO while arriving at the tax liability of the Appellant, erred in not granting credit of taxes already deposited by JAL into the Indian Government Treasury with respect to income earned by the Appellant from JAL as per the provisions of Section 199 read with Section 205 of the Act.*
3. *On the facts and in the circumstances of the case and in law, the learned AO erred in not granting the refund due to the Appellant, of excess taxes paid/deposited for the subject AY.*

3. Briefly the facts are, the assessee is a non-resident corporate entity incorporated in United Kingdom (UK) and a tax resident of UK. Therefore, the assessee is eligible to claim benefit under India – UK Double Taxation Avoidance Agreement (DTAA). The assessee is the commercial rights holder of Formula One World Championship. The assessee is exclusively entitled to award event promoters with the right to host, stage and promote Grand Prix on various Circuits worldwide and in that capacity entered into a Race Promotion Contract (RPC) with Jaypee Sports International Ltd. [now merged with Jaiprakash Associates Limited (JAL)]

granting right to host the Indian Grand Prix. As a consequence of granting the Indian Grand Prix right to JAL, the assessee earned RPC fee. To ascertain the nature and character of RPC fee and its taxability in India, the assessee filed an application before the Authority of Advance Ruling (in short 'AAR') under section 254Q of the Act. Simultaneously, JAL also filed an application with the AAR seeking determination on its obligation to deduct tax at source. In its Ruling dated 17th August, 2016, the AAR held that the RPC fee received by the assessee is in the nature of royalty in terms of Article 13 of India – UK DTAA. Further, it was held that the assessee had no fixed place Permanent Establishment (PE) or agency PE in India. Further, the AAR held that JAL was obliged to deduct tax at source while paying RPC fee to the assessee. The Ruling was challenged both by the assessee and JAL before the Hon'ble Delhi High Court. Though, the Hon'ble Delhi High Court reversed the decision of the AAR concerning nature of payment as royalty as well as existence of agency PE, however, the Hon'ble High Court held that the assessee had a fixed place PE in India and JAL was bound to make deduction of tax at source under section 195 of the Act on the RPC paid to the assessee. Though, the assessee challenged the decision of the Hon'ble Delhi High

Court before the Hon'ble Supreme Court, however, the Hon'ble Supreme Court upheld the judgment of the Hon'ble Delhi High Court, both on the issue of existence of fixed place PE and liability of JAL to deduct tax at source under section 195 of the Act on the RPC fee paid to the assessee. In the meanwhile, the Assessing Officer framed a draft assessment orders bringing to tax the profit taxable in India by dividing global operating profit by number of races conducted during the year. Against the draft assessment order proposed by the Assessing Officer, the assessee raised objections before learned DRP. In pursuance to the directions of learned DRP, the Assessing Officer passed the final assessment orders, impugned in the present appeals.

3. However, while computing the tax demand, the Assessing Officer did not grant credit for TDS by JAL, though, the TDS amounts were reflected in Form 26AS of the assessee. In the final assessment orders the Assessing Officer held that the consideration received by the assessee with the Indian Grand Prix represented its profit with 56% of the said profit being attributable to the PE in India.

4. Before us, Sh. Percy Pardiwalla, learned Senior Counsel appearing for the assessee submitted that as per the notices of

demand issued by the Assessing Officer in pursuance to the final assessment orders the assessee had deposited tax in all these years. He submitted, pursuant to the decision of the Hon'ble Delhi High Court, JAL deposited the TDS amount in respect of RPC fees paid in all the assessment years under dispute which are in addition to the taxes already paid by the assessee on such income. Thus, he submitted, as per the statutory principle laid down under section 205 of the Act as well as settled legal principle, taxes cannot be recovered twice on same item of income. He submitted, though, the assessee filed rectification applications before the Assessing Officer, they were dismissed after repeated follow up action by the assessee on the following grounds:

- *FOWC did not claim tax credit at the time of filing the return of income/ during the assessment proceedings;*
- *tax credit claimed by FOWC does not fall within the parameters of section 190 of the Act (as there was no tax deducted at source or advance tax payment against FOWC's income);*
- *the amount paid by JAL pursuant to WHT proceedings belongs to JAL considering no taxes were actually deducted from the payments to FOWC;*
- *the income equivalent to the TDS has also not been offered to tax by FOWC. FOWC would be allowed the tax credit in a case where FOWC's income would have been assessed inclusive of TDS and the amounts would have been paid after deduction of tax from gross receipts;*
- *demand deposited by JAL pursuant to TDS proceedings is in the nature of interest and penalty. Accordingly, JAL was not deductor of tax in this case (as no tax was actually deducted at source) but a depositor of penal demand. Hence, credit for deposit by JAL cannot be granted to FOWC; and*

- *JAL may seek refund of the same TDS amount in future.*

5. Learned counsel for the assessee submitted, as per the provisions of section 199 of the Act read with Rule 37BA of the Rules, taxes deposited by JAL under section 201 read with section 195 of the Act should be regarded as tax deducted at source deposit of which was made by JAL, to the account of assessee. Hence, credit for the said TDS should be allowed to the assessee against the final tax liability. In this context, he also relied upon CBDT instruction no. 275/29/2014-IT-(B), dated 1st June, 2015. He submitted, the fact that JAL has deducted tax at source on the RPC fee is well documented and demonstrated from Form 26AS in the name of assessee.

6. In reply, learned Departmental Representative submitted, at the time of actual payment/credit to the assessee JAL had not deducted tax at source. Therefore, the assessee cannot be granted credit for TDS deposited by JAL, subsequently, after the decision of the Hon'ble Delhi High Court. He submitted, there is every possibility that JAL may claim refund of the TDS deposited for the very same amount, in which case, there will be loss to the revenue as refund may be granted both to the assessee and JAL. He submitted, since, JAL has deposited the TDS amount without

actually deducting tax at source on the payment made. The deposit made is penal in nature and JAL cannot be considered as deductor. He submitted, in the return of income filed for the impugned assessment year, the assessee has not claimed credit for the TDS amount. Therefore the Assessing Officer had no occasion to grant credit for such TDS. He submitted, JAL has not issued Form 16A to assessee. Further, he submitted, the assessee cannot be granted TDS credit as the TDS amount did not form part of assessee's income.

7. In rejoinder, learned counsel submitted, at the time of actual payment/credit of RPC fee, both the assessee and JAL had a bona fide belief that the payment made was not in the nature of royalty but in the nature of business income. Being of the view that business income is not taxable in India JAL decided not to withhold taxes at the time of actual payment to the assessee. The position adopted by the assessee and JAL was reversed by the Hon'ble Delhi High Court in 2016, by holding that the assessee had a PE in India. Thus, as a result of the decision of the Hon'ble Delhi High Court, JAL was subjected to proceeding under section 201 read with section 195 of the Act by treating JAL as an assessee in default and in pursuance to such proceeding the JAL

deposited the TDS amount in Government account. Therefore, non-deduction of tax at source at the time of actual payment cannot be a reason to deny refund when tax has actually been paid. As regards the apprehension of the learned Departmental Representative that, both assessee and JAL may claim refund, learned Counsel submitted, JAL has *suo motu* provided Form 16A to the assessee acknowledging that it has withheld taxes on behalf of the assessee. He further submitted that JAL has not filed any appeal seeking refund of the TDS amount deposited. By way of a further clarification, he submitted, JAL had deposited an amount of Rs.75 crores pursuant to withholding tax proceeding and after the final assessment orders were passed in case of the assessee, the withholding tax liability of JAL was reduced to Rs.55 crores. He submitted, since, JAL had deposited 75 crores it claimed the excess amount paid of Rs. 19 crores as refund, which is over and above the 55 crores demand raised in the final assessment orders passed in case of the assessee. He submitted, 55 crores demand includes Rs.35.68 crores, tax component and Rs.20 crores towards interest on delay in payment. Because of that TDS credit of Rs.35.68 crores appears in assessee's name, both in Form 26AS and Form 16A. Thus, he submitted, the

assessee is entitled to TDS credit of Rs.35.68. He submitted, the taxes deposited by JAL cannot be considered to be penal in nature as it is withholding of tax under section 195 read with section 201 of the Act. He submitted, JAL has also issued Form 16A in favour of the assessee, which have been submitted before the Assessing Officer. Thus, he submitted, only because TDS credit does not form part of finally assessed income of the assessee it should not result in denial of refund to the assessee, since, the assessee has already discharged the tax liability. Finally, he submitted, if the TDS credit is treated as income of the assessee, since, it was not deducted from the payments made, it has to be treated at par with RPC fee and taxed in the same ratio as the RPC fee.

8. We have considered rival submissions and perused the materials on record. It is evident from the facts on record, while making credit/actual payment of RPC fee to the assessee, JAL had not deducted any amount of tax at source in terms of section 195 of the Act. This is, probably by entertaining a view that RPC fee is not taxable in India. However, on an application filed by the assessee before the AAR, a Ruling was delivered holding that RPC fee is in the nature of royalty in terms of Article 13 of India – UK

Tax Treaty. Thus, AAR held that JAL was obliged to deduct tax at source on the RPC fee paid to the assessee. Being aggrieved with the AAR Ruling, both the assessee and JAL filed Writ Application before the Hon'ble Delhi High Court. In their judgment, the Hon'ble Delhi High Court overruled the decision of AAR by holding that RPC fee is not in the nature of royalty. However, the Hon'ble High Court held that the assessee had a fixed placed PE in India; hence, the RPC fee is taxable in India. Thus, the Hon'ble High Court held that the JAL was bound to make appropriate deduction under section 195 of the Act from the RPC fee paid to the assessee. Admittedly, by the time, the decision of the Hon'ble Delhi High Court came, which ultimately got confirmed by Hon'ble Supreme Court, JAL has paid the RPC fee to the assessee without withholding tax under section 195 of the Act. Thus, it is a fact on record that the RPC fee received by the assessee was the full amount without suffering any withholding of tax at source. This is the reason, why the assessee did not claim credit for TDS in return of income. Subsequently, as a consequence of the judgment of the Hon'ble Delhi High Court, proceedings under section 201 of the Act was initiated against JAL on account of failure to deduct tax at source under section 195 of the Act and

basis demand raised under section 201(1) and 201(1A) of the Act, JAL deposited the amount of tax which should have been withheld under section 195 of the Act while paying RPC fee to the assessee. Of course, it is a fact on record that TDS credit of Rs.35.68 crores appears in favour of assessee in Form 26AS. Subsequently, JAL has also issued TDS certificates in Form 16A in favour of the assessee in respect of TDS deposits. However, it is a fact on record that the TDS credit claimed by the assessee is not a part of the income offered to tax in the returns of income. The TDS credit claimed by the assessee is over and above the actual RPC fee paid to the assessee by JAL. Thus, essentially the TDS credit now claimed by the assessee is in the nature of an additional income over and above the RPC fee the assessee was entitled to receive under the contract. Thus, it is an additional item of income which has not suffered tax at the hands of the assessee. Therefore, the issue arising for consideration is, what is the nature of such income at the hands of the assessee. In this regard, we accept the submission of learned counsel for the assessee that the TDS credit partakes the character of original income, i.e., the RPC fee and has to be taxed in the same manner in which the Assessing Officer taxed the RPC fee.

9. In view of the aforesaid, we direct the Assessing Officer to factually verify the actual amount of TDS credit by matching figures in Form 26AS and TDS certificates issued in Form 16A and thereafter treat the TDS credit as income of the assessee partaking the character of RPC fee and tax it in the same manner in which RPC fee was brought to tax in the final assessment order. At this stage, we make it clear that the mandate given to the Assessing Officer in this order is only for taxation of the TDS credit and no other item of income. Needless to mention, before deciding the issue, the Assessing Officer must provide a reasonable opportunity of being heard to the assessee.
10. In the result, appeals are partly allowed.

Order pronounced in the open court on 26th December, 2022

Sd/-
(G.S. PANNU)
PRESIDENT

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Dated: 26th December, 2022.

RK/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi