

**IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH: 'F' NEW DELHI]**

**BEFORE DR. B. R. R. KUMAR, ACCOUNTANT MEMBER
AND**

SH. YOGESH KUMAR U.S., JUDICIAL MEMBER

I.T.A. No. 7764/DEL/2019 (A.Y 2012-13)

DCIT, Circle : 20 (2), New Delhi. (APPELLANT)	Vs.	M/s. RATP Dev Transdev India Pvt. Ltd. [Formerly known as M/s. Veolia Transport RATP India Pvt. Ltd.] GF-1, B-1, Marble Arch, 9-Prithvi Raj Road, New Delhi – 110 011. PAN No. ABIPS4714N. (RESPONDENT)
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Appellant by	Shri Alkesh Babbar, C.A.;
Respondent by	Shri K. K. Mishra, Sr. D. R.;

Date of Hearing	07.12.2022
Date of Pronouncement	20.01.2023

ORDER

PER YOGESH KUMAR U.S., JM

This appeal is filed by the Revenue for assessment year 2012-13 against the order of the Id. Commissioner of Income Tax (Appeals)-7, New Delhi [hereinafter referred to as CIT (Appeals)] dated 15.07.2019.

2. The Revenue has raised the following substantive grounds of appeal:-

“1. Whether the Ld. CIT (Appeals) erred in law and on facts and in circumstances of the case, in deleting the disallowance of Rs.2,72,66,619/- made by the Assessing Officer under section 28 of the Income Tax Act, 1961, on account of difference between receipts as per 26 AS and as per books of accounts?”

2. Whether the Ld. CIT (Appeals) erred in law and on facts and in circumstances of the case, in deleting the disallowance of Rs.63,57,485/- made by the Assessing Officer under section 40(a)(ia) of the Act, 1961, on account of non-deduction of tax at source on amounts paid for its expat employees?”

3. Brief facts of the case are that, the assessee filed return for the Assessment Year 2012-13 declaring the loss at Rs. 2,05,77,857/-. The notice u/s 143(2) of the Act followed by notice u/s 143(2)/143(2)(1) of the Act along with questionnaire were issued and assessment proceedings were initiated against the assessee. The assessment order came to be passed on 25/03/2015 by making an addition of Rs. 2,72,66,619/- being difference between receipts as per 26AS and as per books of accounts/audited accounts, is income of the assessee u/s 28 of the Act, disallowed the miscellaneous expenses car running and maintenance disposal to the tune of Rs. 14,09,500/-, disallowed sum of Rs. 63,57,485/- u/s 40(a)(ia) of the Act due to non deduction of tax at source on salary paid to expats. The assessment order came to be passed on by

computing the total income of the assessee of Rs. 1,59,93,050/- as against declared returned loss of Rs. 2,05,77,859/-.

4. As against the assessment order 25/03/2015, the assessee has preferred an appeal before the CIT(A). The Ld.CIT(A) has partly allowed the appeal by deleting the disallowance of Rs. 2,72,66,619/- made by the A.O. u/s 68 of the Act and also deleted the disallowance of Rs. 63,57,485/- made by the A.O. u/s 40(a)(ia) of the Act on non deduction of the tax at source.

5. Aggrieved by the order of the Ld.CIT(A) dated 15/07/2019, the Revenue has preferred the present appeal on the grounds mentioned above.

6. The Ld. DR submitted that the Ld.CIT(A) has committed an error in deleting the disallowance of Rs. 2,72,66,619/- made by the A.O. u/s 28 of the Act on account of difference between receipts as per 26AS and as per books of accounts. Further submitted that, the Ld.CIT(A) has also committed an error in deleting disallowance of Rs. 63,57,485/- made by the A.O. u/s 40(a)(ia) of the Act on account of deduction of tax at source on amounts paid for its expat employees and relied on the assessment order.

7. Per contra, the Ld. Counsel for the assessee has relied on the order of the Ld.CIT(A) and submitted that the Ld.CIT(A) has rightly allowed the appeal which requires no interference and taken us through the paper book and the reasons given by the Ld.CIT(A) in deleting the additions/disallowance.

8. We have heard the parties perused the material available on record and gave our thoughtful consideration.

9. Ground No. 1 of the Revenue is regarding deletion the disallowance of Rs. 2,72,66,619/- made by the Assessing Officer u/s 28 of the Act on account of difference between receipts as per 26AS and as per books of accounts. The Ld. A.O. while making the above addition has observed as under:-

“The Reply of the assessee was examined and it has been observed that there is a difference in the Income of the Assessee Company for Rs.2,72,66,619 for the year under assessment. The Assessee in his written submission has adjusted the difference in income with the previous years but the assessee has not furnished any documentary evidence to support its reply. Also the Assessee company has mentioned that the difference in income of Rs.61,09,616/- could be probably be due to amounts incorrectly reported by the deductor while filing the quarterly TDS Statement/Returns or due to adhoc on account settlements made by the customer from time to time.

In-spite of various opportunities granted to the Assessee Company, the Assessee has failed to place on record any Documentary evidence to support its above statements

Further the assessee has claimed that it adjusted the current year difference with the excess income recognized in the previous years which is not supported by any documentary evidence.

Thus on the basis of the above facts and legal provisions, the amount of Rs.2,72,66,619/- being the difference between receipts as per 26AS and as per books of account/audited accounts, is

income of the assessee u/s 28 of the Income Tax Act and is added back to the income of the Assessee.”

10. It is the specific case of the assessee is that the Ld. A.O. has called upon the assessee to furnish explanation with documentary evidence regarding the difference in receipts as per books of account and as per Form 26AS. The assessee in reply submitted reconciliation between the income and TDS as per the audited financial statement for preceding five years i.e. from Financial Year 2007-08 to Financial Year 2011-12 and income as per Form No. 26AS which has been reproduced before us at Page 24 of the paper book. It can be seen from the comparative chart that income excluding the service tax as per the audited financials of the assessee was higher than the corresponding income and service tax which was subjected to TDS deduction as reported in Form No. 26AS for the Financial Year 2007-08 to 2010-11. The said excess has been compensated in the Financial Year 2011-12 which is evident from the fact that the income and service tax reported in Form No. 26AS in the Financial Year 2011-12 is higher than the income and service tax accrued disclosed by the assessee in the audited financials for the said year. Thus, the difference between income reported in Form No. 26AS and the income reflected in audited financial of the assessee has cumulative decreased for a period of five years except for an amount of Rs. 61,09,616/-. The cumulative difference of Rs. 61,09,616/- exists between the income considered in the audited financials and Form No. 26 AS for the said five years, the amount TDS withheld by the

deducter stood duly reconcile. The assessee has also explained to the A.O. that some of the differences are overlapping due to different years in which the assessee and the deductor have considered the respective income/expenses and corresponding income tax deducted at source and also clarified the difference in income could be due to amount in correctly reported by the deductor while filing the quarterly TDS statements/returns or due to adhoc on account statement made by the customer from time to time. From the said reconciliation it can be seen that cumulative during the four years commencing from Financial Year 2010-11, the assessee disclosed income and applicable service tax thereon aggregating to Rs. 19,41,70,972/- in the audited financials as against the income and service tax thereon of Rs. 17,30,13,969/- reported in Form No. 26AS i.e. the assessee has cumulatively offered to tax income and disclosed service tax thereon aggregating to Rs. 2,11,57,003/- in its books of accounts in excess of income and service tax reported in Form No. 26AS for the Financial Year 2007-08 through Financial Year 2010-11.

11. The assessee is maintaining regular books of accounts audited by independent chartered accountant which normally to be taken as correct unless there are adequate reason to indicate that the same is incorrect or unreliable. It is not the case of the A.O. that there are a specific defect or discrepancies in the books of accounts of the assessee. Therefore, in our opinion, the Ld.CIT(A) has committed no error in deleting the disallowance of

Rs. 2,72,66,619/-. Ergo, we find no merit in the Ground No. 1 of the Revenue. Accordingly, Ground No. 1 is dismissed.

12. Ground No. 2 is regarding deletion of the disallowance of Rs. 63,57,485/- made by the A.O. u/s 40(a)(ia) of the Act on account of non deduction of tax at source on the amount paid for its expat employees. The Ld.CIT(A) while deleting the said disallowance, relied on the Assessee's own case for Assessment Year 2014-15 in following manners:-

“7.2 .Ground No 5 relates to disallowance under section 40(a)(i) of the Income Tax Act, 1961 an amount of Rs. 63,57,485 towards expenditure incurred by the appellant on account of social security contributions payable outside India alleging non-deduction of tax at source.

7.3. Similar issue had arisen in the appellant's own case for A.Y. 2014-15 which was decided by the undersigned vide order dated 01.08.2018 in Appeal No: 10900/564/CIT(A)~7/Del/2016-17, wherein the it was observed as under:

“4.2. The appellant, during FY 2013-14 (AY 2014-15) had incurred expenditure of Rs.32,82,022/- towards social security contributions payable outside India for expatriates working in India. These contributions related to expatriates who were deputed to work under the employment of the appellant. The expatriates continued to be covered by social security schemes outside India. Social security contributions were paid by the appellant's associate companies outside India and charged to appellant for recovery on cost incurred basis.

4.3. *During the course of assessment proceedings, the AO raised the issue of disallowance of salary cost incurred in the form of social security contribution on account of non-deduction of TDS. Since, the amount under consideration is part of the salary cost, inadmissibility, if any, of this expenditure will arise under section 40(a)(iii) which deals with “any payment which is chargeable under the head “Salaries” if it is payable outside India or to a non-resident”.*

4.4. *The appellant in its submission provided a detailed reply explaining that amount under consideration was not chargeable as income under the head “Salaries” in the hands of the expatriate employees in the year when the contributions were made. It was contended that the TDS was not required to be deducted in respect of reimbursement of social security contributions/superannuation contributions paid by its related group entities outside India for its expatriate employees since the amount was not chargeable to income tax in the hands of the expatriate employees for the reasons that Social security contributions do not constitute income from salary in the hands of the expatriate employees as employees do not have any vested right over such contributions; The contributions towards social security go to a common pool and not to employee specific accounts and Social security and superannuation contributions paid outside India are not recognized in India.*

4.5. *I have gone through the assessment order and the submissions made by the appellant. The issue as per the AO was “clearly, it cannot be denied that some benefit would be received by the employees by the social security contribution and also that these payments have been made by the assessee*

company on their behalf. The beneficiaries being non-residents, it would not be possible to track the future benefits received and bring that to taxability. Therefore to ascertain no loss to the revenue, TDS must have been deducted on such payments. The intent of legislature, as expressed in Section 40 of the Act is also the same”.

4.6. The appellant is of the view that there is no requirement for the appellant to deduct TDS on Social Security Contributions paid by it and no inadmissibility of expense arises u/s 40 of the Act in regard to such contributions since this was not taxable in the hands of the individuals. The appellant relied on the case of Yoshio Kubo vs. CIT. The Delhi High Court in the case of Yoshio Kubo i/s. CIT has answered a specific query that: Are contributions for social security/ pension/ medical insurance made in the home country by the employer for an employee seconded to India taxable as part of the salary (perquisite)

4.7. The HC held that such contributions are not a perquisite as no benefit is vested in the employees at the time the contributions are made. The HC opined that the judgment of the SC in L. W. Russel applied. The HC said that the SC ruling spelled out a wider fundamental principle, i.e. when an amount does not result in a direct present benefit to an employee but assures him of a future benefit in the event of a contingent occurrence, the payment made by the employer is not vested in the employee. The HC also relied on its judgement in the case of Mehar Singh Sampuran Singh Chawla.

4.8. *In terms of the ratio contained in the decisions stated above the contributions to social security are not chargeable to tax under the head salaries. The Hon'ble Supreme court in the case of GE India Technology Centre Private Ltd. [327 ITR 456] held that section. 195(1) uses the expression "sum chargeable under the provisions of the Act". This means that a person paying any sum to a non-resident is not liable to deduct tax if such sum is not chargeable to tax. TDS obligation u/s 195(1) arises only if the payment is chargeable to tax in the hands of non-resident recipient.*

4.9. *Therefore, the mere fact that the payment was been made to a non-resident does not, in itself, becomes a basis for disallowance for non-deduction of TDS. The payment must have the character of Income" for TDS provisions to get invoked.*

4.10. *The appellant has already stated in its tax audit report that it is of the view that the reimbursements of t actual cost incurred towards social security/superannuation contributions by the associated companies outside India do not constitute consideration or fee for services rendered/do not include any income element and accordingly such payments or credits do not necessitate withholding and deposition of income-tax at source under S. 195 of the IT Act, 1961.*

4.11. *The case laws discussed in the preceding paragraphs also clearly establish that the social security contributions do not constitute income from salary in the hands of the expatriate employees as employees do not have any vested right over such contributions and as such do not partake the character of salary in the year of contribution. Therefore, no inadmissibility*

arises u/s. 40(a) (i) & 40(a) (iii) of the Act. Disallowance of Rs.32,82,022/- made by the AO is directed to be deleted. This ground of appeal is ruled in favour of the appellant. ”

7.4. In the present appeal, as the facts are similar. Following the earlier decision of the undersigned, relief was allowed to the appellant on similar issue. Following the order passed by me on this issue, disallowance of Rs. 63,57,485 /- made by the A.O. is directed to be deleted. This ground of appeal is ruled in favour of the appellant.

13. In our considered opinion, the social security contribution do not constitute income from salary in the hands of expatriate employees and the employees do not have any right over such contributions. The same will not take care the character of salary in the year of contribution. Therefore in our opinion, the deletion of the disallowance made by the CIT(A) to the tune of Rs. 63,57,485/- made by the A.O. u/s 40(ia) of the Act on account of non deduction of tax at source on amounts paid for the expat employees and we do not find merit in the Ground No. 2 of the Revenue. Accordingly, Ground No. 2 of the Revenue is dismissed.

14. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the Open Court on : 20th January, 2023.

**Sd/-
(B. R. R. KUMAR)
ACCOUNTANT MEMBER**

**Sd/-
(YOGESH KUMAR U.S.)
JUDICIAL MEMBER**

Dated : 20/01/2023

MEHTA/R.N, SR. PS

Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI