

आयकर अपीलीय अधिकरण, रायपुर न्यायपीठ, रायपुर
IN THE INCOME TAX APPELLATE TRIBUNAL RAIPUR BENCH, RAIPUR
श्री रविश सूद, न्यायिक सदस्य एवं श्री अरुण खोड़पिया, लेखा सदस्य के समक्ष ।
BEFORE SHRI RAVISH SOOD, JM & SHRI ARUN KHODPIA, AM
आयकर अपील सं./ITA No.66/RPR/2020
(Assessment Year: 2014-2015)

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| M/s BEC Infra Private Limited, 47, Motilal Nehru Nagar, Durg | Vs | Circle-3(1), Raipur |
| PAN No. :AAGCM 0049 N | | |
| (अपीलार्थी /Appellant) | .. | (प्रत्यर्थी / Respondent) |
| निर्धारिती की ओर से /Assessee by | : | Shri Nilesh Jain, CA |
| राजस्व की ओर से /Revenue by | : | Shri Piyush Tripathi, Sr. DR |
| सुनवाई की तारीख / Date of Hearing | : | 20/04/2023 |
| घोषणा की तारीख/ Date of Pronouncement | : | 24/04/2023 |

आदेश / O R D E R

Per Arun Khodpia, AM:

The assessee has filed this appeal against the order passed by the CIT(A)-II, Raipur, dated 31.12.2019 for the assessment year 2014-2015.

2. At the outset, Id. Sr. DR submitted that the appeal filed by the assessee is delayed by 59 days, which can be further extended since the claim of the assessee that the order was served after 38 days of delay was not supported by any documentary evidence. As per appeal memo in Form No.36, the date of service of communication of the order was 7th February, 2020 and the appeal was filed on 08.06.2020. On this aspect, the Id. AR submitted that this was the Covid-19 period and the Hon'ble Apex Court has already directed to extend the limitation for that period, therefore, the delay may be condoned. The submission of the Id. AR found satisfactory and acceptable and accordingly, the delay in filing the present appeal by the assessee is condoned.

3. The assessee in its appeal has raised the following grounds:-

1. *In the facts and circumstances of the case and in law the Id. Commissioner of Income-tax (Appeals) has erred in deciding the appeal ex-parte.*
2. *In the facts and circumstances of the case and in law the Id. Commissioner of Income-tax (Appeals) has erred in confirming the disallowance of Rs.2,47,85,290/- made by the Assessing Officer assuming altogether different grounds of appeal than the grounds taken in the memorandum of appeal.*
3. *In the facts and circumstances of the case and in law the Id. Commissioner of Income-tax (Appeals) has erred in sustaining the disallowance of Rs. 1,35,957/- u/s 14A of the Income-tax Act, 1961.*
4. *The appeal order is bad in law and without jurisdiction.*
5. *The Appellant reserves the right to add, amend, alter, omit or withdraw all or any of the grounds of appeal.*

4. Brief facts of the case are that the assessee derives income from offering of management and technical services, renting of equipment, flats, export sales and capital gain. This year the assessee has shown net revenues from operations at Rs. 19,26,76,462/- which includes revenues of services provided at crores and export services of Rs. 5.87 crores and non-operation incomes. The net profit this year was shown at 8.04% as against 27.69% shown in the immediate preceding year, thus It is low. In the case of other sister concern M/s. Ashish Industrial & Commercial Enterprises Pvt & Ltd. on identical revenues from technical services from the same parent contractee company, the profit rate was shown at 29.58%. In the course of verification of the books of accounts and expenses claimed it is found that assessee has claimed drawing and designing payments- outside India expenses at Rs. 2,47,85,290/-and no such expenditure was claimed till the preceding year. Relevant details were called for and examined. It is found

from the details filed that the expenses towards drawing and designing Coke Transfer Cars for NMDC Steel Plant, Engineering drawings for SAIL the principal contract for which allotted to Bhilai Engineering Corporation, Bhilai assessee renders only technical consultancy services erection and civil works on fixed remuneration of Rs.75,00,000/- per month plus applicable service tax vide agreement dated 01/04/2013, The assessee was asked to explain admissibility of the claim. It was contended that it forms part of the contract agreement and accordingly incurred by them. The contention is not found acceptable by the revenue authorities. As per Ld AO, the agreement specifies scope of work to providing all necessary and essential management and technical consultancy with reference to erection and civil work at NMDC that too on fixed remuneration of Rs.75,00,000/- per month. Verification of account copy of the contractee i.e. BEC reveals that all expenses were incurred and paid by the said company directly to the recipient but a part which it decides to be thrown to the bucket of the sub-contractor in transferred through journal entry. Thus, itself makes the claim contrary to the terms and conditions of scope of work. It is because of debiting such unrelated expenditure in the account of the assessee, the net profit ratio has gone down in comparison, to the preceding year. Therefore, the AO found that the above amount of Rs. 2,47,85,290/- which is not wholly and exclusively relatable to the assessee's business, accordingly, the AO disallowed the same and added to the total income of the assessee.

5. Against the above order of AO, the assessee preferred appeal before the Id. CIT(A) and the Id. CIT(A) upheld the findings of the AO and dismissed the appeal of the assessee.

6. Now, the assessee is in further appeal before the Tribunal.

7. **Ground No.1, 4 & 5 are general and academic in nature, hence, needs no separate adjudication.**

8. **Ground No.2 is with regard to disallowance of Rs.2,47,85,290/- on account of payment made towards drawing and designing charges outside India.**

9. Ld. AR on this issue has submitted that the payments were made for sale of coal charging car (herein after referred to as "equipment") to Mckeown International, Texas as per Equipment Purchase and Sale Agreement dated 01/02/2012. As per clause 3.3 of the agreement the equipment was to be delivered within 15 months following the date of effectiveness of agreement. As per Section 15.19 of the said agreement, it shall be 60 days from the date of agreement i.e April'12. Accordingly, it was agreed to deliver the equipment by June' 2013. As per the Id. AR the assessee started importing the drawings and designs services and have incurred Rs. 1,88,99,712/- on such services in preceding FY 2012-13. It was also the submission that the payment of imports of drawings and designs were subjected either to service tax @ 12.36% or TDS @ 20%. The drawings and designs for equipment were imported from various parties from outside India i.e. (a) Claus Bast (b) INU. Buro Ulke (IBU) (c) Homer Trading Ltd Nevis & (d) Janusz Fliieger. Ledger a/cs of these parties

were produced by the Id. AR in its paper book. According to the Id. AR, drawing and designing services were received in FY 2012-13 and 2013-14 but the equipment was finally exported in FY 2013-14 for Rs.5,87,17,301.71, the relevant expenditure on drawing & design charged to P & L A/c in FY 2013-14 was Rs.2,47,85,290/- consisting of Rs. 1,88,99,712/- incurred in FY 2012-13 & Rs.58,85,578/- incurred in FY 2013-14. The equipment was dispatched in FY 2013-14 and was booked as Export sale. Accordingly, the total expenditure was also charged to P & LA/c in FY 2013-14 only. It was also the fact that the export proceeds were received from M/s Mckeown International INC USA in FY 2013-14. The expenses were charged to P& L A/c in FY 2013-14 following the accounting principle of matching concept. Therefore, the disallowance made by the AO was uncalled for, however, the same was upheld by the Id. CIT(A) without appreciating the facts of the case. It was the submission that, the Id. CIT(A) has confirmed the disallowance altogether on different ground than the ground taken in the memorandum of appeal. Ld. AR also placed before us an application under Rule 29 of ITAT Rules, 1963 for taking additional document on record along with affidavit. The additional document was equipment purchase and sale agreement dated 1st February, 2012 between Mckeown International, Texas and BSDE Infra Pvt. Ltd. Further the Id. AR has filed written synopsis, which read as under :-

- a) *The appellant derives income from the business rendering of management and technical services, rental of equipment, sales, rental of flats, interest and dividend, etc.*

- b) *Assessment for AY 2014-15 was completed determining total income at Rs.2,63,32,897/- as against returned income of Rs. 14,11,650/-.*
- c) *The enhancement relates to (i) disallowance of Rs.2,47,85,290/- as not relatable to business and (ii) disallowance of Rs. 1,35,957/- u/s. 14A.*
- d) *The Id. A.O. did not consider Appellant's reply filed on 19/12/2016 (para-9) qua the first item and made the disallowance on the basis of vague and unrelated observations.*
- e) *In first appeal Id. CIT(A) dismissed the appeal treating the assessment order as ex-parte order solely on the basis of statement of facts. He did not even call for assessment records.*
- f) *The expenses of Rs.2,47,85,290/- relate to sale of Coal Charging Car Equipment to Mckeown International, Texas as per Equipment Purchase and Sale Agreement dated 01/02/2012.*
- g) *As per clause 3.3 of the agreement the equipment was to be delivered within 15 months following the date of effectiveness of agreement. As per Section 15.19 it shall be 60 days from the date of agreement i.e April'12. Accordingly, it was agreed to deliver the equipment by June'13.*
- h) *Appellant started importing the drawings and designs and incurred Rs. 1,88,99,712/- on importing drawing and design in preceding FY 2012-13.*
- i) *It was not charged to P & L A/c in FY 2012-13 and was shown as prepaid expenditure in Balance Sheet as at 31.03.2013 under the head "Short term Loan and Advance " in Note 14.*
- j) *The payments of imports of drawings and designs were subjected either to service tax % 12.36% or TDS @ 20%.*
- k) *The drawings and designs were imported from (a) Claus Bast (b) INU. Buro Ulke (IBU) (c) Homer Trading Ltd Nevis & (d) Janusz Flieger. Ledger a/cs of these parties at S.No (a) & (b) for FY 2012-13 and FY 2013-14 and that of parties at S.No. (c) & (d) for FY 2012-13 form part of appellant's paper book.*

- l) *The equipment was finally exported in FY 2013-14 for Rs.5,87,17,301=71.*
- m) *The relevant expenditure on drawing & design charged to P & L A/c in FY 2013-14 was Rs.2,47,85,290/- consisting of Rs. 1,88,99,712/- incurred in FY 2012-13 & Rs.58,85,578/- incurred in FY 2013-14.*
- n) *The equipment was dispatched in FY 2013-14 and was booked as Export sale. Accordingly, the total expenditure was also charged to P & LA/c in FY 2013-14.*
- o) *The amount of export proceeds was received from M/s Mckeown International INC USA in FY 2013-14.*
- p) *The expenses were charged to P& L A/c in FY 2013-14 following the accounting principle of matching concept. Hence allowable.*
- q) *The disallowance u/s.14A is uncalled for in view of assessee's reply dated 07/11/2016 (para-19)*
- r) *Appellant relies on following citations:*
- (a) *CIT vs. UP State Industrial Development Corpn. (1997) 225 ITR 703 (SC)*
- (b) *Taparia Tools Ltd. vs. Jt. CIT (2003) 260 ITR 102 (Bombay)*
- s) *It is humbly prayed that the additions confirmed by Id. Commissioner of Income-tax (Appeals) may be deleted in the interest of justice.*

10. Ld. Sr. DR on the contrary submitted that the drawing and designing expenses claimed by the assessee was part of the contract agreement and therefore separate claim of the same which is in contradiction to the terms and conditions of the contract agreement, cannot be accepted. The payments were taken into account through journal entry. The drawing and designing for coal charging car for NMDC and civil erection and construction remuneration on fixed payment of Rs.75,00,000/- monthly plus

GST by SAIL was not explained by the assessee. The expenditure was unrelated to the business activity, hence, disallowable and added to the income of the assessee. Ld. Sr DR also objected on admission of additional evidence filed under Rule 29 of ITAT Rules, 1963 by the assessee on time barred Form 36 and accepting the same is bad in law and procedure, hence, the same is not acceptable. It was also the submission of the Id. Sr. DR that the AO has categorically stated that the expenses are contrary to the terms and conditions of the agreement. The AO has also examined the ledger copies furnished for verification. The assessee was not responsive to the appellate proceedings and has also not furnished evidence before the Id. CIT(A) to examine the sales, hence, the evidences were never produced before the AO as well as before the Id. CIT(A), thus, at this stage the same cannot be allowed. The AO/appellate authority/lower court may be given opportunity to furnish the documents/evidence by the assessee for the final decision in the case. Reliance was placed on the decision of ITAT Hyderabad Bench in the case of ACIT Vs. Ascend Telecom Infrastructure (P) Ltd., ITA No.1097&1098/Hyd/2018, order dated 15.04.2021, wherein it is held that while deciding any ground without calling for a remand report from the AO, is untenable in law. Therefore, Id. Sr. DR has prayed that the appeal of the assessee on this ground was rightly adjudicated by the authorities below and the same needs to be sustained.

11. We have considered the rival submissions, perused the material available on record, the additional evidence submitted under Rule 29 of ITAT Rules, 1963 and the judicial pronouncements pressed into our

service. Admittedly, the assessee has entered into an agreement for Mckeown International Inc. USA for sale of coal charging car for Ahamsa's Coke Plant (hereinafter referred to as 'equipment') According to the terms of the agreement the said equipment has to be delivered within next 15 months of following the date of effectiveness of this agreement. On perusal of the Article 5 of the agreement available at page 102 of the Paper Book of the assessee in Section 5.4, Sub-Contractors and Vendors. BEC(I) may, under its responsibility and solely at its cost, engage Sub-Contractors and Vendors as required for the successful performance of this Agreement, provided that BEC(I) shall remain the sole responsible party before MCKEOWN for the quality and proper execution of the scope of work as per agreement and the performance of all applicable terms and conditions of the Agreement by any Sub-Contractor, Vendor or other person performing any part of the scope of work hereunder. In terms of Section 5.4 of the Article 5 of the Agreement, it transpires that the BEC India was allowed to sub-contract any responsibility pertaining to successful performance of the agreement and accordingly the BEC(I) has taken the services of drawing and designing through entities outside India and have paid charges towards such services. These entities were (a) Claus Bast (b) INU. Buro Ulke (IBU) (c) Homer Trading Ltd Nevis & (d) Janusz Flieger. Ledger accounts of the same were also available for the financial year 2012-2013 and 2013-2014, however, the agreement with the aforesaid parties who have provided drawing and designing services were not produced before the authorities below as well as before us. Therefore,

whether the drawing and designing services for which the payments are made are related to the agreement with the Mckeown or not, cannot be verified. Ld. AR was unable to substantiate this aspect during the hearing before us. We, therefore, are of the view that this issue needs to be restored back to the file of AO to examine the additional evidence produced before us and also to examine the nexus of payments for drawing and designing charges to the foreign entities that the same was made in terms of agreement with Mckeown for the successful performance of the terms of agreement, Ld AO is directed to examine and verify the information and evidences and after satisfaction that the payment of drawing and design charges were paid in terms of agreement with McKeown international Inc, USA dated 01.02.2012 for sell / purchase of coal charging car under the obligations cast upon the assessee, the same shall be allowed in the year of completion of project under matching concept of accounting. Our view on matching concept of account has support of the view taken by Honble Mumbai High Court In the case of CIT Vs Taparia Tools Ltd, reported in (2003) 260 ITR 102 (BOM), where in it has been held that:

In order to determine the net income of an accounting year under the mercantile system of accounting, the revenue and other incomes are matched with the cost of resources consumed. The matching is to be done on accrual basis. Under this matching concept, revenue and income earned during an accounting period irrespective of actual cash inflow is to be compared with expenses incurred during the same period irrespective of actual out-flow of cash.

12. Reliance is also placed on the judgment in the case of CIT Vs U.P. State Industrial Development Corporation, reported in (1997) 225 ITR 703 (SC), where in Hon'ble Apex Court has held that:

In order to determine the question of taxability, well settled legal principles as well as principles of accountancy have to be taken into account. It is a well accepted proposition that "for the purposes of ascertaining profits and gains, the ordinary principles of commercial accounting should be applied, so long as they do not conflict with any express provision of the relevant statutes".

13. In view of the aforesaid observations, judicial principals, facts and circumstances of the issues, we are persuaded to restore this matter back to the file of AO for readjudication, in terms of our observations herein above. Reasonable opportunity of being heard to be provided to the assessee during the readjudication process and allow submitting all the necessary information and evidence pertaining to the issue. Thus, the ground No.2 is partly allowed for statistical purposes.

14. The next ground is regarding disallowance u/s.14A of Rs.1,35,957/-

15. Ld. AR on this issue has submitted that the disallowance u/sd.14A of the Act is uncalled for. Ld. AR also submitted that there is interest expenses of Rs.672/- only on car loan shown in the profit and loss account. Apart from this there is interest expenses of Rs.1,85,171/- on late payment of TDS which has been added back fully, hence, no disallowance is called for u/s.14A r.w.r.8D. A perusal of the clause 21(h) of the Tax Audit Report there is disallowance of Rs.26,714.06 has been reported. This is nothing but the amount of brokerage & STT which has been debited in the profit and loss account. Ld. AR placed reliance on the following case laws :-

i) Sesa Goa Ltd., reported in [2021] 127 taxmann.com 354 (Bombay), wherein the Hon'ble High Court has held as under :-
III. Section 14A of the Income-tax Act, 1961, read with rule 8D of the Income-tax Rules, 1962 – Expenditure incurred in relation to income not includible in total income (Applicability of) – Whether where assessee invested its own surplus funds in mutual funds and made

suo motu disallowance under section 14A, further disallowance made by Assessing Officer by applying rule 8D without recording his dissatisfaction on disallowance made by assessee was rightly deleted by Tribunal – Held, yes [Para 67] [In favour of assessee]

ii) Maxopp Investment Ltd., reported in [2018] 91 taxmann.com 154 (SC), wherein the Hon'ble Supreme Court has held as under :-

II. Section 14A, of the Income-tax Act, 1961, read with rule 8D of the Income-tax Rules, 1962 – Expenditure incurred in relation to income not includible in total income (Disallowance) – Assessment year 2002-03 – Whether only that expenditure which is in relation to earning dividends can be disallowed under section 14A and rule 8D – Held, yes – Whether dominant purpose for which investment into shares is made by assessee may not be relevant as section 14A applies irrespective of whether shares are held to gain control or as stock-in-trade – Held, yes – Whether however where shares are held as stock-in-trade, main purpose is to trade in those shares and earn profits therefrom and, in process, certain dividend is also earned which is tax exempt under section 10(34); expenditure attributable to exempt dividend income will have to be appointed to be disallowed under section 14A – Held, yes [Paras 39 & 40] [Partly in favour of assessee]

II. Section 14A, of the Income-tax Act, 1961, read with rule 8D of the Income-Tax Rules, 1962 – Expenditure incurred in relation to income not includible in total income (Applicability of rule 8D) – Assessment year 2002-03 – Whether rule 8D is prospective in nature and could not have been made applicable in respect of assessment years prior to 2007 when this rule was inserted – Held, yes [Para 43][In favour of assessee]

16. We have considered the rival contentions and perused the relevant material on record. Admittedly, in the present case there were certain expenditure incurred by the assessee to earn the exempted income which have suo moto disallowed by the assess, The A.O. has rejected the contentions and explanations of the assessee without assigning any specific reasons for his dissatisfaction regarding rejecting the suo moto disallowance by the assessee and the disallowance was made by applying rule 8D. Therefore, by placing reliance on the judgment of Hon'ble Apex Court and Hon'ble Mumbai High Court in the cases referred to supra,

we hold that the disallowance made u/s 14A read with rule 8D of the income tax act is uncalled-for and is liable to be deleted and we do so. In the result ground no. 3 of the appeal of the assessee is allowed.

17. In the result, appeal of the assessee is partly allowed.

Order pronounced in the court on 24/04/2023.

**Sd/-
(RAVISH SOOD)**

न्यायिक सदस्य / JUDICIAL MEMBER

**Sd/-
(ARUN KHODPIA)**

लेखा सदस्य / ACCOUNTANT MEMBER

रायपुर/Raipur; दिनांक Dated 204/04/2023

Prakash Kumar Mishra, Sr.P.S(on tour)

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant-
2. प्रत्यर्थी / The Respondent-
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर/ DR, ITAT, Raipur
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(Assistant Registrar)

आयकर अपीलीय अधिकरण, रायपुर/ITAT, Raipur