

**IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR**

**BEFORE DR. M. L. MEENA, ACCOUNTANT MEMBER
AND SH. ANIKESH BANERJEE, JUDICIAL MEMBER**

I.T.A. No. 84/Asr/2023
Assessment Year: 2014-15

M/sTorrent Roofing Systems, C/o Sachin K Malhotra (Adv.), Phagwara Road, Hoshiarpur [PAN: AAHFT 1660L] (Appellant)	V.	Income Tax Officer, Ward-4, Hoshiarpur (Respondent)
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Appellant by Sh. P. N. Arora, Adv.

Respondent by Sh. Radhey Shyam Jaiswal, Sr. DR

Date of Hearing : 09.05.2023
Date of Pronouncement : 12.05.2023

ORDER

Per Dr. M. L. Meena, AM:

This appeal has been filed by the assessee against the order of the Ld. CIT(A) National Faceless Appeal Centre (NFAC), Delhi dated 31.01.2023 in respect of Assessment Year: 2014-15.

2. The assessee has raised the following grounds of appeal:

- “1. That the Assessing Officer as well as CIT (A) failed to pass an speaking order, which is against the provisions of laws, so the order passed by the CIT(A) as well as Assessing officer is bad in law and should quashed.
2. That the CIT(A) failed to consider the Ground No 2 and Ground no 3 filed before her, related to the question that whether 100% of Royalty paid should be considered as Revenue Expenses or 25% should be disallowed as done by Assessing officer, and did not consider the case laws in support of that, so the order passed by Assessing officer and CIT (A) should be quashed and 100 % of the Royalty Expenses may be allowed as Revenue expenses as claimed by the assessee.
3. That the Reassessment made by the Assessing officer U/s 143 (3) read with section 263 of Income Tax Act and confirmed by CIT (A) is bad in law, especially when there is no new material available with the Assessing officer and all the facts were duly verified by the Assessing officer while framing the assessment and same was brought to the knowledge of CIT(A), so the order passed by A.O and Confirmed by CIT(A) is against the provisions of law and should be quashed.
4. That the Disallowance made by the Assessing officer to the tune of Rs 67,60,50/- is against the provisions of law, so the order passed by the Assessing officer and Confirmed by the CIT(A) is against the provisions of law and should be quashed.
5. That the assessee seeks the permission to alter, add or amend any of the grounds of appeal.”

3. An adjournment application filed by the appellant on the same date, i.e. 09.05.2023, at the time of hearing is rejected for insufficient reasons and the Id. counsel Mr. P. N. Arora was directed to present the appeal for the assessee on merits.

4. Apropos ground No.1, the appellant challenged that the Assessing Officer as well as CIT (A) failed to pass an speaking order, which is against the provisions of laws, so the order passed by the CIT(A) as well as Assessing officer is bad in law and should quashed.

5. The AO being not Satisfied with the reply of the assessee, rejected the explanations given by the appellant and treated 25% of royalty expenses as capital expenditure and disallowed a sum of Rs.6,76,050/- out of the total royalty expenses of Rs 27,04,192/- u/s.40(1)(ia) of the Act. Aggrieved with the same, the appellant preferred the appeal before the CIT(A) who has confirmed the addition by summarily observing as under:

*“5. **DECISION:** I have gone through the submission of the appellant. Here, Ld. PCIT, Jalandhar has passed order u/s 263 of the Income Tax Act where proper reply of royalty charges worth Rs. 27,04,192/- was not investigated by the Assessing Officer. Hence, the order of the Assessing Officer was clearly erroneous and prejudicial to the interest of revenue.*

5.1 Hence, both the limbs of Malabar Industrial Co. Vs. CIT 243 ITR 83 (S.C.) are satisfied. Hence, the Assessing Officer is justified in making addition on the basis of judgment of Hon'ble Supreme Court in the case of Southern Switch Gear 232 ITR 359 (S.C.).

5.2 Hence, the order of the Assessing Officer is confirmed and the appeal of the appellant is dismissed.”

6. The Ld. Counsel for the appellant reiterated the submissions made before the Ld. CIT(A) as under:

That during the year we have paid the royalty to M/s Kamdhenu Ispat Ltd to the tune of Rs 2704192/- for the use of trade mark @ 1% of sales or minimum of Rs 200000/- per month, as per annexure-1 of the License user Agreement.

That the relevant extract of the Annexure -1 to the agreement is as under:

- 1) The Second Party shall use the KAMDHENU Trade Mark for sale of the Product in the state of Himachal Pradesh, Jammu & Kashmir, Punjab and Haryana by way of permitted use only (Territory).
- 2) The Second Party shall pay an amount of 1% of the basic sale price excluding excise duty plus Service Tax and/or any other tax which may be applicable towards use of KAMDHENU Trade Mark as royalty to the First Party regularly by 5th day of every English calendar month in respect of sales made during the immediate previous calendar month.
- 3) The above said royalty as mentioned in clause 2 of this Annexure shall be subject to minimum royalty of Rs 2, 00,000/- (Rupees two lacs only) per month plus Service Tax and/or any other tax which may be applicable towards use of KAMDHENU Trade Mark as royalty to the First Party regularly by 5th day of every English calendar month in respect of sales made during the immediate previous calendar month. The said minimum royalty shall be applicable from 01/12/2012.

It is clear from the extract of the agreement that we are paying the Royalty for the use of trade mark on the sales of product @ 1% on the total sales made during the month or minimum of Rs. 200000/- per month.

That we are not paying any lumpsum amount as Royalty for the buying of any technology or for the technical knowhow, we just pay the Royalty for use of trade mark on the product we manufacture and for that we are paying the royalty, based upon the sales made by us during the year.

The day agreement is finished among us we cannot use the trade mark and this has nothing to do with the technical know-how, so the version of the Pr. Commissioner and Assessing officer based upon the case law are not related to the facts of our case, and the disallowance made in our case is totally against the provisions of law and should be deleted.

That during the Proceedings U/s 143(3)/263 of Income Tax Act Learned Assessing office based upon the order of the Pr Commissioner of Income Tax has stated that the 25% of Royalty payment should be considered as Capital Expenditure and Disallowed the expenses to the tune of Rs 676050/- 25% of the total royalty paid in view of the Judgment of M/s Southern Switch Gear Ltd (232 ITR 359)

But the facts of our case are entirely different from the facts of the case law relied on by the Pr CIT and A.O.

We submitted many case law decided by Hon'ble courts in which it has been settled that if the right to use the trade mark terminates after the expiry of the agreement in those cases royalty should be allowed as revenue expenses, but the A.O without appreciating the case laws brought to his knowledge made the addition which is bad in law and should be quashed

That the facts of the case followed by the Pr Commissioner of Income Tax U/s 263 as well as by the Assessing officer in 143(3)/263 Proceedings are as under:

M/s Southern Switch Gear Ltd (232 ITR 359)

The assessee-company entered into a collaboration agreement with a foreign company by names Messrs. Brush Electrical Engineering Co. Ltd., U.K., December 12, 1963. Under the said agreement,

The foreign company agreed to provide the assessee-company

- a) Technical information in the manufacture of low tension switchgear, high tension switchgear, etc.,
- b) The right to sell such products.
- a) The foreign company also agreed to keep the Indian company posted with the latest and modern developments in the field of manufacture of switchgears and transformers
- b) And to train the necessary personnel at the U.K. factory, etc.

Under the said agreement, the assessee-company agreed to pay as consideration for the services rendered by the foreign company a lump sum of 20,000 sterling payable in five equal installments of 4,000 sterling each, the first

installment to be paid three months after the date of the agreement and subsequent payments at intervals of 12 months from the first payment.

In this case the company is training the employees of the company and sharing the technical information with the company and for providing these services he will be getting a lumpsum considering of 20000 ponds and it has nothing to do with the sales of the company.

The facts of our case are entirely different in our case we have to give 1% of sales to M/s Kamdhenu Ispat Limited for the use of trade mark of the company or Rs 200000/- per month for use of Trade Mark (Logo), the day agreement is not renewed between us we cannot use their trade mark.

In our case as we are not getting any technical knowhow, nor we are getting any services like training of our employees, we just have to give the Royalty for use of trade mark and royalty @ 1°C of the sales made during the month or Rs 200000/- per month, so the facts of our case are not at all related to the facts of M/s Southeren Switch Gear.

As the facts of the case law followed by A.O are totally different from the facts of our case so the addition made by Assessing officer based upon the case law are totally against the provisions of the law and should be deleted.

More over the legal position has been clarified by the various courts in this regard:-

a) Commissioner Of Income Tax, Noida, Gautam Budh Nagar V/s H-One India Pvt. Ltd.(Allahabad High Court)

In this case it has been held by the Hon'ble Court that Royalty and Fee for Technical Assistance are Revenue Expenditure and not Capital in nature: Allahabad HC.

b) M/s Hilton Roulunds ltd V /s Commissioner of Income Tax ITA 325/2005 (Delhi High Court)

c) Commissioner of Income Tax V/s Kanpur Cigarettes (P) Ltd (Allahabad High Court)

In all these cases it has been clarified by the Hon'ble courts that in the case like our where the right to use the trade mark terminates after the expiry of the

agreement and there sharing of any Technology or Technical knowhow in those cases royalty should be allowed as revenue expenses.

So considering the facts of the case in the light of the judgments passed by the various courts it is requested your good self that the addition made by the A.O should be deleted.

Now coming to application of Sec 263 and making the proceedings under section 143(3)/263 of Income Tax Act.

It is held by various courts that an order is not erroneous if it is not a case of “no inquiry”

If an order is passed after making inquiry on an issue and after having examined the replies of the Assessee with due application of mind, it is not the case where no inquiry was made. Therefore, such a case cannot be treated as a case of “no inquiry” and thus proceedings u/s 263 of the Act cannot be initiated in such a case. Further, an assessment order should not be subject to revision u/s 263 merely because another view is possible on the issue decided by the AO.

I would like to draw your kind attention to following judgments including that of the Supreme Court has decided this issue in favour of Assessee:

- Supreme Court in the case of Greenworld Corporation - [200G] 181 Taxman 111 (SC)
- Delhi High Court in the case of CIT v. Vodafone Essar South Ltd. - [2012] 28 taxmann.com 273
- Delhi High Court in the case of CIT v. Anil Kumar Sharma - [2010] 194 Taxman 504 (Delhi)

Lack of enquiry/no enquiry is different from inadequate enquiry and it is only in case of no enquiry by the AO, Pr. CIT/CIT can exercise jurisdiction u/s 263 of the Act and not in case where the AO has made enquiries as seems appropriate in the facts and circumstances of the case.

Similar proposition was upheld in the following rulings:

- Delhi Tribunal in the case of Braham Dev Gupta v. PCIT - [2017] 88 taxmann.com 831

In our case as the A.O has all the material available on record and he applied his mind, even he has asked for the TDS deposited receipts as per questioner dated nil whose reply was filed on 30/08/2016 so we cannot say that order is errors so Invoking the provisions of Sec 263 and making a fresh assessment is bad in law and should be quashed.

In has been held by many courts that if two views are possible- Revision is not valid

When the Assessing Officer takes one of the two views permissible in law and which the Commissioner does not agree with and which results in a loss of revenue, it cannot be treated as erroneous order prejudicial to the interest of revenue, unless the view taken by the Assessing Officer is completely unsustainable in law.

CIT v. Max India Limited [2007] 295ITR 282 (SC)

Malbar Industries Co Ltd v. CIT [2000] 243 ITR 83 (SC)

In our case also there are two different views possible, first the Royalty of the Revenue expenses as accepted by A.O in his first assessment U/s 143(3) and other view which has been taken by the Pr CIT without appreciating the facts of the case is that 25 % of these expenses to be capitalized" so the assessment framed U/s 143(3)/263 of Income Tax are against the provisions of law, so the order passed by Assessing officer U/s 143(3)/263 is bad in law.

So, considering the facts of the case in the light of the judgments passed by the courts, it is requested your good self that whole Royalty Expenses should be allowed as Revenue expenses and addition made by AO should be deleted."

7. Per contra, the Ld. DR stands by the impugned order, however, he has no objection in remanding the matter to CIT(A) in view of natural justice.

8. Heard rival contentions, perused the material on record, impugned order and written submission by the appellant. Admittedly, the CIT(A) has

dismissed the appeal of the assessee in cryptic and summary manner without even reiterating the ground of appeal raised by the appellant before him. The Grievance of the assessee has been pertaining to its claim of royalty as revenue expense but the Ld. CIT(A) has not even touched the word of royalty and thus, the issue of royalty claimed as a revenue expenditure, the peculiar fact of the instant case remain unaddressed by the Ld. CIT(A). It is noted that the CIT(A) has merely stated in its judgment that hence, both the limbs of *Malabar Industrial Co. Vs. CIT 243 ITR 83 (S.C.)* are satisfied. Hence, the Assessing Officer is justified in making addition on the basis of judgment of Hon'ble Supreme Court in the case of *Southern Switch Gear 232 ITR 359 (S.C.)*. However, the CIT(A) is liable to pass a speaking order on merits by rebutting the contention raised by the appellant before him and distinguishing the citations relied upon in support thereof. In our view, such a cryptic and non-speaking order of the CIT(A) is against the principles of natural justice and bad in law.

9. In the above view, we consider it deem fit to restore back the matter to the file of the Ld. CIT(A) to adjudicate the appeal afresh on the issue of claim of royalty expense after considering the written submission and evidences filed on record and may be filed before him during the fresh proceedings after granting sufficient opportunity of being heard to the

assessee. No doubts, the assessee shall co-operate in the afresh proceedings before the CIT(A).

10. In the result, the appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on 12.05.2023

Sd/-
(Anikesh Banerjee)
Judicial Member

Sd/-
(Dr. M. L. Meena)
Accountant Member

GP/Sr./P.S.

Copy of the order forwarded to:

- (1) The Appellant
- (2) The Respondent
- (3) The CIT
- (4) The CIT (Appeals)
- (5) The DR, I.T.A.T.

True Copy

By Order