IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : H : DELHI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

ITA No.813/Del/2022
Assessment Year: 2015-16

Brij Gopal Construction Company P. Ltd., A-7/2, Shivaji Apartment, Sector-14, Rohini, New Delhi – 110 085.	Vs	ACIT, Special Range-2, Delhi.
PAN: AADCB7702J		
(Appellant)		(Respondent)

Assessee by	:	Ms Monika Aggarwal, Advocate
Revenue by	:	Ms Princy Singhla, Sr. DR
Date of Hearing	:	10.05.2023
Date of Pronouncement	:	19.05.2023

ORDER

PER M. BALAGANESH, AM:

This appeal in ITA No.813/Del/2022 for AY 2015-16 arises out of the order of the Commissioner of Income Tax (Appeals)-24, New [hereinafter referred to as 'ld. CIT(A)', in short] in Appeal No.CIT(A), Delhi-2/10198/2019-20 dated 07.03.2022 against the order of assessment passed u/s 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 09.12.2017 by the ld. Assessing Officer, Spl. Range-2, New Delhi (hereinafter referred to as 'ld. AO').

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

"1 That the learned Commissioner of Income Tax (Appeals)-24, New Delhi has erred both in law and, on facts in not specifically directing to grant TDS to the extent of Rs. 42,64,541/- deducted on mobilization advance received by the appellant of Rs. 8,78,71,500/- from DDA, Ashok Vihar, Delhi Rs. 4,62,59,116/- from HSIIDC, Barwala and Rs. 7,90,96,469/- from DDRA (RRD 4).

1.1 That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that order dated 5.9.2019 u/s 154/143(3) of the Act is per se without jurisdiction and thus deserves to be quashed as such.

1.2 That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that the issue of taxability of mobilization advance is a debatable and not a patent mistake warranting action under section 154 of the Act and therefore, the order so made is otherwise too, legally unsustainable and hence deserved to be quashed as such.

Prayed- It is therefore, prayed that, order made u/s 154/143(3) of the Act be held to be without jurisdiction and further more credit of TDS of Rs. 42,64,541/- deducted on mobilization advance may please be allowed along with interest levied may kindly be deleted and appeal of the appellant company be allowed."

3. We have heard the rival submissions and perused the material available on record. The assessee is engaged in the business of civil construction and trading in securities. The return of income for the assessment year 2015-16 was filed by the assessee on 29.09.2015 declaring the total income of Rs.20,36,52,330/-. During the course of assessment proceedings, the assessee was asked to submit the reconciliation of income declared in the return of income with the statement in Form No.26AS. The ld. AO observed that the assessee had received mobilization advance of Rs.8,78,71,500/- from DDA Ashok Vihar; Rs.4,62,59,116/- from HSIDC, Barwala and Rs.7,90,96,469/- from DDA (RPD-4) on which total TDS amounting to Rs.42,64,541/- was deducted by those parties while granting mobilization advance to the assessee. Accordingly, this TDS figure of Rs.42,64,541/- was claimed in the return of income by the assessee as TDS credit even though the corresponding mobilization advance was not offered to tax in the return as it was not liable to be offered to tax. The ld. AO in the original assessment proceedings framed u/s 143(3)

on 09.12.2017 granted TDS credit as claimed by the assessee after determining the total income at Rs.20,36,52,326/- which is same as the returned income. The ld. AO, however, in the assessment order in para 4 had specifically stated that the assessee is not entitled for TDS credit of Rs.42,64,541/- in respect of mobilization advance. However, in the tax computation sheet, the ld. AO had granted the TDS credit as claimed by the assessee. In order to rectify this mistake, the ld. AO passed an order u/s 154 on 05.09.2019 withdrawing the credit of TDS in the sum of Rs.42,64,541/-. This action of the ld. AO was upheld by the ld. CIT(A).

4. We find that the issue in dispute is already decided in favour of the assessee by the coordinate Bench decision of this Tribunal in the case of ***Bikramjit Ahluwalia vs. JCIT, in ITA No.5842/Del/2013 for AY 2009-10 dated 11.05.2017*** wherein under identical facts and circumstances, on the very same issue in dispute before us, the Tribunal has decided in favour of the assessee. For the sake of convenience, the said order is reproduced hereunder:-

> *"2. Brief facts of the case are that the assessee is having business of civil construction and has shown income from house property and income from other sources apart from business. During the course of assessment proceedings, the assessee was asked to reconcile the gross receipts shown as per the profit and loss account with that of the gross receipts shown as per TDS certificate on which TDS credit was claimed by the assessee. On perusal of the details filed by the assessee, the Assessing Officer noticed that the assessee had claimed TDS credit on mobilisation advances received during FY 2008-09 relevant to assessment year 2009-10 but such advances were not credited to the profit and loss account by way of income. The Assessing Officer observed that the unadjusted mobilization advances during the year stood at Rs. 3,99,06,816/- on which TDS of Rs. 8,77,950/- was claimed by the assessee during the year. The Assessing Officer held that the TDS claimed of Rs. 8,77,950/- was not to be granted in the assessment year 2009-10 as per provisions of sub rule (3)(i) and (ii) of rule 37BA read with section 199 of the I.T. Act, 1961.*
>
> *3. Aggrieved, the assessee preferred an appeal before the ld. CIT(A) who dismissed the assessee's appeal and now the assessee is in appeal before the ITAT and has raised the following grounds of appeal:-*
>
> > *"1. That the Hon'ble Commissioner of Income Tax (Appeal) is not justified in sustaining arbitrarily the disallowance of TDS claim for*

Rs. 8,77,950/- made on Outstanding Mobilization Advance of Rs. 8,99,06,816/- as on 31st March 2009 for alleged is execution of work contracts is subsequent years. The deduction on Mobilization has all along been claimed and allowed in the year of deduction on the basis of the Consistent Method of Accounting regularly followed by the Appellant.

2. That the Mobilization Advance is primarily received against furnishing of Bank Guarantees in favour of the Payee Customer for execution of civil construction work. The Mobilization advance is being adjusted proportionality from time to time as per agreement on submitting of bills to clients for work executed. The payee has a right over bank guarantees to encash it on any issue such as cancellation of work order, stopping of work and even after partial execution of work without compensating for TDS deducted.

3. That the Provision of Sec 199 of Income Tax Act is an enabling provision for TDS Credit and is not a Computation Provision Section 199 permits assessee to claim TDS in the year of deduction where the consistent method of accounting has been followed and accepted by Assessing Officer in earlier years. During the year the amount of work executed Rs. 94,73,40,679/- far exceeds the amount of Mobilization Advance Received Rs. 8,90,18,261/- received during the year on which TDS is deducted of Rs. 20,17,104/-. So much so the TDS is further the deducted by the Clients on submission of bills for work done during the year. The disallowance is arbitrary.

4. That the assessment as framed is against law and facts of the case. It is prayed that the allowance of TDS credit of Rs. 8,77,950/- may be granted.

That the appellant craves leaves to add, to alter or amend the aforesaid grounds of appeal at the time of hearing of appeal."

4. At the outset, ld. AR submitted that the assessee's case was covered in favour of the assessee by the order of the ITAT, Visakhapatnam Bench in the case of ACIT Circle 2(1) vs Peddu Srinivasa Rao in ITA No. 324/Vizag/2009 vide order dated 3.3.2011.

5. Ld. DR placed reliance on the order of the Assessing Officer as well as the ld. CIT(A) but could not dispute the fact that the assessee's case was covered by the aforesaid order of the Visakhapatnam Bench of ITAT.

6. We have heard the rival submissions and have also gone through the relevant records. We agree with the contentions of the ld. AR that the assessee's case is covered in favour of the assessee by the order of the ITAT, Visakhapatnam in the case of ACIT vs Peddu Srinivasa Rao (supra). ITAT Visakhapatnam Bench

has discussed the issues at length in paragraphs 3, 4, 6, 8 and 10 of the impugned order. The relevant portions of these paragraphs are being reproduced for a ready reference:-

> *"3. …….this mobilization advance is in the nature of loan, on which interest @8% is chargeable as per the terms of sub-contract agreement. The mobilization advance is a capital receipt being in the nature of a loan and therefore, there was no legal obligation to deduct tax at source. However, M/s Gammon India Limited deducted tax at source in respect of such mobilization advance also…..*
>
> *4. ……..mobilization advance was granted to the assessee in order to enable it to deploy machinery and man power in sufficient quantity at the work site, awarded to the assessee. It was further contended that since the mobilization advance is not in the nature of income, no TDS can be deducted but it was however, deducted by M/s. Gammon India Limited. Therefore, the credit of the same is to be allowed to the assessee. The contentions of the assesses were examined by the CIT(A) and following the order of the Tribunal, Mumbai Bench in the case of Toyo Engineering India Limited, 5 SOT 616 directed the A.O. to allow the credit of TDS in the year under consideration.*
>
> *6. ……Undisputedly, the tax was deducted at the source on payment of the mobilization amount though this mobilization amount is merely an advance given to the assessee and not chargeable to tax. But once the tax is deducted on any payment made to the assessee, though it is not chargeable to tax, a credit of the same should be given to the assessees. …… mobilization amount would not be adjusted against one contract receipt. It would be adjusted in part in subsequent years whenever the subcontract bills were raised. Therefore, it would be very difficult to claim a proper set off of the TDS deducted in subsequent years in which no separate certificate would be issued. The certificate was issued in the year in which this mobilization amount was paid to the assessees. The Ld. Counsel for the assessee further contended that all these aspects were examined by the Tribunal in the case of Supreme Renewable Energy Limited Vs. ITO 32 DTR 140.*
>
> *8. ….As per amended provisions of section 199, in subsection 1, it has been stated that any deductions made in accordance with the foregoing provisions of this chapter and paid to the Central Government shall be treated as a payment of tax on behalf of the person from whose income the deduction was made. Therefore, as per the amended provisions, once the TDS was deducted, a credit of the same to be given to the assessees, irrespective of the year to which it relates……*

> *10. From a careful perusal of the legal propositions laid down through the aforesaid orders by the Tribunal and the relevant provisions of the Act, we are of the view that once the TDS was deducted and paid to the Central Government, a credit of the same should be given to the assessees in order to avoid all sorts of complications in the year of deduction of the TDS. Therefore, we find no infirmity in the order of the CIT(A) who has rightly directed the A.O. to allow the credit of the TDS in the impugned assessment year. Accordingly, the order of the CIT(A) is confirmed."*

7. In view of the aforesaid order of the ITAT, Visakhapatnam Bench, we set aside the order of the Ld. CIT(A) and direct the Assessing Officer to grant credit of TDS of Rs. 8,77,950/- .

8. In the result, the appeal of the assessee stands allowed."

5. Respectfully following the same, we direct the ld. AO to grant TDS credit of Rs.42,64,541/- to the assessee.

6. Since the relief is granted to the assessee on merits, we do not deem it fit to adjudicate the other grounds raised by the assessee on the aspect of this issue being debatable in nature and, hence, cannot be done in the proceedings u/s 154 of the Act. The said aspect of the issue is left open. Accordingly, the grounds raised by the assessee are allowed.

7. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 19.05.2023.

Sd/-	Sd/-
(SAKTIJIT DEY) JUDICIAL MEMBER	(M. BALAGANESH) ACCOUNTANT MEMBER

Dated: 19th May, 2023.

dk

Copy forwarded to :

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

Asstt. Registrar, ITAT, New Delhi