

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "B", MUMBAI**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA No.236/M/2023
Assessment Year: 2013-14**

Asst. Commissioner of Income Tax-4(1)(1), Room No.640, 6 th Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s. BBH Communications India Pvt. Ltd., 28, Dr. Ernest Borges Road, Parel, Mumbai-400 012 PAN: AADCB7259E
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Pratik Shah, A.R. &
Shri Yogesh Malpani, A.R.

Revenue by : Shri Parsoon Kabra, D.R.

Date of Hearing : 17 . 05 . 2023

Date of Pronouncement : 28 . 06 . 2023

O R D E R

Per : Kuldip Singh, Judicial Member:

The appellant, M/s. BBH Communications India Pvt. Ltd. (hereinafter referred to as 'the assessee') by filing the present appeal, sought to set aside the impugned order dated 02.12.2022 passed by the National Faceless Appeal Centre(NFAC) [Commissioner of Income Tax (Appeals), Delhi] (hereinafter

referred to as CIT(A)] qua the assessment year 2013-14 on the grounds inter-alia that :-

“1. On the facts and circumstances of the case and in law the CIT(A) erred in deleting the addition made by the AO on account of difference between income as per financials and income as per Form 26AS.

2. On the facts and circumstances of the case and in law the CIT(A) erred in deleting the addition on account of difference between income as per financials and income as per Form 26AS without appreciating the fact that the assessee has failed to furnish documentary evidences to substantiate its claim.

3. On the facts and circumstances of the case and in law the CIT(A) erred in not allowing a reasonable opportunity to the AO before taking into account additional evidences in the form of different reconciliation sheet as per rule 46A of I.T. Rules, 1962 without appreciating the fact that in the preceding Assessment Year in the assessee's own case remand report was called for to verify the submission of the assessee on similar issue.

4. On the facts and circumstances of the case and in law the CIT(A) erred in not appreciating the fact that the reconciliation sheet submitted before the CIT(A) was different from that of submitted before the AO during the course of assessment proceedings.

5. The appellant craves leave to amend or alter any ground or add new ground which may be necessary.”

2. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : the assessee being an advertising agency filed its return of income declaring total income at Rs.Nil. During the scrutiny proceedings the Assessing Officer (AO) noticed that there is a mismatch between receipts as reflected in form 26AS and the receipts in the books of accounts viz. the receipts as per 26AS were Rs.30,35,06,000/- as against the receipt shown in the P&L account at Rs.28,08,07,958/-. The assessee furnished reconciliation as required by the AO. Declining the submissions made by the assessee the AO proceeded to make an addition of Rs.2,26,98,042/- being the difference in receipt as per

26AS and P&L account and thereby framed the assessment under section 143(3) of the Income Tax Act, 1961 (for short 'the Act').

3. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has deleted the addition by allowing the appeal filed by the assessee. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the Revenue has come up before the Tribunal by way of filing present appeal.

4. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

5. We have perused the impugned order passed by the Ld. CIT(A) who has duly thrashed the facts on the basis of comprehensive submissions filed by the assessee explaining the difference/reconciliation of Rs.2,26,98,042/- in form 26AS vis-à-vis P&L Account which is extracted for ready perusal as under:

"At the outset, it is humbly submitted that the difference between the income as per Form 26AS and income amounting to INR 2,26,98,042 as per the audited books of accounts in the instant case are primarily on account of the following reasons:

- 1. Difference on account of service tax-INR 3,33,01,067*
- 2. Difference on account of income offered to tax by the Appellant in the ROI of the year but reflected in Form 26AS of next year-INR 1,52,83,936*
- 3. Difference on account of income offered to tax by the Appellant in the ROI of the preceding financial year or the subsequent year but reflected in Form 26AS of the year under consideration-INR 89,23,743.*
- 4. Difference on account of income offered to tax in ROI of the year under consideration but not reflected in Form 26AS-INR 33,63,251.*
- 5. Difference due to other reasons-INR 8,82,939.*

A copy of Form 26AS for the year under consideration is enclosed herewith as Annexure 4 for your goodself kind reference.

For case of reference, the below table captures the reconciliation of difference in Income in

Form 26AS vis-à-vis the amount shown in books of accounts for the year:-

<i>S.No.</i>	<i>Particulars</i>	<i>Amount (INR)</i>
<i>1</i>	<i>Income as per profit & loss account</i>	<i>28,08,07,958</i>
<i>2</i>	<i>Add: Difference on account of service tax (Refer Para 2.7 to 2.1 3)</i>	<i>3,33,01,067</i>
<i>3</i>	<i>Less: Difference on account of income during the year under consideration but reflected in Form 26AS of the next year (i.e. AY 2014-15) (Refer Para 2. 16 to 2.25)</i>	<i>(1,52,83,936)</i>
<i>4</i>	<i>Add: Difference on account of income offered in ROI of the preceding year (i.e. AY 2012-13) but reflected in Form 26AS of the year. (Refer Para 2. 14 to 2.23)</i>	<i>89,23,743</i>
<i>5</i>	<i>Less: Difference on account of income offered to tax in ROI for the year but not reflected in Form 26AS of the year. (Refer Para 2.24 to 2.25)</i>	<i>(33,63,251)</i>
<i>6</i>	<i>Add; Difference due to miscellaneous reasons (Refer para 2.26 to 2.27)</i>	<i>(8,82,939)</i>
<i>7</i>	<i>Income as per Form 26AS</i>	<i>30,35,02,642</i>

The factual and the legal submissions in respect of the above differences have been discussed in seriatim below:

Difference of INR 3,33,01,067 on account of service tax.

With regard to the above, it is humbly submitted that the difference of INR 3,33,01,067 represents the amount of service tax on which IDS has been deducted by the customers of the Appellant.

The details of service tax included in the income received by the Appellant in accordance with Form 26AS for the year under consideration is tabulated below for your Honour's kind consideration (copy of Form 26AS enclosed as Annexure 4):-

Sl.No.	Particulars	Income as per Form 26AS	Service tax portion included
--------	-------------	-------------------------	------------------------------

			in Income
1.	Acer India Private Limited	1,06,05,100	11,66,599
2.	Google India Private Limited	34,94,446	3,84,446
3.	Hindustan Unilever Limited	9,44,34,461	1,03,05,721
4.	TVS Motor Company Limited	1,64,60,194	18,10,680
5.	Bharti Telecom Limited	3,30,546	36,361
6.	Mario Limited	4,88,15,871	53,69,920
7.	Red Bull India Private Limited	85,36,418	9,39,036
8.	Diageo India Private Limited	2,38,25,185	26,20,855
9.	World Gold Council	1,26,02,590	13,86,330
10.	World Gold Council (India) Private-Limited	4,80,552	52,862
11.	Zoom Entertainment Network Limited	68,43,717	7,49,935
12.	Skoda Auto India Pvt. Limited	4,28,02,959	47,08,478
13.	Bharti Airtel Limited	3,42,70,201	37,69,844
	Total	30,35,02,643	3,33,01,067

The details of documentary evidence and information showing breakup of the difference of INR 3,33,01,067 on account of service tax is enclosed herewith as Annexure 5.

It is apposite to note that the service tax is accounted for by the Appellant in its books of accounts under an exclusive method of accounting wherein the service tax component is not routed through Profit and Loss account of the Appellant and is treated as a liability in the books of accounts of the Appellant. Under an exclusive method of accounting, the service tax received on the invoice does not form part of total turnover of the payee and is collected by the payee on behalf of the Government. Accordingly, under an exclusive accounting method, the service tax component is shown separately as a 'liability' in the books of accounts of the payee. In contrast, under an inclusive method of accounting, the service tax component forms part of total turnover of the payee and is subsequently claimed by the payee as an 'expense' in the Profit and Loss account for the year. Therefore, under both the methods of accounting, the net impact on the total income would be identical.

In view of the above, it is conspicuous that the service tax does not partake the character of "income" for the Appellant, irrespective of the accounting method followed. Accordingly, considering the Customers of the Appellant have inadvertently deducted the tax at source on the service tax portion and such service tax has also been deposited by the Appellant with the exchequer, the Appellant should be entitled to claim the credit TDS deducted on the same.

In light of the above, it is most respectfully submitted that the difference of INR 3,33,01,067 [referred in (A) above] on account of service tax could not be construed as "Income" of the Appellant for the year and hence, the addition made on account of this difference is palpably unsustainable and liable to be quashed. Furthermore, since the portion of service tax should ideally not have been subject to any TDS, the taxes erroneously deducted at source by the customers on the service tax component have been claimed by the Appellant as credit during the year under consideration.

Difference of INR 1,52,83,936 on account of Income offered during the year under consideration but reflected in Form 26AS of the next year (i.e. AY 2014-15) AND

Difference of INR 89,23,743 on account of Income offered in ROI of the preceding year (i.e. AY 2012-13) but reflected in Form 28AS of the year.

With regard to the above, the Appellant would like to humbly submit that the difference of INR 1,52,83,936 [referred in (B) above] forms part of the total Income offered to tax by the Appellant in the ROI for the year under consideration. However, the said income and the corresponding TDS is reflected in Form 26AS of the subsequent financial year (i.e. AY 2014-15).

Furthermore, the difference of INR 89,23,743 [referred in (C) above] represents the income of the Appellant which has already been offered to tax by the Appellant in the preceding financial year (i.e. AY 2012-13). However, the said income is reflecting in Form 26AS of the year under consideration.

The details of the documentary evidence and information showing the break-up of the difference stated in (B) and (C) above is enclosed herewith as Annexure 6.

Considering that there is no modification or variation in the applicable tax on the income of the Appellant for AY 2012-13, 2013-14 or AY 2014-15, the tax effect on the inclusion of income in the taxable income current year or preceding year or the subsequent year would be nugatory. Accordingly, the amount added on account of differences of INR 1,52,83,936 and INR 89,23,743 would be entirely academic since the revenue would not be deprived of any revenue and accordingly, the litigation on merits would be futile in the instant case.

In the instant case, the differences of INR 89,23,743 was offered to tax by the Appellant during the preceding year (i.e. AY 2012-13) but the said income was reflected in Form 26AS of the year consideration. Considering that the corresponding TDS credit on the said income (reflecting in Form 26AS of the captioned year) was not claimed by the Appellant in the preceding year (AY 2012-13), the Appellant has claimed the TDS credit for said income during the year under consideration by relying on the principles enunciated by Hon'ble Delhi Tribunal (supra).

In view of the above, it is most respectfully submitted that differences mentioned in (B) and (C) above represents the timing difference of income offered by the Appellant during the year in its books of accounts vis-a-vis the amount of income shown in Form 26AS for the year under consideration and the corresponding TDS on the amount of Income [referred in (C) above] has been claimed by the Appellant during the year under consideration in accordance with the provisions of section 199 of the Act read with Rule 37BA of the Rules.

Difference of INR 33,63,251 on account of Income offered to tax in ROI for the year but not reflected in Form 26AS of the year.

With regard to the above, it is humbly submitted that the Appellant had earned an income of INR 33,63,251 through export of services during the year under consideration which was offered to tax by the Appellant in ROI for the year. However, since such income was not subjected to TDS, this income did not reflect in Form 26AS for year under consideration, thereby resulting in a difference in income in the account reported in the books of accounts vis-a-vis the income appearing in Form 26AS for the year.

For ease of reference, the details of the documentary evidence and information showing the break-up of the difference stated in (D) above is enclosed herewith as Annexure 7.

Difference of INR 8,82,939 due to miscellaneous reasons

With regard to the above, it is humbly submitted that the difference of INR 8,82,939 is on account of provisions of expenses created by the Customers of the Appellant as well as the reimbursement paid to the Appellant during the year under consideration on which taxes have been deducted at source by the customers.

For ease of reference, the details of the documentary evidence and information showing the break-up of the difference stated in (E) above is enclosed herewith as Annexure 8.”

6. The Ld. CIT(A) then has duly dealt with the reasons for difference of Rs.2,26,98,042/- as pointed out by the AO in the assessment order as under:

“4.2 It could be seen from the above explanation of the assessee that this was already presented to the AO at the time of assessment. There are five items of reconciliation which are discussed as follows.

(i) It is seen that the sum of Rs. 3,33,01,067 is a difference on account of service tax which was included in the receipts as per Form 26AS. The clients of the assessee have deducted tax at source on not only the principal amounts paid to the assessee but also on the service tax component. On the other hand, the assessee is following the exclusive system of accounting meaning thereby that the indirect tax component is not routed through the ^P&L A/c either as income or expense. This being the case, the difference between Form 26AS and the books of accounts to Rs.3,33,01,067 is duly explained.

(ii) The 2nd item difference is Rs. 1,52,83,936 on account of income offered by the assessee in the present AY 2013-14 but reflected in Form 26AS of the subsequent AY 2014-15. There is another item of

income of Rs 89,23,743 which is income offered in AY 2012-13 but reflected in Form 26AS for the present AY 2013-14. The assessee has filed evidence before me as mentioned in his written submissions to prove the claim that the income amounting to Rs. 1,52,83,936 has been accounted in the present AY 2012-13 but receipts are reflected in Form 26AS of AY 2014-14. Similarly, the assessee has filed evidence regarding his claim that Rs 89,23,743 is income offered in AY 2012-13 but reflected in Form 26AS of this year. The discrepancies to the extent of Rs. 1,52,83,936 & Rs 89,23,743 are therefore duly explained.

(iii) The assessee has also claimed that a sum of Rs.33,63,251 which is income offered during the year but not reflected in Form 26AS as there was no TDS made on these receipts by the payees, as these were for export of .services. As this amount was received in foreign currency without deduction of tax, the same did not appear in Form 26AS, but was duly accounted as income in the books. The explanation of the assessee reproduced above on these two issues is self-explanatory and therefore this reconciliation is in order.

(iv) Lastly, the assessee has pointed out that there was a difference of Rs. 8,82,939 which is on account of provisions for expenses created by his clients as well as reimbursement made to him on which TDS has been deducted. In this regard also, the submissions of the assessee are self-explanatory.

5. After due consideration of the facts and the submission of the assessee reproduced above, I am of the view that the assessee has sufficiently explained the discrepancy of Rs. 2,26,98,042 and therefore this addition is deleted. Ground 1 is accordingly allowed.”

7. It is brought to the notice of the Bench by the Ld. A.R. for the assessee that identical issue as to the difference in income declared by the assessee in P&L account and TDS declared vis-à-vis gross revenue declared as per form 26AS amounting to Rs.25,10,18,425/- in assessee's own case for A.Y. 2012-13 has also been decided by the Tribunal in ITA No.09/Mum/2022 dated 27.03.2023 in favour of the assessee.

8. In view of the matter, we are of the considered view that from the undisputed facts brought on record it is proved that the major difference of Rs.3,33,01,067/- is on account of service tax

which was included in the receipt as per form 26AS on which the clients of the assessee have deducted tax at source, not only on the principle amounts paid to the assessee but also on the service tax component. Moreover, the assessee is following exclusive system of accounting which is otherwise not disputed by the department vide which indirect tax component is not routed through the P&L account neither as income nor as expense.

9. As discussed in the impugned order the second difference of Rs.1,52,83,936/- is on account of the income offered by the assessee in the year under consideration which is reflected in form 26AS of the subsequent assessment year 2014-15. Another income of Rs.89,23,743/- which is income offered in 2012-13 but reflected in form 26AS for the year under consideration is duly explained from the evidence led by the assessee having been offered in A.Y. 2012-13 but reflected in form 26AS of the year under consideration.

10. Another disputed amount of Rs.33,63,251/-, income offered during the year but not reflected in form 26AS as there was no TDS made on this receipt by the payees as this was for export of services. So when the amount in question was received in foreign currency with deduction of tax the same is not required to be shown in form 26AS but duly accounted in the books of account hence stood explained by the assessee on record. Another difference of Rs.8,82,939/- is on account of provisions for expenses created by his client as well as reimbursement made to him on which TDS was deducted is also duly explained by the assessee in

annexure-8 which is duly thrashed and got reconciled with the books of account of the assessee.

11. From the grounds raised by the Revenue in the present appeal it is apparent on record that the only grievance of the Revenue was that when the additional evidence in the form of reconciliation sheet has been taken on record, provisions contained under rule 46A of IT Rules need to be complied with by providing opportunity of being heard to the assessee. We are of the considered view that the assessee has brought on record reconciliation of the account as extracted by the AO in para 4.2 of the assessment order but before the Ld. CIT(A) the assessee has filed comprehensive explanation and reconciliation to decide the issue in question. When the Ld. CIT(A) has coterminous power there was no need to call for the remand report from the AO moreover the issue was pertaining to reconciliation of the account only which stood reconciled as duly explained in the impugned order by the Ld. CIT(A).

12. Consequently, we find no infirmity or perversity in the impugned order passed by the Ld. CIT(A), hence appeal filed by the Revenue is hereby dismissed.

Order pronounced in the open court on 28.06.2023.

**Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER**

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated: 28.06.2023.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.