IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A', NEW DELHI

Before Sh. Saktijit Dey, Vice President

Dr. B. R. R. Kumar, Accountant Member

ITA No. 1198/Del/2016 : Asstt. Year: 2011-12

Ameriprise India Pvt. Ltd., 50/9, 1st Floor, Tolstoy Lane, Janpath, New Delhi-110001	Vs.	DCIT, Circle-2(2), New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAFCA3489B		

Assessee by : Sh. Kamal Sawhney Adv. &
Sh. Nikhil Agarwal, Adv.
Revenue by : Sh. P. Praveen Sidharth, CIT DR

Date of Hearing: 20.04.2023		**Date of Pronouncement: 17.07.2023**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order dated 27.01.2016 passed by the AO u/s 143(3) r.w.s. 144C(1) of the Income Tax Act, 1961.

2. Following grounds have been raised by the assessee:

"1. Ground No. 1- Disallowances of lease rental payments.

1.1 On the facts and circumstances of the case and in law, the learned DRP/AO has erred in making disallowance under section 37(1) of the Act on account of lease rental payments, amounting to Rs 3,244,083, paid by Appellant to a non-resident party.

2. Ground No. 2- Addition on account of pre-operative expenses.

2.1 On the facts and circumstances of the case and in law, the learned DRP/AO has erred in making disallowance of Rs 11,278,603 towards expenditure incurred by Appellant for the purpose of its mutual fund operations.

2.2 On the facts and circumstances of the case and in law, the learned DRP/AO has erred in not appreciating the fact that mutual fund operations of Appellant are an extension of its existing business activities and hence, deduction for expenses incurred in relation to such operations should be allowed to Appellant.

2.3 On the facts and circumstances of the case and in law, the learned DRP/AO has erred in concluding that the Appellant has failed to prove that the business activities were actually carried out and the expenses have been incurred in connection with earning of income.

3. Ground No. 3- Non-grant of full credit in respect of Tax Deducted at Source (TDS) and advance tax.

3.1 On the facts and in the circumstances of the case and in law, the learned AO has erred in granting credit for TDS of Rs 3,96,924 only against Rs 5,60,724 claimed by the Appellant in its return of income filed for the subject AY.

3.2 On the facts and in the circumstances of the case and in law, the learned AO has erred in granting credit for advance tax of Rs 2,18,00,000 only against Rs 2,53,00,000 claimed by the Appellant in its return of income filed for the subject AY.

The Appellant has filed a rectification application before the learned AO for rectification of the above mistakes and the aforesaid ground shall not be pressed where the application is allowed by the learned AO,

4. Ground No. 4-Levy of interest under section 234C of the Act

4.1 On the facts and circumstances of the case and in law, the learned AO has erred in charging interest under section 234C of the Act.

The Appellant has filed a rectification application before the learned AO for rectification of the above mistake and the aforesaid ground shall not be pressed where the application is allowed by the learned AO

5. Ground No. 5- Initiation of penalty proceedings under section 271(1)(c)

5.1 On the facts and circumstances of the case and in law, the learned AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act against the Appellant on account of the above adjustments made in the assessment order."

3. Heard the arguments of both the parties and perused the material available on record.

4. The appeal filed by the assessee mainly consists of two grievances namely, disallowance of lease rental payments of Rs.32,44,083/- and addition on account of pre-operative expenses of Rs.1,12,78,603/-. These issues have been discussed at page no. 53 of the 54 pages order of the ld. DRP. For the sake of ready reference and convenience, the said order of the ld. DRP is reproduced as under:

"22. Corporate Issues

22.1 Disallowance of rentals, amounting to Rs. 3,244,083, paid by AIPL to a non-resident

The assessing officer pointed out that the assessee had claimed an expense of Rs. 32,44,083/- on lease rent payment for property taken on rent in US. It was claimed that the property was taken on rent in USA for stay of employees travelling for business meetings.

However, no details in respect of addresses and names of persons to whom payments had been made, the purpose for which the property was taken on rent and the details of employee for whom the property was rented out was not provided by the assessee. In absence of these details the assessing officer held that the assessee has unable to establish that the expense was wholly and exclusively for the purpose of business. The assessing officer therefore, disallowed the payment on account of lack of evidence and also on account of non-deduction of TDS by invoking provisions of section 40(a)(i). As per the provisions of section 195 of the Act, the primary condition for applicability of withholding tax provisions from payment made/credited to a non-resident is that the income is chargeable to tax under the provisions of Act. Accordingly, in case the payments made are not chargeable to tax under the provisions of the Act, there will be no liability to deduct tax at source and accordingly, the provisions of section 195 of the Act will not be applicable.

Since, the payment has been made outside India to a non-resident, the provisions of section 40(a)(i) cannot be invoked, however, as the assessee has been unable to show the genuineness of the payment, provide supporting evidence in respect of incurring the expense and give conclusive proof that the expense has been incurred wholly and exclusively for the purpose of business, the proposed addition by the assessing officer is upheld.

22.2 Disallowance of expenditure amounting Rs.11,278,603 Incurred by AIPL for the purpose of its mutual fund operations

The assessee has claimed business loss amounting to Rs.1,12,78,603/-, On enquiry by the assessing officer it was revealed that some of Rs. 146,49,401/- had been debited on account of pre-operative expense relating to mutual fund operations. The assessing officer held that the business activity relating to mutual fund

operation had not started during the year and only pre-operative expenses in respect of commencement of new line of business were claimed by the assessee. The perusal of the facts show that the expenses claimed by the assessee are not linked to the normal line of business being carried on by the assessee. The assessee is venturing into a new line of business, for the purpose of which it has incurred initial expenses which have been claimed as a loss. The new business has still not commenced. As the business has not commenced, therefore, the expense related to it cannot be claimed as a business expense. The addition proposed by the assessing officer is therefore, upheld."

Lease Rentals:

5. We find that the assessee is a company incorporated on 18th August 2005 under Companies Act, 1956, and is a subsidiary of Ameriprise Financial Inc, USA ("Ameriprise USA") which is engaged in the business of providing Information Technology enabled back-office services to its associated enterprises.

6. During the Assessment Year, the assessee incurred expenditure towards rental payments made to a non- resident, CSM Executive Lodging LLC ("CSM), towards property taken on rent in US for stay/ accommodation of employees travelling to USA for business purposes. The assessee claimed this expenditure as allowable expenditure under section 37(1) of the Indian Income-tax Act, 1961. The AO in the Draft Assessment Order dated 27.01.2016 disallowed such expenditure on the ground that the Petitioner failed to furnish any evidence as to what the expenditure was, why was it incurred and to whom the

payments were made. The said order of the AO has been affirmed by the ld. DRP.

7. We have gone through the documents produced by the assessee pertaining to allowability of lease rental expenses namely,

- Copy of confirmation letter from the Human Resource department confirming the list of employees together with their designations as on March 31, 2011.
- Copy of tax residency certificate for CSM Executive Lodging LLC ("CSM").
- Copy of No Permanent Establishment Certificate from CSM.
- Copies of Form 15CAs, including the invoices raised by CSM on AIPL duly mentioning the names of the employees
- Form 15CBs (accountants certificate) obtained by AIPL while making the above remittance.

8. Hence, keeping in view the fact that the lease rentals have been indeed paid for the accommodation of the employees and the recipient is a tax resident of USA with no PE in India, we hold that no disallowance is called for under this head.

Pre-operative Expenses:

9. The relevant facts are that the assessee was incorporated on August 18, 2005 and was engaged in provision of IT-enabled back office services to its parent company, Ameriprise Financial Inc. (AFI). The assessee commenced providing these services in October 2005. IT-enabled back office services provided by the assessee to AFI include a range of services in the nature of

finance support, financial planning, data analytics, vendor management etc. The assessee extended its business to providing financial consultancy and investment advisory in relation to mutual fund investments by amending its Memorandum of Association vide special resolution passed by the shareholders in its extraordinary general meeting held on August 26, 2010. The assessee claimed the expenses pertaining to financial consultancy and investment advisory in relation to mutual fund investments as a deductible revenue expenditure. However, these expenses were disallowed by the AO on the ground that the said expenses were pre-operative expenses, and an addition of Rs.1,12,78,603/- was proposed. The said addition was upheld by the ld. DRP on the same ground that the said expenses were pre-operative expenses, and therefore, not allowable.

10. The assessee submitted before the AO that the business of financial advisory was a mere extension of existing business and not venturing into a new line of business. It was submitted that the test to determine whether two businesses are same or not is not the nature of business operations, but whether the two businesses are interconnected, inter-laced or interdependent. Such interconnection, interlacing is demonstrable through common management, common business organization, common administration, common funds etc.

11. The ld. AR placed reliance on the Hon'ble jurisdictional High Court decision in Jay Engineering Works Ltd. vs. CIT, (2008) 166 taxman 115 wherein assessee engaged in manufacturing fans and sewing machines at various units including Hyderabad, expanded its activities and undertook a

fuel injection equipment project in Hyderabad during the year. The High Court after referring to a series of judgments, held that when there was common management, unity of control, and common funds, it was merely an expansion of the existing business and therefore, expense in relation to the project was allowable as revenue expenditure. Relevant para has been reproduced below:

"On an appreciation of the law laid down by the various decisions referred to above, it is clear that the nature of the new business is not a decisive test for determining whether or not there is an expansion of an existing business. The nature of the business could be as distinct as a jewellery business and a business of cinematographic films: it could be as different as manufacture of metal alloys and manufacture of rubber products. What is of importance is that the control of both the ventures, the existing venture as well as the new venture, must be in the hands of one establishment or management or administration. The place of business of the existing business and the new business may not be in close proximity it could be as far apart as Baroda and Bangalore. However, the funds utilised for the management of both the concerns must be common as reflected in the balance sheet of the company."

12. The Hon'ble Supreme Court judgment in the case of CIT vs. Prithvi Insurance Co. Limited (1967) (63 ITR 632) (SC), held as under:

"*A fairly adequate rest for determining whether the two constitute the same business is furnished by what Rowlett said in Scules vs. George Thompson & Co. Ltd [1927] 13 Tax Cas 83:*

"Was there any inter-connection any inter-lacing, any inter-dependence, any unity at all embracing those two businesses?"

That inter-connection inter-lacing inter-dependence and unity are furnished in this case by the existence of common management, common business organisation, common administration, common fund and a common place of business."

13. The said decision was followed by the Supreme Court in Product Exchange Corporation Ltd. Vs. CIT (1970) 77 ITR 739 (SC)

14. Reliance in this regard is also placed on the Hon'ble Supreme Court decision in the case of B.R. Limited Vs. Gupta (VP) (113 ITR 647) wherein it was held as under:

"In support of his conclusion that the two businesses are different, the Commissioner relies on the circumstances that "there is a distinct and marked difference in the nature of goods dealt with" by the appellant and the procedure involved in the import of articles from foreign countries and the export of articles manufactured in India to different foreign countries is entirely different". These circumstances are not by themselves sufficient to establish that the business of import which the appellant was doing is not the same business as that of export The decisive test, as held by this court in Produce Exchange Corporation [1970] 77 ITR 739 (SC) is unity of control and not the nature of the two lines of business. The Commissioner also fell into the error of supposing that, apart from the fact that the two activities must form an integral part of the entire business, the "main consideration which has to prevail is" whether, "notwithstanding the fact that the assessee may close one activity, it does not interfere in the carrying on of the other activity" The fact that one business cannot conveniently be carried on after the closure of the other may furnish a strong indication that the two businesses constitute the same business. But the decision of this court in Prithvi Insurance Co. [1967] 63 ITR 632 (SC) shows that no

decisive inference can be drawn from the fact that after the closure of one business, another may or may not conveniently be carried on."

15. Therefore, we hold that on the basis of the above decisions, it is evident that the decisive test to determine if the two businesses of the assessee (IT enabled support services and financial consultancy and investment advisory in relation to mutual fund investments) constitute the same business or not, is not the nature of two businesses but whether two businesses are inter-connected and inter-dependent, which can be demonstrated through existence of common management common business organizations, common funds, etc. Since, there is a complete unity of control, management and funds between the IT-enabled services and financial consultancy and investment advisory in relation to mutual fund investments, carried out by assessee be construed as "one business" of the assessee. Hence, keeping in view the ratio laid down by the Hon'ble Apex Court, we hold that the directions of the ld. DRP cannot be supported.

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

Order Pronounced in the Open Court on 17/07/2023.

Sd/-	Sd/-
(Saktijit Dey)	**(Dr. B. R. R. Kumar)**
Vice President	**Accountant Member**

Dated: 17/07/2023

Subodh Kumar, Sr. PS

Copy forwarded to:

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

ASSISTANT REGISTRAR