IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B': NEW DELHI

BEFORE,
SHRI N. K.BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER

ITA No.3249/Del/2019
(ASSESSMENT YEAR 2015-16)

Dy.CIT Circle-27(1) New Delhi	Vs.	M/s UK India Business Council India Pvt. Ltd. UKIBC, Space Tower 9A Level-16, DLF, Cyber City, Phase-II Gurgaon-122 002 (Haryana) PAN-AABCU 2039M
(Appellant)		**(Respondent)**

Appellant by	Mr. Vivek Kumar Upadhyay, Sr. DR
Respondent by	Ms. Ishita Farsaiya, Advocate

Date of Hearing	09/08/2023
Date of Pronouncement	18/08/2023

ORDER

PER YOGESH KUMAR U.S., JM:

This appeal by Revenue is filed against the order of Learned Commissioner of Income Tax (Appeals)-9, New Delhi ["Ld. CIT(A)", for short], dated 31/01/2019 for Assessment Year 2015-16.

2. Grounds taken in this appeal are as under:

1. "Whether on facts and in the circumstances of the case and in law, , the Ld CIT(A) is justified in deleting addition of Rs. 2,55,84.606- made by the AO on account of facility management service."

2. "Whether, on facts and in the circumstances of the case and in law, the Ld. CIT(A) is justified in deleting addition of Rs. 3,83,11,935/ claimed by the assessee as allocation of expenses since the assessee company was not generating any Revenue"

3. "Whether, on facts and in the circumstances of the case and in law, the Ld. CIT(A) is justified in deleting addition of Rs. 7,52,685/- made u/s 36(1)(vii) of the Act as the assessee has not proved its sincere efforts to recover the bad debts."

4. "Whether, on facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of Rs.26,409/- made by the Assessing Officer for delayed payment of provident fund and ESI, by holding that these payment were made by the assessee before filing of return replying on the judgment of jurisdiction High Court given in the case of CIT vs. AIMIL. Ltd. without appreciating the judgment given by the Hon'ble High Court in the case of M/s. Unifac Management Services India Pvt. Ltd. vs. The Deputy Commissioner of Income Tax, Cooperation Circle-3(2), WP No. 5264 of 2018 (Madras), CIT-2, vs. Gujrat State Road Transport Cooperation (2014) 366 ITR 170 (Guj) and CTT vs. Merchem Ltd. (2015) 280 CTR 381 (Kerala) and CBDT's Circular No. 22/2015 dated 17.12.2015."

5. "The appellant craves, leave or reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of the appeal."

3. Brief facts of the case are that, the assessee was engaged in business of promoting and investment between UK and India by providing resource and research consultancy, business support, proprietorship, corporate membership and associate membership. The assessee filed return of income declaring a loss of Rs. 3,63,20,404/- and the case was selected for scrutiny u/s 143(3) of the Act on 22/12/2107 by making following disallowances:-

"Disallowance under the head "facilities management charges	*Rs.25584606/-*
Disallowance of expenses incurred	*Rs.38311935/-*
Disallowance of expenses claimed as bad debts	*Rs.752685/-*

Disallowance of late deposit of PF & ESI	*Rs.26409/-*
Disallowance of interest received on incometax refund	*Rs.9581/-*
Disallowance of prior period expenses	*Rs.87244/-"*

4. Aggrieved by the assessment order dated 22/12/2017, the assessee preferred an appeal before the CIT(A). The Ld. CIT(A) allowed the Appeal filed by the assessee by deleting the addition of Rs. 2,55,84,606/- made by the A.O. on account of Facility Management Service, deleted the addition of Rs. 3,83,11,935/- claimed by the assessee as allocation of expenses, deleted the addition of Rs. 7,52,685/- made u/s 36(1)(vii) of the Act and further deleted the disallowance of Rs. 26,409/- made by the A.O. for delayed payment of PF & ESI. Aggrieved by the order of the CIT(A) the Revenue preferred the present Appeal on the grounds mentioned above.

GROUND NO. 1

5. Ground No. 1 is regarding deletion of addition of Rs. 2,55,84,606/- made by the A.O. on account of Facility Management Services. During the assessment proceedings, the Ld. A.O. made the above addition in following manners:-

> *"The contention of the assessee was perused but not found acceptable as the assessee company is engaged of business of promoting bilateral trade & investment between UK & India by providing services of Research/Consultancy, Business support, Membership, Corporate Membership & Associate membership & the said expense is being incurred for facilitating subletting by the assessee company. Moreover, the business agreement between the assessee company & M/s. Pacific Business Centre Pvt. Ltd. are so*

worded that it gives business advantage to PBC. As per clause 7 of the agreement, assessee shall pay lease rental to the lesser, a security deposit & subsistence amount to PBC. The subsistence amount has been identified in clause 1.1 as the cost incurred by PBC for the performance, execution & implementation of the business centre arrangement & the business centre facilities arrangement including the rent, salaries payable to PBC staff, payment to service provider, overheads, consumables etc. less the user fee received by PBC from the users. This definition itself shows that the agreement was entered on the premise that the expenditure would exceed the user fee collected. The termination clause of the agreement requires the company to restore the property to the same condition as it was prior to the lease agreement. Based on a technical evaluation carried out by a firm of Architects, the estimated cost of restoring the property to its original condition at the time of termination of lease agreement is Rs. 79,20,740/-. The fact that almost the entire expenses of UK India Business Council barring a few have been made to PBC or its related entities controlled by the common directors payment of exorbitant sums to PBC; hiring Mayaland as recruitment agency, when the business of Mayaland is involvement in real estate, lends credence to the finding that the payment of facilitation charge by the assessee company to the M/s Pacific business Centre Pvt. Ltd is nothing but colourable device to buy losses by the assessee company.

(Addition of Rs. 2,55,84,606/-)"

6. The Ld. Departmental Representative has relied on the above findings of the A.O. and submitted that the order of the CIT(A) has committed error in deleting the above addition which required to be reversed.

7. Per contra, the Assessee's Representative submitted that the action of the A.O. based on analyzing the agreement by applying the yardstick of business expediency and commercial prudence and the action of the A.O. has resulted in challenging the business expediency and commercial prudence of assessee. The agreement was entered into with an unrelated party in the ordinary course of business and finding fault in the same is beyond the power vested with the A.O. By relying on the findings of the CIT(A) the ld. Assessee's Representative sought for dismissal of the above ground.

8. We have heard both the parties and perused the material available on record. It is admitted fact that the assessee had entered into an agreement with PBC which was to set up and managed its co-working spaces and in which there was a specific system of sharing of cost and Revenue. The agreement was admittedly entered into with an unrelated party and the same was claimed to have been executed with an intention of further business activities of the assessee in the long run and contribute to its revenue and profits. The action of the A.O. was based on analyzing the agreement by applying the yardstick of business expediency and commercial prudence, accordingly, the A.O. held the same to be colorful device to buy loss by the assessee company. The CIT(A) on analyzing the facts also found that the agreement with PBC was between two independent unrelated parties on an Arm's length basis. To question any agreement on the ground of business expediency or prudence of an agreement entered with the independent

unrelated party during the ordinary course of business which is beyond power vested on the A.O. The Hon'ble Courts have time and again held that when an attempt by the Department to judge any transaction by applying yardstick of business expediency or commercial prudence has not found favour of the Revenue. The Hon'ble Supreme Court in the case of SA builders Ltd. Vs. CIT(A) (2007) 288 ITR 1 (S.C) held as under:-

> "*We agree with the view taken by the Delhi High Court in CIT vs. Dalmia Cement (Bhart) Ltd. (2002) 254 ITR 377 that once it is established that there was nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize its profit. The income tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own view point but that of a prudent businessman. As already stated above, we have to see the transfer of the borrowed funds to a sister concern from the point of view of commercial expediency and not from the point of view whether the amount was advanced for earning profits."*

9. Further we observed that the Assessing Officer in scrutiny process u/s 143(3) of the Act for Assessment Year 2014-15 allowed the Facility Management Charges to the assessee company. There is no change in the facts and circumstances of the case to warrant a different view in the year

under Appeal. Therefore, in our considered opinion, the Ground No. 1 of the Revenue is devoid of merit. Accordingly, the Ground No. 1 of the Revenue is dismissed.

GROUND NO. 2

10. Ground No. 2 is regarding disallowance of Rs. 3,83,11,935/- claimed by the assessee as allocation expenses.

11. The Ld. Departmental Representative vehemently submitted that the expenses claimed by the Mumbai & Bangalore Branches under the head of conveyance and travelling expenses reported and maintenance etc. cannot be viewed as revenue expenses but the same are capital as the Revenue from operations/income from Mumbai and Bangalore Branches are NIL.

12. Per contra, the Ld. Assessee's Representative submitted that the entire expenditure incurred and claimed by the assessee is revenue in nature since the same have been incurred after commencement of business and necessary for it to carry on business activity which are to run a business centre. The Ld. Assessee's Representative relying on the findings and conclusions of the CIT (A) submitted that the Ground No. 2 of the Revenue is liable to be dismissed.

13. We have heard both the parties and perused the material available on record. The assessee company operates with its head office located at Gurgaon and Branches at Mumbai and Bangalore. It also operates with unified structure for the head office and Branches with a common management and

complete unity of control, inter communication, business organization and management. Merely because no revenue were recorded in the books of the branches, cannot lead to a conclusion that those branches are not carrying out any business. It is settled law that once a business has been set up, the entire revenue expenditure incurred is allowable irrespective of whether any revenue is generated there from or not. It is not in dispute that the entire expenditure has been incurred by the assessee company on running its business irrespective of head office or branches. It is not the case that the Branches of Mumabi and Bangalore are independent undertaking/unit for which independent balance sheet required to be drawn. In-fact, the nature of the expense which inter alia includes expenses like repair and maintenance has not been found to be capital in nature, whereas travelling expenditure cannot be held to be capital expenditure. In view of the above, we find no merit in Ground No. 2 of the Revenue and find no error or infirmity in the order of the CIT(A) in deleting the said addition. Accordingly, Ground No. 2 of the Revenue is dismissed.

GROUND NO. 3

14. Ground No. 3 is regarding disallowance of expenses claimed as Bad Debts of Rs. 7,52,685/- made by the A.O. on the ground that the assessee could not produce any documentary evidence to show that the amount became Bad Debts and added the same to the income of the assessee in terms of Section 36(1)(vii) of the Act. It is the case of the assessee that the amount of Rs. 7,52,685/- could not be recovered from "I Love British and claimed as Bad

Debts. The assessee had provided services of "I Love British" for the Financial Year 2013-14, in which the same was considered as revenue and amount recoverable as Sundry Creditors. However, company had made full effort to recover the amount and sent various communications for such recovery, though the Company could not recover the amount despite of continuous reminders and follow up, finally the same has been considered as Bad Debts and claimed as expenses. Considering the fact that the assessee company had made full effort to recover the amount and sent various communications for such recovery, but could not recover the same despite continuous follow up and reminders and the said debt has been written off in its account which meets requirement of provision of Section 36(1)(iii) of the Act. In view of the factual matrix of this grounds and with the support of judicial precedents in the case of Commissioner of Income-tax Vs. Morgan Securities and Credits Pvt. Ltd. [(2007) 292 ITR 339 (Delhi) and T.R.F. Ltd. Vs. Commissioner of Income-tax {(2010) 323 ITR 397(S.C)., we find no error or infirmity in the order of the CIT(A) in deleting the above said disallowance made by the A.O. Accordingly, the Ground No. 3 of the Revenue is dismissed.

GROUND NO. 4

15. Ground No. 4 is regarding disallowance of Rs. 26,409/- made by the A.O. for delayed payment of provident fund and ESI. The issue involved in Ground No. 4 is now settled by the Hon'ble apex Court in the case of Checkmate Services Pvt. Ltd. vs. CIT-1 in Civil Appeal No. 2833 of 2016, vide order dated

12/10/2022 held that delayed deposit of the contribution EPF & ESIC beyond the stipulated period prescribed in the respective Acts are not allowable in following manners:-

> *"51. The analysis of the various judgments cited on behalf of the assessee i.e., Commissioner of Income-Tax v. Aimil Ltd. 24; Commissioner of Income-Tax and another v. Sabari Enterprises25; Commissioner of Income Tax v. Pamwi Tissues Ltd. 26; Commissioner of Income-Tax, Udaipur v. Udaipur Dugdh Utpadak Sahakari Sandh Ltd. 27 and Nipso Polyfabriks (supra) would reveal that in all these cases, the High Court's principally relied upon omission of second proviso to Section 43B (b). No doubt, many of these decisions also dealt with Section 36(va) with its explanation. However, the primary consideration in all the judgments, cited by the assessee, was that they adopted the approach indicated in the ruling in Alom Extrusions. As noticed previously, Alom Extrutions did not consider the fact of the introduction of Section 2(24)(x) or in fact the other provisions of the Act.*
>
> *52. When Parliament introduced Section 43B, what was on the statute book, was only employer's contribution (Section 34(1)(iv)). At that point in time, there was no question of employee's contribution being considered as part of the employer's earning. On the application of the original principles of law it could have been treated only as receipts not amounting to income. When Parliament introduced the amendments in 1988-89, inserting Section 36(1)(va) and simultaneously inserting the second proviso of Section 43B, its intention was not to treat the disparate nature of the amounts, similarly. As discussed previously, the memorandum introducing the Finance Bill clearly stated that the provisions – especially second*

proviso to Section 43B - was introduced to ensure timely payments were made by the employer to the concerned fund (EPF, ESI, etc.) and avoid the mischief of employers retaining amounts for long periods. That Parliament intended to retain the separate character of these two amounts, is evident from the use of different language. Section 2(24)(x) too, deems amount received from the employees (whether the amount is received from the employee or by way of deduction authorized by the statute) as income - it is the character of the amount that is important, i.e., not income earned. Thus, amounts retained by the employer from out of the employee's income by way of deduction etc. were treated as income in the hands of the employer. The significance of this provision is that on the one hand it brought into the fold of "income" amounts that were receipts or deductions from employees income; at the time, payment within the prescribed time – by way of contribution of the employees' share to their credit with the relevant fund isto be treated as deduction (Section 36(1)(va)). The other important feature is that this distinction between the employers' contribution (Section 36(1)(iv)) and employees' contribution required to be deposited by the employer (Section 36(1)(va)) was maintained - and continues to be maintained. On the other hand, Section 43B covers all deductions that are permissible as expenditures, or out-goings forming part of the assessees' liability. These include liabilities such as tax liability, cess duties etc. or interest liability having regard to the terms of the contract. Thus, timely payment of these alone entitle an assessee to the benefit of deduction from the total income. The essential objective of Section 43B is to ensure that if assessee are following the mercantile method of accounting, nevertheless, the deduction of such liabilities, based only on book entries, would not be given. To pass

muster, actual payments were a necessary pre-condition for allowing the expenditure.

53. The distinction between an employer's contribution which is its primary liability under law – in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers' income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) - unless the conditions spelt by Explanation to Section 36(1)(va) are satisfied i.e., depositing such 33 amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts – the employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer. This marked distinction has to be borne while interpreting the obligation of every assessee under Section 43B.

54. In the opinion of this Court, the reasoning in the impugned judgment that the non-obstante clause would not in any manner dilute or override the employer's obligation to deposit the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of Section 43B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assessees are given some leeway in that as long

as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such 34 interpretation were to be adopted, the non-obstante clause under Section 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction.

55. In the light of the above reasoning, this court is of the opinion that there is no infirmity in the approach of the impugned judgment. The decisions of the other High Courts, holding to the contrary, do not lay down the correct law. For these reasons, this court does not find any reason to interfere with the impugned judgment. The appeals are accordingly dismissed."

16. By following the above ratio, we find merit in the Ground No. 4 of the Revenue, accordingly the deletion of disallowance of Rs. 26,409/- made by the A.O. for delayed payment of provident fund and ESI is hereby reversed and the

addition made by the A.O. on the said ground is sustained. Accordingly, Ground No. 4 of the Revenue is allowed.

17. In the result, the appeal of the Revenue is partly allowed for statistical purpose.

Order pronounced in open Court on 18th August, 2023

Sd/-	Sd/-
(N. K. BILLAIYA)	**(YOGESH KUMAR U.S.)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 18/08/2023
Pk/R.N, Sr ps

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI