

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'A' : NEW DELHI)**

BEFORE SHRI G.S. PANNU, VICE PRESIDENT
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 148/Del/2023
Asstt. Year : 2017-18

M/s Atlantis Intelligence Ltd.
(Earlier Link Quest Telecom Ltd.)
C-314, 1st floor,
Defence Colony,
New Delhi – 110 024
(PAN: AAACL1613M)
(Appellant)

VS. DCIT, Circle-13(1),
New Delhi
C.R. Building,
I.P. Estate,
New Delhi – 2
(Respondent)

Appellant by : Sh. S.M. Surana, Adv.
Respondent by : Sh. Kanv Bali, Sr. DR.

Date of Hearing	30.11.2023
Date of Pronouncement	30.11.2023

ORDER

PER G.S. PANNU, VP

This appeal by the assessee is directed against the order of the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi dated 03.01.2023 which in turn has arisen from an order passed by Assistant Commissioner of Income Tax, Circle 15(2), Delhi dated 17.12.2019 under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') pertaining to assessment year 2017-18.

2. In this appeal, although assessee has raised four Grounds of Appeal, but the dispute is primarily on three counts which we shall deal in seriatim. The first grievance of the assessee is against the disallowance made by the income-tax authorities of a sum of Rs. 10,81,046/- by invoking Section 36(1)(va) representing delay in deposit of employees contribution of ESI & PF within the stipulated period. At the time of hearing, Ld. Representative for the Assessee made a very limited submission based on the due date in relation to two payments, namely, Rs. 4,25,301/- and Rs. 14,505/- representing Provident Fund and ESI dues deposited on 16.08.2016 and 22.11.2016 respectively. The Ld. Representative conceded that, in principle, the disallowance made by the income-tax authorities by invoking Section 36(1)(va) of the Act is in order in view of the judgement of the Hon'ble Supreme Court in the case of Checkmate Services (P.) Ltd. vs CIT, [2022] 448 ITR 518 (SC). However, in relation to the aforesaid two payments, it is sought to be canvassed that the respective due dates, being 15.08.2016 and 21.11.2016, were public holidays. It was pointed out by referring to the Tabulation appearing in para 6.2 of the order of the CIT(A) that the two impugned sums have been deposited on the immediate next working day and therefore, such payment can be understood to have been made within the time as provided in the Act.

3. The Ld. DR, appearing for the Revenue has not contested the factual matrix brought out by the Ld. Representative, but has otherwise, relied upon the orders of the authorities below.

4. The dispute raised by the assessee in this Ground lies in a very narrow compass. Section 36(1)(va) of the Act provides a deduction for the sums received by the assessee as employees contributions to which the provisions of Section 2(24)(x) of the Act apply, provided the same is credited to the employees amount in the relevant Fund on or before the due date prescribed in the relevant Act, rule, order or notification thereunder. In the present case, we are concerned with the employees' contribution under the PF and ESI Funds, and qua the two payments in question, the due dates are stated to be 15th August, 2016 and 21st November, 2016 respectively, whereas the payments have been made on 16th August, 2016 and 22nd November, 2016. Section 10 of the General Clauses Act, 1897, which is applicable to all the Central Acts, including the Income Tax Act, 1961, prescribes that where an office is closed on the last day of the period prescribed in any Central Act or Regulation, then the act done on the next day afterwards shall be considered as done in due time. In the instant case, the prescribed due dates, i.e. 15th August, 2016 and 21st November, 2016 were closed days on account of Independence Day and Sunday respectively, and the assessee deposited the dues of Rs. 4,25,301/- and Rs. 14,505/- representing payments for Provident Fund and ESI on 16.08.2016 and 22.11.2016 respectively, being the days immediately following the holidays. Thus, having regard to Section 10 of the General Clauses Act, 1897 it has to be considered that such payments have been made in due time. Therefore, we direct the AO re-compute the disallowance

after allowing relief for the two payments referred above. Thus, on this aspect, assessee partly succeeds.

5. The next issue arises from the action of the income-tax authorities in partially disallowing depreciation on the cost of software. In brief, the facts are that the assessee had made a payment of Rs. 34,91,415/- for acquiring software on which it had claimed depreciation @60%. The AO noted that assessee had failed to deduct tax at source on the payment made for acquisition of software and therefore, in terms of section 40(a)(ia) of the Act, he disallowed 30% of the depreciation claimed. As per the AO section 40(a)(ia) of the Act permitted disallowance of 30% of the expenditure, if the payments made for such expenditure was made without deduction of the requisite tax at source. In other words, as per the AO the allowance of depreciation also fell within the purview of section 40a(ia) of the Act, so long as the corresponding payment was made without deducting tax at source. The CIT(A) has since upheld the stand of the AO, against which the Assessee is in further appeal before us.

6. Before us, the Ld. Representative for the assessee relied upon the Judgement of the Hon'ble High Court of Karantaka in the case of Pr. Commissioner of Income Tax BMTC Complex vs. Tally Solutions Pvt. Ltd. vide ITA No. 199 of 2017 dated 16.12.2020 wherein, an identical controversy has been considered. Notably, the substantial question of law raised before the Hon'ble High Court was as under:-

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in deleting the disallowance made under section 40(a)(ia) in respect of depreciation on intellectual property rights by relying upon the decisions which has not

reached finality and without appreciating that the assessing officer rightly invoked provisions of section 40(a)(ia) of the Act as the assessee had failed to deduct tax on payments made in respect of purchase of software as required under section 195 of the Act?

7. The Hon'ble Karnataka High Court approved the order of the Tribunal permitting depreciation without recourse to section 40(a)(ia) of the Act and the following discussion in the Judgement of the Hon'ble Karnataka High Court is relevant in this regard:-

"10. Thus, from close scrutiny of Section 40(a)(ia) of the Act, it is axiomatic that an amount payable towards interest, royalty, fee for technical services or other sums chargeable under this Act shall not be deducted while computing the income under the head profit and gain of business or profession on which tax is deductible at source; but such tax has not been deducted. The expression 'amount payable' which is otherwise an allowable deduction refers to the expenditure incurred for the purpose of business of the assessee and therefore, the said expenditure is a deductible claim. Thus, Section 40 refers to the outgoing amount chargeable under this Act and subject to TDS under Chapter XVII-B. The deduction under Section 32 is not in respect of the amount paid or payable which is subjected to TDS; but is a statutory deduction on an asset which is otherwise eligible for deduction of depreciation. Section 40(a)(i) and (ia) of the Act provides for disallowance only in respect of expenditure, which is revenue in nature, therefore, the provision does not apply to a case of the assessee whose claim is for depreciation, which is not in the nature of expenditure but an allowance. The depreciation is not an outgoing expenditure and therefore, provisions of Section 40(a)(ia) and (ia) of the Act are not applicable. In the absence of any requirement of law for making deduction of tax out of expenditure, which has been capitalized and no

amount was claimed as revenue expenditure, no disallowance under Section 40(a)(i) and (ia) of the Act would be made. It is also pertinent to note that depreciation is a statutory deduction available to the assessee on a asset, which is wholly or partly owned by the assessee and used for business or profession. The depreciation is an allowance and not an expenditure, loss or trading liability. The Commissioner of Income Tax (Appeals) has held that the payment has been made by the assessee for an outright purchase of Intellectual Property Rights and not towards royalty and therefore, the provision of Section 40(a)(ia) of the Act is not attracted in respect of a claim for depreciation. The aforesaid finding has rightly been affirmed by the tribunal. The findings recorded by the Commissioner of Income Tax (Appeals) as well as the tribunal cannot be termed as perverse.”

[underlined for emphasis by us.]

8. Before us, the Ld. DR has merely relied upon the orders of the authorities below and has not brought to our notice any decision contrary to that of the Hon'ble Karnataka High Court in the case of PCIT BMTC Complex vs. Tally Solutions Pvt. Ltd. (supra). In view thereof, following the judgement of the Hon'ble Karnataka High Court, we set-aside the order of the CIT(A) and direct the AO to allow depreciation without making any disallowance by invoking section 40(a)(ia) of the Act. Thus, on this aspect, assessee succeeds.

9. The last issue is with regard to the disallowance u/s. 14A of the Act. In brief, the relevant facts are that during the year under consideration, assessee had exempt income of Rs. 1,07,21,351/- representing share of profit from a partnership firm, Link Quest Quippo Infra LLP. During the assessment proceedings, assessee was asked to explain as to why no

expenditure has been disallowed in terms of section 14A of the Act while it had earned exempt income of Rs. 1,07,21,351/- as above. The assessee asserted before the AO that no expenditure was indeed incurred for earning of share of profit from the LLP and therefore, no disallowance u/s. 14A of the Act is merited. It was also explained that so far as the investment made in equity and mutual funds are concerned, no exempt income has arisen during the year under consideration. The AO, however, applied Rule 8D and disallowed 1% of the average of opening and closing balances of value of investments, thereby computing the disallowance at Rs. 1,59,667/-. Assessee carried the matter before the CIT(A), who has since held as under:-

"9.3 On perusal of written submissions made by the appellant and the case law cited above, it is noticed that there is merit in the contention of the appellant. Therefore, the Assessing Officer is directed to consider only those investments on which exempted income earned by the appellant for the purpose of calculation of disallowance u/s. 14A of the Income Tax Act, 1961 and re-work the disallowance u/s. 14A of the Income Tax Act, 1961. Accordingly, this ground of appeal No. 4 is partly allowed for statistical purposes."

In sum and substance, the CIT(A) has restricted the disallowance u/s. 14A to only those investments on which exempt income has been earned by the assessee.

10. Before us, Ld. Representative for the Assessee reiterated that no expenditure has been incurred for earning the exempt

income in question and that both the authorities below have not found any fault with the factual assertions made by the assessee, but the same has been summarily rejected. On the other hand, Ld. DR has relied upon the orders of the authorities below.

11. Having considered the rival stands, we find that the approach of the AO in making the impugned disallowance is unsustainable, having regard to the provisions of Section 14A of the Act. Ostensibly, Section 14A of the Act prohibits deduction of any expenditure which has been incurred by the assessee *"in relation to income which does not form part of the total income under this Act"*. In other words, if an expenditure does not have any connection with the exempt income, then such an expenditure cannot attract the disallowance u/s. 14A of the Act. In the instant case assessee pointed out that the exempt income was represented by share in profit of an LLP (Limited Liability Partner) and that no expenditure was incurred for earning the same. The AO on the other hand, has applied the formula contained in Rule 8D of Income Tax Rules, 1962, while holding that Section 14A would be applicable. Quite clearly, the application of the formula prescribed in Rule 8D of IT Rules, 1962 is dependent on satisfaction of the AO envisaged in Section 14A of the Act itself, that having regard to the accounts of the assessee, a disallowance u/s. 14A is required to be made. Since beginning, the assertions of the assessee have been that no expenditure has been incurred in earning the stated exempt income. However, we find that the AO is silent on the correctness or otherwise of such assertion and therefore, in

the absence of any objective satisfaction on the part of the AO that the assertion of the assessee was wrong having regard to the accounts of the assessee, the apportionment of expenditure in terms of Rule 8D of the I.T. Rules, 1962 could not have been resorted to. In view of the aforesaid, we set aside the order of the CIT(A) and direct the AO to delete the disallowance of Rs. 1,59,667/- made u/s. 14A of the Act.

12. In the result, appeal of the assessee is partly allowed.

Above decision was announced on 30.11.2023 in the presence of both the parties, after conclusion of hearing.

Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
VICE PRESIDENT

SRBhatnagar

Copy forwarded to: -

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

TRUE COPY

By Order,

Assistant Registrar, ITAT,
Delhi Benches