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

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

ITA No.2677/DEL/2016
[Assessment Year: 2006-07]

Continental Foundation Joint Venture, Continental House, 28, Nehru Place, New Delhi-110019	Vs	The Assistant Commissioner of Income-tax, Circle-38(1) 19TH Floor, Civic Centre, New Delhi
PAN: AAAAC0084D		
Assessee		Revenue

ITA No.111/DEL/2017
[Assessment Year: 2007-08]

The Assistant Commissioner of Income-tax, Circle-30(1), Room No.1302, E-2 Block, SPM Civic Centre, J. L. Nehru Marg, New Delhi-110002	Vs	Continental Foundation Joint Venture, Continental House, 28, Nehru Place, New Delhi-110019
		PAN: AAAAC0084D
Revenue		Assessee

Assessee by	Shri M.P. Rastogi, Adv.
Revenue by	Shri Vivek Kumar Upadhyay, Sr. DR

Date of Hearing	**14.02.2024**
Date of Pronouncement	**04.03.2024**

ORDER

PER AMIT SHUKLA, JM,

The aforesaid appeal filed by the assessee for Assessment Year 2006-07 is against the order dated 31.03.2016, passed by learned

Commissioner of Income Tax (Appeals)-20, New Delhi, and the Revenue's appeal for Assessment Year 2007-08 is against the order dated 28.10.2016 of the learned Commissioner of Income Tax (Appeals)-10, New Delhi.

2. First, we will take up the appeal for Assessment Year 2006-07, wherein, the assessee has challenged the validity of reassessment proceedings u/s 147 of the Income Tax Act, 1961 (hereinafter 'the Act') and disallowance of Rs.14,41,022/- under section 40(ba) and 40(a)(i) of the Act.

3. Brief facts of the case are that the assessee is a joint venture between M/s Continental Construction Ltd. and M/s Foundation Co. of Canada for the purpose to carry out civil construction of dam at Nathpa Jhakri, District Kinnaur (HP) awarded by Nathpa Jhakri Power Corporation and financed by the World Bank. The appellant is assessed to tax in the status of Association of Persons (AOP) since Assessment Year 1994-95. For the year under consideration, the assessee had filed its original return on 31st October 2006 declaring nil income against which the assessment was completed on an income of Rs.62,37,182/ - vide order dated 25th November 2008. In the original assessment proceedings, the assessee had filed the audited financial and tax audit report on Form No. 3CD along with various schedules. In the original assessment proceedings, the

assessee had filed the tax audit report on Form No. 3CEB in relation to the international transactions between the assessee and its joint venture partner M/s Foundation Co. Thereafter, the AO reopened the case under section 147 of the Act by issuing notice under section 148 on 28.03.2013, which was after the expiry of four years from the end of the relevant assessment year. The reasons recorded by the AO reads as under:-

> "That in the reason to believe, the Assessing Officer has mentioned
>
> (i) From the perusal of the record, it was revealed that during the year consideration the assessee had debited in its profit & loss account an amount of Rs.2,63,94,206/- under the head "Bank Charge and Bank Guarantee" and then inferred that during the course of assessment proceedings or any other proceeding or at the time of filing of return of income, the assessee has not disclosed the name of the person to whom the payment has been made. The AO has further observed that from the perusal of the balance sheet, it is apparent that the assessee had taken a loan of Rs.69.87 crore from a foreign bank (ABN Amro Bank for which the bank guarantee provided by M/s FCC (one of the members of joint venture non-resident).
>
> ii) Consultation fee Rs.14,41,022/- paid to a member of a joint venture not allowable u/s 40(ba) of the Act.
>
> (iii) From the information available on record, it is seen that the assessee has not deducted any TDS under the provisions of Chapter XVIIB of the Act and then inferred that the provision of Section 40(a)(ia) is applicable and the amount on which TDS has not been deducted will not be allowable as expenses claimed.
>
> (iv) Lastly thereafter, the Assessing Officer mentioned that he has reason to believe that income chargeable to tax has escaped assessment for the Assessment Year 2006-07 for the reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment."

4. First of all, the AO has alleged that during the assessment proceedings, the assessee has not disclosed the names of persons to whom the payment of guarantee charges/guarantee commission amounting to Rs.2,63,94,206 have been paid. Before us, the ld. Counsel for the assessee submitted that during the course original assessment proceedings, this precise issue was raised by the AO in various queries and the assessee had also submitted all the details about the bank charges and bank guarantee given to its AE. These details are appearing from pages 59 and 67 of the paper book, which was part of detailed submissions made before the AO during the course of original assessment proceedings. Once, assessment has been completed under section 143(3) of the Act, wherein, the same issue has been scrutinized, reopening of the assessment beyond four years is not permissible, because, there is no failure on the part of the assessee to disclose fully and truly all material facts.

5. Regarding the details of payment of two persons specified under section 40(ba) and 40(a)(i) of the Act, he submitted that in the tax audit report i.e. Form No.3CD, the copy whereof has been placed at page 84 to 122 of the paper book, the Tax Auditor in Schedule V to clause 18 of the said Tax Audit Report at page 101 of the paper book, the details of payment to Foundation Co. of Canada (FCC), the payment by way of bank guarantee commission as well as

consultant fee was duly mentioned. In Clause No.27 of Form 3CD, the Tax Auditor, with regard to the liability of TDS, mentioned as under:-

27(a)	Whether the assessee has complied with the provisions of Chapter XVII-B regarding deduction of tax at source and regarding the payment thereof to the credit of the Central Government (Yes/No)	Yes, however, according to the records examined by us, the assessee has generally been regular in depositing the tax except delay in deposit of TDS in few cases.
(b)	(b) If the provisions of Chapter XVII-B have not been complied with, please give the following details, namely	Nil

6. As per the statutory requirement, another tax audit report is also required on Form No. 3CEB in relation to the international transactions and in Form No.3CEB, whatever amount has been routed through FCC, same was duly provided to the AO and summary thereof has also been placed in Part B at page 162 of the paper book and then thereafter the details of consultancy fee were provided at page 168 of the paper book. At page 168 which contains the details of consultancy, it has been clearly mentioned that the consultation fee was paid to Mr. Surendra Gautam of Canada which was routed through FCC as reimbursement to FCC. Thus. there was full and true disclosure by the assessee even during the course of original assessment proceedings on this issue also.

7. During the course of the present proceedings before us, we had raised the issue, whether the consultation fee paid to Mr. Surendra Gautam, is subjected to TDS under DTAA with Canada or not? Because if the payment of consultancy was liable to tax in India as source country, then it was statutory obligation of the assessee to discuss TDS, and then there could be failure on part of the assessee. In this connection, it has been submitted by the Ld. Counsel that Mr. Surendra Gautam is the resident of Canada and has rendered the services only in Canada and not in India. As per Article 14 of DTAA as executed between India and Canada, the consultation fee is chargeable to tax in Canada and not in India. Therefore, once the said consultation fee is not chargeable to tax in India, the question of deduction of TDS does not arise. He further submitted that, in the case of **GE India Technology Centre Pvt. Ltd. vs. CIT in 327 ITR 456**, the **Hon'ble Supreme Court** observed that if the remittance made to a foreign party is not chargeable to tax in India, then there is no need to deduct TDS in terms of Section 195 of IT Act because Section 195 contemplates only that portion of the receipt which is chargeable to tax in India. Hence, once the consultation fee paid to Mr. Surendra Gautam, a Canadian engineer, is not chargeable to tax in India, the provision of Section 195 is not applicable and in turn the provision of Section 40(a)(ia) of IT Act is also not applicable. Thus, it cannot be said that once the

amount itself is not taxable in India, there is no failure on the part of the assessee to disclose fully and truly all material fact. Thus, entire initiation of proceedings u/s 147 of the Act is bad in law and deserves to be quashed.

8. On the other hand, the learned Departmental Representative strongly relied upon the order of the learned CIT (A). Though, he submitted that in this year, the Department has not challenged the finding of the learned CIT(A) on the issue of bank charges and bank commission of Rs.2,78,35,228/-, however, with regard to disallowance of Rs.14,41,022/-, he submitted that the assessee should have deducted TDS and should have followed the procedure laid down in the law u/s 195(2) of the Act. Thus, non-deduction of TDS amount to failure on the part of the assessee.

9. We have heard both the parties and perused the material placed on record. From the perusal of reasons recorded, it is seen that the 'reasons' have been recorded on the basis that assessee has not disclosed the names of two persons to whom bank charges and bank guarantee for an amount of Rs.2,68,94,206/- has been paid. We find from the record that during the course of assessment proceedings, the Assessing Officer had raised specific query about the details of bank charges and guarantee commission and the purpose of this expenses by query note dated 07.01.2008 (a copy of

which has been placed at pages 51 to 52 of the paper book). In compliance thereto, the assessee had filed its reply vide letter dated 5th February 2008 and along with that the details of all the bank charges and bank guarantee commission as debited to the profit & loss account were also filed, copy thereof has been placed at page 53 of the paper book and the relevant portions are given at pages 55 and 59 of the paper book. In this letter, the assessee had clearly explained above the loan raised from the ABN Amro Bank and in Form No.3CEB, the international transaction with Foundation Co. was also provided. At page 162 of the paper book, the details of the guarantee and consultation fee were duly mentioned and the details whereof have been provided, forming part of the tax audit report in Form No. 3CEB placed at pages 167 and 168 respectively. In the details of guarantee, it was clearly provided that the amount was paid to Hochtief which was reimbursement of the guarantee charged by Hochtief from M/s Foundation Co. All these details were provided during original assessment proceedings before the AO. Thus there was full and true disclosure by the assessee specifically on this issue Similarly, the consultation fee was paid to one Mr. Surendra Gautam of Canada through the Foundation Co. and was sort of reimbursement of the amount paid. All such details were available on record and were before the Assessing Officer. In Schedule 'C' of Tax Audit Report, it was clearly provided that against the loan of

ABN Amro Bank, bank guarantee was provided by Foundation Company Canada (FCC). In Schedule-V of the Tax Audit Report under the head details of payment to persons specified u/s 40A(2)(b) of IT Act, the payment to FCC was provided and it includes reimbursement of bank guarantee commission of Rs. 50,68,733/- and consultant fee Rs. 14,41,022/-. Thus in the present case, the details were not only available in the tax audit reports in Form No. 3CEB and Form No. CD but were also provided to the Assessing Officer during the course of assessment proceedings. Hence we agree with the contention of the Ld. Counsel of the assessee that it cannot be inferred that there was a failure on the part of the assessee to provide necessary material for assessment.

10. Thus, we hold that in so far as the, this part of the reasons recorded, there is no failure on the part of the assessee to disclose fully and truly material facts, therefore, the reasons cannot be sustained on this issue.

11. Coming to the issue of consultant fee, which is second part of the reasons of Rs.14,41,022/- paid to a member of joint venture holding, whether it is allowable u/s 40(ba) or u/s 40(a)(i) of the Act or not.

12. From the perusal of record, it is seen that these payment were made to Mr. Surendra Gautam, a resident of Canada, to whom

consultation fee has been paid, which was routed through FCC as reimbursement. It is not in dispute that he has rendered the services only in Canada and **such consultation fee is in the nature of 'Independent personal services or Professional services'**. Article 14 of Canada DTAA reads as under:-

"Article 14: Independent personal services

1. Income derived by an individual or a firm of individuals (other than a company) who is a resident of a Contracting State in respect of professional services or other independent activities of a similar character shall be taxable only in that State. However, in the following circumstances, such income may be taxed in the other Contracting State, that is to say:

(a) if he has or had a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in that case only so much of the income as is attributable to that fixed base may be taxed in that other Contracting State; or

(b) if his stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 183 days in the relevant fiscal year; or

(c) if the remuneration for the services in the other Contracting State is either derived from residents of that other Contracting State or is borne by a permanent establishment which a person not resident in that other Contracting State has in that other Contracting State and such remuneration exceeds two thousand five hundred Canadian dollars ($2,500) or its equivalent in Indian currency in the relevant fiscal year.

2. The term 'professional services' includes independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants."

13. Article 14 clearly states that if the income derived from an individual, who is resident of a Contracting State (here Canada) in

respect of profession services, the same shall be taxable only in that State, i.e. Canada. Certain exceptions have been provided in clause (a), (b) and (c) which also admittedly is not applicable in the present case. Once the payment is taxable in the resident country and there is no requirement for deducting TDS on such professional services, then, such payment is neither disallowable u/s 40(ba) and 40(a)(i) of the Act nor can be held that there is failure on the part of the assessee to disclose fully and truly all material facts. Accordingly, the entire reopening proceedings u/s 147 is quashed as the reasons do not meet the requirement of law as provided u/s 147 read with proviso thereto. Accordingly, the appeal of the assessee is allowed.

ITA No.111/Del/2017 (Assessment year 2007-08)

15. The Revenue has raised following grounds of appeal:-

"On the facts and in the circumstances of the case, the Ld. CIT (A) has erred in deleting the addition of Rs. 1,73,03,471/- made by the AO on account of non deduction of TDS on payment of bank charges and guarantee commission holding that the payments made by the assessee AOP in form of fee and reimbursement of expense were, in fact, in the nature of remuneration to the members of the joint venture. Therefore, the same is not allowable business expense, as per the provision of Section 40(ba) of the I.T. Act, 1961.

2. "On the facts and in the circumstances of the case, the Ld. CIT (A) has erred in allowing the relief of the total claim of bank charges and guarantee commission of Rs. 1,73,03,471/- whereas the evidence in support of payment of only Rs. 42,93,326/- was produced by the assessee alongwith the said letter dated 18.07.2014 filed with the AO to substantiate its claim, as relied

upon by the Ld. CIT(A) vide para-4.2.3 of his order. The breakup of this payment is as under:-

i) Rs. 19, 65,893/- Bank Guarantee Commission Paid by the JV for guarantee arranged by CCL (against bank Guarantee No. 62 & 36/93)

ii) Rs. 23, 27,433/- Against Bank Guarantee retention money by JV (against 115% margin in bank deposit)

3. On the fact and in the circumstance of the case, the Ld CIT (A) has erred in allowing full credit of Rs. 1,73,03,471/- by accepting that the entire bank guarantee commission was paid directly to the bank whereas the assessee had paid an amount of Rs. 42,93,326/- only and not the entire amount of Rs. 1,73,03,471/-, without appreciating the fact of the case."

16. This issue is exactly similar to the issue of bank charges and guarantee commission raised in the Assessment Year 2006-07. The reopening has been done in this case exactly on the same reasons. For the sake of ready reference the same is reproduced hereunder:-

"The assessment in this case was completed U/s 143 (3) on 03.06.2009 loss at Rs. 6.30.29,237/-It is pertinent to note here that similar issue came before undersigned for A Y. 2006-07. During the course of assessment U/s 143(3)/147 it was observed that no TOS was deducted on the payment of Bank Guarantee Commission.

(1) From the perusal of records. It is revealed that during the year under consideration, the assessee has debited in its P&L account and amount of Rs 1.73.03.471/ under the head Bank charge & bank Guarantee. During the course of assessment proceedings or any other proceedings or at the time of filing of Return of Income the assessee has not disclosed the name of the persons to whom this payment has been made.

From the information available on record it is seen that the assessee has not deducted any TDS under the provisions of Chapter XVII B of the Income Tax Act Therefore, provisions of Section 40(a)(ia) is applicable in the case of the assessee and the amount on which TDs

has not been deducted will not be allowable as expenses claimed by the assessee.

In view of the above facts and giving due consideration to the material on record. I have reason to believe that income chargeable to tax has escaped assessment for the A. Y. 2007-08 for the reason of failure on the assessee to disclose fully and truly all material facts necessary for assessment for that assessment year and the case is fit for re-opening U/s 147/148 of the income Tax Act. The prior sanction of the CIT is required before issue of notice U/s 148 of IT Act as per provisions of sanction U/s 151(1) of the Income Tax Act".

17. Here also, in this case, the assessment was completed u/s 143(3) on 03.06.2009 and exactly similar query was raised and reply filed by the assessee which has been considered by the AO. Though, the learned CIT (A) has deleted this issue on merits after following his order for Assessment Year 2006-07. However, before us, the ld. Counsel for the assessee has raised additional ground under Rule-27 holding that the learned CIT (A) has dismissed the validity of assumption jurisdiction u/s 147, however, he has deleted the addition on merits. Now, the Department has filed the appeal in this year. Therefore, the assessee seeks to take additional ground under Rule-27. Since, it is a purely legal ground challenging the jurisdiction of the AO therefore, same is admitted.

18. We find that here in this case also, the reasons have been recorded on the following grounds:-

- Action has been taken based on the finding given in the reassessment proceedings for Assessment Year 2006-07 and then held that similar payment of bank charges and guarantee commission amounting to Rs. 1,73,03,471/- has been debited to the profit & loss account and the assessee did not disclose the name of persons to whom the payments have been made.
- The assessee has not deducted any TDS under Chapter XVII-B. Therefore, the provision of Section 40(a)(ia) of IT Act is applicable and accordingly expenses claimed not allowable.
- There was a failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment.

20. This is the identical to the reasons recorded for Assessment Year 2006-07. Here also, the assessee has disclosed fully and truly all material facts during the course of original assessment proceedings and therefore, there is no failure on the part of the assessee to disclose fully and truly all material facts. Therefore, our finding given in Assessment Year 2006-07 on this issue, while quashing the assessment shall apply in this year also. Accordingly, reopening of assessment year 2006-07 u/s 147 of the Act is quashed.

21. In the result, the Revenue's appeal is dismissed and the additional ground raised by the assessee under Rule-27 is allowed.

Order pronounced in the open court on 04th March, 2024

Sd/-	**Sd/-**
[M. BALAGANESH]	**[AMIT SHUKLA]**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: .02.2024

SSK

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi