

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D', NEW DELHI**

**Before Dr. B. R. R. Kumar, Accountant Member
Ms. Astha Chandra, Judicial Member**

ITA No. 7275/Del/2017 : Asstt. Year : 2014-15

Siemens International Trading Ltd., Shanghai, 5 th Floor, Room No. 515, Mansion South, No. 2, Hua Jing Road, People Republic of China-200131	Vs	Income Tax Officer, Ward-3(1)(2), International Taxation, New Delhi-110002
(APPELLANT)		(RESPONDENT)
PAN No. AATCS6765Q		

ITA No. 8429/Del/2019 : Asstt. Year : 2016-17

ACIT, Circle-3(1)(2), International Taxation, New Delhi-110002	Vs	Siemens International Trading Ltd., Shanghai, 5 th Floor, Room No. 515, Mansion South, No. 2, Hua Jing Road, People Republic of China-200131
(APPELLANT)		(RESPONDENT)
PAN No. AATCS6765Q		

Assessee by : None

Revenue by : Sh. Sanjay Kumar, Sr. DR

Date of Hearing: 19.12.2023

Date of Pronouncement: 11.03.2024

ORDER

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

The present appeal has been filed by the assessee against the order of Id. CIT(A)-23, New Delhi dated 22.09.2017 and the appeal of the revenue against the order of Id. CIT(A)-43, New Delhi dated 28.08.2019.

2. In ITA No. 8429/Del/2019, following grounds have been raised by the Revenue:

"1. On the facts and circumstances of the case and in law, the Id. CIT(A) has erred in allowing the credit of TDS of Rs.2,41,05,620/- on consideration received for offshore supply of rolling stock, when no corresponding income has been offered for taxation by the assessee."

3. In ITA No. 7275/Del/2017, following grounds have been raised by the assessee:

"1. That on the facts and circumstances of the case and in law, the order passed by the Commissioner of Income Tax (Appeals) - 23, New Delhi ('Ld. CIT(A)'] is bad in law and contrary to facts and provisions of the Income Tax Act, 1961 ('the Act').

2. That the Ld. CIT(A) has erred in law and on the facts of the case in confirming the order of the Income Tax Officer, Ward -3(1)(2), International Taxation, Delhi ('Ld. AO') and not allowing credit of Tax Deductible at Source ('TDS') of INR 68,82,340 to the Appellant.

3. The Ld. CIT(A) has erred in law and on facts and circumstances of the case in rejecting the credit of TDS of INR 6,882,340 for the subject year without appreciating the legal position that income from offshore supply received by the Appellant is not taxable in India under the provisions of the Act read with Double Taxation Avoidance Agreement entered between India and China ("Tax Treaty").

4. That the Ld. CIT(A) has erred in holding that the credit of TDS would be allowed in the year in which the corresponding income shall be offered to tax and the Appellant is required to make specific claim for credit of TDS in specific assessment years which shall be entertained as per law.

5. That the Ld. CIT(A) has erred in making various factual inferences/conjectures/surmises that have no bearing on the return of income filed by the Appellant and / or not borne out from any material on record and are contrary to the provisions of the Act read with Tax Treaty. Inter alia,

the incorrect assumptions/inference made by the .d. CIT(A) are as under:

(a) The appellant has itself contested that Ld. AO has erred in facts and in law in not giving directions for allowing the credit of TDS of INR 6,882,340 deducted on mobilization advances in the year in which actual offshore supplies were undertaken by the Appellant.

(b) The Appellant is accepting that the question of these receipts (mobilization advance) having element of income could be decided in the year in which actual offshore supplies were undertaken by the Appellant.

(c) The contract is, indeed, composite/indivisible one.

(d) The contract being performed by Siemens Consortium is composite/indivisible contract of which the appellant is leader and partner.

(e) There will certainly be a Permanent Establishment ('PE') of the Appellant in India.

(f) The part of income arising out of activities performed by the appellant, certainly accrues and arises in India."

4. The grounds raised by the assessee and the Revenue in this appeal are interrelated, they were heard together and being adjudicated by a common order.

5. The assessee is a company registered and existing under the laws of People's Republic of China. The assessee involved in procurement and sale of Rolling Stocks. Its portfolio covers the full range of vehicles - from railroad cars to metros and locomotives to trams and light-rail vehicles.

6. During Financial Year (F.Y. 2013-14), the assessee entered into a contract with IL & FS Rail Limited ('IRL'). The scope of work of the assessee under the contract was limited to offshore supply of Rolling Stock. The assessee during the assessment

year, received an amount Rs.111,44,52,342/- in connection with the aforesaid contract on which tax of Rs.24,105,620/- was deducted. The said tax was deducted by IRL on the basis of withholding tax certificate issued by ITO, Ward-3(1)(2), (Int. Tax), Delhi u/s 197 of the Income Tax Act, 1961.

7. The assessee had filed return of Income on 07.02.2017 declaring NIL income and claiming a refund of Rs.24,105,620/- on account of Tax Deducted at Source. Copy of RoI along with the acknowledgment and computation of income along with notes to computation, copy of Form 26AS and Form 16A issued by IRL for the year under consideration was filed before the ITO. The AO completed the assessment proceedings u/s 143(3) of the Act vide order dated December 10, 2018 after disallowing the claim for refund of TDS amounting to Rs.24,105,620/-.

8. Aggrieved, the assessee filed appeal before the Id. CIT(A).

9. The fact that the underlying receipts from the contract is not taxable was submitted before the AO during the course of assessment proceedings and while obtaining the lower withholding tax certificate from ITO, Ward-3(1)(2), (Int. Tax), Delhi under section 197 of the Act pursuant to which the Assessee was granted the lower withholding tax certificate, it was submitted that the amount received during the subject year was not in the nature of income chargeable to tax in India.

10. The Assessing Officer held that credit of TDS is not allowable since the Assessee did not offer corresponding income to tax in its RoI. In this regard, the Assessee submitted that the

credit for tax withheld is not linked to actual discharge of tax liability on such receipt by the recipient. In terms of provisions of the Act, the disclosure of such receipt by the recipient in its return of income along with claim for credit of such tax withheld, duly supported by Form 16A issued by tax deductor is the only pre-requisite to grant credit for such taxes.

12. As per Section 199(1) of the Act, any deductions made in accordance with the foregoing provisions of this chapter and paid to the Central Government shall be treated as payment of tax on behalf of the person from whose income the deduction is made. Therefore, as per the provisions, once TDS was deducted, a credit of the same is to be given to the assessee. Considering the same, the claim of credit of withholding tax should be allowed to Assessee as per provisions of the Act.

13. The Co-ordinate Bench of ITAT, in the case of Escorts Ltd. vs. Deputy Commissioner of Income tax [2007] 15 SOT 368 (Delhi) held that once deduction of tax at source is made and the same is deposited with the Government then the assessee becomes entitled for credit of such TDS while computing the tax liability for the period irrespective of the fact that the assessee considered that he is not liable to tax in respect of the income and, therefore, does not disclose the amount of income in his return. The Income-tax Department cannot refuse to give credit merely by contending that the income has not been disclosed in the return filed by the assessee for the assessment year. The relevant extract of the judgment in this regard is reproduced below:

"....7. Credit for TDS must in every case be given to the assessee from whose income tax was deducted at source and paid to the credit of the Central Government. If the recipient of the income considers that he is not liable to tax in respect of the income, wholly or partly, therefore, does not disclose the amount of such income in his return, the Income-tax Department cannot refuse to give credit merely by contending that the income had not been disclosed in the return filed by the assessee for the assessment year. The assessee may as per relevant provisions of Income-tax Act, consider the income either as not taxable in his hands or as being relatable to a different assessment year and he may even claim set off of loss or other deductions against such income. The assessee may also be not chargeable to tax on the income because of the overriding provisions of Double Taxation Avoidance Agreement and/or because of the provision for exemption of such income, whether wholly or partly, under some provisions of the Income-tax Act. It would be, therefore, improper and even impermissible for the revenue to swallow the amount of TDS after having received and enjoyed the same. It cannot be ignored that every item of TDS carries with it an obligation of trust and accountability to return the amount and/or give credit for the amount so deducted depending upon the tax liability of the recipient to be determined in the course of his assessment."

14. The Co-ordinate Bench of ITAT in the case of Supreme Renewable Energy Limited vs. Income Tax Officer [2010] 124 ITD 394 (Chennai) held that assessee is entitled to TDS even if the income has not directly been offered to tax as the same was not liable to tax. The relevant extract of the judgment in this regard is reproduced below:

"....9. From the above it is clear that when a particular income is received by the assessee after deduction of tax at source and the

said TDS has been duly deposited with the Government and the assessee has received the requisite certificate to this effect, then on production of the said certificate the assessee becomes entitled for the credit of TDS even if the assessee has not directly offered the said income for tax as the assessee considered the same was not liable to tax.

10. In view of the above-mentioned decisions of the Supreme Court and order of this Tribunal, it is clear position of law that when TDS is made on a particular income which is otherwise not liable for tax, the assessee is entitled for the said credit of the TDS. In the case in hand when the assessee has earned interest on deposit mandatory for acquisition on installation of machinery then the interest was earned by the assessee and is directly incidental to the acquisition in respect of machinery and therefore the same has been rightly reduced from the cost of the machinery. In this way the assessee has indirectly disclosed income and has offered for assessment. We are of the considered view that even if the income earned by the assessee has not been offered for tax being not liable for tax, the assessee is entitled for credit of TDS made in respect of that income. Accordingly, we set aside the order of the lower authorities and hold that the assessee is entitled for credit of TDS relating to interest income of Rs. 51,21,287/-."

15. The Id. CIT(A) held that the similar addition has been deleted in the case of the assessee in the yearlier Assessment Year 2015-16 where the facts are similar to the present case. The finding of the same is as under:

".....5.2 Ground No. 1 & 2: The appellant in ground number 1 and 2 has submitted that credit for TDS has not been allowed simply on the ground that no income was offered by him corresponding to tax deducted. The appellant has stated that the assessing officer in the

course of the assessment order himself admitted that income is not taxable in India in paragraph 3 of the Assessment Order. Despite this finding, the assessing officer proceeded to disallow the credit of withholding tax. The appellant has quoted a number of judgements wherein it has been held that credit of TDS is required to be allowed to the assessee from whose receipts, Income Tax was deducted and paid to the Government of India. The appellant has quoted a judgement of Escort Limited vs. DCIT 15 SOT 368 in this regard.

*5.3 The appellant was specifically asked to explain as to why the provisions of Rule 37BA(3) are not applicable to him. In this regard, the appellant explained that the rules are sub-servient to Section 199 and maybe read in harmony with the said section. It was also submitted that the tax was deducted on the instance of the revenue which was specified in the certificate issued under section 197. It was further stated that the term *assessable" should not mean that the amount per se is actually taxable. The arguments furnished by the appellant have been seen. The basic issue which arises from the aforesaid facts is that whether the credit for TDS is eligible to be refunded if the consideration did not yield any taxable income under the Income Tax Act. The rigid and literal interpretation of Rule 37BA may indicate that credit for tax deducted is only available against income declared corresponding to such receipts. This is however not logically correct. Once tax has been deducted and deposited, the deductee has a right to claim credit of that tax. This is borne out by a number of judgments quoted by the appellant in his submissions and also on prima facie facts. The credit available to the assessee may be eligible to hit as a refund in case the consideration on which the tax has been deducted is not taxable. This is the primary concept of taxation and withholding tax. Therefore, once the appellant's income is not held to be taxable in the current year, the credit for*

tax on such receipt cannot be denied to him. The AO therefore, is incorrect in not granting credit by application of Rule 37BA."

16. Having gone through the record, we find that no infraction of the Rules or provisions of the Act on this issue. Hence, keeping in view, the order of the Id. CIT(A) for the A.Y. 2016-17, we hold that the assessee is entitled to credit of TDS/Withholding tax and the consequent refunds thereof.

17. In the result, the appeal of the Revenue is dismissed and the appeal of the assessee is allowed.

Order Pronounced in the Open Court on 11/03/2024.

Sd/-

(Astha Chandra)
Judicial Member

Dated: 11/03/2024

Subodh Kumar, Sr. PS

Copy forwarded to:

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

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR