IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "D" BENCH

Before: Shri T.R. SENTHIL KUMAR, Judicial Member And
Shri Makarand Vasant Mahadeokar, Accountant Member

ITA Nos. 1517 & 1621/Ahd/2019
Asst. Year 2008-09

The DCIT, Circle-4(1)(1), Ahmedabad	Vs	Suzlon Energy Ltd. 5, Shrimali Society, Suzlon House, Nr. Shree Krishna Centre, Navrangpura Ahmedabad-380009, Gujarat, India **PAN: AADCS0472N**
Suzlon Energy Ltd. 5, Shrimali Society, Suzlon House, Nr.Shree Krishna Centre, Navrangpura Ahmedabad-380009, Gujarat, India **PAN: AADCS0472N** **(Appellant)**	Vs	The DCIT, Circle-4(1)(1), Ahmedabad **(Respondent)**

Assessee Represented: Shri Soumitra Choudhary, A.R.
Revenue Represented : Shri Rignesh Das, Sr. D.R.

Date of hearing : 18-09-2024
Date of pronouncement : 29-10-2024

आदेश/ORDER

PER : T.R. SENTHIL KUMAR, JUDICIAL MEMBER:-

These cross appeals are filed by the Revenue and the Assessee as against the appellate order dated 15-07-2019 passed by the Commissioner of Income-Tax (Appeals)-8, Ahmedabad

arising out of the assessment order passed under section 143(3) of the Income Tax Act 1961 (hereinafter referred as the 'Act') relating to the Assessment Year 2008-09.

2. This is the second round of litigation before this Tribunal. Brief facts in the first round is that the assessee is a company engaged in the business of manufacturing Wind Turbine Generators [WTG], Rotor blades, etc. The assessee company rendered certain technical services to its Subsidiary company namely M/s. Suzlon Energy [Tianjin] Ltd at China [hereinafter referred as SETL] and earned royalty income aggregating to Rs.16,22,63,445/= and Rs.11,05,97,227/= during the asst. years 2008-09 and 2007-08 respectively. These royalty incomes were already taxed in China on gross basis at 10% under Article 23[2] of the India-China Double Taxation Avoidance Agreement [hereinafter referred as Indo-China Tax Treaty]. Further these royalty incomes already been accepted to be at Arm's Length Price by TPO while framing transfer pricing assessment for the above asst. years, thus there is no dispute by TPO in respect of the royalty income. However, the assessee company failed to claim the Foreign Tax Credit [herein after referred as FTC] under section 90 of the Act while filing the Return of Income as the Tax With-holding Certificates [TWC] were received by the Assessee company in September 2009 from SETL, China. The details of TWCs with 'challan' for tax withheld on such royalty incomes are as follows:

A.Y.2007-08 Rs.1,05,43,697 [RMB 19,56,159 x Rs.5.39]

A.Y.2008-09 Rs.1,62,26,344 [RMB 30,10,467 x Rs.5.39]

2.1. However during the assessment proceedings, the Assessee Company vide its letter dated 17-11-2011 claimed the Tax Credit in respect of these taxes withheld in China as admissible under Article 23[2] of Indo-China Tax Treaty. Thus the assessee requested the Ld AO to grant relief from double taxation as admissible u/s.90 of the Act amounting to Rs.16,22,63,445/ and Rs.11,05,97,227/ relevant to the asst. years 2008-09 and 2007-08 respectively.

2.2. The Ld AO rejected the above claim made by the assessee, on the ground that the claim was neither made in the Original Return of Income nor in the Revised Return of Income filed by the assessee. However, on appeal against the above assessment order before Ld CIT[A], who followed Apex Court judgement in the case of Goetze India Ltd reported in 157 Taxman 1 and allowed the fresh claim by observing that FTC was denied merely on technical ground and AO has not raised any objections in so far as merits of the claim were concerned and therefore directed the Ld AO to allow the claim in accordance with law.

2.3. Aggrieved against the appellate order, Revenue was on appeal before this Tribunal. Co-ordinate Bench of this Tribunal vide order dated 21-04-2017 in ITA No.1610/Ahd/2013 setaside the reliefs granted by CIT[A] on account of Tax Credit of Rs.1,05,43,697/= and also the tax credit of Rs.1,62,26,344/= granted against MAT payment are without verification of the claim made by the assessee company, thereby setaside the issues to the file of Ld CIT[A] for de-nova adjudication.

3. In the setaside proceedings, Ld CIT[A] after giving show cause to the assessee and calling remand report from the AO and rejoinder from the assessee held that the credit for taxes paid in China will not be available in so far as it relates to claim of tax credit for a sum of Rs.1,05,43,697/= because as per Article 23[2], credit is to be claimed in respect of income for the relevant assessment year. Since the sum relates to receipt of fees for technical services during the financial year 2006-07, the credit can be claimed relevant for the asst year 2007-08 not for the present asst. year. Thus Ld CIT[A] denied the claim of tax credit for a sum of Rs.1,05,43,697/= for the Asst. Year 2008-09.

3.1. However Ld CIT[A] for the next issue namely claim for Tax Credit of a sum of Rs.1,62,26,344/= which relates to taxes paid and fees for technical services received during the asst. year 2008-09 and allowed the claim of the assessee as specified in India-Indonesia DTAA and India-Singapore DTAA, wherein the clauses of DTAA are identical to Article 23 of the DTAA between India and China and as considered in the decision rendered by the Co-ordinate Bench of this Tribunal in the case of M/s. Elitecore Technologies Pvt Ltd -Vs- DCIT [2017] 77 Taxmann.com 149 [AHD Trib]. Thus Ld CIT[A] partly allowed the appeal in favour of the assessee.

4. Aggrieved against the appellate order, Revenue is in appeal before us in **ITA No.1517/Ahd/2019** raising the solitary Ground of Appeal:

1. That the Ld. CIT (A) has erred in law and on facts in allowing credit for tax paid u/s. 90 of the Income Tax Act,1961 in a foreign country amounting to Rs.1,62,26,344/- against tax liability under MAT provisions."

4.1. Ld. Sr. DR Shri Rignesh Das appearing for the Revenue submitted that the CIT[A] erred in allowing the credit for tax paid u/s.90 of the Act in a foreign country amounting to Rs.1,62,26,344/- against tax liability under MAT provisions. Ld DR further relied upon the remand report of the Ld AO and requested to allow the appeal in favour of the Revenue.

5. Per contra Shri Soumitra Choudhary Ld Counsel appearing for the assessee submitted that the appeal of the Revenue has no substance because, even the Indo-China Tax Treaty contemplates credit to be given in respect of taxes paid in respect of income earned in China in respect of which tax has been paid. The MAT provisions do not expressly exclude FTC not being provided while computing tax liability under MAT. In the case of ACIT v. Larsen & Tubro Ltd. [ITA No. 4499/Mum/2008, dated 22-7-2009] and DCIT -Vs- Subex Technology Ltd. [2015] 63 taxmann.com 124 (Bangalore ITAT), FTC was granted against MAT liability and it was held that credit for foreign taxes would be available even if taxpayer was liable to pay MAT. Both these decisions were not been considered while deciding in the case of M/s. Elitecore Technologies (P.) Ltd. v. DCIT reported in [2017] 77 taxmann.com 149. Moreover from reading of the above decision, it can be seen that the favorable judgements were neither cited or distinguished. In the above circumstances the Hon'ble Supreme Court in the case of CIT -Vs- Vegetable Products Ltd. reported in 88 ITR 192 held that 'If Court

finds that language to be ambiguous or capable of more meanings than one, then the Court has to adopt that interpretation which favour's the assessee, more particularly so because the provision relates to imposition of penalty.

5.1. Further more Section 91 of Act provides for relief in respect of taxes paid in a country with which there is no agreement under section 90. The Double Taxation Avoidance Agreement ('DTAA/ tax treaty') entered into under sections 90/90A generally contains a separate Article relating to methods to eliminate double taxation. Most of the DTAAs entered into by India follow the credit method. Article 23(3) of Indo-China Tax Treaty clearly equates the taxes paid in China to tax which would have been payable but for the legal provisions concerning tax deduction exemption or other tax incentives in India.

5.2. It is to be noted that CBDT introduced Foreign Tax Credit (FTC) Rules vide Notification No.54 of 2016 dated June 27, 2016 which came into effect from 01-04-2017. Further Rule 128 of the Income-tax Rules, 1962 deals with the manner of computation of FTC. In Union budget 2017, a new proposal in line with Rule 128 was introduced to restrict the carry forward of MAT/AMT credit. In the provisions as it existent prior to the Union Budget 2017, it was possible to carry forward the difference between the tax paid under MAT/AMT and the tax computed under the normal provisions as credit for future years and to be set off against tax payable under normal provisions. However, as per the Budget proposals which became law later, Minimum Alternate Tax/Alternate Minimum Tax

[for short referred as MAT/AMT] credit will not be allowed to be carried forward to the extent that the amount of FTC that can be claimed against MAT/AMT exceeds the amount of FTC that can be claimed against tax computed under the normal Income Tax provisions. This amendment was to apply in relation to Asst. Year 2018-19 and subsequent years.

5.3. Further Rule 128(6) provides that in case of MAT/AMT liability, FTC would be allowed in the same manner as is allowable against tax payable under the normal provisions. Rule 128(7) provides that when FTC against MAT/AMT liability exceeds FTC against tax payable under normal provisions, such excess would be ignored while computing credit under section 115JAA or section 115JD. Therefore Rule 128(6) is a statutory recognition of a right that FTC is to be allowed in the same manner against tax payable under the normal provisions of the Act, which had been accepted in judicial precedents, prior to the introduction of Rule 128(6). For all the above reasons, Shri Soumitra Choudhary Ld Counsel appearing for the assessee submitted that there is no merit in the appeal filed by the Revenue and the appeal is liable be dismissed.

6. Heard rival submissions at length and also considered the Paper Book and case laws filed before us. As per Article 12(2) of Indo-China Tax Treaty, Royalties are taxed in the contracting State in which such Royalty arise (in this case China) according to the laws of that contracting State. However, if the recipient thereof is beneficial owner of such royalty, then tax so charged shall not exceed 10% of gross amount of royalty. Thus, in view of Article 12

of Indo-China Tax Treaty, SETL has deducted tax at source @ 10% while disbursing royalty in question to the assessee company. As per Article 23(2) of the Indo-China Tax Treaty, where resident of India derives royalty income which has been taxed in China, "India" shall allow as deduction from "tax" on income of that resident amount equal to "income tax paid in China" whether directly or by way of deduction. Accordingly, assessee is eligible to claim of such FTC in view of provisions of section 90 of the Act.

6.1. Further as per section 115JB, if tax payable on "book-profit" is more than tax payable on "income under normal provisions", then "book profit" shall be deemed to be the "deemed income" of such assessee and "Minimum Alternative Tax" shall be payable thereon (i.e. "tax" shall be payable at the "rate prescribed u/s.115JB"). Article 23(2) of the Indo-China Tax Treaty, provides the assessee shall get credit of "tax paid in China" from its "tax liability in India". Thus the Scheme of the Act does not differentiate between "tax liability" calculated under "section 115JB" and under the "normal provisions of Act". Accordingly, the assessee company is eligible to claim "FTC" against "tax liability" computed in accordance with Section 115JB of the Act.

6.2. In this connection Co-ordinate Bench of the Bangalore Tribunal in the case of DCIT -Vs- Subex Technology Ltd. reported (2015) 63 taxmann.com 124 held as follows:

> "… 4. The question is whether credit u/s.90 of the IT Act, would be given on tax liability under MAT provisions of the Act. We find that a very same issue had come up before the Mumbai Bench of the Tribunal in the case of L & T Ltd.

5. Co-ordinate Bench noted that the income on which tax has been paid abroad was included in 'book profit' for the purpose of Sec.115JA. It was held that once taxable income was determined either under the normal provisions of the Act or as per Sec.115JB, subsequent portion relating to computation of the tax has to be governed by the normal provision of the Act. It also held that there was no provision in the Act, debarring granting of credit for tax paid abroad in case income is computed u/s.115JA. It was further held that the assessee could not be denied the set off of tax relief against the tax liability determined u/s. 115JA.

6. CIT[A] had given relief to the assessee for the very same reasons mentioned by Co-ordinate Bench in the case of L & T Ltd [supra]. We do not find any good reason to interfere."

7. As regards "quantification" of claim of FTC, as per Article 23(2) of Indo-China Tax Treaty, deduction of FTC shall not exceed that part of income-tax (as computed before deduction is given) which is attributable to income which may be taxed in China. Thus effective rate of tax paid on royalty income in "India" (rate at which "royalty income" has been subjected to tax in "India") is as follows (Pg.11 of CIT(A)'s order r.w. Pgs.129-136 @ 132 of the Paper Book):

AY 2007-08: 11.22%

AY 2008-09 : 11.33%

7.1. Whereas the rate of tax on royalty income in "China" is 10%. Since assessee has paid tax on such royalty income in "India" at a "higher rate" as compared to tax paid on such royalty income in "China", the assessee is eligible for entire Tax Credit effected in China as FTC. Thus, Ld. CIT(A) has rightly held that assessee is eligible for FTC vis-à-vis royalty offered for tax in the A.Y.2008-09, such findings does not require any interference. Thus there is no

merits in the ground raised and the Revenue appeal is liable to be dismissed.

8. In the result **the appeal filed by the Revenue in ITA No. 1517/Ahd/2019 is hereby dismissed**.

9. Assessee is in appeal before us in **ITA No.1621/Ahd/2019** as against the appellate order raising the following Grounds of Appeal:

> 1. The learned CIT(A) has erred in law and on facts in holding that no credit can be given for withholding tax of Rs.1,05,43,697/- during the year under consideration on Royalty income received from China.
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> 2. The learned CIT(A) has failed to appreciate the fact that the DTAA r.w.s. 90 between India and China does not restricts allowance of subject tax credit of Rs 1,05,43,697/- during the year consideration.
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> 3. The learned CIT(A) failed to appreciate the fact that the Rule 128 providing that foreign tax credit to be allowed in the year of booking of income was introduced prospectively from 1-4-2017 and hence not applicable to the year under consideration and therefore there was no bar on allowing subject foreign tax credit during the year under consideration on the ground that corresponding income was offered in previous year.
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> 4. The learned CIT(A) has erred in law and on facts in directing AO to restrict credit u/s. 115JAA of the Act claimed in the subsequent year to the extent of withholding tax allowed in the current year.
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> 5. Both the lower authorities have passed the orders without properly appreciating the facts and they further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order. This action of the lower authorities is in clear breach of law and Principles of Natural Justice and therefore deserves to be quashed.
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> 6. Alternatively and without prejudice to above appellant most humbly craves before your honour that in case of dismissal of all above grounds

suitable direction may kindly be given for allowing subject credit in the year in which income has been booked.

7. The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal.

9.1. Registry has noted that there is delay of 32 days in filing the above appeal by the assessee. The assessee company through its 76 years old Accountant Mr.Mahendra Nathalal Shah filed a notarized affidavit explaining that by inadvertent mistake the appellate order could not be handed over to the Chartered Accountant who handles the appeal. On inquiry from the concerned Chartered Accountant this inadvertent mistake was noted and then filed the appeal with a delay of 32 days and requested to condone the delay since it is neither willful nor wanton and no prejudice to be caused to the Revenue. Ld CIT DR has no serious objection in condoning the delay in filing the above appeal. Thus the delay of 32 days in filing the appeal by the assessee is hereby condoned and now take up the appeal for adjudication.

10. Shri Soumitra Choudhary Ld Counsel appearing for the assessee submitted that the TDS certificate was received by the Assessee from China only in September 2009, hence it was not possible for the Assessee to claim tax credit in A.Y. 2007-08. Therefore the FTC as claimed may kindly be allowed and relied on Co-ordinate Bench decision in the case of Sadbhav Engineering Ltd. Vs. DCIT [2014] 45 taxmann.com 333 (Ahmedabad - Trib.) wherein it was held that credit can be given in the year in which tax is deducted even though income is not offered in that year. In

any event, as mandated by Rule 37BA of IT Rules, credit for tax deducted at source and paid to the Central Government, shall be given for the assessment year for which such income is assessable. A suitable direction may be issued in this regard, in the interest of justice.

11. In so far as the claim of the Assessee to full FTC as against proportionate basis allowed by the CIT(A), the Ld Counsel reiterated the submissions made before the Ld CIT(A) and drawn our attention that Article 23(2) and 23(3) does not mandate such proportionality. Tax paid abroad has to be given the same treatment as advance tax paid or TDS and cannot be given a different treatment. In any event, the domestic law with regard to FTC against MAT as enshrined in the Act, is more beneficial to the Assessee and therefore the same may be followed in preference to DTAA and as mandated by Sec.90(2) of the Act.

11.1. Alternatively, Ld Counsel prayed that the difference between the FTC for which MAT credit is given and the taxes paid in China, may be treated as allowable revenue expenditure u/s.37(1) of the Act, as laid down in the decision of the ITAT Mumbai in the case of Bank of India Vs. ACIT [2021] 125 taxmann.com 155 wherein the ITAT had considered the following question in the aforesaid decision viz., Whether or not the assessee is eligible for a deduction of taxes paid abroad on its income in the respective tax jurisdiction in respect of which the assessee has not been granted any tax credit. The Tribunal following decision of Hon'ble Bombay High

Court, in the case of Reliance Infrastructure Ltd. v. CIT reported 390 ITR 271 and allowed in favour of the assessee.

11.2. Further the Appellate Tribunal in the case of Bank of India also distinguished the decision rendered in the case of DCIT -Vs- Elitecore Technologies (P.) Ltd. 165 ITD 153(Ahd.), based on which the CIT(A) had given the directions in the impugned order against which the Assessee is in appeal before this Tribunal. The Tribunal in Bank of India (supra) made the following observations:

> "78. Learned Departmental Representative's plea is only fit to be noted and rejected. It is relevant to note that this decision was rendered by a bench that did not fall in the jurisdiction of this Hon'ble jurisdictional High Court, and, for that reason, strictly speaking, this Hon'ble jurisdictional High Court judgment was not conclusively binding on the said Bench. As on now, however, the said judgment of Hon'ble jurisdictional High Court judgment is binding on this Bench, which is in the jurisdiction of Hon'ble Bombay High Court, and we most humbly and most respectfully bow before the views expressed by Their Lordships. As laid down by the Apex Court in the case of Ambika Prasad Mishra v. State of U.P. AIR 1980 SC 1762; [1980] 3 SCC 719 (Page 1764 of AIR 1980 SC): "**Every new discovery nor argumentative novelty cannot undo or compel reconsideration of a binding precedent.... A decision does not loose its authority merely because it was badly argued, inadequately considered or fallaciously reasoned.**" Similarly in the case of Kesho Ram & Co. v. Union of India [1989] 3 SCC 151, it was stated by the Supreme Court thus (page 160): "**The binding effect of a decision of this Court does not depend upon whether a particular argument was considered or not, provided the point with reference to which the argument is advanced subsequently was actually decided in the earlier decision.**" We are, therefore, not swayed by the arguments of the learned Departmental Representative. As a matter of fact, even in the Elitecore decision (supra), it is specifically stated that the fact that the Reliance Infrastructure decision, being a non-jurisdictional

Hon'ble High Court decision, is on a different footing and that "Maybe, if the views expressed were by our jurisdictional High Court, or by any of Hon'ble High Courts after taking into account the views expressed by Hon'ble Supreme Court on that issue, things may have been little different, but that is not the case here". Once the Hon'ble jurisdictional High Court holds the law in a particular way, it is our bounden duty to follow the same in letter and in spirit. Whatever arguments learned Departmental Representative seeks to make in support of any other interpretation, than the interpretation adopted by Hon'ble jurisdictional High Court even if was adopted in the light of a concession then made by the learned counsel for the revenue before them, being more appropriate, these arguments may be made before Their Lordships if and when that occasion comes. It is for Their Lordships to take a call on these arguments. We are not inclined to entertain these arguments before us. In the light of these discussions, as also bearing in mind the entirety of the case, we reject the plea of the learned Departmental Representative, uphold the plea of the assessee, and direct the Assessing Officer to allow the deductions in respect of taxes paid by the assessee abroad, in respect of which no foreign tax credit is granted to the assessee, in the light of the decision of Hon'ble jurisdictional High Court in the case of Reliance Infrastructure decision (supra), and examine the matter be afresh in this light. To this extent, this plea of the assessee is upheld.

Our conclusions on the second issue

79. The second question that we had identified for our adjudication, i.e. whether or not the learned CIT(A) was justified in upholding the action of the Assessing Officer in declining deduction, in the computation of business income, of Rs. 182,64,22,948 in respect of taxes so paid abroad, is thus answered in favour of the assessee in principle but the matter is remitted to the file of the Assessing Officer for limited factual verification."

12. Thus Ld Counsel prayed considering the aforesaid decisions, this Hon'ble Tribunal may hold that to the extent the Assessee does

not get FTC while computing MAT, the same be allowed as deduction in computing business income in respect of taxes paid abroad and allow the assessee appeal.

13. Per contra Ld. Sr. DR Shri Rignesh Das appearing for the Revenue supported the order passed by Ld CIT[A] and requested to uphold the same and requested to dismiss the appeal filed by the assessee.

14. Heard rival submissions at length and also considered the Paper Book and case laws filed. The short controversy, which falls for consideration by us is Whether FTC of Rs.1,05,43,697/- can be claimed in Asst. Year 2008-09, when the corresponding royalty income was been offered for tax in the previous Asst. Year 2007-08. It is to be stated that the manner in which FTC is to be claimed is not defined under the DTAA. Hence, one needs to refer and rely upon domestic provisions. Under domestic provisions, credit for TDS has been provided for under Chapter XVII of the Act. Section 199 deals with "Credit for tax deducted". At this stage, it is essential to have a glance over the relevant amendment brought in by the Parliament in Section 199 of the Act with effect from 01.04.2008

> **Section 199.** (1) Any deduction made in accordance with the foregoing provisions of this Chapter and paid to the Central Government shall be treated as a payment of tax on behalf of the person from whose income the deduction was made, or of the owner of the security, or of the depositor or of the owner of property or of the unit-holder, or of the shareholder, as the case may be.

Before or Upto 01.04.2008

> Section 199 (1) Any deduction made in accordance with the foregoing provisions of this Chapter and paid to the Central Government shall be treated as a payment of tax on behalf of the person from whose income the deduction was made, or of the owner of the security, or depositor or owner of property or of unit- holder or of the shareholder, as the case may be, and credit shall be given to him for the amount so deducted on the production of the certificate furnished under section 203 in the assessment made under this Act for the assessment year for which such income is assessable:

14.1. Thus, Section 199 has been amended w.e.f. 01.04.08 (ie. from Asst. Year 2008-09) such that if tax is deducted and paid to the Government, then irrespective of the fact that corresponding income pertains to that previous year or any other year, the "TDS credit" is to be given in the "year in which tax is deducted" and paid to Govt. Reliance is placed on following decisions:

14.2. Sadbhav Engineering Ltd. vs. DCIT - (2015) 153 ITD 234 Ahd;

> "24. We have heard the rival submissions, perused the material available on record and gone through the orders of the authorities below. The brief facts of the case are that the assessee claimed credit for TDS of Rs 1,73,52,062/- for the AV 2006-07 and Rs. 2,25,09,037 in AV 2007-08 which was not allowed by the AO on the ground that the income in respect of the said TDS was not shown by the assessen in view of the provisions of section 199 of the Act. The Id. CIT(A) also confirmed the same
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> 25. The AR of the assessee submitted that the issue is now covered in favour of the assessee by the decision of Hon'ble Visakhapatnam Bench of the Tribunal in IT Appeal No.324(Vizag) of 2009 for AY 2006-07, dated 03/03/2011 in the case of Asstt. CIT v. Poddu Srinivasa Rao. The Id. DR for the Revenue supported the orders of the authorities below.
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> 26. We find that the Visakhapatnam Bench in the case of Peddu Srinivasa Rao (supra) has held as under-
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> > "8. We have carefully perused the provisions of section 199 of the Act and according to the pre-amended provisions of section 199,

the credit of deduction made in accordance with the relevant provisions of this chapter and paid to the Central Government, shall be given for the amount so deducted on the production of the certificate furnished u/s 203 for the assessment made under this Act for the assessment year for which such income is assessable. But in the amended provisions the words "for the assessment year for which such income is assessable" has been omitted. Meaning thereby, that the legislature was quite conscious about the facts and hardships faced by some assessees, while making the amendments in section 199 and in amended provisions nothing has been stated about the year in which the credit of TDS is to be claimed. As per amended provisions of section 199, in sub-section 1, it has been stated that any deductions made in accordance with the foregoing provisions of this chapter and paid to the Central Government shall be treated as a payment of tax on behalf of the person from whose income the deduction was made. Therefore, as per the amended provisions, once the TDS was deducted, a credit of the same to be given to the assessees, irrespective of the year to which it relates. The pre-amended and the amended provisions of section 199 are extracted hereunder:

"Section 199: Credit for tax deducted (1) Any deduction made in accordance with the foregoing provisions of this Chapter and paid to the Central Government shall be treated as a payment of tax on behalf of the person from whose income the deduction was made, or of the owner of the security, or depositor or owner of property or of unit-holder or of the shareholder, as the case may be, and credit shall be given to him for the amount so deducted on the production of the certificate furnished under section 203 in the assessment made under this Act for the assessment year for which such income is assessable:

(3) The Board may, for the purposes of giving credit in respect of tax deducted or tax paid in terms of the provisions of this Chapter, make such rules as may be necessary, including the rules for the purposes of giving credit to a person other than those referred to in sub-section (1) and sub-section (2) and also the assessment year for which such credit may be given.

Section 199. (1) Any deduction made in accordance with the foregoing provisions of this Chapter and paid to the Central Government shall be treated as a payment of tax on behalf of the

person from whose income the deduction was made, or of the owner of the security, or of the depositor or of the owner of property or of the unit-holder, or of the shareholder, as the case may be.
(2) Any sum referred to in sub-section (IA) of section 192 and paid to the Central Government shall be treated as the tax paid on behalf of the person in respect of whose income such payment of tax has been made."

26. The Ld. DR could not cite any contrary decision or any other good reason for which the aforesaid decision of the Co-ordinate Bench of the Tribunal should not be followed by us. Respectfully following the aforesaid order of the Tribunal, we set aside the orders of the lower authorities and direct the AO to allow credit for the TDS to the assessee. Thus, the ground of appeal of the assessee is allowed."

14.3. In the case of Chandra Shekhar Aggarwal -Vs- ACIT - (2016) 57 ITD 626 Delhi Tribunal considered above mentioned decisions of Co-ordinate Benches of Vishakapatnam and Ahmedabad and held as follows:

"Analysis of order of Commissioner (Appeals)

In view of the aforesaid provisions of sections 198 and 199, there is no justification not to grant credit of TDS to the assessee from whose income such tax has been deducted by the deductor, more particularly B when such TDS stands duly declared as income by the assessee. The conclusion of the Commissioner (Appeals) to grant proportionate credit is also not in accordance with the cash system of accounting followed by the assessee. The Commissioner (Appeals) in her order has laid much emphasis on rule 37BA [Para 9]

Provisions of rule 37BA

Rule 37BA(1) provides rules relating to have credit for the purpose of section 199 as is provided in section 199(3). Rule 37BA(3)(1) provides that credit for TDS and credited to the account of Central Government, shall be given for the assessment year for which such income is assessable. Thus, if the said rule is read, it is clear that the assessee is entitled to get credit of the TDS once such income is included in his income

Consideration of case

The admitted facts of the instant case are that the TDS has been offered as income by the assessee in his return of income.

The TDS deducted by the deductor on behalf of the assessee and offered as income by the assessee in his return of income is to be allowed as credit in the year of deduction of TDS. Rule 37BA provides that credit for TDS should be allowed in the year in which income is assessable. Further clause (11) of rule 37BA(3) provides that where tax has been deducted at source and paid to the Central Government and the income is assessable over a number of years, credit for tax deducted at source shall be allowed across those years in the same proportion in which the income is assessable to tax. This rule is only applicable where entire compensation is received in advance, but the same is not assessable to tax in that year and is assessable in a number of years. However, such rule has no applicability, where assessee follows cash system of accounting.

This can be supported from the illustration that suppose an assessee, who is following cash system of accounting, raises an invoice of Rs. 100 in respect of which deductor deducts TDS of Rs. 10 and deposits to the account of the Central Government. Accordingly the assessee would offer an income of Rs. 100 and claim TDS of Rs. 10. However, in the opinion of the revenue, the assessee would not be entitled to credit of the entire TDS of Rs. 10 but would be entitled to proportionate credit only. Now assumes that Rs. 90 is never paid to the assessee by the deductor. In such circumstances, Rs. 9 which was deducted as TDS by the deductor would never be available for credit to the assessee though the said sum stands duly deposited to the account of the Central Government.

Rule 37BA(3) cannot be interpreted so as to say that TDS deducted by the deductor and deposited to the account of the Central Government is though income of the assessee but is not eligible for credit of TDS in the year when such TDS was offered as income. This view is otherwise also not in accordance with the provisions contained in sections 198 and 199. The proposition as laid out by the Commissioner (Appeals), therefore, cannot be countenanced. [Para 10]

In view of the aforesaid, the assessee would be entitled to credit of the entire TDS offered as income by him in his return of income."

14.4. In the case of Shri Rangji Realities P. Ltd. -Vs- ITO (2017) 82 taxmann.com 456 Mumbai Tribunal followed Delhi Tribunal decision of Chandra Shekhar Aggarwal and held as follows:

> "The assessee duly fulfills all the conditions as laid down in section 198 r.ws. 199 r.w. Rule 378A of the Act. I find that TDS had been deducted and paid to the Central Government by the deductee and Payment/ Credit of Rent Income has been included in the accounts of the assessee. The deductor had duly filed requisite TDS returns as per Rules and also issued TDS certificate to the assessee and the same was furnished to the AO. Amount of TDS claimed, corresponding to claim of unrealized rent, is duly offered to tax as income of the assessee, in view of section 198 of the Act and also assessed by the AO.
>
> 8. I also find that this issue is covered by the decision of co-ordinate bench of this tribunal in the case of Chander Shekhar Aggarwal (supra).
>
> ……..
>
> In my considered opinion, assessee's action is in accordance with provisions of section 199 of the Act and the assessee is eligible for seeking credit of the TDS amount. Hence, I set aside the order of the authorities below and decide the issue in favour of the assessee. However, this issue is highly debatable and cannot be acted Cupon by the revenue.
>
> 9. In the result, the appeal of assessee is allowed."

15. In view of the amended provisions and judicial precedents cited above, in our considered view the assessee company is eligible for TDS credit in the present Asst. Year 2008-09 even though corresponding income was offered by the assessee in the previous Asst Year 2007-08. **Thus Ground Nos.1 to 3 raised by the assessee are hereby allowed.**

16. As regards reliance placed by CIT(A) on "Elitecore Technologies P. Ltd." so as to hold that no credit can be given to the withholding tax pertaining to receipts income from which is not assessed in the

current Asst. Year. We are of the considered view the Ld CIT[A] has misconceived the above decision, which deals with allowability of tax credit on proportionate basis and Does not deal with the year of allowability of tax credit. Further Article 23(2) of DTAA does not state that "FTC" is to be allowed only in the year in which corresponding income has been offered. It merely states that where resident of India derives royalty income which has been taxed in China, "India" shall allow as deduction from "tax" on income of that resident amount equal to "income tax paid in China" whether directly or by way of deduction. In the above such circumstances, Ld CIT(A) was not justified in denying FTC on the ground that corresponding income has not been offered for tax in the "year under appeal" but has been offered in the Asst. Year 2007-08. Since no such condition has been prescribed either under the DTAA or under the Act or in the decision of ITAT (Ahmedabad Bench) relied upon by Ld CIT(A).

16.1. Further more Ld CIT[A] called for a Remand Report from the Assessing Officer on this issue and Ld AO has not given any adverse report on this issue in his Remand Report which is placed at Pgs.-129-136 @ 132-134 of the Paper Book. In fact the Ld AO, after taking cognizance of Rule 128 inserted w.e.f. 01.04.17, has observed that "Rule 128" is "not applicable for Asst Year 2008-09.

16.2. It is well settled Principle of law and as per CBDT's Circular No. 14 of 1955, it is the duty of Tax Authority to make available to the tax-payer concerned any legitimate and legal tax relief to which such tax payer is entitled to, but was omitted to claim for one or

the other reason. Accordingly, FTC in question is liable to be allowed since assessee is legitimately eligible for the same. Similarly, Article 265 of The Constitution of India, 1950 states that no tax can be levied except by Authority of Law. This further implies that any tax collected contrary to law has to be refunded. Accordingly, **FTC of Rs.1,05,43,697/- is liable to be allowed in Asst. Year 2008-09 even though corresponding income has been offered in the Asst. Year 2007-08**.

16.3. Insofar as issue as to "MAT credit" is concerned, Ld CIT(A) held that prior to 01.04.2018, credit of tax paid/withheld outside country is eligible for the purposes of S.115JAA, is to be allowed in later years but in view of second proviso to S.115JAA(2A), gave a direction to AO to restrict the MAT credit u/s 115JAA in subsequent years to the extent of withholding tax allowed in current year.

16.4. In our considered view Ld CIT(A) failed to appreciate that second proviso to S.115JAA(2A) has been inserted by the Finance Act, 2017 w.e.f. 01.04.2018. Hence, the said proviso is applicable prospectively. Accordingly, the said proviso referred to and relied upon by CIT(A) is not applicable for the present Asst. Year 2008-09. It is well settled legal principles with respect to retrospective applicability of any amendment as held by the Hon'ble Apex Court in the case of CIT vs. Vatika Township (P.) Ltd.) - (2014) 367 ITR 466 (SC) as follows:

- Unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation.

- Current law should govern current activities. Law passed today cannot apply to the events of the past.

- The general principle of law is known as 'lex prospicit non respicit i.e. 'law looks forward not backward.

- A retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

16.5. In view of the above, Ld CIT(A) was not justified in directing AO to restrict the MAT credit u/s 115JAA in subsequent years to the extent of withholding tax allowed in current year. In any case, the assessee company has never claimed MAT credit of Rs.161,88,14,702/- related to the Asst. Year 2907-08 & 2008-09 (i.e. Rs.57,50,00,362 for AY 07-08 plus Rs.104,38,14,340 for AY 08-09), as is evident from the Return of Income filed for the Asst. Year 2017-18 [Pg.6 of CIT(A)'s order r.w. Pgs.82-83 of the Paper Book. Such direction of Ld CIT[A] is absolutely unwarranted and is hereby quashed. **Thus Ground Nos. 4 & 5 raised by the assessee are hereby allowed.**

17. **Ground Nos. 6 & 7** raised by the assessee are consequential in nature and **therefore does not require separate adjudication**.

18. In the result **the appeal filed by the Assessee in ITA No. 1621/Ahd/2019 is hereby allowed**.

Order pronounced in the open court on 29 -10-2024

Sd/-	**Sd/-**
(MAKARAND V. MAHADEOKAR)	**(T.R. SENTHIL KUMAR)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad : Dated 29/10/2024

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद