

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'E', NEW DELHI)**
BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND SHRI KULDIP SINGH, JUDICIAL MEMBER

I.T.A. No.3355 /Del/2011
Assessment year : 2005-06

M/s. Michelin India Tyres Pvt. Ltd., Vs. DCIT, Circle 6(1),
Unit 401-404, 4th Floor, New Delhi
Copia Corporate Suites,
Jasola District Centre,
New Delhi.

GIR / PAN:AADCM8454G

(Appellant)

(Respondent)

Appellant by : Shri Nageshwar Rao, Adv.

Shri Shailesh Kumar, Adv.

Respondent by : Shri P Dam Kanunjna, Sr. DR

Date of hearing : 17.09.2015

Date of pronouncement : 30.10.2015

ORDER

PER KULDIP SINGH, JM:

The appellant M/s. Michelin India Tyres Pvt. Ltd. by filing the present appeal under the I. T. Act, 1961 (for short 'the Act'), sought to set aside the impugned order dated 14.02.2011 passed by Ld. CIT(A) IX, New Delhi qua the Assessment Year 2005-06 on the grounds inter alia that:

- 1. On the facts and circumstances of the case and in law, the Learned Commissioner of Income Tax (Appeals) ("CIT (A)") erred in confirming the order passed by the learned Assessing Officer ("AO"); and thereby confirming the total loss of the Appellant at Rs. 6,08,24,758 as assessed by the Learned AO in the order of assessment under section 143(3) of the Income tax Act, 1961 ("the Act") dated 25.11.2008, as against the declared loss of Rs. 7,81,94,190/-.*

2. *The Learned CIT(A)/AO erred on the facts presented before them and have not given due cognizance to the fact that technical services received by the Appellant during the financial year 2004-05 were imperative for the purpose of establishing its business operations in India and thus cannot be treated as capital expenditure for the Assessee.*

3. *The Learned CIT(A) erred in concluding that these expenses incurred did not pertain to the existing business carried out by the Appellant and grossly erred in failing to appreciate that the expenses incurred were in the nature of fee for technical services and were not towards any new business. The expenses were in fact towards the Appellant's existing business of 'tyres' and the project was an extension of the Appellant's existing business.*

4. *In concluding that the payment for technical services are capital in nature, the Learned CIT(A)/ AO has also completely ignored the fact that these expenses are wholly and exclusively for the purpose of the business of the Appellant, and accordingly their commercial expediency is of no relevance for the purpose of their allowability under section 37(1) of the Act.*

5. *The Learned CIT(A)/AO failed to take cognizance of the fact that during the course of the transfer pricing proceedings, the Transfer Pricing Officer ("learned TPO") examined the benefits accruing to the Appellant from availing technical services and determined that payment made by the Appellant for availing Technical Services is at arm's length, thereby concluding that the payments made by the Appellant were not excessive and were for the bonafide purpose of the business operations. Accordingly, based on the facts and circumstances of the case, The Learned CIT(A)/AO's contention that the benefit of these technical services has not accrued to Appellant in the financial year 2004-05, is misplaced and grossly inappropriate.*

6. *Without prejudice to the above grounds, the Learned CIT(A)/AO erred on fact and circumstances of the case in not allowing the depreciation on technical services expense disallowed as capital expenditure.*

7. *The Learned CIT(A)/AO has erred on facts and circumstances of the case in confirming the initiation of penalty proceedings under explanation 1 and explanation 7 to section 271 (1)(c) of the Act against the Appellant, which is bad in law.*

8. *The order of The Learned CIT(A)/AO IS contrary to the facts, law, and the principles of natural justice.*

9. *The above grounds of appeal are mutually exclusive & without prejudice to each other.*

10. *The Appellant craves for leave to amend, vary, omit or substitute any of the aforesaid grounds of appeal or add any further ground of appeal(s) at any time before or at the time of hearing of the appeal.*

The above grounds of appeal are mutually exclusive & without prejudice to each other.

The appellant prays for leave to add, alter, amend and / or modify any of the grounds of appeal at or before the hearing of the appeal.

The appellant prays for appropriate relief based on the said grounds of appeal and the facts and circumstances of the case.”

2. Briefly stated, the facts of this case are: during the processing of return of income filed by the assessee for the Assessment Year 2005-06, the case of the assessee was subjected to scrutiny and notice u/s 143(2) dated 01.05.2006 was issued to the assessee followed by detailed questionnaire along with notice u/s 142(1) dated 30.06.2004 and in response thereto, Shri Siddharth CA attended the proceedings as Authorized Representative, filed requisite details and the case was discussed with him.

3. Michelin-Apollo India is a joint venture between Michelin group of France and Apollo Tyres Ltd. in India incorporated on 17.11.2003 to carry

out the business of manufacturing and trading of tyres and tubes for trucks and buses and passenger cars. During the year under consideration, the assessee was engaged in the import and resale (trading) of tyres for passenger cars, trucks and buses, in the replacement market segment in India. Consequently, reference was made to the Transfer Pricing Officer (TPO) u/s 92CA(1) of the Act who has passed order dated 30.09.2008 u/s 92CA(3) stating that no adverse inference is drawn in respect of international transaction undertaken by the assessee during the financial year 2004-05.

4. During the year of assessment the assessee stated to have paid an amount of Rs.1,42,04,926/- towards technical fees under the head 'professional and legal expenses'. Provisions of agreement entered into between the assessee and its partners go to prove that the technical fee paid by the assessee towards receipt of certain rights to use technology by the assessee for manufacture of tyres was expenditure which was clearly in the nature of capital expenditure as the joint venture is usually for manufacture of products, the amount contributed by the non-resident by way of technology is ordinarily being of capital nature and consequently, addition of Rs.1,42,04,926/- has been made.

5. The assessee has claimed legal fee to the tune of Rs.29,11,330/- stated to have been paid to ROC for an increase in authorized capital for Rs.28.02 lacs and the balance for sales tax and excise registration on different locations but the same has been claimed to be capital in nature and as such amount of RS.28,02,000/- is added to the taxable income of the assessee. The assessee claimed an amount of Rs.1,15,368/- as a provision being made for payment of gratuity. The assessee stated that the said amount was based

on actual valuation and was not paid and as such the same has been disallowed and added an amount of Rs.1,15,368/- to the income of the assessee. The A.O. further made an addition of Rs.2,44,328/- deposited late by the assessee pertaining to employees contribution to EPF being not allowable deduction u/s 2(24)X of the Act. The assessee further claimed loss on sale of fixed assets amounting to Rs.2810 in the P & L account and the same has been added to the income of the assessee in computation sheet and the same has also been disallowed. So, the A.O. made the addition accordingly.

6. The assessee challenged the order passed by A.O. before Ld. CIT(A) who has dismissed the appeal. Feeling aggrieved, the assessee has come up before the Tribunal by way of filing the present appeal.

7. Ld. A.R. challenging the impugned order contended inter alia that since there was no capital asset to be transferred nor there was any transfer of technical knowhow, Ld. CIT(A) has grossly erred in appreciating that the expenses incurred were in the nature of Revenue expenditure; that there was no trading activities and the matter referred to the TPO who has found no fault in the international transaction.

8. However, on the other hand, Ld. D.R. contended that since the appellant has failed to conclusively prove that the expenditure was in the nature of revenue expenditure, Ld. CIT(A) has passed valid and legal order and relied upon the impugned order.

9. Now, the first question arises for determination in this case is, as to whether Ld. CIT(A) has erred in confirming the total loss of appellant at Rs.6,08,24,758/- as assessed by the A.O. as against the declared loss of Rs.7,81,94,190/-.

10. The appellant claimed to have paid an amount of Rs.1,42,04,926/- during the period of assessment towards technical fee under the head 'professional and legal expenses'. The A.O. relied upon the operative part of agreement entered into between the assessee and its partner M/s. Apollo Tyres Ltd., which is reproduced as under:

".. WHEREAS, MATL has entered into a Michelin Technology License Agreement dated November 17, 2003 ("Michelin Technology License Agreement ") with Societe de Technologie Michelin ("STM") and Michelin Recherche et Technique S.A. ("MRT") under which tyfATL has received certain rights to use the Technology (as defined hereinafter) in order for MATL to manufacture frock and bus radial tyres ("Product" as herein after defined).

11. A.O. observed that the technical fee paid by the assessee towards receipt of certain rights to use technology by the assessee for the manufacture of Tyres was expenditure which was clearly in the nature of capital expenditure and relied upon the judgements cited as KCP Ltd. Vs CIT 242 ITR 659 (S.C.) and CITS Vs Reinz Talbros Pvt. Ltd. 252 ITR 637 (Del.).

12. Ld. CIT(A) while confirming the order passed by A.O., observed in para 5.2 of the impugned order to the effect that "the appellant itself has submitted that these expenses were incurred with a view to establish a manufacturing facility as a part of its on- going business strategy and achieve backward integration. However, the plan for which the funds amounting to Rs.1,42,04,926/- were expended by the appellant i.e. availing the technical services to assess the feasibility, was eventually hived-off / Discontinued". Thus, such expenditure can be aptly summed up as 'infructuous expenditure' incurred for a project which was ultimately scrapped. Judicial precedents on this issue have held such expenses as not

allowable being in the nature of capital expenditure and relied upon the judgement cited as **Triveni Engineering Works Ltd. Vs CIT 232 ITR 639 (Del.), 100 Taxman 90 (Del. H.C.)**.

13. Ld. A.R. by relying on the judgement of Hon'ble Jurisdictional High Court cited as **Indo Rama Synthetics (I) Ltd. Vs CIT 185 Taxman 277 (Del.)** contended that in the identical circumstances, Hon'ble Jurisdictional High Court has discussed the case of **Triveni Engineering Works Ltd. (supra)** and **CIT vs Modi Industries Ltd. (1993) 200 ITR 341** and came to the following conclusion:

“In the case at hand the amount spent on the project reports was not for the purpose of facilitating the assessee's existing trading operations or enabling management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched. If only the project reports had been successfully accepted and put into implementation, the assessee would have gone into manufacturing of a new product which would have certainly required investment of fresh capital and coming into existence of additional fixed assets.”

14. Now. Coming to the case at hand, the assessee claimed to have spent an amount of Rs.1,42,04,926/- towards legal fee under the head 'professional New Delhi legal expenses', which have been treated as capital expenditure and added to the income of the assessee by the A.O. as well as Ld. CIT(A).

15. Ld. CIT(A) by relying upon the decision of Hon'ble High Court in the case of **Triveni Engineering Works Pvt. Ltd. (supra)** confirmed the order passed by A.O. making addition of Rs.1,42,04,926/- being in the nature of capital expenditure on the sole ground that when the said amount was expended by the appellant for availing the technical services to assess the

feasibility of the project was eventually hived off / discounted such expenditure are to be treated as infructuous expenditure and as such are in the nature of capital expenditure.

16. However, the Hon'ble Jurisdictional High Court in the case of **Indo Rama Synthetics (I) Ltd. (supra)** has made fine distinction in the capital and revenue expenditure in para 10 of the judgement reproduced in the preceding para of this order by observing that if the expenditure is incurred for starting of a new business not carried out by the assessee earlier, then such expenditure is held to be of capital in nature. However, if the expenditure incurred is in respect of the same business which is already carried out by the assessee even if for the expansion of business, to start a new unit which is the same as earlier business and there is unity of control of creating funds then such expenditure is to be treated as business expenditure. No doubt, Hon'ble Jurisdictional High Court in the case of Triveni Engineering Works Ltd. (supra) observed that :-

“After taking note of various judgments of the Supreme Court observed that test to determine an expenditure to be capital or revenue is not straight. However, the test of "enduring benefit is largely accepted and applied by the courts. Further, if the expenditure is incurred with a view to bringing an asset or advantage into existence, it is to be treated as capital expenditure and while doing so, it is not necessary that such expenditure should have that result.”

17. But in the instants case, the expenditure of Rs.1,42,02,926/- expended on legal fees by the assessee, cannot be treated as capital expenditure for two reasons one: that's the expenses were incurred with a view to establish manufacturing facilities as a part of ongoing business strategy and to achieve backward integration, even though, the plant for which the funds amounting

to Rs.1,432,02,926/- were expended by the appellant i.e. for availing technical services to assess the feasibility was eventually hyped off / discontinued and the same are to be treated as revenue expenditure in view of the law laid down by Hon'ble Jurisdictional High Court in the case cited as **Indo Rama Synthetics (I) Ltd (supra)** and as such, the said expenditure on account of technical fee cannot be treated as capital expenditure.

18. The assessee further claimed an amount of Rs.29,11,330/- on account of payment of legal fee paid to ROC for increasing the authorized capital for Rs.28,02,000/- and the balance for Sales Tax And Excise Registration on different locations.

19. For the sake of repetition, it is reiterated that when the amount is being spent by the assessee for increase in the authorized capital and for payment of sales tax and excise registration on different locations in respect of the same business or for the expansion of business under the joint venture then such an expenditure is to be treated as business expenditure despite the fact that the business of the assessee is discontinued. So, in view of the law laid down by Hon'ble High Court in the judgement cited as Indo Rama Synthetics (I) Ltd. (supra), addition of Rs.28,02,000/- made by the A.O. and confirmed by Ld. CIT(A) is not sustainable and hence, ordered to be deleted.

20. The assessee claimed an amount of Rs.1,15,368/- as provision for payment of gratuity based on actual valuation. Undisputedly, the amount of Rs.1,15,368/- claimed on account of making provision for payment of gratuity has never been paid. Provisions contained u/s 40A(7) of the Act explicitly says that no deduction shall be allowed in respect of any provision made in business hence, Ld. CIT(A) has rightly confirmed the addition of Rs.1,15,368/- made on this account.

21. The assessee has also claimed an amount of Rs.2,44,328/- as deduction on account of contribution to EPF during the year under consideration. Undisputedly, the aforesaid payment being contribution to EPF was deposited late even after the date of filing of income tax return. The A.O. as well as Ld. CIT(A) by relying upon the provisions contained u/s 2(24)(x) of the Act disallowed the deduction amounting to Rs.2,44,328/- on account of contribution to EPF on the ground of late deposit. However, the Hon'ble Jurisdictional High Court in the judgement cited as **CIT Vs Aimil Ltd. (2010) 321 ITR 508 (Del.)** decided the issue in controversy. The operative part of the judgement supra is reproduced as under:

“BUSINESS EXPENDITURE - DEDUCTION ONLY ON ACTUAL PAYMENT - PROVIDENT FUND AND ESI CONTRIBUTIONS MADE BEFORE FILING RETURN - ALLOWABLE - INCOME-TAX ACT, 1961, ss. 36(1)(va), 43B

The deletion with effect from April 1, 2004 by the Finance Act, 2003 of the second proviso to section 438 of the Income-tax Act, 1961, which stipulates that contributions to the provident fund and Employees State Insurance fund should be made within the time mentioned in section 36(1)(va) , that is, the time allowed under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, as well as the Employees' State Insurance Act, 1948, is treated as retrospective in nature. If the employees' contribution is not deposited by the due date prescribed under the relevant Acts and is deposited thereafter, the employer not only pays interest on delayed payment but can incur penalties also, for which specific provisions are made in the those Acts. In so far as the Income-tax Act, 1961, is concerned, the assessee can get the benefit of deduction of the payments, if the actual payment is made before the return is filed. Where for the assessment year 2002-03 the assessee had deposited employer's contribution as well as employees' contribution towards provident fund and ESI after the due date, as prescribed under the relevant Act/Rules but before the due date for filing the return under the Income-tax Act:

Held accordingly, that no disallowance could be made in view of the provisions of section 438 as amended by the Finance Act, 2003.”

22. So, following the law laid down by Hon'ble Jurisdictional High Court amount of Rs.2,44,328/- claimed by the assessee as deduction on account of contribution to EPF, though deposited late, is allowable u/s 36(1)(va), 43B of the Act. Consequently, we are of the considered view, addition of Rs.2,44,328/- made by the A.O. and confirmed by Ld. CIT(A) is to be allowed as deduction.

23. The assessee claimed loss of fixed asset amounting to Rs.2810/- but the same has been made as addition to his income on the ground that the same has not been added back to the income of the assessee in computation sheet. When the amount of Rs.2810/- has not been added back to the income of the assessee in computation sheet, the same has been rightly added to the income of the assessee and rightly confirmed by Ld. CIT(A).

24. In view of our findings in the preceding paragraphs, the present appeal filed by the assessee is partly allowed.

25. Order pronounced in the open court on 30th Oct.,2015.

Sd./-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER
Date: 30.10.2015

Sd./-
(KULDIP SINGH)
JUDICIAL MEMBER

Sp

Copy forwarded to:-

1. The appellant
2. The respondent
3. The CIT
4. The CIT (A)-, New Delhi.
5. The DR, ITAT, Loknayak Bhawan, Khan Market, New Delhi.

True copy.

By Order
(ITAT, New Delhi).

S.No.	Details	Date	Initials	Designation
1	Draft dictated on	27/10		Sr. PS/PS
2	Draft placed before author	27,28,30,30,30		Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS	30/10/15		Sr. PS/PS
6	Kept for pronouncement	30/10		Sr. PS/PS
7	File sent to Bench Clerk	30/10		Sr. PS/PS
8	Date on which the file goes to Head Clerk			
9	Date on which file goes to A.R.			
10	Date of Dispatch of order			