IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I", MUMBAI

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER

ITA NO.6574/MUM/2014
(Assessment Year 2010-11)

DCIT, Cir.6(1),
Room No.506, 5th Floor,
Aaykar Bhavan, MK Road,
Mumbai 400 020 ..... Appellant

Vs.

M/s. India Fashions Ltd.,
A2/369 Shah & Nahar Indl.Estate,
Lower Parel(W), Mumbai 400 013
PAN:AABCI 4292A .... Respondent

C.NO.68/MUM/2016
(Arising out of ITA NO.6574/MUM/2014,
Assessment Year - 2010-11)

M/s. India Fashions Ltd.,
A2/369 Shah & Nahar Indl.Estate,
Lower Parel(W), Mumbai 400 013
PAN:AABCI 4292A ..... Cross Objector

Vs.

DCIT, Cir.6(1),
Room No.506, 5th Floor,
Aaykar Bhavan, MK Road,
Mumbai 400 020 ..... Appellant in Appeal

Revenue by : Shri A.K.Kardam
Assessee by : Shri Jitendra Jain

Date of hearing : 13/01/2017
Date of pronouncement : 18/01/2017

ORDER

PER G.S.PANNU,A.M:

The captioned appeal filed by the Revenue and Cross Objection by the assessee pertaining to assessment year 2010-11 is directed against an order passed by CIT(A)-14, Mumbai dated 25/08/2014, which in turn, arises out of an order passed by the Assessing Officer under section 143(3) of the Income Tax Act, 1961 (in short 'the Act') dated 21/02/2014.

2. We may first take up the appeal of the Revenue, wherein the Grounds of appeal read as under:-

> *1. "Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting addition of commission of Rs 87,76,168/-made u/s 37 and also in alternate u/s 40(a)(i) relying on the decision of Hon. ITAT in assessee's own case for assessment years 2008-09 and 2009-10,which was rendered in context of section 37 only, without appreciating that the Hon. ITAT had not given any finding as to the non-applicability of TDS provisions in respect of the commission paid by the assessee and consequently applicability of section 40 (a) (i) of the Act. The C1T(A)failed to uphold addition made u/s 40 (a) (i)of the Act.*
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> *" 2. "Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting addition of commission of Rs. 87,76,168/- made under section40(a)(i) of the Act, failing to take note of retrospective amendment (w.r.e.f. 1/10.1976) brought in by Finance Act 2010, by which Explanation was inserted in section 9, on account of which fee paid for technical services rendered by non-resident would be included in his total income & consequently, TDS was deductible on such remittance made by resident to non resident & resultant applicability of section 40 (a) (i) of the Act"*
>
> *3. "The appellant prays that the order of CIT(A) on the above grounds be set aside to the file of AD or confirm the order of the AO .*

3. As a perusal of the Grounds of appeal reveal, the only issue arises from the action of CIT(A) in disallowing the expenditure of Rs.87,76,168/- representing commission paid to one Mr. Bharat Goyal. In this context, the relevant facts are that assessee is a company incorporated under the

provisions of the Companies Act, 1956 and is, inter-alia, engaged in the business of manufacture and export of readymade garments. The Assessing Officer noted that assessee had paid commission on exports to agent Mr. Bharat Goel of Rs.87,76,168/-. It was canvassed before the Assessing Officer that the recipient was a non-resident, who had rendered services outside India with respect to the exports made and in support assessee also furnished details of the commission paid, statements showing bill wise exports made and the respective sale invoices and debit notes issued by Mr. Bharat Goyal for commission. The Assessing Officer disallowed the commission expenditure on two grounds. Firstly, as per the Assessing Officer similar disallowance was made by the assessing authorities in assessment years 2008-09 and 2009-10 and, therefore, he disallowed the expenditure by invoking section 37(1) of the Act. Secondly, it was noted by the Assessing Officer that assessee did not deduct the requisite TDS on such payment and, therefore, having regard to section 40(a)(i) of the Act, such expenditure was not allowable.

3.1 The CIT(A) has since deleted the disallowance by noticing that the Tribunal in assessee's own case for assessment years 2008-09 and 2009-10 vide order in ITA No.7060&7061/Mum/12 dated 08/04/2014 has deleted the disallowance. Against such a decision of the CIT(A) Revenue is in appeal before us.

4. At the time of hearing, it was a common point between the parties that the order of the Tribunal dated 08/04/2014(supra) relied upon by the CIT(A) continues to hold the field and has not been altered by any higher authority. The relevant discussion in the order of the Tribunal dated 08/04/2014(supra) reads as under:-

" 6. We have heard both the parties and their contentions have carefully been considered. The business of the assessee is mainly of export of textile garments. The assessee has made payment to Shri Bharat Goel who is a non-resident and who does not own any permanent establishment or administrative office in India. Similarly, assessee is also not maintaining any permanent establishment in foreign countries. It is in these circumstances the assessee is making payment of commission to non-resident at specified rate. The recipient of the commission is also not a related party to the assessee. All these findings of facts have been recorded by Ld. CIT(A) and are not disputed by the Revenue as there is no material on record to suggest that these findings of Ld. CIT(A) are either incorrect or false. It is also the findings recorded by Ld. CIT(A) that similar payments were made by the assessee in earlier years to Shri Bharat Goel and have been accepted as allowable expenditure by the Revenue. This fact is clear from the assessment order for A.Y 2006-07 which is passed under the provisions of section 143(3) of the Act and copy is placed on the paper book. It is also a matter of fact that while making the disallowance the AO did not bring any material on record to suggest that the payment made by the assessee to Shri Bharat Goel was for any purpose other than business of the assessee. In view of all these facts, it is difficult to uphold the findings of the A.O that the payments were not made by the assessee for business expediency. In absence of any contrary material and in view of the fact that similar payments have been accepted by the Revenue in earlier years as business expenditure, we are of the opinion that Ld. CIT(A) did not commit any error in holding that such amount was allowable as business expenditure and, therefore, could not be disallowed under section 37 of the Act.

6.1 Now coming to the alternative claim of the AO that on account of non-deduction of tax the amount was disallowable. Here the case of AO is mainly based on withdrawal of earlier circulars and this issue has been discussed in details in above part of this order. The aforementioned decision of Hon'ble Delhi High Court in the case of CIT vs. Angelique International Ltd (supra) and decision of Allahabad High Court in the case of CIT vs. Model Exims(supra) , it has been made clear that withdrawal of earlier circular by the CBDT vide circular No.7 of 2009 dated 22/10/2009 will not operate prior to that date i.e. 22/10/2009. Both the financial years under consideration are prior to 22/10/2009. Therefore, we are of the opinion that there is no error in the order passed by Ld. CIT(A) vide which it has been held that even on the basis of Circular No.7 dated 22/10/2009 disallowance could not be made.

6.2 In view of above discussion, we decline to interfere in the relief granted by Ld. CIT(A and we uphold his findings on this issue.. The view

taken by us on the facts for A.Y. 2008-09 will be equally applicable to the Departmental appeal for assessment year 2009-10. Therefore, both the appeals filed by the Revenue are dismissed."

4.1 In the above background, the Ld. Departmental Representative on the strength of Ground of appeal No.2 submitted that in view of a retrospective amendment brought in by the Finance Act,2010, fees paid to a non-resident would be included in his total income India, even if, services have been rendered outside India. On this basis, it is sought to be pointed out that in the instant year the assessee ought to have deducted tax at source and on the failure to deduct the requisite tax at source section 40(a)(i) was applicable.

4.2 In response, the Ld. Representative for the assessee pointed out that in assessment year 2008-09, the disallowance was not only made in terms of section 37(1), but also by invoking the provisions of section 40(a)(i) of the Act and in this regard he has referred to Grounds of appeal No.3 raised by the Revenue in assessment year 2008-09 before the Tribunal. It was therefore, contended that the decision of the Tribunal dated 08/04/2014(supra) applies to both the objections raised by the Assessing Officer in this year namely, on account of section 37(1) of the Act as also invoking of section 40(a)(i) of the Act.

5. We find that the assertions made by the Ld. Representative for the assessee are borne out of the record and the objections raised by the Assessing Officer in the instant assessment year stand on the same footing as those taken in assessment year 2008-09. Be that as it may, in our considered opinion, even otherwise there is no justification for invoking the amendment made by the Finance Act, 2010 with retrospective effect from 01/06/1976, which seeks to prescribe that in terms of section 9(1) of the Act the amount

paid to a non-resident shall be taxable in India, even if, the services have been rendered outside India. On the strength of such amendment, it is sought to be canvassed on behalf of the Revenue that even if, services have been rendered by the non-resident agent outside India but the same are liable to be taxed in India as the payer is in India, in view of the aforesaid amendment. The Ld. Representative for the assessee had pointed out that such amendment would, in any case, govern fees for technical services and in the present case assessee has paid brokerage or commission for export orders executed on account of efforts made by the non-resident agent, which cannot be considered as fees for Technical Services. In our considered opinion, even otherwise, the said amendment is not determinative in holding the assessee responsible for deduction of tax at source qua the impugned payments. Notably, the payments in question fall during the previous year i.e. 01/01/2009 to 31/03/2010 corresponding to the assessment year before us, whereas the amendment in question came into effect on 08/05/2010 when the Finance Act, 2010 was given assent by the President of India. Though such a retrospective amendment may result in an incidence of tax liability in the hands of recipient of income but it would not result in creating an obligation on the payer of such income to deduct tax at source on the date of payment as it would be impracticable; obviously on the date of payment of income, the said amendment was not on the statute and, therefore, a subsequent amendment cannot create an obligation, which is impossible of performance. Thus, in such a scenario, even if it is held that the income paid to non-resident agent was taxable in India and thus, liable for deduction of tax in India, yet assessee cannot be faulted for non-deduction as on the relevant date there was no such obligation in law. Therefore, under the circumstances, the provisions of

section 40(a)(i) could not have been invoked to disallow the impugned payment.

5.1 In view of the aforesaid discussion, we therefore, deem it fit and proper to affirm the ultimate decision of the CIT(A) in deleting the disallowance of Rs.87,76,168/- made by the Assessing Officer and accordingly, Revenue fails in its appeal.

6. In so far as, the Cross Objection raised by the assessee is concerned, the same is with respect to disallowance of Rs.4,08,461/- made by the Assessing Officer under section 14A of the Act by applying the formula contained in rule 8D of the Income Tax Rules, 1961 (in short 'the Rules'). By applying rule 8D(2)(ii) of the Rules, an expenditure of Rs.3,12,577/- by way of interest has been disallowed and by applying Rule 8D(2)(iii) of the Rules a sum of Rs.95,884/- has been disallowed out of overhead expenses, thus, totalling Rs.4,04,461/-. The entire disallowance has been sustained by the CIT(A), against which assessee is in appeal before us.

7. Before us, the Ld. Representative for the assessee pointed out that during the year under consideration, assessee has earned exempt income only to the tune of Rs.2,840/- on account of dividends. He has assailed the disallowance on various grounds, as can be seen from the detailed Grounds of cross objection, on record. In so far as the disallowance out of interest expenditure is concerned, Ld. Representative for the assessee pointed out by referring to the Annual Financial Statements placed in the Paper Book that assessee had enough interest-free funds in the shape of Share capital and Free Reserves & Surplus so as to cover the investments. By referring to the Balance Sheet as on 31/03/2010 placed in the Paper Book, it is pointed out

that investments are to the tune of Rs.1.17 crores, whereas the Share capital plus Reserves & surplus amount to Rs.185.81 crores. Moreover, it has also been pointed out that during the year no fresh investments have been made and that in the earlier two assessment years no disallowance has been made out of interest expenditure. Under these circumstances, it is canvassed that having regard to the judgment of the Hon'ble Bombay High Court in the case of CIT v. Reliance Utilities & Power Ltd., 313 ITR 340(Bom), it is to be presumed that the investments are out of interest free funds and that such proposition is applicable even in the context of section 14A of the Act, as held by the Hon'ble Bombay High Court in the cases of CIT vs. HDFC Bank Ltd., 366 ITR 505(Bom) and HDFC Bank Ltd. vs. DCIT,383 ITR 529 (Bom).

6.1 The aforesaid factual aspects emerges from the Annual Financial Statement of the assessee, copy of which has been placed in the Paper Book at pages 3 to 11. Before us, the Ld. Departmental Representative has not controverted the factual matrix and, therefore, in our view, the ratio of the judgment of the Hon'ble Bombay High Court in the case of HDFC Bank Ltd.(supra) is clearly attracted and no disallowance out of interest expenditure is merited in terms of section 14A of the Act. Accordingly, we set-aside the order of the CIT(A) and direct the Assessing Officer to delete the disallowance of Rs.3,12,577/- out of interest expenditure.

6.2 Now coming to the disallowance out of overhead expenses of Rs.95,884/- made by the Assessing Officer applying the formula contained in Rule 8D(2)(iii) of the Rules; in this context, the only plea of raised by the Ld. Representative for the assessee is to the effect that the judgment of the Hon’ble Delhi High Court in the case of Joint Investments Pvt. Ltd. Vs. CIT

(2015) **372 ITR 694**(Del), prescribes that the disallowance can only be to the extent of the tax exempt income. Following the ratio of the Hon'ble Delhi High Court in the case of Joint Investments Pvt. Ltd (supra), we direct the Assessing Officer to restrict the disallowance of expenditure to the extent of the exempt income and delete the balance. Thus, assessee succeeds partly on this aspect.

7. Resultantly, whereas the appeal of the Revenue is dismissed, the Cross Objection of the assessee is partly allowed, as above.

Order pronounced in the open court on 18/01/2017

Sd/-	Sd/-
(AMARJIT SINGH)	(G.S. PANNU)
JUDICIAL MEMBER	ACCOCUNTANT MEMBER

Mumbai, Dated 18/01/2017
Vm, Sr. PS
Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai