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

BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER AND
SHRI SANJAY GARG, JUDICIAL MEMBER

ITA Nos.2120 & 2122/M/2011
Assessment Years: 2003-04 & 2005-06

M/s. CEBON Apparel Pvt. Ltd., Nirman Kendra, Unit No.1, Dr. E. Moses Road, Mahalaxmi, Mumbai – 400 011 **PAN: AAACC 2088B**	Vs.	The Asstt. Commissioner of Income Tax, Circle – 6(2) Aayakar Bhavan, Maharshi Karve Marg, Mumbai - 400020
(Appellant)		(Respondent)

Present for:
Assessee by : Shri J.D. Mistry, A.R. & Shri K.K. Ved, A.R.
Revenue by : Shri Vivek A. Perumpurna, D.R.

Date of Hearing : 06.07.2015
Date of Pronouncement : 30.11.2015

O R D E R

Per Sanjay Garg, Judicial Member:

The above titled two appeals have been preferred by the assessee against two separate orders of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] both dated 10.12.2010. Since the facts and issues involved in these appeals are identical in nature, hence the same are disposed of with this common order. First, we take up the appeal of the assessee for the assessment year 2003-04.

ITA No.2120/M/2011 (A.Y. 2003-04)

2. The assessee in this appeal has taken two effective grounds of appeal. First ground is relating to the validity of reassessment proceedings. The admitted facts of the case are that the Assessing Officer (hereinafter referred to as the AO) noted that the assessee had not deducted the TDS under section 195 in relation to payment made to the foreign residents paid outside India. He therefore reopened the assessment by way of issuing notice dated 04.10.05 under section 148 of the Act. The assessee took the objection that no notice under section 143(2) was issued within the stipulated period of 12 months from the end of the month of filing of return of income. The AO accepted the objection of the assessee and

dropped the reopening proceedings. Thereafter the AO issued fresh notice under section 148 of the Act on 13.11.06 seeking to reopen the assessment proceedings of the assessee on the same reasons. This time the requirement of service of notice u/s 143(2) within the stipulated time period was duly complied with. The assessment was reopened and the impugned additions were made. The assessee agitated the validity of the reopening of the assessment before the Ld. CIT(A).

3. The Ld. CIT(A), however, called the remand report in respect to the above issue from the AO. In the remand report, the AO noted that he had complied with the due procedure as laid down under the relevant provisions, hence the reopening was valid. The Ld. CIT(A), after considering the remand report and hearing the Ld. A.R. of the assessee, observed that the original proceedings under section 147 were dropped by the AO. However, the fresh notice under section 148 was issued to the assessee within the prescribed limitation period. The AO was of the belief that the income of the assessee had escaped assessment. He observed that under the law there was no bar to the AO to issue a second notice when in fact the first reopening was not done on merits but was dropped because of non issuance of notice under section 143(2) of the Act. He further observed that even the objections filed by the assessee pursuant to the reopening of the assessment have been duly disposed of by the AO. He therefore held that the reopening of the case was valid.

4. Before us, the Ld. Counsel of the assessee has reiterated his submissions as were made before the Ld. CIT(A). He has further relied upon the decision of the Hon'ble High Court of Punjab & Haryana in the case of "Smt. Anchi Devi vs. CIT" (2008) 218 CTR 11. On the other hand, the Ld. D.R. has relied upon the decision of the Visakhapatnam Bench of this Tribunal in the case of "ITO vs. Rajeev Builders."

5. We have considered the rival contentions. We find that in this case the original reopening of the assessment was not completed by the AO. After the assessee objected that no notice under section 143(2) was issued to it, the AO dropped the reopening of the assessment. However, the AO reopened the assessment after issuing a fresh notice. In our view, when the earlier re-assessment proceedings had not been continued or concluded with and the reopening had been dropped on the technical ground of non service of notice u/s 143(2), there is no bar in the Act for the AO to subsequently reopen the assessment by removing/ redressing the objections raised by the assessee and issuing a fresh notice under section 148 of the Act. So far as the reliance of the Ld. A.R. on the decision in the case of

"Smt. Anchi Devi vs. CIT" (supra) is concerned, we find that in the said case, the assessment was made by the AO which was quashed by the Ld. CIT(A) being barred by limitation. The Revenue preferred appeal against the order of the Ld. CIT(A) which was dismissed. After this the AO issued fresh notice under section 148 of the Act on the same set of facts. The matter travelled up to the Hon'ble High Court wherein the Hon'ble High Court has observed that since the original assessment was already quashed being barred by limitation and that the fresh reassessment proceedings were to circumvent the earlier order of the Tribunal, hence the AO was not justified in initiation of the fresh proceedings on identical facts. It may be observed that in the said decision, the Hon'ble High Court of Punjab & Haryana has considered another decision in the case of "R. Kakkar Glass & Crockery House vs. CIT" (2002) 173 CTR (P&H) 503 wherein it has been held that when a notice for reassessment is quashed on some technical ground, it would be in order to issue a fresh notice under section 148 of the Act, provided all other legal requirements of law are compiled with. So a careful reading of the entire judgment of the Hon'ble High Court of Punjab & Haryana in the case of "Smt. Anchi Devi vs. CIT" (supra) reveals that wherein the assessment is not continued but is dropped at some technical ground and thereafter a fresh notice is issued complying with all the legal requirements, then there is no bar in the Act to reopen and comply the assessment. The case law relied upon by the Revenue in the case of 'Rajeev Builders' is squarely applicable to the case of the assessee.

So far as the contention that the AO has not decided the objections dated 20.03.07 is concerned, we find that the assessee has not produced any copy of the such objections on the file from which it can be gathered as to what were the said objections. The Ld. CIT(A), however, has given a categorical finding that the said objections were duly considered by the AO. We therefore do not find any infirmity in the order of the Ld. CIT(A) holding that the reopening was valid in this case.

6. In view of the above, the ground No.1 of the assessee's appeal is hereby dismissed.

Ground No.2

7. Vide ground No.2, the assessee has agitated the confirmation of disallowance of Rs.51,25,661/- made by the AO under section 40(a)(i) of the Act. The AO noted that the assessee had incurred professional fees of Rs.32,53,517/- and other expenses of Rs.18,72,144/- in foreign currency. However, no TDS was deducted on this amount. On being asked to explain, the assessee submitted that the expenses in foreign currency were

mainly incurred by CEBON UK branch, payments were made towards professional fee and testing fee for the services rendered outside India. The persons to whom the payment was made were not subjected to tax in India. Hence, the assessee was not required to deduct the TDS. The AO, however, did not agree with the contention of the assessee and disallowed the amount of Rs.51,25,661/- under section 40(a)(i) of the Act. The Ld. CIT(A) confirmed the disallowance so made by the AO. The assessee has, thus, come in appeal before us.

8. It may be observed that the Hon'ble Supreme Court in the case of GEI Technology Centre vs CIT (2010) 327 ITR 456 has held that the obligation u/s 195(1) arises only if the payment is chargeable to tax in India in the hands of non-resident recipient. The Ld. A.R. of the assessee has submitted that the assessee had given full details of the expenses incurred outside India. He has submitted that the lower authorities have not given a categorical finding as to whether the income earned by foreigners were subject to tax in India. He has submitted that the nature of expenses have not been examined by the lower authorities.

The Ld. D.R. has also fairly agreed that the matter needs re-examination as to the nature of expenses and as to whether the persons to whom the payments were made could be subjected to tax in India.

9. As submitted by both the parties, the matter is restored to the file of the AO to examine the nature of expenses incurred by the assessee and to give a categorical finding as to whether the TDS was required to be deducted under section 195 of the Act on the expenditure incurred by the assessee taking into consideration the relevant case laws also.

10. Now coming to the appeal of the assessee for A.Y. 2005-06. The assessee in this appeal has taken two effective grounds of appeal.

Ground No.1

11. Ground No.1 is relating to disallowance under section 40(a)(i) of the Act of Rs.1,23,88,459/-, being a part of the advertisement expenses incurred by the assessee during the year outside India. The AO noted that the assessee had not deducted the tax at source in relation to the said expenses. The assessee explained that the said advertisement expenses were incurred outside India and that the said foreigners were not subjected to tax in India. Both the Ld. Representatives of the parties have agreed that the lower authorities have not examined the nature of expenses and the contention of the assessee that the said

foreigners were not subjected to tax in India. In view of our finding given above in relation to A.Y. 2003-04, the issue for this year is also restored to the file of the AO with a direction to examine the details and nature of expenses incurred by the assessee and give a categorical finding as to whether the TDS was required to be deducted in case of those expenses under section 195 of the Act.

Ground No.2

12. Ground No.2 in this case is relating to disallowance of travelling expenses. The AO disallowed the expenses on the travelling of one Mr. Mark Tweed to Fort Aguada Beach Resort at Goa. The AO made the said disallowance holding that the said expenditure was not in connection with the business activity of the assessee. The Ld. CIT(A) upheld the said disallowance.

13. Before us the Ld. Counsel of the assessee has stated that the said Mr. Mark Tweed was the employee of the assessee company from the UK Branch and that more than 90% income of the assessee is from UK Branch; that the expenses on the travel of the employee of the assessee was relating to the business activity of the assessee.

The Ld. D.R., on the other hand, has relied upon the findings of the lower authorities.

14. We have considered the rival submissions. Though the assessee has made a general statement that the travelling expenses of the employee were in relation to business activity of the assessee, however, no evidence has been furnished by the assessee as what activity of the said employee of the assessee was related to the business activity of the assessee for the travel made to a resort in Goa. The expenses on the face of it are seemed to be of personal in nature. We therefore do not find any infirmity in the order of the Ld. CIT(A) in upholding the disallowance on account of travelling expenses. In view of our findings given above, both the appeals of the assessee are treated as partly allowed for statistical purposes.

Order pronounced in the open court on 30.11.2015.

Sd/-	**Sd/-**
(R.C. Sharma)	**(Sanjay Garg)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 30.11.2015.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.