

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
BENCH- C, BANGALORE**

**BEFORE SMT. ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER  
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**

ITA No.441 /Bang/2014  
(Asst. Year 1998-99)

The Jt. Commissioner of Income-tax (LTU),  
Bengaluru.

. Appellant

Vs.

M/s ABB India Pvt. Ltd.,  
Khanija Bhawan,  
Race Course Road,  
Bangalore.

. Respondent

Appellant by : Shri Sanjay Kumar, CIT

Respondent by : Shri T Suryanarayana, Advocate

Date of Hearing : 30-06-2016

Date of Pronouncement : 21-09-2016

**ORDER**

**PER ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER**

This appeal by the assessee is directed against the order of  
Commissioner of Income-tax (Appeals) - LTU, Bengaluru dated  
23/1/2014 and it pertains to the assessment year 1998-99.

2

2. The company had claimed deduction u/s 80 IA in respect of 12 units. The AO had granted relief u/s 80IA in respect of only 3 units. On appeal the CIT(A) granted relief in respect of the balance 9 units, which was confirmed by ITAT. Consequently the Assessment order levying penalty to the extent on disallowance of disallowance of deduction u/s 80IA in respect of 9 units was rectified and deleted. The only surviving penalty under disallowance under sec 80IA is on account of reduction of relief of deduction on account of non-allocation of common corporate expenses among the 12 units in computing deduction u/s 80IA.

3. We find that the Assessee had clearly indicated that all the direct and indirect expenses referable to the 12 units have allocated in computing the relief u/s 80IA. Only the common corporate expenses were not allocated as required by AO. As the CIT(A) has pointed out, there is divergence of opinion whether common corporate expenditure, most of which was being incurred even before the starting of the new undertakings should

be allocated among the new units as being necessary for their manufacture.

4. The learned counsel for Assessee relied on the decision of the Hon'ble madras High Court in the case of CIT Vs. Hindustan Lever Ltd., in Tax Case (Appeal) No.219 of 2006, 267, 269, 270, 273 and 274 of 2008 and TC(A) No.219 of 2006, wherein the question of law is as follows:-

*“Whether in the facts and circumstances of the case the Tribunal was right in holding that the common head office expenses cannot be apportioned to the various units on the basis of their respective turnover for the purpose of calculation of deduction u/s 10B, 80I and 80HH?”*

5. Thus the issue being a debatable issue, the non-allocation of common corporate expenditure resulting in reduction of deduction u/s 80IA, in our opinion, cannot be the basis for levying penalty on account of a wrong claim for deduction. A long as the Assessee had

explained the reason for claiming deduction of a particular amount, the fact that his claim for expenditure has been disallowed cannot be a reason for levying penalty u/s 271(1)(c). We derive support from the decision of the Apex Court in the case of CIT v M/s. Reliance Petro products P Ltd 322 ITR 158 where in it has been held that in order to attract the provisions of s. 271(1)(c), there has to be concealment of income or furnishing of inaccurate particulars of his income by the assessee. In the instant case, admittedly, no information given in the return was found to be incorrect or inaccurate. Hence, the assessee cannot be held guilty of furnishing inaccurate particulars. Making an incorrect claim in law cannot tantamount to furnishing of inaccurate particulars. Merely because the assessee claimed deduction which has not been accepted by the Revenue, penalty under s. 271(1)(c) is not attracted.

6. The ld DR relied on the decision of CIT Vs. HCIL Kalindee Arsspl, 37 taxmann.com 347 (Delhi).

7. The ld counsel for the assessee brought to our notice the order of Tribunal, wherein it has been held as under:-

*The Tribunal had pointed out that the Head office monitored the recruitment of finance and other action which were necessary for running all the units. Consequently, the administrative expenses though relatable to the various units, are expenses incurred in general, towards the well being of the business. Thus, the Tribunal granted the relief to the assessee holding that the head office expense could not be proportionately distributed among the various units or allotted to any particular unit independently.*

8. In the circumstances we agree with the CIT(A) deleting the Penalty u/s 271(1)(c) in respect of reduction deduction u/s 80 IA on account of allocation of Common Corporate expenditure.

9. The next issue in appeal by the revenue is against the CIT(A) deleting the penalty, on account of disallowance fees paid to Non resident for non deduction of tax at source. The Assessee has paid Rs. 96,17,000/- as fees for *services*. The amount was disallowed on the ground that tax was not deducted. In the assessment the entire expenditure was disallowed and the disallowance was confirmed by

CIT(A) and ITAT. The AO had levied penalty of Rs. 33,65,975/- being 100% of the tax sought to be evaded.

10. The CIT(A) deleted the penalty holding as under:

*“In the above matter, the issue hinges around payment for services in strategic planning, defining project mix, export co-ordination, advice on purchase of license and technical know-how etc., which the assessee, as per the DTAA between India and Switzerland had considered as failing within the meaning of ‘Business Profit’. The AO held them to be in the nature of ‘fees for technical services.’ Since the interpretation of legal provisions and a dispute around nature of services performed is at the heart of this matter, I am inclined to hold that the requirement of sec. 271(1)(c) for concealment of income or furnishing of inaccurate particulars are not attracted here. Accordingly, the levy of penalty related to this matter cannot be sustained.*

11. We quite agree that the issue whether the fees paid can be considered as Fees for technical services or Business Profits under the DTAA between India and Switzerland. The present appeal is for the AY 1998-99. As held by the Jurisdictional High Court in the

case of Jindal thermal Power Co Ltd v DCIT 321 ITR 31 has held that the Explanation incorporated in s. 9(2) by Finance Act 2007, declares that "where the income is deemed to accrue or arise in India under cls. (v),(vi) and (vii) of sub-s. (1), such income shall be included in the total income of the non-resident, whether or not the resident has a residence or place of business or business connection in India". The plain reading of the said provision suggests that criterion of residence, place of business or business connection of a non-resident in India has been done away with for fastening the tax liability. However, the criteria of rendering service in India and the utilisation of the service in India laid down by the Supreme Court in Ishikawajima-Harima Heavy Industries Ltd. vs. Director of IT (2007) 207 CTR (SC) 361, to attract tax liability under s. 9(1)(vii) remains untouched and unaffected by the Explanation to s. 9(2). Hence till a further explanation was introduced to sec 9(2) by the finance Act 2010, Fees for technical services rendered outside India was not taxable in India.

12. As held by the ITAT Agra in the case of Metro & Metro vs. Addl CIT (158 TTJ 308), it is only as a result of

amendment in Section 9(1), by virtue of Finance Act 2010, that Fees for technical services paid can be said to be taxable in India. In case of Channel Guide vs. ACIT (139 ITD 49), it was held that amount paid to the foreign enterprise was not taxable in India in light of legal position as it prevailed at that point of time, and it became taxable in India only as a result of retrospective amendment in Section 9(1), said payment cannot be disallowed by invoking section 40(a) (i). As for earlier period, even though amendment is said to be merely clarificatory in nature, in view of fact that services were rendered outside India, even if utilized in India, the tribunal held that impugned fees for technical services was not taxable in India. Following decision of co-ordinate bench in case of Channel Guide, the tribunal in that case held that disallowance u/s 40(a)(i) cannot be invoked on facts of this case.

13. In view of the above, we agree with the conclusion of the CIT (A) deleting the penalty in respect of non-deduction of tax from fees paid to Non-residents for services rendered abroad. The revenue's appeal on this issue is dismissed.

14. In the result the appeal of the revenue in ITA No 441/Bang/2014 for AY 1998-99 is dismissed.

Order pronounced in the open court on **21st September, 2016.**

**Sd/-**  
**(INTURI RAMA RAO)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(ASHA VIJAYARAGHAVAN)**  
**JUDICIAL MEMBER**

Bangalore  
Dated : 21/09/2016

Vms

Copy to :1. The Assessee  
2. The Revenue  
3.The CIT concerned  
4.The CIT(A) concerned  
5.DR  
6.GF

By order

Asst. Registrar, ITAT, Bangalore