IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "D" MUMBAI

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 6391/MUM/2014
Assessment Year: 2011-12

Shri Devesh N Jani 372/8 Vasant CHS Ltd., Bhaudaji Road, Matunga Mumbai – 400019	Vs.	ACIT 21(2) Mumbai

PAN No. AEPJ2009J

ITA No. 7071/MUM/2014
Assessment Year: 2011-12

ACIT 21(2) R. No. 508, C-10, 5th Floor, BKC ,Bandra (E), Mumbai – 400051	Vs.	Shri Devesh N Jani 372/8, Vasant CHS Ltd., Bhaudaji Road, Matunga, Mumbai – 400019 **PAN No. AEIPJ2009J**
(Appellant)		**(Respondent)**

Assessee by: Shri Malav P. Sheth, AR
Revenue by: Shri Love Kumar, DR

Date of Hearing : 24/01/2017
Date of pronouncement: 11/04/2017

ORDER

PER N.K. PRADHAN, AM

These two cross appeals – one by the assessee and the other by the revenue – for the Assessment Year 2011-12 directed against the order of the Commissioner (Appeals) – 32, Mumbai, involve some common issues. As such, we are proceeding to dispose them off by this consolidated order for the sake of convenience.

2. The ground of appeal filed by the assessee reads as under:

> "On facts and circumstances of the case and in law, the learned CIT(A) erred in confirming the disallowance under section 43B of the Income-tax Act, 1961 ('Act') in relation to provision for BMC charges of Rs. 27,04,976/- without appreciating that the amount payable is in the nature of premium payable to BMC and therefore, not in the nature of any tax/duty/cess or fee within the meaning of section 43B."

3. In a nutshell, the facts are that the assessee has debited provisional expenses of Rs. 1,15,00,000/- in his P&L A/c for Shyam Vihar Project. In response to a query raised by the Assessing Officer (AO), the assessee submitted that amount of Rs. 87,95,024/- was spent till 31.03.2012 and the remaining amount of Rs. 27,04,976/- remained unspent. The assessee submitted before the AO that the amount of Rs. 27,04,976/- is to be paid to Govt. Authorities for obtaining OC etc.. The AO observed that the liability of Rs. 27,04,976/- is to be paid to Govt. Authorities as fees and as per provisions of section 43B of the Act, such expenses are allowable only if paid before the due date of filing of return of income. As the assessee had not paid the above amount before filing the return of income, the AO made disallowance of Rs. 27,04,976/- u/s 43B of the Act.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the learned CIT(A). We find that the learned CIT(A) has dismissed the appeal filed by the assessee on the reasons that (i) the amount of Rs. 27,04,976/- represents 50% of the balance as one time premium i.e. the difference demanded by the BMC which is payable by the assessee before NoC to occupation / BCC whichever is earlier, (ii) the letter issued by BMC shows that the amount of Rs. 24,10,500/- has been mentioned towards balance amount of one time premium /

difference demanded by BMC and apparently this appears to be 50% of one time premium for the excess floor area, etc. (iii) It is for services that as per the laws governing in force that BMC charges its fees, though may be called as one time premium for the use of excess floor area, (iv) it is the assessee who wanted to utilise excess floor area for which BMC as per their rule were to grant permission and enter such permission granted in their records and thereby legitimise use of such excess floor area for which they have charged a fee by the name one time premium and (v) section 43B says any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force.

5. Before us, the learned counsel of the assessee submits that out of the provision of Rs. 1,15,00,000/-, the actual expenses incurred in A.Y. 2012-13 amount to Rs. 87,95,024/- and the balance amount of Rs. 27,04,976/- is the amount provided for the FSI premium to be paid when demanded by BMC. It is submitted that the said amount of FSI premium does not fall within the ambit of 'tax, duty, cess or fee' within section 43B(a). It is stated that the said payment was made for obtaining additional FSI, thereby it is payment towards acquisition of license. At the most, it can be said as payment towards obtaining leasehold rights wherein BMC is the lessor. Since it is towards obtaining exclusive rights / privilege of BMC, there was no consideration for services from BMC. The fact that this is payment towards license fee / consideration for obtaining exclusive right is proved from the fact that BMC itself has stated so in its letter dated 18.03.2008 (page 16 & 17 of the paper book). The BMC has also stated that if any extra potential is derived in the form of additional

FSI on the said plot due to revision of the policies / rules etc., it, as lessor will have exclusive right of taking one time premium for the said extra FSI as per the then prevailing policy. Thus, the learned counsel submits that 'fee' u/s 43B(a) envisages only service fees and not fees for obtaining exclusive trading rights. It does not envisage lease premium / rent. Regarding the finding of the learned CIT(A) that the said provision is a contingent liability, the learned counsel submits that there is present obligation on the part of the assessee to make payment to BMC of the said FSI premium and this obligation is arising out of past event, wherein reasonable estimate has been made.

6. On the other hand, the learned DR supports the order of the learned CIT(A) confirming the disallowance of provision of expenses of Rs. 27,04,976/- made by the AO u/s 43B of the Act.

7. We have heard the rival submissions and perused the relevant material on record. Let us recapitulate the facts. The amount of Rs. 27,04,976/- is provided for the FSI premium to be paid when demanded by the BMC. The assessee had already paid first (50%) of the FSI premium in F.Y. 2007-08 amounting to Rs. 24,10,500/-. The balance 50% was to be paid when demanded by BMC which shall be before NoC to occupation/ BCC whichever is earlier. This has been stated by BMC in their letter dated 18.03.2008. Now we refer to section 43B which reads as under:

> "Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of-
>
> (a) any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called under any law for the time being in force or
>
> .....

> shall be allowed irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him."

A plain reading of the above shows that section 43B(a) does not envisage fees for obtaining exclusive trading rights. He does not envisage lease premium / rent. In the case of *CIT vs. C.J. International Hotels Ltd.* (2002) 75 TTJ (Del) 285, it has been held that the license fee charged by a Municipal Corporation from the assessee for granting license to the assessee to construct a hotel on a plot of land is of the nature of land revenue and as such it would be out of purview of section 43B as it is clearly arising out of a contractual obligation and is not levied by any Act of Central or State Legislature.

In *Garo Devi vs. ITO* (2001) 71 TTJ (Asr.) 880, it is held that premium collected by the assessee on sale of kerosene on behalf of the State Government cannot be treated as cess, fee, duty or tax or 'any sum payable by the assessee by whatever name called' within the meaning of section 43B.

Also the said provision is not a contingent liability, as there is present obligation on the part of the assessee to make payment to BMC of the said FSI premium and this obligation is arising out of past event, wherein reasonable estimate has been made

In view of the above, we set aside the order of the learned CIT(A) on the above issues and delete the disallowance made by the

AO of balance amount of Rs. 27,04,976/- provided by the assessee for the FSI premium. Thus the above ground of appeal is allowed.

8. The grounds of appeal filed by the revenue read as under:

i. On the facts & in the circumstances of the case and in law, the Ld. CIT(A) has erred in not considering that the TDS can be allowed as deduction only if it is deducted and paid before the due date.

ii. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not considering that since the contractual expenses were liable to TDS and it was debited to P&L A/c for the A.Y. 2011-12, TDS was required to be made on such payments and were to be paid before the due date of filing the return.

iii. On the facts & in the circumstances of the case and in law, the Ld. CIT(A) has erred in not considering that the assessee is following mercantile system of accounting and since liaison work fee is in the nature of business income, the same was liable to be assessed on accrual basis.

9. We begin with the 1st & 2nd ground of appeal filed by the revenue as they address a common issue. The AO found from the details filed by the assessee that some contractual expenses were liable to TDS since debited in the P&L A/c for the A.Y. 2011-12. Provisions for TDS were required to be made on such payments and to be paid before the due date of filing the return of income. The AO disallowed the expenses where TDS amount was paid after the due date and its comes to Rs. 43,63,515/-.

10. On appeal, the learned CIT(A) observed that in the present case the AO had not disputed that the questioned amounts represented provision. Therefore, the said amounts could not have been credited to any individual payee's account nor could have been paid as the

concerned payee, till the end of financial year was not identified and an exact amount in respect of such payee was not quantified. In view of the above, the learned CIT(A) deleted the disallowance of Rs. 43,64,515/- made by the AO u/s 40(a)(ia) of the Act.

11. Before us, the learned DR supports that the order passed by the AO.

12. On the other hand, the learned counsel of the assessee submits that the issue is whether disallowance u/s 40(a)(ia) of the Act is attracted on provisions made in A.Y. 2011-12, wherein TDS is deducted and deposited in the year of incurring actual expenditure i.e. A.Y. 2012-13. It is submitted by him that an adhoc provision of Rs. 1.15 crores was made on the basis of probable work to be done as certified by the architect on 31.03.2011. Payee for the said expenses was not determined as on 31.03.2011. Payees had issued bills and payments were made in the A.Y. 2012-13. Out of the said Rs. 1.15 crores, TDS was applicable on Rs. 43,63,515/-. TDS was deducted and deposited in A.Y. 2012-13 at the time of incurring the expenses. The AO has mentioned the details of deposit of the TDS at page 5 of the assessment order. TDS was deposited in A.Y. 2012-13 as reproduced by the A.O. at page 5 of the assessment order. Thus it is stated that when payee is not identified and also the quantum of expense to be incurred, then TDS provisions will not be applicable in the year in which the adhoc provisions are made. Therefore, it is stated that the learned CIT(A) has rightly deleted the disallowance of Rs. 43,63,515/- made by the A.O. u/s 40(a)(ia) of the Act.

13. We have heard the rival submissions and perused the relevant material on record. A similar issue arose in the case of *Apollo Tyres Ltd. vs. DCIT* (2017) 163 ITD 177 (Delhi – Trib.). In the above case, an order was passed by the AO u/s 201 and 201(1A) holding that the assessee failed to deduct TDS in respect of provisions made under several heads of income amounting to Rs. 15,07,25,637/-. Accordingly, the demand u/s 201(1) was raised at Rs. 1,04,02,197/- and also interest u/s 201(1A) at Rs. 38,48,924/-. After considering the order in the case of (i) *Abad Builders (P) Ltd. vs. ACIT* (2014) 43 taxmann.com 128, (ii) *Dishnet Wireless Ltd. vs. DCIT* (2015) 154 ITD 827 and (iii*) Industrial Development Bank of India vs. ITO* (2007) 107 ITD 45, the Tribunal held as under:

> "After considering the scheme of Chapter XVII-B with regard to tax deduction at source, we agree with the views expressed by ITAT Mumbai Bench and ITAT Chennai Bench. As per the scheme of TDS under Chapter XVII-B Section 199, the credit for the TDS is to be given to the deductee. Thus, the identification of the person from whose account income tax was deducted at source is a pre-requisite condition so as to make the provision for Chapter XVII-B workable. Tax deducted at source is considered to be tax paid on behalf of the person from whose income the deduction was made and, therefore, the credit for the same is to be given to such person. When the payee is not identifiable, to whose account the credit for such TDS is to be given. Section 203(1) lays down that for all tax deductions at source, the tax deductor has to furnish a certificate to the person to whose account such credit is to be given. Therefore, when the tax deductor cannot ascertain the payee who is the beneficiary of a credit of tax deduction at source, the mechanism of Chapter XVII-B cannot be put into service. In view of the above, we, respectfully agreeing with the views of ITAT Chennai Bench in the case of *Dishnet Wireless Ltd.* (*supra*), set aside the orders of authorities below on this point and restore the matter to the file of the Assessing Officer for both the years under consideration. We direct the Assessing Officer to verify whether the payee is identifiable and the amount payable to him is ascertainable. Then the assessee would be required to deduct tax at source in respect of such provision. However, in case payee is not identifiable, the provision of Chapter XVII-B i.e., tax

> deduction at source, cannot be pressed into service and, therefore, the assessee is not required to deduct tax at source in such a case. The Assessing Officer will re-adjudicate the issue afresh after examining the above facts. Needless to mention that he will allow adequate opportunity of being heard to the assessee while giving effect to our order."

13.1 We follow the above order of the Tribunal and set aside the order of learned CIT(A) and restore the matter to the file of the AO with a direction to verify whether the payee is identifiable and the amount payable to him is ascertainable. Then the assessee would be required to deduct tax at source in respect of such provision. However, in case payee is not identifiable, the provision of Chapter XVII – B i.e. tax deduction at source cannot be pressed into service and, therefore, the assessee is not required to deduct tax at source in such a case. The AO will adjudicate the issue afresh after examining the above facts. Needless to say that the AO will allow adequate opportunity of being heard to the assessee while giving effect to this order. Thus this ground of appeal is allowed for statistical purposes.

14. Now we turn to 3rd ground of appeal of the revenue. The AO found that as per Form No 26AS, the assessee has been paid Rs. 4,40,000/- on 31.03.2011 on which TDS of Rs. 44,000/- was deducted. The assessee has not shown the above amount of Rs. 4,40,000/- in his computation of income. As the assessee is following mercantile system of accounting for his construction business, the AO did not accept his plea that cash method of accounting was followed for liaison work. So the AO did not accept the contention of the assessee that he had not received Rs. 4,40,000/- in the A.Y. 2011-12,

but had received in A.Y. 2012-13. Therefore, the AO made an addition of Rs. 4,40,000/- in the impugned assessment year.

15. In appeal, the learned CIT(A) agreed with the contention of the assessee that he was following cash system of accounting in respect of his professional income from liaisoning services consistently year after year. The learned CIT(A) also observed that the assessee had accounted for this receipt towards liaison services of Rs. 4,40,000/- in the period corresponding to the A.Y. 2012-13 which was as per his regular method of accounting i.e. cash system of accounting. Therefore, the learned CIT(A) deleted the addition of Rs. 4,40,000/- made by the AO in the impugned assessment year.

16. Before us, the learned DR submits that as the assessee was following mercantile system of accounting for his construction business, the AO has rightly rejected his plea of maintaining accounts for liaison work on cash method and made an addition of Rs. 4,40,000/- in the impugned assessment year.

17. On the other hand, the learned DR submits that the assessee is engaged in the dual business of construction of building as developer / builder and providing services of building proposal liaison with regulatory authorities. In relation to providing services of building proposal liaison, the assessee follows cash system of accounting and in relation to business of construction, mercantile system of accounting. It is thus submitted that the assessee follows cash system of accounting and hence income and TDS be considered in the year of receipt of income i.e. A.Y. 2012-13 and not in A.Y. 2011-12.

18. We have heard the rival submissions and perused the relevant material on record. In the case of *CIT vs. Tanjore Permanent Bank Ltd*. (1984) 149 ITR 788 (Mad), it is held that "it is well established that a tax credit can be given only in cases where the tax is paid on the income in respect of which deduction has been made at source."

In *CIT vs. H. Krishna Vijoy Arora* (2012) 20 taxmann.com 655 (Ker), It is held that "credit of tax based on TDS certificates issued by bank in respect of interest income, which has not been assessed in assessment of assessee, should be allowed in year in which subject matter of deduction of tax is assessed."

In *CIT vs. Smt. Pushpa Vijoy* (2012) 19 taxmann.com 157 (Ker), it is held that "the assessee is entitled to credit of tax based on TDS certificate only in assessment years in which income from which tax is deducted is assessed."

As reflected in Form 26AS, the assessee has been paid Rs. 4,40,000/- on 31.03.2011 on which TDS of Rs. 44,000/- was deducted. The AO has rightly brought to tax Rs. 4,40,000/- during the impugned assessment year. In view of the ratio laid down in the decisions mentioned here-in-above, we set aside the order of the learned CIT(A) and restore the order of the AO.

19. In the result, the appeal of the assessee is allowed whereas the appeal of the revenue is partly allowed.

Order pronounced in the open Court on 11/04/2017

Sd/-	Sd/-
(SAKTIJIT DEY) JUDICIAL MEMBER	(N.K. PRADHAN) ACCOUNTANT MEMBER

Mumbai;
Dated: 11/04/2017
Biswajit, Sr. P.S.

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