

**IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, "B", CHANDIGARH**

**BEFORE SHRI N.K. SAINI, VICE PRESIDENT &
SHRI R.L NEGI, JUDICIAL MEMBER**

आयकरअपीलसं./ITA No. 373/CHD/2018

निर्धारणवर्ष / Assessment Year : 2014-15

The ACIT, Circle 4(1), Chandigarh	बनाम	M/s Winsome Textiles Industries Ltd., SCO 191-192, Sector: 34A Chandigarh
स्थायीलेखासं./PAN NO: AAACW1910G		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

Hearing through video Conferencing

निर्धारितीकीओरसे/Assessee by : Shri Tej Mohan Singh, Advocate

राजस्वकीओरसे/ Revenue by : Sh. Ashok Khanna Addl. CIT

सुनवाईकीतारीख/Date of Hearing : 24.08.2021

उदघोषणाकीतारीख/Date of Pronouncement : 31.08.2021

आदेश/Order

Per R.L. Negi, Judicial Member:

The Revenue has filed the present appeal against the order dated 18.01.2018 passed by Commissioner of Income Tax (Appeals)-2, Chandigarh [for short 'the CIT(A)'] u/s 143(3) of the Act, whereby the Ld. CIT(A) has allowed the appeal filed by the assessee against the assessment order passed by the AO u/s 143(3) of the Income Tax Act, 1961 [for short 'the Act'] for the assessment year 2014-15.

2. Brief facts of the case are that the assessee company filed its return of income for the assessment year under consideration declaring nil income. The case was selected for scrutiny and the AO passed assessment order u/s 143(3) of the Act determining the total income of the assessee at Rs. 15,57,70,453/- after making addition of Rs. 2,06,81,641/- on account of disallowance u/s 40(a)(i) of the Act for non-deduction of TDS, addition of Rs.38,307/- on account of disallowance made u/s 36(1) (va) of the Act for not depositing the employee's contribution welfare funds before the due date and addition of Rs. 20,973/- on account of disallowance u/s 14 A of the Act. However, after allowing set off the unabsorbed depreciation for the AY 2008-09 and 2009-10 income of the assessee was computed as nil. The assessee challenged the assessment order before the CIT(A). The Ld. CIT(A) after hearing the assessee set aside the assessment order and deleted the additions. Against the said findings of the Ld. CIT(A), the revenue is in appeal before this Tribunal.

3. The Revenue has challenged the impugned order on the following effective grounds: -

- i) *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has not erred in allowing appeal of the assessee without appreciating the facts of the case.*
- (ii) *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has not erred in allowing the appeal of the assessee and deleting the addition of Rs. 2,06,81,641/- despite the fact that the assessee failed to deduct taxes at source u/s 195*

of the Act on the payments made to non-residents without appreciating the fact that income accrued in India and the assessee was under statutory obligation to deduct tax at source.

- (iii) *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is correct in deleting the additions made u/s 36(l)(va) of the IT Act, 1961, on account of employee share paid after due date wherein the CBDT has given clarification regarding applicability of Section 43-B that this circular does not apply to claim of deduction relating to employee's contribution to welfare funds which are governed by Section 36(l)(va) of the I.T.Act.*
- (iv) *Whether on the facts and circumstances of the case, the Ld. CIT(A) has not erred in law and fact in ignoring the legislative intent expressed in CBDT's Circular No.5/2014 dated 11.02.2014 which explicitly states that expenses relatable to earning of exempt income have to be considered for disallowance irrespective of the fact whether any such income has been earned during the F.Y. or not?*
- v) *Whether on the facts and circumstances of the case, the Ld. CIT(A) has not erred in law in following the decision of Hon'ble High Court in Lakhani Marketing decided following decisions in the case of Hero Cycles Ltd., 323 ITR 204 and CIT vs. Winsome Textile Industries Ltd., 319 ITR 204 whose facts were distinguishable from the taxpayers, ignoring the principal laid down by Hon'ble Supreme Court decision in CIT vs. Walford Share and stock Brokers P Ltd: 326 ITR 1 (SC).*
- vi) *Whether on the facts and circumstances of the case, the Ld. CIT(A) has not erred in law and fact in ignoring legislative intent to uphold which the Department is in SLP in several cases on this issue (Nilgiri Infrastructure Development Ltd. ITA No. 135 of 2016 A.Y. 2009-10 of Delhi High Court and Instant Holding Ltd. ITA No. 2168 of 2011 of jurisdictional High Court)?*
- vii) *It is prayed that the order of Ld. CIT(A) be set aside and that of the Assessing officer may be restored.*

4. Ground No.(i) of the Revenue's appeal is general, therefore does not require specific adjudication.

5. Vide ground No.(ii), the Revenue has challenged the action of the Id. CIT(A) in deleting the addition of Rs. 2,06,81,641/- made by the AO for non-deduction of tax at source. The Id. Departmental Representative

(DR) pointed out before us that the assessee had paid export commission amounting to Rs. 2,06,81,641/- to non-residents, however, did not deduct the tax at source. The ld. DR further submitted that the ld. CIT(A) has deleted the addition ignoring the fact that since the income had accrued in India the assessee was required to deduct tax at source under the provisions of the Act. The payments were made on the basis of contract entered into by the assessee company with the commission agents. Hence, the commission received by the non-residents is deemed income in India. Since the assessee has failed to comply with the provisions of section 195 of the Act, the ld. CIT(A) has wrongly deleted the addition made by the AO under the provisions of section 40 (a)(i) of the Act for non-deduction of tax at source. Accordingly, the ld. DR submitted that the impugned order may be set aside.

6. On the other hand, the Ld. counsel for the assessee submitted that this issue is covered in favour of the assessee by the decision of the ITAT Chandigarh in the case of *IDS Infotech Limited* (2016) 69 taxman.com 393 and since the Ld. CIT(A) has decided this issue by following the decision of the jurisdictional Tribunal, there is no infirmity in the findings of the Ld. CIT(A).

7. We have heard the rival submissions of the parties and perused the material on record including the cases relied upon by the ld. CIT(A). The ld. CIT(A) has deleted the addition made by the AO holding as under: -

“5.3 The taxability in India of payment of commission and legal and professional charges made to non-resident entities by an Indian company were considered and decided in favour of the assessee by Hon'ble ITAT in the similar facts and circumstances in the case of IDS Infotech Ltd. (2016) 69 taxman.com 393. The CIT (Appeals)-2, Gurgaon vide his order for assessment year 2012-13 in the case of the appellant in appeal No. 99/11/2014-15 and CIT(A)-2 Chandigarh vide his order dated 01.09.2017 in appeal no 276/2/15-16 for assessment year 2013-14 decided the issue after considering the aforesaid decision of the ITAT, Chandigarh Bench and also considered the decision of Hon'ble Supreme Court in the case of GE India Technology Centre (P) Ltd. vs CIT (2010) 327 ITR 456 / 193 Taxman 234 17. The issue was decided as under:-

" The aforesaid decision of Hon'ble Supreme Court has discussed of case law of Transmission Corporation which has been distinguished on the facts that in that case there was a composite contract have bearings in India. In the present case, the entire activity of sales done by the respective commission agents is outside the territories of India. The argument of the Assessing Officer that the sales pertain to Indian entity does not hold good ground because by that analogy each and every sale would become taxable in India. In consideration of the decided cases as above and the facts of the present case, it can be concluded that since there exists no income chargeable to tax having accrued or arisen to the foreign commission agents in India, therefore, provisions of tax withholding are not applicable. Under such circumstances, there was no default as contemplated under section 40(a)(ia) of Income Tax Act. The ground of appeal is allowed."

I am in agreement with the findings of CIT(A)-2, Gurgaon and my predecessor that the appellant is not liable to deduct TDS under the provisions of section 195 of the Act and therefore, disallowance made by the assessing officer u/s 40(a)(i) of Rs. 2,06,81,641/- is deleted. The ground of appeal no. 1 taken by the assessee is allowed”.

8. As pointed by the Ld. counsel, this issue is covered in favour of the assessee by the order of the ITAT in the case of IDS Infotech Ltd. (supra) and the findings of the ld. CIT(A) are in accordance with the decision of Tribunal. Further, the ld. CIT(A) has followed the decision

of the CIT(A) Gurgaon in the assessee's own case for the A.Y. 2012-13 and his predecessor, CIT(A) Chandigarh-2 in assessee's own case for A.Y. 2013-14. Since the Ld. CIT(A) has decided this issue in favour of the assessee by following the decision of the ITAT, we do not find any reason to interfere with the findings of the Ld. CIT(A). Hence, we dismiss this ground of appeal of the Revenue and uphold the findings of the ld. CIT(A).

9. Vide ground No. (iii), the Revenue has challenged the action of the Ld. CIT(A) in deleting the addition made u/s 36(1) (va) of the Act on account of employees share paid after due date. The ld. DR submitted before us that since the assessee company had not deposited the employee's contribution to welfare funds before the due date, the ld. CIT(A) has wrongly deleted the addition made by the AO.

10. On the other hand, the ld. counsel for the assessee submitted that this issue is covered in favour of the assessee by the judgement of the Hon'ble Punjab & Haryana High Court in the case of *CIT Vs Mark Auto Industries Ltd.* 358 ITR 43 and the decision of the Chandigarh Bench of the Tribunal in the case of *Hotel Surya vs DCIT, ITA Nos. 133 & 134/Chd/2021* and the Ld. CIT(A) has decided the issue by following the ratio laid down by the Hon'ble High Court in the aforesaid case, there is no merit in this ground of appeal of the Revenue.

11. We have considered the rival submissions of the parties. The grievance of the Revenue is that the ld. CIT(A) has wrongly deleted the

addition of Rs. 38,307/- made by the AO u/s 36(1)(va) of the Act on account of non-payment of employees contribution to welfare funds on or before the due date as per the relevant Act. The Id. CIT(A) has deleted the addition holding as under: -

“6.1 During the assessment proceedings assessing officer observed that the assessee has not deposited employee’s contribution to welfare funds aggregating to Rs. 38,307/-. The assessee was confronted as to why disallowance of late payments made on account of employee’s contribution to welfare funds not be made. The assessee filed his reply.

As pointed out by the Ld. counsel the Ld. CIT(A) has decided the issue in favour of the assessee but was found unacceptable by the AO. Hence, AO disallowed amount of Rs. 38,307/- u/s 36(1)(va) of the I.T. Act.”

6.2 During the course of appellate proceedings appellant made submission as under:-

“Disallowance u/s 36(1) (va) of the Income Tax Act 1961 amounting to Rs. 38307/-. *The assessee has deposited ESI/PF last as per the respective Act but before the due date of filing of the Return. The AO disallowed same in view of the provision u/s 36(1)(va) of the Income Tax Act 1961. Since, the same was deposited before due date of filing of return no addition is called for in view of the decision of the Hon'ble Punjab & Haryana High Court in the case of Commissioner of Income Tax vs Mark Auto Industries Ltd 358 ITR 43 has held that in the case of employee’s share of ESI/PF is deposited before due date of filing of return, the same is admissible. The addition being unjustified deserves to be deleted.”*

“6.3 I have considered the submission of the appellant and order of the AO. The case of the assessee is directly covered by the decision of Hon'ble Punjab & Haryana High Court in the case of Commissioner of Income Tax Vs Mark Auto Industries Ltd 358 ITR 43 (P&H). Since in the present case the assessee has deposited the ESI/PF before the due date of filing of the return, respectfully following the decision of Mark Auto Industries

(supra) the addition made by the AO is deleted. Ground of appeal no. 2 is allowed.”

12. Since this issue is covered in favour of the assessee by the judgement of the Hon'ble Court High Court and the coordinate Bench of the Tribunal discussed above, we do not find any infirmity in the findings of the Id. CIT(A). We, therefore, dismiss this ground of appeal of the Revenue and uphold the findings of the Id. CIT(A).

13. Vide ground No. (iv), (v) and (vi) the Revenue has challenged the action of the Id. CIT(A) in deleting the addition of Rs. 20,973/- made u/s 14A of the Act. The Id. DR submitted before us that the Id. CIT(A) has deleted the addition made u/s 14A of the Act in violation of the provisions of Act and the various judgements of the Hon'ble Supreme Court and the High Court. Since the assessee had invested in the shares of Shivalik Solid Waste Management Ltd. and had not made any *sue moto* disallowance, the AO has rightly made disallowance u/s 14A read with Rule 8D of the Income Tax Rules. The Id. DR accordingly submitted that since the Id. CIT(A) has wrongly deleted the addition the impugned order may be set aside.

14. On the other hand, the Id. counsel for the assessee submitted that since the assessee had not received any dividend on investment in shares during the year relevant assessment year, the Id. CIT(A) has rightly deleted the addition made by the AO. The Id. counsel further submitted that the findings of the Id. CIT(A) are based on the ratio laid down by the Hon'ble Punjab & Haryana High Court in the case of *CIT vs M/s*

Lakhani Marketing [2014] 49 taxman.com 257 (P&H). Hence, there is no infirmity in the order passed by the Ld. CIT(A).

15. We have considered the rival submissions and also perused the material on record including the judgment of the Hon'ble High Court relied upon by the Id. CIT(A). The Ld. CIT(A) has decided this issue in favour of the assessee holding as under: -

“7.3 I have considered the submission of the Ld. Counsel along with the case laws relied upon by the assessee and pursued the order of the Assessing Officer. Hon'ble Punjab & Haryana High Court in the case of CIT vs. M/s Lakhani Marketing Incl.[2014] 49 taxmann.com 257 (Punjab & haryana) has held that unless and until, there is receipt of exempted income for concerned assessment year, section 14A cannot be invoked. In the present case, there is no income which is exempt, therefore respectfully following the decision of the Hon'ble jurisdictional High Court ad made by the Assessing officer is deleted. The ground of appeal No.3 is allowed.”

16. We notice that the assessee during the course of appellate proceedings specifically pleaded that it had made investment in the shares, which was made out of the internal accruals and not out of borrowed funds, however, no dividend was received on the said investment. Further, as pointed out by the Id. counsel, the findings of the Id. CIT(A) are based on the judgement of the Hon'ble jurisdictional High Court in the case of *CIT Vs M/s Lakhani Marketing* (supra) wherein it has been held that unless and until there is receipt of exempt income during the year relevant to the assessment year under consideration, section 14A cannot be invoked. Since the Id. CIT(A) has decided the issue in favour of the assessee in the light of the ratio laid down by the Hon'ble jurisdictional High Court, we do not find any merit

in the contention of the Revenue that the Id. CIT(A) has wrongly deleted the addition. We, therefore, dismiss this ground of appeal of the Revenue and uphold the findings of the Id. CIT(A).

In the result, the appeal of the Revenue is dismissed.

Order pronounced on 31st Aug, 2021.

Sd/-

(N.K. SAINI)

उपाध्यक्ष / Vice President

Sd/-

(R.L.NEGI)

न्यायिक सदस्य / Judicial Member

Dated : 31.08.2021

“आर.के.”

आदेशकीप्रतिलिपिअग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त/ CIT
4. आयकरआयुक्त (अपील)/ The CIT(A)
5. विभागीयप्रतिनिधि, आयकरअपीलीयआधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्डफाईल/ Guard File

आदेशानुसार/ By order,
सहायकपंजीकार/ Assistant Registrar