

IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'A': NEW DELHI)

1288

BEFORE SHRI A. D. JAIN, JUDICIAL MEMBER
AND
SHRI J.SUDHAKAR REDDY, ACCOUNTANT MEMBER

ITA No.4085/DEL/ 2011
(Assessment Year :2008-09)

Angelique International Ltd.
104-107,
Hemkunt Tower, 98 Nehru Place
New Delhi
PAN:AACCA4675N
(APPELLANT)

Vs. DCIT
Circle-1(1)
New Delhi.

(RESPONDENT)

ITA No.4325/DEL/ 2011
(Assessment Year :2008-09)

DCIT
Circle-1(1)
New Delhi
(APPELLANT)

Vs. Angelique International Ltd.
104-107,
Hemkunt Tower, 98 Nehru Place
New Delhi.
PAN:AACCA4675N
(RESPONDENT)

ASSESSEE BY :Shri Ved Jain & Smt. Rano Jain,CA's
REVENUE BY :Shri Gunjan Prasad, CIT.DR.

ORDER

PER J. Sudhakar. Reddy, Accountant Member:

These are cross appeals are directed against the order of the
Commissioner of Income Tax (Appeals)-VI, New Delhi dated 14.07.1011
for the assessment year 2008-09.



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2. Facts in brief: The assessee is a company and in the business of agriculture crop insurance. It filed its return of income on 27.09.2008 declaring total income of Rs.59,35,91,633/-. Assessment was completed u/s 143 (3) on 24.12.2012 determining total income at Rs.94,67,23,600/-.
3. Aggrieved the assessee carried the matter in appeal. The first appellate authority granted part relief. Aggrieved both the parties are in appeal before us.
4. We have heard Mr. Ved Jain, Ld. Counsel of the assessee and Shri Gunjan Prasad, CIT.DR, on behalf of the Revenue. We first take up the Revenue appeal ITA No. 4325/Del/2011. The grounds of appeal are as follows:

"1. In the facts and circumstances of the case, the Ld. CIT (A) has erred in law and on facts in deleting addition of Rs.34,41,02,001/- u/s 40(a) on account of export commission:

The CIT (A) has ignored that the commission paid to non-resident is income deemed to accrue or arise in India within the meaning of section 9 of the I. T. Act and, therefore. The assessee is liable to deduct TDS on export commission paid to non- residents.

Notwithstanding to the above, the CIT (A) has ignored that commission in this case is akin to fee for technical services. The assessee failed to substantiate that payment of export commission was for business purpose as no agreement in this regard was furnished before the AO.



2. In the facts and circumstances of the case, the Ld. CIT (A) has erred in law and on facts in deleting addition of Rs.82,81,091/- on account of retention money:

The CIT (A) has ignored that the assessee is following mercantile system of accounting and in that system the money retained by the authorities from the contract payments made to the assessee constitutes income accrued to it and is taxable in the relevant year irrespective of the fact that the actual money may not have been received by him in the year.

The CIT (A) has ignored that the retention money is nothing but a kind of security retained by the Authority awarding contract for the completion of the contract as per the agreed term.

3. The appellant craves leave for reserving the right to amend, modify alter, add or forego any ground(s) if appeal at any time before or during the hearing of the appeal."

5. After hearing the rival contentions, we find the ground no. 1 is covered in favour of the assessee by the order of the Tribunal in the assessee's own case for the assessment year 2009-10 vide ITA No. 4967/Del/ 2012 order dated 26.07.2012.

6. The Ld. CIT (A) brought out the facts at para 4.5 of his order which are extracted for the ready reference:

"4. From the impugned order, it is evident that the assessee had debited an amount of Rs.36,64,23,205/- on account of commission paid. The assessee was asked to furnish a narration of TDS deduction and deposited. The assessee submitted a reply dated 18/11/2010, perusal of which indicated that the assessee had neither deducted nor deposited TDS on the said



amount of export commission which actually worked out to a figure of Rs.34,41,02,001/-. The response suggested that the commission had been paid to non resident parties not having any PE in India for services rendered and utilized outside India. Thus, the commission was not taxable and therefore no TDS was required to be deducted as per the provisions of Section 9 of the Act read with Circular 23 dated 23/07/1969 and Circular No. 786 dated 7/2/2000 issued by the Board. On receipt of the reply, the Ld. AO drew the attention of the assessee to the provisions of Section 40(a) of the Act and against this backdrop a show cause was issued. The assessee reiterated the stand already taken earlier.

5. The Ld. AO was dissatisfied with the response of the assessee. He referred to the provisions of Section 9(1)(Vii) of the Act and stated that as per the said provisions, all incomes as accruing and arising in India which partake the character of payment on account of 'fee for technical services' would be taxable. He was of the opinion that the payment made by the resident assessee in connection with his business in India to a person outside India making use of his expertise in sale of goods is nothing but a fee which has been paid by the resident assessee to the non resident for the services rendered by him and can be construed as 'fee for technical services'. Thereafter, he referred to the provisions of section 195 of the Act and relied on the decisions in Transmission Corporation of AP Ltd. [1999] 239 ITR 587(SC), Van Oord ACZ India (P) Ltd. Vs. CIT 189 Taxmann 232 (Delhi), State Bank of Travancore Vs. CIT 158 ITR 102 (SC), Kerala Financial Corporation Vs. CIT 210 ITR 129 (SC), among others as also Circular No. 7 of 2009 and Circular No. 23 dated 23/07/1969 and 786 dated 7/2/2000 to make an addition of Rs. 34,41,02,001/- u/s 40(a) of the Act."

7. On appeal the first appellate authority held that

- (a) There is no dispute that commission has paid to agents outside India for sales outside the country.



- (b) There is not material on record which would suggest that the foreign agent had a permanent establishment in India.
- (c) It is also not in dispute that the assessee has not deducted TDS.
- (d) Payment of commission has been made to agents outside India for services rendered outside India.
- (e) The payment does not fall within the ambit of section 9(1)(VII) of the Act, as the services under consideration is not for any technical services rendered. It is only for facilitation of the sales of the assessee outside India.
- (f) The payment of commission was not sum chargeable to tax within the provisions of the Income Tax Act and hence no tax needed to be deducted at source under chapter (XVII-B).

8. These findings are in consonance with the decision of this bench of the Tribunal in ITA No.4167/del/2012 in the assessee's own case for the assessment year 2009-10 where at para 7 to 11 it is held as follows:

"7. The assessee company, during the year, was dealing in export of produce and commodities and was into construction activity. The AO made the addition for the reason that the assessee had failed to deduct tax at source on the payment of export commission. While deleting the addition for Assessment Year 2008-09, it was taken into account that the relationship between the assessee and its agents was on a principal to principal basis; that the agents of the assessee did not have any PE in India and it was on account of services rendered by the agents that the payments were made by the assessee to them,



which payment could not be considered as if for technical services, nor could be taken as a job which was managerial in nature. There was no agreement between the assessee and the agents and no such agreement was even required, since the transaction was of payment of commission for services rendered. The assessee was held not to be liable for TDS under Chapter XVII-B of the Act. The facts for the year under consideration also remained much the same as for Assessment year 2008-09.

8. In "EON Technology"(Supra), under similar facts and circumstances, the Hon,ble High Court held that such export commission was not income chargeable to tax in India and, hence, not liable to tax deduction as source.

9. In "Divi's Laboratories" (supra), it was held that commission paid to a non-resident agent for services rendered outside India is not chargeable to tax in India and that hence, no disallowance can be made.

10. Similar are the decisions in the following case laws relied on by the assessee:-

- 1) "ITO vs. M/s Planet Herbs Life Science", order of the Delhi Tribunal dated 25.05.2012, ITA No. 522/Del/2011 (copy is placed on record); and
- 2) "ADIT (IT) vs. Wizcraft International Entertainment P. Ltd.", a decision of the Mumbai Tribunal dated 19.11.2010, in ITA No. 3208/Mum/2003 (copy is placed on record).

11. In view of the above, we do not find any error whatsoever in the order of the Ld. CIT (A) in this regard and the same is hereby confirmed. Ground No. 1 raised by the revenue is accordingly rejected."

Respectfully following the same we uphold the order of the CIT (A) and dismissed the ground of appeal.

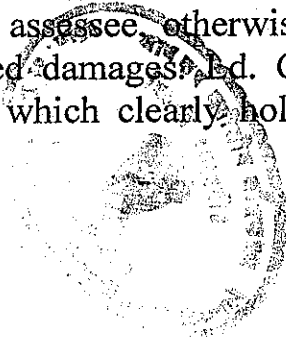


9. The second ground is on whether retention money is taxable as income. During the year the assessee undertook contracts. The employer retained a certain per centage of the contract amount, which becomes payable only on fulfillment of certain conditions. The assessee claims that it follows the mercantile system of accounting and as, the assessee has no right to receive the retention money till the contract obligations are fulfilled, there is no accrued of income.

10. It is submitted that when there is no right to receive, income does not accrue even under the mercantile system of accounting. The AO rejected this contention. On appeal the first appellate authority observed that similar issue came up before his predecessor in the assessee's own case and the issue was decided in the favour of the assessee. He followed the order. The earlier year's order of the Ld. CIT (A) was approved by the ITAT on appeal.

11. The 'A' bench of the tribunal the assessee's own case in ITA No.481/Del/2011 assessment year 2007-08 order dated 13th July, 2012 as considered the issue at para 7, page 8 held as follows:

"7. We have considered the facts of the case and submissions made before us. The facts are that the customer retains money in respect of a completed contract for satisfactory performance of the contract for which the due diligence is undertaken. On demonstration of satisfactory performance of the contract, the money is released finally to the assessee, otherwise it has to repair the fault or pay liquidated damages. Ld. Counsel has cited cases as discussed above, which clearly hold that such



money withheld by the customer does not accrue as income to the assessee on completion of the turn-key project, the reason being that right to receive the money does not accrue to the assessee. This money accrues as income when the stipulated condition is satisfied which may be in the nature of showing satisfactory performance of the project. Depending upon the stipulated condition, the amount accrues as income the moment the condition is satisfied and on such date the amount becomes the income. Therefore, the amount is taxable on accrual basis in the year in which stipulated condition is satisfied. The assessee on the other hand is showing the income on cash basis, which may not be correct, however, this is not the issue before us. The issue before us is whether the retention money constitutes income on completion of a project in mercantile system of accounting. We are of the view that this amount does not accrue as income to the assessee on raising the bill after completion of the project. The income arises on performance of the conditionalities of the agreement. Thus, it is held that Ld. CIT (A) was right in holding that a sum of Rs.32,91,935/- did not accrue as income in this year. The result is that ground no.2 is also dismissed.”

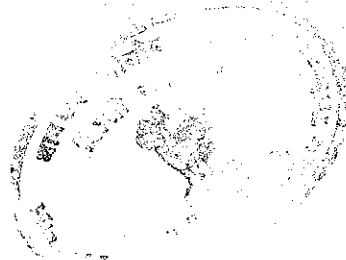
12. This decision was followed by the Tribunal in the assessment year 2009-10 and decided the issue in favour of the assessee. Respectfully following the same we uphold the order of the CIT (A) and dismiss this ground of Revenue.

In the result the Revenue's appeal is dismissed.

13. We now take up the assessee's appeal. The grounds are as follows:

- “1. That the orders of the lower authorities are not justified on facts and circumstances of the case and the same are bad in law.
2. That on the facts and circumstances of the case, lower authorities have erred both in facts and in law in making

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disallowance of an amount of Rs.7,48,875/- invoking provisions of section 14A of the Act.

3. That on the facts and circumstances of the case, lower authorities have erred in arbitrarily ignoring the disallowances made by the Appellant for the expenses directly relatable to the exempt income and also in ignoring the facts and explanations furnished by the Appellant for such disallowances that disallowance of Rs.7,48,875/- is more than the exempt income of Rs.2,09,663/- earned by the Appellant during the year.
4. That the Appellant craves permission to add, amend, alter or delete one or more grounds of appeal on or before the date of hearing."

14. The sum and substance of the submission of the Ld. Counsel for the assessee, is that the entire disallowance u/s 14A was wrongly computed by the AO for the reason that, while computing average value of investment in the beginning of the year, value of the free hold land was wrongly taken into account. Thus, value of free hold land of Rs. 11.28 crores has to be deducted from 21.27 crores, taken as opening investments.

15. Further, it was pointed out that while calculating the average value of investments at the end of the year as well as in the beginning of the year, the investments in 8% non cumulative redeemable ^{Debentures} preferences were taken, though the return on these investments were taxable. If these items are removed the ^{opening} ~~opening~~ and closing investments would be Rs.17.12 crores and



Rs.14.27 crores. It has submitted that if calculated on the correct opening balance and closing ^{balance of investments} the ~~intent~~ disallowance as per AO ^{of interest} would be Rs.20,685/- and the disallowance of administrative expenses will be Rs.3,56,404/- Further, it is submitted that this disallowance is also incorrect, for the reason that

- a) No interest being funds have been used for making ^{investments} ~~interests~~.
- b) Interest being loans have been used for business purposes.
- c) Rule 8D is not applicable. This rule cannot be applied automatically.
- d) Administrative expenses have not been incurred on investment.

16. The Ld. DR though not leaving his ground, submitted that the issue be sent back to the file of the AO for fresh adjudication in accordance with law.

17. In view of the above submissions as we are of the opinion that a fresh computation of disallowance u/s 14 A has to be done. We set aside the issue to the file of the AO for fresh adjudication in accordance with law. While doing so the AO is directed to consider all the contentions of the assessee, as well as the decision of the jurisdictional High Court in the case of Maxopp Investment Ltd. Vs. CIT (2012) 347 ITR 272 (Del).

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18. In the result the appeal is set aside.

19. In the result the appeal of Revenue is dismissed and the appeal of the assessee is allowed for statistical purposes.

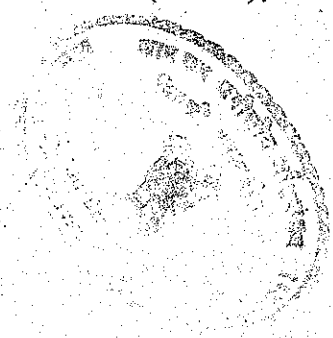
Order pronounced in open court on 31/01/2013.

Sd/-
(A. D. Jain)
Judicial Member

Sd/-
(J. Sudhakar Reddy)
Accountant Member

Dated the 31st day of January, 2013
S.Sinha

- Copy forwarded to
1. APPELLANT
 2. RESPONDENT
 3. CIT
 4. CIT (A)
 5. CIT(ITAT), New Delhi.



[Signature]
AR, ITAT
Assistant Registrar,
आयकर अपील विभाग
Income Tax Appellate Tribunal
दिल्ली पाठ, नई दिल्ली
Delhi Benches, New Delhi.

