आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ ‘ई’, मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL “E”, BENCH MUMBAI

सर्वश्री जोगिन्दर सिंह, न्यायिक सदस्य **एवं** श्री आर.सी.शर्मा, लेखा सदस्य

BEFORE SHRI JOGINDER SINGH, JM
&
SHRI R.C.SHARMA, AM

आयकर अपील सं./**ITA No.7946/Mum/2010**

(**निर्धारण वर्ष /** Assessment Year :2007-2008)

ADCIT, Rg.4(2), Mumbai	Vs.	M/s Shreepati Holdings& Finance Private Limited, 401, Mehta Mahal, 4th Floor, Mathew Road, Opera House, Mumbai-04
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AAACS 8111 R**		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

राजस्व **की ओर से** /Revenue by : Shri Neil Philip

निर्धारिती **की ओर से** /Assessee by : Shri Vijay Mehta

सुनवाई की तारीख / **Date of Hearing : 15/12/2014**

घोषणा की तारीख/**Date of Pronouncement 19/01/2015**

आदेश / O R D E R

***PER R.C.SHARMA (A.M)*:**

This is an appeal filed by Revenue against the order of CIT(A) dated 15-9-2010, for the assessment year 2007-2008, in the matter of order passed under Section 143(3) of the I.T. Act.

1. (i) "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of Rs.30,43,105/- made u/s40(a)(ia) in respect of Vsat charges and Leaseline charges paid to NSE without appreciating the facts that these were composite charges for professional and technical services rendered by the stock exchange to its members and the assessee has failed to deduct TDS thereon.".

ii. "On the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in ignoring the fact that these services are essential in nature as they can only be availed by members of Stock Exchange."

iii. "On the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in ignoring the facts that use of technology and algorithm based programs have converted an erstwhile physical market into a digitally operated market."

iv. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in ignoring the fact that the services rendered by the brokers are not standard services but services that has been developed to cater to the needs of the broker community to facilitate trading."

v. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has overlooked the fact that the brokers have in subsequent years themselves started deducting the TDS on such payments and that there is no reason to give a different treatment in this year."

2. i. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition made on account of penalty of Rs.8,45,458j- on violation of the bye-laws of the stock exchange, which are statutory in character and thus amounted to infringement of law".

ii. "On the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in ignoring the fact that the penalty is imposed under SEBI [procedure for holding inquiry and imposing penalty by Adjudicating Officer] Rules 1995 which has a binding character'.

iii. "On the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in ignoring the facts that non-adherence to statutory provisions is not an allowable expenditure.

iv. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in appreciating that it was not enough that the disbursement was made in the course of trade, but was also for the lawful purpose of trade .'

v. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in ignoring the fact that the penalty was imposed because the business was not conducted within the framework of law.'

3. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of Rs.2,45,000/- made on account of software expenses u/s40(a)(ia) without realizing the fact that these services are squarely covered under the purview of fee for technical service and therefore liable for deduction of taxation u/s.194J"

3. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in relying on the decision of the Hon'ble Supreme Court in the case of CIT vs Alom Extrusion which

pertains to employer's contribution to PF while the issue in question is employees' contribution which is covered u/s.36(1)(va)"

4. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the deemed dividend of Rs.21,40,865/- and Rs.17,58,656/- holding that the said amount cannot be brought to tax as deemed dividend as per the provisions of section 2(22)(e) in the hands of the assessee which was not the share holder in M/s. Indo Unique Trading Pvt Ltd and M/s. Shreepati Commodities Ltd"*

5. *"On the facts and circumstances of the case and in law, the impugned order of the Ld.CIT(A) is contrary to law and consequently merits to be set aside and that of the Assessing Officer be restored."*

2. We have heard the rival contentions and perused the record. During the course of scrutiny assessment, the AO disallowed payments made to stock exchange on account of VSAT Charges of Rs.4,60,000/- leaseline charges of Rs.14,61,370/- and transaction charges of Rs.11,21,735/- for non deduction of tax u/s 194J of Income tax Act, 1961. The A.O. had made these disallowances holding that these payments had been made for technical services falling within the purview of section 194J on which tax was liable to be deducted. Accordingly, the AO added to the income of the assessee for non deduction of TDS. Thus, the total amount of Rs.30,43,105/- was added to the income of the assessee by the AO.

2.1 By the impugned order, the CIT(A) deleted the addition following the appellate order for A.Y.2006-07.

2.2 We found that similar disallowance made in the assessment year 2006-07, which was deleted by the CIT(A), was upheld by the Tribunal in assessee's own case vide order dated 30-12-2011 after having following observations :-

> *"3. In appeal, the Ld. CIT(A) deleted the addition made by the AO on account of VSAT and Lease line charges on the ground that these are reimbursement to the stock exchange in lieu of infrastructure and facilities provided by the Stock Exchange. These are not "free for technical services" and are also not for "any work" done by NSE for the member broker. We find the Hon'ble Jurisdictional High Court in the case of CIT vs. Angel Capital & Debit Market Ltd. in ITA No.475 of 2011 order dated 28.06.2011 has upheld the decision of the Tribunal that VSAT and Lease line charges paid by the assessee to the Stock Exchange are merely reimbursement of the charges paid I payable by the Stock Exchange to the Department of Telecommunication. Since the VSAT and Lease line charges paid by the assessee do not have any element of income, deducting tax while making such payments do not arise. The above view of the Hon'ble Jurisdictional High Court has been again reiterated in the case of CIT vs. M/s. The Stock and Bond Trading Company in ITA No.4117 of 2010 order dated 14.10.2011. In view of the decision of the Hon'ble Jurisdictional High Court we do not find any infirmity in the order of the Ld. CIT(A) in deleting the disallowance made in respect of VSAT and Lease line charges. Accordingly, the same is upheld."*

As the facts and circumstances during the year under consideration are same, respectfully following the order of the Tribunal in assessee's own case, we do not find any infirmity in the order of CIT(A) for deleting the addition.

3. The next ground of appeal is against deleting the disallowance of NSE penalty of Rs.8,45,458/- paid for breach of contractual obligations. The A.O. had made disallowance holding that the payment having been made for violation of law and regulation was of the nature of fine and penalty which is required to be disallowed.

3.1 By the impugned order, the CIT(A) deleted the disallowance.

3.2 We have considered rival contentions and found that similar penalty imposed by the AO and which was deleted by the CIT(A) was confirmed by the Tribunal in assessee's own case vide order dated 30-12-2011 after having the following observations :-

> *"6. After hearing both the sides we find the issue relating to penalty paid to stock exchange for violation of byelaws is decided in*

favour of the assessee by the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Angel Capital & Debit Market Ltd. (supra). We find the Hon'ble High Court at para 3 of the order has upheld the finding given by the Tribunal that amount paid as penalty was on account of irregularities committed by the assessee's clients. Such payments are not on account of any infraction of law and hence allowable as business expenditure. In such a case, the explanation to section 37 would not apply. Respectfully, following the decision of the Jurisdictional High Court (supra) we hold that penalty paid to Stock Exchange for violation of the byelaws is allowable as 'business expenditure' and Explanation to I section 37 would not apply. We accordingly, uphold the order of the Ld. CIT(A) on this issue. The ground raised by the Revenue is accordingly, dismissed."

As the facts and circumstances during the year under consideration are same, respectfully following the aforesaid order of the Tribunal in assessee's own case, confirm the order of CIT(A) for deleting the penalty.

4. The next ground of appeal is against deletion of disallowance of software expenses amounting to Rs.2,45,000/- for alleged non deduction of TDS u/s 194J of the Income-tax Act. The expenditure was payment for purchase of ODIN software. The A.O. recorded a finding that this expenditure was technical services which was covered under provisions of section 194J liable to deduction of tax on payment. The AO held it to be not allowable u/s 40(a)(ia) since no deduction of tax had been made.

4.1 By the impugned order the CIT(A) deleted the addition after having the following observations :-

"6.1 Upon consideration of relevant facts of the appellant's submission, I find that the A.O. has erred in treating. payment of.Rs.2,45,000/- as payment for technical fee on which tax was deductible u/s 194J. Apparently, what the payment secured was utilities of the software and not transfer of any technical know-how or goods in the software. It is, therefore, wrong to contend that the payment of Rs.2,45,000/- was fee for technical services to which provisions of section 194J was applicable. As no tax. was required to be deducted from payment of Rs.2,45,000/-, the provisions of section 40(a)(ia) are not attracted in the instant case. The disallowance of Rs.2,45,000/-, therefore, cannot be sustained. The addition of Rs.2,45,000/- is deleted. The appeal on this ground is, therefore, allowed.

4.2 We have considered rival contentions and found that no tax was required to be deducted u/s.40a(ia) in view of the fact that payment was for purchase of ODIN software. The findings recorded by the CIT(A) at para 6.1 have not been controverted. Accordingly, we do not find any reason to interfere in the order of CIT(A) deleting the addition of Rs.2,45,000/-.

5. The next ground of appeal is against deletion of payment of Provident Fund contribution amounting to Rs.2,76,450/- being late payment of Provident Fund contribution of the employee, paid during the year. The A.O. has mentioned that assessee had delayed payment of employee's contribution towards provident fund amounting to Rs.2,76,450/-, accordingly disallowed the same.

5.1 We have considered rival contentions and found that the CIT(A) has restored the matter back to the file of the AO to verify details and documents with regard to actual payment of such contribution. The CIT(A) has not deleted the addition but has directed the AO to verify the actual payment and to decide afresh in terms of decision of Hon'ble Supreme Court in the case of **Alom Extrusions Ltd., 319 ITR 306(SC)**. Accordingly, there is no infirmity in the order of CIT(A) in this regard.

6. The next ground of appeal is against deletion of addition made by AO u/s.2(22)(e) on account of deemed dividend amounting to Rs.21,40,865/- and Rs.17,58,656/-,being receipts from M/s Indo Unique Trading Pvt. Ltd. and M/s Shreepati Commodities Pvt. Ltd., respectively.

6.1 The addition so made u/s.2(22)(e) was deleted by the CIT(A) after having following observation :-

> *"8.2. I find that the issue pertaining to certain receipts from M/s Indo Unique Trading Pvt. Ltd. had been decided by my Ld. predecessor in favour of the assessee allowing the appeal in this regard. The fact mentioned in the assessment order establishes that the assessee being a recipient of fund from M/s Indo Unique Trading Pvt. Ltd. and MIs Shreepati Commodities Pvt. Ltd. was not the share holder of MIs Indo Unique Trading Pvt. Ltd. and MIs Shreepati Commodities Pvt. Ltd. rather two share holders of the assessee company viz. Mr. Prem Kedia and Mrs. Kusum Kedia were the share holders of MIs Indo Unique Trading Pvt. Ltd. and M/s Shreepati Commodities Pvt. Ltd. Thus, the admitted fact is that the assessee company was not share holders of the concern from whom it had received the impugned amount. The question that arises for determination is whether the deemed dividend is to be taxed in the hand of the recipient who is not a share holder of the concerns from whom the amount deemed to be dividend has been received or the same is taxable in the hand of the share holder for whose benefit the funds have been received. As has been pointed out by the appellant in its written submission, the issue has been decided by the Hon'ble ITAT, Mumbai in the case of Seamist Properties Pvt. Ltd. -vs- ITA [95 TT J Mumbai 201] in which it has been held that the provisions of section 2(22)(e) cannot be applied to a non share holder. Identical decision is to be found in the judgement of the Hon'ble Rajsthan High Court in the case of CIT -vs- Hotel Hill Top [313 ITR 116 (Raj.)] in which it has been held :*
>
>> *"obviously, income from dividend is taxable as income from other sources, u/s.56 of the Act, and in the very nature of things, the income has to be of the person earning the income. The assessee in the present case is not shown to be one of the persons being shareholder. Of course the two individuals being Roop Kumar and Devendra Kumar, are the common person, holding more than requisite amount of share holding, and are having requisite interest, in the firm, but then, thereby the dividend income could not be deemed dividend in the hands of the firm, rather it would obviously be deemed dividend in the hands of the individuals, on whose behalf or on whose individual benefit, being such shareholder, the amount is paid by the company to the concern."*

6.2 We have considered rival contentions and found that since the assessee was not the shareholder of M/s Indo Unique Trading Pvt. Ltd. and M/s Shreepati Commodities Pvt. Ltd., therefore, there is no infirmity in the order of CIT(A) for holding that provisions of Section 2(22)(e) of the Act is not applicable. Accordingly, we uphold the action of CIT(A) for deleting the addition made u/s.2(22)(e) of the Act. Moreover, issue is covered by the order of ITAT in assessee's own case for A.Y.2006-07, dated 30.12.2011, wherein the Tribunal observed as under :-

> *"11. After hearing both the sides we find the issue stands covered in favour of the assessee and against the Revenue by the decision of Special Bench of the Tribunal in the case of ACIT vs. Bhaumik Color (P) Ltd. reported in 118 ITD 1 (Special Bench) according to which deemed dividend can be assessed only in the hands of a person who is a shareholder of lender company and not in hands of a person other than a shareholder. Since, the assessee is not a shareholder of the above two companies, nor the above two companies are the shareholder of the assessee company, therefore, the question of deemed dividend in the hands of the assessee company does not arise. In this view of the matter, the ground raised by the Revenue is dismissed."*

As the facts and circumstances during the year under consideration are same, respectfully following the order of Tribunal in assessee's own case, we do not find any infirmity in the order of CIT(A) in deleting the addition made u/s.2(22)(e) of the Act.

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

Order pronounced in the open court on this 19/01/ 2015.

आदेश की घोषणा खुले न्यायालय में दिनांकः 19/01/2015 को की गई ।

Sd/-	**Sd/-**
(जोगिन्दर सिंह**)**	**(**आर.सी.शर्मा**)**
(JOGINDER SINGH)	**(R.C.SHARMA)**
न्यायिक सदस्य **/ JUDICIAL MEMBER**	लेखा सदस्य **/ ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक Dated 19/01/2015

प्र.कु.मि/pkm, नि.स/ PS

<u>आदेश की प्रतिलिपि अग्रेषित/**Copy of the Order forwarded to**</u> **:**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार
(Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai