

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G': NEW DELHI**

**BEFORE,
SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER**

**ITA No.7894/Del/2019
(ASSESSMENT YEAR 2016-17)**

ACIT Circle-7(1) New Delhi	Vs.	M/s Delmos Aviation Pvt. Ltd., 209, Prakash Deep Building, 07 Tolstoy Marg, Cannaught Place New Delhi-110 001 PAN-AABCD 9009J
(Appellant)		(Respondent)

Appellant by	Mr. T. James Singson, CIT- Ld. Departmental Representative
Respondent by	Mr. S. K. Chaturvedi, CA

Date of Hearing	10/08/2023
Date of Pronouncement	06/10/2023

ORDER

PER YOGESH KUMAR U.S., JM:

This appeal by Revenue is filed against the order of Learned Commissioner of Income Tax (Appeals)-3, New Delhi [“Ld. CIT(A)”, for short], dated 24/07/2019 for Assessment Year 2016-17. Grounds taken in this appeal are as under:

1. *“On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.20,00,37,558/- made by the AO u/s 41 of the Act.”*

2. “On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.2,27,64,303/- made by the AO on account of disallowance of 50% of handling charges.

3. “On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.2,45,00,000/- made by the AO u/s 68 of the Act on account of unsecured loans.”

4. “On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of PMS fees of Rs.2,37,697/.”

5. “On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the disallowance of Rs.8,40,255/- to Rs.2,52,128/- u/s 14A of the I.T. Act and read with Rule 8D of IT, Rules.

6. “On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the increase in the Director’s remuneration of Rs.53,90,000/-

7. “The appellant craves leave to add, amend or forego any ground(s) of appeal at any time before or during the hearing of this appeal.”

3. Brief facts of the case are that, the assessee filed return of income declaring income of Rs. 1,42,61,740/-, the case was selected for complete scrutiny, the assessment u/s 143(3) of the Act came to be passed on 09/12/2018 by making following additions:-

- i. Addition of Rs. 20,00,37,558/- u/s 41 of the Act;
- ii. Addition of Rs. 2,27,64,303/- by disallowing 50% of handling charges.
- iii. Addition of Rs. 2,45,00,000/- u/s 68 of the Act.
- iv. Addition of Rs. 2,84,270/- by disallowing PMS Fees;
- v. Addition of Rs. 8,40,255/- by making disallowance u/s 14A of the Act.
- vi. Addition of Rs. 53,90,000/- on account of increase in remuneration paid to employees.”

4. Aggrieved by the assessment order dated 09/12/2018, the assessee preferred an appeal before the CIT(A), the Ld. CIT(A) vide order dated 22/01/2019 partly allowed the Appeal filed by the assessee. Aggrieved by the order of the CIT(A), the Department of Revenue preferred the present Appeal on the grounds mentioned above by challenging the deletion of additions.

5. Ground No. 1 is regarding deletion of addition of Rs. 20,00,37,558/- made by the A.O. u/s 41 of the Act. The ld. Ld. Departmental Representative by relying on the assessment order submitted that the CIT(A) has committed error in deleting the addition of Rs. 20,00,37,558/- made by the A.O. u/s 41 of the Act. Per contra, the Ld. Assessee's Representative relying on the finding and order of the CIT(A) submitted that the Ground No. 1 of the Revenue is devoid of merit and the same is deserves to be dismissed.

6. We have heard both the parties and perused the material available on record. During the assessment proceedings, the assessee was asked to furnish comparative details of the balances of trade payables for last three years in a tabular form along with particular and also to submit confirmation letters from the Creditors. The assessee furnished statement of creditors, however, not submitted the confirmation of any creditors. The assessee further submitted that no specific correspondence was available in respect of outstandings for more than one year. The A.O. observed following balances are payable for more

than one year and there is no transaction with following parties during the year.

- (i) Armavia Airlines :Rs. 2,04,005/- (outstanding Prior to 01/04/2015)
- (ii) Volgatrans :Rs. 4,27,92,990/- (outstanding prior to 01/04/2015)

The A.O. further observed that, the huge balance of Rs. 21,20,53,479/- payable towards Consultancy Investment Services-Moscow (foreign company), therefore, the A.O. was of the opinion that Opening Outstanding (even prior to 01/04/2015) continues and the credit are Rs. 5.56 Crore- a sample payment of Rs. 6,24,175/- was made and held that, although the assessee has submitted confirmation of parties since it is on a plain paper and there is no evidence that the same has been received from Moscow. Therefore, the opening outstanding of Rs. 15,70,40,563/- has been treated as income u/s 41 of the Act. Aggrieved by the same, the assessee preferred an appeal before the CIT(A), the Ld. CIT(A) while deleting the above addition held as under:-

“4.2 I have considered the facts of the case and the submission made by the AR. It has been contended that the appellant is having running accounts with these parties and has furnished the ledger accounts for previous and subsequent years having transactions with these parties. It is also submitted that the AO did not confront anything to the appellant after the preliminary details were furnished and the AO did not make any independent enquiry. The AR has also filed the copies of the assessment orders for AYS 2013-14 to 2015-16 in which the transactions with all these parties have been duly accepted. On perusal of the complete details filed by the

AR and the assessment order, it is observed that the AO has not brought on record any material or reason before making the addition. The AO has simply added back the opening balances of the trade payables without making any verification from the parties and has also ignored the fact that part of the payments have been made in the current/subsequent years and there is a running account with these parties held by the appellant. In this regard, reference is made to the decision of *Hon'ble Delhi ITAT in the case of Smt. Sudha Loyalka, New Delhi vs Ito, in ITA No. 399/Del/2017, in which it has been held (after discussing various decisions of the Apex Court as well as various High Courts) that-*

6. *If addition has been mentioned u/s 41(1), ingredients of section 41(1), the burden of proof which is resting on revenue in view of the following judicial decisions has not been discharged.*

6.1 *There is no evidence that the liability has ceased to exist and that too in the year under appeal. The very fact these amounts are being shown as payable in the balance sheet of the assessee go to establish that there was no cessation of the liability as held in the following judicial decisions:-*

6.2 *Impugned liabilities are very much payable by the assessee as and when demanded and unless it is demanded, these are bound to be shown as outstanding. The very fact that these liabilities are appearing in the balance sheet is a strong acknowledgement of the debts payable by the assessee as has recently been held in the case of CIT vs Tamilnadu Warehousing Corporation 292 ITR 310(Mad). It has also been held in the case of Ambica Mills Ltd vs CIT 54 ITR 167 (Guj)*

that liability shown in the balance sheet is a clear case of acknowledging the liability and such liability cannot be treated to have ceased so as to attract section 41(1). That being so, where is the question of holding the said liabilities as ceased to exist, more so when assessee herself is acknowledging the liabilities to be paid? How can a third party that too a quasi judicial authority hold in the absence of any material that the liability is not payable by the assessee? Therefore, the addition made on the basis of the presumption does not have either factual or legal lags to stand. Reliance is also placed on the decision of Sita Devi Juneja 325 ITR 593(P&H).

6.3 It is settled law by umpteen number of decisions including the decision of the apex court in the case of Sugauli Sugar Works vs CIT 236 ITR 518(SC) that the cessation of the liability can be done not by the unilateral act but it can certainly be so by the bilateral act So long as the appellant is recognizing her liability to pay to these creditors, where is the question of a quasi judicial authority to intervene & to say on behalf of sundry creditors or on behalf of the appellant that amount is not payable by the assessee? Here there is not even unilateral act, let alone the bilateral act, Therefore also, action of AO in holding the liabilities ceased to exist may please be reversed.

6.4 Even in law, the addition is not sustainable for more than one reason. Section 41(1) of the Act is a deeming fiction according to which an amount which does not have any trace of income is treated as income liable to suffer the brunt of tax. Therefore, as per the established canons of law, the burden to prove that a particular amount falls within the four corners of section 41(1) is on the shoulder of the Assessing Officer without

which the addition cannot be made and if made is liable to be deleted.

6.5 The first pre-requisite for the applicability of section 41(1) is there must be a trading liability in respect of which the deduction has been claimed and allowed and burden to prove the twin conditions to the effect of the above facts, it goes without saying, is on revenue. There is not even an iota of whisper as to whether the impugned creditors were in respect of trading liability for which any deduction was ever claimed and allowed and if allowed, in which year was it allowed so on so forth. This is evident from a plain reading of the assessment order. Therefore, Ld. A.O. miserably failed to discharge the said burden in view of the following decisions and therefore this addition is liable to be deleted on this Short ground alone. There could very well be the possibility of the loan creditors or advances from the business constituents under the head of sundry creditors for which there could never be any claim of deduction having been allowed.

6.6 The A.O. has not established with evidence that the liability in respect of the above outstanding balances has ceased to exist. AO has gone on presumption and that too by placing the burden wrongly on the shoulders of the assessee. Section 41(1) does not envisage any such presumption of cessation and fix the incidence of tax thereon.

6.7 In the absence of any material having been brought on record to establish that the deduction was claimed or credit balance has been remitted, addition cannot be made u/s 41 (1) in view of the following decisions:

- *Steel and General Mills Co. Ltd vs CIT 96 ITR 438(Del) CIT vs Nathubhai Desha Bhai 130 ITR 238 (MP) Liquidator, Mysore Agencies P Ltd vs CIT 114 ITR 853(Karn) K.V. Moosa Koya & Co vs CIT 175 ITR 120,124(Ker) CIT vs Pranlal P Doshi 201 ITR 756(Guj).*

6.8 The third burden which was on A.O. was to establish that cessation if at all has happened, has happened in the year under appeal. After all, liability to tax can be fixed in the year to which it pertains and to no other year. Liability to tax any ceased liability in a particular year does not depend on the action of A.O. in selecting a case in scrutiny of that year. Merely because A.O. chose to enquire about the creditors in this year and if assessee fails to establish the existence of the liability in this year (even if it is so assumed) then also it cannot be said that the liability ceased to exist only in this year and not before. Nobody can be permitted to fix the year of taxability by a conscious design or omission, be he an assessee or an Assessing Officer. Therefore, viewed from any angle, the addition made by A.O. is liable to be deleted."

4.3 In the present case also, the AO has failed to discharge the primary onus and has made the addition in a summary manner. In view of the complete facts and the legal position as discussed above, the addition made by the AO is deleted."

7. It was canvassed before the CIT(A) by the assessee that the **Assessee was having running accounts with the above parties and has furnished the ledger accounts for previous and subsequent years to prove the transactions with**

those parties. The A.O. did not confront anything to the assessee after preliminary details were furnished and A.O. has also not made any independent enquiry. The assessee had filed copies of the assessment orders for Assessment Years 2013-14 to 2015-16 in which the transactions with all the parties have been duly accepted, further in the absence of the A.O. bringing any material or reasons before making any addition, simply added back the opening balances of the trade payables without making any verification from the parties. The A.O. has also ignored the fact that part of the payment have been made in current/subsequent year and there is a running account with these parties held by the assessee. The Ld. CIT(A) has relied on various decisions of Apex Court as well as various High Courts and ultimately deleted the above addition. Considering the fact that the A.O. has failed to discharge the preliminary onus and has made the addition in summary manners, in our considered opinion, the CIT(A) has committed no error in deleting the addition of Rs. 20,00,37,558/- made u/s 41 of the Act. Accordingly, we dismiss the Ground No. 1 of the Revenue.

8. Ground No. 2 is regarding deletion of addition of Rs. 2,27,64,303/- made by the A.O. on account of disallowance of 50% of handling charges.

9. The Ld. Departmental Representative relying on the observations made in the assessment order submitted that the CIT(A) committed error in deleting the addition. Per contra, the Ld. Assessee's Representative by supporting the

findings and conclusion of the CIT(A), submitted that the Ground No. 2 of the Revenue is devoid of merit and the same is liable to be dismissed.

10. Heard. During the assessment proceedings, the assessee submitted purchase ledger summary showing Rs. 35,67,25,274/-(under various heads) debited in P & L account as cost of services. The assessee reported to have incurred Rs. 4,55,28,607/- towards handling charges and copy of the ledger account shows that the said amount is payable to Consultancy and Investment Services-Moscow. Since the opening outstanding was added by the A.O., he was of the opinion that the amount is not being paid to party expenses during the year are also treated as not genuine and 50% of the same has been disallowed by making total disallowance of Rs. 2,27,64,303/-. The Ld. CIT(A) while deleting the said addition, held as under:-

“5.3 I have considered the facts of the case and the submission made by the AR. It is observed that the AO has disallowed 50% of the handling charges by stating that the amount has not been paid by the appellant to the concerned vendors and therefore, these expenses claimed are not genuine. The AR has contended that the appellant is following Mercantile System of Accounting and not on cash basis and therefore, the expenses cannot be disallowed merely on the basis of non-payment to the vendors. On perusal of the complete facts, it is observed that the AO has not brought on record any material or evidence to show that the expenses claimed are not genuine or the expenses have not been incurred for the purposes of business. The AO has not made any enquiry also from the appellant in this regard and has not rejected the books of account also which

are duly audited. In view of these facts, the addition made on ad-hoc basis by the AO is deleted and the ground of appeal is allowed.”

11. Since, the Assessee was following Mercantile System of Accounting and not on cash basis, the expenses cannot be disallowed merely on the basis of nonpayment to the vendors. It has been observed by the CIT(A) that the A.O. has not brought on record any material or evidence to show that the expenses claimed are not genuine or the expenses have not been incurred for the purpose of business. Further, the A.O. has not made any enquiry also from the assessee on this regard. The A.O. without rejecting the books of account which was duly audited made the above disallowance of 50% of handling charges which has been rightly deleted by the CIT(A). Thus, we find no merit in Ground No. 2 of the Revenue, accordingly, we dismiss the Ground No. 2 of the Revenue.

12. Ground No. 3 is regarding deletion of addition of Rs. 2,45,00,000/- made by the A.O. u/s 68 of the Act on account of unsecured loans. The Ld. Departmental Representative relying on the assessment order, submitted that the assessee has only submitted the acknowledgement of return and confirmation of amount outstanding at the yearend but not submitted the copy of the bank account to prove that the said amount has been repaid. In the absence of any material on record, that the amount has been repaid the CIT(A) has committed error in deleting the addition.

13. The Ld. Assessee's Representative relying on the findings of the CIT(A) submitted that the bank statement has been duly uploaded on the e-portal and the copy of the statement was also furnished before the A.O. but the same has not been considered by the A.O. and the CIT(A) has rightly deleted the addition.

14. Heard both the parties. The Ld. A.O. observed that the Director, Sh. Naveen Rao has given loan of Rs. 2.45 crores to the assessee, when A.O. asked to furnish the evidence regarding the said loan, the assessee submitted the acknowledgment of ITR and confirmation was also filed, but the assessee has not filed copy of the bank statement of Naveen Rao, therefore, the A.O. made the addition u/s 68 of the Act. It is the case of the assessee that the bank statement has been duly uploaded on the e-portal and also furnished the copy to the A.O. which has not been considered by the A.O. during the assessment proceedings. It is not clear as to whether the CIT(A) while deleting the addition has actually verified the bank statement or not, the order of the CIT(A) is non speaking and the same is cryptic. In view of the above facts and circumstances, we restore the issues to the file of the A.O. for de-novo adjudication with a direction to the assessee to submit the bank statement of Shri Naveen Rao to substantiate the claim of the assessee. Accordingly, we partly allow the Ground No. 3 of the Revenue for statistical purpose.

15. Ground No. 4 is regarding deletion of the disallowance of PMS fees of Rs. 2,37,697/-. The Ld. Departmental Representative relying on the

assessment order submitted that the CIT(A) committed error in deleting the disallowance of PMS fees of Rs. 2,37,697/-.

16. Per contra, the Ld. Assessee's Representative relying on the findings and conclusion of the CIT(A) submitted that the CIT(A) has rightly deleted the addition.

17. We have heard both the parties and perused the material available on record. The A.O. disallowed PMS fees of Rs. 2,37,697/- and interest on TDS Rs. 46,576/- without giving any reasons. The said disallowance has been deleted by the CIT(A) on the ground that the assessee shown the shares in the balance sheet as stock-in-trade, therefore, the expenses are allowable as business expenses. The interest on TDS is also compensatory in nature and is not penal and therefore, the same is allowable. We find no error or infirmity in the order of the CIT(A) in granting the relief to the assessee by deleting the addition accordingly, we dismiss the Ground No. 4 of the Revenue.

18. Ground No. 5 is regarding restricting the disallowance of Rs. 8,40,255/- to Rs. 2,52,128/- u/s 14A of the Act. The Ld. Departmental Representative by relying on the assessment order, sought for allowing the Ground No. 5 of the Revenue. Per contra, the Ld. Departmental Representative relied on the order of the CIT(A).

19. Heard. The A.O. observed that the assessee had made various investments from which earned income which is exempt u/s 10(34) of the Act. Therefore, by invoking the provision of Section 14A read with Rule 8D made disallowance of Rs. 8,40,255/-. In the appeal, the said disallowance u/s 14A was restricted to the amount of dividend income i.e. Rs. 2,52,128/- and balance disallowance was deleted. The assessee earned exempt income of Rs. 2,52,128/- in the form of dividend income and the amount of disallowance u/s 14A cannot exceed the total exempt income, therefore, we find no error or infirmity in restricting the disallowance u/s 14A of the Act to the amount of dividend income i.e. Rs. 2,52,128/- and the balance disallowance has been rightly deleted by the CIT(A). Thus, we find no merit in Ground No. 5 of the Revenue, accordingly Ground No. 5 of the Revenue is dismissed.

20. Ground No. 6 is regarding deletion of increase of Director's remuneration of Rs. 53,90,000/- the Ld. Departmental Representative relying on the assessment order and submitted that no explanation has been forwarded by the assessee for increase of the remuneration of the Directors, the order of the CIT(A) in deleting the addition is erroneous and the same is liable to be reversed. Per contra, the Assessee's Representative relying the findings of the CIT(A) sought for dismissal of Ground No. 6 of the Department.

21. Heard the parties. During the assessment proceedings, the A.O. on perusal of employees benefit expenses found that there is increase in expenses

from Rs. 4,72,44,155/- to Rs. 5,15,49,744/- while there was a reduction in total revenue of the assessee from 71.09 crore to 45.39 crore. Since the increase in employee benefit expenses was mainly on account of increase in Directors remuneration from Rs. 3,79,90,000/- to Rs. 4,33,80,000/- in the absence of any explanation forwarded for increase in such remuneration, the A.O. made addition of Rs. 53,90,000/- by disallowing u/s 40A(2)(b) of the Act. During the first appellate proceedings, the above said addition has been deleted in following manners:-

“11.3 I have considered the facts of the case and the submission made by the AR. It has been contended that there is increase in the Director's remuneration because the Director's have been given rent free accommodation and the landlord had increased the rent during the year and the perquisite value of the rent free accommodation is duly shown in the ITRS filed by the Directors. It is further contended that the AO has made the addition without any reason. On perusal of the complete facts, it is observed that the AO has not given any reason for treating the remuneration given to the directors as excessive and the AO has not analysed the facts completely. The AR has very well explained the reason for increase in the remuneration of the directors which is mainly due to the increase in the rent paid by the appellant company in respect of the rent free accommodation provided to the directors. In view of these facts, the addition made by the AO is deleted and the ground of appeal is allowed.”

22. It is found that the assessee had given no explanation before the A.O. regarding increasing the remuneration of Directors but during the first appellate proceedings, the assessee made elaborate submission and the CIT(A)

observed that there is an increase of Directors' remuneration as the Directors have been given rent free accommodation and the landlord has increased the rent during the year and the perquisite value of the land free accommodation has been duly shown in ITR filed by the Directors. The said fact has not been brought to the notice of the A.O. and the same has been left without examining by the A.O. Therefore, we remand the issue involved in Ground No. 6 to the file of the A.O. for fresh adjudication with a direction to the assessee to substantiate its claim by providing the evidence. Accordingly, the Ground No. 6 of the Revenue is partly allowed for statistical purpose.

23. In the result, Appeal filed by the Revenue is partly allowed for statistical purpose.

Order pronounced in open Court on 06th October, 2023

Sd/-

(N. K. BILLAIYA)
ACCOUNTANT MEMBER

Dated: 06/10/2023

Pk/R.N, Sr.ps

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(YOGESH KUMAR U.S.)
JUDICIAL MEMBER

ASSISTANT REGISTRAR
ITAT, NEW DELHI

