
(2012) 01 DEL CK 0094
In the Delhi High Court
Case No : ITA No. 526 of 2011

CIT

APPELLANT

Vs

At and T Communication Services India Pvt. Ltd.

RESPONDENT

Date of Decision : 19-01-2012

Acts Referred:

Citation : (2012) 250 CTR 57 : (2012) 342 ITR 257 : (2012) 205 TAXMAN 93

Hon'ble Judges : Sanjiv Khanna, J;R.V. Easwar, J

Bench : Division Bench

Advocate : Abhishek Maratha with Ms. Anshul Sharma, for the Appellant; Jayant K. Mehta and Mr. Sukant Vikram, for the Respondent

Judgement

Sanjiv Khanna, J.—The Revenue is aggrieved by the order of the Income Tax Appellate Tribunal (for short "the Tribunal") dated 19th February, 2010 in ITA No. 2788/Del/2006 deleting the penalty u/s 271(1)(c) of the Income Tax Act, 1961 (for short "the Act"). It pertains to the Assessment Year 2000-01.

2. The Assessing Officer had imposed penalty under the said section on three accounts:-

(i) Rs. 1,31,58,290/- on account of disallowance of expenses claimed respect of payment made to AT&T, Singapore;

(ii) Rs.33,333/- being disallowance of expenses paid to the Registrar of Companies (ROC); and

(iii) Rs.3,98,36,108/- being amount received from Birla AT&T.

3. At the outset, we may note that the third addition has been set aside for fresh adjudication by the Tribunal in the quantum appeal. The Revenue, therefore, has not raised this issue in the present appeal. The question therefore is whether the Tribunal was justified in deleting the penalty u/s 271(1)(c) of the Act in respect of additions/disallowance (i) and (ii).

4. Learned counsel for the appellant/Revenue has drawn our attention to the order dated 3rd October, 2008 passed by the Tribunal in the quantum proceedings and submits that there is contradiction in this order and the order now passed by the Tribunal in the penalty proceedings. He

further submits that the question of malafides is irrelevant and cannot be a ground to quash the penalty. The assessee had accepted disallowance of Rs. 33,333/-, which was paid to the ROC and did not file any appeal against the order of the Assessing Officer.

5. The question whether a particular expenditure is capital or revenue in nature is always debatable and two views are possible. It is an admitted position that the assessee had made payment of Rs. 1 lakh to the ROC and had amortized the said amount. 1/3rd of this amount was claimed as a revenue deduction in this year. It was held by the Assessing Officer that the payment to ROC was capital expenditure and not revenue expenditure. The tribunal has accepted the plea and explanation of the respondent-assessee that they genuinely believed that 1/3rd of the amount paid to the ROC could be treated as revenue expense in view of the legal advice offered. The tribunal has noticed that identical claim for the assessment year 2000-01 was allowed by the Assessing Officer. Keeping in view the total quantum of income offered for taxation, the exiguous amount involved and the explanation offered, we do not think that it will be appropriate to admit the present appeal on the said issue.

6. Rs. 1,31,58,290/- was disallowed u/s 40(a)(i). It is relevant to refer to certain facts and the explanation given by the assessee, which has been accepted. The aforesaid payment was for services rendered by AT&T Singapore. There is no dispute that the payment has been made and TDS on the said amount was paid to the Government on 23rd November, 2001 i.e. after the end of the previous year relevant to the assessment year 31st March, 2001. The respondent/assessee had received a bill from AT&T Singapore on 23rd November, 2001. Quantum and genuineness of the expenditure is not disputed.

7. The Tribunal in the quantum proceedings had examined the said aspect including the contention of the respondent/assessee that AT&T Singapore had rendered services during the period relevant to the assessment year in question and the assessee had also earned the income as a result of the said services during the period relevant to the assessment year. It was held as under:-

"It is no doubt true that the relevant bill was raised by AT&T, Singapore on the assessee company only in the month of November, 2001. However, it is also true that the said bill was raised for the services which had been rendered by AT&T, Singapore to the assessee company in terms of an agreement already entered into which was in force throughout the year under consideration. A perusal of the copy of the bill raised by AT&T, Singapore on the assessee company placed at page No.93 of the assessee's paper book also shows that the narration/description given therein was "charges towards remote end support and network

charges for period April, 2000 to 31st March, 2001 as per clause (1) of agreement effective 1st April, 2000". This description given in the relevant bill clearly shows that not only the services charged for in the said bill were rendered by AT&T, Singapore to the assessee company in terms of an agreement which was effective from 1.4.2000 but even the charges for the said services were quantified as per the terms and conditions of the said agreement. The liability for the said services thus had not only arisen during the year under consideration in terms of the agreement which was very much in force but even the quantification thereof was possible with reasonable certainty in that year. In our opinion, the said liability thus had crystallized during the year under consideration itself irrespective of the fact that the relevant bill was raised by AT&T Services in the month of November, 2001. (emphasis supplied)

8. Thereafter, the Tribunal examined the provisions of Section 40(a)(i) and referred to the decision relied upon by the respondent-assessee in (2005) 275 ITR 1 and decision dated 9th May, 2007 in ITA No. 641/2006 titled Oracle Software India Ltd. vs. CIT. However, it was held that the tax had been deposited only in November, 2001, and therefore, in view of Section 40(a)(i), the deduction as an expense would be available in the next assessment year and not in the assessment year in question. Accordingly, the addition made by the Assessing Officer was upheld.

9. After referring to the factual matrix of the present case, the Tribunal in the impugned order in the penalty proceedings went into the question of whether or not the assessee has been able to justify and discharge the onus under Explanation 1 to Section 271(1)(c) of the Act. It may be noted here that the respondent-assessee had contended that Section 40(a)(i) was not applicable as the words used were "tax has been paid or deducted". The contention of the respondent was that they had deducted the TDS on 31st March, 2001, but the same was paid on 23rd November, 2001. Accordingly, it was submitted that Section 40(a)(i) was not applicable. The said contention was rejected upholding that the words "paid or deducted" cannot be interpreted in the manner as suggested by the respondent assessee.

10. Section 40(a) (i) during the relevant assessment year was as under:

40. Amounts not deductible.-Notwithstanding anything to the contrary in Sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession,-

(a) in the case of any assessee-

(i) any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act, which is payable outside India, on which tax has not been paid or deducted under Chapter XVII-B:

Provided that where in respect of any such sum, tax has been paid or deducted

under Chapter XVII-B in any subsequent year, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid or deducted. Explanation.-For the purposes of this sub-clause,-

(A) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of Section 9;

(B) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of Section 9;

The said section was amended w.e.f. 1.4.2004 by the Finance Act, 2003 and after amendment the sub-clause (i) of section 40(a) was modified as under:-

40. Amounts not deductible.-Notwithstanding anything to the contrary in Sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession,-

(a) in the case of any assessee-

(i) any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act, which is payable,-

(A) outside India; or

(B) in India to a non-resident, not being a company or to a foreign company,

on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of Section 200:

Provided that where in respect of any such sum, tax has been deducted in any subsequent year or, has been deducted in the previous year but paid in any subsequent year after the expiry of the time prescribed under sub-section (1) of Section 200, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

Explanation.-For the purposes of this sub-clause,-

(A) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of Section 9;

(B) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of Section 9;

11. It is possible to submit that the amendment which came in 2004 was clarificatory in nature, but this is different from stating and holding that the assessee could not have raised the said plea or argued that the disallowance under the pre amended Section 40(a)(i) was not justified or mandatory. We may also note that in the present case TDS has been deducted and paid. The payment

was made in the next assessment year. The question was whether the respondent-assessee can claim deduction of the amount paid to AT&T Singapore in the assessment year 2001-02 or in the assessment year 2002-03. If this expense is allowed in the assessment year 2002-03, income for the said year will be proportionately reduced. There is no evidence or material to show that the assessee wanted to claim the amount paid to AT&T Singapore in the assessment year 2001-02 as the respondent-assessee did not have taxable income in the assessment year 2002-03. The plea and interpretation propounded by the respondent-assessee was rejected in the quantum proceedings but the assessee can in the penalty proceeding show and explain that interpretation was plausible and had merit, though was not accepted.

12. Keeping in view the aforesaid facts and the findings recorded by the tribunal, we do not think that any substantial question of law arises for consideration. Accordingly, the present appeal is dismissed. No costs.