
(2011) 07 DEL CK 0061

In the Delhi High Court

Case No : ITAs No"s. 112 and 113 of 2011

Commissioner of Income Tax-IV

APPELLANT

Vs

FX INFO Technologies Pvt. Ltd.

RESPONDENT

Date of Decision : 11-07-2011

Acts Referred:

Income Tax Act, 1961 — Section 142(2), 143(1), 143(3), 260A

Citation : (2011) 6 AD 29 : (2011) 337 ITR 526

Hon'ble Judges : M.L. Mehta, J;A.K. Sikri, J

Bench : Division Bench

Advocate : Sanjeev Sabharwal, for the Appellant; Prem Nath Monga and Manu Monga, for the Respondent

Final Decision : Dismissed

Judgement

M.L. Mehta, J.—These two appeals are u/s 260A of the Income Tax Act, 1961 (hereinafter referred to as the "Act") directed against the order dated 31st March, 2010 of the Income Tax Appellate Tribunal (for short "the Tribunal") pertaining to the assessment years 2004-05 and 2005-06. The Assessee was carrying on business of distribution of Acer products, such as computers, laptops, desktops, etc. of M/s. Acer India Pvt. Ltd. for about two years. Due to some financial constraints, it could not make its business venture a profitable one and in the process incurred heavy losses. In the meeting of the Board of Directors held on 29th December, 2001, the Assessee company decided to transfer the distribution of the Acer producers to M/s. Salora International Ltd. (for short "SIL"), for which M/s. Acer India Pvt. Ltd. had also consented, by virtue of a written agreement between the Assessee and SIL. The distribution of the products was to be taken over by SIL on certain terms and conditions including payment of commission on sale at the rate of one per cent with effect from 1st January, 2002. The Assessee offered the commission income gained from its business as "business income" and set off the same against the business losses incurred in the same business. It may be noted here that after the transfer of

distribution to SIL, the latter could achieve huge profits within the short period of time and by virtue of the commission received from SIL, the Assessee also made profits of the same business of which it was already running losses. The Assessing Officer treated the income of the Assessee from commission as income from other sources and declined set off against the brought forward business losses. The Assessee preferred appeals in respect of both the assessment years. In the appeal in respect of assessment year 2004-05, Assessee produced three additional documents, namely, copies of letters dated 27th December, 2001 by Acer India Pvt. Ltd. to SIL; by Acer India Pvt. Ltd to the Assessee and copy of resolution of Board of Directors dated 29th December, 2001. The CIT called for the comments of the Assessing officer under Rule 46A of Income Tax Rules, 1962. The CIT (A) allowed the appeal with these reasons:

I have considered the above facts and am of the view that the AO has not conclusively proved his view point for arriving at conclusion that the commission income so received by the Appellant company from M/s. Salora International Ltd. is not a business income. There is no denying the fact that the Appellant company has entered into an agreement with M/s. ACER India Pvt. Ltd. for distributionship of ACER products in India. The Appellant company has shown income on this account in the earlier income tax returns which had been assessed by the Department u/s 143(1)/143(3). The distributionship business ran into losses when the Appellant company decided to shift the same in the hands of its sister concern i.e. M/s. Salora International Ltd. to which M/s. ACER India Pvt. Ltd. also agreed. The AO agreed to all the above mentioned facts of the case. However, thereafter the AO disagreed and stated that agreement dated 1/1/2002 between ACER India Pvt. Ltd. and M/s. Salora International Ltd. does not contain any reference to the Appellant company. I fail to understand how the AO can say that the agreement between ACER India Pvt. Ltd. and M/s. Salora International Ltd. must contain reference of the Appellant company. I do not see any justification on the part of the AO to conclude with certainty as to how and manner in which the business needs to be carried out. I again do not agree with the AO when he stated that M/s. Salora International Ltd. is a major share holder of the Appellant company and the commission has been paid with a view to adjust the brought forward business losses of the Appellant company and to avoid payment of tax by M/s. Salora International Limited. Is there any legal bar on M/s. Salora International Ltd. in making payment of commission to the Appellant company simply because it is a major share holder of the Appellant company? And to this, I do not see any reasonable ground on the part of the AO for arriving at a conclusion that the commission income so received is not business income. Letters dated 27/12/2001 written by ACER India Pvt. Ltd. to M/s. Salora International Ltd. clearly show that the Appellant company could not continue the business of distribution of ACER products due to the financial constraints and as such agreed to the request of the Appellant company to transfer and assign distribution business to M/s. Salora International Ltd. Ms/.ACER India Pvt. Ltd. is not concerned about any other arrangements made

by the Appellant company with M/s. Salora International Ltd. i.e. whether the commission is required to be paid to the Appellant or not. In these circumstances, I do not consider it appropriate to accept the view point of the AO and accordingly, the AO is directed to delete the addition and treat the amount of Rs. 52,91,670/- as business income and allow set off of brought forward losses if otherwise allowable as per law.

2. In the appeal pertaining to the assessment year 2005-06, the CIT followed the reasons as recorded in the order for the assessment year 2004-05 as noted above. Consequently, in this case also the CIT (A) held the commission amount to be a business income and the Assessee was entitled to assessment of the carried forward business losses.

3. The Revenue preferred appeals against both these orders of the CIT (A), to the Tribunal which vide the impugned order dated 31st March, 2010 dismissed both the appeals of the Revenue. It is against these orders of the Tribunal that the Revenue is in appeal before us.

4. Having regard to the material on record and the findings of the CIT (A) and the Tribunal and also the material exchanged between the Assessee and the SIL regarding assignment of distribution of Acer products, we notice that the transfer of distribution business by Assessee to SIL of the products of M/s. Acer was by way of a written agreement between two of them and also with the consent of M/s. Acer India Pvt. Ltd. The substantial increase in the sales turnover year after year by SIL clearly depict that the services as agreed were actually rendered by the Assessee. It is not only that, the Assessee had also provided supporting documents on various aspects of arrangement as and when required by the SIL. All these are finding of facts, which have been recorded by the authorities below. It is also noted that SIL in its return had shown payment of commission made to the Assessee as business expenditure and the same was allowed by the CIT (A). In appeal against the order of the CIT (A), in case of SIL, the Tribunal upheld the order of the CIT (A) by observing that SIL has utilized the establishment and infrastructure of M/s.FX Info Technologies Ltd. (Assessee herein) for carrying out sale of Acer computers. The expenses incurred by SIL in the shape of commission paid for the services rendered by FX Info Technologies Ltd., is directly associated with its business. There is nothing on record to suggest that the said order of the Tribunal was challenged. That being so, it comes out to be an accepted position that in the case of SIL, it was accepted by the Revenue that the commission paid by SIL to the Assessee was business expenditure. If that was so, the business expenditure in the hands of SIL by natural corollary is the business income in the hands of FX Info Technologies Ltd., which is the Assessee in the present case.

5. It was, however, submitted by the learned Counsel for the Revenue that there was no clause in the memorandum of association of the Assessee that it could carry any business and, therefore, such commission income cannot be treated as income from business of Assessee. The Tribunal in the impugned order referred

to Clause (8) of the objects as contained in memorandum of association which reads as under:

To enter into any arrangements with any Government or authorities whether municipal, local or otherwise or any person, firm or company, in India or abroad, that may seem conducive to the attainment of the company's objects or any of them, and obtain from any such Government, authority, person, firm or company any rights, privileges licences and concessions which the Company may consider necessary or desirable to obtain and to carry out, exercise, use or comply with any such arrangements, rights privileges or concessions.

6. Referring to above clause, the Tribunal dealt with similar submission as under:

It is crystal clear from the above clause of the memorandum that the Assessee company had the power to enter into the arrangement with any company which may seem conducive to the attainment of the company's objects as also to obtain from such company which may seem conducive to the attainment of the company's objects as also to obtain from such company any rights, privileges or concessions which the company may consider necessary.

7. We do not find any reason to differ with the Tribunal on above findings. We may reiterate that both the authorities below have rightly arrived at a conclusion of the commission being business income at the hands of the Assessee and we do not see any infirmity or perversity in those findings of the fact and thus we do not see any substantial question of law involved in these appeals. Hence, both the appeals are dismissed.