IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C': NEW DELHI

BEFORE SHRI G.D. AGRAWAL, VICE PRESIDENT AND
SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER

ITA No.3215/Del/2015 & 3216/Del/2015
Assessment Year : 2010-11 & 2011-12

M/s Apollo Tyres Limited, Plot No.7, Institutional Area, Sector-32, Gurgaon, Haryana. TAN : RTKAO3480B.	Vs.	Deputy Commissioner of Income Tax, TDS Circle, Gurgaon.
(Appellant)		(Respondent)

Appellant by : Shri Deepak Chopra, Advocate.
Respondent by : Shri A.K. Saroha, CIT-DR.

Date of hearing : 10.11.2016
Date of pronouncement : 10.01.2017

ORDER

PER G.D. AGRAWAL, VP :-

These two appeals by the assessee for the assessment year 2010-11 and 2011-12 are directed against the order of learned CIT(A)-1, Gurgaon dated 16th March, 2015.

ITA No.3215/Del/2015 – Assessee's appeal for AY 2010-11 :-

2. In this appeal, the assessee has raised the following grounds :-

"1. That the ld. Assessing Officer ('AO') and/or ld. Commissioner of Income Tax (Appeals) ('CIT(A)') grossly erred in treating appellant as an 'assessee in default' for non-deduction of tax at source on provisions amounting to INR 15,07,25,637/- under section 201(1) of the Income Tax Act, 1961 ('Act').

2. That the order passed by ld.CIT(A) is perverse in law (as regards it gives no factual finding in ascertaining true nature of individual transaction and is silent about the

details and evidences furnished by Appellant) when the complete details were filed during appellate proceedings.

3. That the ld.CIT(A)/AO erred on facts and in law in holding that tax ought to have been deducted at source on provision for conference expenses amounting to INR 4,00,00,000/-.

3.1 That the ld.CIT(A) erred on facts and in law in not appreciating that the parties to whom conferences expenses were to be paid were not identifiable at the time of making provision and hence tax could not have been deducted at that point of time.

3.2 Without prejudice to the above, the ld.CIT(A)/AO erred on facts and in law in treating appellant as an 'assessee in default' when the provision was reversed in subsequent year and tax was deducted on actual expenses booked in accounts whereof resulting in double taxation.

4. That the ld.CIT(A) has erred on facts and in law in holding that tax ought to have been deducted at source on provision for business development initiative expenses amounting to INR 1,25,61,825/-.

4.1 That the ld. CIT(A)/AO erred on facts and in law in not appreciating that expenses relating to business development initiative were not ascertainable at the time of finalizing the books of accounts for the relevant assessment year and thus, as such tantamount to ask appellant to perform impossible act, which is not permissible under law.

4.2 Without prejudice to the above, the ld.CIT(A)/AO erred on facts and in law in treating appellant as an 'assessee in default' when the provision was reversed in subsequent year and tax was deducted on actual expenses booked in accounts whereof resulting in double taxation.

5. That the ld.CIT(A)/AO grossly erred on facts and in law in holding that tax ought have been deducted at source on provision for business development conferences amounting to INR 5,00,00,000/-.

5.1 Without prejudice to the above, the ld.CIT(A)/AO erred on facts and in law in treating appellant as an 'assessee in default' when the provision was reversed/adjusted on the basis of actual expenditure

incurred in the subsequent year and tax was deducted on actual expenses booked in accounts whereof resulting in double taxation.

6. That the ld.CIT(A)/AO grossly erred on facts and in law in holding that tax ought have been deducted at source on provision for product publicity expenses outside India amounting to INR 4,58,14,000/-.

6.1 Without prejudice to the above, the ld.CIT(A)/AO erred on facts and in law in treating appellant as an 'assessee in default' when the provision was adjusted on the basis of actual expenditure incurred in the subsequent year and tax was deducted on actual expenses booked in accounts whereof resulting in double taxation.

6.2 That the ld.CIT(A)/AO erred on facts and in law in not appreciating that there is no 'income' element in regard to the expenses paid to the foreign dealers on cost to cost basis as reimbursement.

7. That the ld.CIT(A)/AO erred on facts and in law in holding that tax ought to have been deducted at source on provision of INR 19,64,000/- created on commission paid to domestic selling agents.

7.1 Without prejudice to the above, the ld.CIT(A)/AO erred on facts and in law in treating appellant as an 'assessee in default' when the provision was reversed/adjusted on the basis of actual expenditure incurred in the subsequent year and tax was deducted on actual expenses booked in accounts whereof resulting in double taxation.

8. That the ld.CIT(A)/AO erred on facts and in law in holding that tax ought to have been deducted at source on year end provision on commission paid to selling agents for clearing & forwarding amounting to INR 3,85,812/-.

8.1 Without prejudice to the above, the ld.CIT(A)/AO erred on facts and in law in treating appellant as an 'assessee in default' when the provision was adjusted on the basis of actual expenditure incurred in the subsequent year and tax was deducted on actual expenses booked in accounts whereof resulting in double taxation.

9. That the ld.CIT(A)/AO erred on facts and in law in levying interest under section 201(1A) of the Act.

10. That the ld.CIT(A)/AO erred on facts and in law in charging an ad-hoc rate for computing alleged liability on deducting tax at source in respect to the year end provision."

3. At the time of hearing before us, it was admitted by both the sides that the grounds raised by the assessee in its appeal in ITA No.3216/Del/2015 are identical to the grounds as raised in ITA No.3215/Del/2015.

4. The facts of the case are that a TDS survey was conducted by the ACIT, TDS Circle, Gurgaon on 5th August, 2011 at the premises of the assessee company at Gurgaon. Thereafter, the summons were issued u/s 131 of the Income-tax Act, 1961 asking for details/information for the financial year 2009-10, 2010-11 and 2011-12, in response to which, necessary details were furnished by the assessee. Thereafter, the Assessing Officer passed the order u/s 201 and 201(1A) holding that it failed to deduct the TDS in respect of provisions made under several heads of income amounting to ₹15,07,25,637/-. Accordingly, the demand u/s 201(1) was raised at ₹1,04,02,197/- and also interest u/s 201(1A) at ₹38,48,924/-. The details of the provisions of various heads of income and alleged non-deduction of tax is as under :-

Head of provision	Amount	Date of provision	Amount of TDS demand u/s 201(1)	Delay in months	Interest amount Demand u/s 201(1A)
Misc. Expenses – conference expenses	4,00,00,000	31.03.10	40,00,000 @ 10%	37	14,80,000
Business development initiative (reimbursement to dealers)	1,25,61,825	31.03.10	2,51,236 @ 2%	37	92,957
Business development conference	5,00,00,000	31.03.10	50,00,000 @ 10%	37	18,50,000
Product publicity	4,58,14,000	31.03.10	9,16,280 @ 2%	37	3,39,024

expenses outside India					
Commission to selling agents – domestic	19,64,000	31.03.10	1,96,400 @ 10%	37	72,668
Commission to selling agents – clearing & forwarding	3,85,812	31.03.10	38,581 @ 10%	37	14,275
Total	15,07,25,637		1,04,02,497		38,48,924

5. On appeal, learned CIT(A) sustained the same. Hence, this appeal by the assessee.

6. At the time of hearing before us, it is submitted by the learned counsel that at the end of the financial year 2010, the assessee made provision for various expenses. He submitted that next year when the actual expenditure was incurred, the provision was reversed and the deduction was claimed on the basis of actual expenditure incurred. When such expenditure was actually incurred, TDS was made as per law. He further submitted that when the payee was an identified person, then even while making the provision, the TDS was deducted. But, when the payee was not an identifiable person, no TDS was made. He submitted that when the payee is not identifiable, the TDS cannot be made from a lump sum provision made by the assessee under various heads of income. In support of this contention, he relied upon the following decisions :-

(i) Dishnet Wireless Ltd. Vs. DCIT – [2015] 60 taxmann.com 329 (Chennai-Trib.).

(ii) Industrial Development Bank of India Vs. ITO – [2007] 293 ITR (AT) 267 (Mumbai).

7. Learned DR, on the other hand, stated that when the assessee made the provision, he claimed the deduction for the expenditure in this year. Provision can be made only when the liability is an ascertained liability. Therefore, the assessee cannot claim that the

payee in respect of whom the liability is created is unidentifiable. He further stated that as per provision of Section 194C(2), the tax is to be deducted at source where any sum is credited to any account whether called suspense account or by any other name in the books of account of the person liable to pay such income. Therefore, when the assessee made the provision in its books of account, the liability of TDS arose. In support of this contention, he relied upon the decision of ITAT, Cochin Bench in the case of Abad Builders (P) Ltd. Vs. ACIT – [2014] 43 taxmann.com 128 (Cochin-Trib).

8. We have carefully considered the submissions of both the sides and have perused the material placed before us. The limited dispute before us is whether the assessee can be said to be in default for not deducting the TDS in respect of a provision made at the year end. Learned DR has relied upon the decision of Cochin Bench of ITAT in the case of Abad Builders (P) Ltd. (supra), wherein the learned Members of the ITAT held as under :-

> *"6.2 A careful reading of the provisions of sec. 194C would show that any person responsible for paying any sum to any resident for carrying out any work in pursuance of a contract, shall deduct the tax at source either at the time of credit of the same to the account of the contractor or at the time of payment thereof, whichever is earlier. It is further provided in Explanation 2 of sec. 194C, which existed at the relevant point of time, that the said TDS liability would arise even if the amount is credited to any account whether called suspense account or called by any other name. In the instant case, the ld.CIT(A) has observed that the assessee's claim for deduction of very same amount in the succeeding year was allowed, since the assessee had deducted tax at source thereon in that year. This fact shows that the assessee is accepting the position that the provision for expenses so made is susceptible for deduction of tax at source. Further, the provisions of sec. 194C clearly states that the assessee is liable to deduct tax at source either at the time of credit to the account of the contractor or at the time of payment thereof, whichever is earlier. It is further provided that the said liability would*

arise even if the amount is credited to any other account whether called "Suspense Account" or by any other name. Hence, in our view, the assessee would be liable to deduct tax at source u/s 194C on the amount provided under the head "provision for expenses". Hence, we reject the contentions of the assessee that the TDS provisions shall not apply to the provision for expenses."

9. Learned counsel for the assessee, on the other hand, relied upon the decision of ITAT Mumbai Bench in the case of Industrial Development Bank of India (supra), wherein ITAT held as under :-

"Held, allowing the appeal, that as on March 31 of the year, the assessee had a liability for "interest accrued but not due" because interest was payable for the period till the end of the relevant accounting year, once annually on a date other than the date of closure of accounts but the assessee had no means to find out who could be the recipients of "interest due but not payable" in respect of "Regular Return Bonds", the bonds in question being freely transferable. The assessee could not be expected to know as on March 31 who would own the bonds on May 15 of that year. The Explanation to section 193 could not be applied because the payee was not known at the stage of provision for "interest accrued but not due" being made. The fiction embodied in the Explanation was only applicable in situations in which tax deduction liability is sought to be evaded by crediting interest to an account other than that of the recipient of interest. The bonds being transferrable by simple endorsement and delivery and the relevant registration date being a date subsequent to the closure of books of account, the assessee could not have ascertained the payees made. Accordingly, no tax was required to be deducted at source in respect of the provision for interest payable made by the assessee. Taxes having been duly deducted at source at the time of payment, on June 9, 1994, there was no loss of revenue as such. When there was no obligation to deduct tax at source, there was no question of levy of penalty or interest."

10. Learned counsel has also relied upon the decision of ITAT, Chennai Bench in the case of Dishnet Wireless Ltd. (supra), wherein the ITAT held as under :-

"24. Now coming to the issue of year-end provisions, the contention of the assessee is that it is engaged in various services like address verifications, credit certification, content development etc. The assessee claims that provisions are made on estimation basis since it is not identifiable as to what amount has to be paid to the service providers. In case of new service connections, the assessee has to necessarily verify the customers' address and identification. The claim of the assessee is that in the last month of the financial year, it is not known how many customer verifications have been completed and the exact amount required to be paid. However, on the basis of the past experience, the assessee is making an overall provision for incurring this expenditure. From the order of the CIT(Appeals) it appears that apart from identification and address verification, the assessee has also made provision towards ICU charges and lease line expenses, etc. From the order of the CIT(Appeals) it appears that the assessee also has to pay the various other service providers for providing value added service to its subscribers like daily horoscopes, astrology, songs, wall paper downloads, cricket scores, etc. Admittedly, the assessee made arrangement with other service provides for providing these kind of value added services. There may be justification with regard to the expenditure for availing the services of identification and verification for the last month of financial year, since the assessee may not have the exact details on verification done by the concerned persons and the amount required to be paid. However, in respect of the downloads and value added service, etc. the entire details may be available in the system. Therefore, this Tribunal is of the considered opinion that wherever the particulars and details available and amount payable could be quantified, the assessee has to necessarily deduct tax. In respect of value added services like daily horoscopes, astrology, customer acquisition forms are all from specific service providers and these value added services are monitored by system. Therefore, even on the last day of financial year, the assessee could very well ascertain the actual quantification of the amount payable and the identity of the payee to whom the amount has to be paid. To that extent, the contention of the assessee that the payee may not be identified may not be justified. The exact facts need to be examined. However, this Tribunal is of the considered opinion that the matter needs to be reconsidered by the Assessing Officer. In other words, the Assessing Officer has

to examine whether the payment to the party /payee is identifiable on the last day of financial year and whether the quantum payable by the assessee is also quantified on the last date of financial year. In case, the Assessing Officer finds that the payee could not be identified on the last day of financial year and the amount payable also could not be ascertained, the assessee may not require to deduct tax in respect of that provision. However, in case the payee is identified and quantum is also ascertainable on the last day of the financial year, this Tribunal is of the considered opinion that the assessee has to necessarily deduct tax at source. Since the details are not available on record, the orders of the lower authorities are set aside and the issue of year-end provision is remitted back to the file of the Assessing Officer. The Assessing Officer shall re-examine the issue afresh as indicated above and thereafter decide the issue in accordance with law after giving reasonable opportunity to the assessee."

(emphasis by underlining supplied by us)

11. We have carefully considered the submissions of both the sides including the decisions relied upon by them. As per the scheme of Chapter XVII-B of the Income-tax Act, 1961, there is a provision for deduction of tax at source. Ordinarily, the deduction is to be made at the time of payment or the credit of the amount to the account of payee. However, as per provision of Section 194C(2), the tax is to be deducted even if the amount is not credited to the account of the payee but to the suspense account. Section 194C(2) reads as under :-

"194C(2). Where any sum referred to in sub-section (1) is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly."

12. At the time of hearing before us, learned DR has referred to the above section so as to buttress his argument that tax is to be deducted even if there is provision of the amount payable. The ITAT, Cochin Bench in the case of Abad Builders (P) Ltd. (supra), after considering

the above provision, has held that tax is to be deducted even in respect of provision for expenses. However, the ITAT, Chennai Bench in the case of Dishnet Wireless Ltd. (supra) has held that in the case of the year end provision where the party/payee is identifiable, the TDS is to be deducted and where the party is not identifiable, no TDS is deductible. Similar view has been taken by the ITAT Mumbai Bench in the case of Industrial Development Bank of India (supra). After considering the scheme of Chapter XVII-B with regard to tax deduction at source, we agree with the views expressed by ITAT Mumbai Bench and ITAT Chennai Bench. As per the scheme of TDS under Chapter XVII-B Section 199, the credit for the TDS is to be given to the deductee. Thus, the identification of the person from whose account income tax was deducted at source is a pre-requisite condition so as to make the provision for Chapter XVII-B workable. Tax deducted at source is considered to be tax paid on behalf of the person from whose income the deduction was made and, therefore, the credit for the same is to be given to such person. When the payee is not identifiable, to whose account the credit for such TDS is to be given. Section 203(1) lays down that for all tax deductions at source, the tax deductor has to furnish a certificate to the person to whose account such credit is to be given. Therefore, when the tax deductor cannot ascertain the payee who is the beneficiary of a credit of tax deduction at source, the mechanism of Chapter XVII-B cannot be put into service. In view of the above, we, respectfully agreeing with the views of ITAT Chennai Bench in the case of Dishnet Wireless Ltd. (supra), set aside the orders of authorities below on this point and restore the matter to the file of the Assessing Officer for both the years under consideration. We direct the Assessing Officer to verify whether the payee is identifiable and the amount payable to him is ascertainable. Then the assessee would be required to deduct tax at source in respect of such provision. However, in case payee is not identifiable, the provision of Chapter XVII-B i.e., tax deduction at source, cannot be pressed into

service and, therefore, the assessee is not required to deduct tax at source in such a case. The Assessing Officer will readjudicate the issue afresh after examining the above facts. Needless to mention that he will allow adequate opportunity of being heard to the assessee while giving effect to our order.

13. In the result, both the appeals of the assessee are treated to be allowed for statistical purposes.

Decision pronounced in the open Court on 10.01.2017.

Sd/-	Sd/-
(CHANDRA MOHAN GARG)	**(G.D. AGRAWAL)**
JUDICIAL MEMBER	**VICE PRESIDENT**

VK.

Copy forwarded to: -

1. Appellant : **M/s Apollo Tyres Limited,**
   Plot No.7, Institutional Area,
   Sector-32, Gurgaon, Haryana.
2. Respondent : **Deputy Commissioner of Income Tax,**
   TDS Circle, Gurgaon.
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar