

आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'B' BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं

श्री डि.एस. सुन्दर सिंह, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./ITA Nos.2293 & 2294/Mds/2016

निर्धारण वर्ष / Assessment Years : 2010-11 & 2011-12

&

आयकर अपील सं./ITA No.1269/Mds/2013

निर्धारण वर्ष / Assessment Year : 2009-2010

The Assistant Commissioner of
Income Tax,
Non-Corporate Circle – 1(1)
Formerly known as Business
Circle-1, Chennai

(अपीलार्थी/Appellant)

v. M/s Anand Transport,
No.1, 9th Street,
Dr. Radhakrishnan Salai,
Mylapore, Chennai - 600 004.

PAN : AAFA 1037 D

(प्रत्यर्थी/Respondent)

आयकर अपील सं./ITA Nos.2298 & 2299/Mds/2016

निर्धारण वर्ष / Assessment Years : 2010-11 & 2011-12

M/s Anand Transport,
No.1, 9th Street,
Dr. Radhakrishnan Salai,
Mylapore, Chennai - 600 004.

(अपीलार्थी/Appellant)

v. The Assistant Commissioner of
Income Tax, Business Circle-1,
New jurisdiction:
The Deputy Commissioner of
Income Tax,
Non-Corporate Circle – 1(1),
Chennai.

(प्रत्यर्थी/Respondent)

राजस्व की ओर से /Revenue by : Dr. Milind Madhukar Bhusari, CIT

निर्धारिती की ओर से /Assessee by : Shri G. Baskar, Advocate

सुनवाई की तारीख/Date of Hearing : 15.03.2017

घोषणा की तारीख/Date of Pronouncement : 31.05.2017

आदेश / O R D E R

PER N.R.S. GANESAN, JUDICIAL MEMBER:

Both the assessee and Revenue have filed appeals against the respective orders of the Commissioner of Income Tax (Appeals)-2, Chennai, for the assessment years 2010-11 and 2011-12. The Revenue has also filed appeal for the assessment year 2009-10. Since common issues arise for consideration in all these appeals, we heard these appeals together and disposing of the same by this common order.

Let's first take Revenue's appeal for assessment year 2009-10.

2. The first issue arises for consideration is disallowance under Section 40(a)(i) of the Income-tax Act, 1961 (in short 'the Act').

3. Dr. Milind Madhukar Bhusari, the Ld. Departmental Representative, submitted that the payment made by the assessee to M/s Jaldhi Overseas Pvt. Ltd. to the extent of ₹33.92 Crores was disallowed by the Assessing Officer on the ground that tax was not deducted. The CIT(Appeals), however, allowed the claim of the

assessee on the ground that M/s Jaldhi Overseas Pvt. Ltd. has no permanent establishment in India. The CIT(Appeals) has also found that the permanent establishment of M/s Jaldhi Overseas Pvt. Ltd. is at Singapore. Referring to Explanation to Section 195(1) of the Act, the Ld. D.R. submitted that the payment made by the assessee to M/s Jaldhi Overseas Pvt. Ltd. is taxable in India, therefore, irrespective of the permanent establishment of the non-resident, the payment is taxable. Therefore, according to the Ld. D.R., the assessee is liable to deduct tax. The Ld. D.R. further submitted that the assessee has not filed any application under Section 195A of the Act before the Assessing Officer.

4. On the contrary, Shri G. Baskar, the Ld.counsel for the assessee, submitted that the very same issue was considered by the Madras High Court in the assessee's own case in Anand Transport (P.) Ltd. v. ACIT (2015) 370 ITR 524. The Madras High Court found that an identical payment made to M/s Jaldhi Overseas Pvt. Ltd. was held to be not falling within the ambit to deduct tax. In view of this decision of Madras High Court, according to the Ld. counsel, the CIT(Appeals) has rightly deleted the addition made by the Assessing Officer.

5. We have considered the rival submissions on either side and perused the relevant material available on record. As rightly submitted by the Ld.counsel for the assessee, the Madras High Court in the assessee's own case for assessment year 2010-11, considered the issue in a writ proceeding and the Division Bench of the High Court found that the income earned by M/s Jaldhi Overseas Pvt. Ltd. is taxable at Singapore. Moreover, the High Court observed that Double Taxation Avoidance Agreement between Government of India and Singapore would come to rescue of M/s Jaldhi Overseas Pvt. Ltd. Therefore, it was ultimately concluded by the High Court that the payment made by the assessee to M/s Jaldhi Overseas Pvt. Ltd. will not come within the ambit of deduction at source. In view of this finding of Madras High Court, this Tribunal is of the considered opinion that the CIT(Appeals) has rightly deleted the addition made by the Assessing Officer.

6. The next issue arises for consideration is disallowance of proportionate interest on the advance made to sister concern, namely, M/s MGM Logistics and Shipping Pvt. Ltd.

7. Dr. Milind Madhukar Bhusari, the Ld. Departmental Representative, submitted that the assessee advanced a sum of ₹20 Crores to M/s MGM Logistics and Shipping Pvt. Ltd., therefore, the Assessing Officer found that the borrowed funds were diverted for non-business purpose. Accordingly, he disallowed ₹1.36 Crores. On further appeal by the assessee, the CIT(Appeals) allowed the claim of the assessee on the ground that there was commercial expediency in advancing ₹20 Crores by the assessee. According to the Ld. D.R., M/s MGM Logistics and Shipping Pvt. Ltd. entered into a joint venture agreement in a listed business with M/s PR Developers & Builders Pvt. Ltd. The assessee is in the transport business. According to the Ld. D.R., the money was advanced to M/s MGM Logistics and Shipping Pvt. Ltd. for entering into a joint development business with another company which is totally not connected with the assessee's business. Therefore, according to the Ld. D.R., the advance made by the assessee cannot be construed for business purpose. The agreement entered into between M/s MGM Logistics and Shipping Pvt. Ltd. and M/s PR Developers & Builders Pvt. Ltd. had already expired and barred by limitation. Moreover, there was violation of Rule 46A of the Income-

tax Rules, 1962. According to the Ld. D.R., the Assessing Officer was not given any opportunity to examine the so-called agreement which was said to be produced before the CIT(Appeals).

8. On the contrary, Shri G. Baskar, the Ld.counsel for the assessee, submitted that during the course of appellate proceeding, the assessee also filed a stay petition praying for recovery of outstanding amount during the pendency of appeal before the CIT(Appeals). According to the Ld. counsel, the CIT(Appeals), in fact, gave a copy of agreement to the Assessing Officer Shri K. Rohan Raj. The said Shri Rohan Raj also appeared before the CIT(Appeals) and admitted that the said copy of agreement was available with him. Therefore, according to the Ld. counsel, it cannot be said that there was violation of Rule 46A. Furthermore, the assessee-firm advanced the borrowed funds to sister company wherein there are common shareholders and partners for the purpose of engaging in business jointly with other company. Since the partners of the assessee-firm and directors of M/s MGM Logistics and Shipping Pvt. Ltd. are common, according to the Ld. counsel, there was commercial expediency in advancing money,

therefore, the CIT(Appeals) has rightly allowed the claim of the assessee.

9. We have considered the rival submissions on either side and perused the relevant material available on record. The assessee admittedly is a partnership firm and the money was advanced to M/s MGM Logistics and Shipping Pvt. Ltd., wherein the partners of the assessee-company and some of the Directors/shareholders are common. The question arises for consideration is whether merely because there were some partners of assessee firm and shareholders of M/s MGM Logistics and Shipping Pvt. Ltd. are common, can it be considered to be a sister concern of the assessee? This fact was not examined by any of the authorities below.

10. Moreover, when the agreement said to be entered into by M/s MGM Logistics and Shipping Pvt. Ltd. and M/s PR Developers & Builders Pvt. Ltd. for joint business was filed before the CIT(Appeals), the CIT(Appeals) observed in the impugned order that a copy of the said agreement was given to Shri Rohan Raj, the Assessing Officer. Rule 46A requires the CIT(Appeals) to give an

opportunity to the Assessing Officer to contradict the contents of additional evidence filed before him. Mere furnishing of a copy of agreement would not be sufficient for compliance of Rule 46A of Income-tax Rules, 1962. This Tribunal is of the considered opinion that the CIT(Appeals) ought to have given an opportunity to examine the contents of agreement. Since such an opportunity was not given, this Tribunal is of the considered opinion that the matter needs to be re-examined. Accordingly, the orders of the authorities below are set aside and the issue of disallowance of ₹1.36 Crores towards interest on the amount borrowed and advanced to M/s MGM Logistics and Shipping Pvt. Ltd. is remitted back to the file of the Assessing Officer. The Assessing Officer shall re-examine the matter afresh in the light of the agreement said to be entered into by the assessee and also examine whether M/s MGM Logistics and Shipping Pvt. Ltd. is a sister company of the assessee-firm merely because there were common partners/shareholders.

11. In the result, Revenue's appeal in I.T.A. No. 1269/Mds/2013 is partly allowed for statistical purposes.

12. Now coming to assessment year 2010-11, the first ground in the Revenue's appeal is depreciation claimed by the assessee on boat jetty.

13. Dr. Milind Madhukar Bhusari, the Ld. Departmental Representative, submitted that the assessee has erected jetty for transport of iron ore in Ennore Port trust. According to the Ld. D.R., the structure cannot be construed as temporary structure, therefore, not eligible for 100% depreciation.

14. On the contrary, Shri G. Baskar, the Ld.counsel for the assessee, submitted that this issue was examined by this Tribunal for assessment year 2005-06 in I.T.A. No.737/Mds/2014. This Tribunal found that the jetty erected by the assessee is only a temporary structure, therefore, eligible for depreciation at the rate of 100%. In fact, an appeal was filed by the Revenue before Madras High Court in TCA 82 of 2017. The Madras High Court, after referring to dictionary meaning of the word "jetty" found that jetty is nothing but a structure which is used either as a landing stage, a small pier, a bridge or a staircase or a construction, built into the

water to protect the harbour. Finally, the Madras High Court confirmed the order of this Tribunal.

15. We have considered the rival submissions on either side and perused the relevant material available on record. As rightly submitted by the Ld.counsel for the assessee, this Tribunal in the assessee's own case, for the assessment year 2005-06, examined this issue elaborately and found that the assessee erected a temporary structure for loading and unloading of goods in Ennore Port Trust, therefore, eligible for 100% depreciation. The order of this Tribunal for assessment year 2005-06 was confirmed by the Madras High Court. Therefore, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

16. The next ground raised by the Revenue is disallowance made by the Assessing Officer under Section 40(a)(i) of the Act in respect of payment made to M/s Jaldhi Overseas Pvt. Ltd.

17. We have heard Dr. Milind Madhukar Bhusari, the Ld. Departmental Representative and Shri G. Baskar, the Ld.counsel for the assessee. The Ld.counsel for the assessee pointed out that

the assessee in fact withdrew this ground of appeal on the basis of the judgment of Madras High Court in the assessee's own case for assessment year 2010-11 in a writ proceeding and the CIT(A) has not adjudicated this ground at all. Therefore, the appeal filed by the Revenue is not maintainable. This Tribunal is of the considered opinion that when the Madras High Court in a writ proceeding found that the payment made by the assessee to M/s Jaldhi Overseas Pvt. Ltd. will not come within the ambit of deduction at source, the ground of appeal raised by the Revenue has no merit at all. Accordingly, the same is dismissed.

18. Now coming to assessee's appeal for 2010-11, the first ground of appeal is with regard to disallowance of interest on the advance made to M/s MGM Logistics and Shipping Pvt. Ltd.

19. While considering this issue for assessment year 2009-10 in Revenue's appeal, this Tribunal remitted the matter back to the file of the Assessing Officer. Since the facts are identical for assessment year 2010-11 also, this issue is remitted back to the file of the Assessing Officer with same direction.

20. The next issue arises for consideration is disallowance under Section 40(a)(i) of the Act in respect of payment made to Port Trust.

21. Shri G. Baskar, the Ld.counsel for the assessee, submitted that the Port Trust, in fact, included this amount in the return of income and paid the taxes. Therefore, there cannot be any disallowance in the hands of the present assessee.

22. On the contrary, Dr. Milind Madhukar Bhusari, the Ld. Departmental Representative, submitted that this issue may be remitted back to the file of the Assessing Officer for verification.

23. We have considered the rival submissions on either side and perused the relevant material available on record. The Assessing Officer disallowed the claim of the assessee to the extent of ₹83,77,966/- under Section 40(a)(i) for non-deduction of tax at source. Now the assessee claims that Chennai Port Trust paid the taxes by including the amount received from the assessee in their return of income. Therefore, as rightly submitted by the Ld. Departmental Representative, the matter needs to be verified. Accordingly, the orders of the authorities below are set aside and the issue of disallowance of ₹83,77,966/- under Section 40(a)(i) of

the Act is remitted back to the file of the Assessing Officer. The Assessing Officer shall re-examine the issue afresh and find out whether the recipient, namely, Chennai Port Trust has paid the taxes on the amount received by them and thereafter decide the same in accordance with law, after giving a reasonable opportunity to the assessee.

24. The next issue arises for consideration is disallowance made by the Assessing Officer under Section 80G of the Act.

25. The Assessing Officer disallowed ₹3,08,500/- on the ground that the assessee could not substantiate the payment by producing necessary evidence. The CIT(Appeals) confirmed the same since there was no material evidence. Even before this Tribunal, no material was produced. Therefore, the disallowance made under Section 80G of the Act is confirmed.

26. Now coming to Revenue's appeal for assessment year 2011-12, the first issue arises for consideration is with regard to depreciation on the temporary erection, namely, jetty. The second issue arises for consideration is in respect of payment made to M/s Jaldhi Overseas Pvt. Ltd.

27. Both the issues were examined for the assessment year 2009-10. By following the judgment of Madras High Court, this Tribunal allowed the claim of the assessee for assessment year 2009-10 in the earlier part of this order. For the same reason, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

28. Now coming to assessee's appeal for assessment year 2011-12, the only issue arises for consideration is disallowance of interest paid on advances made to sister company.

29. This issue was also dealt with elaborately in the earlier part of this order for assessment year 2009-10 and 2010-11. This Tribunal has remitted back the matter to the file of the Assessing Officer for reconsideration. For the year under consideration also, for the reason stated for assessment years 2009-10 and 2010-11 in the earlier part of this order, the orders of the authorities below are set aside and the issue is remitted back to the file of the Assessing Officer.

30. In the result, the Revenue's appeals in I.T.A. Nos.2293, 2294/Mds/2016 & 1269/Mds/2013 and the assessee's appeal in I.T.A. Nos.2298/Mds/2016 are partly allowed for statistical purposes & I.T.A. No.2299/Mds/2016 is allowed for statistical purposes.

Order pronounced on 31st May, 2017 at Chennai.

sd/-

(डि.एस. सुन्दर सिंह)

(D.S. Sunder Singh)

लेखा सदस्य/Accountant Member

sd/-

(एन.आर.एस. गणेशन)

(N.R.S. Ganesan)

न्यायिक सदस्य/Judicial Member

चेन्नई/Chennai,

दिनांक/Dated, the 31st May, 2017.

Kri.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. निर्धारिती /Assessee
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)-2, Chennai
4. Principal CIT-1, Chennai
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.