

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES “B”, BANGALORE**

Before Shri George George K, JM & Shri Jason P.Boaz, AM

ITA No.1051/Bang/2016 : Asst.Year 2008-2009

M/s.CIBER Sites India Private Limited 6 th & 7 th Floor, Aquamarine Block, Bagmane Developers Private Limited, SEZ K.R.Puram – Marthahalli Ring Road, Bangalore – 560 048. PAN : AABCK2797E.	Vs.	The Income Tax Officer Ward 11(1) Bangalore.
(Appellant)		(Respondent)

Appellant by : Shri Sampath Raghunathan, Advocate

Respondent by : Smt.Padmameenakshi, JCIT

Date of Hearing : 23.10.2017	Date of Pronouncement : 03.11.2017
-------------------------------------	---

ORDER

Per George George K, JM

This appeal at the instance of the assessee is directed against CIT(A)’s order dated 08.03.2016. The relevant assessment year is 2008-2009.

2. The learned Counsel for the assessee had only raised arguments to the following grounds, namely ground No.3 and its sub grounds and Ground No.4. Ground Nos.3, 4 and its sub grounds read as follows:-

“3. *Disallowance under section 40(a)(i) of the Act.*

3.1 *On the facts and circumstances of the case and in law, the Learned AO has erred in disallowing payments of INR 2,842,202 under section 40(a)(i) of the Act made by*

the Appellant to CIBER Inc. towards usage of software licences and the Learned Commissioner of Income-tax (Appeals) [‘CIT(A)’] erred in confirming the said disallowance.

3.2 On the facts and circumstances of the case and in law, the Learned CIT(A) erred in holding that the aforesaid payments are in the nature of royalty and hence liable for deduction of tax at source under section 195 of the Act.

3.3 The Learned AO has erred in not appreciating that the aforesaid payment is in the nature of pure reimbursement of expenses and therefore, not liable for deduction of tax at source under section 195 of the Act.

4. Non-allowance of deduction under section 10A on increased business profit on account of disallowance under section 40(a)(i).

4.1 Without prejudice to the above, on the facts and circumstances of the case and in law, even assuming, while denying that the disallowance of payment made towards usage of software licences was warranted, the Learned AO erred in not considering the increased business profits, arising on account of the said disallowance, while computing the deduction under section 10A of the Act and the Learned CIT(A) erred in not adjudicating on the said ground.”

3. Brief facts in relation to ground No.3 and its sub grounds are as follows.

3.1 For the assessment year 2008-2009, the assessee had debited in its Profit & Loss Account, a sum of Rs.28,42,202 towards software expenses. The above sum was paid to CIBER Inc., a non-resident, without deduction of tax at

source u/s 195 of the Act. The Assessing Officer disallowed the payment u/s 40(a)(i) of the Act.

3.2 Aggrieved by the disallowance u/s 40(a)(i), the assessee preferred an appeal before the first appellate authority. The CIT(A) confirmed the view taken by the Assessing Officer. The relevant finding of the CIT(A) reads as follow:-

“The said payment is squarely covered under ‘royalty’ liable to deduction of tax at source u/s 195 as held by the jurisdictional High Court in the case of Samsung Electronics in 320 ITR 209 (Kar). The provisions of section 40(a)(i) are therefore applicable. The disallowance made is in order and is upheld.”

3.3 Aggrieved by the order of the CIT(A), the assessee has preferred the present appeal before the Tribunal.

4. We have heard the rival submissions and perused the material on record. The assessee has made payment to its parent company, viz., CIBER Inc. for use of software licence procured by the parent company. The said payment is squarely covered under the term ‘royalty’ and is liable for deduction of tax at source u/s 195 of the Act. The issue of payment for the use of software licence is covered in favour of the Revenue by the judgment of the Hon’ble jurisdictional High Court in the case of Samsung Electronics reported in 320 ITR 209. Hence ground No.3 and its sub grounds are dismissed.

5. In ground No.4 assessee contends that if the disallowance is made, the consequent increase in its business profits ought to be given the benefit of deduction u/s 10A of the Act.

6. After having heard the rival submissions and perused the material on record, we noticed that a specific ground was raised before the first appellate authority, wherein it was contended that increased business profit on account of disallowance u/s 40(a)(i) ought to be given the benefit of deduction u/s 10A of the Act. The specific ground raised before the CIT(A) reads as follow:-

“The ITO has not considered the increased business income on account of disallowance in relation to payments made towards software licences, while computing the deduction under section 10A of the Act.”

7. On perusal of the CIT(A)'s order, we noticed that this specific ground of the assessee was not adjudicated. The Bangalore Bench of the Tribunal in the case of *DICT v. Goldman Sachs Services (P.) Ltd.* [(2017) 82 txmann.com 380 (Bang.Tri.)) had stated that the disallowance made goes to increase the business profit and the assessee would be entitled to deduction of the enhanced profits u/s 10A of the Act. The contentions raised before the Tribunal in the case of *Goldman Sachs Services (P) Ltd.* (supra) and its relevant finding read as follows:-

“9. On the other hand, the ld.AR of the assessee has submitted that the said decision of the Ahmedabad bench

of the Tribunal relied upon by the revenue has been reversed by the Hon'ble Gujarat High Court in case of *ITO v. Keval Construction* [2013] 354 ITR 13/217 Taxman 96 (Mag.) / 33 taxmann.com 277. Therefore this issue is covered by the decision of Hon'ble Gujarat High Court in case of *Keval Construction* (supra) and submitted that the Hon'ble High Court has held that even if certain expenditure which were incurred by the assessee for the purpose of developing house project was not allowable by virtue of section 40(a)(ia) of the Act for want of TDS it cannot be denied that such disallowance would ultimately go to increase the assessee's profit from the business of developing house project and would qualify for deduction as provided under the law.

10. Having considered the rival submissions as well as relevant material on record, at the outset we note that this issue of disallowance made u/s 40(a)(ia) eligible for deduction of tax holiday under law is covered by the decision of Hon'ble High Court has held in para 5 as under:

“5. Having heard counsel on both the question today in this appeal, we find no error in the Tribunal's ultimate conclusion. Even if a certain expenditure which was incurred by the assessee for the purpose of developing housing project was not allowable by virtue of section 40(a)(ia) of the Act, since the assessee had not deducted the tax at source as required under law, it cannot be denied that such disallowance would ultimately go to increase the assessee's profit from the business of developing housing project. Whatever be the ultimate profit of assessee as computed even after making disallowance under section 40(a)(ia) of the Act, would qualify for deduction as provided under the law.”

11. Following the decision of the Hon'ble Gujarat High Court we uphold the directions of the DRP on this issue. Since the alternative claim of the assessee is allowed

therefore we do not propose to go into the issue of nature of payment in question. The same become infructuous."

8. In view of the above judicial co-ordinate order of the Tribunal (supra), we hold that the assessee is entitled to the benefit of deduction u/s 10A of the Act on the enhanced business profits, on account of disallowance made u/s 40(a)(i) of the Act. It is ordered accordingly.

9. In the result, the appeal by the assessee is partly allowed, as indicated above.

Order pronounced on this 03rd day of November, 2017.

Sd/-
(Jason P.Boaz)
Accountant Member

Sd/-
(George George K.)
JUDICIAL MEMBER

Bangalore ; Dated : 03rd November, 2017.
Devdas*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT, Bengaluru.
4. CIT(A)-2, Bengaluru
5. DR, ITAT, Bangalore
6. Guard file.

True copy

BY ORDER,

(Asstt. Registrar)
ITAT, Bangalore