आयकर अपीलीय अधीकरण, न्यायपीठ – "D" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH: KOLKATA

(समक्ष)श्री पी. एम.जगताप, उपाध्यक्ष **एवं** श्री ए.टी. वर्की,न्यायिक सदस्य)

[Before Shri P.M. Jagtap, Vice President & Shri A. T. Varkey, JM]

I.T.A. No. 755/Kol/2018
Assessment Year: 2012-13

Modern Impex (PAN: AAFFM0833Q)	Vs.	Assistant Commissioner of Income-tax, Citrcle-32, Kolkata.
Appellant		Respondent

Date of Hearing	09.01.2019
Date of Pronouncement	27.03.2019
For the Appellant	Shri Anil Kochar, AR
For the Respondent	Shri Sankar Halder, JCIT, Sr. DR

ORDER

Per Shri A.T.Varkey, JM

This is an appeal preferred by the assessee against the order of Ld. CIT(A)-9, Kolkata dated 23.03.2018 for AY 2012-13.

2. Ground nos. 1 and 6 are general in nature, therefore, does not require any adjudication and hence, the same are dismissed.

3. Ground nos. 2 and 3 of assessee's appeal are as under:

"2. For that the Ld. CIT(A) erred in appreciating the factual aspect of the matter with regard to the payments made relating to Freight charges and erred in confirming the disallowance made by the AO by invoking provisions of sec. 40(a)(ia) of the Income Tax Act, 1961.

3. For that the Ld. CIT(A) ought to have properly considered the submissions made by the appellant in regard to payment of Freight charges to M/s. Air India and on the basis of the evidences adduced ought to have held that non-deduction of tax u/s. 194C of the Act did not entail any liability for disallowance u/s. 40(a)(ia) of the Act."

4. Briefly stated facts are that during the assessment proceedings the AO noticed that the assessee had paid freight charges of Rs.1,66,367/- and Rs.7,73,864/- to M/s. Jet Airways and M/s. Air India respectively without deduction of tax. The AO required the assessee to explain as to why payments have been made without TDS. In reply, the assessee stated that

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TDS has not been deducted on air freight charges paid in Mumbai since the provider has made available the PAN to the assessee and according to assessee since the PAN having been made available there was no liability to deduct tax under the provision of Sec. 194C of the Income-tax Act, 1961 (hereinafter referred to as the "Act"). The AO did not accept the contention of the assessee and disallowed the same u/s. 40(a)(ia) of the Act. On appeal, the Ld. CIT(A) confirmed the action of AO. Aggrieved, assessee is before us.

5. We have heard both the parties and carefully gone through the facts and circumstances of the case. We note that assessee had paid freight charges to Jet Airways to the tune of Rs.1,66,367/- and Air India to the tune of Rs.7,73,864/- totaling to Rs.9,40,231/- without deducting TDS. So, AO invoked sec. 40(a)(ia) of the Act and disallowed the expenditure claimed by the assessee. The only limited prayer of the assessee before us is that after the amendment in sec. 200/201 of the Act, when the recipient of the amounts have shown in their return of income, the amount in question and has been assessed to tax, then disallowance is not warranted. We find force in the contention of the assessee and direct the AO to adjudicate the issue afresh. And direct that if the payees have reflected this payment in question towards them in their respective Return of Income and have taken into account this sum of amount in their Return of Income and has paid tax due on the income declared in the Return of Income, and fulfils the conditions stipulated u/s. 200 of the Act, then no disallowance u/s. 40(a)(ia) of the Act is warranted. Needless to say, the AO may call for the aforesaid details from the payees in case it is found necessary. So, we set aside the order of Ld. CIT(A) and remand the matter back to AO for fresh adjudication as directed above. Both these grounds of appeal of assessee are allowed for statistical purposes.

6. Ground no. 4 of assessee's appeal is against the action of Ld. CIT(A) in confirming Rs.89,930/- made by AO applying section 2(22)(3) of the Act.

7. The facts of the case as noted by the AO in the assessment order are that -

> *"In the instant case, Ripple P Doshi had 33.2% holding in M/s. Modern Solarum Pvt. Ltd. and had 25% share of profit in M/s. Modern Impex. Thus, the assessee satisfies the conditions of "any concern in which such shareholder is a member and in which he has a substantial interest"mentioned in section 2(22)(e) of Income Tax Act. The assessee company, during the*

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year, received an amount of Rs.55,00,000 from M/s. Modern Solaurum Pvt. Ltd., a company in which public were not substantially interested. A perusal of the details filed by the assessee company during the course of assessment proceedings revealed that M/s. Modern Solaurum Pvt. Ltd. had accumulated profits of Rs.89,930 as on 31.03.2012, thereby signifying that the said company was in possession of accumulated profits. Since the conditions attracting provisions of section 2(22)(e) of Income Tax Act are fully satisfied in respect of the loan received by the assessee company from M/s. Modern Solaurum Pvt. Ltd. it is held that the said amount of Rs.89,930 shall be deemed to be income of the assessee company u/s. 2(22)(e) of the Income Tax Act.

Aggrieved, the assessee preferred an appeal before the Ld. CIT(A), who confirmed the action of AO. Aggrieved, assessee is before us.

8. We have heard both the sides and gone through facts and circumstances of the case. We note that one of the partners of assessee firm Shri Ripple P. Doshi holds 33.20% in the assessee firm. And the firm had received advance/loan from a company called M/s. Modern Solaurum Pvt. Ltd. wherein Shri Ripple P. Doshi was having a shareholding of 25%. So, AO added the accumulated profit of M/s. Modern Solaurum Pvt. Ltd. of Rs.89,930/- as deemed dividend u/s. 2(22)(e) of the Act in the hands of the assessee firm . We note that assessee firm is not a shareholder of M/s. Modern Solaurum Pvt. Ltd. So, sec. 2(22)(e) of the Act is not attracted against the assessee firm and so the impugned addition invoking sec. 2(22)(e) of the Act cannot be sustained as held by the Hon'ble Delhi High Court in Ankitech pvt ltd 2011[5] TMI 325, wherein this principal/ratio has been held. So since the Firm being not a shareholder of the Pvt. Ltd. company which lent the money cannot be taxed by applying sec. 2(22)(e) of the Act. So, the addition is deleted. This ground of appeal of assessee is allowed.

9. In the result, appeal of assessee is partly allowed for statistical purposes.

Order is pronounced in the open court on 27th March, 2019

Sd/-	Sd/-
(P. M. Jagtap) Vice President	(Aby. T. Varkey) Judicial Member

Dated : 27th March, 2019

Jd.(Sr.P.S.)

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Copy of the order forwarded to:

1. Appellant – M/s. Modern Impex, C/o S. L. Kochar, Advocate, 5, Ashutosh Choudhury Avenue, Kolkata-700 019. .

2 Respondent – ACIT, Circle-32, Kolkata

3. CIT(A)-9, Kolkata (sent through e-mail)

4. CIT- , Kolkata.

5. DR, ITAT, Kolkata. (sent through e-mail)

/True Copy, By order,

Assistant Registrar

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