

IN THE INCOME TAX APPELLATE TRIBUNAL DELHI

(DELHI BENCH 'C' : NEW DELHI)

**BEFORE SH. SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No. 8196/Del/2019, A.Y. 2015-16

M/s. Instel Services Pvt. Ltd., 203, South Ex-Plaza 1, South Extension Part-II, South Delhi-110049	Vs.	Dy. Commissioner of Income- tax , Circle-12(2), New Delhi
(APPELLANT)		(RESPONDENT)

ITA No. 8505/Del/2019, A.Y. 2015-16

Assistant Commissioner of Income-tax , Circle-12(2), New Delhi	Vs.	M/s. Instel Services Pvt. Ltd., 203, South Ex-Plaza 1, South Extension Part-II, South Delhi-110049
(APPELLANT)		(RESPONDENT)

Assessee by	Shri Alok Vasant, CA & Ms. Poonam Ahuja, Adv.
Revenue by	Shri Anuj Garg, Sr. DR

Date of hearing:	06.09.2022
Date of Pronouncement:	20.09.2022

ORDER

PER ANUBHAV SHARMA, JM:

Both appeals have been filed by the Assessee & Revenue respectively against order dated 30.08.2019 in appeal no. 173/2019-20/CIT(A)-44 passed u/s

250(6) of the Income Tax Act, 1961(hereinafter referred to as 'the Act') by Commissioner of Income Tax (Appeals)-44, Delhi (hereinafter referred to as the First Appellate Authority in short 'Ld. F.A.A.') in regard to the appeal before it arising out of assessment order dated 22.12.2018 u/s 143(3) of the Income Tax Act, 1961 passed by Dy. Commissioner of Income Tax, Circle 12(2), New Delhi (hereinafter referred to as the Ld. Assessing Officer or in short 'Ld. AO').

2. The facts in brief are the assessee company is engaged in the business of sale, distribution and trading of various telecommunication products including mobile handsets, data cards and Smart phones on a whole-sale cash and carry basis to various distributors throughout India and also providing investment consultancy services to group companies holding of investment in Group of Companies for retaining a controlling stake on them.

2.1 The appellant company has filed its revised return of income on 27.02.2017 declaring an income of Rs. 1,83,34,700/- vide acknowledgement no. 636785111270217 for the Assessment Year 2015-16. The case was selected for "Limited Scrutiny under CASS" as per Notice dated 06th April 2016 on the basis of following reasons :

- High ratio of refund to TDS
- Substantial increase in share capital in a year
- Large international transactions

The assessment under section 143(3) of the Act was concluded by the Ld. Assessing officer, Circle-12(2), new Delhi on 22.12.2018 at total income of Rs. 4,01,51,080. Aggrieved against the aforesaid order of the learned Assessing Officer, the assessee preferred appeal. An addition of Rs. 2,18,16,379/- was made on account of the following grounds.

1. Disallowance on account of legal and professional expenses of Rs. 57,19,037/-.
2. Disallowance of business promotion expenses amounting to Rs. 1,42,90,200/-.
3. Disallowance of professional expenses for seeking legal opinion to the tune of Rs. 18,07,142/-. The Ld. Assessing officer has also simultaneously initiated penalty u/s 271(1)(c) of the Income Tax Act, 1961.”

3. Ld. CIT(A) allowed the appeal of assessee in regard to the disallowance of Rs. 57,19,037/- and also allowed the appeal of assessee in regard to disallowance of business promotion expenses of Rs. 1,42,90,200/-. However, the appeal of assessee with regard to professional expenses of Rs. 18,07,142/- in respect of non-current investments was dismissed. Accordingly, the revenue and assessee both are in appeal raising following grounds in their respective appeals :-

1. Assessee’s appeal (ITA No. 8196/Del/2019, A.Y. 2015-16)

“1.1 The Ld. AO has grossly erred in facts and in law in exceeding his jurisdiction in making huge disallowances on issues which were not the basis for initiating Limited Scrutiny and consequently the order passed is bad in law and void ab-initio.

1.2 The ld. AO has grossly erred in facts and in law in converting the assessment in a Complete Scrutiny without seeking prior approval of the Principal Commissioner of Income Tax/ Commissioner of Income Tax as directed in the Board’s Instruction No. 5/2016 in respect of “CASS” assessment, and the order passed in violation of Board’s instructions is bad in law and void ab-initio.

2.1 The ld. AO has grossly erred on facts and in law in disallowing professional expenses of Rs. 18,07,142/- contending the same to be capital in nature, even though the same were incurred in the course of business and no asset of enduring nature came into existence.

2.2 *The Ld. CIT/Ld. AO has grossly erred on facts and in law in not taking into account the invoice provided in the apepr books submitted before the Ld. CIT/ Ld. AO and summarily disallowing/sustaining the disallowance, merely on the basis that invoice was not furnished.”*

2. Revenue’s appeal (ITA No. 8505/Del/2019, A.Y. 2015-16)

“(1) Whether the CIT(A) has erred in deleting the addition of Rs. 57,19,037/- which was made by the AO by disallowing Legal & Professional expenses without recognizing that the assessee has not filed any supporting evidence to prove that the expenses claimed were pertaining to relevant A.Y. 2015-16 and wholly and exclusively for the purpose of business carried out by the assessee.

(2) Whether the CIT(A) has erred in deleting the addition of Rs. 1,42,90,200/- which was made by the AO by disallowing Business Promotion expenses without recognizing that the assessee has nto filed any supporting evidence to prove that the expenses claimed were pertaining to relevant A.Y. 2015-16 and wholly and exclusively for the purpose of business carried out by the assessee.

(3) The appellant craves leave, to add, alter or amend any ground of appeal raised above at the time of hearing.”

4. Heard and perused the record. The Assessee’s appeal is taken up first for discussion. On behalf of the assessee in regard to it’s appeal it was submitted that the assessee’s case was selected for limited scrutiny under ‘CASS’ and without mandatory approval for expanding the scope converted the case to complete scrutiny. It was submitted that there was no ground of scrutiny to examine the professional expenses but Ld. AO travelled beyond the scope of limited scrutiny and tried to cover it under the head “High ratio of refund to TDS”. It was submitted that this issue when raised before Ld. CIT(A), he has given interpretation to frustrate the intention of limited scrutiny provisions. It was submitted that on the facts also as such there was no high ratio of refund

because the tax liability of assessee was nearly Rs. 59,48,694/- and advance tax of Rs. 56,00,000/- was paid and there was TDS of Rs. 26,06,769 on which refund of Rs. 22,58,080/- was claimed. It was submitted that for exceeding the jurisdiction alone the assessment deserves to be quashed.

4.1 On merits, it was submitted that the assessee incurred expenditures for examination in regard to the issues of applicability of CIC guidelines and FEMA on subscription of RPS and for evaluating tax implications. It was submitted that assessee merely wanted to ensure that investments in non-cumulative, non-convertible, redeemable preference shares of M/s. Sistema Shyam Teleservices Limited did not infringe any laws. The copy of invoice in that regard placed at page no. 34A of paper book was relied to submit that merely because the transaction in question is a capital asset, the professional expenses will not become capital expenditure. Ld. DR however submitted that there is no error in the findings of Ld. CIT(A).

In regard to ground no. 1 in assessee's appeal :

5. The Bench is of considered opinion that when the tax authorities are scrutinizing the claim of High ratio of refund to TDS, the substantial question involved should be the examination of those heads of receipts wherein TDS credit is sought to be adjusted against the income and refund claim. Here is a case where with tax liability of assessee was Rs. 59,48,694/- and advance tax of Rs. 56,00,000/- was paid and there was TDS of Rs. 26,06,769. If the arguments of Revenue is sustained that scrutiny for high ratio of refund to TDS entitles even examination of expenditures, which have no relationship with the TDS, then that will in a way give arbitrary powers to the Assessing Officer to do complete scrutiny of all the expenses in a limited scrutiny and thus circumvent the provision of Act which require mandatory approval of competent authority to convert limited scrutiny to complete scrutiny. Ld. CIT(A) has tried to justify

the act of Ld. AO by observing that legal and professional expenses, business promotion expenses, professional expenses for seeking legal opinion would be included under the head of “High ratio of refund” to TDS. However, no reason was cited as to how the TDS credit shown in the return has impact on the expenditure and would affect the refund of assessee. Thus, the Bench is of considered opinion that, the very exercise of jurisdiction to examine the disputed expenses under limited scrutiny on ground of ‘High ratio of refund to TDS’, was vitiated and that made all the additions illegal. Ground deserves to be allowed.

In regard to ground no. 2 and 3 in assessee’s appeal :

6. It can be observed that the Id. CIT(A) has sustained the addition by observing that the relevant documents in the form of invoices were not presented during the assessment proceedings. The Bench is of considered opinion that if that was so then the Ld. CIT(A) had wide powers u/s 250(4) of the Act to call for comments of the AO or make an enquiry himself, as assessee was pressing that it had filed all the document/evidences during assessment. In fact, the assessment order shows that Ld. AO had taken note of the fact that the payment was being made as a fee for assistance in connection with seeking clarification from RBI on applicability of CIC Guidelines and applicability of FEMA on subscription of RPS and evaluating tax implications of unwinding RPS held by the Assessee. Thus certainly relevant evidence was on record.

6.1 Then the Bench is of considered opinion that Redeemable Preferences Shares (RPS) held by the assessee being long term in nature may be capital expenditure but the expenses paid to legal and professionals for an opinion about legal and tax consequences of the prospective investment cannot be considered to be a capital expenditure. The legal expenses were merely to avoid panel provisions and to assure that there is no breach of any regulatory

guidelines of investment. These expenses did not added any value to the investment nor would have reduced the risk of investment, but merely made the investment in consonance with the law of the land. Therefore, disallowance by calling them, capital expenditure cannot be sustained. Both grounds deserve to be allowed.

In regard to Ground no. 1 and 2 in Revenue's appeal :-

7. The grounds are taken up together as same are based on common questions of law. It was submitted by the Ld. DR that the ld. CIT(A) has fallen in error in taking into account the evidence of the assessee without calling for any remand report in regard to disallowances.

7.1 In regard to addition of Rs. 57,19,037/- which was made by the AO by disallowing Legal & Professional expenses the assessee has placed on record in the form of copies on invoices at page no. 34-34A of paper book, copy of engagement agreement at page no. 46-56 in regard to professional services choosing Ernst & Young LLP similarly with regard to advisory services from M/s. J. Sagar Associates invoices at page no. 35-36 and 37 of the paper book have been placed on record. In regard to services M/s. KPMG India Pvt. Ltd. invoice at page no. 38 -39 of paper book have been placed on record.

8. Ld. AO has not mentioned in his order specifically in para 4.3 that these invoices are not placed on record, however, he mentioned in para no. 4.2 replied dated 14.12.2018 was submitted by the assessee, this reply is on record on paper book at page no. 31 to 33 which not only mentions about the justification of expenses but also has certain annexure but the invoices from the service providers seems to be not part of this reply dated 14.12.2018.

9. It can be appreciated that Ld. AO has disallowed these expenses for lack of evidences and that no revenue was recognized. In regard to addition of Rs.

57,19,037/- which was made by the AO by disallowing Legal & Professional expenses the assessee has placed on record in the form of copies of invoices at page no. 34-34A of paper book, copy of engagement agreement at page no. 46-56 in regard to professional services choosing Ernst & Young LLP similarly with regard to advisory services from M/s. J. Sagar Associates invoices at page no. 35-36 and 37 of the paper book have been placed on record. In regard to services M/s. KPMG India Pvt. Ltd. invoice at page no. 38 -39 of paper book have been placed on record.

10. Ld. CIT(A), however, has considered them. These invoices are not doubted in terms of expenditure, the reason for disallowance was that Ld.AO found the same not expended wholly and exclusively for the purpose of business carried out by the assessee. It appears that foundation to this observation was that he found that expenses were debited for project which were not earning revenue. This fact was, however, controverted by the assessee as assessee claims to have engaged in online gaming activities and at page no. 44-45 the copies of invoices have been placed on record which were also considered by Ld. CIT(A). Ld. CIT(A) also observed in para 6.6 of it's order that online gaming business revenue for FY 2015-16 is shown to be Rs 38,74,489/- and same has been accepted by the Ld AO vide order dated 20/5/2019. In this context, reliance can also be placed on judgment relied by Ld. Counsel for the assessee in **CIT vs. Rajendran Prasad [(1978) 115 ITR 519 ; CIT vs. Axis Private Equity Limited. [(2017)] 98 CCH 0038 (Bombay HC) ; ITO vs. Mokul Finance Private Limited [(2007) 110 TTJ 0445 (Del)]** which substantiate the proposition of law that expenditure cannot be disallowed merely for business sustaining loss or not generating revenue.

11. Even otherwise when the expenditures are in the nature of professional services they may not have immediate impact or relationship with the revenue and the purpose of this expenditure is more to run the business in a law

observant and subject to regulatory measures. The same do not add to the revenue as such but only ensure that no penal liabilities are created out of that business activity. Thus the findings of Id. AO were incorrect and rightly interfered by Ld CIT(A). Thus, there is no force in the ground no 1 raised by the revenue and the ground is disallowed.

12. In regard to disallowing Business Promotion expenses. The details of expenses have been made available by the assessee at page no. 40 of the paper book with copy of audit finance statement at page no. 23. In regard to the expenditure of Rs. 51,68,560/- with Hannover Milano Fairs India Pvt. Ltd. copy of invoices is available at page no. 77. This amount has been paid towards participation charges for 140 square meters and Gaming Arena Partner, similar invoices have been filed of O2 Enterprises, Wizcraft International Entert. Pvt. Ltd., NODWIN Cyber Games Merchandising Pvt. Ltd. and in its reply to the show cause notice available at page no. 32 of the paper book. The assessee had explained that as it had set up business of online Gaming by providing Gaming Gears to Gamers and promoting E-Sports in India. Consequently, the assessee had incurred promotion expenses for the same. The AO has observed that no evidence has been tendered on the other hand, on the basis of submissions dated 20.12.2018 which referred to expenditures in support of submissions were mentioned by the Id. AO and Ld. CIT(A) has considered all this evidence. Accordingly, the Id. CIT(A) has distinguished the findings of Ld AO on same terms as allowing Legal & Professional expenses and for which the Revenue's appeal ground no 1 has been dealt above and there is no distinction. The observations of this Bench as made above apply mutatis mutandis to this ground no 2 as well. Thus the findings of Id. AO were incorrect and rightly interfered by Ld CIT(A). Thus, there is no force in the ground no 2 raised by the revenue and the ground is disallowed.

13. As a sequel to the aforesaid determination of the grounds, **the appeal of assessee is allowed and the appeal of Revenue is dismissed.**

Order pronounced in the open court on 20th September, 2022.

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER

Date:- 20th .09.2022

Binita, SR.P.S

Copy forwarded to:

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3. CIT
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ASSISTANT REGISTRAR
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