IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH, NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

ITA No. 598/DEL/2022 [A.Y 2019-20]

BAE Systems Information & Electronic Systems Integration Inc 65, Spit Brook Road, Nashua USA	Vs.	The A.D.I.T. Intt. Taxation Circle -1(1)(2) New Delhi
PAN: AAHCB 7265 N		
(Applicant)		(Respondent)

Assessee By	:	Shri Rishab Malhotra, AR Shri Ravi Sharma, Adv
Department By	:	Shri Sanjay Kumar, Sr. DR

Date of Hearing	**:**	**20.06.2023**
Date of Pronouncement	**:**	**23.06.2023**

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is directed against the order of the CIT(A), Delhi-42 dated 08.02.2022 pertaining to A.Y 2019-20.

2. In the appeal memo, the assessee has taken as many as 7 grounds of appeal having only one issue, which is non granting of TDS credit of Rs. 16,58,287/-.

3. Vide letter dated 14.02.2023, the assessee has raised the following additional ground of appeal:

> ***"8. That on the facts and circumstances of the case and in law, the receipts from sale of software are not taxable in India in view of the decision of the Hon'ble Supreme Court in Engineering Analysis Centre of Excellence Pvt Ltd Vs. CIT 432 ITR 471 [SC].***
>
> ***8.1 That on the facts and circumstances of the case and in law, the ld. CIT(A)/Assessing Officer ought to have allowed the refund of tax deducted/paid on receipts from sale of software."***

4. The underlying facts in the first ground are that the assessee is a company, incorporated in United States of America and is engaged in the sale of software. In its return of income for the year under consideration, the assessee has offered to tax income and claimed corresponding credit of TDS amounting to Rs. 16,58,287/-.

5. While processing the return, Centralized Processing Centre [CPC] did not allow credit of Tax Deducted at Source [TDS]. The assessee follows the Accrual System of Accounting and recognizes its income from sale of software when invoices are raised. During the year under consideration, the assessee had sold software to its two customers in India. Considering that the invoices for the sale of software were raised by the assessee during the year under consideration, entire income arising under the invoices was offered to tax in the return of income filed for the year under consideration.

6. While invoices were raised by the assessee during the year under consideration, customers deducted tax on the invoices in the subsequent A.Y i.e. 2020-21 and, therefore, credit of TDS pertaining to these invoices are appearing in Form No. 26AS of A.Y 2021 and, therefore, the CPC did not grant credit of TDS amounting to Rs. 16,58,287/-.

7. When the matter was agitated before the ld. CIT(A), the ld. CIT(A) did not allow credit of TDS.

8. Before us, the ld. counsel for the assessee strongly drew our attention to the decision of the co-ordinate bench in assessee's group case BAE Systems [Operations] Ltd in ITA No. 442/DEL/2020 and pointed out that on identical circumstances, this Tribunal has allowed credit of TDS.

9. Per contra, the ld. DR strongly supported the findings of the ld. CIT(A) and read the relevant operative part.

10. We have carefully considered the orders of the authorities below. The only reason for denying credit is that the CPC cannot grant credit of TDS appearing in Form 26AS for the earlier/subsequent A.Y unless the return has been correctly filed and TDS has been correctly shown.

11. The undisputed fact is that the assessee has raised invoice during the year under consideration itself. It is also not in dispute that the assessee has shown revenue from the invoice as income during the year under consideration itself. The deductor may have deducted tax in subsequent A.Ys, but the fact of the matter is that since the assessee has shown income, the assessee has every right to get credit of TDS.

12. The co-ordinate bench [supra] in group case had the occasion to consider an identical grievance and held as under:

"6. While placing reliance on section 199 of the Act and also rule 37 BA of the Income Tax Rules1962 ("the Rules"), Ld. AR submitted that a harmonised reading of the Act and the Rules permit the grant of TDS in the year in which the income/receipt on which the tax was deducted at source was offered/assessable to tax, and therefore, prayed this Tribunal to grant the proportionate credit of TDS reflected in form 26AS for the assessment year 2018-19, for the assessment year 2017-18.

7. We have gone through the record in the light of the submissions made on either side. Insofar as the facts are concerned, absolutely there is no dispute. Even according to the Ld. CIT(A), the issue has come up in the assessment year 2017-18 only due to the wrong reporting by the deductor.

8. Section 199 (3) of the Act says that the Board may, for the purpose of giving the credit in respect of tax deducted or tax paid in terms of the provisions of the chapter, make such Rules as may be necessary, including the 4 Rules for the purpose of giving credit to a person other than those referred to in subsection (1) and subsection (2) and also the

assessment year for which such credit may be given. So also according to rule 37 BA (3) of the Rules, credit for tax deducted at source and paid to the Central government, shall be given for the assessment year for which such income is assessable; and that where tax has been deducted at source and paid to the Central government and the income is assessable over a number of years, credit for tax deducted at source shall be allowed across the years in the same proportion in which the income is assessable to tax.

9. On a careful consideration of the matter in the light of the provisions under section 199 (3) of the Act and also rule 37 BA (3) of the Rules, we are of the considered opinion that in this case where the tax has been deducted at source and paid to the Central government by the Hindustan Aeronautics Limited in the assessment year 2018-19 and such TDS relates to the income assessable over the assessment years 2017-18 and 2018-19, the credit has to be given in the proportion in which the income is assessable to tax for the assessment years 2017-18 and 2018-19 respectively. In the circumstances weare of the opinion that the ends of Justice would be met by directing the assessing officer to look into the fact whether the TDS deducted by the Hindustan Aeronautics Limited and reflected in form 26AS for the assessment year 2018-19, relates to the income/receipt in the hands of the assessee which is assessable for the assessment years 2017-18 and 2018-19, and

if so then the assessing officeris directed to grant proportionate credit for such years.

10. We, therefore, set aside the impugned order and remand the issue to the file of the assessing officer to verify whether the TDS deducted by the Hindustan Aeronautics Limited and reflected in the 26AS for the assessment year 2018-19 relates to the receipt in the hands of the assessee assessable for 5 the assessment years 2017-18 and 2018-19, and if it is so, learned Assessing Officer will allow proportionate credit for these 2 years. With this observation we allow the appeal of the assessee."

13. We accordingly direct the Assessing Officer to verify the claim and allow credit of TDS if the income is shown in the year under consideration.

14. The additional ground relates to the taxability of receipts from sale of software, now claimed as not taxable in view of the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt Ltd 432 ITR 471.

15. In so far as the underlying facts are concerned, they are not at all in dispute in as much the assessee is following the accrual system of accounting and recognizes its income from sale of software when invoices are raised. This fact has also been considered and accepted in the ground of appeal discussed hereinabove.

16. The Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt Ltd [supra], has settled the quarrel in favour of the assessee and against the revenue, which prompted the assessee to raise the impugned additional ground before us as the said decision of the Hon'ble Supreme Court was not there during the assessment proceedings nor before the first appellate authority.

17. The ld. DR raised strong objections and supported his contention by the decision of the Hon'ble Supreme Court in the case of M/s Gurjagravures Private Limited [1978] AIR 40 169 wherein the Hon'ble Supreme Court has held as under:

"We do not find it possible to agree with the High Court that if an item of income is taxed, the question of its non- taxability should be taken to have been considered by the Income-tax officer though no such claim was made before, him by the assessee. This is directly opposed to the view taken by this Court in Commissioner of income-tax (Central),. Calcutta v. Bahadur Hardutroy Motilal Chamaria(1) Before refer to this case in more detail, we think it necessary to. point out a mistaken assumption appearing in the judgment under appeal. If the High Court assumed that a portion of the profit in the relevant assessment year was exempt from tax under section 84, only the assessee failed to claim an exemption. In narrating the facts of the case the judgment records that the assesses was "admittedly entitled to exemption". Again, in the extract quoted above, it appears to have been assumed that a certain portion of the profit was exempt from tax under section 84. We find no basis for the assumption in the statement of the case drawn up by the Tribunal. What appears to have been admitted was that in the years subsequent to the, assessment year in question, relief under section 84 had been allowed to the assessee. But from this it cannot be assumed that the prescribed conditions justifying a claim for exemption under the section were also fulfilled in an earlier year. Turning now to the decision in Commissioner of Income-tax v. Rai` Bahadur Hardutroy Motilal Chamaria (supra), this was a case of enhancement of the assessment by the Appellate Assistant Commissioner under Section 31(3) of the Indian Income-Tax Act, 1922. This Court held on a consideration of the earlier authorities including Commissioner of Income-tax v. Shapoorji Pallonji Mistry and Narrondas, Manohardass v. Commissioner of Income-Tax (supra),. that the Appellate Assistant Commissioner bad no jurisdiction under section 31(3) "to assess a source of income which has not been processed by the Income-tax Officer" and that "it is not open to the Appellate Assistant Commissioner to travel outside the record

i.e. the return made by the assessee or the assessment order of the Income-tax Officer with a view to find out new sources of income and the power of enhancement under section 31(3) of the Act is restricted to the sources of income which have been the subject matter of consideration by the Income-tax Officer from the point of view of taxability". What 'consideration' by the Income-tax officer means in this context was also explained consideration' does not mean incidental or collateral examination of any matter, by the Income-tax officer in the process of assessment. There must be something in the assessment order to show that the Income-tax officer applied his mind to the particular subject matter or the particular source of income with a view- to its taxability or to its non-taxability and not to any incidental connection". If, as held in this case, an item of income noticed by the Income-tax officer but not examined by him from the point of view of its taxability or non taxability cannot be said to have been considered by him, it is not possible to bold that the Income-tax officer examining a portion of the Profits from the point of view of its taxability only, should be deemed to have also considered the question of its non- taxability. As we have pointed out earlier, the, statement of case drawn up by the Tribunal does not mention that there was any material on record to sustain the claim for exemption which was made for the first time be fore the Appellate Assistant Commissioner. We are not here called (1)(1967) 66 I.T.R. 443.

upon to consider a case where the assessee failed to make a claim though there was evidence on record to support it, or a case where a claim was made but no evidence or insufficient evidence was adduced in support. In the present case neither any claim was made before, the Income- tax officer, nor was there any material on record supporting such a, claim. We therefore hold that on the facts of this case, the

question referred to the High Court should have been answered in the, negative."

18. We have given thoughtful consideration to the rival submissions. In the words of the Hon'ble High Court of Bombay, said in the case of Pruthvi Brokers & Shareholders 349 ITR 336 as under:

"It is indeed a question of exercise of discretion whether or not to allow an assessee to raise a claim which was not raised when the return was filed or the assessment order was made."

19. As held by the Hon'ble Supreme Court, there may be several factors justifying the raising of a new plea in appeal and each case must be considered on its own facts. The decision relied upon by the ld. DR also says "on the facts of this case". This means that the facts of each case has to be considered while entertaining a claim which was not raised when the return was filed or assessment was made or when the first appellate authority was deciding the appeal.

20. The most important fact which makes the claim of the assessee justifiable from all other cases is that the decision of the Hon'ble Supreme Court was neither there at the assessment stage nor at the first appellate stage.

21. Even the CBDT has recognized in its Circular No. 68 dated 17.11.71 such situation. The Circular reads as under :

"Section 154 – RECTIFICATION OF MISTAKES

899. Mistakes apparent from records - Whether can be treated as such on the basis of subsequent decision of Supreme Court

1*. The Board are advised that a mistake arising as a result of a subsequent interpretation of law by the Supreme Court would constitute "a mistake apparent from the records" and rectificatory action under section 35/154 of the 1922 Act/the 1961 Act would be in order. It has, therefore, been decided that where an assessee moves an application under section 154 pointing out that in the light of a later decision of the Supreme Court pronouncing the correct legal position, a mistake has occurred in any of the completed assessments in his case, the application shall be acted upon, provided the same has been filed within time and is otherwise in order. Where any such applications have already been rejected and the assessee files fresh applications within the statutory time limit, the same may also be treated on par with the applications which may either be pending or received after the issue of this circular.*

***2**. The Board desire that any appeals or references pending on the point at issue may please be withdrawn.*

***Circular** : No. 68 [F.No. 245/17/71-A&PAC], dated 17-11-1971.*

JUDICIAL ANALYSIS

EXPLAINED IN - In ITO v. Smt. Manini Niranjanbhai [1992] 41 ITD 324 (Ahd.-Trib.) (SMC) it was observed that as per Circular No. 68, dated 17-11-1971, it is now a well established position that the Supreme Court does not declare the law with effect from the date of its order and the law declared by the Supreme Court has effect not only from the date of the decision but from the inception of the statutory provision. It has been mentioned therein that the Board have been advised that the mistake arising as a result of subsequent interpretation of law by the Supreme Court would constitute a mistake apparent from record and rectificatory action under section 154 would be justified."

22. Though the Circular refers to rectification application, but the same analogy applies to the claim made before the appellate authority. Therefore, considering the underlying facts, we direct the Assessing Officer to consider the claim of the assessee in light of the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt Ltd [supra]. We hold accordingly.

23. In the result, the appeal of the assessee in ITA No. 598/DEL/2022 is allowed.

The order is pronounced in the open court on 23.06.2023.

Sd/-	**Sd/-**
[CHALLA NAGENDRA PRASAD] **JUDICIAL MEMBER**	**[N.K. BILLAIYA]** **ACCOUNTANT MEMBER**

Dated: 23rd JUNE, 2023.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
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