IN THE INCOME TAX APPELLATE TRIBUNAL

"D" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA no.3017/Mum./2016
(Assessment Year : 2011–12)

Dy. Commissioner of Income Tax
Circle–6(2)(1), Mumbai ……. Appellant

v/s

M/s. Deloitte Touche Tohmatsu
India Pvt. Ltd., 12, Dr. Annie Basant Rd.
Opp. Shiv Sagar Estate, Worli
Mumbai 400 018 PAN – AABCD1147R ……. Respondent

ITA no.277/Mum./2016
(Assessment Year : 2010–11)

Dy. Commissioner of Income Tax
Circle–6(2)(1), Mumbai ……. Appellant

v/s

M/s. Deloitte and Touche Consulting
India, 12, Dr. Annie Basant Rd.
Opp. Shiv Sagar Estate, Worli
Mumbai 400 018 PAN – AACCD6017H ……. Respondent

ITA no.276/Mum./2016
(Assessment Year : 2010–11)

Dy. Commissioner of Income Tax
Circle–6(2)(1), Mumbai ……. Appellant

v/s

M/s. Deloitte Touche Tohmatsu
India Pvt. Ltd., 12, Dr. Annie Basant Rd.
Opp. Shiv Sagar Estate, Worli
Mumbai 400 018 PAN – AABCD1147R ……. Respondent

ITA no.2200/Mum./2016
(Assessment Year : 2008–09)

Jt. Commissioner of Income Tax (OSD)
Circle–6(2)(1), Mumbai ……. Appellant

v/s

M/s. Deloitte Corporate Finance
Service India Pvt. Ltd. 6th Floor
Mafatlal House, Backbay Reclamation
Mumbai 400 020 – PAN – AACCD4805B ……. Respondent

Revenue by : Shri Ram Tiwari
Assessee by : Shri Ketan Ved a/w Shri N.A. Patade

Date of Hearing – 16.04.2018	Date of Order – 27.04.2018

O R D E R

PER SAKTIJIT DEY, J.M.

Aforesaid appeals by the Revenue are against separate orders of learned Commissioner (Appeals)–2, Mumbai, in respect of three different assessees pertaining to assessment years 2008–09, 2010–11 and 2011–12.

2. Since aforesaid appeals involve more or less common issues they have been clubbed together and are being disposed off by way of this consolidated order for the sake of convenience.

3. There are two effective grounds raised by the Revenue in this appeal. In ground no.1, Revenue has challenged deletion of addition made on account of disallowance of club membership fee amounting to ₹ 15,60,876.

4. Brief facts are, the assessee a company is engaged in the business of providing Corporate Finance Services, Bid Support Services and Vendor Assistance. For the assessment year under dispute, assessee filed its return of income on 30th September 2008, declaring loss of ₹ 78,30,700. During the assessment proceedings, the Assessing Officer noticing that an amount of ₹ 15,63,101, was debited to Profit & Loss account under the head Operation, Administration and Other Expenses on account of membership and subscription called for the necessary details. On examining the details filed by the assessee, the Assessing Officer found that the deduction claimed represents payment made towards membership and subscription of a director in certain club and hotel. He, therefore, called upon the assessee to explain why the expenditure should not be disallowed as it provides enduring benefit to the assessee, hence, are in the nature of capital expenditure. Though, the assessee objected to the proposed

disallowance, however, the Assessing Officer rejecting the claim of the assessee disallowed the amount of ₹ 15,60,876 by treating it as capital expenditure. Assessee challenged the disallowance in an appeal before the first appellate authority.

5. The learned Commissioner (Appeals) relying upon the decision of the Hon'ble Supreme Court in CIT v/s United Glass Manufacturing Co. Ltd. (Civil Appeal no.6447/2012, judgment dated 12th September 2012) and the order passed by him in case of assessee's holding company deleted the disallowance made by the Assessing Officer.

6. The learned Departmental Representative relying upon the observations of the Assessing Officer submitted that the expenditure incurred by the assessee being of an enduring nature is a capital expenditure, hence, is not allowable as deduction.

7. The learned Authorised Representative strongly relying upon the decision of the learned Commissioner (Appeals) submitted that the issue stands settled in favour of the assessee by the decision of the Hon'ble Supreme Court in United Glass Manufacturing Co. Ltd. (supra). Further, he also relied upon the following decisions of Tribunal:–

i) *DCIT v/s Indian Oil Tanking Ltd., ITA no.4608/Mum./ 2001;*

ii) DCIT v/s Hinduja Global Solution Ltd., ITA no.1107/Mum./ 2014, dated 18.08.2017; and

iii) ITO v/s Mars India Pvt. Ltd., ITA no.1573/Mum./2011, dated 05.10.2016.

8. We have considered rival submissions and perused materials on record. As could be seen from the facts on record, the dispute is with regard to assessee's claim of deduction on account of payment made towards club and hotel membership fee of a director. It is the say of the Department that the said payment being capital in nature is not allowable. However, in our considered opinion, the issue now stands settled by the decision of the Hon'ble Supreme Court in United Glass Manufacturing Co. Ltd. (supra), wherein, the Hon'ble Supreme Court has held that such expenditure is allowable under section 37(1) of the Act. In view of the aforesaid, we uphold the order of the learned Commissioner (Appeals) on this issue. Ground no.1, is dismissed.

9. In ground no.2, the Revenue has challenged deletion of addition made on account of professional income.

10. Brief facts are, during the assessment proceedings, the Assessing Officer while examining Profit & Loss account found that the assessee has shown professional fee of ₹ 10,78,39,186. After calling for the

details of professional fee, the Assessing Officer found that assessee has not shown any work–in–progress either in the Balance Sheet or Profit & Loss account. To verify the value of work done by the assessee in the financial year 2008–09, the Assessing Officer called upon the assessee to furnish the professional fees ledger for the month of April 2008. On a perusal of the said ledger, he found that the assessee had received an amount of ₹ 1,48,39,217, from various concerns in the month of April 2008. The Assessing Officer observed, the assessee was providing due diligence services to various corporate entities and private equity clients across industries for their financial restructuring activities. He observed, the activity of the assessee requires substantial time to complete / submit the reports to its clients. Therefore, according to the Assessing Officer, the professional income received by the assessee in the month of April 2008 has to be considered as the value of work done during the financial year 2007–08. The Assessing Officer further observed that for such work done the assessee must have claimed relatable expenses in financial year 2007–08. Therefore, he called upon the assessee to explain why the income shown in April 2008 should not be treated as income of the impugned assessment year. In response, it was submitted by the assessee that the bills for the professional income received in April

2008 were raised in the said financial year on the basis of completion of work by the company and it was also accounted for in the said financial year. Therefore, it cannot be treated as income of impugned assessment year. However, the Assessing Officer did not find merit in the submissions of the assessee. He was of the view that the assessee could not have completed the work in such short period to raise the bill and receive payment in April 2008. Therefore, he held that the payments received in April 2008, were in respect of work completed in financial year 2007–08 relevant to the assessment year under dispute. Accordingly, he added back the amount of ₹ 1,48,39,217, to the income of the assessee. Assessee challenged the addition before the first appellate authority.

11. The learned Commissioner (Appeals) after considering the submissions of the assessee and taking note of the fact that similar addition made by the Assessing Officer in assessment year 2009–10 was deleted by him, followed the same and deleted the addition made by the Assessing Officer in the impugned assessment year as well.

12. The learned Departmental Representative relied upon the observations of the Assessing Officer.

13. The learned Authorised Representative strongly supporting the order of the learned Commissioner (Appeals) submitted that the assessee has not only received the disputed professional income in the subsequent financial year 2008–09 relevant to assessment year 2009–10 but the assessee has also accounted for and offered the said professional income of ₹ 1,48,39,217, in the subsequent assessment year i.e., A.Y. 2009–10. He submitted, the assessee has raised the bills in the month of April 2008, and has also received payment in April 2008. Therefore, the professional income was correctly offered to tax in assessment year 2009–10. He submitted, the assessee is following the same method of accounting over the years by accounting for the income of a particular year on the basis of bills raised. He submitted, similar addition made by the Assessing Officer in subsequent assessment years 2009–10, 2010–11 and 2011–12 on identical reasoning was deleted by the learned Commissioner (Appeals) and while deciding the appeals of the Department the Tribunal has upheld the decision of the learned Commissioner (Appeals). In this context, the learned Authorised Representative placed on record the following orders of the Co–ordinate Bench passed in assessee's own case:–

i) ITA o.4135 and 4136/Mum./2015, dated 15.03.2017 for A.Y. 2009–10 and 2011–12; and

ii) ITA no.4422/Mum./2016, dtd. 14.03.2018 for A.Y. 2010–11;

14. We have considered rival submissions and perused materials on record. As could be seen from facts emanating from record, the dispute is confined to the proper assessment year wherein the professional income of ₹ 1,48,39,217, is to be assessed. The Assessing Officer has assessed the said income in the impugned assessment year on the presumption that the work relating to such professional fee was completed in the impugned assessment year. Whereas, it is the stand of the assessee that the bills relating to such professional income was not only raised in the subsequent financial year but the assessee has also received the professional income in the subsequent assessment year. Therefore, assessee has accounted for such income and offered it to tax in the subsequent assessment year. Notably, on a perusal of the orders passed by the Co–ordinate Bench in assessee's own case for assessment years 2009–10, 2010–11 and 2011–12, as referred to above, it is seen that identical issue has been decided in favour of the assessee considering the fact that the assessee has accounted for the income in the assessment year, wherein, the bills were raised and income was received. Moreover, as held by the Hon'ble Supreme Court

in case of CIT v/s Excel Industries Ltd. 38 Taxman 100 (SC), when the tax rate applicable in both the years are same there is no loss to the Revenue if the income is assessed in the subsequent assessment year. Thus, respectfully following the decision of the Co–ordinate Bench in assessee's own case as referred to above, we uphold the decision of the learned Commissioner (Appeals) on this issue. Ground no.2, raised by the Revenue is dismissed.

15. In the result, Revenue's appeal is dismissed.

ITA no.276/Mum./2016
Assessment Year – 2010–11

16. In ground no.1, the Revenue has challenged the deletion of addition of ₹ 54,65,656, made by the Assessing Officer on account of un–reconciled AIR / ITS data.

17. Briefly the facts are, during the assessment proceedings on the basis of information available on record, the Assessing Officer called upon the assessee to furnish reconciliation of the AIR/ITS data with its books of account. As observed by the Assessing Officer, in response to the query raised assessee partly reconciled the AIR/ITS data. However, in respect of an amount of ₹ 54,65,656, relating to various parties the assessee was unable to reconcile the data with its books.

Though, it was submitted by the assessee that it has issued letters to the concerned parties requesting confirmation for the same, however, the Assessing Officer stating that the assessee was unable to reconcile the AIR/ITS data treated the amount of ₹ 54,65,656 as undisclosed income of the assessee. The assessee challenged the addition before the learned Commissioner (Appeals).

18. The learned Commissioner (Appeals) after considering the submissions of the assessee in the context of facts and material on record found that except the AIR/ITS data the Assessing Officer had no other information / material available on record to indicate that the disputed amount was received by the assessee. The learned Commissioner (Appeals) observed, when the assessee had exhausted all its options for obtaining necessary information from the concerned parties and could do no more and has also filed an affidavit before the assessing officer asserting that it has not received any such income, it was the duty of the Assessing Officer to conduct enquiries either under section 133(6) or under section 131 of the Act with the concerned parties to obtain necessary information with regard to the payments appearing in the AIR information / ITS data. The learned Commissioner (Appeals) held, without making any enquiry to ascertain the correct fact, the Assessing Officer cannot make the addition simply

on the basis of AIR information. Relying upon certain judicial precedents, the learned Commissioner (Appeals) ultimately deleted the addition made by the Assessing Officer.

19. The learned Departmental Representative relied upon the observations of the Assessing Officer. He submitted, it is the duty of the assessee to reconcile the discrepancies arising out of the AIR information. Assessee having failed to do so the amount was correctly added to the income of the assessee.

20. The learned Authorised Representative supporting the decision of the learned Commissioner (Appeals) submitted that the assessee having not received the income in question, the Assessing Officer was not justified in making the addition simply relying upon the AIR information. In support of such submission assessee relied upon the following decisions:–

i) CIT v/s S. Ganesh, ITA no.1930/2011, dated 18.03.2014;

ii) M/s. A.F. Ferguson & Co. v/s JCIT & Ors. ITA no.5037/ Mum./2012, etc., dated 17.10.2014; and

iii) Shreeballabh R. Lohiya v/s ITO, ITA no.4120/Mum./2011, dated 08.08.2018.

21. We have considered rival submissions and perused materials on record. As could be seen from the facts emanating from record, in course of assessment proceedings the assessee to some extent has reconciled the discrepancies pointed out as per the AIR information. However, in respect of payments alleged to have been received from certain parties, the assessee though made all efforts to obtain information from the concerned parties, however, it failed in its attempt. It is evident, simply because the assessee was unable to reconcile a part of the payment allegedly received as per AIR information, the Assessing Officer proceeded to make the addition without making any further enquiry. As rightly observed by the learned Commissioner (Appeals), the minimum the Assessing Officer could have done is to issue notices under section 133(6) or 131 of the Act to the concerned parties whose identities were available before the Assessing Officer, to ascertain the correct fact. When the assessee has asserted before the Assessing Officer that it has not received any such income, the Assessing Officer is duty bound to make proper enquiry before concluding that the disputed amount was earned by the assessee during the relevant assessment year. Instead of doing that the Assessing Officer has made the addition simply on the basis of AIR information, which, in our view is absolutely incorrect. Therefore, we

do not find any infirmity in the order of the learned Commissioner (Appeals) on this issue. Ground raised is dismissed.

22. In ground no.2, the Revenue has challenged the deletion of addition made of ₹ 22,50,000 on account of club membership fee of the director.

23. This ground is identical to the ground no.1, raised by the Revenue in its appeal being ITA no.2200/Mum./2016, decided by us in the earlier part of the order. Following our decision therein, we uphold the order of the learned Commissioner (Appeals) on this issue. This ground is dismissed.

24. In the result, Revenue's appeal is dismissed.

ITA no.277/Mum./2016
Assessment Year 2010–11

25. The only issue raised by the Revenue relates to the deletion of addition of ₹ 38,94,599, made by the Assessing Officer on account of un–reconciled AIR/ITS data.

26. Facts relating to this ground are more or less similar to the ground no.1, raised by the Revenue in its appeal being ITA no.276/ Mum./2016. In the present case, on the basis of ITS/AIR data it was

found that the assessee has not offered an amount of ₹ 38,94,599, as income of the year. In response to the query raised by the Assessing Officer, the assessee submitted that the bills were raised by its sister concern and not by it. However, the Assessing Officer rejecting the submissions of the assessee, added back the amount of ₹ 38,94,599 as income of the assessee. Assessee challenged the addition before the first appellate authority.

27. The learned Commissioner (Appeals) after considering the submissions of the assessee having due regard to the facts on record deleted the addition.

28. We have considered rival submissions and perused materials on record. As could be seen from the fact and material on record, out of the total amount of ₹ 38,94,955, only an amount of ₹ 8,92,303, could not be reconciled by the assessee with its books of account. As observed by the learned Commissioner (Appeals), as per the latest Form no.26AS entries aggregating to ₹ 20,86,160 were reversed by the payers and entries aggregating to ₹ 9,16,136 have been reconciled due to clarification provided by Balmer & Lawrie. Thus, from the aforesaid facts, it is clear that the conclusion drawn by the Assessing Officer simply on the basis of AIR information was not correct. As

observed by the learned Commissioner (Appeals), the Assessing Officer without making any enquiry with the payers had simply made the addition on the basis of AIR information. That being the case, in our considered opinion, the learned Commissioner (Appeals) was justified in deleting the addition made. In this regard, we are supported by the decisions cited before us by learned counsel for the assessee. Accordingly, we uphold the order of the learned Commissioner (Appeals) by dismissing the ground raised.

29. In the result, Revenue's appeal is dismissed.

ITA no.3017/Mum./2016
Assessment Year – 2011–12

30. The solitary issue in this appeal relates to deletion of addition made by the Assessing Officer on account of un reconciled AIR data.

31. Brief facts are, during the assessment proceedings, on the basis of the information available as per AIR/ITS data the Assessing Officer called upon the assessee to reconcile them with its books of account. As observed by the Assessing Officer, though, the assessee made part reconciliation, however, in respect of amount of ₹ 2,61,64,930, received from various parties as per AIR information, the assessee was unable to reconcile with its books of account. Though, the assessee

submitted before the Assessing Officer that it has not received any such income and to prove such fact has also issued letters to the concerned parties seeking their confirmation, however, the Assessing Officer observing that the assessee failed to furnish any reply from the concerned parties to substantiate its claim added the amount of ₹ 1,92,37,081, as undisclosed income at the hands of the assessee. Assessee challenged the addition before the first appellate authority.

32. The learned Commissioner (Appeals) after considering the submissions of the assessee qua the materials on record found that the assessee has duly accounted for all the income received during the year in its books of account. Further, he found that the assessee has made an effort to reconcile the discrepancies found as per AIR information and to an extent has also reconciled them. However, after exhausting all options available, since, assessee could do no more, it has asserted before the Assessing Officer that it has not received the un reconciled income as per AIR information. The learned Commissioner (Appeals) observed, even after such submissions of the assessee the Assessing Officer made the addition simply on the basis of AIR information without conducting any enquiry on his own to ascertain whether the assessee has actually received such income. The learned Commissioner (Appeals) observed, AIR data is only a piece of

information on the basis of which further enquiry was required to be made. Thus, the learned Commissioner (Appeals) concluded that when the Assessing Officer has failed to bring any corroborative evidence, apart from the AIR information, to establish the fact that the assessee has received the income as per AIR information, the addition cannot be sustained.

33. The learned Departmental Representative relying upon the observations of the Assessing Officer submitted that the onus is on the assessee to prove that the income as per the AIR information was not received by the assessee.

34. The learned Authorised Representative on the other hand strongly supported the decision of the learned Commissioner (Appeals) on the issue. In this context, he repeated the submissions made in respect of similar issues in the other appeals dealt by us in the earlier part of the order.

35. We have considered rival submissions and perused materials on record. Undisputedly, a reading of the assessment order makes it clear that the disputed addition has been made only on the basis of AIR information. It is evident, the Assessing Officer has accepted the fact that the assessee has partly reconciled the AIR information with its

books of account. Thus, from the aforesaid facts, it becomes clear that the figure shown in the AIR information do not in reality represent assessee's income. It is also evident, the Assessing Officer has made the addition simply on the allegation that the assessee failed to reconcile the AIR information with the books of account. However, the facts on record demonstrate that before the Assessing Officer the assessee has made submissions with supporting evidence to the effect that though it has made attempt to obtain confirmations from the concerned parties by issuing letters to them, but, it has failed in its attempt. Further, the assessee has not only filed an affidavit before the Assessing Officer asserting that it has not received any such income as contained in the AIR information, but, it has also requested the Assessing Officer to conduct enquiry with the concerned parties for eliciting the correct facts. As observed by the learned Commissioner (Appeals), the Assessing Officer issued notice under section 133(6) of the Act to only one party and, that too, he did not pursue the matter any further even with regard to that party. In respect of the other parties, the Assessing Officer did not conduct any independent enquiry to verify assessee's claim that it has not received any income as alleged in the AIR information. Even, the learned Commissioner (Appeals) has mentioned specific instances why the assessee could not

reconcile certain entries in the AIR information, reason being, wrong mention of assessee's PAN. Thus, the aforesaid facts clearly reveal that the figure shown in the AIR information in reality do not represent assessee's income. The judicial precedents cited before us also lay down the proposition that only on the basis of AIR information no addition can be made. In the case before us this exactly is the factual position. The Assessing Officer without making any independent enquiry to ascertain the correct fact has made the addition simply relying upon the AIR information. In view of the aforesaid, we do not find any infirmity in the order of the learned Commissioner (Appeals) in deleting the addition. Grounds raised are dismissed.

36. In the result, Revenue's appeal is dismissed.

37. To sum up, all the appeals of the Revenue are dismissed.

Order pronounced in the open Court on 27.04.2018

Sd/-	**Sd/-**
RAJESH KUMAR	**SAKTIJIT DEY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 27.04.2018

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The CIT(A);

(4) The CIT, Mumbai City concerned;

(5) The DR, ITAT, Mumbai;

(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

(Asstt. Registrar/Sr.P.S)
ITAT, Mumbai