IN THE INCOME TAX APPELLATE TRIBUNAL "H ", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM
&
SHRI SANDEEP GOSAIN, JM

ITA No738/Mum/2016
(Assessment Year :2011-12)

M/s. HDFC Securities Ltd., Office Floor 8 I-Think Techno Campus Alpha Building, B Kanjurmarg (E) Mumbai – 400 042	Vs.	DCIT – 4(1) Mumbai
PAN/GIR No.AAACH8215R		
Appellant)	..	**Respondent**)

ITA No716/Mum/2016
(Assessment Year :2011-12)

DCIT – 4(1) (1) Mumbai	Vs.	M/s. HDFC Securities Ltd., Office Floor 8 I-Think Techno Campus Alpha Building, B Kanjurmarg (E) Mumbai – 400 042
PAN/GIR No.		**AAACH8215R**
Appellant)	..	**Respondent**)

Assessee by	Ms. Krupa R. Gandhi / Shri Vidhi Doshi
Revenue by	Shri Rajat Mittal
Date of Hearing	**11/04/2018**
Date of Pronouncement	**16/04/2018**

आदेश / O R D E R

***PER R.C.SHARMA (A.M)*:**

These are the cross appeals filed by assessee and Revenue against the order of CIT(A)-8, Mumbai dated 16/11/2015 for A.Y.2011-12 in the matter of order passed u/s.143(3) of the IT Act.

2. Rival contentions have been heard and record perused.

3. Facts in brief are that the assessee is engaged in the business of stock broking and is a member of the BSE and NSE. The assessee earns brokerage and commission from Primary Market Operations, Secondary Market Operations and fee income. During the course of scrutiny assessment, AO made disallowance of Data Circuit / Broadband / Multi-Protocol Label Switching ("MPLS") charges under section 40(a)(ia) of the Act for purported non-deduction of taxes u/s.194J of the Act.

4. By the impugned order, CIT(A) confirmed the disallowance.

5. At the outset, learned AR placed on record the order of the Tribunal in assessee's own case for the A.Y.2010-11 in ITA No.3137/Mum/2014 and 3502/Mum/2014 wherein exactly similar issue was decided by the Tribunal in assessee's favour. We had carefully gone through the order of the Tribunal, para 5, Page 2 to 4 reads as under:-

> *"5.We have heard the rival submissions and perused the material before us. We find that the assessee had availed services of eight entities and had made payments for use of data/circuit bandwith, that the FAA held that use of data bandwidth required human intervention and that it fell within the preview of fee for technical services, that TDS had to be made as per the provisions of section 194J of the Act. We are of the opinion that the basic issue to be decided is as to whether D/CBC can be treated technical services or not. We find that similar question had arisen in the case of iGate Computer System Ltd.(supra).Brief facts of the case were that the assessee was a software company engaged in software development, software export and allied activities, that a TDS Survey, u/s.133A of the Act, was carried out on 13.01.2009 at the business premises of assessee, that during verification, it was found that the assessee had not deducted tax at source from the DATA link charges paid to various telecom service providers. As per the AO, the assessee should have deducted tax at source from the said DATA link charges under section 194J of the Act. The plea of the assessee before the AO was that the DATA link charges were not in the nature of fee for technical services but for allowing the satellite link line from one service provider to be carried over to the other service provider, that the existing service provider had to provide inter connection of their*

net works from equipment of net works to equipment of other service providers to provide subscribers efficient and flawless services,that the DATA link usage was only for transmission of data from the server of assessee to the designated client server, that it was obvious that through the process of interconnection one service provider would establishes a link between it's own network, services and equipment with the network, services and equipment of other service provider, that for facilitating these arrangements, service provider only uses the network element (for carrying the lines to their destination)of other service provider, that by providing the interconnection, the interconnection provider does not render any technical services either to the Interconnection Seeker or to the Subscriber of the services, that just because technical equipment/gadgets were used in the transmission process would not make the contract/connect towards rendering / availing technical services. However, the AO held that the DATA link charges was the fee paid for technical services rendered by the service provider and the assessee should have deducted tax at source under the provisions of section 194J of the Act. The matter travelled to the Tribunal and it decided the issue as under:

"15. We have heard the rival contentions and perused the record. The assessee was engaged in software development, software export and allied activities. TDS Survey under section 133A of the Act was conducted on the premises of the assessee on 13.01.2009. The assessee was found to have made payments against DATA link charges to various telecom service providers. The ACIT-TDS was of the view that the assessee was liable to deduct tax at source out of such DATA link charges paid to various telecom service providers being professional services provided by the said service providers, in view of section 194J of the Act. The explanation of the assessee in this regard was that the said payments for DATA link charges were paid for using standard facilities provided by the service providers by using technical gadgets, which were made available universally to the others by way of the DATA link satellite line, which was established from one service provider to be carried over to the other service provider. In order to provide efficient and flawless services to the subscribers, the existing service providers provide interconnection of their networks through equipment of their networks to the equipments of other service providers. The connection is used for the transmission of DATA from one service provider to the designated client server and there was no human intervention for the transmission of the DATA.
16. On the perusal of the record, it transpires that facilities were provided by two entities i.e. the assessee and the service providers, who were linked to each other through the DATA link and for facilitating the arrangement, one service provider used the network element of other service provider to provide services to the ultimate customers. The issue which arises in the present appeal is whether such providing of

services is covered under section 194J of the Act being technical or professional services provided by the service provider.

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25. Now coming to the facts and circumstances of the present case, the assessee had furnished the explanation before the Assessing Officer and also filed written submissions before the CIT(A) vide letter dated 01.04.2013 along with Flow chart / Diagram of how the DATA links works which is placed at pages 24 to 26 of the Paper Book. The assessee also placed on record the sample copies of purchase orders at pages 27 onwards under which, it was explained that the perusal of the bills would reflect the basis of charges, rates, etc. which were fixed / agreed upon and finally billed by the DATA link providers and it was vehemently stated that the same does in no way indicate involvement or otherwise of human intervention in the DATA link process. In view thereof, in the absence of any human intervention between the assessee and the services provided by the DATA link provider, it cannot be said that the payment made by the assessee was for technical services. Merely because for maintenance purpose certain human intervention was provided, cannot lead to the surmise that the DATA link charges paid to various telecom service providers, were in the nature of technical services governed by the provisions of section 194J of the Act. The DATA link charges were paid for utilizing the standard facilities which were provided by the individual service providers by way of use of technical gadgets which were made available vide DATA link satellite link line established from one service provider to be carried over to the other service provider, does not involve technical services as there was only interconnection of the networks to the equipments of other service providers. In the absence of any human intervention for transmitting the DATA through such DATA link satellite link line, the payments made for utilizing such services was not in the nature of technical services governed by section 194J of the Act. Accordingly, we reverse the finding of CIT(A) in this regard and hold that DATA link charges of Rs.8,32,46,468/- were not liable for tax deduction at source under the provisions of section 194J of the Act."

We find that while deciding the appeal the Tribunal had considered all the cases that were available at time and were dealing with the identical issue. So, respectfully following the above order of the Tribunal, we decided ground no.1 in favour of the assessee."

6. Learned DR fairly conceded that issue is covered by the order of the Tribunal in assessee's own case. As the facts and circumstances during the year under consideration are *parameteria* and the disallowance has been made on the same basis as made in the A.Y.2010-11, therefore,

respectfully following the order of the Tribunal in assessee's own case for the A.Y.2010-11, we do not find any merit for the disallowance so made.

7. Ground No.2 has become infructuous, as we have already decided Ground No.1 in favour of the assessee.

8. Next grievance of assessee relates to disallowance of net enhancement and customization expenses (after allowing depreciation at the rate of 60%).

9. By the impugned order, CIT(A) confirmed the action of the AO.

10. We have considered rival contentions and carefully gone through the orders of the authorities below. As per our considered view, as technology keeps evolving, no enduring benefit arises and thus payments made for application software are revenue in nature. For this purpose, reliance may be placed on the following judicial pronouncements:-

- *CIT v. Raychem RPG Ltd. (346 ITR UNHM-HM)*
- *CIT v. Geoffrey Manners & Co. Lid. (226 Taxman135) (Bom.)*
- *CIT v. UHDE India (P.) Ltd. (224 Taxman 137(Bom.)*
- *Amway India Enterprises v. Dy. CIT (111 ITD 112(Del Trib) (SB) affirmed in n CIT v. Amway India Enterprises (346 ITR 341(Del HC ')*
- *CIT v. Voith Paper Fabrics India Ltd. (.346 ITR 70)(P&H)*
- *CIT v. Asahi India Safety Glass Ltd. (203 Taxman 277) (Delhi HC)*
- *CIT v. Varinder Agro Chemicals Lid. (309 ITR 272) (P & H)*

11. In the following judicial pronouncements, it has been held that updation / modification for improving the operational efficiency are revenue in nature.

- *CIT v. Raychem RPG Ltd. (346 ITR 138) (Bom.)*
- *Amway India Enterprises v. Dy. CIT (111 ITD 112 (Del Trib) (SB) affirmed in CIT v. Amway India Enterprises (346 ITR 341) (Del HC)*
- *CIT v, N. J. Invest ((P.) Ltd. (215 Taxnmn 78)(Guj)*

- *ACIT v. Sanghvi Savla Stock Brokers Ltd.(152 ITD 820) (Mum.)*
- *ACIT v. M/s. Maersk India Pvt. Ltd (ITA No.3072/Mum/2013)*
- *Clariant Chemicals (I) Ltd. v. Addnl CIT (152 ITD 191) (Mum)*
- *DCIT v. Eicher Motors Ltd, 67 SOT 306 (Del T)*
- *Eimco Elecon (India) Ltd. v. ACIT 58 SOT 14 (Ahm)*

12. In view of the above discussion, we do not find any merit for the disallowance of net enhancement and customization expenses.

13. Next grievance of assessee relates to disallowance of net repairs and maintenance expenses after allowing depreciation at the rate of 10%.

14. By the impugned order, CIT(A) confirmed the action of the AO.

15. We have considered rival contentions and carefully gone through the orders of the authorities below. After going through the nature of expenditure incurred on repairs and maintenance, we found that same is revenue in nature. Principle has been laid down in the following judicial pronouncements for determining the nature of expenditure as capital and revenue.

- *Empire jute Co. Ltd. v.CIT (124 ITR 1(1980) (SC)*
- *CIT vs. Mahalakshmi Textiles Mills Limited (66 ITR 710)(SC)*
- *CIT V. Chowgule and Co. Pvt. Lid. (214 ITR 523) (Bom)*
- *New Shorrock Spg. & Mfg. Co. Ltd, v. CIT (1956) (30 ITR 338) (Bom)*
- *PCIT v. Sesa Resources Ltd. (250 Taxman 182) (Bom)*
- *CIT vs. Southern Roadways Ltd. (304 ITR 84(Mad)(HC)*
- *Commissioner of Income-tax vs. MAC Charles (India) Lid. (60 taxmann.com 68) (Kar)*
- *M/s. Sprang & Associates v. DCIT (ITA No. 31/Mum/2016)*
- *Am way India Enterprises v. DCIT 27 SOT 344 (Del Trib)*

16. Even decision with regard to treating the expenditure incurred in a lease property to be treated as revenue expenditure is also supported by the following judicial pronouncements.

- *Commissioner of Income-tax vs. Hi Line Pens (P.) Ltd. (306 ITR 182) (Delhi HC)*
- *CIT v. Anush Shares and Securities (P) Ltd., 62 mxrnann.com 287) [Mad.)*
- *Deputy Commissioner of Income-tax vs. Lazard India (P.) Ltd. (41 SOT 72) (Mum.)*
- *Deputy Commissioner of Income-tax vs. Ikea Trading (India) (P.) Ltd. (82 (Del Trib.)*

17. In view of the above, we do not find any merit for the disallowance so made by the AO on account of repairs and maintenance.

18. Grievance of the Revenue relates to deleting disallowance made on account of lease rent expenses amounting to Rs.1,13,02,061/-, the disallowance so made by the AO has been deleted by CIT(A).

19. We have considered rival contentions and found that the issue is squarely covered by the order of the Tribunal in assessee's own case for the A.Y.2010-11, the order dated 19/02/2016, observation of the Tribunal was as under:-

> *9.We find that the AO had made the disallowance as he was of the opinion that it was a prepaid expense and that it could not be claimed during the year under appeal, that the assessee had claimed the expenditure as per the provisions of AS-19, that the agreement entered into by the assessee was in the nature of operating lease as defined in AS-19, as per the accounting standard in such cases the payments have to be considered as an item of P&L account on a straight line basis over the lease period. The FAA had given a categorical finding of fact that the provision of Rs.1.08 crores was in respect of the liability that had accrued during the FY 2009-10.We are of the opinion that, by following AS-19 the assessee has complied with the provisions of the Act, that AS-19 provides that in case of operating leases, the lease rent payment has to be treated as an allowable expenditure. Therefore, in our opinion, the order of the FAA does not require any interference from our side.*
> *As a result, appeal filed by the AO stands dismissed and the appeal filed by the assessee stands partly allowed.*

20. As the facts and circumstances during the year under consideration are same, respectfully following the order of the Tribunal in assessee's own case, we do not find any reason to interfere in the order of CIT(A) for deleting the disallowance.

21. In the result, appeal of the assessee is allowed in terms indicated hereinabove whereas appeal of the Revenue is dismissed.

Order pronounced in the open court on this 16/04/2018

Sd/-	**Sd/-**
(SANDEEP GOSAIN)	**(R.C.SHARMA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 16/04/2018
Karuna Sr.PS

Copy of the Order forwarded to :

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

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai