

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD “SMC” BENCH
(Conducted Through Virtual Court)
Before: Shri Mahavir Prasad, Judicial Member
And Shri Amarjit Singh, Accountant Member

ITA No. 197/Ahd/2019
Assessment Year 2015-16

Karnavati Engineering Ltd. 708, Sarkhej Dhokla Road, Bhat, Ahmedabad-382210 PAN: AAACK6047Q (Appellant)	Vs	The ACIT, Circle-2(1)(2), Ahmedabad (Respondent)
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Revenue by: Shri S.S. Shukla, Sr. D.R.
Assessee by: Ms. Urvashi Shodhan, A.R.

Date of hearing : 04-08-2021
Date of pronouncement : 23-08-2021

आदेश/ORDER

PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-

This assessee’s appeal for A.Y. 2015-16, arises from order of the CIT(A)-02, Ahmedabad dated 22-11-2018, in proceedings under section 143(3) of the Income Tax Act, 1961; in short “the Act”.

2. The assessee has raised following grounds of appeal:-

- “1. The Ld. CIT (A) erred in law and on facts in confirming addition of Rs.5,42,751/- in respect of commission expenses payable to non-resident foreign agent for the reason that appellant has made a provision for commission and actual payment has not been made in subsequent year.*
- 2. The Ld. CIT (A) ought to have appreciated that the Appellant has incurred the commission expenses during the previous year relevant to the assessment year 2015-16.*

3. *The Ld. CIT (A) erred in law and on facts in confirming addition u/s 36(l)(iii) of the Act of Rs.23, 13,140/- in respect of proportionate interest on capital advances.*
4. *The Ld. CIT (A) ought to have appreciated the nature and the commercial expediency of the capital advance made.*
5. *The Ld. CIT (A) erred in law and on facts in confirming addition u/s. 36(l)(va) r.w.s 2(24)(x) of the Act of Rs. 5,23,396/- in respect of employees contribution to PF and ESIC which has been remitted in the same financial year.”*

3. The brief fact of the case is that return of income declaring total income of Rs. Nil was filed on 30th Nov, 2015. The case was subject to scrutiny assessment and notice u/s. 143(2) of the act was issued on 12th April, 2016. Further facts of the case relating to issues contested in the instant appeal are discussed while adjudicating the grounds of appeal of the assessee as follow:-

Ground Nos. 1 & 2 (confirming addition of Rs. 5,42,751/- in respect of commission expenses)

4. During the course of assessment, the Assessing Officer noticed that assessee has debited commission expenditure to the amount of Rs. 48,57,000/- in the profit and loss account. The Assessing Officer made disallowance of expenses on account of export commission to the amount of Rs. 23,84,170/- on the ground that it has not deducted tax on the aforesaid foreign commission payment. The Assessing Officer stated that assessee has not proved the identity of the commission agent as no copy of agreement executed between the foreign agent and the assessee has been furnished. The Assessing Officer also pointed out that assessee has failed to substantiate the rendering of services by the commission agents with supporting evidences.

5. The assessee has filed appeal before the Id. CIT(A). The Id. CIT(A) has restricted the disallowance to the extent of Rs. 5,42,751/-. The relevant of the decision of the Id. CIT(A) is reproduced as under:-

“Decision:

3.3. I have carefully considered the facts of the case, assessment order and submission of the appellant. The AO has made the disallowance of export commission of Rs.23,84,170/- on the ground that appellant has not been able to prove the identity of the commission agents as no copy of agreement executed between the foreign agents and the assessee has been furnished and no proof of rendering the services on the basis of commission has been paid been provided. The AO without prejudice has also disallowed the above expenditure as the IDS has not been deducted on the above foreign commission.

3.4. The appellant has submitted that it has submitted before the AO all copies of invoices of export commission, lax residency certificate of non resident received along with copy of Form 15CA & 15CB to establish the genuineness of expenditure wherever it was available and that appellant is not required to deduct IDS on the foreign commission as services were rendered outside India and the commission agents did not had PE in India. Appellant has further submitted that CIT(A) in the earlier assessment year has allowed such disallowances made by the AO.

3.5. It is evident from the detail of export commission submitted that appellant has claimed export sales commission of Rs.23,84,170/-. Out of the above commission, appellant has paid commission of Rs.1,94,464/- in respect of Egyptian Promotion and Rs.6,38,085/- in respect of Sigma K. Appellant has submitted copy of 15CA & 15CB, debit note and certificate of no PE. Therefore, the commission to above parties appears to be genuine and no IDS is required to be made. In respect of balance of commission, appellant has made the provision for commission on the basis, of sales made during the year, but the payment has not been made in the current year. Appellant has contended that provision has been made as per the past experience as sales have been effected during the year and commission has been paid in subsequent years. Appellant in respect of commission of Rs.4,73,500/- from Sharhe Sadar, Rs.49,774/- in respect of Egyptian Promotion and Rs.4,06,445/- in respect of System Engineering has submitted the copy of debit note, 15CA & 15CB and no PE certificate for which payment has been made in subsequent year. As appellant has made the provision on the safe effected during the year and payment has been subsequently made and these parties have no PE in India and services have been rendered outside India, no disallowance is called for in respect of above parties. As regard to commission payment in respect of Rs.1,03,400/- from Anurag Khunteta appellant has submitted copy of Form 16A showing that the TDS has already been deducted. Therefore, no disallowance is called for in respect of above party. As regard to provision of sale commission of Rs.2,00,000/- in respect of Sahare Sadar and Rs.3,42,751/- in respect of Arab country trading company, provision has been made on 3170372015 and payment has not been made yet. Appellant has not submitted any document in the form of debit note, Form 15CA & 15CB in support of its contention that services have been rendered and the payment has not been made even after more than three years, the disallowance of sale commission is upheld. In view of the above, disallowance to the extent of Rs.5,42,751/- is upheld. Relief is granted for the balance disallowance. The ground of appeal is accordingly **partly allowed.**”

6. During the course of appellate proceedings before us, the Id. counsel submitted that identical issue on similar fact has been adjudicated against the assessee by the Co-ordinate Bench of the Ahmedabad vide ITA No.

830/Ahd/2018 assessment year 2013-14. The ld. counsel Departmental Representative has submitted that this issue has been decided in favour of the revenue by the above referred decision of the ITAT.

7. Heard both the sides and perused the material on record. Without reiterating the facts, we have gone through the decision of the Co-ordinate Bench of the ITAT as referred above. The relevant part of the decision of the ITAT is reproduced as under:-

“8. We have heard the rival contentions of both the parties and perused the materials available on record. In the present case the assessee has claimed deduction on account of commission paid to the overseas parties on the export sales amounting to Rs. 29,61,337/- only. But the same was disallowed by the AO on account of two reasons. Firstly, the assessee failed to furnish the documentary evidences such as the identity of the party, the services rendered by such parties, details of the exports made by it through the commission agents. Thus the genuineness of the transaction was doubted. Secondly, the assessee failed to deduct the TDS under section 195 read with section 40(a)(i) of the Act.

8.1 However, the learned CIT (A) was pleased to hold that the provisions of TDS are not applicable with respect to the commission paid to the overseas parties. Besides this the assessee furnishes the necessary details to justify that the export commission was genuine in support of its claim. Accordingly the learned CIT (A) deleted the addition made by the AO for a sum of Rs. 23,85,408.00 out of the total addition of Rs. 29,61,337.00 made by the AO. In other words the balance amount of Rs. 5,75,929.00 was confirmed by the learned CIT (A) on the reasoning that the assessee failed to furnish the details of the parties and the services rendered by such parties.

8.2 Nevertheless, the learned AR before us at the time of hearing requested to restore the matter to the file of the AO and assured to file the requisite details in support of the claim of the assessee. However we find that the matter before us pertains to the assessment year 2013-14 which was decided by the AO dated 29 December 2015 and subsequently the learned CIT (A) has passed the order dated 17th February 2016. The assessee before the authorities below failed to furnish the details of the parties despite having several opportunities. Even now before us the matter has been listed 16 times prior to the present date of hearing but the assessee has not brought anything on record about the details of such parties after filing the appeal on 4th April 2018. Thus it is transpired that it is very unlikely that the assessee shall be in a position to furnish the necessary details. Accordingly, we are not inclined to give fresh opportunity to the assessee by restoring the matter to the file of the AO as prayed by the learned AR for the assessee. Accordingly, without going into the merit of the case, the ground of appeal of the assessee, in the absence of documentary evidence as discussed above, is hereby dismissed.”

8. On similar facts as elaborated above in the findings of the ITAT for the A.Y. 2013-14 the ld. CIT(A) has sustained the disallowance to the extent of Rs. 5,42,751/- during the year under consideration since the assessee has

failed to submit the supporting relevant detail to substantiate the genuineness of the commission payment. Therefore, respectfully following the decision of the ITAT Ahmedabad in the case of the assessee itself for assessment year 2013-14 as elaborated above, this ground of appeal of the assessee is dismissed.

Ground Nos. 3 & 5 (confirming addition u/s. 36(1)(iii) of Rs. 23,13,140/- in respect of proportionate interest on capital advances)

9. During the course of assessment, the Assessing Officer noticed that assessee has shown capital advances of Rs. 1,92,76,000/- under the head long term loan and advances. On verification of the detail, the Assessing Officer observed that assessee has paid advances on various dates towards purchase of intangible assets to H.L. Pharma Co Korea. On perusal of the profit and loss account, the Assessing Officer noticed that assessee has made interest payment of Rs. 46,48,000/- on the loan and advances acquired by the assessee company. The Assessing Officer was of the view that assessee has obtained substantial loans from banks and financial institutions and was paying substantial interest on the loan. But it has not received intangible assets during the financial year relevant to the assessment year under consideration. On query, the assessee explained that advances were made out of interest free funds only and no disallowance u/s. 36(1)(iii) should be made. The assessee has made detailed explanation along with judicial pronouncement mentioned at page nos. 8 to 10 of the assessment order. The Assessing Officer has not accepted the submission of the assessee stating that assessee has not given any cash flow statement to ascertain that the advances were given out of interest free funds. Therefore, the Assessing

Officer has capitalized proportionate interest paid @ 12% amounting to Rs. 23,13,140/- on the advances given for intangible assets to H.L. Pharmaceutical South Korea and added to the total income of the assessee.

10. Aggrieved assessee has filed appeal before the Id. CIT(A). The Id. CIT(A) has dismissed the appeal of the assessee. The relevant part of the decision of the Id. CIT(A) is reproduced as under:-

“4.3. I have carefully considered the facts of the case, assessment order and submission of the appellant. The AO has made disallowance of Rs.23,13,140/- u/s. 36(l)(iii) on the interest free advance of Rs. 1,92,76,000/- of M/s. H. L Pharma Co., Korea. The appellant has submitted that the capital advance of Rs. 1,92,76,000/- was made to M/s. H. L. Pharma Co. against the purchase of technical know how for business purpose and out of own fund, therefore, provision ejection 36(l)(iii) is not applicable. The appellant 'has submitted that advance was given to H.L. Pharma for the purpose of acquiring technical know how in order to enable the applicant to manufacture machinery and sell them in domestic and international market. As these advances were provided exclusively for business purpose only and on commercial expediency, no disallowance u/s. 36(l)(iii) is to be made.

*4.4. On perusal of balance sheet, it is seen that capital advance of Rs.1.92 crore has been made in F.Y. 2012-13 and the AO had made disallowances u/s. 36(l)(iii) in respect of above advance. The CIT(A) after considering the appellant's argument has confirmed the disallowances in the preceding years. The CIT(A) has held that the appellant did not have sufficient fund to make capital advance of Rs.1.92 crore in F.Y. 2012-13. It is also seen that the intangible asset for which advance has been given has not been acquired even by now. In view of the above and considering the order of CIT(A) in preceding years disallowance made by AO is **confirmed.**”*

11. During the course of appellate proceedings before us, the Id. counsel contended that similar issue on identical facts in the case of the assessee itself vide ITA No. 830-831/Ahd/2018 dated 18-06-2 has been adjudicated in favour of the assessee. On the other hand, the Id. Departmental Representative could not prove contrary to the submission of the assessee that issue is covered in favour of the assessee by the above referred decision of the ITAT Ahmedabad.

12. Heard both the sides and perused the material on record. Without reiterating the facts as mentioned above, with the assistance of Id.

representatives, we have gone through the decision of the Co-ordinate Bench of the ITAT vide ITA No. 830-831/Ahd/2018 dated 18-06-2001 in the case of assessee itself. The relevant part of the decision is reproduced as under:-

"15. We have heard the rival contentions of both the parties and perused the materials available on record. The assessee in the case on hand claimed to have made advances to M/s HL Pharma Co., Korea for acquiring the technical know-how and thus such advance represents the payment for the business exigency. Accordingly the assessee claimed that there cannot be any disallowance of the amount of proportionate interest attributable to such advances. However, the AO disregarded the contention of the assessee by observing that the assessee on one hand is bearing interest expenses on the borrowed fund and on the other hand it has provided interest-free advances to the company for acquiring the technical know-how. Accordingly the AO was of the view that the proportionate amount of interest for Rs.6,85,804/- should be capitalized as the same is attributable to capital asset. The view taken by the AO was subsequently confirmed by the learned CIT (A).

15.1 Before we touch upon the issue raised by the authorities below, it is pertinent to note that the own fund (Rs. 3,91,81,000.00) of the assessee exceeds the amount of advances. This fact can be verified from the audited financial statement which is available on pages 10 of the paper book. Besides the above, it is also significant to note that the assessee has shown receipt of interest free loans and advances amounting to Rs. 3,10,00,000.00 which can be verified from the financial statements placed on 15 of the paper book. Thus the own fund of the assessee along with the interest free loans received by it aggregates to a sum of Rs. 7,01,81,000.00 which is in excess of the advance given to the party for an amount of Rs. 1,92,76,148.00 only. Accordingly a presumption can be drawn that the own fund of the assessee has been used for advancing money to the party as discussed above for acquiring the technical know-how. In other words, the borrowed fund has not been used for advancing the sum of Rs. 1,92,76,148.00 to the party.

15.2 In holding so we draw support and guidance from the judgment of Hon'ble jurisdictional High court in the case of CIT vs. Torrent Power Ltd reported in 363 ITR 474 where the head note reads as under:

"It was noted from records that the assessee was having share holding funds to the extent of 2607.18 crores and the investment made by it was to the extent of Rs.195.10 crores. In other words, the assessee had sufficient funds for making the investments and it had not used the borrowed funds for such purpose. This aspect of huge surplus funds is not disputed by the revenue which earned it the interest on bonds and dividend income. [Para 7]"

15.3 In view of the above, it can be concluded that the assessee has not utilized the borrowed fund for making the advance to the party as discussed above. Thus the question of capitalizing the element of interest attributable on the advances given by the assessee for acquiring the technical know-how does not arise. Hence the ground of appeal of the assessee is allowed.

*15.4 In the result the appeal filed by the assessee is **partly allowed.**"*

It is clear from the facts reported in the findings of the Id. CIT(A) as elaborated above in this order that assessee has made capital advance of Rs. 1,92,76,000/- to M/s. H.L. Pharma Company for purchase of technical know-how in the financial year 2012-13 relevant to the assessment year 2013-14. The Co-ordinate Bench of the ITAT vide ITA No. vide ITA No. 830-831/Ahd/2018 dated 18-06-2 has adjudicated the issue in favour of the assessee as per the decision referred above. The Co-ordinate Bench of the ITAT has adjudicated vide above referred decision that the impugned advance was made out of the interest free fund and no borrowed fund has been used therefore respectfully following the decision of Co-ordinate Bench as supra we are not inclined with the decision of the Id. CIT(A). Accordingly, the appeal of the assessee on this issue is allowed.

Ground No. 5 (Addition of Rs. 5,23,396/- in respect of employees' contribution to Provident Fund)

13. During the course of assessment, the Assessing Officer noticed that assessee has made late payment of employees' contribution towards provident fund to the amount of Rs. 5,23,396/-. The Assessing Officer has disallowed the same after referring the provision of section 36(1)(va) r.w.s. 2(24)(x) that the deduction from employees' contribution is allowable only if such sum is credited by employer (assessee) to the employee's account in the relevant fund or funds before the due date.

14. Aggrieved assessee has filed appeal before the Id. CIT(A). The Id. CIT(A) has dismissed the appeal of the assessee.

15. Heard both the sides and perused the material on record. The Assessing Officer has made disallowance for the reason that employee's contribution to P.F. amounting to Rs. 5,23,396/- to Provident Fund was not paid within the due dates specified u/s. 36(i)(va) of the I.T. Act, therefore, the same was treated as income as per the provisions of sub-clause (x) of clause (24) of section 2 of the act. The Hon'ble Jurisdictional High Court of Gujarat in the case of Gujarat Road Transport Corporation (2014) 41 taxman.com 100 (Guj) held that assessee is entitled for the deduction only if the amount is credited to the relevant funds before the due date, therefore, respectfully following the decision of the Hon'ble Gujarat High Court as referred above, we do not find any infirmity in the decision of the Ld. CIT(A). Therefore, this ground of appeal of the assessee is dismissed.

16. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 23-08-2021

Sd/-
(MAHAVIR PRASAD)
JUDICIAL MEMBER
Ahmedabad : Dated 23/08/2021

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद