

THE INCOME TAX APPELLATE TRIBUNAL
“E” Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Pavan Kumar Gadale (JM)

I.T.A. No. 6283/Mum/2019 (Assessment Year 2011-12)

Transtonnellstory Afcons Joint Venture 16, Afcons House, Shah Industrial Estate, Veera Desai Road, Andheri(W) Mumbai-400 053 PAN : AACAT0119N	Vs.	DCIT-25(1) [Earlier JCIT-20(3)] Room No.202, 2 nd Floor, Kautilya Bhawan, BKC Bandra(East) Mumbai-400 051
(Appellant)		(Respondent)

Assessee by	Shri J.D.Mistry
Department by	Vijay Kumar Menon
Date of Hearing	04.05.2021
Date of Pronouncement	01.07.2021

O R D E R

Per Shamim Yahya (AM) :-

This appeal by the Assessee is directed against the order of learned CIT(A)-53 dated 12.04.2019 and pertains to Assessment Year 2011-12.

2. The grounds of appeal read as under :

1. On the facts and circumstances of the case and in law, the Ld.CIT(A) erred in not condoning the delay in filing of appeal.
2. Without prejudice, the Ld.CIT(A) erred in not adjudicating the case of the appellant on merits.

3. The assessee has also filed following additional grounds read as under:-

1:0 Re.: Short credit for tax deducted at source amounting to Rs. 86,38,553/-:

1 : 1 The Assessing Officer has erred in not granting (short) credit for tax deducted at source to the extent of Rs. 86,38,553/- .

1 : 2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject it is entitled to a total tax credit of Rs. 2,66,51,427/-being the total tax deducted at source as against Rs. 1,80,12,874/-

granted by the Assessing Officer and the Commissioner of Income-tax (Appeals) ought to have held as such.

1 : 3 The Appellant submits that it ought to be granted credit for tax deducted at source on the mobilization advance received by it and the stand taken by the Assessing Officer in this regard is incorrect.

1 : 4 The Appellant submits that the Assessing Officer be directed to grant full credit for tax deducted at source and to re-compute its tax liability accordingly.

2 : 0 Re.: General:

2 : 1 The Appellant craves leave to add, alter, amend, substitute and/or modify in any manner whatsoever all or any of the foregoing grounds of appeal at or before the hearing of the appeal.

4. Brief facts of the case are that the assessee is a Joint Venture (JV) assessed to tax in the status of Association of Persons. The assessee is engaged in the business of providing EPC services for complex infrastructure projects. The assessee is a JV between AFCONS Infrastructure Limited(AFCONS) and Transtonnelstory Ltd. for the purpose of submitting the bid in respect of the tenders and also for executing the contract. For this purpose, JV agreements were entered into which the AO examined.

Thereafter, he observed that the limited work was carried out by the assessee on Kolkata project. Further, the two contracts relating to Chennai Metro Rail Corporation Ltd. are awarded to the assessee at the far end of the year and therefore, very limited work was carried out by the assessee till 31 March 2011.

He further observed that for financial year 2010-11, the assessee has received mobilisation advance from Chennai Metro Rail Ltd. of Rs.97,41,76,875 on which tax of Rs.1,94,83,538 is deducted and the same is claimed as credit by the assessee. He noted that the assessee has relied on the following case laws to contend that

mobilisation advance is in the nature of loan for execution of the contract and it cannot be regarded as income received in advance.

Delhi Tribunal in the case of Five Star Construction P. Ltd. v. of Income tax - ITA No. 1861/Del/2011 dated 2 November 2012; Punjab and Haryana High Court decision in the case of Hindustan instruction Company Limited v. State of Haryana and Others - 109 STC 660.

Further, the assessee has relied on the following judicial precedents to contend that even though the assessee had not offered to tax the amount of income in his return of income, the credit for taxes deducted should be allowed to the assessee.

- Arvind Munjari Brands (P.) Ltd. v. ITO (2012) 21 taxmann.com 131 (Mum.);
- Escorts Ltd. v. DCIT (2007) 15 SOT 368 **(Del.)**;
- Supreme Renewable Energy Ltd. v. ITO (2010) 124 ITD 394 (Che.);
- Toyo Engg.India Ltd. v. Jt.CIT(2006) SOT616 (Mum.)

5. However, AO rejected the submissions and held as under:-

8. I have carefully considered the above submission of the assessee. The above judicial decisions are also considered by my predecessor in the assessment year 2010-11. After considering the facts of the case and going through the relevant contract between the assessee and the CMRL and other contractor it is evident that the assessee has arranged a equitable bank guarantee against the mobilization advance and the contractee would adjust the mobilization advance against work completed by the assessee from the bills raised by the assessee at a certain stage as agreed by the parties. Therefore/ the nature and character is not a loan even though the contract has specifically mentioned that the mobilization advanced was given as a loan. As such ,the amount received from CMRL is not a temporary loan but it is only mobilisation advance given on account of contractual obligations on the part of contractee. Accordingly, the credit for TDS claimed by the assessee is not allowed.

9. Further, the assessee has raised an alternative contention that the TDS credit should be allowed to the extent of revenue recognised in the books of accounts. After considering the facts and circumstanced of the case and going through the account of the assessee it is observed that the assessee has disclosed the amount of Rs 57.86 as a contractual revenue which is forming part of the account of the assessee

10. Accordingly, the total TDS credit of Rs.1,80,12,874 (1,08,44,985 + 5,70,814 + 65,97,075) is granted to the assessee based on the revenue recognised by the assessee during the financial year 2010-11 relevant to the assessment year 2011-12.

11. Further, the assessee has raised contention that the balance amount of TDS, not allowed in the assessment years 2010-11 and 2011-12 should be allowed to the assessee in the subsequent assessment "years in proportion to the revenue recognised by the assessee in subsequent assessment years.

12. Subject to the above remarks, the total income of the assessee for the financial year 2010-11 remains same at loss of Rs.1,07,91,655. Assessed accordingly u/s 143(3) of the Act. Give credit for taxes (including tax deducted at source) paid, if any after due verification. Grant interest u/s 244A as per the provisions of the I.T. Act. Issue R.O accordingly.

6. Upon assessee's appeal Ld. CIT(A) partly adjudicated and also dismissed the appeal in limine for non condonation of delay. He held as under:-

4.1." In this case, appeal has been filed on 31.12.2015, against the assessment order and demand notice served on 25.03.2014, as per the appellant. Along with the appeal memo in form 35, a letter has been filed by the appellant stating that due date of filing of appeal was 25.04.2014, but there was delay of 615 days. It was explained that the appellant is an Association of Persons, engaged in the business of providing EPC services for complex infrastructure projects. During the course of assessment, the appellant made various submissions before the AO. The AO noted that credit for TDS on mobilization has to be granted in the year of such deduction itself. This contention was not accepted by the AO. However, in the notice of demand, the tax payment was determined at Nil, though refund for entire TDS claim of the appellant was subsequently granted. On the above clear facts and circumstances of the case, the appeal for non-granting of credit for TDS on mobilization advanced, remain to be filed.

4.2. The appellant was given opportunity to substantiate why condonation of delay should not be denied. The appellant furnished submissions which were a repetition of the submissions made in the appeal memo. It was also stated that vide rectification order dated 14.10.2014, the AO withdrew the excess TDS granted, pursuant to order passed u/s 143(3) of the IT Act. On the advice of the counsel, in connection with the appeal of the assessee before the Hon'ble ITAT for AY 2010-11, wherein also identical issues are arisen, the appellant was advised to file appeal against the order passed u/s 143(3) of the IT Act. It was contended that delay should be condoned and liberal approach should be adopted in principle.

4.3. I have considered the explanation filed by the appellant carefully. It is noticed that in para 8 of the assessment order, the AO categorically stated that credit for TDS claimed by the appellant is not allowed for the reasons mentioned in earlier paras. The TDS credit was accorded based on the revenue recognized during the financial year. This issue has arisen in earlier years also, which has been disputed in appeal. Thus, the appellant was very much aware of the nature of the issue. The view taken by the AO was explicitly mentioned in the assessment order, and that in case appellant was to dispute the same, a proper appeal should have been filed. It is also noted that joint venture is engaged in the business of providing Engineering Procurement and Construction services for complex infrastructure projects, and has the services of well qualified professionals to advise regarding tax matters. It is difficult to believe that the appellant was not aware of the time limit for filing of appeal. In this case, the delay is not of a few days but is of two years. **The delay in filing of appeal is not condoned and appeal is not admitted.**

7. Against this order assessee is in appeal before us.

8. We have heard both the parties and perused the record. We note that the Ld.CIT(A) has not condoned the delay in filing of appeal of 615 days and dismissed the appeal in limine. We note that in original order u/s 143(3) dated 24.03.2014, AO has not allowed full TDS credit. However, subsequently vide rectification order dated 14.10.2014, AO further withdrew the TDS credit allowed. The Assessee pleaded before the Ld.CIT(A) that assessee did not file appeal before him against order dated 24.03.2014. But, after rectification order dated 14.10.2014 where AO withdrew further, the TDS credit, the assessee was advised to file appeal as similar matter was also in dispute for AY 2010-11 before ITAT.

9. The above reasonable cause for the delay 516 days was not accepted by Ld.CIT(A), who dismissed the appeal in limine, as he was of the opinion that assessee has consciously chosen not to file appeal against the order dated 24.03.2014.

10. In our considered opinion, the inference of Ld.CIT(A) is apparently correct that assessee has consciously chosen not to file appeal before Ld.CIT(A) against the order dated 24.03.2014. The plea before Ld.CIT(A) was that on advice of a counsel, the

appeal was filed as assessee was also contesting similar issues before ITAT for AY 2010-11. The assessee's plea for liberal approach was rejected by the Ld.CIT(A).

11. In our considered opinion, the assessee's plea of a liberal approach on the facts narrated above deserves to succeed. Accordingly, we direct that the delay be condoned and appeal admitted by Ld.CIT(A).

12. In this regard, we note that Ld. Counsel of the assessee has pleaded that since identical issue on merits was decided by ITAT, in earlier year this appeal on merits should also be decided in favour of the assessee also. In this regard, we note that after only applying a liberal approach, we have directed that the delay be condoned and appeal admitted by Ld.CIT(A), although, nowhere it has been pleaded that delay of 615 days was owing to wrong legal advice. In the interest of justice and fair play, the Ld.CIT(A) should have an opportunity to examine the order of AO for this year, in light of the ITAT order for AY 2010-11 and the assessee's submission thereon. This is more so when even the AO did not have the ITAT order before him to examine when he framed the assessment order. Accordingly, we remit the appeal on merits to file of Ld.CIT(A) after condoning the delay of 516 days, which was not condoned by the Ld.CIT(A). The additional ground referred by the assessee may also be considered by Ld.CIT(A). Needless to add, in deciding the appeal on merits, the Ld.CIT(A) should grant adequate opportunities of being heard to the assessee.

13. In the result, the assessee appeal is stands allowed for statistical purpose.

Pronounced in the open court on 01.07.2021

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 01/07/2021
Sr.PS. Thirumalesh

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai