IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : H : DELHI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

ITAs No.2475 & 2476/Del/2022
Assessment Years: 2013-14 & 2014-15

HT Mobile Solutions Limited (Amalgamating Company of Firefly E Ventures Limited), 18-20, Kasturba Gandhi Marg, New Delhi – 110 001.	Vs	JCIT (OSD), Circle-74(1), New Delhi.
PAN: AAFCM1042C		
(Appellant)		(Respondent)

Assessee by	:	Shri Mayank Mohanka, FCA
Revenue by	:	Ms Princy Singhla, Sr. DR
Date of Hearing	:	11.05.2023
Date of Pronouncement	:	22.05.2023

ORDER

PER M. BALAGANESH, AM:

These appeals in ITAs No.2475 & 2476/Del/2022 for AYs 2013-14 & 2014-15 arise out of the order of the Commissioner of Income Tax (Appeals), NFAC, Delhi [hereinafter referred to as 'ld. CIT(A)', in short] in DIN & Order No.ITBA/NFAC/S/250/2022-23/1044618450(1) & in DIN & Order No.ITBA/NFAC/S/250/2022-23/1044620237(1), respectively, dated 11.08.2022 against the orders of assessment passed u/s 201(1)/201(1A) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 18.03.2021 by the ld. Assessing Officer, Circle-74(1), New Delhi (hereinafter referred to as 'ld. AO').

2. Identical issues are involved in both these appeals, hence, they are taken up together and disposed of by this common order for the sake of convenience.

3. Let us take up the appeal for the AY 2013-14 first. The only effective issue to be decided in the appeal for AY 2013-14 is as to whether the assessee could be treated as an 'assessee in default' within the meaning of section 201(1) of the Act and consequentially liable for interest u/s 201(1A) of the Act, in respect of non-deduction of tax at source on provision for expenses made at the end of the year, falling within the ambit of provisions of sections 194C, 194I and 194J of the Act.

4. We have heard the rival submissions and perused the material available on record. The case of the Revenue is that the assessee had made year-end provisions for expenses amounting to Rs.86,12,471/- on which tax was not deducted at source. The assessee was treated as 'assessee in default' in the sum of Rs.8,61,247/- u/s 201(1) of the Act and interest of Rs.8,00.548/- u/s 201(1A) of the Act. The ld. AO observed that the provision had been made on ad hoc basis in respect of various expenditures by the assessee. On the contrary, the assessee's case is that payees of these expenses are not identifiable and, hence, tax could not be deducted at source. The assessee also submitted that invoices for these expenses were received by the assessee company in the next financial year with the date falling in next financial year. Hence, these year-end provisions made by the assessee were reversed by the assessee in the next financial year and expenses were booked on receipt of invoices and at which point in time, tax had been duly deducted at source and remitted to the account of the Central Government. In respect of this year-end provision, the assessee had *suo moto* disallowed the expenses in the computation of its income. In these facts and circumstances, it was pleaded that the assessee could not be treated as 'assessee in default' u/s 201(1) of the Act and consequentially no interest could be levied u/s 201(1A) of the Act.

5. We find that the demand has been raised on the assessee treating it as an 'assessee in default' for the following expenses:-

Nature of Expenses	Section under which tax deductible	Amount of Provision made	Amount of tax deductible
Advertisement and sales promotion exp.	194J	45,94,057	4,59,406
Legal and professional fee	194J	3,59,400 (5,00,000 – 1,40,600)	35,940
Interest on loan	194A	36,59,014	3,65,901
Total		86,12,471	8,61,247

6. The assessee had stated that it had been regularly following the practice of making provisions for expenses for which parties are not identifiable or amounts payable were not identifiable or bills have not been received or the same have not been processed for payment/credit to the accounts of the payees, based on Accounting Standards-29 "Provisions, Contingent Liabilities & Contingent Assets" issued by the Institute of Chartered Accountants of India (ICAI) while finalizing books of account. It is a fact on record that such provisions were made in view of accrual method of accounting followed by the assessee and the same were reversed in the books of account on the first day of the immediately succeeding year. It is not in dispute that as and when the invoices are received by the assessee in the succeeding year with date of invoice falling in the succeeding year, the same are processed for payment wherein due deduction of tax at source have been made and remitted to the account of the Central Government within the prescribed time. We find that this is a consistent practice followed by the assessee on year-to-year basis. The fact of reversal of these expenses in the succeeding year are enclosed in pages 23 to 29 of the paper book. This is not disputed by the revenue before us. The fact of the assessee deducting the tax at source in the succeeding year and remitting the same to the account of the Central Government on 02.05.2013, 30.05.2013,

05.07.2013 and 06.09.2013 are enclosed are enclosed in pages 33-37 of the paper book. We find that the issue in dispute is no longer res integra in view of the decision of the Hon'ble jurisdictional High Court in the case of UCO Bank vs. Union of India reported in 369 ITR 335 wherein it was held as under:-

> ***18**. In terms of Section 194A of the Act, the petitioner would, in the normal course, be obliged to deduct tax at source in respect of any credit or payment of interest on deposits made with it. However, in the present case, the question that needs to be addressed is whether Section 194A of the Act contemplates deduction of tax in a situation where the assessee is not ascertainable and the person in whose name the interest is credited is also, admittedly, not a person liable to pay tax under the Act.*
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> ***19.** The Registrar General of this Court is, clearly, not the recipient of the income represented by interest that accrues on the deposits made in his/her name. The Registrar General is also not an assessee in respect of the deposits made with the petitioner bank pursuant to the orders of this Court. The deposits kept with the petitioner bank under the orders of this Court are, essentially, funds which are custodia legis, that is, funds in the custody of this Court. The interest on that account – although credited in the name of the Registrar General - are also funds that remain under the custody of this Court. **The credit of interest to such account is, thus, not a credit to an account of a person who is liable to be assessed to tax. In this view, the petitioner would have no obligation to deduct tax, because at the time of credit there is no person assessable in respect of that income which may be represented by the interest accrued/paid in respect of the deposits**. The words "credit of such income to the account of the payee" occurring in Section 194A of the Act have to be ascribed a meaning in conformity with the scheme of the Act and that would necessarily imply that deduction of tax bears nexus with the income of an assessee.*
>
> ***20**. **In absence of an assessee, the machinery of provisions for deduction of tax to his credit are ineffective. The expression "payee" under Section 194A of the Act would mean the recipient of the income whose account is maintained by the person paying interest. In the present case, although the FD is made in the name of the Registrar General, the account represents funds which are in custody of this Court and the Registrar General is neither the recipient of the amount credited to that account nor the interest accruing thereon. Therefore, the Registrar General cannot be considered as a "payee" for the purposes of Section 194A of the Act. The credit by the petitioner bank in the name of the Registrar General would, thus, not attract the provisions of Section 194A of the Act. Although, Section 190(1) of the Act clarifies that deduction of tax can be made prior to the assessment year of regular assessment, nonetheless the same would not imply that deduction of tax is mandatory even where it is known that the payee is not the assessee and there is no other assessee.***
>
> ***21. It is relevant to note that there is no assessee to whom interest income from the deposits in question can be ascribed; no person can file a return claiming the interest payable by the petitioner as income. The necessary implication of this situation is recovery of tax without the corresponding income being assessed in the hands of any assessee. The ultimate recipient of the funds from the FD would also not be able to avail of the credit of TDS. It is apparent that in absence of an ascertainable assessee the machinery of recovering tax by deduction of tax at source breaks down because it does not aid the charge***

of tax under Section 4 of the Act but takes a form of a separate levy, independent of other provisions of the Act. This is, clearly, impermissible.

22*. The impugned circular proceeds on an assumption that the litigant depositing the money is the account holder with the petitioner bank and/or is the recipient of the income represented by the interest accruing thereon. This assumption is fundamentally erroneous as the litigant who is asked to deposit the money in Court ceases to have any control or proprietary right over those funds. The amount deposited vests with the Court and the depositor ceases to exercise any dominion over those funds. It is also not necessary that the litigant who deposits the money would be the ultimate recipient of those funds. As indicated earlier, the person who is ultimately granted the funds would be determined by orders that may be passed subsequently. And at that stage, undisputedly, tax would be required to be deducted at source to the credit of the recipient. However, the litigant who deposits the funds cannot be stated to be the recipient of income for the reasons stated above.*

23*. Deducting tax in the name of the litigant who deposits the funds with this Court would also create another anomaly because the amount deducted would necessarily lie to his credit with the income tax authorities. In other words, the tax deducted at source would reflect as a tax paid by that litigant/depositor. He, thus, would be entitled to claim credit in his return of income. The implications of this are that whereas this Court had removed the funds from the custody of a litigant/depositor by judicial orders, a part of the accretion thereon is received by him by way of Tax deducted at source. This is clearly impermissible because it would run contrary to the intent of judicial orders.*

24*. In the given circumstances, the writ petitions are allowed and the impugned notice dated 25.04.2012, the impugned circular bearing no. 8/2011 and the impugned order dated 10.03.2014 are set aside*

(emphasis supplied by us)

7. We find that in the absence of an ascertainable amount and identifiable payee, the machinery provisions of recovering tax deducted at source falls flat because in either way, it does not aid the charge of tax u/s 4 of the Act, but, takes a form of separate levy independent of other provisions of the Act. Similar view was also taken in yet another decision of the Hon'ble Jurisdictional High Court in the case of *DCIT vs. Ericcson Communications Ltd. reported in 378 ITR 395 (Del),* wherein it was held as under:-

22. In our view, mere passing of the book entries, which are reversed, would not give rise to an obligation to deduct TAS by the Assessee, as clearly, there is no debt that can be said to be acknowledged by the Assessee. Imposition of an obligation to deduct TAS in these circumstances would amount to enforcing payments from one person towards a tax liability of another, even where the person does not acknowledge that any sum is payable. This, in our view, is contrary to the scheme of provisions relating to collection of TAS under the Act.

23. *It is also not disputed that TLME had not claimed royalty payable from the Assessee and, concededly, no royalty for the period has been paid either. In the circumstances, we are unable to accept that any income had accrued or arisen or deemed to have accrued or arisen, which is chargeable to tax in the hands of TLME. It is not disputed that the agreement dated 1st January, 1997 was not acted upon at the material time. In the absence of any income chargeable to tax arising on account of royalty in the hands of TLME at the material time, the question of withholding TAS would not arise.*

24. *In our view, reliance placed by the Revenue on the decision of Transmission Corpn. of AP Ltd. (supra) is wholly misplaced. In that case, the Supreme Court had clarified that where payments of any amount(s) on account of trade payables (i.e. payments in the nature of Revenue) were made, the payer was obliged to deduct tax at the relevant rates on the entire amount paid and it was not open for the payer to deduct TAS at a lower amount on the ground that the income embedded in the payments made would be lower than the amounts paid. The Supreme Court had explained that it was not open for the payer to suo moto take a decision as to the quantum of income embedded in the payments and withhold tax accordingly. And, the question of the quantum of income embedded in the receipts would be determined, subsequently in the assessment proceedings with respect to the payee. The Supreme Court had also noted that in the case where the Assessee had contended that a lower TDS should be deducted, it would be open for the payer to make an application to the AO under the provisions of Section 195(2) of the Act, to determine an appropriate proportion of payment chargeable to tax. This decision of the Supreme Court is not an authority for the proposition that TAS has to be deducted and paid where there is neither any payment nor any acknowledgement of debt which reflects any accrual of income chargeable to tax or in cases where no income accrues or arises which is chargeable to tax under the Act.*

25. *It is not disputed that TLME also did not claim the aforesaid amount of royalty in question and no such amount had in fact been paid. Thus, where the parties by their understanding and conduct are ad-idem that no liability to pay any amount arises, it would not be open for the Revenue to insist on collection of any tax. In the case of CIT v. Shoorji Vallabhdas & Co. [1962] 46 ITR 144 the Supreme Court had considered the case where the Assessee firm was a managing agent of inter alia two shipping companies and as per its agreements with the concerned shipping companies, was entitled to managing commission @10% of the freight charged and entries for the same had also been passed in the books of account. The Assessee floated two private companies and desired that the said private companies be substituted as managing agents in its place. In this background one of the shipping companies managed by the Assessee received a letter from two of its shareholders, who objected to the quantum of management agency commission being charged by the Assessee. In this context, the Assessee was invited to make an offer to reduce the commission charged. The Assessee agreed for reduction in the agency commission in order to put the concerned managed companies on a firm financial footing and at the Extraordinary General Body Meeting of the managed companies held subsequently, the private companies floated by the assessee were accepted as the managing agents in place of the Assessee. The Income Tax Officer as well as the Appellate Assistant Commissioner had concluded that larger commission had accrued during the relevant period and was thus assessable to tax. The Tribunal accepted the Assessee's contention and held that the income on account of larger commission had neither accrued nor was paid to the Assessee and, thus, was not chargeable to tax. The Bombay High Court agreed with the Tribunal, however, certified the case as fit under Section 66A(2) of the Income Tax Act, 1961, to be considered by the Supreme Court.*

The Supreme Court referred to the earlier decision of the Bombay High Court in CIT v. Chamanlal Mangaldas & Co. [1956] 29 ITR 987 (Bom.), which was approved by the Supreme Court in CIT v. Chamanlal Mangaldas & Co. [1960] 39 ITR 8 (SC) and held as under: -

> *".....Income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in bookkeeping, an entry is made about a "hypothetical income", which does not materialise. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account. This is exactly what has happened in this court. Here too, the agreements within the previous year replaced the earlier agreements, and altered the rate in such a way as to make the income different from what had been entered in the books of account. A mere book-keeping entry cannot be income, unless income has actually resulted, and in the present case, by the change of the terms the income which accrued and was received consisted of the lesser amounts and not the larger. This was not a gift by the assessee firm to the managed companies. The reduction was a part of the agreement entered into by the assessee firm to secure a long-term managing agency arrangement for the two companies which it had floated."*

26. *In view of the aforesaid, we are of the view that the Assessee was not obliged to deduct tax at source. Accordingly, the question of law is answered in favour of the Assessee and against the Revenue and the appeal is dismissed.*

27. *In the circumstances, parties are left to bear their own costs.*

(emphasis supplied by us)

8. In view of the aforesaid observations and respectfully following the jurisdictional precedents relied upon hereinabove, we hold that the assessee cannot be treated as an 'assessee in default' for mere book entries passed within the meaning of section 201(1) of the Act and consequentially interest u/s 201(1A) is also directed to be deleted.

9. The next issue involved in this appeal is as to whether the assessee could be treated as an 'assessee in default' u/s 201(1) of the Act liable for interest u/s 201(1A) of the Act in respect of short-deduction of tax at source on certain expenditures, in the facts and circumstances of the instant case.

10. We find that out of the total TDS demand of Rs.23,03,028/- raised by the ld. AO u/s 201(1) of the Act, a sum of Rs.8,61,247/- discussed hereinabove was on account of non-deduction of tax at source on year-end provision for expenditure and balance sum of Rs.14,41,781/- was on account of short-deduction of tax at source on certain expenditures incurred by the assessee during the year under consideration. As stated above, we find that demand of Rs.14,41,781/- has been raised on the ground that the assessee had made short-deduction of tax at source on certain expenses. We find that the assessee had explained before the lower authorities that some of the payees had furnished low tax deduction certificate obtained u/s 197 of the Act from their TDS Officer and had furnished the same to the assessee. Accordingly, the assessee had deducted the tax at source in accordance with the rates prescribed in the low tax deduction certificate u/s 197 of the Act with effective date mentioned thereon. Hence, it was the case of the assessee that there was no short-deduction of tax made by the assessee at all and that all the taxes have been duly deducted and remitted in accordance with the provisions of Chapter XVII-B of the Act. We find that the ld.CIT(A) had merely directed the ld. AO to examine the same and decide the issue accordingly. The assessee is directed to produce the certificates obtained u/s 197 of the Act before the ld. AO to justify its case. Accordingly, the issue in respect of short-deduction of tax at source is hereby remitted to the file of the ld. AO.

11. In the result, the appeal of the assessee for AY 2013-14 is allowed for statistical purposes only.

ITA No.2476/Del/2022 (Assessment Year 2014-15 - Assessee's Appeal)

12. The first issue to be decided in this appeal for AY 2014-15 is as to whether the assessee could be treated as an 'assessee in default' within the meaning of section 201(1) of the Act and consequentially liable for interest u/s 201(1A) of the

Act, in respect of non-deduction of tax at source on provision for expenses made at the end of the year, falling within the ambit of provisions of sections 194C, 194I and 194J of the Act.

13. We have heard the rival submissions and perused the material available on record. The case of the Revenue is that the assessee had made year-end provisions for expenses amounting to Rs.73,65,593/- on which tax was not deducted at source. The assessee was treated as 'assessee in default' in the sum of Rs.7,21,913/- u/s 201(1) of the Act and interest of Rs.6,13,625/- u/s 201(1A) of the Act.

14. Out of the aforesaid expenses of Rs.73,65,593/-, the ld.CIT(A) had granted relief in respect of provision made for "Employee welfare expenses' of Rs.47,450/- and 'Travelling expenses' of Rs.2,16,452/- on the ground that TDS were not deductible on the same. Apart from this, the issue is identical with AY 2013-14 adjudicated by us hereinabove. Hence, the decision rendered by us in this regard for AY 2013-14 shall apply, *mutatis mutandis*, for AY 2014-15 also.

15. The next issue to be decided in this appeal is as to whether the assessee could be treated as an 'assessee in default' u/s 201(1) of the Act in the sum of Rs.5,47,118/- and liable for interest u/s 201(1A) of the Act in the sum of Rs.4,95,140/- in respect of professional expenses incurred by the assessee in the sum of Rs.54,71,186/-.

16. We have heard the rival submissions and perused the material available on record. The main grievance of the Revenue is that the assessee had not furnished documentary evidences in support of this issue. On the contrary, the assessee had submitted that it had deducted tax at source on the aggregate amount of Rs.1,70,71,786/- debited under the head 'Retainership fee', out of which an amount of Rs.54,71,186/- was transferred to 'Professional charges' account in the books of account of the assessee. The corresponding documentary evidences in this regard

were duly placed on record before the lower authorities, which fact was not appreciated by the lower authorities. We find from the details placed on record in pages 133-134 of the paper book containing the details of payments made to Randstad India Ltd. and Team Lease Services Pvt. Ltd. totaling to Rs.1,70,71,786/-, which had been duly subjected to deduction of tax at source at the applicable rates prescribed under Chapter XVII-B of the Act. We find that a sum of Rs.54,71,186/- has been transferred by the assessee to 'Professional charges' separately. This clearly acts to prove that the professional expense of Rs.54,71,186/- is already included in the aggregate retainership fee amount of Rs.1,70,71,786/-. Hence, the contentions of the Revenue that professional expenses of Rs.54,71,186/- had not been subjected to deduction of tax at source, is factually incorrect. We direct the ld. AO to delete the demand raised on account of professional expenses both u/s 201(1) and u/s 201(1A) of the Act.

17. The next issue to be decided in this appeal is as to whether the assessee could be treated as an 'assessee in default' u/s 201(1) in the sum of Rs.10,27,285/- and liable for interest u/s 201(1A) of the Act in the sum of Rs.9,29,692/- in respect of rent expenses, retainership fee and search engine marketing expenses amounting in all to Rs.1,31,06,477/-.

18. We have heard the rival submissions and perused the material available on record. We find that the entire details in this regard party-wise were filed by the assessee before the lower authorities which are also enclosed in pages 148-155 of the paper book. The tax remittance challans in this regard are enclosed in pages 156-180 of the paper book. As stated in earlier ground, some of the parties to whom payments were made had furnished lower tax deduction certificate u/s 197 of the Act and some of the parties to whom payments were made were not liable to be subjected to TDS provisions as per the Act. In the interest of justice and fair play, we deem it fit and appropriate to restore this issue to the file of the ld. AO for

denovo adjudication *qua* this aspect of the expenditure, i.e., rent expenses, retainership fees and search engine marketing expenses. The assessee is also at liberty to furnish fresh evidences, if any, in support of its contentions. Accordingly, this issue is allowed for statistical purposes.

19. The ground raised by the assessee in respect of TDS on ESOP of Rs.3,73,287/- was stated to be withdrawn by the ld. AR at the time of hearing. Accordingly, the same is hereby dismissed as withdrawn.

20. The next issue is with regard to incorrect calculation of interest u/s 201(1A) of the Act. This issue being consequential in nature, we restore this issue to the file of the ld. AO to recalculate the same in accordance with law after giving effect to the aforesaid directions in respect of other grounds.

21. In the result, the appeal of the assessee for AY 2014-15 is partly allowed for statistical purposes only.

22. To sum up, the appeal of the assessee in ITA No.2475/Del/2022 for AY 2013-14 is allowed for statistical purposes only & the appeal of the assessee in ITA No.2476/Del/2022 for AY 2014-15 is partly allowed.

Order pronounced in the open court on 22.05.2023.

Sd/-	Sd/-
(SAKTIJIT DEY) JUDICIAL MEMBER	(M. BALAGANESH) ACCOUNTANT MEMBER

Dated: 22nd May, 2023.

dk

Copy forwarded to :

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

Asstt. Registrar, ITAT, New Delhi