In the High Court of Judicature at Madras

Dated : 30.01.2019

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

and

The Honourable Mr.Justice N.SATHISH KUMAR

Tax Case Appeal No.38 of 2019

The Commissioner of Income
Tax, Corporate Circle, 3,
Chennai ...Appellant

Vs

M/s.TWI (India) Private Limited,
Chennai-18 ...Respondent

APPEAL under Section 260A of the Income Tax Act, 1961 against the order dated 29.5.2018 made in ITA.No.387/Chny/2017 on the file of the Income Tax Appellate Tribunal, Chennai 'D' Bench for the assessment year 2012-13.

For Appellant : Mr.M.Swaminathan
For Respondent : Mr.Ramanakumar

Judgment was delivered by T.S.SIVAGNANAM,J

This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 (hereinafter called the Act) is directed against the order dated

29.5.2018 passed by the Income Tax Appellate Tribunal, Chennai 'D' Bench (for short, the Tribunal) in ITA.No.387/Chny/2017 for the assessment year 2012-13.

2. The Revenue has filed this appeal by raising the following substantial questions of law :

> *"i. Whether the Tribunal was right in deleting the disallowance made by the Assessing Officer under Section 40(a)(ia) of the Income Tax Act, 1961 on commission payment for non deduction of TDS under Section 194H by holding that the payment was not in the nature of commission, but in the nature of income sharing arrangement overlooking the contract ? And*
>
> *ii. Whether the Tribunal was right in deleting the disallowance made by the Assessing Officer under Section 40(a)(ia) of the Income Tax Act, 1961 on commission payment for non deduction of TDS under Section 194H overlooking the notes to the financial statement when the assessee has debited this payment as commission? "*

3. We have heard Mr.M.Swaminathan, learned Senior Standing Counsel for the Revenue and Mr.Ramankumar, learned counsel for the respondent – assessee.

4. The assessee filed their return of income for the assessment year 2012-13 on 29.11.2012 admitting a total income of Rs.34,21,380/- and the same was processed under Section 143(1) of the Act. Thereafter, a notice

dated 19.8.2013 was issued to the assessee under Section 143(2) of the Act. The assessee claimed deduction for payment made to M/s.TPL-TQ Services to the tune of Rs.1,82,89,061/- and M/s.Blastline Institute of Surface Preparation & Painting to the tune of Rs.19,50,256/-.

5. The Assessing Officer directed the assessee to produce evidence for deduction of TDS on the ground that the payment made to those two companies was a commission.

6. The assessee submitted a reply stating that they had entered into an agreement with the said companies, that those companies collected fees for training, that the profit was split between them, that therefore, it is not a commission payment and that they are not liable to deduct TDS. The copies of the agreements were also enclosed along with the reply.

7. However, the Assessing Officer did not agree with the assessee on the said point and completed the assessment under Section 143(3) of the Act on 23.3.2015. Aggrieved over the same, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals)-13, Chennai [for brevity, the CIT(A)] and it was dismissed holding that the invoices were raised for the entire sales, that the commission was credited to the two companies and that it was mandatory on the part of the assessee to deduct TDS as required under Section 194H of the Act. Accordingly, the disallowance made by the Assessing Officer was confirmed.

8. Aggrieved over the same, the assessee preferred an appeal to the Tribunal and it was allowed in favour of the assessee holding that the agreements entered into by the assessee with M/s.TQ Services and more particularly Clause 6.6 shows the methodology of demarcation of the fees collected. The modus was examined by the Tribunal and it was held that the assessee issued invoices to the said company for sharing of income, which was provided in Schedule-A to the agreement. Therefore, the Tribunal concluded that the payment made by the assessee to M/s.TQ Services is, in no way, commission payment, but, is, in fact, a sharing of profit and consequently, the provisions of Section 194H of the Act did not apply and ultimately, deleted the disallowance made by the Assessing Officer.

9. The Tribunal, after examining the documents and the assessment order and in particular, paragraph 2.1, opined that prima facie, it does not show any of the trainers being in India for more than 90 days. The Tribunal pointed out that the exact number of days has not been provided by the assessee to establish the number of days each trainer has been in India and the agreement between the assessee and its parent organization has not been placed before the Tribunal to know as to whether any technical services have actually been provided and whether the same has passed 'make available test'. Therefore, the Tribunal opined that the issue is to be restored to the file of the Assessing Officer for re-adjudication. The assessee was

granted liberty to prove before the Assessing Officer that the days the trainers were in India were less than 90 days and that what has been provided is not fees for technical services.

10. In the light of the above findings, we are fully convinced that the Tribunal, on examination of the factual position, concluded that payments made are not commission, but a sharing of profit with M/s.TQ Services. Apart from that, the Tribunal remanded the matter to the Assessing Officer for verification of the necessary details and as to whether any technical services have been actually provided and also as to whether the same passes the 'make available test'. Thus, there are no grounds to interfere with the order passed by the Tribunal.

11. Mr.M.Swaminathan, learned Senior Standing Counsel for the Revenue contends that the agreement is camouflaged and that the commission is shown to be as if it is a profit sharing.

12. We are not convinced to accept such a contention on account of the fact that the Tribunal examined the agreement and rendered a factual finding and in this appeal, we do not propose to re-examine the factual issue, which has been concluded by the Tribunal. We are convinced to state that no substantial question of law arises for consideration in this appeal.

13. Accordingly, the above tax case appeal is dismissed. No costs.

30.01.2019

RS

Internet : Yes

To

The Income Tax Appellate Tribunal, Chennai 'D' Bench

T.S.SIVAGNANAM,J

AND

N.SATHISH KUMAR,J

RS

TCA.No.38 of 2019

30.01.2019