



THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 15.01.2010

+ **ITA 12/2010**

COMMISSIONER OF INCOME TAX ... Appellant

- versus -

**SMCC CONSTRUCTION INDIA FORMERLY
MITSUI KENSETSU INDIA LTD** ... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Subhash Bansal
For the Respondent : Mr Salil Kapoor with Ms Swati Gupta

CORAM:-

**HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SIDDHARTH MRIDUL**

1. Whether Reporters of local papers may be allowed to see the judgment ?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in Digest ?

BADAR DURREZ AHMED, J (ORAL)

CM 197/2010

The delay in re-filing the appeal is condoned.

This application stands disposed of.

ITA 12/2010

1. This appeal by the revenue is directed against the Income Tax Appellate Tribunal's order dated 23.12.2008 passed in ITA 806/Del/2007 in respect of the assessment year 2003-2004. The grievance before the



deleting the addition of Rs 3,16,64,463/- made by the Assessing Officer by making a disallowance of expenses on the ground that the said expenses related to the year prior to the previous year relevant for the assessment year in question. In other words, the addition was made in respect of prior period expenses. The said expenses were in the nature of fees paid to a foreign entity for rendering technical services to the assessee. The said technical fee was payable from time to time. However, the same had not been shown as payable in the books of accounts of the assessee in the year prior to the assessment year 2003-2004 because the parties had mutually agreed to defer the payments towards the liability. The assessee's stand was that the said fee for all the years had become payable and had been charged to the Profit & Loss Account and paid during the assessment year 2003-2004. The assessee had classified the said amount as pertaining to prior period expenses. It is also to be noted that the tax in respect of the said payment was paid in the current assessment year.

2. The Assessing Officer did not agree with the contentions of the assessee. The Assessing Officer took the view that the amounts could have been debited in the previous years when they had allegedly become payable. Since they were not shown in the accounts in this manner, the Assessing Officer disallowed the claim of the assessee.

3. Being aggrieved by the said assessment order, the assessee



relied upon the provisions of Section 40 (a)(i) of the Income Tax Act, 1961 (hereinafter referred to as the 'said Act'). The Commissioner of Income Tax (Appeals) allowed the appeal and deleted the disallowance. The Commissioner of Income Tax (Appeals) had noted in his order that the Assessing Officer's main ground for disallowance of deduction was that it was a prior period expenditure which was not debited in the year in which the said expenditure had been incurred. The Commissioner of Income Tax (Appeals) noted that the Assessing Officer was of the view that when there was no claim in the year in which the expenditure was incurred, the same could not be allowed under the provisions of the said Act. The Commissioner of Income Tax (Appeals), after considering the contentions of the assessee and the view taken by the Assessing Officer, came to the conclusion that merely not making an entry in the accounts would not disentitle the assessee from its claim of deduction provided the same was allowable under the Act. According to the Commissioner of Income Tax (Appeals), the deduction could be claimed in view of the provisions of Section 40(a)(i) only in the year in which the tax was actually paid. Thus, the Commissioner of Income Tax (Appeals) took the view that even if the hypothetical situation was to be considered that the assessee had debited the amount in the earlier years, the same could not have been allowed in terms of the provisions of Section 40 (a) (i) of the said Act as the tax had not been deducted at source and paid to the government account. The total income would have remained the same. Consequently, the Commissioner of Income

4. Being aggrieved by the said decision, the revenue preferred an appeal before the Income Tax Appellate Tribunal. The Tribunal confirmed the view taken by the Commissioner of Income Tax (Appeals). An important aspect noted by the Tribunal was that as far as the genuineness of expenditure is concerned, the admissibility of deduction was not in dispute. The only objection that had been raised by the revenue was that expenditure ought to have been claimed in the year they relate to. After considering the provisions of Section 40(a)(i) of the said Act, the Tribunal observed as under:-

“5. From the bare reading of this provision, it would reveal that sum chargeable under this Act if payable either outside India or in India to a non-resident is not allowable as a deduction unless tax has been deducted on the source or after deduction of such tax, it has not been paid before the expiry of the time prescribed under sub-section (1) of Section 200 and in accordance with that provisions of Chapter XVI-B of the Act. In the case of ABN Amro Bank, the ITAT has observed that when a deduction is not allowable because of the statutory provisions, it would make no difference whether the same was claimed or not by the assessee. Because of Section 40(a)(i) of the Act, the deduction has to be allowed in computing the income of previous year in which such tax deducted at source has been paid. This section 40(a)(i) starts with a non-obstante clause which implies that section 40, overrides the provisions of Section 30 to 38 of the Act. The amounts which may otherwise be allowable as a business expenditure as per the provisions of Section 30 to 38 and which is chargeable to tax in the hands of the recipient would not be allowed as a deduction unless requisite amount of tax has been



for claiming the deduction in the present account in the concerned year then also deduction would not be admissible unless tax has been paid on such amount. The proviso to section 40(a)(i) makes it clear that if tax has been deducted in subsequent year and paid then deduction would be allowed in that year. Therefore, we are of the opinion that the learned Ist Appellate Authority has rightly deleted the disallowance. We do not find any merit in this appeal of the revenue. It is dismissed.”

5. We are of the view that the Tribunal has correctly understood the provisions of Section 40(a)(i) and that the deduction was clearly allowable. The position is clear that the deduction is to be allowed in the year in which the tax is paid. No substantial question of law arises for our consideration.

The appeal is dismissed.

BADAR DURREZ AHMED, J

SIDDHARTH MRIDUL, J

JANUARY 15, 2010
SR