INCOME TAX : Where CENVAT credit on passenger service fee (PSF)/user development fee (UDF) and advertisement fee was not actually received by assessee, but anticipating that it was entitled to such credit, assessee had offered them as income, assessee would be entitled to claim deduction of such amount in subsequent assessment year by way of reversal of entries

INCOME TAX : Where assessee's claim of having paid service tax on chartered flight and discount received on PSF/UDF to government account in impugned assessment year was found to be correct, same had to be allowed

INCOME TAX : Interest paid by assessee on delayed payment of service tax is compensatory in nature and, if on verification it was found that assessee had actually paid interest in impugned assessment year, same was to be allowed as deduction

INCOME TAX : Expenditure incurred for meeting fees paid towards legal services provided by a law firm in relation to proposed issuance of IPO, which was later aborted was akin to expenditure incurred towards aborted project, hence, qualified as revenue expenditure

[2021] 126 taxmann.com 152 (Mumbai - Trib.)

IN THE ITAT MUMBAI BENCH 'G'

Go Airlines (India) Ltd.

v.

Deputy Commissioner of Income Tax-5(1)(1), Mumbai*

SAKTIJIT DEY, JUDICIAL MEMBER
AND M. BALAGANESH, ACCOUNTANT MEMBER
IT APPEAL NO.3789 (MUM.) OF 2018
[ASSESSMENT YEAR 2012-13]
JANUARY 25, 2021

I. Section 37(1) of the Income-tax Act, 1961 - Business expenditure - Allowability of (Prior period expenditure) - Assessment year 2012-13 - Whether when an item of income was not received by assessee and was wrongly offered in preceding assessment years, assessee would be entitled to claim deduction of such amount in subsequent assessment year by way of reversal of entries - Held, yes - Assessee engaged in business of operating and chartering aircraft, claimed CENVAT credit on passenger service fee (PSF)/user development fee (UDF) and advertisement expenses and offered these amounts as prior period income in assessment years 2010-11 and 2011-12 - However, on being legally advised that it was not entitled to CENVAT credit pertaining to PSF/UDF and advertisement expenses, assessee reversed prior period income offered in assessment years 2010-11 and 2011-12 in impugned assessment year claiming it as deduction under section 37(1) - Assessing Officer disallowed assessee's claim and made additions on ground that they were prior period expenditure - However, it was found that CENVAT credit on PSF/UDF and advertisement fee was not actually received by assessee but anticipating that it was entitled to such credit, assessee had

offered them as income in assessment years 2010-11 and 2011-12 - Whether therefore, where assessee had not earned income, liability in respect of such non-existent income could not be fastened on assessee - Held, yes - Whether thus, Assessing Officer was to be directed to delete addition subject to verification that assessee had actually forgone its claim of CENVAT credit before concerned authority - Held, yes [Para 11][In favour of assessee]

II. Section 43B of the Income-tax Act, 1961 - Business disallowance - Certain deduction to be allowed only on actual payment (Service tax paid on chartered flight) - Assessment year 2012-13 - Assessee, while offering income on accrual basis in preceding assessment years, had also included service tax paid on chartered flight and discount received on passenger service fee (PSF)/user development fee (UDF) - Assessee submitted that since it had voluntarily offered such income in preceding assessment years and since amount had been actually paid in impugned assessment year, they had to be allowed as deduction in view of section 43B - Whether Assessing Officer was to verify whether service tax on chartered flight and discount received on PSF/UDF was paid to government account in impugned assessment year and if on verification assessee's claim was found to be correct, same had to be allowed - Held, yes [Para 12][In favour of assessee]

III. Section 37(1) of the Income-tax Act, 1961 - Business expenditure - Allowability of (Interest) - Assessment year 2012-13 - Whether interest paid by assessee on delayed payment of service tax is compensatory in nature and, if on verification it was found that assessee had actually paid interest in impugned assessment year, same was to be allowed as deduction to assessee - Held, yes [Para 13][Partly in favour of assessee]

IV. Section 37(1) of the Income-tax Act, 1961 - Business expenditure - Allowability of (Legal expenditure) - Assessment year 2012-13 - Assessee incurred expenditure for meeting fees paid towards legal services provided by a law firm in relation to proposed issuance of IPO - Subsequently, issuance of IPO was aborted; hence, no enduring benefit had accrued to assessee - Whether since, no asset of enduring nature was created on account of issuance of IPO, this expenditure was akin to expenditure incurred towards aborted project, hence, qualified as revenue expenditure - Held, yes [Para 18][In favour of assessee]

CASE REVIEW - IV

CIT v. *Nimbus Communications Ltd.* [IT Appeal No. 4244 (Bom.) of 2010, dated 8-12-2011] (para 18) and *CIT* v. *General Insurance Corporation* [2006] 156 Taxman 96/286 ITR 232 (SC) (para 18) *followed*

CASES REFERRED TO

Lotus Energy India (P.) Ltd. v. *ITO* [IT Appeal No. 3632 (Mum.) of 2015, dated 28-2-2019] (para 9), *Bharat Insulation Co. (I) Ltd.* v. *Asstt. CIT* [IT Appeal No. 33 (Mum.) of 2013, dated 20-11-2015] (para 9), *NCS Distilleries (P.) Ltd* v. *ITO* [IT Appeal No. 699 (Hyd.) of 2012, dated 16-9-2014] (para 9), *Federal Moghul TPR (I) Ltd*. v. *Jt. CIT* [IT Appeal No. 509 Delhi of 2017] (para 9), *CIT* v. *Nagri Mills Co Ltd.* [1958] 33 ITR 681 (Bom) (para 9), *Standard Industries Ltd.* v. *Jt. CIT* [IT Appeal No. 5636 (Mum.) of 1999] (para 16), *ACIT* v. *Nicholas Piramal India Ltd.* [IT Appeal No. 1939 (Mum.) of 2005, dated 16-9-2020] (para 16), *Ador Technologies Ltd.* v. *Dy CIT* [2007] 112 TTJ 24 (Pune-Trib) (para 16), *CIT* v. *Nimbus Communications Ltd.* [IT Appeal No. 4244 (Bom.) of 2010, dated 8-12-2011] (para 16), *CIT* v. *Essar Oil Ltd.* [IT Appeal No. 921 (Bom.) of 2006, dated 16-10-2008] (para 16) and *CIT* v.

General Insurance Corporation [2006] 15 Taxman 96/286 ITR 232 (SC) (para 16).

Ronak Doshi *for the Appellant.* **Nikhil Choudhary**, *CIT (DR) for the Respondent.*

ORDER

Saktijit Dey, Judicial Member. - Captioned appeal by the assessee arises out of the order dated 20-2-2018 of learned Commissioner of Income-tax (Appeals)-10, Mumbai for the assessment year 2012-13.

2. In ground No. I, assessee has challenged the disallowance of service tax adjustment of Rs. 12,17,29,204/- and interest on service tax amounting to Rs. 8,29,749.

3. Briefly the facts are, the assessee, a resident company, is stated to be engaged in the business of operating and chartering aircraft for carrying passenger, cargo or any other commodity. While engaged in such activity, the assessee paid service tax on passenger service fee(PSF)/user development fee (UDF). On the amount of service tax paid on PSF/UDF and advertisement expenses the assessee claimed CENVAT credit amounting to Rs. 11,10,28,717/-and Rs. 61,99,545/- respectively. Since, the assessee was of the view that CENVAT credit would be granted, he offered these amounts as prior period income in assessment years 2010-11 and 2011-12. However, on being legally advised that it is not entitled to CENVAT credit pertaining to PSF/UDF and advertisement expenses, the assessee reversed the prior period income offered in Assessment Years 2010-11& 2011-12 in the impugned assessment year claiming it as deduction under section 37(1) of the Act. Further, the assessee also claimed deduction of Rs. 55,00,941/- being service tax paid on chartered flight and discount received on PSF/UDF by stating that while offering certain income on gross basis, the assessee has included service tax component which is not the income of the assessee. Assessee also claimed deduction of an amount of Rs. 8,29,749/- being interest on delayed payment of service tax. Being of the view that deduction claimed on account of service tax adjustment and interest on delayed payment of service tax is a prior period expenditure which has not accrued in the impugned assessment year, the Assessing Officer disallowed assessee's claim.

4. Assessee contested the aforesaid disallowance before the first appellate authority. After considering the submissions of the assessee in the context of facts and materials on record, learned Commissioner (Appeals) noted that the expenditure relating to PSF/UDF and advertisement on which the assessee had claimed CENVAT credit were debited to the P&L account in the financial years 2006-07 and 2007-08. However, assuming that it is eligible to claim CENVAT credit on service tax paid on PSF/UDF and advertisement expenses which were booked in the preceding years, assessee has created a CENVAT credit asset in assessment years 2010-11 and 2011-12 and the CENVAT credit to the extent of expenses claimed in the preceding assessment years was credited to prior period income account in assessment years 2010-11 and 2011-12 and offered to tax. In the impugned assessment year, the assessee has reversed the income credited to the prior period account on account of CENVAT credit and claimed it as deduction.

5. As regards service tax paid on chartered flight and discount received on PSF/UDF, he observed that it is the claim of the assessee that due to system/accounting error assessee had booked certain income from chartered flight on gross basis without segregating the service tax component. Similarly, certain income from discount received on PSF/UDF was offered to tax in the preceding assessment years without segregating service tax component. Thus, on the aforesaid premise assessee had claimed deduction of the amount.

6. Having taken note of the submissions of the assessee, the learned Commissioner (Appeals) ultimately concluded that what is allowable under section 37(1) of the Act is expenditure incurred against the

existing liabilities. He held, since, the deduction claimed by the assessee is not against any existing liability, it cannot be allowed. As regards the claim of the assessee regarding service-tax component offered to tax on gross basis, he held, unless the assessee pays the amount collected to the government, it cannot be allowed on deemed basis. As regards the interest paid on delayed payment of service-tax, though, in principle he agreed that such interest is compensatory in nature; hence allowable; however, he held that the assessee's claim of deduction can be accepted if the liability for interest has arisen during the year. Being aggrieved, the assessee is before us.

7. Reiterating the stand taken before the departmental authorities, the learned Counsel for the assessee submitted, PSF/UDF are levied by Airport Authority of India (AAI). Every passenger embarking the flight in the airport within its jurisdiction. He submitted, PSF/UDF is collected for provision of various services at the airport, such as, telephone, newspapers, water, toilet, maintenance of the airport, security of various airports including the capital cost towards purchase of assets like arms, metal detector, etc. He submitted, for administrative convenience, the AAI instead of collecting the PSF/UDF directly from passengers, has cast an obligation on the airlines whose flights are being used by the passengers embarking to collect the PSF/UDF from such passengers and to remit it to AAI. He submitted, since the assessee collects PSF/UDF on behalf of AAI, such amount collected along with service-tax and paid over to AAI has been claimed as expenditure in earlier assessment years. He submitted, assuming that assessee is entitled to CENVAT credit on service-tax collected on PSF/UDF and certain other items for which it had not created a CENVAT credit asset in preceding assessment years, on the basis of invoices available on record assessee created a CENVAT credit asset in assessment years 2010-11 and 2011-12 by debiting the CENVAT credit account and credited the prior period income account. Thus, the CENVAT credit on PSF/UDF collected and paid for prior assessment years were offered to tax in assessment years 2010-11 and 2011-12. He submitted, after obtaining legal advice the assessee realized that it is not eligible for the CENVAT credit and service-tax on PSF/UDF/advertisement expenses, the assessee reversed the entry to the extent of Rs. 11,62,28,262/- by debiting the prior period expense account. Thus he submitted, it is a mere reversal of CENVAT credit which the assessee offered to tax in previous assessment years for which the assessee is not eligible. Thus he submitted, the amount wrongly offered as income in the previous assessment years has to be allowed as deduction.

8. As regards service tax paid on chartered flight and discount received on PSF/UDF, the learned Counsel submitted, since in the preceding assessment years the assessee has accounted certain income on gross basis without segregating service tax, the service tax component included in the income which was allowable as expenditure in those assessment years should be allowed in the impugned assessment year as it amounts to reversal of additional income offered to tax in preceding assessment years.

9. As regards interest on delayed payment of service-tax, the learned Counsel submitted, the interest being compensatory in nature is allowable as deduction. In support of his contentions, he relied upon the following decisions:—

(1) *Lotus Energy India (P.) Ltd.* v. *ITO* [IT Appeal No. 3632 (Mum.) 2015, dated 28-2-2019]

(2) *Bharat Insulation Co. (I) Ltd.* v. *Asstt. CIT* [IT Appeal No. 33/Mum/2013, dated 20-11-2015]

(3) *NCS Distilleries (P.) Ltd* v. *ITO* [IT Appeal No. 699 (Hyd.) of 2012, dated 16-9-2014]

(4) *Federal Moghul TPR (I) Ltd*. v. *Jt. CIT* [ITA No. 509/Del/2017]

(5) *CIT* v. *Nagri Mills Co Ltd.* [1958] 33 ITR 681 (Bom)

10. The learned Departmental Representative strongly relying upon the observations of the Assessing

Officer and learned Commissioner (Appeals) submitted, the expenditure claimed by the assessee, since, relates to prior period, it cannot be allowed in the impugned assessment year. Further, he submitted that CENVAT credit cannot be allowed as it is not a liability of the assessee. He offered similar arguments with regard to service tax liability as well.

11. We have considered rival submissions in the light of decisions relied upon and perused the materials on record. As regards deduction claimed on account of CENVAT credit pertaining to PSF/UDF and advertisement expenses, the departmental authorities have rejected them on the ground that they are prior period expenditure. Facts on record reveal that the CENVAT credit pertained to service tax paid on PSF/UDF and advertisement expenses which were collected by the assessee on behalf of AAI have been allowed as expenditure to the assessee in assessment years 2006-07 and 2007-08. Subsequently, the assessee assuming that it is eligible to avail CENVAT credit on service tax on PSF/UDF and advertisement credited the CENVAT credit to the extent of expenditure claimed in the earlier years to the prior period income account created in assessment years 2010-11 and 2011-12 and offered them to tax. Subsequently, on the basis of legal opinion obtained from professionals, the assessee found that it is not eligible to claim CENVAT credit on the service tax paid on PSF/UDF and advertisement expenses, since, such liability does not pertain to the assessee but is of AAI and the assessee merely collects them on behalf of AAI. On the basis of such legal opinion, the assessee has reversed the entries in the prior period income account by debiting the prior period expenditure account in the impugned assessment year. Thus, as could be seen from the facts on record, the CENVAT credit on PSF/UDF and advertisement fee was not actually received by the assessee but anticipating that it is entitled to such credit, assessee had offered them as income in assessment years 2010-11 and 2011-12. In other words, the amount representing CENVAT credit on PSF/UDF and advertisement expenses were wrongly offered as income in assessment years 2010-11 and 2011-12. When an item of income is not received by the assessee and was wrongly offered in the preceding assessment years, the assessee is entitled to claim deduction of such amount in the subsequent assessment year by way of reversal of entries. This is simply on the basis of real income theory and on the principle that if there is no income, there cannot be any tax. When the assessee has not earned the income, liability in respect of such non-existent income cannot be fastened with the assessee. Therefore, we direct the Assessing Officer to delete the addition of Rs. 11,62,28,262/- subject to verification that the assessee has actually forgone its claim of CENVAT credit before the concerned authority.

12. As regards service tax paid on chartered flight and service tax computed on discount received on PSF/UDF, it is the contention of the assessee that while offering income on accrual basis in the preceding assessment years, the assessee had also included the service tax paid on chartered flight and discount received on PSF/UDF. He submitted, since the assessee had voluntarily offered such income in the preceding assessment years and since the amount has been actually paid in the impugned assessment year, they have to be allowed as deduction in view of section 43B of the Act. We find substantial merit in the aforesaid submission of the assessee. Accordingly, we direct the Assessing Officer to verify whether the service tax on chartered flight amounting to Rs. 18,72,540 and discount received on PSF/UDF of Rs. 36,28,401 was paid to the government account in the impugned assessment year and if on verification assessee's claim is found to be correct, the same has to be allowed.

13. As regards interest on delayed payment of service tax, it is a fact on record that learned Commissioner (Appeals) has accepted assessee's claim that such interest is not penal, but compensatory in nature. The doubt raised by him is only with regard to the fact whether the liability relating to such interest payment has arisen during the year. In view of the aforesaid, we direct the Assessing Officer to verify the date of actual payment of interest on delayed payment of service tax. If on verification it is found that the assessee has actually paid the interest in the impugned assessment year, the same should be allowed as deduction to the assessee. This ground is allowed subject to verification.

14. In ground II, the assessee has challenged the disallowance of Rs. 32,74,269 being the expenditure incurred for increase in share capital.

15. Briefly, the facts are that in course of assessment proceedings, the Assessing Officer noticed that the assessee had debited an amount of Rs. 40,92,638/- towards initial public offer (IPO). Being of the view that such expenditure is for the purpose of expanding the capital base; hence, is a capital expenditure, the Assessing Officer allowed amortization of 1/5th of the expenditure claimed u/s 35D of the Act. In other words, he allowed an amount of Rs. 8,18,567. Though, the assessee contested the aforesaid disallowance before learned Commissioner (Appeals), however, the disallowance was sustained.

16. The learned Counsel submitted, the expenditure incurred was for meeting the fees paid towards legal services provided by a law firm in relation to proposed issuance of IPO. He submitted, subsequently, the issuance of IPO was aborted; hence, no enduring benefit has accrued to the assessee. Therefore, he submitted, the expenditure claimed has to be allowed as deduction. In support of such contention, he relied upon the following decisions:—

(*a*) *Standard Industries Ltd.* v. *Jt. CIT* [IT Appeal No. 5636 (Mum.) of 1999];

(*b*) *ACIT* v. *Nicholas Piramal India Ltd.* [I.T. A. No. 1939/Mum/2005, dated 16-9-2020;]

(*c*) *Ador Technologies Ltd.* v. *Dy CIT* [2007] 112 TTJ 24 (Pune - Trib);

(*d*) *CIT* v. *Nimbus Communications Ltd.* [IT Appeal No. 4244 (Bom.) of 2010, dated 8-12-2011];

(*e*) *CIT* v. *Essar Oil Ltd.* [IT Appeal No. 921 (Bom.) of 2006, dated 16-10-2008];

(*f*) *CIT* v. *General Insurance Corporation* [2006] 156 Taxman 96/286 ITR 232(SC).

17. The learned Departmental Representative relying upon the observations of the departmental authorities submitted that the assessee has not furnished any evidence to indicate that the issuance of IPO was aborted during the year.

18. We have considered rival submissions in the light of the decisions relied upon and perused the materials on record. The fact that the assessee has actually incurred the expenditure towards proposed issuance of IPO has not been doubted or disputed by the Assessing Officer. This is evident from the fact that the Assessing Officer has allowed amortization of a part of expenditure in terms of section 35D. The only reasoning of the AO while doing so is, since the expenditure is related to expanding the capital base, it is a capital expenditure. However, it is the contention of the assessee that ultimately, the decision to issue IPO was aborted. On a perusal of the balance-sheet of the assessee as at 31-3-2012, we do not find any asset of enduring nature created on account of issuance of IPO. Thus, in our view, this expenditure is akin to expenditure incurred towards aborted project, hence, qualify as revenue expenditure. Further, we find that in case of *Nimbus Communications Ltd*. (*supra*), the Hon'ble jurisdictional High Court has allowed expenditure on issuance of share as revenue expenditure. In the case of *General Insurance Corporation* (*supra*), the Hon'ble Apex Court has allowed assessee's claim of expenditure in connection with issuance of bonus shares as revenue expenditure. Similar view has been expressed in the other decisions cited before us. Therefore, keeping in view the ratio laid down in the judicial precedents referred to above, we allow assessee's claim by deleting the disallowance made by the Assessing Officer. This ground is allowed.

19. In ground III, the assessee has challenged short grant of TDS credit.

20. Having heard the parties, we direct the Assessing Officer to verify assessee's claim and allow due credit of TDS in accordance with law after proper verification of facts and materials on record. This

ground is allowed, for statistical purpose.

21. In the result, appeal is partly allowed.

JK

*Partly in favour of assessee.

(Source: Taxmann.com)