INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI

BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SHRI N. K. CHOUDHRY, JUDICIAL MEMBER

ITA No. 5760/Del/2017
(Assessment Year: 2012-13)

Addl. Commissioner of Income-tax, Special Range-5, New Delhi.	Vs.	M/s Lenskart Solution (P) L name: M/s Valyoo Technol Pvt. Ltd.)W-123, Greater K Part-2, New Delhi-110048. **PAN no. AACCV7324B**
(Appellant)		**(Respondent)**

Revenue by :	Shri Kumar Pranav, Ld. Sr. DR
Assessee by:	Shri K.M. Gupta Ld. CA
Date of hearing	16/03/2022
Date of pronouncement	30/03/2022

O R D E R

PER N.K. CHOUDHRY, J. M.:

The Assessee has preferred the instant appeal against the order dated 30.05.2017impugned herein passed by the ld. Commissioner of Income tax (Appeals)-13, New Delhi (in short "Ld. Commissioner") u/s 250 of the Income Tax Act, 1961 (in short "the Act"), whereby the Ld. Commissioner deleted the additions of Rs. 1,64,02,845/- and 67,68,768/- made by the AO.

2. Brief facts of the case are that the Assesseehad e-filed its return of income on dated 28.09.2012 by declaring loss of Rs. (-) 4,18,78,678/-, which came into scrutiny and resulted into assessing the income of the Assessee to the tune of Rs.(-) 1,87,07,069/- by passing the Assessment Order U/s 143(3) of the Act and making of additions of Rs. 1,64,02,845/- on account of trade creditors outstanding for payment as on 31.03.2012 and of Rs. 67,68,768/- on account of non-deduction of TDS qua payment of marketing expenses.

3. Against the said additions/Assessment Order, theAssessee preferred an appeal before the Ld. Commissioner who vide impugned order confirmed the same by concluding as under:

> *"5. The above written submission has been carefully considered.Grounds of appeal nos. 3 and 4 are general in nature. At ground of appeal no. 1, the appellant has disputed the addition of trade creditors amounting to Rs. 1,64,02,845/-. The appellant has submitted that the total amount of Rs.1,64,02,845/- included trade creditors of only Rs. 98,16,753/-, and the remainder amount consisted of provisions for ascertained liabilities, expenses payable, and reimbursement to be made to employees. The appellant filed confirmations of balances obtained from the creditors on 20.03.2015, but the AO had completed the assessment on 19.03.2015. The appellant has submitted that it had furnished the names and addresses of all the creditors on 30.01.2015, and the AO had made no effort to verify these parties through his own powers u/s 131 or 133(6) of the Act. Moreover, the AO has raised no queries regarding the genuineness of the purchases to which the trade balances pertained. The appellant has furnished copies of the confirmations filed before the AO on 20.03.2015. The appellant*

has also filed the purchase register and ledger accounts of the trade creditors from which it is seen that payments were made through banking channels. The appellant has also filed the complete bank statements in respect of the purchases, as well as copy of DVAT returns of the four quarters of the previous year in question. The appellant has relied on a number of judicial pronouncements to argue that the creditors could not be treated as unexplained where payments had been made by account payee cheque which were duly debited to the assessee's bank account, and where the purchases and sales had been accepted by the department, including the purchases made on credit. In the case of CIT vs. RituAnuragAggarwal (2010), taxmann.com 134, the Hon'ble Delhi High Court has held that where there was no case for disallowance of corresponding purchases, no addition can be made u/s 68 as the creditors' balances related to purchases, and the trading results were accepted by the AO. Considering all the facts stated above, as well as the cited judgments, the addition made of Rs. 1,64,02,845/- which includes provisions for expenses and ascertained liabilities in addition to trade creditors, cannot be sustained. Accordingly, the appellant succeeds at ground of appeal no. 1.

6. At ground of appeal no. 2, the appellant has contested the disallowance u/s 40(a)(ia) of marketing expenses, on account of failure to deduct tax on payments made to Facebook Ireland Inc. (hereafter referred to as FII). The appellant has submitted that it had explained before the AO that FII had no permanent establishment in India and payments made to it for advertising services were therefore not chargeable to tax in India. Reliance was placed on Article 7 of the DTAA between India and Ireland, and Declaration of No Permanent Establishment and Tax Residency Certificate of FII, all of which had been submitted before the AO. It is argued that the appellant was not required to deduct tax on the payments made to FII and hence the provisions

of section 40(a)(ia) were not applicable. The appellant has relied upon a number of case laws, including the case of Yahoo India Pvt. Ltd. vs. DCIT (2011) 11 taxmann.com 431, wherein the Hon'ble ITAT, Mumbai held that in the absence of any permanent establishment of Yahoo in India, the assessee was not liable to deduct tax at source from payments made for online advertising services. The appellant has also relied upon the introduction of Equalisation Levy which has come into force from 01.06.2016. Equalisation levy has been introduced to tax the income accruing to foreign e-commerce companies from India, requiring that a person making payment exceeding Rs. 1,00,000/- in a year to a non resident, who does not have a permanent establishment in India, will withhold tax at 6% of the gross amount. The appellant has argued accordingly that prior to 01.06.2016, online advertising did not attract deduction of tax at source.

6.1 Section 9 of the Income Tax Act provides that business income is taxable in India only if such income accrues or arises through or from a business connection in India. Under section 195 of the Act, the liability to deduct tax at source by the payee on payment made to a foreign company arises only where such income is chargeable to tax in India under the provisions of the Income Tax Act. The DTAA between India and Ireland provides that the profits of the foreign enterprise shall be taxable only if it had carried on business in India through a permanent establishment situated therein. Fll has certified that it has no permanent establishment in India, and is a resident of Ireland for taxation purposes. The AO has brought nothing on record to refute these contentions. Hence there was no liability to deduct tax on payments made for advertising services to FII. Accordingly, no disallowance u/s 40(a)(ia) was called for, and the appellant succeeds at this ground of appeal."

4. Being aggrievedby the Impugned Order, has the Revenue Department preferred the instant appeal.

5. We have heard the parties and perused the material available on record. The Revenue Department has raised the following grounds of appeal:

"GROUNDS OF APPEAL

1. *That the Ld. CIT(A) has erred in law and on facts by not appreciating the action of the AO regarding addition made under section 68 of the I.T.Act amounting to Rs. 1,64,02,845/- towards trade creditor outstanding for payment as on 31.03.2012 as per balance sheet of the assessee's company.*

2. *That the Ld.CIT(A) has erred in law and on facts by not appreciating the action of the AO regarding addition of Rs. 67,68,768/- on account of non deduction of TDS on payment of marketing expenses.*

3. *That the order of the Ld.CIT(A) is erroneous and is not tenable on facts and in law.*

4. *That the grounds of appeal are without prejudice to each other.*

5. *That the appellant craves leave to add, alter, amend or forego any ground(s) of the appeal raised above at the time of hearing.*

6. We are deciding this appeal by ground wise.

7. **Ground no. 1**: By way of ground no. 1 the Revenue Department claimed that the CIT(Appeals) has erred in law and on facts by not appreciating the action of the AO regarding addition made u/s 68 of the Act amounting to Rs. 1,64,02,845/- towards trade creditor

outstanding for payment as on 31.03.2012 as per balance sheet of the Assessee company and, therefore, the order under challenge is perverse, improper and against the facts and circumstances of the case and liable to be set aside on this ground alone.

7.1 We observe from the orders passed by the authorities below that total amount of Rs. 1,64,02,845/- on the basis of which addition was made u/s 68 of the Act by the AO includes the only amount of Rs.98,16,753/- qua trade creditors and remaining amount consisted of provision for ascertained liabilities, expenses payable and reimbursement to be made to the employees. The Assessee in support of its contention also filed confirmation of the balances obtained from the creditors on 20.03.2015. However, it is a fact that AO had completed the assessment on 19.03.2015 itself. It was also claimed by the Assessee that the Assessee had furnished the purchase registers, ledger accounts, names and addresses of all the creditors as on 31.01.2015 but the AO had made no effort to verify these parties by exercising his powers u/s 131 or 133(6) of the Act. Even otherwise no queries with regard to the genuineness of the purchases, to which the trade balances pertained, have been raised. The Assessee also filed complete bank statements qua purchases and copy of the DVAT returns of the four quarters of the year in question. From the same it is clear that payments were made through banking channels only. It was also claimed by the Assessee that as the AO has accepted the trading results and, therefore, no addition is warranted qua

disallowance of corresponding purchases. By taking into consideration the aforesaid facts, the Ld. Commissioner deleted the addition in hand.

7.2 We have given our thoughtful consideration to the above factual position and determination made by the Ld. Commissioner. Before us the aforesaid facts remained un-controverted and even otherwise we do not find any material and/or any plausible reason to take a contrary view against the conclusion drawn by the ld. Commissioner. Consequently, ground no. 1 stands dismissed.

8. **Coming to the 2ndGround**, which relates to the making of addition of Rs. 67,68,768/- on account of non-deduction of TDS qua payments of marketing expenses, which was deleted by the Ld. Commissioner.It was claimed by the Assessee that as the Assesseehad made the payment to Facebook Ireland Inc. (In short "FII"), which admittedly did not have any permanent establishment („PE") in India and, therefore, the payments made to it for advertisement services were not chargeable to tax in India in view of the Article 7 of DTAA between India and Ireland. In support of its contention the Assessee also relied upon various judgments including in the case of **Yahoo India Pvt. Ltd. Vs. DCIT (2011) 11 Taxmann.com 431**, as relied upon by the Ld. AR before us as well, wherein it is clearly held *that in the absence of any permanent establishment ('PE') of the deductor, the deductee is not liable to deduct the tax at source from the payments made for online advertisement services*. It was also claimed by the Assessee that equalization levy was introduced to tax the income accruing to foreign e-commerce companies from India, requiring that a person

making payment exceeding Rs. 1,00,000/- in a year to a non-resident, having no permanent establishment in India to withhold the tax at 6% of the gross amount, infact came into effect from 1.6.2016 only and prior to that the online advertisement were not subjected to deduction of tax at source.

8.1 We have given thoughtfulconsideration to the facts and circumstances of the case and observe that ld. Commissioner while considering the aforesaid claim of the Assesseeand analyzing the provisions of section 9 & 195 of the Act, held that the DTAA between India and Ireland provides that the profits of the foreign enterprise shall be taxable only if it had carried on business in India through a permanent establishment („PE") situated therein. The Ld.Commissioner also observed that FII has certified that it has no permanent establishment („PE") in India and is a resident of Ireland for taxation purposes. The Ld. Commissioner finally concluded that there was no liability of tax on payments made for advertising services to FII.

8.2 Before us the aforesaid facts remained uncontroverted and even otherwise we do not find any material and/or any reason to take a contrary view against the conclusion drawn by the ld. Commissioner. Consequently, ground no. 2 also stands dismissed.

9. Ground nos. 3 to 5 are formal in nature, hence do not require any independent adjudication.

10. In the result, the appeal filed by the Revenue Department stands dismissed.

Order pronounced in the open court on 30.03.2022.

-Sd/-	-Sd/-
(**ANIL CHATURVEDI**)	(**N.K. CHOUDHRY**)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 30/03/2022

A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi