IN THE INCOME TAX APPELLATE TRIBUNAL

"F" BENCH, MUMBAI

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.1380/Mum./2024
(Assessment Year : 2017–18)

ACIT, Circle-4(2)(1)
Room No.640, 6th Floor,
Aayakar Bhavan, M. K. Road ……. Appellant
New Marine Lines
Mumbai-400020

v/s

First Advantage Pvt Ltd
First Floor, Interface,
Building No.7, Link Road,
Malad West-400064 ..... Respondent
PAN-AAACQ0706E

Assessee by : Shri Nitesh Joshi/Ms Sonakshi Jhunjhunwala
Revenue by : Shri Surendra Meena, Sr. DR

Date of Hearing – 11/06/2024	Date of Order –16/08/2024

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the Revenue challenging the impugned order dated 29/01/2024, passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, [*"learned CIT(A)"*], for the assessment year 2017-18.

2. The brief facts of the case, as emanating from the record, are that the assessee is a private limited company engaged in the business of employment background screening services. For the year under consideration, the assessee filed its return of income on 29/11/2017 declaring a total income of Rs. 25,01,35,460 under the normal provisions and book profit under section 115JB of the Act at Rs.8,10,93,284. The return filed by the assessee was selected for complete scrutiny and statutory notices under section 143(2) as well as section 142(1) of the Act were issued and served on the assessee. The Assessing Officer ("*AO*") vide order dated 27/12/2019 passed under section 143(3) of the Act assessed the total income of the assessee at Rs.36,72,33,727 under normal provisions of the Act, inter-alia, after disallowing software license expenses treating the same as capital in nature, and making disallowance under section 40(a)(ia) of the Act. The learned CIT(A), vide impugned order, granted relief to the assessee and deleted the aforesaid disallwoanced. Being aggrieved, the Revenue is in appeal before us on the following grounds:-

> *"1. Whether on the facts and circumstances of the case, the Ld. CIT(A)/NFAC is right in deleting the disallowance of Rs.2,05,79,751/- and treating the same as capital expenditure?*
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> *2. Whether on the facts and circumstances of the case, the Ld. CIT(A)/NFAC is right in deleting the disallowance of 30% of the expenditure on contractors and professional fees u/s 40(a)(ia) of the Act of Rs.9,10,64,526/- on account of non-payment of TDS within time and short deduction of tax?"*

3. The issue arising in ground no. 1, raised in Revenue's appeal, pertains to deletion of disallowance of software license expenses.

4. We have considered the submissions of both sides and perused the material available on record. During the year under consideration, the assessee incurred the software license expenditure of Rs.2,05,79,751 towards purchase of Microsoft licenses, Microsoft server product maintenance, Microsoft desk product maintenance, e-TDS software, license for use of data base for access to data-salesforce.com, mobile app, etc. As per the assessee, the nature of the software is such that it needs to be updated with new versions in view of the technological advancements that keep coming and have to be uninstall/upgraded within a very short period of time. Therefore, the software payment towards license fees is charged by the service provider on periodical basis. Accordingly, as per the assessee, it has not obtained any enduring benefit from the use of the aforementioned software, and expenditure incurred is recurring in nature. The AO, vide assessment order, did not agree with the submissions of the assessee, and held that the expenses claimed by the assessee are capital expenditure, as it is an "intangible asset". Accordingly, the AO disallowed the claim of software license fees and added the same to the total income of the assessee.

5. The learned CIT(A), vide impugned order, following the decision of the coordinate bench of the Tribunal in assessee's own case for the assessment year 2010-11 deleted the disallowance based on treating the software license expenditure as capital in nature.

6. We find that the issue whether software license expenditure incurred by the assessee is revenue or capital expenditure, is recurring in nature and has been decided in favour of the assessee by the coordinate bench of the Tribunal

in preceding years. We find that in DCIT v/s M/s First Advantage Private Limited, in ITA No. 6659/Mum./2013, for the assessment year 2010-11, the coordinate bench of the Tribunal vide order dated 30/06/2015 held the software license expenditure on similar products to be revenue in nature. The relevant findings of the coordinate bench, in the aforesaid decision, are reproduced as follows:-

> *"8. In keeping with the tests as laid down by the Special Bench of the ITAT, in the case of CIT vs. Amway India Enterprises, 111 ITD 112[SB] (Delhi), three tests have to be met in order to pass the expenditure incurred on account of software expenses as capital, or otherwise. These are the ownership test, the enduring benefit test and the functionality test. In the present case, as rightly considered by the ld. CIT(A), none of these tests fails the claim of the assessee. The software was not owned by the assessee. The assessee acquired the license only to use the same. The license fee was not paid for obtaining any right qua the transfer of the software. Then, obsolescence also does not prove any enduring benefit to the assessee. It is not the case of the Department that the longevity of the software is any more than two years. Rather, it has not been disputed that all but one of the items of expenditure have a life much less than two years. Apropos the functionality test, the Department again does not refute the fact that the software license was acquired by the assessee to carry out its routine operations in a more efficient manner. Further, the fixed capital of the assessee has not been shown to have undergone any change as a consequence of the acquisition of the license. In fact, it was either an antivirus software, or a software for filing TDS return or payments for support service for maintenance of firewalls, maintenance charges of Microsoft licenses, annual hosting fees, etc. Therefore, the nature of the software acquired is that of a revenue expense, the ld. CIT(A) has rightly held it to be so.*
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> *9. It is pertinent to note that the ld. CIT(A) capitalized the expense for software for indexing operations documents. In fact, this expenditure of Rs. 3,12,000/-, paid to M/s First Indian Corporation was a one- time cost, expended for the use of the software to over two years, fetching an enduring benefit to the assessee. The ld. CIT(A) added back this amount of Rs. 3,12,000/- as a capital expenditure while granting depreciation thereon. The assessee has not challenged this add back before us. Thus, the ld. CIT(A) has duly taken into consideration all the relevant factors for deciding the expenditure to be a revenue expenditure. In this regard, reliance placed by the assessee on the case of "Raychem RPG Ltd." (supra) is also appropriate, therein the Hon'ble jurisdictional High Court upheld the decision of the Tribunal in allowing software expenditure as a revenue expenditure."*

7. Similar findings were rendered by the coordinate bench of the Tribunal in assessee's own case for the assessment years 2005-06, 2009-10 and 2018-

19, and the software license expenditure was held to be revenue in nature. The learned Departmental Representative ("*learned DR*") could not show us any reason to deviate from the aforesaid decision rendered in assessee's own case and no change in facts and law was alleged in the relevant assessment year. Thus, respectfully following the order passed by the coordinate bench of the Tribunal in assessee's own case cited supra, we find no infirmity in the impugned order in treating the software license expenditure as revenue in nature. As a result, ground no. 1 raised in Revenue's appeal is dismissed.

8. The issue arising in ground no. 2, raised in Revenue's appeal, pertains to deletion of disallowance under section 40(a)(ia) of the Act.

9. Having considered the submissions of both sides and perused the material available on record, we find that during the assessment proceedings vide notice dated 23/12/2019 issued under section 142(1) of the Act, the assessee was asked to show cause as to why the disallowance should not be made under section 40(a)(ia) of the Act, as it has not deducted TDS on the total payment made to the contractors and fee for professional or technical service or the assessee has deducted TDS on part payment and has not deposited the same within time. In response thereto, the assessee submitted that TDS under section 194C and section 194J of the Act has been deducted at the specified rate and paid on the major portion of the amount paid to contractors and fee for professional or technical service. However, the TDS was short deducted by an amount of INR 629 on the payment made to the contractor. Similarly, the TDS was short deducted by an amount of INR 6591 on the payment made for the fees for profession or technical service. The

assessee further submitted that the aforesaid short payment has been duly reported in the Tax Audit Report. The AO, vide assessment order, held that the assessee has only submitted that tax was deducted and paid without substantiating its claim with supporting details/documents. In the absence of proof of payments, date of payment and challan of payment, the AO disallowed Rs.9,10,64,526, being 30% of the total amount paid to contractors and fee for professional or technical service.

10. In its appeal before the learned CIT(A), the assessee made the following submissions:-

> *"6.1 At the outset, the Appellant submits that no disallowance should be made under Section 40(a)(ia) of the Act since TDS has been duly deducted and deposited into the Government treasury by the Appellant as per the applicable provisions of the Act.*
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> *6.2 It is submitted that during the year under consideration, the Appellant had made payments of Rs. 3,08,24,877 under Section 1940 of the Act and Rs. 27,27,23,542 under Section 194J of the Act aggregating to Rs. 30,35,48,419, which are liable to tax deduction at source under the said respective sections. The Appellant had duly complied with the provisions of Section 194C and 194J of the Act on the above expenditure; consequently, deducted and deposited the applicable TDS to the government treasury, except to the short deduction as mentioned in the below paragraph.*
>
> *6.3 While complying with the TDS provisions on the above entire expenditure, the Appellant had short deducted the TDS of Rs. 629 under Section 194C of the Act and Rs. 6,591 under Section 194J of the Act. The details of the same are as under:*
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> *……*
> *……*
> *……..*
>
> *6.4 On perusal of the above table, your Honors would note that total amount of TDS short deducted under Section 194C of the Act is Rs. 629 [Refer Total 'A' in Colum F] and TDS short deducted under Section 194J of the Act is Rs. 6,591 [Refer Total 'B' in Colum F]. Thus, considering the above short deducted of TDS, the Appellant had suo moto disallowed an amount of Rs. 29,509 under Section 40(a)(ia) of the Act (ie. 30% of the corresponding expenses on which TDS is short deducted) while filing its return of income.*

6.5 It is to be noted that the Appellant has made compliance to the TDS provisions on the entire amount of Rs. 30,35,48,419 and the same has been duly verified by the tax auditor. Further, findings of the tax auditor on non-compliance was limited to the aforesaid short deduction of TDS as tabulated above. Copy of the tax audit report is enclosed herewith to substantiate the same at Page No. 132-146.

6.6 In view of above factual background, your Honors would appreciate that the Appellant has adequately complied with the relevant TDS provisions under Section 1940 and 194J of the Act, except to the short deduction as mentioned above. Further, a suo-moto disallowance was made by the Appellant in the return of income in relation to the said short-deduction of TDS."

11. The learned CIT(A), vide impugned order, after considering the aforesaid submissions of the assessee directed the AO to delete the addition of Rs.9,10,64,526.

12. In the present case, it is undisputed that the assessee made a payment of Rs.3,08,24,877 and Rs.27,27,23,542 to the contractors and fee for professional or technical service, which were subject to TDS under section 194C and 194J, respectively. The assessee admitted that out of the aforesaid amount, on an amount of Rs.98,363 the tax was deducted at a lesser rate than what was prescribed in the statute, by an amount of Rs.629 and Rs.6,591 under section 194C and 194J, respectively. Further, there is no material contrary to the assessee's submission that the relevant details were submitted before the learned CIT(A) in this regard and 30% of Rs.98,363, i.e. Rs.29,063 was disallowed in its computation of income by the assessee. Such being the facts, we are of the considered view that the learned CIT(A) has rightly deleted the disallowance made by the AO under section 40(a)(ia) of the Act, and found disallowance of 30% of the total payments to be unjustified. Accordingly, the order passed by the learned CIT(A) on this issue is affirmed. As a result, ground no. 2 raised in Revenue's appeal is dismissed.

13. In the result, the appeal by the Revenue is dismissed.

Order pronounced in the open Court on 16/08/2024.

Sd/-	**Sd/-**
B.R. BASKARAN	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 16/08/2024

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The PCIT / CIT (Judicial);
(4) The DR, ITAT, Mumbai; and
(5) Guard file.

By Order

Assistant Registrar
ITAT, Mumbai