ITAT allowed port exp. as it was agreed with buyer that port charges were to be borne by assessee

Summary – The Hyderabad ITAT in a recent case of NMDC Ltd., (the Assessee) held that where assessee under an agreement had exported lumps and as per clauses of said agreement it was clear that expenditure of port charges and demurrage charges were to be borne by assessee, said expenditure was to be allowed

Where assessee-company failed to discharge its onus that expenditure in respect of corporate social responsibility was incurred out of business expediency, in fact, no details of expenditure incurred were filed, entire expenditure claimed to have incurred on corporate social responsibility was to be disallowed

Where assessee-company had exported iron ore through a canalising agency and paid a commission to said agency at fixed trade margin, assessee was liable to deduct tax at source on commission payment

Facts I

- The assessee was a public sector undertaking, engaged in the mining of Iron ore, diamonds, wind power generation and sale. The assessee had exported lumps and fines under agreement through an agent, MMTC. The assessee had claimed the shipment charges and demurrages charges which was claimed under selling expenses.
- The Assessing Officer held that the said expenditure was to be borne by the buyer as per agreement. The assessee could not be allowed this deduction in the face of the clause in the agreements. In the note submitted by the assessee-company with regard to agreement for exports with MMTC for the financial year 2011-12, it was stated that there was no agreement into by the assessee-company with the buyer and whatever exported during the year was only spill over of the previous year. Thus, the same was considered as prior period expenditure. In view of the above facts and circumstances, the expenditure was not an allowable expenditure in the hands of assessee. Thus, the same was disallowed and added back to the income of the assessee-company.
- On appeal, the Commissioner (Appeals) also upheld the order of the Assessing Officer.
- On second appeal:

Held I

- The issue in this ground of appeal is with regard to allowability of demurrage charges and shipment charges paid. The Assessing Officer after pursuing the agreement between the appellant and the buyer *i.e.* MMTC had considered that this expenditure is to be reimbursed by the MMTC. Whereas the appellant contends that the Assessing Officer as well as the Commissioner (Appeals) mis-understood the terms of the agreement and the responsibility always lies on the appellant to bear

this expenditure in terms of the MoU. As per the relevant extracts of the agreement the allowability of the expenditure of port charges as well as the demurrage charges have to be determined having regard to the two clauses of the agreement. On plain reading of the those two clauses, it is manifested that the assessee had to bear the expenditure of port charges relating to export of cargo and the demurrage charges and therefore, the Assessing Officer as well as the Commissioner (Appeals) mis-construed the provisions of clauses governing the port charges and demurrage charges and erroneously held that expenditure was reimbursable to the appellant. In these circumstances, the Assessing Officer is directed to allow this expenditure.

Facts II

- The assessee was a public sector undertaking. It was engaged in the mining of iron ore, diamonds, wind power generation and sale. The assessee claimed certain amount of expenditure towards Corporate Social Responsibility.
- The Assessing Officer disallowed expenses claimed by assessee.
- On appeal, the Commissioner (Appeals) held that expenditure to the extent of certain amount was in the nature of capital expenditure and, therefore, disallowed to that extent and the balance expenditure was allowed.
- On second appeal:

Held II

- The issue in this ground of appeal is whether the expenditure incurred towards corporate social responsibility can be allowed as an expenditure. Before adverting to the facts of the present case, it is pertinent to note that the Companies Act, 2013 has prescribed corporate responsibility to incur the expenditure in case of certain companies making the profits. These provisions are applicable for the financial year 2014-15. The *Explanation* 2 to section 37(1) was inserted by Finance Act, 2014 with effect from 1-4-2015 clarifying that the expenditure incurred on the corporate social responsibility under section 135 of the Companies Act, 2013 shall not be deemed to be expenditure of assessee for the purpose of business. Now adverting to the facts of the present case, *i.e.*, the assessment year 2012-13, for which the provisions of the Companies Act, 2013 are not applicable. It does not mean that there is a bar on the part of corporates to incur any expenditure on social responsibility. But the question now is whether this expenditure can be considered as business expenditure wholly and exclusively incurred for the purpose of business under the provisions of section 37(1). In order to claim deduction under section 37(1), the condition to be satisfied are that the item of expenditure should not be an item of expenditure prescribed in sections 32 and 36 and should not be in the nature of capital expenditure or personal expenditure of the assessee. It should be laid out wholly and exclusively for the purpose of business or profession. Needless to mention that all the three conditions are required to be cumulatively satisfied. In the present case, there is no dispute as regards the satisfaction of the first two conditions mentioned supra. The bone of

contention is only regarding satisfaction of the condition that the expenditure was incurred wholly and exclusively for the purpose of business. It is also settled principle of law that there is no need to establish necessity of such expenditure. But the onus lies on the assessee to prove that the expenditure was incurred wholly for the purpose of business. Once the assessee discharge this onus, the assessee would be entitled for deduction under section 37(1). In the present case, from the explanation furnished before the Assessing Officer, it is manifest that the assessee was only harping that the expenditure was incurred towards corporate social responsibility. There is no any attempt made by the appellant to discharge the onus that this expenditure was incurred out of business expediency. In fact, no details of the expenditure incurred were filed before the lower authorities. Even before this Court also the assessee made no attempt to discharge onus, who was simply harping on that expenditure was incurred for the purpose of business. Thus, no factual foundation was laid by the assessee to establish that this expenditure was incurred for the purpose of business. Mere bald assertion that expenditure was incurred for promoting the business cannot be accepted without establishing the nexus between the expenditure and business. The assessee had failed miserably to establish this onus nor any attempt was made by him to establish business expediency for incurring this expenditure. He merely submitted that he filed details of the expenditure incurred before the Commissioner (Appeals) and for the reasons best known to him had chosen not to file before this Court by way of Paper Book in conformity with the rules of the Tribunal. Neither of the parties to the appeal had brought to the notice of this Tribunal that the assessee-company also filed an appeal challenging the findings of the Commissioner (Appeals) that part of the Corporate Social Responsibility expenditure which was in the nature of capital is disallowed. The submission of the assessee that this expenditure was incurred in consideration of Government granting license for mining cannot be accepted as this kind of contracts are against public policy and are *void* under section 23 of the Contract Act. Therefore, it can be said that this expenditure was incurred voluntarily there was no business expediency and therefore, it amounts to application of income voluntarily towards charity which cannot be allowed as a deduction. Therefore, the entire expenditure incurred on corporate responsibility cannot be allowed as deduction.

Facts III

- The assessee was a public sector undertaking, engaged in the mining of iron ore, diamonds, wind power generation and sale. The assessee transported iron ore to one, VCP and arranged for loading of vessles through a canalising agent, MMTC who got fixed charges at the rate of 2.8 per cent on the invoice value. MMTC received the money from the buyer or foreign parties and after adjusting amounts due to MMTC released the payment to assessee. MMTC got a fixed trade margin (currently 2.8 per cent) of FOB price and the balance entire amount realized is passed on to assessee. Assessee was a back-to-back supplier to MMTC which charged 2.8 per cent trading commission on FOB price. The assessee paid certain amount to the MMTC towards commission for acting as an agent for the assessee for export of iron ore.

- The Assessing Officer disallowed a sum on the ground that the assessee had not deducted tax at source on the commission paid at the rate of 2.8 per cent of the FOB price paid to the MMTC. The Assessing Officer observed that the assessee was paying a commission the MMTC for acting as an agent for the assessee for export of iron ore and the Assessing Officer also examined on oath the directions of the assessee. The Assessing Officer also rejected the submissions of the assessee that the relationship between appellant and MMTC was that of principal to principal basis by holding that the commission payment was reduced from the value of invoice instead of directly paying in the form of commission. Therefore, the Assessing Officer held that the assessee was liable to deduct tax at source on the commission payment made to the MMTC and therefore, disallowed the same by invoking the provisions of section 40(a)(*ia*).
- On appeal, the Commissioner (Appeals) upheld the liability of payment to deduct TDS at sources, however, deleted the addition.
- On second appeal:

Held II

- The issue in this ground of appeal relates to the liability of assessee to deduct tax at source on the commission payment made to MMTC. No doubt, there was no direct payment in the form of commission payment to the MMTC by the assessee. But the mode of payment and the treatment in the books of account had no relevance to determine the nature of transaction. It is a case of the Assessing Officer that the assessee had paid commission at the rate of 2.8 per cent of FOB value of the exports for acting as canalising agent to the MMTC. This commission was paid in the form of reduction from the value of the invoices. The Assessing Officer also referred to the discussion note between the appellant and MMTC and also examined the Director (Marketing) and had come to the conclusion that commission payment was made without deducting tax at source. The assessee had not filed any evidence controverting the findings of the Assessing Officer. He merely placed reliance on the orders of the Co-ordinate Bench for the earlier years. Needless to mention that this issue requires to be adjudicated having regards to the facts of the case. Therefore, placing reliance on the orders of the Co-ordinate Bench in earlier years is totally misplaced and in fact absence of any evidence brought on record indicating that no commission paid to the MMTC, the action of the Assessing Officer was upheld, holding that the assessee was liable to deduct tax at source on commission payment. Accordingly, the Assessing Officer was justified in disallowing the same in invoking the provision of section 40(a)(*ia*). Therefore the grounds of appeal are dismissed.