IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES " L ", MUMBAI
BEFORE SHRI P.M.JAGTAP, ACCOUNTANT MEMBER,
AND SHRI AMIT SHUKLA, JUDICIAL MEMBER

ITA No.8824/Mum/2004

Assessment Year: 2001-2002

KPMG India Private Limited, KPMG House, Kamala Mills Compound, 448, Senapati Bapat Marg, Lower Parel, Mumbai-400 013 PAN No.AAACK 2138 A	Vs.	DCIT, Cir 6(2), Mumbai
Appellant		Respondent

AND

ITA No.8787/Mum/2004

Assessment Year: 2001-2002

DCIT, Cir 6(2), Mumbai	Vs.	KPMG India Private Limited, KPMG House, Kamala Mills Compound, 448, Senapati Bapat Marg, Lower Parel, Mumbai-400 013 PAN No.AAACK 2138 A
Appellant		Respondent

AND

ITA No.2251/Mum/2006

Assessment Year: 2002-2003

KPMG India Private Limited, KPMG House, Kamala Mills Compound, 448, Senapati Bapat Marg, Lower Parel, Mumbai-400 013 PAN No.AAACK 2138 A	Vs.	DCIT, Cir 6(2), Mumbai
Appellant		Respondent

AND

ITA No.2379/Mum/2006

Assessment Year: 2002-2003

JCIT, (OSD), Rg.6(2), Mumbai	Vs.	KPMG India Private Limited, KPMG House, Kamala Mills Compound, 448, Senapati Bapat Marg, Lower Parel, Mumbai-400 013 PAN No.AAACK 2138 A
Appellant		Respondent

AND

ITA No.1979/Mum/2007

Assessment Year: 2003-2004

KPMG India Private Limited, KPMG House, Kamala Mills Compound, 448, Senapati Bapat Marg, Lower Parel, Mumbai-400 013 PAN No.AAACK 2138 A	Vs.	DCIT, Cir 6(2), Mumbai
Appellant		Respondent

AND
ITA No.2057Mum/2007
Assessment Year: 2003-2004

ACIT, 6(2), Mumbai	Vs.	KPMG India Private Limited, KPMG House, Kamala Mills Compound, 448, Senapati Bapat Marg, Lower Parel, Mumbai-400 013 PAN No.AAACK 2138 A
Appellant		Respondent

Appellant- assessee by	**:**	Mr. A.V.Sonde
Respondent- Department by	**:**	Mr. Mahesh Kumar
Date of hearing	**:**	14th May 2012
Date of pronouncement	**:**	8th June, 2012

O R D E R

PER AMIT SHUKLA (J.M.) :

These are bunch of cross appeals filed by the assessee and the department for the assessment years 2001-2002, 2002-2003 & 2003-2004. Since the issues involved in all these appeals are common, therefore, the same are being disposed of by this consolidated order.

2. **ITA No.8824/mum/2004(AY 2001-02)(By Assessee)** :

In ground No.1, the assessee has challenged the disallowance of ₹.12,18,732/- in respect of professional fees and expenses not recoverable from clients and claimed as bad debts.

3. The relevant facts necessary for adjudication of this ground are that the assessee has written off in the books of account ₹.12,18,732/- as bad debts in respect of eight parties the details of which are given in para 5.1 of the CIT(A)'s order. Before the Assessing Officer, it was

contended that the reasons for non recovery of the amounts from the clients were that :-

i) fee claim raised for additional work not covered in the original fee agreement;
ii) re-negotiation over agreed fees by clients;
iii) non-acceptance/part acceptance of deliverables by the client; and
iv) differences over quantum and quality of deliverables.

Further, these amounts have been written off only after making the required efforts for recovery. The management ultimately was of the view that legal recourse could not be in the interest of the company. With respect to the allowability of claims of bad debt, it was submitted that **firstly**, it has complied with requisite condition that the fee amount disclosed as bad debts have been considered as income of the previous years in which the respective invoices were raised and **secondly**, the company has disclosed the debts as irrecoverable and written off as bad debts in the books of accounts of the previous year ended 31st March, 2001. Reliance was placed to the amendment made to section 36(1(vii) and 36(2) w.e.f. 1-4-1989 that once the bad debts has been written off, the same should be allowed. The Assessing Officer did not agreed with the contention of the assessee had held that the assessee cannot write-off any amount arbitrarily or irrationally. The write-off has to be bonafide and reasonable. He held that even after the amendment the basic condition relating to establishing the debt as bad is still effective. He, thus, disallowed the claim of bad debts amounting to ₹.12,18,732/-.

4. Before the CIT(A), the assessee contended that bad debt has to be allowed if the debt has been actually written off in books of accounts and has been taken into account in computing its income of the previous year in which the debt is written off. There is no onus to establish the debt as bad. Learned CIT(A) too rejected the explanation of the assessee and after relying upon the decision of the Hon'ble Gujarat High Court in the case of **CIT Vs. Ahmedabad Electricity Co. Ltd., reported in (2003) 262 ITR (Guj.)**, and held that the assessee has not brought on record the necessary evidence to show that its claim of writing off the debt as bad debt was an objective of a bona fide belief. He, thus, upheld the disallowance.

5. Learned Senior AR on behalf of the assessee submitted that this issue has been set at rest by the decision of the Hon'ble Supreme Court in the case of **T.R.F. Limited Vs. CIT, reported in (2010) 323 ITR 397 (SC)**. This was fairly agreed by the Ld. CIT DR also.

6. We have carefully considered the rival submissions and also the findings of the CIT(A) as well as the Assessing Officer. It is not disputed that fees amount disclosed as bad debts has been taken as income of the previous year in respect of the invoices relating to the said eight parties and subsequently the assessee had disclosed the debts as irrecoverable and written it off in the books of account for the previous year ending 31st March, 2001 i.e. in the relevant assessment

year. Thus, after the amendment w.e.f. 1st April, 1989, it is sufficient that the assessee has written off the bad debts in the account and the same has to be allowed. This issue has now been set at rest by the decision of the Hon'ble Supreme Court in the case of **T.R.F. Limited Vs. CIT (supra**), wherein the Hon'ble Supreme has held that after 1st April, 1989, it is not necessary for the assessee to establish that the debt, in fact, has become irrecoverable. It is enough if the bad debt is written off as irrecoverable in the accounts of the assessee. Thus, following the law settled by the Hon'ble Supreme Court in the aforesaid case, we hold that the claim of bad debts for a sums aggregating ₹.12,18,732/- is allowable as bad debts and the findings of the CIT (A) on this score is set aside. **In the result, ground No.1 is allowed**.

7. In ground No.2, the assessee has challenged the *ad hoc* disallowance of 10% for sums aggregating ₹.42,20,000/- made under Section 37(1) read with section 40A(2)(b) out of professional fees paid for services paid to KPMG Consulting Private Limited (KCPL) and KPMG firm. The facts are that the assessee company had made a payment of ₹.4,12,00,000/- to KCPL as professional fee and an amount of ₹.1,87,50,000/- and ₹.10,50,000/- to KPMG in the form of support service charges and professional fees. It was submitted by the assessee that the professional fee was paid to KCPL for doing certain specialized work to various concerns like Airport Authority of India,

BFL Software Limited, CMC Ltd, FCL Technology India Ltd and SSI Technology. As the assessee did not had sufficient specialized manpower to carry out the job, hence, the service of KCPL was engaged. Besides this, the KPMG had provided support to the company by way of computers, laptops, office space, communication facilities, office supplies for which support service charges of ₹.1,87,50,000/- was paid and further professional fee of ₹.10,50,000/- was paid for accounting, secretarial, human resources and technology related services by it. Further, it was submitted that the payments were made as per the standard rates and no excessive or any unreasonable payment has been made. The Assessing Officer rejected the contention of the assessee on the ground that the assessee has failed to furnish any particular which would through light on the exact nature of work done by either KPCL or KPMG and in absence of any verifiable specific details for the ascertainment of reasonableness of expenditure, he made the disallowance of ₹.60,95,000/- u/s. 40A(2)(b) by holding that the amount equivalent to 10% of such charges is excessive and unreasonable.

8. Before the CIT(A), the assessee placed documents like :-

i) copies of invoices raised by KCPL;
ii) details of time spent by personnel of KCPL on each assignment of the assessee and the value thereof;
iii) qualifications of the personnel of KCPL;
iv) amounts billed by the assessee on each engagement where personnel of KCPL were engaged;
v) copy of agreement with KCPL;

vi) copies of invoices raised by KPMG; and
vii) details of time spent by personnel of KPMG and their charge out rates.

Learned CIT (A) did not accept the contention of the assessee and agreed with the Assessing Officer that the excessiveness of the payment of service/professional charges cannot be ruled out. However, he directed the Assessing Officer to exclude the amount of reimbursement of costs of ₹.1,87,50,000/- and to calculate the disallowance on the balance amount at 10%.

9. Learned Senior AR on behalf of the assessee submitted that details of charges and time spent, invoices and confirmations were filed before the authorities below and it was in consonance with the payments made to non related parties i.e. the same rate has been paid to other parties also. Therefore, the provision of Section 40A2(b) cannot be applied in regard to such payments. He referred to various documents submitted in the paper book in this regard. Further in support of his contentions reliance was placed on the following decisions :-

i) Upvan International [1986] 15 ITD 215 (Del);
ii) Shankar Trading Co.(P) Ltd.[2006] 152 TAXMAN 49 (Del);
iii) Girnar Construction Co.[2003] 261 ITR 463 (Raj.); and
iv) Voltamp Transformers [1981] 129 ITR 105 (Guj).

10. On the other hand, learned Senior DR relied upon the findings given by the CIT(A) as well as the Assessing Officer and submitted that whether the payment to the non-related parties have been made

on the same proportion or on same rate, could not be established from the records as it was not placed before the Assessing Officer as well as the CIT(A). Hence, the disallowance made should be confirmed.

11. We have carefully considered the submission of the rival parties and the findings given by the CIT(A) as well the Assessing Officer. Section 40A (2)(b) provides that :-

> *" (2)(a) Where the assessee incurs any expenditure in respect of which payment has been or is to be made to any person referred to in clause (b) of this sub-section, and the [Assessing] Officer is of opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him therefrom, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction."*

From the plain reading of above, it is amply clear that the payments which are made to persons specified in sub-clause b of sub section 2 of Section 40A, if in the opinion of Assessing Officer, is excessive and unreasonable;

firstly, having regard to the fair market value of the goods, services or facilities for which the payment is made;

secondly, looking to the legitimate needs of the business or profession of the assessee;

or **thirdly**, the benefit derived by or accruing to him therefrom;

then such an expenditure as is considered by the Assessing Officer to be excessive or unreasonable, shall be disallowed. In a given case,

the question whether the expenditure is excessive or unreasonable has to be examined keeping in mind the goods, services or facilities provided by the relative persons for which payment is made. In such a process, the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to the assessee from such services has also to be kept in mind. After applying this test, if it is found that the expenditure is excessive or unreasonable, then excess or unreasonable portion of the expenditure is to be disallowed. The initial onus to prove that the payment made to specified persons is excessive or unreasonable rests upon the assessee, who has to show that such payments are in consonance with the market rate or the payment made to any relative parties are for legitimate needs of the business or profession. It is then the Assessing Officer has to prove from the material placed on record that such a payment on which expenditure is incurred is excessive or unreasonable and is not for the legitimate needs of the business or profession, or any kind of benefit is derived to the assessee. Here in this case, the Assessing Officer has neither enquired nor brought anything on record to show that the payment is excessive as compared to unrelated parties or it was not for the legitimate needs of the business or profession of the assessee. The same does not seem to have been doubted. It is also not borne out from the finding of the Assessing Officer as well as the CIT(A), as to what was the basis for disallowance of 10%, whether there was any some kind of material or some comparable payments to other parties.

In absence of such material on record, we are unable to sustain the view taken by the Assessing Officer as well as the CIT(A) that disallowance of 10% should be made on *ad hoc* basis. Under these facts and circumstances of the case, we find that it would be proper that matter is restored back to the Assessing Officer, who will examine whether the similar payments to other unrelated parties have been made in the same proportion or on similar rates or whether there was any legitimate need for its business. Thus, this matter is restored back to the file of the Assessing Officer for verification from the end of the Assessing Officer to examine similar nature of payments made to unrelated parties are in consonance or are on similar rate and then decide this matter. If it is found that payments made to related parties are in consonance with the payments made to unrelated parties or it is for legitimate needs of the business or profession, no addition or disallowance should be made. **In the result, this ground is allowed for statistical purpose.**

12. In grounds No.3 & 4, the assessee has challenged disallowance of ₹.1,12,404/- made under Section 43B in respect of the assessee's contribution to the Employees Provident Fund. The assessee has raised additional ground before the CIT(A) for allowing the payments of provident fund contribution by the employer on the ground that the same should be allowed in view of the *second proviso* to section 43B.

The learned CIT(A) dismissed the additional ground as not admitted on the following reasons :-

> *(1) The appellant had suo motto made the disallowance as per the then provision of the second proviso to Section 43B and total income cannot be reduced below the returned income at this stage.*
> *(2) The amendment omitting the second proviso to Section 43B was made by the Finance Act, 2003 w.e.f. 01-04-2004 i.e. after the appellant had filed its return of income.*
> *(3) The aforesaid decisions having been delivered recently do not apply to the concluded assessment because this does not give rise to the cause of action for raising the additional ground. The return of income filed after making payment of self assessment tax becomes a concluded assessment if the returned income is accepted u/s. 143(1) or u/s 143(3)."*

13. Both the parties fairly agreed that this issue is covered by the decision of the Hon'ble Supreme Court in the case of **CIT Vs. Alom Extrusions Ltd., reported in (2009) 319 ITR 306**, wherein the Hon'ble Supreme Court concluded that the omission of second proviso to Section 43B and the amendment of first proviso by the Finance Act, 2003, bringing about uniformity in payment of tax duty, cess and fee on one hand and contribution to employees welfare funds on the other are curative in nature and thus, is effective retrospectively from 1st April, 1988 i.e. the date of insertion of *proviso*. It is also not disputed that payments have been made before the due date of filing of a return. Thus, the disallowance of ₹.1,12,404/- is deleted and the same is to be allowed as deduction under Section 43B. Thus, grounds No.3 & 4 are allowed. **In the result, appeal filed by the assessee stands allowed subject to directions given in respect to the ground No.2**.

14. ITA No.8787/mum/2004(AY 2001-02)(By Department)

In this appeal, the department has raised the following grounds of appeal :-

> *1. "On the facts and in circumstances of he case and in law, the CIT(A) erred in directing the Assessing Officer to allow the payments made to foreign parties without TDS, disallowed by the Assessing Officer u/s.40(a)(i) on the grounds that the same were in the nature of professional fees not liable to TES as per the provisions of DTAA without appreciating the fact that payments of all kinds including reimbursement of expenses is hit by the provisions of section 40(a)(i) r.w.s. 195 as held by the Mumbai ITAT in the case of DCIT, SPl. Rg. 20 Vs. M/s Arthur Andersen & Co. (ITA No.9125/Mum/1995).*
> *2. On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the Assessing Officer to exclude the reimbursement costs from the total payments made to sister concerns for working the disallowance at 10% of the total payment made without appreciating the fact that the assessee had not produced any proof to determine the reasonableness of payments made u/s.40A(2)(b) and acceptance of the same by the CIT(A) was in contravention of Rule 46A."*
> *3. On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the Assessing Officer to allow the late payment of PF contribution u/s.43B without appreciating the fact that the grace period is solely for the purpose of section 14B of the P.F. Act and the due date under both the Acts remains the same."*

15. The facts apropos ground No.1 is that, the assessee company had made the following payments to non-residents towards professional charges for services rendered and for reimbursement of expenses.

a)	KPMG LLP, USA -Professional fees	₹.20,89,906	(USD46,248.00)
b)	KPMG Consulting LP, Canada -Professional fees and Reimbursement of expenses	₹.13,37,229	(USD 30,678,08)

The payments were made without deduction of tax at source. The Assessing Officer held that these payments were in the nature of royalties under Section 9(1)(vi) and the relevant article dealing with royalties under the respective Double Taxation Avoidance Agreements (for short 'DTAAs'). While coming to his conclusion, he has relied upon the following decision :-

1) ITAT Delhi Bench-ITO Vs. Munak Galva Sheet Ltd.[1990] 35 ITD 304;
2) ITAT Bangalore Branch-AEG Vs. Commissioner [1994] 48 ITD 359 (Bang.);
3) EPW Da Costa and Another Vs. Union of India [1980] 121 ITR 751 (Delhi);
4) Continental Construction Ltd. Vs. CIT [1990] 185 ITR 178 (Delhi);
5) Continental Construction Ltd. Vs. CIT [1992] 195 ITR 81 (SC); and
6) ITAT, Mumbai-Capt. K.C.Saigal Vs. ITO [1995] 54 ITD 488 (Del.).

Accordingly, he held as under :-

"i) The Professional Fees paid to KPMG are in the nature of royalties within the meaning of explanation to section 9(1)(vi) of the I.T.Act, 1961.

ii) Article 15 of DTA Agreement does not apply in as much as KPMG Dallas is the resident of USA and being a beneficial owner of royalties is not carrying on business in India through a permanent establishment situated in India s per the provisions of Article -12(6).

iii) Article-14 of DTA Agreement does not apply as the said article applies only to individuals and not Partnership firms and KPMG Dallas is a Partnership Firm.

iv) That, royalties payable to KPMG Dallas are taxable in India under Article 12 of DTA Agreement and Section-9(1)(vi) of the I.T. Act, 1961.

In view of the above, it is stated that the company should have deducted tax in respect of amount payable to KPMG Dallas under the provisions of section 195 r.w.s. 195A on the ground that the amount payable to KPMG Dallas was chargeable to tax in India under Article-12(2) and section -9(1)(vi) r.w.s. 115A.

Therefore, the amount of ***₹.20,89,906/-*** *is not allowed as a deductible expenditure under the provisions of section -40(a)(i)*

r.w.s.195 r.w.s. 195A and is accordingly included in the total income of the assessee company.

For the same reason as discussed in forgoing paragraphs in relation to remittance of professional fees to KPMG Dallas it is held that the company should have deducted tax in respect of amounts payable to KPMG Consultancy LP, Canada of a sum of ₹.13,37,229/- under the provisions of section 195 r.w.s. 195A on the ground that the amount payable to KPMG Consulting LP, Canada was chargeable to tax in India under Artilce-12(2) and section 9(1)(vi) r.w.s. 115A to the exclusion of Article-7 which for the above reasons are held as not being applicable and relevant to the case of the remittances ot KPMG Consulting LP, Canada who has rendered professional services in connection with developing the transaction strategy/value proposition, etc. to Essar Oil Ltd. Accordingly, the amount of ₹.13,37,229/- is not allowed as deductible expenditure under the provisions of section 40(a)(I) r.w.s. 195 and is included in the total income of the assessee company."

16. Before the CIT(A), it was submitted that the none of the case laws as have been relied upon by the Assessing Officer are applicable and further in order to be covered under the definition of the term royalty used in the DTAA, it has to fulfil certain criteria which in this case is not applicable at all. The Assessee also relied upon the decision of the M.P. High Court in the case of **CIT V HEG Ltd., reported in [2003] 130 Taxman 72 (MP).** The CIT(A) agreed with the contention of the assessee and held that the payments were not in the nature of royalties either under Section 9(1)(vi) or under respective DTAAs, hence, there is no obligation to deduct the tax under Section 195. The relevant finding of the CIT(A) are reproduced herein below :-

"4.2 Finding

<u>Payment made to KPMG LLP, USA</u>

The appellant has placed on record invoice, letter of engagement dated 19 April, 2000, note on services rendered, RBI approval and declaration dated 18 August 2000 received from KPMG LLP, USA.

The appellant has stated that it was engaged as a consultant by Essar Oil Limited to provide consultancy services in connection with the sale of its energy business. In this connection KPMG LLP, USA was engaged to render professional services.

The scope of engagement was for rendering professional services. The services were rendered outside India. KPMG LLP, USA is a firm of individuals. Pursuant to the provisions of Article 15 of the Indo-US DTAA, the income from the services is not taxable in India. Accordingly, there was no requirement of tax deduction at source from the remittance.

Payment made to KPMG Consulting LP, Canada

The appellant has placed on record invoice, letter dated 09 April, 2001, note on services and declaration dated 29 May 2001 received from KPMG Consulting LP, Canada.

The appellant has stated that it was engaged along with SBI Capital Markets Ltd. by Essar Oil Limited for assisting it in the search of a strategic partner as Essar Oil was planning to enter the retail oil marketing sector post de-regulation. In this connection KPMG Consulting LP, Canada was engaged to render professional services. The payment was towards fees of USD 28,000 and reimbursement of expenses in the nature of air travel, transportation, lodging, meals and other expenses amounting to USD 2,678.08.

The scope of engagement was for rendering professional services. The services were rendered in Canada and in India. KPMG Consulting LP is a partnership of body corporates. It did not have a fixed base/permanent establishment in India. Pursuant to the provisions of Article 7 of the Indo-Canada DTAA, the income from the services is not taxable in India. Accordingly, there was no requirement of tax deduction at source from the remittance.

To sum up, the above mentioned payments are not in the nature of 'royalties' either under section 9(1)(vi) of the Act or under the respective DTAAs. There was no obligation to deduct tax u/s 195 of the Act. Therefore, the subject amounts are not disallowable u/s. 40(a)(i) of the Act. In the result, Ground Nos. 1 to 5 are allowed."

17. Learned Senior AR on behalf of the assessee submitted that it is not a case of royalty under Article 12 of the Indo-US DTAA as the payment was made purely for rendering of professional services to KPMG, US and KPMG Canada. In support of his contentions, he relied upon the following judgments :-

i) HEG 130 Taxman 73 (MP);
ii) Hindalco 96 TTJ 1009 (Mum);
iii) JDIT Vs. Harward Medical International USA [2011] 16 taxman.com 69 (mum); and
iv) Standard Chattered Bank vs. DDIT (Intl.tax) [2011] 11 taxman.com 105 (mum).

He, thus, finally relied upon the findings of the CIT(A). On the other hand learned CIT DR relied upon the findings given by the Assessing Officer.

18. We have carefully considered the rival submissions and also gone through the findings given by the Assessing Officer as well as the CIT(A). The relevant facts are that the assessee company was engaged as a consultant by Essar Oil Limited to provide consultancy services in connection with sale of its energy business. Such a sale was expected to require application of high level office skills besides technical and industry knowledge. For rendering such consultancy a significant number of such overseas companies are based in USA. The assessee engaged the services of KPMG Dallas, which is a firm of individual and resident of USA, which had the skill and technical knowledge relating to energy division based industry and technical parameters in giving such consultations and conduct negotiations with the potential parties. It was in lieu of this, that a professional fee of USD 46,248 which in terms of INR come to ₹.20,89,906/-, was paid. The second payment was made to KPMG consulting LP Canada for rendering professional services for the Essar Oil Limited for retail oil

marketing and other related services. The payment towards fee was made at USD 30,678/- which in terms of INR is ₹.13,37,229/-, which also included reimbursement of expenses in the nature of transportation, lodging, meals and other expenses. The Assessing Officer has given categorically finding that so far as the Article 15 of DTAA is concerned, the same does not apply to KPMG USA as it does not have any PE or business based in India and the services were not rendered for a period exceeding 90 days within the period of 12 months. His only case is that the professional fees paid to KPMG USA are in the nature of royalties within the meanings of '*explanation'* to section 9(1)(vi) and is taxable under Article 12 of Indo-US DTAA. The royalties and fees for included services is taxable as per Article 12 in clause 3, reads as under :-

> **"3. The term "royalties" as used in this Article means :**
> (a) payments of any kind received as a consideration for the use of or the right to use any copyright or a literary, artistic or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity use or disposition thereof: and"

18.1 Looking to the nature of professional services rendered to the KPMG USA, it is evident that it does not fall in any of the terms of definition given for Royalty under Article 12 of Indo US DTAA. It was purely a professional service for consultancy which were rendered outside India and nor for supply of scientific, technical, industrial or

commercial knowledge or information. Thus, nature of payment do not fall within the meaning of Article 12 and, therefore, there was no liability to deduct TDS and consequently disallowance made under section 49(ia) is uncalled for. Similarly, in the case of payment made to KPMG, Canada were also purely for professional services and reimbursement of expenses, which in any manner does not fall under Article 12. Thus, on such payment also there was no liability to deduct TDS and consequently Section 40(ia) will not be applicable. The finding of the CIT(A) is, thus, upheld. **Accordingly, ground No.1 as raised by the department is dismissed**.

19. At the outset, as admitted by both the parties that ground No.2 is similar to ground No.2 of the assessee's appeal in ITA No.8824/M/2004. Therefore, in view of the finding given in the aforesaid appeal, the matter has to be examined by the Assessing Officer in the light of the directions given above in para 11. Thus, this ground is treated as allowed for statistical purposes.

20. In ground No.3, the department has challenged the disallowance of ₹.4,81,778/- made under Section 43B by the Assessing Officer. It is seen that there is a categorical finding by the CIT(A) that the assessee had made contribution to the provident fund within the grace period of five days. Based on this fact, learned CIT(A) has deleted the addition. It is undisputed fact that contribution to provident fund has been made within the grace period of 5 days and in any case, it has been paid

within the due date of filing of return. Under these facts and circumstances, no disallowance under Section 43B can be made on this score and, **therefore, the finding of the CIT(A) is upheld and the ground No.3 raised by the department is dismissed**.

21. **ITA No.2251/Mum/2006 (AY 2002-03)(By Assessee)** :

In this appeal, the assessee has raised the following grounds of appeal :-

> *"1. On the facts and circumstances of the case and in law the Commissioner of Income Tax (Appeals) erred in upholding the disallowance made by the Assessing Officer of the amounts not recoverable from clients and claimed as bad debts amounting to ₹.33,14,803/-.*
> *2. On the facts and circumstances of the case and in law the Commissioner of Income Tax (Appeals) erred in upholding disallowance to the extent of ₹.2,10,000 made by the Assessing Officer u/s.40A(2)(b) of the Income Tax Act, 1961 out of professional fees paid to KPMG, a firm registered in India."*

The ground No.1 deals with disallowance of amount of claim of bad debts. This issue has already been decided in the assessee's favour in appeal for the assessment year 2001-2002 in ITA No.8824/m/2004. Thus, in view of the reasoning given in the aforesaid appeal, the disallowance made for bad debts is deleted and **accordingly ground No.1 is allowed**.

22. The ground No.2 relates to ad hoc disallowance of ₹.2,10,000/- made by the Assessing Officer under Section 40A(2)(b). This issue has also been decided in the aforesaid appeal and in view of the

reasoning given above, this issue is set aside to the file of the Assessing Officer as per the directions given therein. **In the result, the ground No.2 is allowed for statistical purpose**.

23. **ITA No.2379/Mum/2006 (AY 2002-03)(By Department) :**

In this appeal, the revenue has raised the following ground of appeal:-

> *"1. On the facts and circumstances of the case and in law the CIT(A) erred in restricting the disallowance of ₹.15,85,00/- us/.40A(2)(b) of the Act to ₹.2,10,000/- without appreciating the fact that the assessee had not produced any proof to determine the reasonableness of payments made u/s.40A(2)(b) and acceptance of the same by the CIT(A) was in contravention of Rule 46A."*

This ground has already been decided while deciding the assessee's appeal for the assessment year 2001-2002 and also the department's appeals for the same year. Since, this matter has been restored back to file of the Assessing Officer it is treated as allowed for statistical purposes. **This ground is thus allowed for statistical purposes**.

24. **ITA No.1979/Mum/2007 (AY 2003-04)(By Assessee) :**

In this appeal, the assessee has raised the following ground of appeal:-

> *"1. On the facts and circumstances of the case and in law the Commissioner of Income tax (Appeals) erred in upholding the disallowance made by the Assessing Officer us/.40A(2)(b) of the Income tax Act, 1961 of ₹.2,10,000/- being 10% of professional fees amounting to ₹.21,00,000/- paid to KPMG, a firm registered in India."*

In this case, only one issue has been raised with regard to adhoc disallowance of ₹.2,10,000/- under section 40A(2)(b). In view of the finding given in I.T.A.No.8824/M/2004 (AY 2001-02), this issue is

restored back to the file of the Assessing Officer as per the directions given in the aforesaid appeal. **In the result, this ground is allowed for statistical purpose**.

25. **ITA No.2057/Mum/2007 (AY 2003-04)(By Department) :**

In this appeal, the revenue has raised the following ground of appeal:-

> *""1. On the facts and circumstances of the case and in law the CIT(A) erred in restricting the disallowance of ₹.15,85,00/- us/.40A(2)(b) of the Act to ₹.2,10,000/- without appreciating the fact that the assessee had not produced any proof to determine the reasonableness of payments made u/s.40A(2)(b) and acceptance of the same by the CIT(A) was in contravention of Rule 46A."*

The issue raised by the department in the present appeal has also been covered by the decision given in ITA No.8824/M/2004. In view of the finding given in the aforesaid appeal, this ground is also allowed for statistical purpose.

26. **In the result, the appeals of the assessee are partly allowed for statistical purposes and departmental appeals are also partly allowed for statistical purposes**.

Order pronounced on this 8th day of June, 2012.

Sd/-	Sd/-
(P.M.JAGTAP)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, Dt: 8th June, 2012

Copy forwarded to :

1. The Appellant,
2. The Respondent,

3. The C.I.T.
4. CIT (A)
5. The DR, B - Bench, ITAT, Mumbai

//True Copy//

BY ORDER

ASSISTANT REGISTRAR
ITAT, Mumbai Benches, Mumbai

Pkm