IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH "B" NEW DELHI)
BEFORE SHRI N.K. SAINI AND SHRI I.C. SUDHIR

ITA No. 6183/Del/2014
Assessment Year: 2007-08

Cheil India Pvt. Ltd., (Formerly known as Cheil Communications India Pvt. Ltd.), 2nd Floor, Block-C, Vipul Tech Square Sector-43, Golf Course Road, Gurgaon. (PAN: AACCC2299Q)	vs.	Income-tax Officer, Ward 3(3), New Delhi.
(Appellant)		(Respondent)

Appellant by: Shri Salil Kapoor, Adv. and Shri Vikas Jain, CA
Respondent by: Shri Sanjay Prasad, CIT(DR)

Date of hearing : 18.05.2015
Date of pronouncement: 16 .07.2015

ORDER

PER I.C. SUDHIR: JUDICIAL MEMBER

The assessee has questioned First Appellate Order on the following grounds:

1. That the appellate order passed by the learned CIT(A) is contrary to the facts of the case and against the provisions of law and has been passed with pre-conceived notions and is based on conjectures and surmises and is therefore liable to be quashed.

2. That the learned CIT(A) has grossly erred both on facts and in law, in confirming the addition made by Income-tax Officer, Ward 3(3), New Delhi ('learned AO') being the amount paid/payable by Appellant to its vendor i.e. Star India Private Limited ('Star India') on the sole premise that Star India did not respond to the notice issued by the learned AO under section 133(6) of the Act.

   2.1. That the learned CIT(A) has grossly erred in holding a huge disallowance which is based on presumptions, assumptions,

conjecture and surmises and without appreciating the fact that penalizing the Appellant for the inaction of third party who are not under any sort of control is blatantly incorrect.

3. That the learned CIT(A) has completely disregarded the fact that Star India had already filed its confirmation with the learned AO on March 10, 2014.

4. Without prejudice to the fact that Star India had already filed its confirmation and same is placed on records, learned CIT(A) has completely disregarded the alternate evidence filed by the Appellant related to payments made to Star India which included copy of ledger account incorporating the details of invoices received and payments made to Star India, copy of invoices issued by Star India and extracts of bank statements evidencing the payment to Star India.

5. That the learned CIT(A) has grossly erred both on facts and in law in holding that amount not confirmed by Star India should be disallowed under section 68 of the Act.

6. That the notice issued by learned CIT(A) for enhancement of additions made by learned AO and enhancement so made is illegal, bad in law, unjust and without jurisdiction.

7. That the learned CIT(A) has grossly erred on facts and in law enhancing the addition made by learned AO by directing the learned AO to disallow payments made by the Appellant under section 40(a)(ia) of the Act and ignoring the fact that the appeal is preferred against the order passed under section 254 read with section 143(3) of the Act pursuant to the specific directions of Hon'ble ITAT.

   7.1. The learned CIT(A) has completely disregarded the fact that the Hon'ble ITAT had referred the matter to the learned AO only for verification of pass-through cost and therefore, enhancement made is illegal, bad in law and without jurisdiction.

8. That the learned CIT(A) has grossly erred on facts and in law in exceeding her jurisdiction and in enhancing the income of the Appellant by making addition on issue which was never raised by the learned AO

9. That the learned CIT(A) has erred on facts and in law in disallowing payments made to Star India without deduction of tax at source under section 40(a)(ia) of the Act on the ground that no bills or vouchers were filed by the Appellant to substantiate payments made to Star India.

9.1. The learned CIT(A) has completely overlooked those exhaustive details that have been filed by Appellant to substantiate payments made to Star India.

9.2. The learned CIT(A) has completely ignored the submissions of the Appellant that the payments made to print/ electronic media are specifically exempted from deduction of tax at source as per CBDT Circular No 715 dated 8 August 1995 and Circular No 717dated 14 August 1995.

9.3. Without prejudice to the above, the learned CIT(A) has erred in disallowing the amount paid/ payable to Star India by the Appellant when such amount has already been disallowed on account of non-receipt of confirmation from Star India and the same results into double disallowance of the same amount.

10. That the learned CIT(A) has erred on facts and in law in disallowing payment of Rs 9,50,040 made to Doordarshan without deduction of tax at source under section 40(a)(ia) of the Act on the ground that nil withholding certificate submitted by the Appellant has been issued in the name of Cheil Worldwide and not the Appellant.

10.1 Without prejudice to the above, above disallowance is bad-in-law as the payment made to Doordarshan are not subjected to deduction of tax at source as per CBDT Circular No 715 dated 8 August 1995.

11. That the learned CIT(A) has erred on facts and in law in disallowing the payment of Rs 97,29,688 made by the Appellant to its vendors without deduction of tax at source under section 40(a)(ia) of the Act.

11.1. The learned CIT(A) has disregarded the fact that such payments were made without deduction of tax in light of lower tax withholding certificate furnished by the vendors and submitted by Appellant to learned CIT(A).

11.2. The learned CIT(A) has erred in disallowing payments amounting Rs 67,75,238 made to Star India Private Limited on the premise that no documents or evidences was submitted by the Appellant when such specific documents were never asked by learned CIT(A) to verify the payment made to such vendor.

12. That the learned CIT(A) has erred on facts and in law in disallowing the payment of Rs 54,341 made to its vendors for supply of materials without deduction of tax at source under section 40(a)(ia) of the Act on

the ground that these payments are made for work undertaken by the vendors and are subject to withholding tax under section 194C of the Act.

13. That the learned CIT(A) has erred on facts and in law in disallowing the payment of Rs 13,14,406 made to its vendors for supply of materials without deduction of tax at source under section 40(a)(ia) of the Act on adhoc basis and presuming that even such payments are subject to withholding tax.

14. That the learned CIT(A) has erred on facts and in law in disallowing the reimbursements made by the Appellant to its employees without deduction of tax at source under section 40(a)(ia) of the Act alleging that no evidences such as bank statement of employees were filed by the Appellant to substantiate that such expenses have actually been incurred and paid by employees.

    14.1. The learned CIT(A) has grossly erred both on facts and in law in making such impugned disallowance based on presumptions, assumptions, conjecture and surmises without appreciating that reimbursement of expenses is not income of the recipient and accordingly, no withholding is required.

    14.2. The learned CIT(A) while making such disallowance has completely ignored the evidences filed by the Appellant (i.e. sample bills, credit card statements, etc.) to substantiate the fact that such expenses were pure cost to cost reimbursements and no further specific evidences were sought by the learned CIT(A).

    14.3. Without prejudice to above, even if such reimbursements are taxable in the hands of employees and are subject to withholding tax under section 192 of the Act, same cannot be disallowed under section 40(a)(ia) of the Act.

15. That the learned CIT(A) has grossly erred in disallowing payments amounting to Rs 13,185 under section 40(a)(ia) of the Act without appreciating that the amount is less than the threshold prescribed for the deduction of taxes under the Act and accordingly, no withholding is required.

16. Without prejudice to the above grounds, in view of the facts and circumstances of the case and in view of the insertion of second proviso to section 40(a)(ia) of the Act, no such disallowance made by learned CIT(A) under section 40(a)(ia) of the Act is uncalled for.

17. Without prejudice to the above grounds, benefit of second proviso to section 40(a)(ia) of the Act should be allowed in the year in which TDS is deemed to be deducted and paid.

18. That the learned CIT(A) has exceeded her jurisdiction by directing the learned AO to initiate penalty proceedings under section 201(1) of the Act

19. That the learned CIT(A) has grossly erred on facts and in law by completely ignoring the provisions of law, submissions made by the Appellant, evidences placed and the material available on record and has passed a perverse order in utmost haste without giving adequate opportunity of being heard which is against the principles of natural justice.

2. Heard and considered the arguments advanced by the parties in view of orders of the authorities below, material available on record and the decisions relied upon.

3. Ground No.1 is general in nature, hence, does not need independent adjudication.

4. Ground Nos.2 to 5: The facts in brief are that the appellant is engaged in the business of advertising, communication, publicity and other services for its customers. The appellant undertakes advertising services for its clients in capacity of an agent. The appellant acts as an intermediary between its clients and the third party vendors in order to facilitate the placement of advertisements. The appellant is remunerated on the basis of an agreed commission fixed as a percentage of the advertisement spends with third

party vendors on behalf of its clients. Therefore, only such commission is recognized as an income and the payments to be made to third party vendors towards abovementioned advertisement spend on behalf of client is recognized as receivable from client as well as payable to vendors in balance sheet and not routed through profit and loss account. This accounting treatment is in accordance with the accounting standards prescribed in India. For the assessment year 'A.Y' 2007-08, the appellant filed its return of income declaring a total income of Rs.21,977,994. The case was picked up for scrutiny assessment under sec. 143(2) of the Income-tax Act, 1961 ('the Act').

5. During the course of assessment proceedings, ld Assessing Officer had asked the appellant to explain the difference between the Revenue recognized in the profit and loss account and the amount on which tax has been deducted by its clients and why such difference should not be treated as income of the appellant. It was explained that the appellant, being engaged in the advertising business in capacity of an agent for its client recognizes only the commission income received/receivable from advertising services in the profit and loss account. The amount incurred on behalf of its clients and the third party vendors are recognized in balance sheet both as payable

to third party vendors and receivable from client. The appellant also filed reconciliation between the two amounts. Further, the appellant also furnished supplementary details along with above reconciliation such as party wise details of amount paid or payable to the third party vendors amounting to Rs.893,992,187.

6. Final assessment order was passed under sec. 143(3) read with 144C of the Act and an addition of Rs.893,992,187 was made on account of pass through cost claimed by the appellant. Aggrieved by the final assessment order, appellant preferred an appeal with the Hon'ble Income-tax Appellate Tribunal ('ITAT') on the ground that appellant was not given proper opportunity of being heard. The Hon'ble ITAT after hearing the company's contention referred the matter to ld. A.O. for fresh adjudication after giving opportunity of being heard. Pursuant to the order of the Hon'ble ITAT and in order to verify the pass through cost disallowed during the course of original assessment proceedings, the ld. A.O. issued fresh notices under sec. 133(6) of the Act to the vendors of the appellant. Such notices were duly complied by all the vendors except in the case of Star India Pvt. Ltd. ('Star India'). Therefore, Ld. A.O. has added Rs.45,541,557 (being amount claimed by the appellant as paid/payable to Star India) to the returned

income of the appellant and passed the assessment order dated February 28,2014. As per the assessment order, Star India did not respond to the notice issued by the Ld. A.O. under sec. 133(6) of the Act in the given time.

7. Subsequently, the appellant was informed by Star India that it had responded to the notices issued by Ld. A.O. through speed post and the same was delivered to the Ld. A.O. on March 10,2014. In the said response filed by Star India, vendor has confirmed that it had collected Rs.74,376,857 from the appellant in A.Y 2007-08. Copy of response filed by Star India obtained from Ld. A.O. is enclosed as Annexure II. Since confirmation has reached the office of the Ld. A.O. after the order was passed, cognizance of such confirmation has not been taken by the Ld. A.O. However, once effect of such confirmation is considered, the additions made by the Ld. A.O. will not survive, claimed the assessee.

8. The aggrieved assessee went in first appeal but could not succeed as the Learned CIT(Appeals) has upheld the disallowance of Rs.4,55,41,557 on account of claim of payment made to Star India Pvt. Ltd. and confirmed the addition of Rs.4,55,41,557 on the basis that Star India Pvt. Ltd. was given sufficient opportunity to prove the transaction but it failed to respond. This

action of the First Appellate Authority has been questioned before the ITAT in ground Nos. 2 to 5.

9. The Learned AR contended that the sole reason for the disallowance was that confirmation filed by the Star India Pvt. Ltd. reached the office of the Assessing Officer after the order was passed and accordingly the Assessing Officer did not take cognizance of the said confirmation. He referred page No. 84 to 92 of the paper book-I wherein copy of the said confirmation has been made available. The Learned AR submitted that besides the said confirmation filed by Star India Pvt. Ltd. before the Assessing Officer on 10.3.2014 subsequent to the passing of the assessment order, the assessee in support of its claim had also submitted evidences like ledger account, bank statements, confirmation obtained by the assessee to substantiate that the transactions carried out by the assessee are genuine. The Learned CIT(Appeals), however, ignored the submissions and material on record and directed the Assessing Officer to again issue notice under sec. 133(6) of the Act to Star India Pvt. Ltd. to seek confirmation again. Accordingly, the Assessing Officer issued notice dated 25.8.2014 to Star India Pvt. Ltd. and in his remand report dated 4.9.2014, the Assessing Officer stated that no confirmation was filed by Star India Pvt. Ltd. within

the time allowed by the Assessing Officer. The Assessing Officer thus ignored the fact that confirmation was already received by his office during the remand proceedings. Based on such remand report, the Learned CIT(Appeals) has upheld the disallowance as unconfirmed amount. The Learned AR contended that the above payments have been made through the bank account of the assessee which were also on record. Thus, the addition made is based on presumption, assumption, conjectures and surmises. The Learned AR contended that the evidences placed and the material available on record has not been properly and judiciously considered. The Learned AR placed reliance on the following decisions:

i) ITO vs. Super Chemicals Distributor – 1 SOT 102 (Del.);

ii) Mather & Platt (India) Ltd. vs. CIT – 168ITR 493 (Cal.);

iii) CIT vs. Nikunj Eximp Enterprises Pvt. Ltd. – 35 Taxmann 384 (Bombay);

iv) Sagar Bose Vs. ITO – 56 ITD 561 (Cal.);

v) Rajesh P. Soni vs. CIT – 100 TTJ 892 (Ahd.);

vi) Anish Ahmed & Sons vs. CIT – 297 ITR 441 (S.C);

10. The Learned AR submitted further that provisions of section 68 are not applicable as held by the Learned CIT(Appeals) while upholding the

disallowance since there is no outstanding credit balance of Rs.4,55,41,557 in the books of the assessee on account of Star India Pvt. Ltd. and the closing balance on 31.3.2007 is nil. He submitted that assessee had availed services from Star India Pvt. Ltd. on behalf of its clients and such payments form part of the pass through cost and were not made towards purchases. The credit in the account of Star India Pvt. Ltd. in the subject assessment year was explained by way of a corresponding debit in the books of the assessee as "recoverable from clients" which are not disputed by the authorities below. He contended further that the issue of addition under sec. 68 of the Income-tax Act, 1961 was not subject matter in the original assessment or revised assessment framed by the Assessing Officer. Without prejudice to the above submissions, the Learned AR submitted that disallowance under sec. 68 of the Act is unwarranted where the identity of the creditor (Star India Pvt. Ltd.) is established. He placed reliance on the following decisions:

i) Manoj Aggarwal & Ors. Vs. DCIT – 310 ITR 99 (Del.);
ii) CIT vs. Lovely Exports – 216 ITR 195 (S.C);

11. The Learned AR submitted further that the assessee is engaged in the business of advertising services and undertakes the services for its clients in capacity of an agent. The assessee acts as an intermediary between its clients

and the third party vendors in order to facilitate the placement of advertisement. The assessee is remunerated on the basis of an agreed commission fixed as a percentage of the advertisement spent on behalf of its clients, therefore, only such commission is recognized as an income and the payments to be made to third party vendors towards such advertisement spent is recognized as "pass through cost" in the balance sheet and is not debited to the profit and loss account. He submitted that the ITAT in the case of assessee for the assessment year 2005-06 has discussed nature of the business of the assessee vide order dated 30.11.2010 in ITA No. 712/Del/2010 holding that the assessee simply acts as an intermediary between the ultimate customers and the third party vendor in order to facilitate placement of the advertisement.

12. The Learned CIT(DR) on the other hand placed reliance on the orders of the authorities below on the issue with the submission that despite availing sufficient opportunity, the assessee could not establish the genuineness of the claimed payment of Rs.4,55,41,557 made to Star India Pvt. Ltd. Since the assessee had failed to discharge its onus to establish the genuineness of the above claim and Star India Pvt. Ltd. also failed to respond notice issued under sec. 133(6) of the Act to them, the Assessing

Officer was having no option but to make the disallowance of the doubted payment.

13. Having gone through the orders of the authorities below, we find that out of the notices under sec. 133(6) of the Act issued to eleven vendors of the company to verify the deemed income on account of short receipts declared in profit and loss account of Rs.89,39,92,000, ten responded the notice and filed confirmation except Star India Pvt. Ltd. The Assessing Officer thus in absence of confirmation from Star India Pvt. Ltd. disallowed the payment claimed to have been made to them by the assessee at Rs.4,55,41,557. The same has been upheld by the Learned CIT(Appeals). We thus find that the authorities below have not bothered themselves to verify the other evidences filed by the assessee before the Assessing Officer in support of the genuineness of the claim, which were confirmation obtained by the assessee from Star India Pvt. Ltd. along with reconciliation with their accounts maintained by the assessee; ledger account of Star India Pvt. Ltd. maintained by the assessee; invoice received from Star India Pvt. Ltd.; relevant extracts of bank statement highlighting the payments made to Star India Pvt. Ltd. by the assessee and reconciliation between amount confirmed by Star India Pvt. Ltd. to the Assessing Officer and amount as per

accounts of assessee. This fact had also not been rebutted by the department that after completion of the assessment under sec. 254/143(3) on 28.2.2014, the Star India Pvt. Ltd. had filed its confirmation to the Assessing Officer on 10.3.2014, which was not entertained by the Assessing Officer since he had completed the assessment. During the appellate proceedings, the Learned CIT(Appeals) called for remand report from the Assessing Officer. The Assessing Officer again issued notice under sec. 133(6) of the Act to Star India Pvt. Ltd. on 25.8.2014 which was delivered to Star India Pvt. Ltd. on 01.09.2014 but in absence of any response, the Assessing Officer furnished its remand report dated 04.09.2014 upholding the disallowance. Thus, we find that the disallowance has been made and upheld by the authorities below merely on the basis that the Star India Pvt. Ltd. did not bother to respond the notices issued under sec. 133(6) of the Act by the Assessing Officer to them. The authorities below have not bothered to examine the veracity of the documents filed by the assessee in support of the genuineness of the claimed payment made to Star India Pvt. Ltd. It is a well established position of law that genuineness of the claim cannot be denied merely because the party to whom payment claimed to have been made is not responding the notice issued by the Assessing Officer especially when the assessee claimant had filed sufficient documents in support of the claimed

payment. There may be several reasons for a party for non-appearance or non-compliance before the Assessing Officer, for which the assessee cannot be penalized. Though we are aware that it is second round of the appeal before the ITAT, still to meet the end of justice the only option left with us is to set aside the matter to the file of the Assessing Officer to examine the veracity of the documents filed by the assessee in support of the genuineness of the claimed payment of Rs.4,55,41,557 to Star India Pvt. Ltd. after affording opportunity of being heard to the assessee and decide the issue afresh. It is ordered accordingly. Ground Nos. 2 to 5 are thus allowed for statistical purpose.

14. Ground Nos. 6 to 8: Supporting these grounds, the Learned AR contended that the Learned CIT(Appeals) while directing the Assessing Officer to disallow payments made by the assessee under sec. 40(a)(ia) of the Act has also grossly erred in enhancing the addition and ignoring the fact that appeal is preferred against the order passed under sec. 254 read with sec. 143(3) of the Income-tax Act, 1961 pursuant to the specific directions of the ITAT. He submitted that the ITAT had referred the matter to the Assessing Officer only for verification of pass through cost and, therefore, enhancement made is illegal and without jurisdiction. The Learned AR

submitted that disallowance under sec. 40(a)(ia) of the Act as directed by the Learned CIT(Appeals) was not the subject matter of the earlier assessment. He placed reliance on the decision of Hon'ble High Court of Delhi in the case of CIT vs. Sardari Lal & Co. – 251 ITR 864 (Del.). He also placed reliance on the following decisions:

i) Saheli Synthetics (P) Ltd. vs. CIT – 302 ITR 126 (Guj.);
ii) DCIT vs. Surat Electricity Co. Ltd. – 377 ITR 271 (Guj.);
iii) CIT vs. Union Tyres – 107 Traxmann 447 (Del.); &
iv) ITO vs. Jabal Woodcrafts India – ITA No. 803/Del/2009

15. The learned CIT(DR) on the contrary submitted that the facts of the above cited case of Sardari Lal & Co. are distinguishable hence it is not relevant in the present case. He submitted that in the case of Sardari Lal & Co.(supra), the Assessing Officer had not looked into some facts for which directions were issued by the appellate authority. It was in this light of the matter, the Hon'ble Delhi High Court held as "looking from the aforesaid angles, the inevitable conclusion is that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the Assessing Officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under sec. 147/148 and section 263, if requisite conditions are fulfilled. It is inconceivable that in the presence of

such specific provision, a similar power is available to the first appellate authority. That being the position, decision in Union Tyre case (supra) of this court expresses the correct view and does not meet reconsideration. This reference is accordingly disposed.

16. Learned CIT(DR) submitted that the method of accounting followed by the assessee and the fact that some items are shown as pass through without deduction of tax were very much investigated by the Assessing Officer in both the rounds of assessment. He also placed reliance on the decision of Hon'ble Supreme Court in the case of CIT vs. Sun Engineering (P) Ltd. – 198 ITR 297 (S.C). The learned CIT(DR) submitted further that the issue of method of accounting followed by the assessee, non-deduction of TDS (evidenced by the discrepancy in 26AS statements), passed through costs were very much part of the original assessment, DRPS order and the set aside order of the ITAT. He submitted that the issue before the ITAT was on the violation of principles of natural justice and vide para No. 23, the ITAT has simply directed that the assessee be granted sufficient opportunity.

17. Having considered arguments advanced by the parties in view of the cited decisions, we find that the contention of the Learned AR is that while

directing the Assessing Officer to disallow payments made by the assessee under sec. 40(a)(ia) of the Act, the Learned CIT(Appeals) has enhanced the income without appreciating that the appeal was preferred against the order passed by the Assessing Officer under sec. 254 read with sec. 143(3) of the Act pursuant to the specific direction of the ITAT, thus, the Learned CIT(Appeals) has exceeded the jurisdiction. The contention of the learned CIT(DR) on the other hand remained that the cited decisions by the Learned AR having distinguishable facts are not relevant and the Learned CIT(Appeals) as alleged has not exceed his jurisdiction while directing the Assessing Officer to disallow payments made by the assessee under sec. 40(a)(ia) of the Act, since issue of method of accounting followed by the assessee, non-deduction of TDS and pass through cost was very much part of the original assessment, DRPs order and the set aside order of the ITAT. We, thus find that the setting aside order of the ITAT, has become more relevant to decide the issue. The relevant para numbers 21 to 24 of the order dated 31.1.2012 of the ITAT is being reproduced hereunder:

> "21. In this regard, it is seen that indeed, the A.O. collected evidence at the back of the assessee and never confronted the same to the assessee. The assessee was not allowed any opportunity to rebut the evidence. However, the A.O. went on to make the addition of Rs.89,39,92,188, on account of the alleged short receipts declared in

the profit and loss account. Now this is entirely in violation of the natural justice principles of audi alterem partem. No body can be condemned in hearing. Addition herein having been made at the back of the assessee without confronting the same to the assessee much less allowing the assessee any opportunity to rebut it, this addition, as it stands, is not sustainable in the eye of law. Accordingly, this issue is remitted to the file of the A.O., to be decided afresh in accordance with law, on providing due and adequate opportunity to the assessee to rebut the evidence collected by the A.O. at the back of the assessee.

22. In this regard, a perusal of the relevant portion of the DRP's order, as reproduced herein above, shows that the assessee has produced confirmations from 45 vendors before the DRP, and the DRP had forwarded the same to the A.O. for verification. The A.O. had requested for more time to make the verification. The DRP, however, directed the A.O. to verify the evidence and if the A.O. were satisfied, he was to restrict the disallowance, if any, which, in any case, as per the DRP, could not exceed Rs.89,39,92,188, the payments made to third parties not verifiable. Since the matter is now being remitted to the file of the A.O., as above, the assessee would get ample opportunity to prove its case.

23. The entire matter is, accordingly, remitted to the file of the A.O. to be decided afresh in accordance with law on affording adequate, due and proper opportunity of hearing to the assessee by confronting the entire evidence collected to the assessee.

24. In the result, for statistical purposes, the appeal of the assessee is treated as allowed."

18. The perusal of above order of the ITAT, as submitted by the Learned CIT(DR) does not suggest that the ITAT has simply directed that the assessee be granted sufficient opportunity but opportunity was afforded to the assessee to rebut the evidence used by the Assessing Officer regarding the addition of Rs.89,39,92,188 made by the Assessing Officer on account of alleged short receipts declared in the profit and loss account violating the principles of natural justice. In compliance, the Assessing Officer made the assessment on the issue afresh under sec. 254 read with 143(3) of the Act, making the addition of Rs.4,55,41,557 out of Rs.89,39,92,188 which was questioned before the Learned CIT(Appeals). The Learned CIT(Appeals) not only upheld the addition of Rs.04,55,41,557 made on account of short receipts declared in profit and loss account but enhanced the income by directing the Assessing Officer to disallow payments made by the assessee under sec. 40(a)(ia) of the Act. We thus find substance in the contentions of the Learned AR that by directing the Assessing Officer to make the disallowance of payments made by the assessee under sec. 40(a)(ia) of the Act, the Learned CIT(Appeals) has introduced in the assessment a new source of income, which is not allowed in an assessment which was made by

the Assessing Officer strictly in compliance of the order of the ITAT for reconsideration of addition of Rs.89,39,92,188 after examining the evidence and upholding opportunity of being heard to the assessee. In the case of DCIT vs. Saheli Synthetics Pvt. Ltd. (supra), it was held that order of Learned CIT(Appeals) to set aside assessment, which does not involve a proposal for enhancement cannot be used for the purpose of expending the scope of the powers available to the Assessing Officer while making fresh assessment pursuant to a set aside. In the case of CIT vs. Sardari Lal & Co. (supra), the Hon'ble jurisdictional High Court has been pleased to hold that the ITAT was justified in holding that in calling for a remand report on the noted four points, the AAC had exceeded his jurisdiction. While computing the total business income of the assessee, the Assessing Officer in that case had estimated the sales at an enhanced figure and had applied a higher rate of gross profit. Thus, the only matter dealt with by the Assessing Officer in the assessment order was the estimation of profits and gains of the business of the assessee. None of the noted four points had any bearing on the question of estimation of either the sales or the gross profit rate. It was held that any addition on account of unexplained investment would constitute a new source of income, which was not the subject matter before the Assessing Officer, therefore, it was not open to the First Appellate Authority

to direct the Assessing Officer to conduct inquiry on the said four points. Hon'ble High Court came to the conclusion that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the Assessing Officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under sec. 147/148 of the Act and section 263 of the Act, if requisite conditions are fulfilled. It is inconceivable that in the presence of such specific provisions, a similar power is available to the appellate authority, held the Hon'ble High Court. Taking strength from the ratios of the above cited decisions, we hold that the direction to the Assessing Officer by the Learned CIT(Appeals) to disallow payments made by the assessee under sec. 40(a)(ia) of the Act was a question of taxability of income from a new source of income which has not been considered by the Assessing Officer, hence it was exceeding of jurisdiction by the Learned CIT(Appeals) in a set aside matter by the ITAT in the present case. The decisions relied upon by the Learned CIT(DR) having distinguishable facts are not relevant as main thrust of the Learned CIT(DR) in his contentions is that the Learned CIT(Appeals) has co-terminus powers as of the Assessing Officer, hence, he is empowered to do what an Assessing Officer can do for the assessment and the directed disallowance has bearing on the question of pass-through costs. It is,

however, not in dispute that the directed disallowance was new source of income, which was not the subject matter of setting aside order by the ITAT, in compliance of which assessment under sec. 254 read with section 143(3) was framed. We thus decide the issue in favour of the assessee with finding that while directing the Assessing Officer to disallow payments made by the assessee under sec. 40(a)(ia) of the Act, the Learned CIT(Appeals) has exceeded her jurisdiction on an issue which was never raised by the Assessing Officer or remained the subject matter of the setting aside order of the ITAT. Similarly, the Learned CIT(Appeals) has also exceeded her jurisdiction by directing the Assessing Officer to initiate penalty proceedings under sec. 201(1) of the Act. In result, ground Nos. 6 to 8 are allowed in favour of the assessee. In consequence, ground Nos. 9 to 18 (questioning the disallowance of payment made by the assessee under sec. 40(a)(ia) and initiation of penalty u/s. 201(1) on its merit) have become infructuous and are thus accordingly disposed of.

19. In result, the appeal is partly allowed.

Order pronounced in the open court on 16 .07.2015

Sd/-	Sd/-
(N.K. SAINI)	(I.C. SUDHIR)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 16 /07/2015
Mohan Lal

Copy forwarded to:

1) Appellant

2) Respondent

3) CIT

4) CIT(Appeals)

5) DR:ITAT

ASSISTANT REGISTRAR

	Date
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Date on which file goes to the Head Clerk.	
Date of dispatch of Order.	