

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1826 OF 2014

Commissioner of Income Tax-19(2) ... Appellant
Vs.
M/s. ITD CEM India JV ... Respondent

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Mr. Abhay Ahuja a/w Mr. P. A. Narayanan for the Appellant
Mr. Riyaz S. Padvekar a/w Mr. Sameer Dalal and Mr. Tanzil R.
Padvekar for the Respondent.

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**CORAM : S. C. DHARMADHIKARI &
PRAKASH D. NAIK, JJ.**

DATE : SEPTEMBER 04, 2017.

P.C. :

1. This Appeal of the Revenue challenges the order passed by the Income Tax Appellate Tribunal, Bench at Mumbai in Income Tax Appeal No.4225/Mum/2012.
2. The assessment year is 2008-2009. The Tribunal dealt with, in the order of 9th April, 2014, at the instance of the assessee, six grounds/questions.

3. The Revenue is in Appeal essentially on the findings of the Tribunal in relation to the ground no. 2 in the assessee's Appeal and ground no. 4.

4. These grounds were taken distinctly in the memorandum of Appeal before the Tribunal. In that memorandum of Appeal, the grievance of the assessee was that the order passed by the First Appellate Authority-CIT(A) 30, Mumbai dated 26th March, 2012 is contrary to law. Ground nos. 2 and 4 read as under :

“2. On the facts and circumstances of the case and in law the Hon'ble Commissioner of Income Tax (Appeals)-30 has erred in upholding the action of the AO in disallowing reimbursement of salary and related expenses to the tune of Rs.4,99,19,593/- for non-deduction of TDS u/s 40(a)(ia).

4. On the facts and circumstances of the case and in law the Hon'ble Commissioner of Income Tax (Appeals)-30 has erred in upholding the action of the AO in disallowing reimbursement of administrative expenses to the tune of Rs.2,39,64,463/- for non-deduction of TDS u/s 40(a)(ia).”

5. As far as ground no.2 is concerned, the Tribunal understood it to mean that it is relatable and referable to ground nos.3 and 4, in the sense the Tribunal found that it is only Section 40(a)(ia) of

the Income Tax Act, 1961 (for short, “the IT Act”) which is the applicable provision. However, on a perusal of the order of the Assessing Officer and that of the Commissioner, we find that Section 40(ba) of the IT Act was also invoked and applied. The relevant finding on that aspect of the matter can be found in the order of the Assessing officer. In paragraph no. 4.2 and while dealing with the issue related to salary of the employees of ITD Cementation India Limited, the Assessing Officer held as under:

4.2 Salary related to employees of ITD Cementation India Ltd.

An amount of Rs.4,99,19,593/- has been paid to ITD Cementation India Ltd. as salary and related expenses to the employees deputed. As per Annexure-5 of letter dated 14-12-2010 no deduction of TDS has been made on the salary paid to employees of the Joint Ventures. Total amount is disallowed as per provision of Sec.40(a)(ia) of the Income-tax Act, 1961. Even disallowance of this amount is also warranted as provision of Sec.40(ba) wherein it is stipulated that in case of association of person, any payment of salary or remuneration by whatever name called, made by such association, body or member of such association shall not be allowed as deductible expenditure.

6. In Appeal before the First Appellate Authority as well, the matter was approached by the First Appellate Authority in the

light of applicability of Section 40(ba) of the IT Act.

7. That aspect is dealt with by the First Appellate Authority in paragraph 5.4 of the order dated 26th March, 2012 (page 36 of the paper book).

8. Thus, the First Appellate Authority had before it a remand report and a reply on the remand report by the assessee. The assessee's representative contended that the payments were routed through the co-ventures and therefore, Tax Deducted at Source (TDS) was 2% from the salary at the rate applicable to that of sub-contractors. Thus, from the salary expenses of Rs.4,99,19,593/- a sum of Rs.10,19,346/- was deducted as TDS. The argument was that the assessee has reimbursed the expenditure on account of salary and related payments to ITD Cementation India Private Limited, who has claimed the same by raising debit notes on the assessee. The Assessing Officer in the remand report (made after remand) held that these payments made cannot be called as payment made to contractor in terms of Section 193C of the IT Act. Although these payments were routed through the current account of the co-venturer that requires

deduction of TDS as per the provisions of Section 192 of the IT Act. The Assessing Officer in the remand report also stated that the debit notes raised by the ITD Cementation India Private Limited were test checked and the amount of expenditure claimed by the assessee was verified. However, the assessee failed to deduct the TDS as per the provisions of the IT Act which was admitted by the assessee. That is how the Assessing Officer, on remand report, also found that he is justified in disallowing expenditure of Rs.4,99,19,593/- on account of salary and other related expenses for non deduction of TDS under Section 40(a) (ia) of the IT Act. Pertinently, the Assessing Officer also noted in the order that the said disallowance is also warranted by the provisions of Section 40(ba). That is because in the case of association of persons, any payment of interest, salary, bonus, commission or remuneration by whatever name called, made by such association to a member of such association shall not be allowed as deductible expenditure. Therefore, on this ground also, the salary and related expenses need to be disallowed. The First Appellate Authority agreed with the Assessing Officer and confirmed this finding.

9. The aggrieved assessee approached the Tribunal. The assessee pointed out that it is a Joint Venture. The Joint Venture is with two companies, namely, ITD Cementation India Limited, an Indian Company and Italian-Thai Development Public Company Limited, a foreign enterprise. The Assessing Officer noted that the assessee company had not deducted tax at source when making payments on account of salary and related expenses, bank guarantee and administrative expenses paid by the Joint Venture to ITD Cementation India Limited.

10. The Tribunal approached the matter by bifurcating the disallowance in relation to salary and administrative expenses. The Tribunal, after noting the rival contentions and particularly the argument that no disallowance has been made in the assessment years 2006-2007 and 2007-2008 which were framed under Section 143(3), proceeded further to hold that the departmental representative relied on some decision, details of which are not disclosed to justify the disallowance. The Tribunal holds in paragraph 18 that it has heard the detailed arguments,

perused the evidence placed in the Appeal paper book and the written submissions.

11. It then mixes up its findings and in relation to the applicability of Section 40(a)(ia) and 40(ba), but concludes that it does not find any reason to sustain the disallowance under Section 40(a)(ia) as the payments made by the assessee to ITD Cementation India Limited were only on account of salary and related expenses.

12. Then it purports to divert its attention to Section 40(ba) of the IT Act, but proceeds to state that this provision is specific. It calls for disallowance of payment of any kind by the association of persons to its members. Then it holds that it could have accepted the arguments of the departmental representative had the member of the assessee been an individual. Because the provision seeks to prevent the enrichment of members through back door. However, in the case at hand, the payment has been made to a company, which is a separate juridical person, distinct from its shareholders/directors. It then holds that payment has been made

on account of reimbursement of an expense incurred by the company. Therefore, the question of enrichment of a member does not arise. There is no profit element. That is why the Section 40(ba) does not get attracted.

13. The Revenue has proposed before us two substantial questions of law.

14. However, when it came to deletion of the addition of Rs.4,99,19,593/-, Mr. Ahuja would submit that the finding of the Tribunal in that regard raises a substantial question of law.

15. The counsel for the assessee on the other hand, would submit that there is no question of invoking Section 40(ba) of the IT Act and merely because the Assessing Officer has referred to it does not mean that the Tribunal was obliged to render any finding about its applicability. We do not agree with the counsel for the assessee for more than one reason. The finding with regard to the applicability of Section 40(ba) is rendered in paragraphs 20, 21 and 22 of the Tribunal's order. These paragraphs read as under:

“20. Now we divert our attention to the provision of section 40(ba).

21. The provision is very specific, because it calls for disallowance of payment of any kind by the AOP to its member. We would have accepted the arguments of the DR/AO/CIT(A), had the member of the assessee were an individual, because, the provision has the enrichment of members through back door. But here is the case of a company, which is a separate juridical person, distinct from its shareholders/directors. In the instant case, the payment has been made on account of reimbursement of an expense made by the company. Here the question of enrichment of a member does not arise, as has been held earlier that there is no profit element.

22. In such a circumstance, provision of section 40(ba) does not get attracted.”

16. As far as Section 40(ba) is concerned, that is pertaining to the amounts not deductible. Section 40 opens with a non-obstante clause. Notwithstanding anything to the contrary in Sections 30 to 38 of the Income Tax Act, 1961, the amounts enumerated in the clauses and sub-clauses thereto shall not be deducted in computing the income chargeable under the head “Profit and

gains of business or profession” That *inter alia* includes an amount in the case of an AOP (Association Of Persons) or body of individuals (other than a company or a co-operative society or a society registered under the Societies Registration Act, 1860, or under any law corresponding to that Act in force in any part of India) any payment of interest, salary, bonus, commission or remuneration, by whatever name called, made by such association or body to a member of such association or body. There are three Explanations below the same.

17. We have not found from the Tribunal's order that it has taken into consideration the provisions and the wide wording thereof. It's applicability therefore, will have to be decided on the touch stone of the plain language of this provision. We do not see any discussion in the Tribunal's order on this point at all.

18. Apart from that, the Tribunal's order is confusing. In the impugned order, the Tribunal does not indicate what it means by AOP. It does not indicate as to what it means by TAS for both sides tell us that it is identical to TDS, namely, Tax Deducted at

Source. We are unhappy with the abbreviations and short forms in the Tribunal's order. We do not see who is reluctant, either one who dictates or one who takes down the same, but such abbreviations and shortcuts increase burden on the higher Courts. We would caution the Tribunal that hereafter it should indicate somewhere in the order as to what the abbreviations used by it stand for.

19. In the circumstances, we proceed to admit this Appeal on question no.10(a) of the paper book. The question reads as under:

10(a) Whether on the facts and in the circumstances of the case and in law, the Hon'ble tribunal erred in deleting the addition of Rs.4,99,19,593/- pertaining to salaries, made by the Assessing Officer and confirmed by CIT(A), on account of disallowance U/s 40(ba) of the Income Tax Act, 1961?

20. Mr. Ahuja for the Revenue would submit that even question no.(a-1) as proposed and substituted by the amendment is a substantial question of law. We are unable to agree with him. That relates to a disallowance of administrative expenses at

Rs.2,39,64,463/-. The concurrent finding in that regard of the Assessing Officer and the Commissioner of Income Tax (Appeals) has been set aside.

21. The Tribunal discussed this issue from paragraph 40 of the order under challenge.

22. The Assessing Officer noticed that the assessee had not deducted the Tax at Source while making payment on account of administrative expenses. That was paid by the Joint Venture to their Indian company, namely ITD Cementation India Limited. The payment was hit, according to the Assessing Officer, by Section 40(a)(ia) and thus disallowable. The Assessing Officer also held that even under Section 40(ba) this expense shall not be allowed because in the case of Association Of Persons, any payment of salary or remuneration by whatever name called, is not allowable.

23. The assessee contended that there were fresh materials to support its contentions. The Commissioner of Income Tax (Appeals) therefore directed the Assessing officer to consider the

further documents and submit a remand report. On remand, the assessee submitted that it reimbursed the expenses (administrative expenses) to ITD Cementation India Limited. They were incurred on behalf of the assessee. Thereafter, debit notes were raised on the assessee by ITD Cementation India Limited. These facts were checked and verified by the Assessing Officer and he found the same to be correct. However, in remand, he could not give any categorical finding, and therefore left the matter to the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals), after considering the remand report and the detailed arguments, sustained the disallowance on account of non deduction of Tax at Source by referring to Section 40(a)(ia). That is how the assessee approached the Tribunal. The assessee *inter alia* contended that no disallowance has been made in the assessment years 2006-2007 and 2007-2008 which assessment was framed under Section 143(3) of the IT Act. Thus, a consistent stand should be taken and similar treatment should be given to the accounts as in the preceding assessment years. The alternate argument is made and is noted in paragraph 49 of the Tribunal's order. The departmental representative referred to the remand

report and thereafter supported the finding of the Commissioner of Income Tax (Appeals). There were written submissions filed by the assessee's representative. In consideration of this issue as well, we note that the Tribunal has made identical observations and to some extent its observations in paragraphs 15 to 21 accord with paragraphs 50 to 55. However, we are of the firm view that Section 40(ba) was referred in the passing, but not attracted as far as the disallowance of administrative expenses in the sum of Rs.2,39,64,463/-. Once the Assessing Officer has checked debit notes raised by the ITD Cementation India Limited and they were test checked and the amount of expenditure claimed by the assessee was verified and the genuineness of the same has been proved, then, we do not see any reason to interfere with the finding of fact recorded in paragraph 54 of the Tribunal's order. All the more, when Section 40(ba) was not attracted as far as this disallowance is concerned.

24. Despite his persuasive ability, when Mr. Ahuja would submit that even the re-framed question (a-1) is the substantial question of law, we are unable to agree with him. We affirm the findings of

fact by the Tribunal and dismiss this Appeal to that extent.

25. However, we have expressed our displeasure and unhappiness at the manner in which the Tribunal approached the matter/issue insofar as the applicability of Section 40(ba) (question no. 10(a) reproduced above) of the IT Act is concerned, we allow this Appeal. We set aside the Tribunal's order to that extent. We restore the issue to the file of the Tribunal for being decided afresh on merits and in accordance with law. The Tribunal shall not be influenced in any manner by its earlier observations. We also clarify that when we note the rival contentions, beyond that exercise, we have expressed no opinion on the correctness of these contentions. All of them are open insofar as this issue is concerned for being raised before the Tribunal. There will be no order as to costs.

(PRAKASH D. NAIK, J.)

(S. C. DHARMADHIKARI, J.)