

**IN THE INCOME TAX APPELLATE TRIBUNAL DELHI
BENCH 'F', NEW DELHI**

**BEFORE SH. BHAVNESH SAINI, JUDICIAL MEMBER
AND
SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER**

(THROUGH VIDEO CONFERENCING)

ITA No.4199/Del/2016

Assessment Year: 2011-12

Pear tree Enterprises Pvt. Ltd., C4/142, Safdarjung Development Area, Delhi – 110 019 PAN No. AACCP 8759 Q (APPELLANT)	Vs.	DCIT, Circle – 14(1), New Delhi (RESPONDENT)
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Appellant by	Shri Piyush Kaushik, Adv.
Respondent by	Shri Saras Gupta, Sr. DR

Date of hearing:	30/07/2020
Date of Pronouncement:	05/08/2020

ORDER

PER ANIL CHATURVEDI, AM:

This appeal filed by the assessee is directed against the order dated 23.05.2016 of the Commissioner of Income Tax (A)-7, [CIT(A)] New Delhi relating to Assessment Year 2011-12.

2. The relevant facts as culled from the material on records are as under:

3. Assessee is company stated to be engaged in the business of Civil Construction Contracts. Assessee filed its return of income for A.Y 2011-12 declaring total income of Rs. 'Nil'. The case was selected for scrutiny and thereafter, the assessment was framed u/s 143(3) vide order dated 28.02.2014 and the total income was determined at Rs.92,80,400/-. Aggrieved by the order of AO, assessee carried the matter before CIT(A) who vide order dated 23.05.2016 in Appeal No. 03/CIT(A)-7/Del/14-15 granted partial relief to the assessee. Aggrieved by the order of CIT(A), assessee is now before us and has raised the following grounds:

- “1. That the facts and circumstances of the case the Ld. AO/CIT(A)-VII has erred in law, in making an addition of Rs.13,65,851/- to the returned income as disallowance of capital expenditure.*
- 2. That the facts and circumstances of the case the Ld AO/CIT(A)-VII has erred in law, in making an addition of Rs.30,92,818/- to the returned income as disallowance of expenses for Non-Deduction of the TDS on payment of share of income of joint venture partner alleging it to be in the nature of procurement commission.*
- 3. The appellant takes leave to add, amend or alter the above ground of appeal at the time of hearing.*
- 4. The appellant prays for Justice.”*

4. First ground is with respect to the addition of Rs 13,65,851/-.

5. During the course of assessment proceedings, AO noticed that assessee had incurred expenses aggregating to Rs.63,94,004/- which was claimed to be on account of repairs and therefore, revenue expenditure. AO on the basis of the details furnished by the assessee concluded that out of the total

expenditure claimed, assessee could only establish the expenses aggregating to Rs.14,01,778/- to be of revenue in nature. He held the balance expenditure of Rs.49,92,226/- to be of capital in nature and accordingly disallowed the same. When the matter was carried before CIT(A), CIT(A) after considering the submissions of the assessee *inter alia* held that it was not the case of the AO that the expenses were not incurred or the genuineness of the expenditure was in doubt. He thereafter, held that out of the total amount disallowed, expenses of Rs.35,65,581/- were of revenue in nature and accordingly granted relief. With respect to the balance expenses of Rs.13,56,645/-, he held it to be of capital in nature and accordingly upheld its disallowance. Aggrieved by the order of CIT(A), assessee is now before us.

6. Before us, Ld AR pointed to the expenses which have been disallowed by CIT(A) as noted in the order of CIT(A). He fairly submitted that he does not dispute the disallowance of Rs.37,000/- on account of penalty and to that extent the disallowance be confirmed. However with respect to disallowance of Rs 8,67,245/- paid to Larsen & Toubro Ltd., he submitted that it is towards the comprehensive repairs of machinery. He pointed to the copy of the invoice placed in the paper book and from that he pointed out that it is for the purpose of repairs and that no new machinery has come into existence. He submitted that amount of expense cannot be a criteria to judge the nature of expenses.

7. With respect to the expense of Rs 4,52,400/- paid to Larsen & Toubro Ltd. and which has been held to be capital expenditure. He pointed to the copy of the bill/purchase order placed in the paper book. From it pointed out that it is incurred for the purpose of repairs. He submitted that the procurement of engine was nothing but a consumable required for the machinery. He submitted that no new asset has been brought into existence and all these repairs were done to preserve and maintain an already existing asset and therefore the expense was rightly claimed by the assessee to be of revenue in nature. He therefore submitted that considering the nature of business in which the assessee is engaged, the amount of the gross block of assets, the expense be allowed to be revenue expense.

8. Ld DR on the other hand supported the order of CIT(A).

9. We have heard the rival submissions and perused the material on record. The issue in the present case is with respect to disallowance of expenses holding it to be of capital in nature. As far as the expense of Rs. 37,000/- is concerned, before us. Learned AR fairly submitted that he does not wish to agitate the disallowance upheld by CIT(A). In such circumstance, we find no reason to interfere with the order of CIT(A) to that extent. As far as the aggregate disallowance of Rs.13,19,645/- (Rs 8,67,245 + 4,52,400) is concerned, from the details of the bills placed in the paper book, it is seen that the bills for the expenses indicate it to

be for the repairs, supply of consumables, recalibration of the machinery. It is not the case of the Revenue that by incurring of the impugned expenditure any new asset has come into existence. Considering the totality of the aforesaid facts, we are of the view that the repairs was for preserving and maintaining an already existing asset. We therefore set aside the addition confirmed by CIT(A) and hold the expense to be of revenue in nature. **Thus the ground of the assessee is partly allowed**

10. Second ground is with respect to disallowance of Rs.30,92,818/- on account of non-deduction of TDS.

11. AO noted that assessee had paid commission to HCIL for procurement of projects from RCD Bihar but had not deducted TDS at the time of making the payment. The assessee was therefore asked to show-cause as to why the expenses not be disallowed u/s 40(a)(ia) of the Act for non deduction of TDS. Assessee *inter alia* submitted that assessee had entered into joint venture agreement with HCIL for the road construction project in Bihar. As per the MOU, both the parties had agreed to participate in the contract value in the ratio of 97:3. On receipt of the payment from the client, the joint venture would pay HCIL 3% and the balance will be of the assessee. It was further submitted that both the partners of the joint venture are acting as principal contractor and not as agent or sub contractor of the other party. It was submitted that the amount that was drawn by HCIL was its share of the proceeds and was not in the nature of commission

and therefore assessee was not liable to deduct TDS u/s 194C of the Act. The submissions of the assessee were not found acceptable to AO. AO was of the view that the amount of Rs.30,92,818/- paid to HCIL was on account of commission and that assessee should have deducted TDS before making the payment. Non deduction of TDS would therefore result into attraction of provisions of s. 40(a)(ia) of the Act. He accordingly disallowed the amount of Rs.30,92,818/-. Aggrieved by the order of AO, assessee carried the matter before CIT(A), who upheld the order of AO. Aggrieved by the order of CIT(A), assessee is now before us.

12. Before us, Ld AR reiterated the submissions made before lower authorities and further submitted that assessee had entered into a joint venture agreement with Harish Chandra India Ltd (HCIL) known as HCIL & PEPL JV. The JV was assigned a contract by Bihar Government for improvement of existing road in Siwan Dist. As per the MOU, both the parties of the JV were to jointly open an account in the name of JV with two signatories, one from each party. It was further agreed between the partners of the JV that on receipt of payment from client, JV account will pay 3% to HCIL and 97% to assessee. The MOU also spelt out the role and obligation of both the parties. Further, as per the JV that both the parties were responsible to render their respective share of services to the client and both the parties shall individually assume the risks and that neither of the parties will be entitled to the profit or loss of the other party arising from the service

performed by the other party. In support of his aforesaid contentions he pointed to the copy of the JV agreement which is placed in the paper book. He thereafter submitted that the amounts which has been disallowed by the AO does not represent the payment towards the services rendered and thereby attracting the provision for deduction of TDS. He submitted that the amount represents the diversion of income by overriding title and in such a situation, the AO was not justified in disallowing the amount by invoking the provisions of s.40(a)(ia) of the Act. He further submitted that on identical facts, the Hon'ble J&K High Court in the case of Soma TRG Joint Venture Vs. CIT (2017) 398 ITR 425 held that no disallowance can be made by invoking the provisions of s. 40(a)(ia). He thus prayed that the disallowance be deleted. Ld DR on the other hand supported the order of lower authorities.

13. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to disallowance made by AO by invoking the provisions of s. 40(a)(ia) of the Act. It is an undisputed fact that assessee had entered into a JV with HCIL for the construction of road in Bihar. From the copy of MOU entered into by both the JV partners which is placed on record, Learned AR has demonstrated that both the parties were individually responsible for their respective share of services to the client and they individually assumed the risks. From the MOU, Learned AR has also demonstrated that the respective parties were not entitled to the profit or loss arising from the services performed by the other party. Learned AR has

also pointed to the understanding of the sharing of the revenue on receipt from the clients. Considering the totality of the aforesaid facts, we find force in the argument of Ld AR that the amount paid to HCIL represented the diversion of income by overriding title. We also find support from the decision rendered by Hon'ble J&K High Court in the case of Soma TRG Joint Venture (supra) wherein on identical facts the issue was decided in Assessee's favour. Before us, Revenue has not pointed to any factual error in the submissions of Learned AR nor has pointed to any contrary binding decision. Considering the totality of the aforesaid facts, we are of the view that the AO was not justified in disallowing the expenses by invoking the provisions of s. 40(a)(ia) of the Act. We therefore, set aside the order of AO. **Thus the ground of assessee is allowed.**

14. In the result, the appeal of assessee is partly allowed.

Order pronounced in the open court on 05.08.2020

Sd/-

**(BHAVNESH SAINI)
JUDICIAL MEMBER**

Sd/-

**(ANIL CHATURVEDI)
ACCOUNTANT MEMBER**

Priti Yadav Sr. PS*

Date:- 05.08.2020

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI