

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'SMC-I', NEW DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

ITA No. 5842/Del/2018
A.Y.: 2015-16

M/s KEC DELCO DUTSAN (JV) 1 st Floor, Building No. 9A, DLF, Cyber City, Phase-III, Gurgaon (PAN-AABAK2503L)	Vs.	Income Tax Officer, Ward-2(3), Gurgaon
(Appellant)		(Respondent)

ITA No. 5843/Del/2018
A.Y.: 2015-16

M/s KEC TRIVENI KPIPL (JV), GURGAON 8 th Floor, Building No. 9A, DLF, Cyber City, Phase-III, Gurgaon (PAN-AABAJ1798B)	Vs.	Income Tax Officer, Ward-2(3), Gurgaon
(Appellant)		(Respondent)

ITA No. 5844/Del/2018
A.Y.: 2015-16

M/s KEC SIDHARTH (JV) GURGAON (JV) 8 TH Floor, Building No. 9A, DLF, Cyber City, Phase-III, Gurgaon (PAN-AABAK1448C)	Vs.	Income Tax Officer, Ward-2(3), Gurgaon
(Appellant)		(Respondent)

ITA Nos. 2943/Del/2019
A.Y.: 2015-16

M/s KEC VARSHA-KHAZANA (JV) Building No. 9A, DLF, Cyber City, Phase-III, Gurgaon (PAN-AABAK0492N)	Vs.	Income Tax Officer, Ward-2(3), Gurgaon
(Appellant)		(Respondent)

Assessee by	SH. PRAKASH SINHA, CA
Department by	SH. C.P. SINGH, SR. DR

ORDER

These 04 appeals filed by the different Assesseees are directed against the common order dated 29.6.2018 passed by the Ld. CIT(I), Gurgaon in relation to assessments year 2015-16. Since the issues involved in these appeals are common and identical, hence, I am reproducing hereunder the common grounds raised in ITA No. 5842/Del/2018 (AY 2015-16) and dealing the same by passing a common order for the sake of convenience.

1. That the Ld. AO erred in understanding the fact that the status of the assessee is joint venture and not AOP. The assessment completed by the Ld. AO by considering the fact that the assessee is an AOP. The term AOP is a much wider term where there should be association between more than one person. Here all the partners of JV are independent, responsible for their own work and there exists no association between them. Merely participation in the tender jointly does not mean that there is an AOP. Similarly, merely preparing of accounts and having surplus of some account also that there was an AOP. The Delhi High Court has an occasion to discuss the AOP issue in the similar circumstances in the case of Linde AG Linde Engineering Division reported in 365 ITR 1 (Copy of order enclosed). The CSDT vide circular No. 7/2016. Dated 07/03/2016 has issued the detailed guidelines in this regard. Later, the department withdrew the SLP filed in this case before the Supreme Court by its order dated 26.08.2016 reported in 73 taxmann.com 212 on the basis of above said circular.

2. That the JV itself is not an AOP and any payment made by JV to the JV partner does not fall under the purview of section 40A (2). The payment made by the JV to the JV partner is not expenditure but it is a diverted income. The High Court of Delhi in the case of Oriental structure Engineering Private Limited as reported in 58 taxmann 77 (copy enclosed) and the High Court of the Jammu and Kashmir in the case of Soma TRG joint venture as reported in 86 taxmann 83 (copy enclosed) has elaborately discussed this point and concluded that 40A (2) does not apply in this situation.

3. That the JV agreement and the contents therein including the ration of work allocation were for fulfilling the bid requirement to get the work awarded. Once the work is awarded to JV all the work has been executed by

one of the partners namely KEC International the lead partner. Post award allocation to KEC International cannot conclude that the JV was an AOP unless all the parameters as elaborated in the above-mentioned circular are met. In a view of the above submission we reiterate that JV was mere a pass-through entity.

4. The appellant craves the leave of the Honorable to submit any other documents and raise any other grounds of appeal at the time of hearing.

Prayer -

Under the circumstances it is more respectfully prayed that this Hon'ble may be please to-

- a) Set aside the order passed by the Ld. CIT(A) to the extent disallowing the deduction u/s 40A(2)(b) for the interest of justice and fairness, and*
- b) Pass any other order as this Hon'ble Court may deem fit under the circumstances.*

2. Facts narrated by the revenue authorities are not disputed by both the parties, hence, the same are not repeated here for the sake of convenience.

3. At the time of hearing, Ld. Counsel for the Assessee stated that the issue in dispute has already been adjudicated and decided in favour of the assessee by the various orders of the ITAT, Delhi Benches and enclosed the copies thereof with the Paper Book from pages 1-35. He requested that respectfully following the said decisions, the addition in dispute may be deleted by allowing the appeal filed by the Assessee.

4. On the contrary, Ld. DR has not raised any objection on the request of the Ld. Counsel for the assessee.

5. I have heard both the parties and perused the orders of the revenue authorities, grounds of appeals raised in all these appeals alongwith the orders passed by the Tribunal in assessee's own case and copies thereof are attached with the Paper Book at pages 1-35 in assessee's case i.e. ITAT orders in the cases of KEC PLR KPIL-JV vs. ITO & KEC Asiakom UB JV vs. ITO for 2015-16; ITO vs. KEC Sidharth JV for AY 2013-14 and ITO vs. KEC PLR KPIPL JV for AY 2013-14 & 2014-15; ITO vs. KEC Delco Vraha (JV) for AY 2011-12; KEC Sidhartha JV vs. ITO for AY 2012-13 and order of ITO vs. KEC Asiakom UB (JV) for AY 2011-12. For the sake of

convenience, the relevant findings of the ITAT, SMC Bench in the case of KEC PLR KPIPL-JV vs. ITO and KEC AsiaKom UB JV vs. ITO decided in ITA No. 7763/Del/2018 (AY 2015-16) and 7764/Del/2018 (AY 2015-16) vide order dated 09.5.2019 are reproduced as under:-

“13. I have considered the rival arguments made by both the sides and perused the relevant material on record. The assessee is a joint venture of KEC International Limited and M/s Asia Communication & Electronics SDN BHD and M/s Unique Builders who are engaged in the business of civil construction and all the parties entered into JV agreement dated 13.07.2010 for the execution of the contract awarded by Eastern Railways Kolkata. KEC International Limited was appointed as the lead partner of the JV. I find the assessee filed return of income declaring a total loss of Rs.29,295/- by giving the following financial details:-

<i>Sl. No.</i>	<i>Particulars</i>	<i>Amount</i>	<i>(Rs.)</i>
<i>1</i>	<i>Revenue from operations</i>	<i>(1,28,99,176)</i>	
<i>2</i>	<i>Paid to the JV partner</i>	<i>(1,28,81,117)</i>	
<i>3</i>	<i>Other Expenses</i>	<i>11,236</i>	
<i>4</i>	<i>Profit/(Loss)</i>	<i>(29,295)</i>	

14. I find the Assessing Officer disallowed expenditure @ 4% of the total expenses incurred towards KEC International Ltd. by invoking the provisions of section 40A(2)(b) which has been confirmed by the CIT(A). I find identical issue had come up before the Tribunal in the case of KEC-Delco-Vraha (JV) (supra) and the Tribunal has dismissed the appeal filed by the Revenue by observing as under:-

“9. We have considered the rival arguments made by both sides and perused the orders of the authorities below. We find the SMC Bench of the Tribunal in the case of ITO Vs. M/s KEC Sidharth JV and in the case of ITO Vs. M/s. KEC PLR

KPIPL JV in the consolidated order dated 03.04.2018 has decided identical issue and dismissed the appeal filed by the revenue in all these appeals by observing as under :-

“8 I have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is an admitted position that the AO made the addition by invoking the provisions of Section 40A(2)(b) of the Act which are applicable to the expenses considered to be excessive or unreasonable having regard to the fair market value of the goods/services or facilities for which the payment is made. However, in the instant case, the AO estimated the profit of the assessee and determined the income, nowhere he doubted the expenses incurred by the assessee. Therefore, I am of the confirmed view that the AO was not justified in making the addition by invoking the provisions of Section 40A(2)(b) of the Act which are applicable to the expenditure and not to the receipts and the ld. CIT(A) rightly deleted the same. A similar issue having identical facts has already been adjudicated by the ITAT Delhi Bench “SMC”, New Delhi vide order dated 21.11.2016 in ITA No. 2326/Del/2016 for the assessment year 2011-12 in the case of ITO, Ward-2(2), Gurgaon Vs KEC-Asiakom UB (JV), Gurgaon wherein the relevant findings are given in paras 5 & 6 of the order dated 21.11.2016 which read as under:

“5. It is noticed that the AO made disallowance u/s 40A(2)(b) of the Act by opining that the assessee should have earned

income from subcontracting. At this stage, it is relevant to note the prescription of the relevant part of Section 40A(2), which is as under :-

‘40A(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.’

6. On going through the mandate of the above provision, it is clear that the disallowance under this section is made in respect of the expenses incurred or payments made which are not deductible. This section has no application to income aspect of the assessee. As the AO has made disallowance u/s 40A(2)(b) in respect of income which the assessee in his opinion ought to have earned rather than certain expenses incurred, I am of the considered opinion that the provisions of this section are not attracted. I, therefore, uphold the

impugned order on this score deleting the disallowance.”

9. The aforesaid order was followed in the assessee’s own case in ITA No. 5943/Del/2016 for the assessment year 2012-13 vide order dated 28.02.2017 wherein it has been held as under:

“4. I have considered the submissions of both the parties and perused the record of the case. Admittedly, the Assessing Officer has invoked the provisions of section 40A(2)(b) as the contract had been given to associated party. I find that under identical circumstances the Tribunal in the case of Kec-Asiakom UB (JV) (supra) has observed as under:-

“4. I have heard the ld. AR and perused the relevant material on record. None is present on behalf of the Revenue. In fact, there is no one to attend the proceedings from the side of the Revenue in all the cases fixed before the Bench today. The ld. AR insisted that the appeal be disposed of. I am agreeable with the contention of the ld. AR and, accordingly, proceeding to dispose of the instant appeal ex parte qua the Revenue.

5. It is noticed that the AO made disallowance u/s 40A(2)(b) of the Act by opining that the assessee should have earned income from sub-contracting. At this stage, it is relevant to note the prescription of the relevant part of Section 40A(2), which is as under:-

‘40A(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.'

6. On going through the mandate of the above provision, it is clear that the disallowance under this section is made in respect of the expenses incurred or payments made which are not deductible. This section has no application to income aspect of the assessee. As the AO has made disallowance u/s 40A(2)(b) in respect of income which the assessee in his opinion ought to have earned rather than certain expenses incurred, I am of the considered opinion that the provisions of this section are not attracted. I, therefore, uphold the impugned order on this score deleting the disallowance."

5. Respectfully following the decision of the Tribunal in the case of Kec-Asiakom UB (JV) (supra), I allow the claim of assessee."

10. So, respectfully following the aforesaid referred to order, I do not see any merit in this appeal of the department.

11. In ITA Nos. 7045 & 7046/Del/2017, identical issue having similar facts is involved, therefore, the findings given in the former part of this order shall apply mutatis mutandis.

12. In the result, the appeals of the department are dismissed."

10. Since the order of the CIT (A) is in consonance with the decisions of the Tribunal in other group concerns, therefore, in absence any contrary material brought to our notice against the orders of the Tribunal and considering the fact that the Ld. CIT (A) while deciding the issue has followed the decisions of the Hon'ble High Court, therefore, we find

no infirmity in the order of Ld. CIT(A). Accordingly, the same is upheld and the grounds raised by the revenue are dismissed.”

15. *Since the facts of the impugned appeal are identical to the facts of the case decided by the Tribunal in the case of ITO vs. M/s KEC-Delco Varaha (JV) cited (supra) therefore, respectfully following the same, I set aside the order of the CIT(A) and direct the Assessing Officer to delete the addition. The grounds raised by the assessee are accordingly allowed.*

ITA No.7763/Del2018 (A.Y. 2015-16)

16. *After hearing both the sides and perusing the material available on record, I find the grounds raised by the assessee are identical to the grounds raised in ITA No.7764/Del/2018. I have already decided the issue and the grounds raised by the assessee have been allowed. Following similar reasonings, I set aside the order of the CIT(A) and direct the A.O. to delete the addition. The grounds taken by the assessee in the instant appeal are accordingly allowed.*

17. *In the result, both the appeals filed by the assessee are allowed.*

5.1 I further find that ITAT, ‘G’ Bench, Delhi in ITA No. 2327/Del/2016 (AY 2011-12) in Revenue’s Appeal in the case of ITO vs. Kec Delco Vraha (JV) has decided the similar issue in favour of assessee by holding as under:-

“9. We have considered the rival arguments made by both sides and perused the orders of the authorities below. We find the SMC Bench of the Tribunal in the case of ITO vs. M/s KEC Sidharth JV and in the case of ITO vs. M/s KEC PLR KPIPL JV in the consolidated order dated 03.4.2018 has decided identical issue and dismissed the appeal filed by the revenue in all these appeals by observing as under:-

"8 I have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is an admitted position that the AO made the addition by invoking the provisions of Section 40A(2)(b) of the Act which are applicable to the expenses considered to be excessive or unreasonable having regard to the fair market value of the goods/services or facilities for which the payment is made. However, in the instant case, the AO estimated the profit of the assessee and determined the income, nowhere he doubted the expenses incurred by the assessee. Therefore, I am of the confirmed view that the AO was not justified in making the addition by invoking the provisions of Section 40A(2)(b) of the Act which are applicable to the expenditure and not to the receipts and the ld. CIT(A) rightly deleted the same. A similar issue having identical facts has already been adjudicated by the ITAT Delhi Bench "SMC", New Delhi vide order dated 21.11.2016 in ITA No. 2326/Del/2016 for the assessment year 2011-12 in the case of ITO, Ward-2(2), Gurgaon Vs KEC-Asiakom VB (JV), Gurgaon wherein the relevant findings are given in paras 5 & 6 of the order dated 21.11.2016 which read as under:

"5. It is noticed that the AO made disallowance u/ s 40A(2)(b) of the Act by opining that the assessee should have earned income from subcontracting. At this stage, it is relevant to note the prescription of the relevant part of Section 40A(2), which is as under:-

'40A(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.

6. On going through the mandate of the above prctnsion; it is clear that the disallowance under this section is made in respect of the expenses incurred or payments made which are not deductible. This section has no application to income aspect of the assessee. As the AO has made disallowance u/s 40A(2)(b) in respect of income which the assessee in his opinion ought to have earned rather than certain expenses incurred, I am of the considered opinion that the provisions of this section are not attracted. 1, therefore, uphold the impugned order on this score deleting the disallowance. "

9. The aforesaid order was followed in the assessee's own case in ITA No. 5943/Del/2016 for the assessment year 2012-13 vide order dated 28.02.2017 wherein it has been held as under:

"4. I have considered the submissions of both the parties and perused the record of the case. Admittedly, the Assessing Officer has invoked the provisions of section 40A(2)(b) as the contract had been given to associated party. I find that under identical circumstances the Tribunal in the case of Kec-Asiakom UB (JV) (supra) has observed as under:-

"4. I have heard the ld. AR and perused the relevant material on record. None is present on behalf of the Revenue. In fact, there is

no one to attend the proceedings from the side of the Revenue in all the cases fixed before the Bench today. The ld. AR insisted that the appeal be disposed of I am agreeable with the contention of the ld. AR and, accordingly, proceeding to dispose of the instant appeal ex parte qua the Revenue.

5. It is noticed that the AO made disallowance u/ s 40A(2)(b) of the Act by opining that the assessee should have earned income from sub-contracting. At this stage, it is relevant to note the prescription of the relevant part of Section 40A(2), which is as under:-

“40A(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.”

6. On going through the mandate of the above provision, it is clear that the disallowance under this section is made in respect of the expenses incurred or payments made which are not deductible. This section has no application to income aspect of the assessee. As the AO has made disallowance u/s 40A(2)(b) in respect of income which the assessee in his opinion ought to have earned rather than certain expenses incurred, I am of the considered opinion that the provisions of this section are not attracted. I, therefore, uphold the impugned order on this score deleting the disallowance.”

5. Respectfully following the decision of the Tribunal in the case of Kec-Asiakom us (JV) (supra), I allow the claim of assessee."

10. So, respectfully following the aforesaid referred to order, I do not see any merit in this appeal of the department.

11. In ITA Nos. 7045 & 7046/Del/2017, identical issue having similar facts is therefore, the findings given in the former part of this order shall apply mutatis.

12. In the result, the appeals of the department are dismissed."

10. Since the order of the CIT (A) is in consonance with the decisions of the Tribunal in other group concerns, therefore, in absence any contrary material brought to our notice against the orders of the Tribunal and considering the fact that the Ld. CIT (A) while deciding the issue has followed the decisions of the Hon 'ble High Court, therefore, we find no infirmity in the order of Ld. CIT(A). Accordingly, the same is upheld and the grounds raised by the revenue are dismissed.

11. In the result, the appeal filed by the revenue is dismissed."

6. After perusing the aforesaid findings of the ITAT, SMC Bench, Delhi as well as the ITAT, 'G' Bench, Delhi, I am of the considered that the issue in dispute has already been adjudicated and decided in favour of the Assessee in the aforesaid findings of the Tribunal. Therefore, respectfully following the same ratio, the addition in dispute is hereby deleted and all the 04 appeals filed by the assessee stand allowed.

7. In the result, all the 04 appeals filed by the Assessee are allowed.

The decision is pronounced on 05.05.2020.

Sd/-

(H.S. SIDHU)
JUDICIAL MEMBER

Dated: 05.05.2020

"SRB"

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi