

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।  
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

श्री डी. करुणाकरा राव,लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष  
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No. 35/PUN/2016

निर्धारण वर्ष / Assessment Year: 2012-13

The Income Tax Officer,  
Ward 3(1),  
Pune.

.....अपीलार्थी / Appellant

**बनाम / V/s.**

M/s. Shraddha & Prasad JV  
Khura Varoda  
"Shraddha House" 1206/1/1,  
Plot No. 887A, Shirole Road,  
Pune-411 004  
PAN : ABGFS6231A

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No. 36/PUN/2016

निर्धारण वर्ष / Assessment Year: 2012-13

The Income Tax Officer,  
Ward 3(1),  
Pune.

.....अपीलार्थी / Appellant

**बनाम / V/s.**

M/s. Shraddha & IHP JV  
Wangana Project,  
"Shraddha House",  
1206/1/1,  
Plot No. 887-A, Shirole Road,  
Pune-411 004

PAN : AACAS5183M

.....प्रत्यर्थी / Respondent

Revenue by : Dr. Vivek Aggarwal  
Assessee by : Shri Kishore Phadke

सुनवाई की तारीख / Date of Hearing : 28.02.2018  
घोषणा की तारीख / Date of Pronouncement : 28.02.2018

**आदेश / ORDER**

**PER VIKAS AWASTHY, JM**

These two appeals by the Department against two different assesses are directed against the order of Commissioner of Income Tax (Appeals)-3, Pune for the assessment year 2012-13 in the case of respective assessee. Both the impugned orders are dated 12.10.2015.

Since, the issues involved in both the appeals are identical, these appeals are taken up together for adjudication and are disposed of vide this common order. For the sake of convenience, facts are taken from ITA No. 35/PUN/2016.

**ITA No. 35/PUN/2016**

2. The brief facts of the case as emanating from the records are: The assessee is a Joint Venture of M/s. Shraddha Energy Infraprojects Pvt. Ltd. and Prasad & Company Ltd. The assessee JV was formed as special purpose of vehicle for making a bid for construction of dam at Charthane for Khura-Varoda Sinchan Yojana. The work was allotted to the assessee. The assessee received Rs. 38 Crores as contract charges. The contract charges were distributed between the constituent members of JV i.e. the assessee, for executing the work. The assessee for the impugned assessment year filed its return of income on 01.08.2012 declaring total income as 'Nil'. The case of the

assessee was selected for scrutiny. During the course of scrutiny assessment proceedings, the Assessing Officer disallowed Rs.38 Crores paid by assessee to its members u/s. 40(a)(ia) of the Income Tax Act, 1961 ( hereinafter referred to as 'the Act').

3. Aggrieved by the assessment order dated 24.11.2014, the assessee filed appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) by following the order of Tribunal in the case of assessee's sister concern, M/s. Shraddha & Mahalaxmi Joint Venture in ITA No. 942/PN/2013, decided on 28.11.2014, wherein identical issues were involved granted relief to the assessee. Against the findings of Commissioner of Income Tax (Appeals), the Department is in appeal before the Tribunal.

4. Dr. Vivek Aggarwal representing the Department vehemently supporting the order of Assessing Officer submitted that TDS was deducted in the name of joint venture and both the constituent members of JV shared the receipts. Even if members of JV have shown profits arising from joint venture business in their respective returns of income, they were required to follow mandatory provisions of Rule 37BA of the Income Tax Rules to get their name substituted in the TDS certificate.

5. On the other hand, Shri Kishore Phadke appearing on behalf of assessee submitted that the co-ordinate Bench in assessee's own case in immediately preceding assessment years i.e. ITA Nos. 1957 & 1958/PN/2014 for assessment years 2010-11 & 2011-12 decided on 29.07.2016 has confirmed the deletion of disallowance u/s.40(a)(ia) of the Act under similar circumstances. The ld. AR furnished copy of order of Tribunal dated 29.07.2016 in the aforesaid appeals.

6. Both sides heard. Orders of the Authorities below perused. The issue involved in the present appeal by the Department is with regard to non deduction of TDS u/s. 194C of the Act in respect of payments made by assessee joint venture to its members. We find that identical issue had come up before the Tribunal in assessee's own case in immediately preceding assessment year. The Tribunal decided the issue in favour of the assessee by observing as under :

*“10. We have heard the rival submissions and perused the records. In the facts of the present case, the issue arising before us is in relation to application of provisions of section 40(a)(ia) of the Act. The assessee AOP had received contract from third party which, in turn, was executed by one of the members AOP. The plea of the assessee AOP was that it was constituted for obtaining work and receiving payments against the said work done by the constituents of the AOP and the said payment was to be distributed in the agreed ratio between the two members of the AOP for carrying out the work. The true ratio in the instant case is 1:0. Such assignments of the work to the members as per the Memorandum of Understanding agreed upon is not equivalent to sub- contract per se and thus the assessee AOP was not liable to deduct tax at source out of the amount distributed amongst the members of the AOP in the agreed ratio of respective share. The Assessing Officer, while deciding the chargeability of income in the hands of the assessee did observe that in the case of M/s. Swapnali RDS Joint Venture (supra), similar addition under section 40(a)(ia) has been made for the assessment year 2008-09 which has been deleted by the Pune Bench of the Tribunal. However, the Department has not accepted the order of the Tribunal and to keep the issue alive, the amount paid by the AOP to its member without deduction of tax is disallowed and added back to the total income of the assessee in terms of section 40(a)(ia) of the Act. We notice that in the identical facts and circumstances, the Co- ordinate Bench of the Tribunal in the case of ITO vs. Shraddha & Mahalaxmi Joint Venture and Others (supra) after making reference to several judicial precedents including M/s. Swapnali RDS Joint Venture (supra) has affirmed the view taken by the CIT(A) and decided against the Revenue.*

*10.1 The relevant findings of the order of the Co-ordinate Bench of the Tribunal in the case of ITO vs. Shraddha & Mahalaxmi Joint Venture and Others (supra) is reproduced hereunder for ready reference :-*

*“10. We have heard the rival and perused the records. In the facts of the present case, the issue arising before us is in relation to the application of provisions of section 40a(ia) of the Act. The assessee AOP had received contracts from third party which, in turn, was executed by the two members of AOP. The plea of the assessee AOP was that it was constituted for obtaining work and receiving payments against the said work done by the constituents of the AOP and the said payment was to be distributed in the agreed ratio between the two members of the AOP for carrying out the work. Such assignments of the work to the members as per the Memorandum of Understanding agreed upon is not equivalent*

*to sub-contract and as such the assessee AOP was not liable to deduct tax at source out of the amount distributed amongst the members of the AOP in the agreed ratio of share. The Assessing Officer, while deciding the issue in the hands of the assessee, had given an office note to the effect that in the case of M/s. Swapnali RDS Joint Venture (supra), similar addition under section 40(a)(ia) of the Act has been made for the assessment year 2008-09 which has been deleted by the CIT(A)-II, Pune. Department has filed appeal against this order to ITAT and the matter is pending before ITAT. To keep the issue alive in other cases also, the similar addition is being made in this case also. The facts and circumstances arising in the present appeal are identical to the facts and circumstances of the case before the Tribunal in M/s. Swapnali RDS Joint Venture (supra), wherein it was held as under:-*

*“2. At the outset of hearing, Ld. Authorised Representative pointed out that this case is covered in favour of the assessee by ITAT, Pune Bench, in ITA.No.65/PN/2011 for A.Y. 2006-07 in the case of ITO Vs. Gammon Progressive-JV, wherein vide paras 5 to 9 the Tribunal deciding similar issue in favour of the assessee by dismissing the appeal of the Revenue, has held as under:*

*“5. After going through the above submissions and material on record, we find that the first issue is regarding status of the assessee. The Assessing Officer has mentioned the status as firm. However, in the explanation given, the assessee has made it clear that the status in which the returns was filed was that of an AOP. It was explained that in the returns of income since beginning till the A.Y. 2006-07, the status was mentioned as AOP only, i.e., when the returns were filed manually. However, from A.Y. 2007-08, when electronic filing had to be done, due to computer error the status appeared as ‘firm’ on the ITR acknowledgement, whereas in the computation of total income, it was correctly mentioned as AOP. It was explained that I.T.Return Form No.5 was actually applicable for firms, AOPs and BOIs. Therefore, this error might have occurred. The assessee has also filed computation of total income alongwith acknowledgements from A.Y. 2002-03 to A.Y. 2006-07 in which the status was regularly shown as AOP and even in the application form for allotment of PAN it was shown as AOP. The CIT(A) noticed from the record that status was shown as AOP. However, it was not very much relevant for the purpose of applicability of provisions of section 194C since TDS provisions are applicable to all entities except individuals and HUF having gross receipts or turnover from business or profession below the prescribed limit.*

*6. It was further explained on behalf of the assessee that joint venture as such does not execute any contract work but were merely formed for obtaining contract work and for receiving the payment, which was immediately distributed in the ratio of the share of the work done. The actual share in the joint venture of the total work allocated*

was 60% for M/s.Gammon India Ltd. and 40% for M/s.Progressive Contraction Ltd. In this background it was explained that the contract account and the Balance Sheet of the joint venture reveals nothing but apportionment of contract receipts, assets and liabilities between the members. There was no expenditure booked in the contract account nor any Profit and Loss Account prepared for the purpose since there did not arise any profit or loss to the assessee per se. The Joint venture transferred not only the gross revenue but also the corresponding TDS to its members in the ratio of their work done by individual members for which the appointment certificate was duly issued every year by the Assessing Officer. In this background it was submitted that there was no relationship of contractor and sub-contractor between the joint venture and its two members. Therefore, there was no question of applicability of TDS provisions u/s.194C of the Act. The assessee also explained why a returns were filed by the joint venture as AOP. It was explained that it was done to pass on the credit of TDS to the members on the basis of tax apportionment certificates who have accounted for the corresponding contract revenue in their respective returns. It was also submitted that 'Nil' income arising in the hands of the AOP is confirmed by the action of the Assessing Officer in not assessing any profit/income arising from the contract apart from this disallowance u/s. 40(a)(ia) of the Act. The assessee vide its submissions dated 26.03.2010 and 06.09.2010, explained the difference between revenue sharing arrangement entered into by the joint venture vis-a-vis subcontract. It was explained on behalf of the assessee that in the case of subcontract, there was a relationship of principal and agent whereas in the situation of revenue sharing, it was on a principal to principal basis. Further, in sub-contracting, the contractor retains his share of profit alongwith the TDS and only the balance is passed on to subcontractor. But in joint venture, assessee did not retain any share in the revenue with it and has passed the entire gross revenue alongwith TDS apportioned for them. It was submitted that the Department has also issued tax apportionment certificates every year during the past eight years to enable the two members to claim the TDS credits in their respective cases. Even in the current assessment year, it was noticed that tax apportionment certificate was issued by the Department vide letter No.Pn/Wd.3(4)/TC/07-08 dated 26.11.2008 of the Assessing Officer in which the Assessing Officer has allowed apportionment of entire TDS of Rs.9,26,588/- during the year to M/s.Gammon India Ltd., since entire work during the year was carried out by it. Similarly, there has been apportionment to either of the two companies or to both the companies in the earlier years also by the Assessing Officer for enabling them to claim

*TDS in respective cases. The assessee, vide its submission dated 22.04.2010, furnished the details which revealed that gross revenue from this contract receipts by joint venture was accounted for in case of either or both of the two companies who were members of the joint venture in all assessment years 2001-02 to 2008-09. It was further explained by the assessee that revenue sharing was not exactly 60:40 in each year since it depends on the relative work done in the particular year. Having explained the difference between cases of contract/sub-contract, in the background of clauses of the agreement, the assessee relied on the decision of Hon'ble Himachal Pradesh High Court in the case of CIT vs. Ambuja Darla Kashlog Mangu Transport Cooperative Society (2009) 227 CTR 299 (HP).*

*7. In the background of the tax apportionment certificates issued by the Assessing Officer, it was stated on behalf of the assessee that the Assessing Officer has marked copy of this certificate to the members of the joint venture as well as to their respective Assessing Officers, which shows that the Assessing Officer has applied his mind and consciously accepted the fact that the joint venture AOP was for the distribution of receipts amongst its constituents in proportion of their work sharing. Therefore, there was no applicability of provisions of TDS u/s.40(a)(ia) of the Act.*

*8. Further, the assessee, vide its submission dated 06.09.2010, made comparison of the tax rates applicable to domestic companies, being joint venture partner in their individual capacity and the tax rates applicable to the AOP. However, in submission dated 21.10.2010, it was explained that tax rates in the case of domestic company and the AOP would be the same in this case. This was due to applicability of section 167B of the Act. The assessee also filed details of the returns of income of the two corporate entities being joint venture members, alongwith acknowledgements of their I.T. returns, which revealed that both of them had huge positive returned incomes every year. For this payment the stand of the assessee was that the method of apportionment of revenue to the members was not to take any undue benefit of losses incurred by them. Therefore, it was stated that there was no loss to the revenue as a result of this method adopted by the assessee of sharing the gross revenue by its members, which was taxed in their hands. However, this explanation of the assessee did not find favour from the Assessing Officer. The assessee has also raised the issue of consistency stating that the same method was being accepted by the Department in the past 8 to 10 years including A.Y. 2007-08 in which tax apportionment certificate was also being issued. It was contended that this aspect has not been considered in the assessment order u/s.143(3) for A.Y. 2007-08. On the principle of consistency, the Ld.*

*Authorised Representative relied on the decision of Hon'ble Bombay High Court in the case of Gopal Purohit (2010) 228 CTR 582 (Bom.) and assessee also relied on the decision of the Hon'ble Supreme Court in the case of Radhasoami Satsang vs. CIT (1992) 193 ITR 321 (SC) wherein it was observed that strictly speaking the principle of res judicata does not apply to income tax proceedings since each assessment year was a separate unit in itself and what is decided in one year may not apply in the following year. It was further contended that where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year. It was also contended that Hon'ble Kerala High Court in the case of Manjunath Motor Service and Canara Public Conveyances, 197 ITR 321 (Kar.) observed that method adopted by the Assessing Officer would result in double taxation of the same income since gross receipts distributed amongst the two joint venture partners was included as receipts in their respective cases and the joint venture partners had also utilised the TDS credits on the basis of apportionment certificate issued by the Assessing Officer. In view of the above discussion, CIT(A) was justified in holding that in absence of any contract or sub-contract work by joint venture to its member companies, provisions of section 194C were not applicable for the purpose of TDS. The two corporate entities forming joint venture were already being assessed since A.Y. 2000-01 onwards on their respective shares and TDS apportionment certificates were also issued by the Assessing Officer every year for these eight years including the current assessment year to enable them to claim the same in their own cases. Moreover, there was no Profit and Loss Account in the assessee's case and there was no claim of any expenditure. Therefore, there was no question of any disallowance under the provisions of section 40(a)(ia) of the Act. Moreover, disallowance u/s. 40(a)(ia) made by the Assessing Officer cannot be sustained. In effect, the method adopted by the Assessing Officer will also result in double taxation of the same contract revenue which is in violation of the Karnataka High Court decision reported in 197 ITR 321 (Kar.). This view is fortified by the decision of the ITAT Pune Bench in ITO vs. Rajdeep & PMCC Infrastructure, wherein the Tribunal has observed as under:*

*“6. We have noted that it is an admitted position that no work is carried out by the AOP, it has acted as a conduit between the MSRDC and the two persons constituting this AOP so far as their separate, and neatly identified, work areas are concerned. A mere existence of an AOP cannot lead to taxability in the hands of the AOP unless the AOP*

*receives monies in its own right. We have noted that Hon'ble Authority of Advance Rulings was in seisin of a materially identical situation in the case of Van Oord ACZ BV In Re(248 ITR 399) in which two contractors joined hands for carrying out neatly identified separate work which was a part of composite contract awarded to the AOP, but the taxability of income from such contract was held to be taxable in the hands of the respective contractors. While holding so Hon'ble Authority for Advance Ruling observed as follows:*

*"7. So far as question Nos. 1 and 2 are concerned the parties have specifically ruled out constitution of any partnership between them. There is no sharing of profits or loss. They have specifically provided in the agreement that each party will bear its own loss and retain its profits as and when such profits or loss arise. Having regard to the agreement we are of the view that the applicant cannot be treated as a partnership which can only be created by an agreement. Nor can it be treated as an AOP. In order to constitute an AOP there will have to be common purpose or common action and the object of the association must be to produce income jointly. It is not enough that the persons receive the income jointly.*

*In the instant case, each of the two parties has agreed to bear its own loss or retain its own profit separately. Both have agreed to execute the job together for better co-operation in their relationship with the Chennai Port Trust. The intention was not to carry out any business in common, only a part of the job will be done by VOACZ according to its technical skill and capability. The other part of the contract will be executed by HCC. The total value of the contract was Rs. 2,62,01,03,120. the applicant's share of work was valued at Rs. 44,52,78,920 (17 per cent of total value). The association with the HCC was not with the object of earning this income but for co ordination in executing the contract so that HCC could also make its own profit. HHC's work and income arising therefrom was quite separate and independent of the applicant's work and income. If the cost incurred by the HCC or the applicant was more than their income, each party will have to bear its loss without any adjustment from the other party. The association of the petitioner company with HCC was undoubtedly for mutual benefit but such association will not make them a single assessable unit and liable to tax as an AOP. For example, a building contractor may associate with a plumber and an electrician to execute a building project. All these persons are driven by profit-making motive. But that by itself will not make the three persons liable to be taxed as an AOP if each one has a designed and independent role to play in the building project. In the instant case, the applicant has stated that the applicant*

*has made its own arrangement for execution of work independent from that of HCC. There is no control or connection between the work done by the applicant and HCC."*

*8. On the facts hereinabove, the applicant and HCC cannot be treated as an AOOP for the purpose of levy of income-tax. The applicant will be liable to be taxed as a separate and independent entity. The question No.1 is answered accordingly."*

*7. We are in considered agreement with the views so expressed by the Hon'ble Authority for Advance Ruling. We adopt the reasoning of the Hon'ble AAR and, respectfully following the same, approve the conclusion arrived at by the CIT(A) and decline to interfere in the matter."*

*In view of the above discussion, we are not inclined to interfere in the finding of the CIT(A) who has directed the Assessing Officer to delete the addition. The same is upheld.*

*9. In the result, the appeal filed by the Revenue is dismissed."*

*3. Nothing contrary was brought to our knowledge on behalf of Revenue.*

*4. Facts being similar, so following same reasoning we are not inclined to interfere with the finding of the CIT(A) who has rightly held that there is no question of disallowance made u/s. 40(a)(ia) of the Act. Same is upheld."*

*11. Since the facts are, mutatis mutandis, identical to the facts and issue decided by the Tribunal in M/s. Swapnali RDS Joint Venture (supra), therefore, following the parity of reasoning, we uphold the order of the CIT(A). Consequently, the grounds of appeal raised by the Revenue are dismissed."*

*10.2 Respectfully following the decision of the Co-ordinate Bench of the Tribunal in the case of ITO vs. Shraddha & Mahalaxmi Joint Venture and Others (supra), we are inclined to hold against the Revenue. We simultaneously find that the case of the assessee is fully supported by CBDT Circular No.07/2016 (supra) and judicial opinions expressed in the case of SMSL-UANRCL (JV) (supra) and Linde AG, Linde Engineering Division and Anr. (supra).*

*10.3 We also simultaneously take affirmative note of the argument on behalf of the assessee that rigours of section 40(a)(ia) are diluted in the facts of the case since the payee has admittedly filed its return of income disclosing the impugned receipts and income earned by it embedded in the receipt has been duly offered for taxation. In this view of the matter, the assessee Joint Venture cannot be treated as assessee in default in view of the decision of the Hon'ble Delhi High Court in the case of Ansal Land Mark Township (P.) Ltd. (supra) and the decision of the Co-ordinate Bench of the Tribunal in the case of ITO vs. Shri Chandrakant J. Mandale (supra). Thus, seen from any angle, we find no*

*infirmity in the order of the CIT(A). Accordingly, the appeal of the Revenue is dismissed.”*

7. Both the sides are unanimous in stating that the issues involved in the present appeal are identical. Therefore, in the light of decision of co-ordinate Bench in assessee's own case for the immediately preceding assessment years, the findings of Commissioner of Income Tax (Appeals) are upheld and appeal of the Revenue is dismissed.

**ITA No. 36/PUN/2016**

8. The facts in the present appeal are undisputedly similar to the facts in ITA No.35/PUN/2016. The ld. AR has placed on record a copy of order of Tribunal in assessee's own case in ITA No.2200 & 2201/PN/2014 for assessment years 2010-11 and 2011-12 decided on 07.10.2016 wherein on identical set of facts, the appeal of the Revenue was dismissed.

Following the decision of Co-ordinate Bench of the Tribunal in assessee's own case in preceding assessment years, the impugned order is upheld and appeal of the Revenue is dismissed.

9. In the result, both the appeals filed by Revenue are dismissed.

Order pronounced on Wednesday, the 28<sup>th</sup> day of February, 2018.

Sd/-	Sd/-
(डी. करुणाकरा राव/D. KARUNAKARA RAO)	(विकास अवस्थी /VIKAS AWASTHY)
लेखा सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 28<sup>th</sup> February, 2018

SB

**आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT (Appeals)-3, Pune.
4. The Pr. CIT-2, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच,  
पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

// सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.