INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F ": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 2238/Del/2008
(Assessment Year: 2004-05)

Asst Commissioner of Income Tax, Circle-31(1), CR Building, IP Estate, New Delhi	Vs.	M/s. RNGS Consortium, 8, Aradhana Colony, Sector-13, RK Puram, New Delhi
(Appellant)		(Respondent)

ITA No. 153/Del/2009
(Assessment Year: 2004-05)

DCIT, Circle-11(1), New Delhi	Vs.	M/s. Expotec International ltd, 8, Aradhana Colony, RK Puram, Sector-13, New Delhi
(Appellant)		(Respondent)

Revenue by :	Shri Surender Pal, Sr. DR
Assessee by:	Shri Ajay vohra, Sr. Adv Shri Deepesh Jain, CA
Date of Hearing	08/10/2018
Date of pronouncement	20/12/2018

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are the two appeals filed by the revenue one in case of an AOP and another in case of the member of the AOP.

2. First we take the appeal of the consortium in ITA No. 2238/Del/2008 for the AY 2004-05, which is preferred by the ld AO against the order of ld CIT(A)-26, New Delhi dated 31.03.2008, where the ld AR has revised its ground of appeal as under:-

"*1. The CIT(A) has erred in holding that the AO was not justified in rejecting books of accounts u/s 145(3) of the It Act.*

2. The CIT(A) has erred in holding that expenditure of Rs. 77,10,535/- only was liable to be disallowed in the hands of assessee instead of entire contract expenses of Rs. 33,05,43,749/- without appreciating the fact that the same was unvouched for, though no separate addition was made by the AO on this account.

3. *The CIT(A) has erred in holding that the issue of deduction of Rs. 26,10,57,290/- by GAIL was referred to arbitration, therefore, the assessee could not be said to have received the rights to receive the above income and the same cannot constitute the income of assessee for relevant assessment income, without appreciating the fact that in the mercantile system of accounting the assessee was liable to include this income in his gross receipt once the bill has been raised by the assessee."*

3. Brief facts of the case is that the assessee is a consortium of association of person formed with four other members for laying of pipeline and associated facilities from Jagoti to Vijaipur pipeline project floated by GAIL vide agreement dated 19.12.2003. The assessee filed its return of income declaring loss of Rs. 7145551/-. The return was accompanied with tax audit report u/s 44AB of the Act. During the course of assessment proceedings the books of account and contentions of the assessee were examined and total taxable income of the assessee was determined at Rs. 47375458/-. The ld AO noted that the assessee has shown contract receipt of Rs. 59.21 and has deducted 26.10 crores being deduction made by the customers and therefore, net receipt of Rs. 33.11 was shown. The assessee also debited the expenditure of Rs. 33.05 crores being direct contract expenses. The assessee submitted that this is the expenditure incurred by the assessee as work done by sub-contractors which are the parties of AOP. It was further stated that this is as per the agreement executed by the AOP. The copies of the agreement were also placed on record. Further, the AO asked the details of expenses incurred by assessee of Rs. 12.88 crores incurred by the sub-contractor. Assessee showed its inability to produce the details of expenses incurred by the consortium members. The ld AO rejected this contention and issue several letters to the assessee. The assessee explained the working of the consortium and respective work done by the consortium members. The AO rejected the explanation of the assessee and consequently, he rejected the books of account u/s 145(3) of the Act. Consequently, he determined the net profit of the assessee @8% of the gross receipts. As the turnover of the assessee was Rs. 592193232/- he computed the net profit of Rs. 47375458/- and passed the assessment order u/s 144 of the Act on 29.12.2006.

4. The assessee aggrieved with the order of the AO preferred an appeal before the ld CIT(A) who decided the issue vide para No. 11 onwards. He held that

appellant is an association of persons. With respect to rejection of the books of account he accepted the contention of the assessee that books of account cannot be rejected. He stated that complete books of account along with necessary details have been maintained by the assessee. He further stated that the ld AO has failed to appreciate the nature of the contracts shown by the assessee and allowed the appeal of the assessee. The ld AO aggrieved with the order has preferred the appeal before us.

5. The first ground of appeal was with respect to rejection of the books of account and second ground with respect to restricting the disallowance of Rs. 330543749/- to only Rs. 7710535/-. With respect to third ground it is stated that sum of Rs. 261057290/- referred to the arbitration is not the income accruing to the assessee.

6. The ld DR stated that the ld CIT(A) has not considered the issue in proper respective. He submitted that the books of account were not produced before the ld AO and therefore, same were rejected and profit was determined. He further stated that the deduction from customers of Rs. 361057290/- was also wrongly excluded from the total income.

7. The ld AR vehemently referred to various paragraph of the order of the ld CIT(A) and held that the assessee is an AOP. He further stated that books of account were produced before the ld AO and same were rejected wrongly by the ld AO. He referred to paragraph No. 41 and 42 of the order of the ld CIT(A). He further stated that now the issue is squarely covered in favour of the assessee by the decision of the Hon'ble Delhi High Court in case of Linde AG and Circular No. 7/2016 dated 07.03.2016. He therefore, submitted that there is no infirmity in the order of the ld CIT(A). With respect to ground No. 3 of the revenue he referred to para No. 40 of the order of the ld CIT(A) and stated that the assessee raised bills of Rs. 59.21 crores and GAIL passed the bills only Rs. 33.11 crores and there was uncertainty with respect to the receipt of amount and therefore, same could not be assessed during the year as income of the assessee. He therefore, submitted that deduction of Rs. 26.10 crores cannot be assessed to tax as income of the assessee.

8. We have carefully considered the rival contentions and also perused the orders of the lower authorities. The ld CIT(A) has dealt with issue of taxing of income of AOP vide para No. 11 to 39 of his order as under:-

"11. The issues raised and discussed in the assessment order have been carefully considered. It is seen that during the course of assessment proceedings it was submitted by the appellant before the assessing officer

(i) the appellant was only .a conduit between Gail and the consortium members in order to facilitate the laying of pipeline between Dahej and

(ii) the amount paid to the consortium members was evidenced by separate agreements entered into between the appellant and the members,

(iii) the appellant had no control over the members to produce the bills/vouchers in respect work done by the respective members and

(iv) the amount withheld by GAIL could not be treated as income of the appellant for the relevant assessment year as the matter was subjudice and was pending before the arbitrator.

13. In this regard the appellant submits that the assessing officer while completing the assessment of the consortium at aforementioned income, ignored the relevant agreements and other documents produced before him and did not appreciate the relationship between the appellant and the consortium members, their role's,, rights and obligations. The members of the consortium were statedly not working on behalf of the appellant as assumed by the AO and the appellant was statedly not responsible for the work carried out by them. The amount received by the appellant from GAIL except for the amount of 0.1% thereof retained by the appellant, in terms of the consortium agreement did not constitute income of the appellant in the first place, notwithstanding that the same was recorded as income in the books of the appellant. There was in fact, diversion of income by overriding title to the consortium members.

14. The appellant placed reliance in support was placed on the following decisions wherein it has been held the income divested by an overriding title would be assessable in the hands of person in whose favour it is vested:

CIT vs. Travancore Sugar & Chemicals Ltd.: 88 ITR 1 (SC), CIT vs. Jhanzie Tea Association: 179 ITR 295 (Cal.), CIT vs. M.D. Kanoria: 137 ITR 137 (Bom.), Dalmia Cement Ltd. vs. CIT: 237 ITR 619 (SC), CIT vs. Canara Bank: 293 ITR 115 (Del. and CIT vs. Jayantilal D. Patel: 295 ITR 386 (Guj.)

15. The appellant submitted that no association of persons (AOP) was formed by coming together of consortium members, in relation to the pipeline project work to be carried out and the remuneration receivable therefore from GAIL, for the following reasons:-

a) The intention of the members was not to carry on the business in common.

b) The scope of work to be carried on independently by each member and the amount payable as per schedule was also pre-determined.

c) The members were to bear their own cost for the work specified in their respective agreements, retain its profits or bear losses if any and were assessable an independent entities for the scope of work assigned to them.

It is submitted that the assessing officer has not appreciated the facts of the case in proper perspective and has not appreciated that the consortium was only a vehicle formed for coordination and successful completion of the project and the amount receivable from GAIL could not be brought to tax in the hands of the appellant, assessed in the status of an AOP. The relationship between the appellant and the consortium members was stated to be an independent relationship and there was no principal-agency relationship.

16. It was also one of the contentions of the ARs that the assessing officer in the assessment order has not been able to rebut the correct factual matrix i. e. that the project work was independently being carried on by the respective members as per the separate and independent sub-contract agreements with each member. The assessing officer has not brought anything on record to show that the work of the project was done by the appellant or by the members under its control/supervision. It was stated that the facts and circumstances of the case and the conduct of the appellant or of the members clearly suggest that the respective work assigned to each member was carried on independently by each member and it was only the respective members who were responsible for any profits/losses arising by virtue of the project work assigned to by each member.

17. Reliance in this regard was also placed on the ruling of the Authority for Advance Ruling in the case of Van Oord Acz. Bv. (In Re.): 248 ITR 399. wherein the said Authority had held that no AOP has been formed by the applicant by entering into a jointventure with an Indian company. In that case the applicant, Van Oord ACZ. BV (VOACZ), was a company incorporated in Netherlands and was engaged in the business of dredging and marine contractors. In the year 1996. Chennai Port Trust floated a tender for the Breakwater Construction at Ennore Port, the contract known as Ennore Coal Port Project-ECPP/C4. Since VOACZ possessed technical knowledge and capabilities to perform a part of the work, it participated in the said contract in a joint venture with an Indian company namely Hindustan Construction Company Ltd. (HCC). The purpose of the agreement as stated in clause 1.1 was that VOACZ and HCC would associate themselves in an unincorporated joint venture in the form of consortium, the sole object of which was to fulfill the obligations of the contract.

Article 23 of the agreement defirfed the relationship of the parties as "the relationship of the parties shall be that of an unincorporated association formed for the purposes of collaborating in respect of the contract. Each of the parties expressly agreed that it is not their

intention through the joint venture to carry on business in common with the other party-' with a view-' to earn profit and that it is their intention to utilise the joint venture for the better co-operation of their relationships with the employer and the division of the works and gross income arising under the contract. Each party shall bear its own losses and retain all profits arising from the performance of its requisite works package. Nothing in this agreement shall be deemed to give rise to a partnership between the parties or to any contract for services between the parties and each of the parties undertakes to use all reasonable endeavours not to do any act or thing which would cause such a relationship to arise.

On the above facts and circumstances the applicant approached the Authority for an advance ruling on the following question, besides some other questions:

"1. Whether, on the facts and in the circumstances of the case, the joint venture constitutes an association of persons within the meaning of section 2(31)(v) so as to become liable to tax under the Income-tax Act. 1961, or each party of the joint venture is liable to tax on its own profits?"

The Authority ruled as under:

So far as questions 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. They7 have specifically provided in the agreement that each party w-ill bear its ow-n 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 only7 be created by an agreement. Nor can it be treated as an association of persons. In order to constitute an association of persons there will have to be a 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 statedly not to cany' 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 the 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% of the total value). The association with the HCC was not with the object of earning this income but for coordination in executing the contract so that the HCC could also make its own profit. The HCC's work and income arising therefrom was quite separate and independent of the applicant's work and income. If the costs incurred by the HCC or the applicant were 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 the HCC was undoubtedly for mutual benefit but such association will not make them

a single assessable unit and liable to tax as an association of persons. 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 association of persons if each one has a designated 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 the HCC. There is no control or connection between the work done by the applicant and the HCCT (emphasis supplied)

18. Relying on the above decision, the appellant has argued that the assessment of the appellant, in the status of an AOP, it was submitted, could only be made in respect of 0.1% of the gross receipts receivable from GAIL,

retained by the appellant and that 99.9% of the gross amount received from GAIL was assessable in the hands of respective members.

19. Alternatively, the ARs- of the appellant submitted that even if the amount received from GAIL constituted income of the appellant for the assessment year under consideration, the assessing officer should have allowed the deduction for the payment amounting to Rs.33,05,43,749 made to the consortium members in respect of the work done by them as per the fixed ratio specified in the Consortium Agreement.

20. It was further contended that the amount paid to the consortium members by the appellant as per the agreed terms constituted independent income in the hands of the respective consortium members and any expenditure incurred by the consortium members was to be deducted therefrom by the consortium members, while computing their respective income liable to tax. It was further contended that there could not be any bills and vouchers for the amount paid to the consortium members in the possession of the appellant since it was not the appellant who was actually- executing the pipeline project. It was statedly the consortium members and not the appellant who actually incurred the expenses on executing the contract and the bills and vouchers relating thereto were in their possession only. According to the appellant, the non-allowance of deduction in respect of the said amount by the assessing officer alleging that the appellant has not produced bills/vouchers to substantiate the said payment and that the appellant ought to have kept records of the expenses incurred by respective members in relation to the project is not legally sustainable on the facts of the case.

21. It was argued that the allegation of the assessing officer that the appellant has not produced bills and vouchers, in relation to pipeline project in

respect of the payments made to members, especially when defacto control on the project was that of the appellant and not of the four constituent members and. therefore, the appellant should have kept all the records, bills, vouchers in its possession relating to the income earned and the expenses incurred, is not based on correct appreciation

of facts and the pre-determined contractual arrangement between the parties. It was statedly the members who were responsible for the completion of the pipeline project and any profit or loss arising therefrom is to the account of the members. The payment made bv the appellant to the consortium members was not dependent upon production of vouchers/bills by the members. The payment was statedly made as per the ratio agreed upon by the members, as per the respective agreement and therefore, the same was claimed tp be allowable on the basis of the terms of such agreements.

22. The appellant reiterated that the consortium was, only acting as a conduit between GAIL and the members and that it had no control over the financial records of the members or the manner in which the actual work was to be carried out by the members, who were separate legal entities distinct from the appellant. It is stated that the assessing officer, thus, erred in holding that the appellant should have kept the record of bills/vouchers in respect of the expenses incurred in relation to the project.

23. As regards the allegation of the assessing officer in the assessment order that the appellant has not been able to produce the details of expenses amounting to Rs. 12.88 crores incurred by Expotec International Ltd., my attention was drawn to the relevant pages of the paper-book wherein the appellant had annexed copy of notices dated, 7.12.06 issued under sections 131/ 133(6) of the Act summoning one of the consortium members, viz., M/s Expotec International Ltd. (Expotec) to produce details regarding the said expenditure incurred in relation to the said project. The said member vide reply dated 11.12.2006, had submitted complete details of the expenditure incurred during the year in relation to the said project including that of expenses of Rs. 12.88 crores. Therefore, it was argued that the observations of the AO are factually incorrect.

24. It was submitted that the appellant had maintained the regular account books, bills and the vouchers in respect of the business administrative expenses and the same have been audited by the tax auditors and no adverse inference has been drawn by the auditors. It is stated that the assessing officer has not pointed out any discrepancy either in the books of account maintained in the regular course of the business or the bills/ vouchers maintained in respect of the administrative expenses. The assessing officer thus has statedly erred on the basis of above allegations in rejecting the books maintained by the appellant and computing the taxable income of the appellant @ 8% of the gross receipts, invoking provisions of section 44AD of the Act, holding that the appellant is into civil construction business.

25. In this connection, from the assessment order, it is seen that the assessing officer relied upon the case of the Awadhesh Pratap Singh Abdul Rehman And Brothers vs. CIT: 210 ITR 406/ 76 Taxman 106 (All.). My attention was drawn to the facts of the case as reproduced in the submissions.

It is seen that in that case the assessing officer noticed various defects in the account books of the assessee on the basis of which he came to

the conclusion that the account books maintained by the assessee were neither correct nor complete. It was found that the purchases and the corresponding sales were not at all verifiable. No vouchers for the expenses and the cash memos were kept. No stock register was maintained. The assessee could not furnish the periodical retail sale price of the liquor. On inquiries, the Assessing Officer was informed by the District Excise Officer that the liquor contractors were free to fix the sale price of liquor and there was no control over the selling rate. A clear finding was recorded that the profit and loss account furnished by the assessee does not depict a correct and real profit earned during the year. It was on these findings, that the assessing officer rejected the account books invoking the provisions of section 145(2) of the Act and proceeded to make assessment on best judgment. The action of the assessing officer was affirmed by the CIT(A) and by the Tribunal.

26. It was pointed out by the appellant that the aforementioned decision relied upon by the assessing officer is not applicable to the facts of their case as in that case there were specific allegations to the effect that books of accounts were not complete, the' purchase/ sales were not verifiable and no invoices, bills/ vouchers were being maintained by the appellant. It was submitted that in the present case, the appellant had filed complete details of expenses, the copies of ledger accounts, copies of relevant agreements and the bills/ vouchers relating to administrative expenses were produced during the assessment proceedings for verification. It was stated that the assessing officer without appreciating that the accounts of the appellant are audited and without pointing out any discrepancy in the bills, vouchers and ledger accounts produced before him during the assessment proceedings, rejected the books of accounts on the sole ground that the appellant has not been able to substantiate the amount paid to the consortium members for the work done by them in relation to the pipeline project and is not maintaining the record of bills/ vouchers in relation to the expenses incurred by the respective members for the said project.

27. The appellant has submitted that the assessing officer has erred in rejecting the books of acc-ount§ of the appellant for the following reasons:

(a) there could not have been any other bill/ voucher for making payments to the members besides the agreements,

(b) the members are independent assessable entities distinct from the appellant and thus the appellant has no control over the records of the members, and

(c) one of the consortium member namely, Expotec International Ltd. in pursuance to notice under sections 131 and 133(6) of the Act, filed all the documents and bills/ vouchers in respect of the work carried on by it, as required by the AO.

28. With regard to the rejection of books of accounts by the AO, the appellant has placed reliance on certain case laws which are as below: -

In the case of Vishal Infrastructure Ltd 104 ITD 537 (Hydra.) the assessee was engaged in the business of engineering and construction activities and carried on work by itself and also sub-contracted some of the works. The AO invoked the provisions of section 145(3) and rejected the books of accounts for certain reasons out of which one reason was that the assessee did not have satisfactory evidence in support of the expenditure claimed for sub-contracted works. In this case it was held that, ''where the AO had accepted the factum of expenditure on account of sub-contractor and thus, the non-availability of.vouchers of expenditure incurred by the sub¬contractors with the assessee could not be a reason for rejection"

Amritsar Bench of ITAT in the case of Ashok Kumar & Co. 2-SOT-518 held that, rejection of books could not be resorted simply on the basis of absence of some vouchers and the failure to produce the same by the assessee.

In other words any such situation should only warrant a specific addition by the AO it it comes to the conclusion that such expenditure had not been incurred or was not verifiable. Instead of adopting this accepted approach if an AO resorts to the convenient approach of rejecting the books of accounts, in total, such action would be illegal and against the tenets of Law."

Also in the case of C.M. Francis & co (P) Ltd 77 ITR 449 (Ker.) and in the case of Emran Ahmed [1982] Tax LR (NOC) 111 (All.) it was held, "that on account of mere absence of vouchers to substantiate entries for accounts, the account in total cannot be rejected.".

29. As regards the allegation of the assessing officer that the appellant consortium ought to have shown the gross amount receivable as per contract with GAIL, i.e. Rs.59,21,93.232. as income for the year as against the net amount of Rs.33,1 1,35,942 credited to the profit and loss account for the year ended 31.3.2004, computed .after reducing therefrom a sum of Rs.26,10,57,290 withheld by GAIL due to certain discrepancies/ shortcomings regarding the completion of pipeline project, it was submitted that since GAIL and the appellant had referred the matter for arbitration there was uncertainty as to ultimate collection of the-abov.e amount of Rs.26,10,57,290 and the said income did not statedly accrue to the appellant during the relevant previous year as GAIL did not acknowledge the debt in respect of the above amount. It is seen that the assessing officer has though not denied that there was a dispute between the parties, which was also confirmed by GAIL. However, the AO held that the whole of the amount receivable from GAIL. viz.. Rs.59,21.93.232 constituted income of the appellant which had as per the AO accrued to the appellant during the assessment year under consideration.

30. In this regard it was submitted by the Ld. ARs that even though the appellant was maintaining its accounts on the mercantile system, wherein credit items are brought into the account immediately after they become legally due but before they are actually received and all

expenses for which a legal liability has been incurred are debited before they are actually disbursed, yet it is to be appreciated that even under the mercantile system, provisional, notional, contingent or disputed receipts or payments are not required to be considered as income or expense, as the case may be. It has been stated that in order that an income or profit may accrue to a person, it is necessary that there should be no uncertainty as to its ultimate collection and the person should have acquired a right to receive the same or a right to the income or profit should have become vested in him though its valuation may be postponed.

31. Attention was also drawn to Para-9 of the Accounting Standard-9 (AS- 9), on Revenue Recognition issued by the Institute of Chartered Accountants of India (ICAI) wherein the accounting treatment of income with uncertainties has been explained. It was thus claimed, that since in the case of the appellant, too, there was uncertainty evidenced by the dispute and subsequent arbitration proceedings as to the ultimate collection of the above amount withheld by GAIL, the aforesaid dmount was not to be recognized as revenue following the mercantile system of accounting.

32. The appellant drew support from the following judicial precedents:

The Supreme Court in the case of E.D. Sassoon & Co. Ltd. v. CIT 26 ITR 27 observed as under:

> *"That the words 'arising or accruing' are general words descriptive of a right to receive profits... If the assessee acquires a right to receive the income, the income can be said to have accrued to him. Though it may be received later on it being ascertained. The basic conception is that he must have acquired a right to receive the income. There must be a debt owed to him by somebody... Unless and until there is created in favour of assessee a debt due by somebody it cannot be said that he has acquired a right to receive the income or that income has accrued to him."*

33. The appellant has further 'relied upon the case of CIT vs. Hindustan' Housing & Land Development Trust: 161 ITR 524 (SC), wherein the assessee, was a limited company dealing in land and was maintaining its accounts on the mercantile system. By an order dated June 21, 1946, under rule 75A(1) of the Defence of India Rules read with section 19 of the Defence of India Act, 1939, certain plots of land measuring about 19.17 acres in village Kankulia in the District of 24 Parganas and belonging to the assessee, were requisitioned by the Government of West Bengal. Subsequently, the land was acquired permanently by the State Government. The Land Acquisition Officer awarded a sum of Rs.24.97,249 as compensation to the assessee. The assessee was not satisfied with the amount of compensation and preferred an appeal before the Arbitrator. The arbitrator made an award, whereby the compensation was fixed at Rs/30.10,873 on account of the permanent acquisition of the land, thus enhancing the original amount of compensation by Rs.5,1 J,624 on which directions

were also issued for payment of interest @ 5 per cent PA. The arbitrator also directed that further recurring compensation at Rs.62,72,104/- per mensem should be paid to the assessee from the date of the requisition till the date of the acquisition.

The State Government appealed to the High Court and during the pendency of the appeal, it deposited Rs.7,36,691, which the assessee was permitted to withdraw on furnishing security'. On receipt of the amount, the assessee credited it in its suspense account on the same date.

During the assessment proceedings for the assessment year 1956-57, the Assessing Officer brought to tax a sum of Rs.7.24,914 as the assessee;s business income in terms of the award. The Assessing Officer treated the sum as liable to income-tax on the basis that the income had accrued to the assessee on the date of the award. The order of the Assessing Officer w;as confirmed by the AAC. In second appeal by the assessee before the Tribunal, the Tribunal accepted the contention that the above sum was not taxable in the captioned assessment year and allowed the appeal accordingly. The decision of the Tribunal was upheld by the Calcutta High Court. Aggrieved, the Department filed a SLP to the Supreme Court. The Supreme Court observed as under:

> *If the actual amount of compensation has not been fixed, no income could accrue to him. It cannot be contended that the mere claim by the assessee. after taking of possession, at a- particular rate or for a certain sum is the compensation. It is the amount actually awarded by the collector or subsequently decreed by the court which accrues to him. and the respective amounts, whether awarded by the collector or the court accrue on the respective dates on which the award or the decree is passed. Income-tax is not levied on a mere right to receive compensation; there must be something tangible, something in the nature of a debt, something in the nature of an obligation to pay an ascertained amount. Till such time, no income can be said to have accrued. On the date when the collector awarded the compensation, it is only that amount which had accrued or was deemed to accrue, whether in fact paid or nok_But by no stretch of the words in section 4(l)(b)(i), could it be said that the right to enhanced compensation, which has not yet been accepted by the proper forum, namely, the court, has also become payable on the date when the original compensation became payable, for being included in that year of assessment. The enhanced compensation accrues only when it becomes payable, i.e., when the court accepts the claim. As has been stated earlier, a mere claim by the assessee. after taking of possession of the land, at a particular rate or for a certain sum is not compensation. It must not be forgotten that, even if a court has awarded enhanced compensation, there is a right of appeal by the Government to the High Court, and the High Court may either disallow that claim or reduce the compensation. As against that judgment, there is a further right of appeal to the Supreme Court. The assessee also can appeal against the insufficiency of*

the enhanced compensation. Can it be said that the final determination by the highest court of the compensation would entitle the Income-tax Officer, notwithstanding the period of limitation fixed under the Income-tax Act, to reopen the assessment in which he had included the initial compensation awarded by the Collector and recompute the entire income on the basis of the final compensation1? We do not think there can be any justification for such a proposition. On a proper construction of the terms 'accrue' or 'arise1, we are of the view that such an inteipretation cannot be placed. The interpretation given by us does not affect the interests of the Revenue. At the same time, it safeguards the assessee and prevents harassment. To hold otherwise wduld be contrary to the provisions of law." (emphasis supplied)

34. The appellant also refered to and relied upon the case of Topandas Kundanmal vs. CIT: 114 ITR 237 (Guj.). Addl. CIT vs. New Jehangir Vakil Mills Co. Ltd.. 117 ITR 849 (Guj.). K. V. Moosa Koya and Co. vs. ITO: 175 ITR 120 (Ker.), CIT vs. Mysore Sugar Company Limited: 183 ITR 113 (Kar.), CIT vs. Abdul Mannan Shah Mohammed: 248 ITR 614 (Bom.) and CIT vs. Bavla Gopalak Vividh Karyakari Sahakari Mandli Limited: 253 ITR 97 (Guj)

35.. It was further pointed out by the appellant that in the assessment order at page-6 the assessing officer has placed reliance on the case of CIT vs. Ashokbhai Chimanbhai: 56 ITR 42 (SC)5 that the Apex Court has held that income is said to accrue or arise to an assessee, when the right to receive the same vests with the assessee. The appellant has explained that the assessee in that case was a Hindu undivided family (HUF) consisting of Ashokbhai, the manager, his.wife, and his minor son. Ashokbhai was a partner in a firm namely M/s. Amrit Chemicals with a share of five annas in every rupee in the profit and loss. The beneficial interest in the profits of the firm falling to the share of Ashokbhai belonged to the HUF. By deed dated, November 12. 1955, the Hindu undivided family was disrupted, and the property of the family was divided. The following are the material clauses of the deed of partition:

> *"4. There is joint family property of the joint family of Seth Ashokbhai Chimanbhai of the First Part. Out of that we are making a partial partition of the property as hereinafter stated, particulars whereof are as follows:*
>
> *(a) in the partnership firm in the name of the Amrit Chemicals five annas shares out of sixteen annas in the rupee including goodwill together with the benefit and liability in respect of the profit and loss relating to five annas share in a rupee of sixteen annas made by the said firm from January 1, 1955, 0f the value of about Rs. 70,001.*
>
> *The partnership firm of the Amrit Chemicals has been in existence from January 1, 1946, and a deed of partnership dated August 14, 1946, has been made in respect of the said partnership and according to the said deed there is a share of*

five annas in a rupee of sixteen annas in the profit and loss of the said firm in the name of Seth Ashokbhai Chimanbhai.

Seth Ashokbhai Chimanbhai has become the full owner of the said share henceforth and all the rights under the said deed of partnership are to be enjoyed by Seth Asbokbhai. Chimanbhai party of the First Part himself. Similarly, any liability under the said deed is to be borne and discharged by Seth Ashokbhai Chimanbhai part of the First Part."

In the proceedings for assessment for 1955-56, the assessee contended that the share in the profits of M/s Amrit Chemicals for the calendar year which accrued on or after December 31, 1955, belonged to Ashokbhai in his individual capacity and was not liable to be included in the taxable income of the assessee, because it had been declared under the partition deed to belong exclusively to Ashokbhai as from January 1, 1955, and that in any event since the firm made up its accounts at the end of the calendar year, the assessee had no interest in the share of profits for the calendar year 1955, which accrued at the end of that year to Ashokbhai in his individual capacity. The Assessing Officer while completing the assessment of the assessee made an addition of Rs.21,051 received by Ashokbhai as five annas share in the profits of the firm. On appeal the AAC held that Ashokbhai ceased to represent the HUF and the share of profits received from the firm had to be apportioned between the assessee and Ashokbliai. This order was confirmed by the Tribunal and the High Court. Aggrieved, the Department filed an appeal before the Supreme Court. The Court observed as under:

In the present case at the date when Ashokbhai acquired the right to receive a share of profits, there was no subsisting joint family and his share of the profits was not received by him on behalf of the assessee.

There was in this case no assignment of the profits which had already accrued to the assessee. Profits accrued to Ashokbhai and on the date on which they accrued, the assessee had because of the deed of partition no interest in the profits. The revenue authorities could not claim that profits, which under the instrument of partition did not accrue or arise to Ashokbhai as representing the Hindu undivided family, must, for purposes of taxation, be so deemed. The High Court was. therefore, right in answering the question in the negative.

The appeal fails and is dismissed."

36. It was submitted that the above case relied upon by the assessing officer in the assessment order is of no help to the assessing officer as in that case the Apex Court on the facts of that case held that the income had not accrued to the assessee during the year due to the overriding title in favour of the manager on partial partition of the HUF. Infact, the above case relied upon by the assessing officer supports the case of the appellant that the gross receipts got divested in favour of the members by an overriding charge.

37. The appellant also drew attention to the copy of assessment order dated 29.9.06, passed in the case of Ace Pipeline Contracts Ltd., one of the consortium members placed at page Nos. 196 - 203 of the paper-book. The assessing officer of that company has held that the amount received from the appellant is the income of the member (Ace Pipeline) and has allowed deduction of expenses actually incurred by that assessee, in relation to the pipeline project work carried out by it, while computing the taxable income of the assessee. On that basis it was submitted, that the assessing officer in the case of the appellant Consortium may be directed to allow deduction of the amount paid by it to the members as per the ratio specified in the consortium agreement, which constitutes income in the hands of the members. Otherwise it will lead to double taxation. '

38. The Ld. ARs further pointed out that in the case of another member of the Consortium, viz., Expotec International Ltd, the assessing officer while completing the assessment of that company for the assessment year 2004-05. has disallowed the loss arising to that company on account of execution of the above contract holding that the loss is to be allowed in the hands of the appellant (RNGS Consortium). It was submitted that the expenses incurred by that member (Expotec), which' have been verified with reference to bills/vouchers, etc. in the assessment of that assessee, to the extent of the amount paid by the appellant to Expotec as per the sub-contract agreement with Expotec has to be allowed as deduction in the hands of the appellant, otherwise it will lead to double taxation.

39. The Ld. ARs, therefore, submitted that the action of the assessing officer in computing the income of the appellant estimated @ 8% of the gross receipts, not allowing the deduction of payments made to the Consortium members and disallowing the loss as computed by the appellant may kindly be deleted."

9. Further the issue is also clearly covered in favour of the assessee by circular of CBDT which is as under:-

07/2016

Government of India Ministry of Finance Department of Revenue Central Board of Direct Taxes

North Block, New Delhi, the 7th of March, 2016

Subject: Clarification regarding taxability of consortium members- reg.-

A consortium of contractors is often formed to implement large infrastructure projects, particularly in Engineering, Procurement and Construction ('EPC') contracts and Turnkey Projects. The tax authorities, in many cases have taken a position that such a consortium constitutes an Association of Persons ('AOP') i.e. a separate entity for charging tax. The claim of taxpayers, on the other hand, is contrary to this view. This has led to tax disputes particularly in those cases where each member of the consortium, although jointly and severally liable to the contractee, has a clear distinction and role in

scope of work, responsibilities and liabilities of the consortium members.

2. The term AOP has not been specifically defined in the Income-tax Act, 1961 (Act). The issue as to what would constitute an AOP was considered by the Apex Court in some cases. Although certain guidelines were prescribed in this regard, the Court opined that there is no formula of universal application so as to conclusively decide the existence of an AOP and it would rather depend upon the particular facts and circumstances of a case. In the specific context of the EPC contracts/Turnkey projects, there are several contrary ruling of various Courts on what constitutes an AOP.

3. The matter has been examined. With a view to avoid tax-disputes and to have consistency in approach while handling these cases, the Board has decided that a consortium arrangement for executing EPC/Turnkey contracts which has the following attributes may not be treated as an AOP:

a. each member is independently responsible for executing its part of work through its own resources and also bears the risk of its scope of work i.e. there is a clear demarcation in the work and costs between the consortium members and each member incurs expenditure only in its specified area of work;
b. each member earns profit or incurs losses, based on performance of the contract falling strictly within its scope of work. However, consortium members may share contract price at gross level only to facilitate convenience in billing;
c. the men and materials used for any area of work are under the risk and control of respective consortium members'
d. the control and management of the consortium is not unified and common management is only for the inter-se coordination between the consortium members for administrative convenience;

4. There may be other additional factors also which may justify that consortium is not an AOP and the same shall depend upon the specific facts and circumstances of a particular case, which need to be taken into consideration while taking a view in the matter

5. It is further clarified that this Circular shall not be applicable in cases where all or some of the members of the consortium are Associated Enterprises within the meaning of section 92A of the Act. In such cases, the Assessing Officer will decide whether an AOP is formed or not keeping in view the relevant provisions of the Act and judicial jurisprudence on this issue.

6. The above may be brought to the notice of all for necessary compliance.

7. Hindi version to follow.

(Rohit Garg)

10. Therefore, the ld Assessing Officer is not right in rejecting the books of accounts of the assessee for the reason that the ld AO could not appreciate the nature of the business of the assessee and purpose of entering into consortium contract. He did not consider that assessee was only a pass through entity between the principle and the consortium members for the purpose of the above infrastructure project. The amount paid to the consortium members are also supported by the separate contracts entered into between AOP and consortium members for executing there part of the work. In fact each member was separately responsible for their own work. In view of the above facts we do not find any merit in the ground No. 1 and 2 of the appeal of the revenue. Accordingly, we confirm the order of the ld CIT(A) and dismissed these grounds.

11. Ground No. 3 relates to deduction of Rs. 26.10 crores by GAIL. The assessee has shown the amount withheld by GAIL as subjudice and both the appellant and GAIL have referred the matter to arbitration. Undisputedly, though the appeals have been raised by the assessee but same has not been accepted by GAIL, the income did not accrue to the assessee. The ld CIT(A) has dealt with this issue in page No. 107 to 108 as under:-

> *"The next ground i.e. ground No. 4(g) taken by the appellant relates to the amount of Rs.26.10.57.290 -. being the deductions made by the GAIT. It is seen that the AO has treated this amount as income of the appellant for the relevant previous year whereas the appellant has contended that the above amount did not accrue to the appellant and. therefore, was not liable to tax during the relevant previous year.*
>
> *40. In this regard, it is seen that the appellant has shown the net receipts in the profit and loss account for the previous relevant to assessment year 2004- 05. As submitted by the appellant, the amount withheld by GAIL is subjudice and both the appellant and GAIL have referred the matter for arbitration. Even though the invoices were raised on GAIL of the gross amount of Rs.59.21.93.232. GAIL passed on an amount of Rs.33.1 1.35.942/- only to the appellant. As there was an uncertainty with respect to the receipt of the amount withheld by GAIL the same could not have been assessed during the relevant assessment year as per the accepted accounting principles. Even otherwise, it is settled position that the assessing officer while framing the best judgment assessment as per the provisions of section 144 of the Act has to consider all the relevant material before him and has to compute the total income of the assessee judiciously and not arbitrarily, i.e. by taxing the correct receipts and allowing the entitled expenditure*

incurred. As GAIL had not accepted the entire claim of the appellant for Rs.59,21,93,232 and had disputed the same, the appellant could be said be not to have received the right to receive the above amount and the same cannot constitute income of Ae appellant for the relevant assessment year. Only the amount of Rs.33,1 1.35,942 being the amount of claim accepted by GAIL can be said to be the income assessable to tax in the hands of the appellant. The case laws referred to by the appellant i.e. E.D. Sassoon & Co. Ltd Vs. CIT 26 ITR 27 (SC), CIT Vs. Hindustan Housing and Land Development Trust. 161 ITR 524 (SC) and other case laws discussed above have been considered and it is seen that they support the appellant's contention. It is also seen that the case law- relied upon by the AO in the assessment order, as discussed above, does not support the action of the AO. Keeping in view the facts and circumstances of the case as discussed above, the assessing officer is directed to take the net receipts as declared by the appellant for computing the income of the appellant for the year under consideration. This disposes off ground No.4(g) and 4(h) taken by the appellant.

Ground No.4 (i) relates to charging of interest, which is consequential in nature. The AO is directed to charge interest as per Law as giving effect to this appellate order."

12. The facts itself shows that the above amount was the bill raised by the assessee but not accepted by GAIL. The issue is whether the income accrues in the hands of the assessee despite it being disputed by the payee. It is also an accepted fact that there was a dispute and matter was referred to arbitration. Therefore, it was not sure whether the assessee has acquired right to receive the above income. Income can be held to accrue only when the assessee acquires a right to receive that income. Unless, the assessee acquired that right it merely remains a claim and not income. The mere raising a claim or a bill does not by itself create any legally enforceable right to receive any income. The Hon'ble Supreme Court in Godhra Electricity Vs. CIt 225 ITR 746 has held that unilateral increase in the rates of electricity shown as receipt in the books which could be realized due to protracted litigation did not result in an accrual of income, hence, such amount was not assessable. Therefore, in the present case there was no certainty of realization of the claim of the assessee as it was referred to arbitration, we confirm the finding of the ld CIT(A) in holding that such amount of Rs. 26.10 crore did not have any right to receive acquired by the assessee and hence, cannot be held as income chargeable to tax in the hands of the assessee. In view of this we do not find any merit in ground No. 3 of appeal of the revenue. Hence same is dismissed.

13. Accordingly, appeal of the revenue is dismissed.

14. Now we come to the appeal of revenue in ITA No. 153/Del/2009 for the Assessment Year 2004-05, wherein, The revenue has raised the following grounds of appeal:-

> "*1. On the facts and circumstances of the case and in law, the CIT(A) has erred in allowing the set off of loss of AOP amounting to Rs. 5,74,98,232/-.*"

15. The brief facts shows that assessee is deriving income from processing of rice and export. The above business was discontinued. The assessee has claimed project expenses of Rs. 29.92 crores against the income of Rs. 24.17 crores and claimed loss of Rs. 5.74 crores. The assessee is the consortium member of RNGS Consortium, New Delhi. It filed its return of income on 01.11.2004 declaring loss of Rs. 5929379/-. The total income of assessee is assessed at Rs. 46167749/- vide order dated 06.12.2006, wherein, the loss of Rs. 57498232/- incurred by the assessee in the contract work was disallowed by the ld AO. The ld AO was of the view that an AOP is a separate entity and the income and expenditure pertaining to that cannot be assessed in the hands of the member.

16. The assessee aggrieved preferred an appeal before the ld CIT(A) who held that the income and expenditure of the assessee was determined by a separate agreement entered by the assessee with the AOP for the work to be performed by assessee as per sub-contract agreement dated 15.05.2003. He further noted that 99.9% of the receipts were distributed amongst the member for the work to be done by them and therefore, the above loss cannot be disallowed. Revenue aggrieved has preferred this appeal.

17. The ld Departmental Representative relied upon the order of the ld AO and the ld AR relied upon the order of the ld CIT(A) as well as his submissions made in appeal of the AOP.

18. We have carefully considered the rival contentions and perused the orders of the lower authorities. Undisputedly the assessee is a part of consortium which received a contract from GAIL for laying pipeline. Each of the consortium member also entered into sub-contracting agreement with the AOP for carrying out the above work and also sharing the gross receipts. Admittedly, the work has been executed by the members of the AOP by

sharing of the gross receipts and incurring necessary expenditure to execute that contract, if any loss or income earned by them is chargeable to tax in their hands only. Therefore, we do not find any infirmity in the order of the ld CIT(A) in allowing the loss to the assessee. In view of this the only ground raised in appeal of the revenue is dismissed.

19. In the result ITA No. 153/Del/2009 is dismissed.

20. Accordingly, both the appeals of the revenue are dismissed.

Order pronounced in the open court on 20/12/2018.

-Sd/-	-Sd/-
(AMIT SHUKLA)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated:20/12/2018
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi