आयकर अपील य अ धकरण, अहमदाबाद यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL,
''C'' BENCH, AHMEDABAD

BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.99/AHD/2016**

नधारण वष/Asstt. Year: 2010-2011

Park Avenue Associates, 10th Floor, Commerce House-IV, 100 Ft Road, Nr. Prahlad Nagar, Satellite, Ahmedabad-380 015. PAN: AAIFP3192J	Vs.	JCIT, Range-9, Ahmedabad.

(Applicant)		**(Respondent)**

Assessee by :	Shri P.M. Mehta, A.R
Revenue by :	Shri L.P. Jain, Sr.DR

सुनवाई क तारख/**Date of Hearing : 26/11/2018**
घोषणा क तारख /**Date of Pronouncement: 01/01/2019**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Commissioner of Income Tax (Appeals)-13, Ahmedabad[CIT(A) in short] vide appeal no.CIT(A)-13/Ahd/31/2014-15, dated 03/12/2015 arising in the matter of assessment order passed under s.143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dated 30/03/2013 relevant to Assessment Year (AY) 2010-11.

2. The assessee has raised the following grounds of appeal.

1. On facts and in the circumstances of the Appellant's case, the Ld. CIT (Appeals) has erred in confirming disallowance of interest expenditure for Rs.11,32,288, when no such disallowance is called for. The same may be deleted.

2. On facts and in the circumstances of the Appellant's case, the Ld. CIT (Appeals) has erred in confirming disallowance of wooden work expenses for Rs. 16,63,883 incurred for housing project constructed by it when no such disallowance is called for. The same may be deleted.

3. On facts and in the circumstances of the Appellant's case, the Ld. CIT (Appeals) has erred in confirming disallowance of other material expenses for Rs.8,89,664 incurred for housing project constructed by it when no such disallowance is called for. The same may be deleted.

4. On facts and in the circumstances of the appellant's case, Ld. CIT(A) has erred in confirming disallowance of miscellaneous work expenses for Rs.12.93,301/- incurred for housing constructed by it when no such disallowance is called for. The same may be deleted.

5. On the facts and in the circumstances of the case, the Ld.CIT(A) has erred in not giving direction to the Assessing officer for charging interest u/s.234A, 234B and 234C of the Act.

6. The appellant craves to add to, alter, amend and/or withdraw any grounds of appeal either before or during the course of hearing the appeal.

3. The 1st issue raised by the assessee is that Ld. CIT(A) erred in confirming the addition made by the AO by sustaining the disallowance of Rs. 11,32,288/- on account of diversion of the fund.

4. Briefly stated facts are that the assessee is a partnership firm engaged in the business of developing, organizing the building projects. The assessee in the year 2007-08 has entered into a joint development agreement with M/s Goyal & company for the development of the residential project namely **Riviera Elegance** consisting of 44 flats.

4.1 As per the agreement, the assessee was to receive 21 flats, and Goyal & company was authorized to receive 23 flats. Both the parties were authorized to make the sales out of the flats allotted to them as per the agreement.

4.2 The assessee during the year has shown sale proceeds of Rs. 15,58,67,250/-only against which claimed expenses under the head opening work in progress of Rs. 13,92,37,267/-only and declare a net profit of Rs. 92,12,906/-only.

4.3 The assessee has also claimed interest expenses of Rs.67,23,721/-only in its profit and loss account though there was no expense debited in the profit and loss account for the purchase of any building material, labor, and other construction work.

4.4 The AO during the assessment proceedings observed that Goyal & company firstly received all the sale proceeds and the share of the assessee was transferred to it subsequently after the gap of significant time. It was also observed that the assessee had not charged any interest from Goyal & company for the period when the money of the assessee was held by Goyal & company.

4.5 On a question by the AO, the assessee submitted that the sale proceeds were received by it within a period of 4 to 5 days after the sale of the flat subject to bank holidays.

4.6 The assessee also worked out the amount of proportionate interest for the period when the fund was held by the Goyal & Co amounting to Rs 4,91,559/-only and without prejudice to the above agreed for such disallowance.

4.7 However, the AO was not satisfied with the reply of the assessee on the ground that as per the joint agreement the assessee was authorized to collect

the payment directly without routing through Goyal & Co. Accordingly, he was of the view that the interest expenses to the extent of the amount utilized by Goyal & Co need to be disallowed. The AO while working out the disallowance of interest expenses also held that bank holidays could not be considered while disallowing the interest expenses. It is because the bank while charging the interest does not give any relief for the holidays.

4.8 Thus the AO worked out proportionate interest amounting to Rs 11,32,288/-only and disallowed the same by adding to the total income of the assessee.

5. Aggrieved assessee preferred an appeal before the Ld. CIT(A). The assessee before the Ld. CIT(A) submitted that Goyal & Co owned the land and therefore it was signing the sale deed as 1st party.

5.1 The marketing activities were carried out by Goyal & Co, and therefore it was having its reputation and brand value as well as trusts in the market. Therefore all the units of the assessee were sold by Goyal & Co. So the sale consideration was 1st received by Goyal & Co.

5.2 Indeed there is a clause in the agreement that both the parties can collect the sale proceeds, but there was no prohibition that one party cannot receive sale consideration on behalf of another party.

5.3 However the Ld. CIT(A) rejected the contention of the assessee by observing that there was no reason to hold the payment of the assessee by the Goyal & Co. Accordingly, the Ld. CIT-A confirmed the disallowance made by the AO on account of interest expenses.

6. Being aggrieved by the order of Ld. CIT(A) assessee is in appeal before us.

7. The Ld. AR before us filed a paper book running from pages 1 to 274 and submitted that in the identical facts and circumstances this tribunal in the case of the CIT Vs. M/s Ansul associates in ITA No. 3063/AHD/2015 vide order dated 16th April 2018 decided the issue in favor of the assessee.

8. On the other hand the Ld. DR vehemently supported the order of the lower authorities.

9. We have heard the rival contentions and perused the materials available on record. At the outset, we note that M/s Goyal & Co was having a similar contract with M/s Anshul associates. In the case of M/s Anshul associates the ITAT was pleased to delete the addition made by the AO. The relevant extract of the order is reproduced as under:

> *"11. There is no dispute that the assessee has in fact incurred the expenditures which have been disallowed by the A.O. It is equally true that nowhere the A.O. has mentioned that the expenditures were not related to the business of the assessee. It is also true that quantitative specification of works allotted to assessee has not been mentioned in the said agreement but at the same time, the A.O. has accepted the said agreement without questioning its legality or enforceability. We find that the sale consideration was first received by Goyal & Co. and thereafter after the gap of 4 to 6 days, the same was transferred to the account of the assessee. On such fact, it cannot be said that the assessee has deliberately passed on some favour to Goyal & Co. Therefore, it cannot be said that by doing so, the assessee has unnecessarily incurred interest . A.Y. 2011-12 expenditure on loans from Punjab National Bank. Moreover, the assessee is also having sufficient interest free funds available with it. The disallowance of proportionate interest is uncalled for. Expenditure on Tube Well was incurred for the constant availability of flow of water for RCC work and Plaster work. As*

mentioned elsewhere, A.O. has not disputed that such expenditure was never incurred for the purpose of the business. Similarly, expenditure on Wooden Work is also not in dispute. The only reason for making the disallowances is that the assessee has done some work beyond the scope of work allotted to it. Assuming, yet not accepting, the contention of the A.O. is correct then also if the assessee has done some work which was not allotted to it, the same would be a matter of dispute between the assessee and Goyal & Co. By no stretch of imagination, the expenditure incurred can be disallowed.

12. On a conspectus reading of the assessment order and the order of the First Appellate Authority vis-à-vis the facts in issues relating to the impugned expenditures, we do not find any merit in the disallowances made by the A.O. and therefore decline to interfere with the findings of the ld. CIT(A). All the grounds taken together are accordingly dismissed."

9.1 As the facts of the case on hand are identical to the facts of the case as discussed above, we respectfully following the same reverse the order of authorities below. Thus we set aside the order of Ld. CIT(A) and direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is allowed.

10. The 2nd issue raised by the assessee is that the Ld. CIT (A) erred in confirming the disallowance of wooden material expenses of Rs. 16,63,880/- only.

10.1 The assessee in its opening work in progress has claimed the expenses for wooden material amounting to Rs.16,63,880/- only which was carried forward from the preceding year to the year under consideration.

10.2 However, the AO was of the view that the assessee is not authorized to incur the expenses on such wooden material as discussed above in pursuance to the joint development agreement with the Goyal & Co. Accordingly, an

explanation was sought by the AO from the assessee. In compliance to it, the assessee submitted that the wooden work is covered under RCC work which was incurred as per the joint development agreement.

10.3 The assessee in support of such work filed the supporting pieces of evidence along with engineer certificate justifying the cost incurred in the wooden work in connection with the construction of the project.

10.4 The Labour expenses incurred in relation to such wooden work were also covered in labor charges incurred for RCC work.

10.5 However, the AO observed that the engineer certificate just gives a general remark about the utilization of woods. As such there was no mention about the nature of work carried out by the assessee.

10.6 The assessee as per the agreement is liable to execute the RCC work, which the assessee has given on sub-contract basis to RCC labor contractor. As such there was no liability of the assessee to incur any expense for the wooden work.

10.7 The assessee has not furnished sufficient documentary evidence in support of Labour expenses incurred by it in relation to the wooden work.
The assessee has conceded that the expenses on the wooden work were to be borne by Goyal & Co by admitting the fact that both the parties namely the assessee and Goyal & Co are subject to tax at the similar rate and therefore there was no loss to the Revenue.

10.8 In view of the above, the AO made the disallowance of wooden material expenses of Rs 16,66,880/-only and added to the total income of the assessee.

11. Aggrieved assessee preferred an appeal to Ld. CIT(A) the assessee before the Ld. CIT(A) submitted that all the expenses for the wooden work were supported from the bills.

11.1 The Labour expenses incurred by the assessee in relation to the wooden work were already covered in the Labour expenses incurred in relation to RCC work. Therefore there were not separate Labour expenses which were incurred by the assessee.

11.2 The payment to the Labour contractors was made after deducting the TDS.

11.3 There was separate expenditure incurred by the assessee on the purchase of wooden material which was not part of labor expenses.

11.4 However the Ld. CIT(A) disregarded the contention of the assessee by observing that the wooden material expenses were not incurred as per the joint development agreement. Accordingly, he confirmed the order of the AO. Being aggrieved by the order of Ld. CIT(A) assessee is in appeal before us.

12. The Ld. AR before us submitted that in the identical facts and circumstances this tribunal in the case of the CIT Vs. M/s Anshul associates in ITA No. 3063/AHD/2015 vide order dated 16th April 2018 decided the issue in favor of the assessee.

13. On the other hand the Ld. DR vehemently supported the order of authorities below.

14. We have heard the rival contentions and perused the materials available on record. At the outset, we note that M/s Goyal & Co was having a similar contract with M/s Anshul associates. In the case of M/s, Anshul associates the ITAT was pleased to delete the addition made by the AO. The relevant extract of the order is reproduced as above in ground no 1. As the facts of the case on hand are identical to the facts of the case as discussed above, we respectfully following the same reverse the order of authorities below.

14.1 We also note that the assessee has furnished all the bills in support of wooden material expenses and there was no defect pointed out by the authorities below.

14.2 We also note that the assessee and Goyal & Co are paying taxes at the same rate of tax. Therefore it can be safely concluded that there is no loss to the revenue. In this regard CBDT in its Circular No.6-P dated 06/07/1968 has observed as under:

> ***"74.*** *It may be noted that the new provision is applicable to all categories of expenditure incurred in businesses and professions, including expenditure on purchase of raw materials, stores or goods, salaries to employees and also other expenditure on professional services, or by way of brokerage, commission, interest, etc. Where payment for any expenditure is found to have been made to a relative or associate concern falling within the specified categories, it will be necessary for the Income-tax Officer to scrutinise the reasonableness of the expenditure with reference to the criteria mentioned in the section. The Income-tax Officer is expected to exercise his judgment*

> *in a reasonable and fair manner. It should be borne in mind that the provision is meant to check evasion of tax through excessive or unreasonable payments to relatives and associate concerns and should not be applied in a manner which will cause hardship in bona fide cases."*

14.3 From the above Circular, it is clear that to attract the provisions of section 40(A)(2)(b) of the Act, there has to intention to divert the income to escape from the tax liability. However, in the instant case, there was no escapement of income, and accordingly, no loss of Revenue occurred to the Government Exchequer.

14.5 We also find support and guidance from the Judgment of Bombay High Court in the case of CIT Vs Indo Saudi Services (Travels) (p) Ltd. reported in 310 ITR 306 wherein it as held as under :

> *"Where the revenue was not in a position to point out how the assessee evaded payment of tax by alleged payment of higher commission to its sister concern since the sister concern was also paying tax at higher rate, and copies of the assessment orders of the sister concern were taken on record by the Tribunal, disallowance of alleged excess commission paid to the sister concern was not justified."*

14.6 Similarly, we find support and guidance from the order of this Tribunal in the case of M/s Akshar Finance Ltd. Vs. ITO in ITA No. 3215/Ahd/2010 dated 05/12/2013 wherein it was held as under:

> *"5. We have heard the rival submissions, perused the material available on record and gone through the orders of the authorities below as well the judgement relied upon by the ld.counsel for the assessee. We find that in AY 2005-06 this issue has been decided by the Coordinate Bench (ITAT-Ahmedabad) against the assessee on identical facts, but the assessee was not able to prove that recipients of the interest were also paying tax at maximum marginal rate, however in the instant case, the ld.counsel for the assessee has submitted the details at page No.37 of the paper-book which shows that the recipients of the interest were also paying maximum marginal rate of tax,*

therefore there is no evasion of tax. The undisputed facts are that the transactions have been effected between the related parties as contemplated u/s.40A(2)(b) of the Act. The assessee has paid interest @15% and interest received on advances to its sister-concern @ 10%. The AO made addition on the basis that the assessee received only 10% of interest, however, paid @15%, thereby the payment of interest @15% was excessive. It is also recorded by the AO that the payment of interest was not for the commercial expediency. The Hon'ble High Court of Bombay in the case of CIT vs. Indo Saudi Services (Travel) (P) Ltd.(supra), has held that the learned advocate appearing for the appellant was also not in a position to point out how the assessee evaded payment of tax by alleged payment of higher commission to its sister-concern since the sister-concern was also paying tax at higher rate and copies of the assessment orders of the sister-concern were taken on record by the Tribunal. In the instant case, the contention of the ld.counsel for the assessee is that there is no evasion of tax, the recipients of the interest are taxed at higher rate. As per CBDT Circular No.6-P dated 06/07/1968, it is envisaged that where payment for any expenditure is found to have been made to a relative or associate-concern falling within the specified categories, it will be necessary for the Income-tax Officer to scrutinize the reasonableness of the expenditure with reference to the criteria mentioned in the section. The Income-tax Officer is expected to exercise his judgement in a reasonable and fair manner. It should be borne in mind that the provision is meant to check evasion of tax through excessive or unreasonable payments to relatives and associate- concerns and should not be applied in a manner which will cause hardship in bona fide cases. The AO has not given any finding as to how these expenses are unreasonable and excessive and how this payment has resulted into evasion of tax. Therefore, respectfully following the decision of Hon'ble Bombay High Court in the case of CIT vs. Indo Saudi Services (Travel) (P) Ltd.(supra), we direct the AO to delete the addition. Thus, grounds of assessee's appeal are allowed."

14.7 From the above details, there remains no ambiguity that there was any evasion of taxes. Therefore in our considered view, the disallowance cannot be made under the provision of Rule 40(A)(2)(b) of the Act.

14.8 The genuineness and the business connection of wooden expenses have not been doubted by the authorities below. Therefore we can safely hold that the expenses were incurred in connection with the business of the assessee.

14.9 In view of the above, we set aside the order of the Ld. CIT(A) and direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is allowed.

15. The 3rd issue raised by the assessee is that the Ld. CIT(A) erred in confirming the addition of the other material expenses of Rs. 8,89,664/-only.

16. The AO during the assessment proceedings observed that the assessee had incurred certain expenses such as chemicals, small pipe, etc. which were not incurred as per the joint development agreement.

16.1 However, the assessee in support of the expenses filed the copies of the bills and submitted that the payment was made through banking channel.

16.2 However, the AO disregarded the contention of the assessee by holding that these expenses were not incurred in pursuance of the agreement as discussed above and assessee failed to substantiate that these expenses were incurred in connection with the work allocated to it. Accordingly, the AO disallowed the sum of Rs. 8,89,664/- and added to the total income of the assessee.

17. Aggrieved assessee preferred an appeal to the Ld. CIT(A), the assessee before the Ld. CIT(A) submitted that all the expenses were incurred in connection with the business of the assessee. The assessee in support of such expenses filed the copies of the bills of the 3rd parties.

17.1 From the above it could be seen from the bills of the third party that material expenses include : (1) tile protector used in tiles work (2)

disinfectant treatment in a building which is part of the construction. Not considered as part of finishing. (3) Material AV-300 used for strengthening the RCC structure. (4) glass fibber for glass work assigns to appellant (5) material being a gold star, flow grout, used in flooring. (6) Chemical for brickwork.

17.2 However the Ld. CIT(A) disregarded the contention of the assessee by observing that the expenses were not incurred in pursuance to the agreement. Accordingly, he confirmed the order of the AO.

18. Being aggrieved by the order of Ld. CIT(A) assessee is in appeal before us.

19. The Ld. AR before us submitted that the expenses were incurred in connection with the business of the assessee. Therefore there cannot be any disallowance for such expenses.

20. On the other hand the Ld. DR vehemently supported the order of authorities below.

21. We have heard the rival contentions and perused the materials available on record. The issue in the instant case relates to the expenses claimed by the assessee under the head other material expenses. The lower authorities allege that the expenses have not been incurred in pursuance to the joint development agreement. Therefore the same was disallowed by the authorities below.

21.1 From the preceding discussion, we note that the reasonableness of the expenses has not been doubted by the authorities below. Similarly, there was no allegation that the expenses claimed by the assessee are bogus in nature. In this regard, we note that the expenses which have been incurred wholly and exclusively for the purpose of the business are eligible for deduction under section 37(1) of the Act. There was no allegation that the expenses were not incurred for the purpose of the business and profession.

21.2 Besides the above, we also note that the assessee incurred the expenses in the earlier assessment year which were carried forward to the year under consideration. We note that there was no such disallowance made by the authorities below in the immediately preceding assessment Year. Therefore we are of the view the opening balances which have been carried forward from the earlier Years cannot be disturbed in the year under consideration.

21.3 We also note that genuineness and the business connections of the expenses have not been doubted. The only reason for the disallowance is that these expenses are not in pursuance to the joint development agreement. Thus such expenses were either to be allowed to the assessee or Goyal & Co. and both the companies are paying the tax at the same rate. Therefore, respectfully following the reasoning as given in the preceding ground no. 2 Para 14 of this order, we reverese the order of the authorities below. Thus we set aside the order of the ld. CIT(A) and direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is allowed.

22. The last issue raised by the assessee is that the Ld. CIT(A) erred in confirming the disallowance of miscellaneous work expenses amounting to 12,93,300/-.

23. The assessee during the year has made payment was labor charges amounting to Rs. 12,93,300/-to 5 parties. All the payments were made through banking channel.

23.1 However the AO found that the assessee was not authorized to incurred such expenses as per the joint development agreement. The AO also noted that the assessee failed to prove the genuineness of the expenses. Therefore the same was disallowed and added to the total income of the assessee.

24. Aggrieved assessee preferred an appeal to the Ld. CIT(A). The assessee before the Ld. CIT(A) a filed the initial pieces of evidence in support of his claim. Accordingly the Ld. CIT(A) called for the remand report from the AO who submitted that the assessee had furnished only self-generated vouchers. As per the AO, the assessee has not discharged his duty by producing the supporting evidence.

24.1 In view of the above the Ld. CITA sustained the addition made by the AO.

25. Being aggrieved by the order of the Ld. CIT(A) assessee is in appeal before us.

26. The Ld. AR before us submitted that the expenses were incurred in the previous year which was carried forward as opening balance in the year under consideration. Therefore there cannot be any disallowance of such expenses in the year under consideration.

27. On the other and the Ld. DR vehemently supported the order of authorities below.

28. We have heard the rival contentions and perused the materials available on record. In the instant case the assessee has incurred miscellaneous work expenses in the immediately preceding assessment year which was carried forward to the year under consideration as the opening balance. These opening balance were claimed as an expense in the year under consideration. However the AO rejected the contention of the assessee on account of 2 reasons firstly the expenses were not incurred in pursuance to the joint development agreement, secondly, the assessee failed to prove the genuineness of the expenses.

28.1 However we note that the assessee has claimed to have incurred such expenses after the deduction of TDS and exclusively for the purpose of the business.

28.2 However the AO in its remand report has rejected the claim of the assessee on the ground that there were self-made vouchers in support of such expenses. Even before us the Ld. AR has not referred to the bills submitted before the Ld. CITA. Therefore in the absence of supporting evidence we are not inclined to disturb the finding of the lower authorities.

28.3 However the fact that the expenses were incurred in the immediately preceding assessment year cannot be ignored. It is because the expenses were accepted by the Revenue in the earlier assessment year which was brought to the under consideration as the opening balance. It is established law that the closing balance of one year becomes the opening balance of the next year.

Therefore the opening balance brought forward from the earlier year cannot be disturbed in the year under consideration. Accordingly, we are not inclined to uphold the finding of the authorities below. Thus we set aside the order of the Ld. CIT(A) and direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is allowed.

29. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the Court on 01/01/2019 at Ahmedabad.

-Sd-	**-Sd-**
(MAHAVIR PRASAD)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 01/01/2019

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आदेश क□ □□ित□ल□प □ेषित/Copy of the Order forwarded to :

1. अपीलाथ□ / The Appellant
2. □□यथ□ / The Respondent.
3. संबं□धत आयकर आयु□त / Concerned CIT
4. आयकर आयु□त(अपील) / The CIT(A)
5. □वभागीय □□ितिनध, आयकर अपीलाय अ□धकरण / DR, ITAT,
6. गाड□फाईल / Guard file.

आदेशानुसार/BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलाय अ□धकरण, अहमदाबाद / ITAT, Ahmedabad