

THE INCOME TAX APPELLATE TRIBUNAL
"SMC" Bench, Mumbai
Before Shri Shamim Yahya (AM)

I.T.A. No. 1925/Mum/2017 (Assessment Year 2012-13)

M/s. ITD Pratibha Consortium C/o. Jayesh Sanghrajka & Co. LLP Chartered Accountants Unit No. 405, Hind Rajashan Centre, D.S Phalke Road Dadar (East), Mumbai-400014. PAN : AAAA1654D (Appellant)	Vs.	ITO-17(2)(1) Aayakar Bhavan M.K. Road Mumbai-400 020. (Respondent)
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Assessee by	Shri Margav Shukla
Department by	Shri Chaitanya Anjaria
Date of Hearing	10.12.2019
Date of Pronouncement	10.02.2020

ORDER

This appeal by the assessee is directed against the order of learned CIT(A) dated 6.12.2016 and pertains to A.Y. 2012-13.

2. The grounds of appeal read as under :-

"1. On given facts, circumstances, and judicial pronouncements Hon. CIT (Appeals) erred in confirming the addition made by Ld. Assessing Officer by disallowing the payment made to member of AOP as Professional fees and such addition is bad in law and liable to be deleted.

2. Without prejudice to above, on given facts, circumstances, and judicial pronouncements Hon. CIT (Appeals) erred in confirming the addition made by Ld. Assessing Officer by disallowing the payment made to member of AOP as Professional fees and such addition is bad in law and liable to be reduced.

3. Without prejudice to above, on given facts, circumstances, and judicial pronouncements Hon. CIT (Appeals) erred in confirming the addition made by Ld. Assessing Officer by disallowing the payment made to member of AOP as Professional fees even as per provisions of section 28(iv) as business loss and such addition is bad in law and liable to be deleted.

4. On given facts, circumstances, and judicial pronouncements Hon. CIT (Appeals) erred in directing Ld. Assessing Officer to reopen assessments for

three preceding years and such direction is bad in law and liable to struck down.

5. On the given facts, circumstances and legal propositions; Hon. CIT (A) erred in passing the order in absence of reasonable opportunity of making the submissions to the assessee in principles of natural justice and such order is in violation of principles of natural justice and liable to be quashed.”

3. This appeal was earlier disposed of by this Tribunal vide order dated 10.8.2018. The Tribunal has adjudicated as under :-

“1. Aforesaid appeal by assessee for Assessment Year [AY] 2012-13 contest the order of Ld. Commissioner of Income-Tax (Appeals)-28 [CIT(A)], Mumbai, Appeal No.CIT(A)-28/IT-413/ITO-17(2)(1)/2015-16 dated 06/12/2016 qua confirmation of certain additions on account of ITA.No.1925/Mum/2017 ITD Pratibha Consortium Assessment Year-2012-13 professional fees paid to a member of the assessee Association of Person [AOP]. The assessment for impugned AY was framed by Ld. Income Tax Officer -17(2)(1), Mumbai [AO] u/s 143(3) of the [Income Tax Act](#),1961 on 30/03/2015 wherein the income of the assessee was determined at Rs.48.48 Lacs after sole addition of Rs.46.24 Lacs as against returned income of Rs.2.23 Lacs filed by the assessee on 25/09/2012. The assessee has been assessed as Association of Person [AOP] and was engaged in the business of carrying out construction project. The sole addition of Rs.46.24 Lacs as made by Ld. AO is the sole subject matter of this appeal.

2. The material on record reveals that the assessee AOP is consortium / Joint Venture between M/s Pratibha Industries Limited [in short 'Pratibha'] & M/s Italian-Thai Development Public Company Limited, [a company incorporated in Thailand] [in short 'ITD] vide deed of agreement dated 14/01/2007. The Joint Venture has undertaken contract work from Airport Authority of India [AAI] vide agreement dated 31/03/2008. The contract was awarded by AAI to the Assessee vide acceptance letter dated 02/02/2007 and contract agreement dated 08/02/2007. The contract was related with construction of New International Terminal Building at Ahmedabad Airport.

3. In terms of Internal consortium agreement dated 14/01/2007, a copy of which is on record, ITD was to act as lead member of the consortium for bidding and execution of the project whereas Pratibha was to execute all work under the contract and was to undertake all contractual obligations and liabilities arising out of the aforesaid contract subject to overall superintendence and monitoring of the project by ITD.

Further, Pratibha was required to provide all the required resources for the execution of the project and all the project cost and resources were to be at the entire risk and cost of Pratibha. In terms of Clauses 6 & 7 of the aforesaid document, the contract receipts were to be disbursed in the following ratios:-

No.	Name of the Party	Share	Remarks
1.	ITD	3.5%	Leadership Fees
2.	Pratibha	1.17%	Fees for Pratibha
3.	Pratibha	95.33%	For performance of contract
	Total	100%	

The deductibility of payment of leadership fees @3.5% as aforesaid is the sole subject of appeal before us.

4. The quantum of such payment made by the assessee in the impugned AY is Rs.46.24 Lacs and the assessee, during assessment proceedings, defended the same before Ld. AO on the plea of business expediency. At the same time, the assessee sought direction of Ld. JCIT-17(2) in terms of Section-144A wherein Ld. JCIT, inter-alia, concluded that the profits, if any, should be distributed to the members of AOP only after the payment of taxes and further no payment should be made to the members before payment of tax if no services for the same has been rendered by its members. The assessee defended the same by raising various contentions, which have been extracted in the quantum assessment order. However, not convinced, Ld. AO disallowed the same in terms of [Section 37\(1\)](#) and added it to the income of the assessee.

5. The assessee reiterated the submissions before Ld. CIT(A) wherein Ld. CIT(A) concluded that the income was transferred without actual receipt of any services and ITD was merely name lending entity and therefore the payments under question were mere appropriation of profits. Aggrieved, the assessee is in further appeal before us.

6. The Ld. Authorized Representative for Assessee [AR], Shri Margav Shukla, justified the payment on the ground of commercial expediency. Our attention is drawn to the fact that no such additions were made in earlier years and therefore the additions were not justified. The same has been controverted by Ld. Departmental Representative [DR], Ms. N.Hemalatha, who submitted that the payment was mere appropriation of profits and therefore, the same could not be allowed without actual receipt of services. It was also submitted that each AY was independent unit of assessment and the principle of res-judicata were not applicable to Income Tax proceedings.

7. We have carefully heard the rival contentions and perused relevant material on record including the consortium agreement entered by the two entities. The material facts are not in dispute. Upon perusal of documents on record, we find that the entity namely ITD was merely a name lending entity whose association was vital to the award of the contract. The whole responsibility / obligations arising out of the contract lay on the other entity, which is also not in dispute. No material has been placed on record to suggest that ITD has provided any real services under the contract except lending its association / name against which it has been paid impugned leadership fees @3.5%. The assessee, all along has justified the same on the

ground of commercial expediency. However, we find that the assessee was an AOP and the provisions of [Section 40\(ba\)](#) specifically disallow payment made by AOP to its member on account of interest, salary, bonus, commission or remuneration, by whatever name called. Secondly, upon careful consideration of the factual matrix, we find that the impugned payment were mere appropriation of profits and could not be allowed as a deductible expenditure. The share of the contract receipts was pre-determined and the same was nothing but the profit sharing ratio only.

8. So far as the contentions that no such additions have been made in earlier AYs, we find no strength in the same since each AY was independent unit of assessment and the principle of res-judicata were not applicable to income tax proceedings.

9. Viewed from different angles, we find no reason to interfere with the stand of lower authorities. Ground Numbers 1 to 3 stands dismissed. Ground No. 4 is legal ground which contest the directions issued by Ld. CIT(A) to Ld. AO to reopen assessment for three preceding years. The same may be agitated by the assessee, at an appropriate time and therefore, not dealt with. Ground Number 5 has not been pressed before us whereas Ground Number 6 is general in nature.

10. In nutshell, the appeal stand dismissed.”

4. Subsequently, the aforesaid order was recalled by order in M.A.No. 689/Mum/2018 dated 23.4.2019. While recalling the Tribunal observed as under :-

“2. Drawing our attention to the petition, Ld. Authorized Representative for Assessee [AR], Shri Margav Shukla, submitted that the assessee had sought permission to file additional evidences in the shape of tender document during hearing of the appeal in view of the fact that the same could not be submitted before the authorities as the project was already completed by that time and details pertaining to the same were not received at the time of making of submissions. Therefore, Ld. AR submitted that a request was made to set aside the matter to the file of Ld. Assessing Officer. Since the prayer of admission of additional evidences has not been considered while adjudicating the matter, the same constitute mistake apparent from record. Another submission made by Ld. AR is that fact that the loss under dispute was alternatively allowable as business loss u/s 28(iv) against which a specific ground no. 3 was raised in the appeal, which has not been adjudicated. In the aforesaid circumstances, Ld. AR pleaded for suitable rectification/recall of the order. The Ld. DR opposed the same by submitting that the order requires no rectification. 3. After careful consideration and perusal of records, the bench concurs with assessee’s submissions on both counts. Therefore, in the interest of justice, the aforesaid order stands recalled.”

5. Pursuant to the aforesaid recall this appeal has been heard.

6. Upon careful consideration I find that for the admission of additional evidence in the shape of the tender documents a prayer was there before the ITAT at the time of hearing. Since the ITAT had omitted to consider the same the order of ITAT which was delivered without considering this aspect has been recalled by the ITAT. Upon careful consideration and hearing both the parties in my considered opinion the additional evidence is important for proper adjudication of the matter. I also note that this was not before the authorities below. Accordingly, in my considered opinion in the interest of justice will be served if the additional evidence is admitted. Accordingly, the additional evidence is admitted and to let the authorities below given a chance to examine the same, the same stands remitted to the file of the Assessing Officer. The Assessing Officer shall consider the issue afresh in light of the aforesaid additional evidence and pass an order as per law. Since the matter is remitted to the file of the Assessing Officer the other aspect being agitated by the assessee of the claim being allowable as business loss also stands remitted to the Assessing Officer to examine the same.

7. In the result, the appeal stands allowed for statistical purposes.
Order has been pronounced in the Court on 10.02.2020.

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 10/02/2020

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

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BY ORDER,
(Assistant Registrar)
ITAT, Mumbai