

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : A : NEW DELHI

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

ITA Nos.4498 & 4499/Del/2017
Assessment Years 2013-2014 & 2014-15

The ACIT, Circle-2(2), Room No.392, C.R. Building, I.P. Estate, New Delhi - 110 002	vs.	M/s. Anand Divine Developers Pvt. Ltd., 711/92, Deepali, Nehru Place, New Delhi. PIN – 110 019 PAN AAJCA4361J
(Appellant)		(Respondent)

For Revenue :	Shri Kanav Bali, Sr. D.R.
For Assessee :	Shri Ved Jain, Advocate & Shri Aman Garg, C.A.

Date of Hearing :	03.11.2022
Date of Pronouncement :	24.11.2022

ORDER

PER CHANDRA MOHAN GARG, J.M.

Both the above appeals filed by the Revenue are directed against the order of the Ld. CIT(A)-I, New Delhi, dated 25.04.2017, relating to the A.Ys. 2013-14 and 2014-15. Since common issues are involved in both the appeals, these appeals were heard together and are being disposed of

by this common consolidated order. Both the parties agreed that the decision taken in ITA.No.4498/Del./2017 for the A.Y. 2013-14 shall be applicable to ITA.No.4499/Del./2017 for the A.Y. 2014-15. We, therefore, first take-up the appeal of the Revenue for the A.Y. 2013-14.

ITA.No.4498/Del./2017 – A.Y. 2013-14 :

2. Briefly stated facts of the case are that the assessee company is engaged in the business of development of group housing projects. It filed its return of income on 28.11.2013 for the A.Y. 2013-14 declaring loss of Rs.3,12,21,967/-. Subsequently, the case of the assessee company was selected for scrutiny and statutory notices under sections 143(2) and 142(1) of the I.T. Act, 1961 were issued and duly served upon the assessee. In response to the said notices, the Authorised Representative of the assessee appeared before the A.O. from time to time and filed written submissions and required details called for. During the course of assessment proceedings, the A.O. noted that the assessee company had made various payments to ATS Infrastructure Limited amounting to

Rs.3,37,08,000/- towards management fees. The A.O. asked the assessee to show cause as to why the expenditure incurred in respect of management fees should not be treated as excessive and unreasonable under section 40A(2)(b) of the I.T. Act, 1961. The assessee filed detailed reply before the A.O. However, the A.O. did not satisfy with the submissions of the assessee and made the impugned addition of Rs.3,37,08,000/- as against the returned loss claimed by the assessee company at Rs.3,12,21,967/- and completed the assessment under section 143(3) of the I.T. Act, 1961 vide order dated 29.03.2016.

2.1. Aggrieved by the order of the A.O, the assessee carried the matter in appeal before the Ld. CIT(A), who vide order dated 25.04.2017 deleted the disallowance made by the A.O.

3. Aggrieved by the order of the Ld. CIT(A), the Revenue is now in appeal before the Tribunal and has raised the following effective ground :

“The Ld. CIT(A) has erred in deleting the addition amounting to Rs. 3,37,08,000/- on account of payment of management fee paid to M/s ATS Infrastructure Ltd, invoking the provisions of section 40A(2)(b) of the I.T. Act.”

4. During the course of hearing, the Ld. D.R. strongly relied on the order of A.O. and submitted that the assessee company had paid huge sum on monthly basis for a period of five years, but, failed to discharge its onus by filing requisite documents that the management services were actually availed from M/s. ATS Infrastructure Limited and, therefore, the disallowance of Rs.3,37,08,00/- made by the A.O. be confirmed.

5. The Learned Counsel for the Assessee, on the other hand, strongly relied on the order of the Ld. CIT(A). He filed paper book containing 1 to 303 in support of his submissions which are copy of return of income for the A.Y. 2013-14, audited financial statements for A.Y. 2013-14, copy of acknowledgment of return of income along with computation of income for the A.Y. 2014-15, audited

financial statements for the A.Y. 2014-15, copy of replies filed before A.O. for the A.Y. 2014-15 and 2013-14, copy of documentary evidences filed during the course of assessment proceedings for the A.Ys. 2013-14 and 2014-15, copy of written submissions filed before Ld. CIT(A) for the A.Ys. 2013-14 and 2014-15.

5.1. The Learned Counsel for the Assessee further submitted that the assessee company had filed all the requisite documents before the A.O. such as (i) Certificate of Services received from M/s. ATS Infrastructure Limited, (ii) Resolution and minutes of meetings between the officials of assessee company and ATS Infrastructure Ltd., (iii) Official Communication via email done by the employees of ATS Infrastructure Ltd. on behalf of the assessee company with banks, customers and other parties (iv) List of employees of ATS Infrastructure ltd deputed on the project of the assessee along with their salaries (v) Clearances from respective Statutory Bodies (vi) MOU with ATS Infrastructure Ltd (vi) Invoices issued by ATS Infrastructure Ltd to its clients (vii) Ledger of ATS Infrastructure Ltd and

the certificate/confirmation obtained from M/s ATS Infrastructure Limited. The above documents are also placed on record in the paper book filed by the assessee company before the Tribunal. The Learned Counsel for the Assessee further submitted that in the confirmation it has been explained by M/s ATS Infrastructure Limited that it has provided following managerial services to the assessee company viz., (i) Design and development of project (ii) Planning Labour management and emoluments disbursement (iii) Procurement (iv) Sales and CRM (v) Accounting and finance including fund raising and credit appraisal (vi) Human resource planning, appraisal and review (vii) Information Technology for managing project (viii) Compliance with various regulatory authorities. The Learned Counsel for the Assessee submitted that the assessee company had provided the details of project expenses incurred in the year under consideration under the guidance and consultancy of M/s. ATS Infrastructure Limited which is placed on record at pages 133 to 137 of the paper book. The assessee company had also filed minutes of

meetings between the assessee company and the officials of ATS Infrastructure Ltd., which is placed on record at pages 142 to 149 of the paper book.

5.2. The Learned Counsel for the Assessee further drew the attention of the Bench that the matter in issue is squarely covered by the CBDT Circular No.6P Dated 06.07.1968 wherein it was clarified by the CBDT that while examining the reasonableness of expenditure, the A.O. 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. The said Circular had been challenged before the Hon'ble jurisdictional Delhi High Court in the case of Hive Communication P Ltd Vs CIT (2011)353 ITR 200 (Delhi) wherein the Hon'ble Delhi High Court observed as under :

“We may also refer to the scope of section 40A(2) as explained by CBDT in Circular No. 6P, dated 6-7-1968.

The CBDT clarified that while examining the reasonableness of expenditure the Assessing 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. ”

5.3. The Learned Counsel for the Assessee further submitted that the above Judgment has been subsequently followed in Sigma Corporation India Ltd., vs., DCIT reported in 2017 (3) TMI 980 – Delhi. He submitted that the assessee company had not claimed these payments to ATS Infrastructure Private Limited as expenditure in its profit & loss account as is evident from the Profit & Loss Account of FY 2012-13 which is placed at pages 11 of the paper book and details of other expenses at page-21 of the paper book and Profit & Loss Account for the FY 2013-14 which is placed at pages 39 of the paper book and details of other expenses filed at page 51 of the paper book and accordingly

submitted that once the expenditure has not been claimed by the assessee, disallowance of the said expenditure cannot be made. He, submitted that the A.O. had not observed the reasonableness of the expenditure from the point of view of businessman, but, only viewed as revenue, which is contrary to CBDT Circular No.6P dated 06.07.1968. In support of his submissions, the Learned Counsel for the Assessee relied upon the various decisions such as CIT vs., M/s. Second Leasing Pvt. Ltd., 2017 (11) TMI-269-Delhi-HC, CIT vs., Dalmia Cement (P.) Ltd., reported in 254 ITR 377 CIT vs., Padmani Packaging (P) Ltd., 155 taxmann 268 (Del.), Judgment of Hon'ble Supreme Court in the case of S.A. Builders Limited vs., CIT reported in 288 ITR 1 (SC) wherein the Hon'ble Supreme Court observed that *".....once it is established that there was nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the board of directors and assume the role to decide how much is*

reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize his profit. The income-tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own view point but that of a prudent businessman " , while approving the decision of the Hon'ble Delhi High Court in the case of CIT vs., Dalmia Cement (P) Ltd., (supra). The Learned Counsel for the Assessee, thus, prayed that the order of the Ld. CIT(A) be confirmed on this issue.

6. We have heard the Learned Representative of both the parties and perused the material available on record. We find that the A.O. determined the income of assessee company at Rs.24,86,033 by disallowing the expenditure claimed by the assessee at Rs.3,37,08,000/- as against the returned income loss at Rs.3,12,21,967/- declared by the assessee company. The assessee carried the matter in appeal before the Ld. CIT(A) on the issue of disallowance of expenditure amounting to Rs.3,37,08,800/-

and the Ld. CIT(A) deleted the said addition by observing as under :

“I have considered the submission of the appellant, observation of the assessing officer in the assessment order and various case laws relied upon by the appellant in this regard. It is seen that Assessing Officer has not appreciated the services provided by ATS to the appellant by way of a service agreement. The Assessing Officer has not brought any information/evidence on record which has driven him to take an adverse view during the year. Further, the Assessing Officer has sought to disallow the same expense under two different provisions of the Act which is against the fundamental principle that in absence of clarity of charge to be created against the assessee, the action of the Assessing Officer is bad in law and violation of the principles of natural justice. Support in this regard is taken from Bombay High Court decision in the case of CIT vs. Kaushalya (1995)(216 ITR 660)(Bom.)(HC) and

Gujarat High Court in the case of New Sorathia Engineering Co vs. CIT (2006) (282 ITR 642) (Guj.) (HC).

Considering the fact that the appellant company was new in this line of business, it would not have been possible for the appellant to execute such large housing project without taking professional and consultancy services as per the service agreement, from ATS. During the course of appellate proceedings, the appellant has produced numerous and contemporary documents before me in the form of paper book which justifies the service agreement and payment management fee to ATS.

On the basis of these facts, I am of the considered view that ATS has provided services as per service agreement to the appellant and the payment of management fee of Rs.3,00,00,000/- is fully justified.

Further, since the service tax liability is consequential to the project management fees and that the same, in any ways, is deposited into the

government accounts, the same cannot be held to be excessive or unreasonable by any means and hence Rs.37,08,000 is fully justified.

It is also observed from the order that Assessing Officer has applied the provisions of Section 40A(2)(b) while disallowing the payment of management fee made to ATS, however, AO has failed to give any instance of services which were not on arm's length, therefore, he was not justified in invoking the provisions of Section 40A(2)(b). Merely because the appellant is a related party of ATS, it cannot be held that the payments were not on arm's length or without commercial expediency. In this regard, reliance is placed on the decision of Supreme Court in the case of S.A. Builders Limited: 288 ITR 1.

Reliance is also placed on the judgment of Hon'ble Supreme Court in the case of Glaxosmithkline Asia Pvt. Ltd. 236 CTR 113 wherein the appellate authorities contended before the Court that allocation of cross

charges by the assessee company was not correct. The Court held as under :

*" ..Having gone through the relevant material placed before us concerning Assessment Year 2001- 2002, we are of the view that, as far as this special leave petition is concerned, no interference is called for as the entire exercise is a revenue neutral exercise. Hence, this special leave petition filed by the Department stands dismissed..."
[Emphasis supplied].*

The Apex court also said in the case of domestic transactions, the under-invoicing of sales and over invoicing of expenses ordinarily will be revenue neutral in nature, except in two circumstances having tax arbitrage:

"...(i) If one of the related Companies is loss making and the other is profit making and profit is shifted to the loss making concern; and

[ii] If there are different rates for two related units [on account of different status, area based incentives, nature of activity, etc.] and if profit is diverted towards the unit on the lower side of tax arbitrage. For example, sale of goods or services from non-SEZ area [taxable division] to SEZ unit [non-taxable unit] at a price below the market price so that taxable division will have less profit taxable and non-taxable division will have a higher profit exemption..."

It is seen that appellant company as well as ATS are subject to same rate of tax and are not claiming any exemption, therefore, there is no loss to the revenue and accordingly there is no need for any disallowance u/s 40A(2) of the Act.

Further reliance is also placed on the judgment of Dhakeshwari Cotton Mills Ltd v. CIT [1954] 26 ITR 775 (SC) wherein the Court has held that the Revenue Authorities cannot resort to ad-hoc adjustment without any reasonable basis. The

observations of Hon'ble Supreme Court are as under :

'in making an assessment under section 23(3) of the Indian Income Tax Act, the Income tax Officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment under section 23(3). '

In view of the above findings, the disallowance made by the AO of Rs.3,37,08,000/- was not justified and same is deleted."

6.1. We find that, the contention of assessee that the assessee company as well as ATS are subject to same rate of tax and are not claiming any exemption and, therefore, there is no loss to the revenue and there is no need for any disallowance under section 40A(2) of the I.T. Act, 1961. We find force in the submissions of the Learned Counsel for the

Assessee. The Ld. CIT(A) also accepted the contention of assessee by following the Judgment of Hon'ble Supreme Court in the case of Dhakeshwari Cotton Mills Ltd., vs., CIT [1954] 26 ITR 775 (SC) wherein the Hon'ble Apex Court held that the Revenue Authorities cannot resort to ad-hoc adjustment without any reasonable basis. The CBDT also in its Circular No.6P dated 06.07.1968 clarified on the issue stating that the provisions of Section 40A(2) are 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 bonafide cases. The assessee company had filed all the requisite documents before A.O. as called for, but, however, the A.O. without considering the fact that there is no loss to the revenue since assessee company as well as ATS are not claiming any exemption, disallowed the impugned expenditure of Rs.3,37,08,000/- and added back the same to the returned loss of assessee company in an arbitrary manner without considering the judicial precedence on this issue as well as the Circular of CBDT No.6P Dated

06.07.1968. Thus, the A.O. flouted the CBDT Circular as well as judicial precedence on the matter in issue. We may note that in the instant case the A.O. judged the merits or otherwise of a commercial transaction by sitting in the chair of assessee which is not sustainable under law as per Judgment of Hon'ble Delhi High Court in the case of Pr. CIT vs., M/s. Second Leasing Pvt. Ltd., 2017 (11) TMI 269-Del.-HC. We find that the A.O. failed to bring any cogent material on record to suggest that the entire expense is excessive without bringing any comparable that the expenditure claimed by the assessee company is much higher than that of prevailing market rate. We, therefore, find no force in the arguments of Ld. D.R. on this issue. The Ld. D.R. also did not brought anything on record to sustain the addition made by the A.O. In this view of the matter and the settled position of law on this issue by the Hon'ble Supreme Court in the case of S.A. Builders Limited vs., CIT reported in 288 ITR 1 (SC) and the Judgment of Hon'ble Supreme Court in the case of Dhakeshwari Cotton Mills Ltd., vs., CIT [1954] 26 ITR 775 (SC) relied upon by the Ld. CIT(A), we find no

reason to interfere with the order of the Ld. CIT(A) in deleting the disallowance made by the A.O. amounting to Rs.3,37,08,000/-. Thus, we dismiss the ground of Revenue.

7. In the result, appeal of the Revenue is dismissed.

ITA.No.4499/Del./2017 – A.Y. 2014-15 :

8. Briefly stated facts of the case are that the assessee filed its return of income on 30.11.2014 for the A.Y. 2014-15 declaring loss of Rs.1,37,96,162/-. The case of the assessee was selected for scrutiny and notices under section 143(2) and 142(1) of the I.T. Act, 1961 were issued and duly served upon the assessee. In response to the said notices, the assessee's Authorised Representative appeared before the A.O. and filed requisite details/documents as called for by the A.O. However, the A.O. did not satisfy with the submissions and made the impugned addition of Rs.6,74,16,000/- by noting that the payments made by the assessee company to ATS Infrastructure Limited are held to be excessive and unreasonable.

8.1. Aggrieved by the order of the A.O, the assessee carried the matter in appeal before the Ld. CIT(A), who vide order dated 25.04.2017 deleted the disallowance made by the A.O. amounting to Rs.6,74,16,000/-.

9. Aggrieved by the order of the Ld. CIT(A), the Revenue is now in appeal before the Tribunal and has raised the following effective ground :

“The Ld. CIT(A) has erred in deleting the addition amounting to Rs.6,74,16,000/- on account of payment of management fee paid to M/s ATS Infrastructure Ltd, invoking the provisions of section 40A(2)(b) of the I.T. Act.”

9. Since, we have decided the above issue in Revenue's appeal for the A.Y. 2013-14 by upholding the order of the Ld. CIT(A) and dismissed the addition made by the A.O, respectfully following the reasons for decision, we dismiss the appeal of the Revenue.

10. In the result, ITA.No.4499/Del./2017 for the A.Y. 2014-15 of the Revenue is dismissed.

To sum-up, both the appeals of the Revenue are dismissed.

Order pronounced in the open court on 24.11.2022.

Sd/-

Sd/-

(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

(CHANDRA MOHAN GARG)
JUDICIAL MEMBER

Delhi, dated : 24th November, 2022.

VBP/-

Copy forwarded to :

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

// By Order //

Asstt. Registrar, ITAT, New Delhi