

**आयकर अपीलीयअधिकरण, विशाखापटणम पीठ, विशाखापटणम**

IN THE INCOME TAX APPELLATE TRIBUNAL,  
VISAKHAPATNAM BENCH, VISAKHAPATNAM

**श्री दुव्वूरु आर एल रेड्डी, न्यायिक सदस्य एवं श्री एस बालाकृष्णन, लेखा सदस्य के समक्ष**

BEFORE SHRI DUVVURU RL REDDY, HON'BLE JUDICIAL MEMBER &  
SHRI S BALAKRISHNAN, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./ I.T.A. No. 487 & 132/Viz/2019

(निर्धारण वर्ष / Assessment Year :2010-11)

आयकर अपील सं./ I.T.A. No. 133 & 139/Viz/2019

(निर्धारण वर्ष / Assessment Year :2011-12)

Nikhil Constructions,  
Visakhapatnam.

PAN: AAGFN 7160 A

(अपीलार्थी/ Appellant)

अपीलार्थी की ओर से/ Appellant by

प्रत्यार्थी की ओर से / Respondent by

Vs. Income Tax Officer,  
Ward-3(2),

Visakhapatnam.

(प्रत्यर्थी/ Respondent)

: None

: Shri Sankar Pandi, Sr. AR

सुनवाई की तारीख / Date of Hearing

: 04/01/2023

घोषणा की तारीख/Date of

: 23/01/2023

Pronouncement

**ORDER**

**PER BENCH :**

All the captioned appeals are filed by the assessee against the orders of the Learned Commissioner of Income Tax (Appeals), Hyderabad arising out of the orders passed U/s. 143(3) r.w.s 147

and U/s. 143(3) r.w.s 263 of the Income Tax Act, 1961 [the Act] for the AYs 2010-11 and 2011-12. Since all the appeals pertaining to one assessee and they are inter-connected, these appeals are clubbed, heard together and disposed off in this consolidated order. Appeal wise adjudication is given in the following paragraphs of this order.

**ITA No. 487/Viz/2019**  
**(AY: 2010-11)**

2. This appeal filed by the assessee against the order of the Ld. CIT(A)-1, Hyderabad in appeal No. 0079/2017-18/ITO, Ward-3(2), Vsp/CIT(A)-1/Hyd/2019-20, dated 8/5/2019 arising out of the order passed U/s. 143(3) r.w.s 263 of the Act for the AY 2010-11.

3. In this appeal, the assessee has raised the following grounds:

*“1. The order passed U/s. 147 r.w.s 143(3) is itself bad in law. As a result the revision order passed by the Ld. Pr. CIT U/s. 263 is bad in law. Consequently the order passed by the Ld. AO U/s. 143(3) r.w.s. 263 is bad in law and void.*

*2. The Ld. AO is not at all correct in disallowing U/s. 40(a)(ia) the proportionate consideration paid to non-resident towards purchase of immovable property for non-deduction of tax at source in view of the provisions of paragraphs (4) of Article 26 of the DTAA between India and USA.*

*3. The Ld. AO is not at all correct in disallowing the proportionate consideration paid to non-resident as the non-resident does not have any income chargeable to tax embedded in the payment received from the assessee.*

4. *The Ld. AO is not at all correct in disallowing the consideration paid to the non-resident Indian, as the same is claimed as a direct expenditure U/s. 28, whereas the provisions of section 40(a)(ia) are applicable only to sections 30 to 38.*

5. *The Ld. AO is not correct in disallowing the whole of the consideration paid to the non-resident Indian as only 30% of the amount can be disallowed as is provided in section 40(a)(ia) and the amendment to section 40(a)(ia) being curative in nature is retrospective in operation.*

6. *The appellant craves leave to add to, amend, alter, modify or delete all or any of the above grounds of appeal.*

7. *All the above grounds of appeal are mutually exclusive and without prejudice to one another."*

4. Brief facts of the case are that the assessee is a partnership firm, engaged in the business of construction of apartments. The assessee filed its return of income for the AY 2010-11 on 22/12/2011 admitting a total income of Rs. 26,020/-. Initially the return was processed U/s. 143(1) of the Act accepting the income returned. Thereafter, the case was reopened by issue of notice U/s. 148 of the Act on 15/01/2013 and served on the assessee on 19/1/2013. In reply the assessee vide its letter dated 26/2/2013 submitted that the return for the AY 2010-11 filed on 28/03/2011 declaring a sum of Rs. 26,020/- may be treated as return filed in response to notice U/s. 148. Subsequently, notice U/s. 143(2) was issued on 27/02/2013 and complying the same, the Ld. Authorized Representative of the assessee appeared before the Ld. AO from time to time and produced the books of

accounts and the other documentary evidence called for. After examining the details submitted by the assessee, the Ld. AO noticed that the assessee debited P & L Account with an amount of Rs. 50,38,500/- under the head 'Direct Expenses' towards site cost, out of which an amount of Rs. 30,23,140/- was shown under the head 'closing stock' towards unsold site at Seetammadhara, Visakhapatnam. Thus, the expenditure towards site cost relevant to AY 2010-11 works out to Rs. 20,15,420/- in pursuance to the development agreement entered with one Sri Muddu Sudhakar S/o. Sri Venkata Rao, a non-resident and Sri Akundi Lakshmi Narayana Rao S/o. Sri Satyanarayana Murthy for development of 444 sq yds situated at Seetammadhara, Visakhapatnam. As per the agreement the land owner gets 3,480 sft constructed are along with cash amount of Rs. 60,00,000/-. The assessee firm had paid an amount of Rs. 20,00,000/- during the FY 2008-09. However, the Ld. AO noticed that the assessee has not deducted tax at source on the payment made to the non-resident co-owner during the previous year 2009-10 relevant to the AY 2010-11, as required u/s. 195(1) of the Act. Therefore, the Ld. AO was of the opinion that since the assessee firm did not deduct the tax on the payments made to the non-resident, the expenditure claimed by the assessee towards of cost of site at Rs.

20,15,420/- attracts proportionate disallowance U/s. 40(a)(ia) of the Act to the extent of amount paid to the non-resident. Before the Ld. AO, it was the submission of the assessee that the disallowance u/s. 40(a)(ia) of the Act is not warranted in the case of the assessee as the payment was made to Power of Attorney holder of the NRI but not directly to the NRI. The assessee further submitted that the NRI has invested the amount received from the assessee in the residential property at Bangalore and since the capital gains on the said house sale transaction is exempted under the provisions of section 54, the assessee has not made any TDS. In support of its argument, the Ld AR of the assessee relied on various decisions. However, not convinced with the submissions of the Ld. AR of the assessee, the Ld. AO observed that as per the development agreement out of the total extent of 444 sq yds, Sri M. Sudhakar (NRI) was in possession of 273 sq yds and the other co-owner Sri A Lakshminarayana Rao was holding 171 sq yds of land. Accordingly, the Ld. AO concluded that the proportionate amount of Rs. 12,39,211/- out of the total expenditure (Rs. 20,15,420/-) claimed by the assessee towards site cost belongs to the NRI co-owner. Thus, the Ld. AO disallowed the proportionate expenditure of Rs. 12,39,211/- u/s. 40(a)(ia) of the Act and added the same to the

total income of the assessee. Further, the Ld. AO restricted the claim of deduction made by the assessee U/s. 40(b) of the Act to the extent of Rs.84,973/- as against the assessee's claim of Rs. 2,29,771/- and made disallowance on the ground that the one of the partners of the assessee-firm failed to offer the interest on capital received by him from the firm. Accordingly, the Ld. AO completed the assessment u/s. 143(3) r.w.s 147 of the Act and determined the assessed income at Rs. 13,50,210/- against the returned income of Rs. 26,021/-.

5. Aggrieved by the order of the Ld. AO, the assessee filed an appeal manually before the Ld. CIT(A)-6, Hyderabad on 02<sup>nd</sup> May, 2014 and filed appeal electronically on 30/08/2016. Subsequently, the case was transferred to Ld. CIT(A)-5, Hyderabad vide Notification in F.No. Pr. CC/Tech/5C(Appeals)Jurs/2017-18, dated 4/10/2017. Later Pr. CCIT, Hyderabad issue one more Notification vide F.No. Pr.CC/Tech/5C(Appeals)/Jurs/2018-19, dated 20/11/2018, transferring the case from CIT(A)-5, Hyderabad to CIT(A)-6, Hyderabad. Before the Ld. CIT(A), none appeared on behalf of the assessee and therefore, the Ld. CIT (A) taking into account the facts of the case available on record adjudicated the appeal and

granted part relief to the assessee and partly allowed the assessee's appeal. Aggrieved by the order of the Ld. CIT (A), the assessee is in appeal before the Tribunal in its appeal ITA No.132/Viz/2019 (AY: 2010-11).

6. In the meantime, the Ld. Principal Commissioner of Income Tax-1, Visakhapatnam invoked the provisions of section 263 of the Act by stating the assessment order passed by the Ld. AO in the case of the assessee for the AY 2010-11 is not only erroneous but also prejudicial to the interests of the revenue and the twin conditions contemplated in section 263 of the Act are satisfied in the present case. Accordingly, the Ld. Pr. CIT vide para 5.3 of his order directed the Ld. AO to disallow the entire land cost of Rs. 30,00,000/- paid/credited to NRI and included in the amount of Rs. 50,38,560/- debited to P & L Account this year and also proportionate development expenditure i.e., cost of construction attributable to NRI owner of Rs. 6,79,520/- as worked out by the assessee (out of Rs. 20,38,560/-) based on extent of built up area to be given to the NRI in addition to exclusive payment of Rs. 60,00,000/- and revise the disallowance made U/s. 40(a)(ia) in the assessment order. In other words, the total disallowance to be made U/s. 40(a)(i) is Rs. 36,79,520/- (Rs. 30,00,000 + Rs.

6,79,520) as against Rs. 12,39,211/- considered in the assessment order for AY 2010-11. Thus, the Ld. Pr. CIT revised the assessment order and passed the order U/s. 263 of the Act on 31/3/2016. Accordingly, giving effect to the directions of the Ld. Pr. CIT, the Ld. AO passed consequential order u/s. 143(3) r.w.s 263 of the Act. Aggrieved by the order of the Ld. AO, the assessee filed an appeal before the Ld. CIT(A)-1, Hyderabad. Before the Ld. CIT(A), none appeared on behalf of the assessee. The Ld. CIT(A) vide his order dated 8/5/2019 observed that in the consequential order passed by the Ld. AO, the Ld. AO has made the additions based on the directions of the Ld. Pr. CIT, U/s. 263 of the Act and no other additions were made and therefore there is no application of mind by the Ld. AO. The Ld. CIT(A) further observed that *"an appeal against the assessment completed as per the directions of the Pr. CIT u/s. 263 of the Act could not be decided by the Ld. CIT (A)"*. Accordingly, the Ld. CIT(A) dismissed the appeal of the assessee. Aggrieved by the order of the Ld. CIT(A), assessee is in appeal before the Tribunal in appeal ITA No. 487/Viz/2019 (AY: 2010-11).

7. Before us, none appeared on behalf of the assessee to represent its case. On the other hand, the Ld. DR relied on the

order of the Ld. Pr. CIT passed U/s. 263; order of the Ld. AO passed U/s. 143(3) r.w.s. 263, and the decision of the Ld. CIT(A)-1, Hyderabad.

8. We have heard the Ld. DR and perused the material available on record as well as the orders of the Ld. Revenue Authorities. In the present case, undisputed facts are that, in the case of the assessee initially, the Ld. AO passed the assessment order U/s. 143(3) r.w.s. 147 of the Act and determined the assessed income at Rs. 13,50,210/- which includes (i) disallowance u/s. 40(a)(ia) of the Act amounting to Rs. 12,39,211/- and (ii) disallowance of interest on capital paid to one of the partners of the assessee company (Sri Yatindranath). Aggrieved by the order of the Ld. AO, assessee filed an appeal before the Ld. CIT(A)-6, Hyderabad and the Ld. CIT(A) granted part relief to the assessee and partly allowed the appeal. Aggrieved, the assessee filed an appeal before the Tribunal vide ITA No. 132/Viz/2019. In the meantime the Ld. Pr. CIT-1, Visakhapatnam invoked his powers U/s. 263 of the Act and passed the order and enhanced the disallowance to Rs. 36,79,520/- as against Rs. 12,39,211/- made by the Ld. AO. The Ld. AO passed the consequential order U/s. 143(3) r.w.s. 263 of

the Act giving effect to the directions of the Ld. Pr. CIT. Aggrieved, the assessee filed another appeal before the Ld. CIT(A)-1, Hyderabad. On appeal, the Ld. CIT(A) dismissed the assessee's appeal and upheld the consequential order passed by the Ld. AO. Again aggrieved, the assessee filed an appeal before the Tribunal in ITA No.487/Viz/2019 (AY 2010-11).

9. On perusal of the order of the Ld. Pr. CIT-1, Visakhapatnam we are of the considered opinion while giving directions to the Ld. AO to revise the disallowance made U/s. 40(a)(i), the Ld. Pr. CIT discussed the issue at length and considered the written submissions made by the assessee. For the sake of reference, it is pertinent to extract the observation and finding of the Ld. Pr. CIT vide para 5 and its sub-paragraphs which are extracted herein below for reference:

*"5. The submissions made by the assessee are carefully examined with reference to the factual matrix of the case, material placed on record including development agreement dated 09-10-2008 and provisions of sec. 263 of the I T Act. The first submission of the assessee in this regard is that the proportionate addition made by the Assessing Officer in the assessment order u/s.40(a)(i) in case of NRI's share is challenged in appeal before the CIT(A) and in view of clause (c) of Explanation-1 to sec. 263, proceedings initiated u/s 263 may be dropped. The contention of the assessee has no merit. The said clause provides that where any order passed by the Assessing Officer had been the subject matter of any appeal filed the powers of the Principal Commissioner or Commissioner under sec. 263 shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal. In the present proceedings, only the quantum of disallowance made by the AO*

under sec. 40(a)(i) is proposed for revision as there is an apparent error in the apportionment of consideration to the NRI owner on pro-rata basis while making the disallowance u/s 40(a)(i). The issues raised in the grounds of appeal before the CIT(A) i.e. whether the assessee is liable to deduct at source at all from the payments made to NRI owner as the NRI owner is stated to have invested the gain in a new residential house and there is no tax liability from the transaction in his case or whether provisions of sec. 40(a)(i) are applicable when the sums were paid to POA holder of NRI and not directly to NRI are not subject-matter of present revision proceedings. The limited point being considered in the present proceedings is the correctness or arithmetical accuracy of the amount of consideration apportioned by the Assessing Officer to the NRI out of total consideration paid as per the development agreement entered into by the assessee for development of subject property. Therefore, issues which are subject-matter of appeal filed by the assessee before CIT(A) are not being considered and dealt with in the present proceedings.

5.1. Reverting to the issue being considered in the present proceedings i.e., correctness of quantum of disallowance to be made under sec. 40(a)(i), the assessee firm has debited a sum of Rs.50,38,560/- this year which includes a sum of Rs.30 lakhs paid/credited to NRI owner and construction value of Rs. 20,38,560/-. The assessee had shown closing work-in-progress in respect of land at Seetammadhara at Rs.30,23,140/- and credited to the P & L A/C. Therefore, according to the Assessing Officer, net expenditure of Rs.20,15,420/- was charged to the P & L a/c in the year under consideration. The observation of the AO that only net expenditure of Rs.20,15,420/- has to be considered for the purpose of disallowance u/s.40(a)(i) and not the entire expenditure debited to P & L A/c of Rs. 50,38,560/- is not correct as the expenditure towards land cost and development cost debited to the P & L A/c is Rs.50,38,560/-. Merely because a portion of such expenditure was credited to the P & L A/c as work-in-progress or in some other form like closing stock, it does not imply that only net expenditure is debited to the P & L A/C. What is to be considered for purpose of disallowance u/s 40(a)(i) is the gross expenditure charged to P & L a/c without deducting tax at source. Thus, the Assessing Officer erred in considering only net expenditure excluding closing WIP while making the disallowance u/s 40(a)(i).

5.2. Another inaccuracy noticed in the assessment order is that even presuming for a while that only net expenditure is to be taken into consideration as observed by the AO, out of the said net expenditure considered by the AO, a sum of Rs.14,71,805/- was apportioned to the NRI owner on the basis of land holding of the NRI owner. As tax was not deducted at source from the payments/credits made to NRI, this pro-rata expenditure was subjected to disallowance in the assessment order. But, as already mentioned, as per clauses in the development agreement the entire cash component of consideration amounting to Rs.60 lakhs has to be paid exclusively to the NRI owner and therefore, it is not correct to apportion cash component of consideration to the other owner. The AO ought to have disallowed the entire cash component debited to the P & L

*A/c this year (out of total cash consideration of Rs. 60 lakhs), which is relatable to consideration paid to NRI u/s 40(a)(i) without deducting tax at source in addition to proportionate cost of construction attributable to NRI owner as per the land holding pattern.*

*5.3. From the foregoing discussion, it is clear that the assessment order dated 20.03.2014 passed by the Assessing Officer in the case of the assessee for A.Y. 2010-11 is not only erroneous but also prejudicial to the interests of revenue and the twin conditions as contemplated in sec. 263 are satisfied in the present case. Accordingly, by virtue of the powers vested in the undersigned sec. 263 of the IT Act, the Assessing Officer is directed to disallow entire land cost of Rs. 30,00,000/- paid/credited to NRI and included in the amount of Rs.50,38,560/- debited to P & L a/c this year and also proportionate development expenditure i.e. cost of construction attributable to NRI owner of Rs. 6,79,520/- as worked out by the assessee (out of Rs. 20,38,560/-) based on extent of built of area to be given to NRI in addition to exclusive payment of Rs. 60,00,000/- and revise the disallowance made u/s 40(a)(i) in the assessment order. In other words, the total disallowance to be made u/s 40a(i) is Rs. 36,79,520/- (Rs.30,00,000 plus Rs.6,79,520) as against Rs. 12,39,211/- considered in the assessment order for A.Y. 2010-11."*

10. While giving effect to the order of the Ld. Pr. CIT, the Ld. AO had revised the disallowance barely following the directions of the Ld. Pr. CIT and no other additions/disallowances were made. Therefore, even when the assessee filed an appeal before the Ld. CIT(A)-1, did not comment on the consequential order passed by the Ld.AO. Therefore, in our considered opinion, the directions given by the Ld. Pr. CIT and consequential order passed by the Ld. AO are in accordance with law. While disposing off the appeal of the assessee, the Ld. CIT (A) relied on the order of the ITAT, Hyderabad in the case of Maheswari Mega Ventures Ltd in ITA No.1602/Hyd/2014 to state that *the Ld. CIT(A) should not have exercised his appellate powers on an issue which was subject*

*matter of consideration by the CIT U/s. 263.....” and rightly dismissed the appeal of the assessee. Consequently, we are of the considered view that no interference is required in the decision of the Ld. CIT(A)-1, Hyderabad vide order dated 8/5/2019 dismissing the appeal of the assessee.*

11. In the result, appeal of the assessee in ITA No.487/Viz/2019 is dismissed.

**ITA No. 132/Viz/2019**  
**(AY: 2010-11)**

12. This appeal is filed by the assessee against the order of the Ld. CIT (A)-6, Hyderabad in appeal No. 10374/2018-19/B1/CIT(A)-6/2018-19, dated 18/1/2019 arising out of the order passed U/s. 143(3) r.w.s 147 of the Act for the AY 2010-11.

13. The assessee has raised the following grounds of appeal:

- “1. The Ld. AO is not justified in disallowing and the Ld. CIT(A) is not justified in confirming the disallowance u/s. 40(a)(ia) the proportionate consideration paid to non-resident towards purchase of immovable property for non-deduction of tax at source in view of the provisions of Article-26 with respect to non-discrimination of the DTAA between India and USA.*
- 2. The Ld. AO is not justified in disallowing the Ld. CIT(A) is not justified in confirming disallowance the proportionate consideration paid to the non-resident Indian, as the non-resident payee’s taxable capital gain is NIL after claiming exemption U/s. 54F and the same is accepted in his assessment vide order passed U/s. 143(3).*

3. *The Ld. AO is not justified in disallowing and the Ld. CIT(A) is not justified in confirming the disallowance of the proportionate consideration paid to the non-resident Indian, as the same is claimed as a direct expenditure U/s. 29, whereas the provisions of section 40(a)(i) are applicable only to section 30 to 38.*
4. *The Ld.AO is not justified in disallowing and the Ld. CIT(A) is not justified in confirming the disallowance of the whole of the consideration paid to the non-resident Indian as only 30% of the amount can be disallowed as is provided in section 40(a)(ia) in view of the non-discrimination provisions contained in Article 26 of the Indo-US DTAA.*
5. *All the above grounds of appeal are without prejudice to one another.*
6. *The appellant craves leave to add to, alter, delete, modify all or any of the above grounds of appeal."*

14. Since we have upheld the decision of the Ld. CIT(A)-1, Hyderabad, order dated 8/5/2019 while adjudicating the assessee's appeal in ITA No. 487/Viz/2019 (AY 2010-11), the order of the Ld. CIT(A)-6, Hyderabad, dated 18/1/2019, against which the present appeal is filed, is set-aside and accordingly the grounds raised by the assessee are dismissed.

15. In the result, appeal filed by the assessee in ITA No. 132/Viz/2019 (AY 2010-11) is dismissed.

**ITA No. 139/Viz/2019**  
**(AY: 2011-12)**

16. This appeal filed by the assessee against the order of the Ld. CIT(A)-6, Hyderabad in appeal No. 0078/2017-18/B2 CIT(A)-6, dated 30/11/2018 arising out of the order passed U/s. 143(3) r.w.s 263 of the Act for the AY 2011-12.

17. In this appeal, the assessee has raised the following grounds:

*"1. The order passed U/s. 147 r.w.s 143(3) is itself bad in law. As a result the revision order passed by the Ld. Pr. CIT U/s. 263 is bad in law. Consequently the order passed by the Ld. AO U/s. 143(3) r.w.s. 263 is bad in law and void.*

*2. The Ld. AO is not at all correct in disallowing U/s. 40(a)(i) the proportionate consideration paid to non-resident towards purchase of immovable property for non-deduction of tax at source in view of the provisions of paragraphs (4) of Article 26 of the DTAA between India and USA.*

*3. The Ld. AO is not at all correct in disallowing the proportionate consideration paid to non-resident as the non-resident does not have any income chargeable to tax embedded in the payment received from the assessee.*

*4. The Ld. AO is not at all correct in disallowing the consideration paid to the non-resident Indian, as the same is claimed as a direct expenditure U/s. 28, whereas the provisions of section 40(a)(i) are applicable only to sections 30 to 38.*

*5. The Ld. AO is not correct in disallowing the whole of the consideration paid to the non-resident Indian as only 30% of the amount can be disallowed as is provided in section 40(a)(ia) and the amendment to section 40(a)(i) being curative in nature is retrospective in operation.*

*6. The appellant craves leave to add to, amend, alter, modify or delete all or any of the above grounds of appeal.*

7. *All the above grounds of appeal are mutually exclusive and without prejudice to one another."*

18. The assessee has raised the above grounds which are identical to that of the Grounds of Appeal raised by the assessee in its appeal ITA No.487/Viz/2019 (AY: 2010-11). Since, the issues raised in both the appeals are identical, our decision given therein while adjudicating the assessee's appeal in ITA No. 487/Viz/2019 (AY 2010-11) *mutatis mutandis* applies to the issues involved in present appeal also. Consequently, we are of the considered view that no interference is required in the decision of the Ld. CIT(A)-6, Hyderabad vide order dated 30/11/2018 dismissing the appeal of the assessee. Accordingly, the grounds raised by the assessee are dismissed.

19. In the result, appeal filed by the assessee in ITA No. 139/Viz/2019 (AY 2011-12) is dismissed.

**ITA No. 133/Viz/2019**  
**(AY: 2011-12)**

20. This appeal is filed by the assessee against the order of the Ld. CIT (A)-6, Hyderabad in appeal No. 10375/2018-

19/B1/CIT(A)-6/2018-19, dated 14/12/2018 arising out of the order passed U/s. 143(3) r.w.s 147 of the Act for the AY 2011-12.

21. The assessee has raised the following grounds of appeal:

- "1. The Ld. AO is not justified in disallowing and the Ld. CIT(A) is not justified in confirming the disallowance u/s. 40(a)(ia) the proportionate consideration paid to non-resident towards purchase of immovable property for non-deduction of tax at source in view of the provisions of Article-26 with respect to non-discrimination of the DTAA between India and USA.*
- 2. The Ld. AO is not justified in disallowing the Ld. CIT(A) is not justified in confirming disallowance the proportionate consideration paid to the non-resident Indian, as the non-resident payee's taxable capital gain is NIL after claiming exemption U/s. 54F and the same is accepted in his assessment vide order passed U/s. 143(3).*
- 3. The Ld. AO is not justified in disallowing and the Ld. CIT(A) is not justified in confirming the disallowance of the proportionate consideration paid to the non-resident Indian, as the same is claimed as a direct expenditure U/s. 29, whereas the provisions of section 40(a)(i) are applicable only to section 30 to 38.*
- 4. The Ld. AO is not justified in disallowing and the Ld. CIT(A) is not justified in confirming the disallowance of the whole of the consideration paid to the non-resident Indian as only 30% of the amount can be disallowed as is provided in section 40(a)(ia) in view of the non-discrimination provisions contained in Article 26 of the Indo-US DTAA.*
- 5. All the above grounds of appeal are without prejudice to one another.*
- 6. The appellant craves leave to add to, alter, delete, modify all or any of the above grounds of appeal."*

22. Since we have upheld the decision of the Ld. CIT(A)-6, Hyderabad, order dated 30/11/2018 while adjudicating the

assessee's appeal in ITA No. 139/Viz/2019 (AY 2011-12), the order of the Ld. CIT(A)-6, Hyderabad, dated 14/12/2018, against which the present appeal is filed, is set-aside and accordingly the grounds raised by the assessee are dismissed.

23. In the result, appeal filed by the assessee in ITA No. 133/Viz/2019 (AY 2011-12) is dismissed.

Pronounced in the open Court on the 23<sup>rd</sup> January, 2023.

Sd/-

(दुव्वूरु आर.एल रेड्डी)

(DUVVURU RL REDDY)

न्यायिकसदस्य/JUDICIAL MEMBER

Sd/-

(एस बालाकृष्णन)

(S.BALAKRISHNAN)

लेखा सदस्य/ACCOUNTANT MEMBER

Dated :23.01.2023

OKK - SPS

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee – Nikhil Constructions, D.No.53-52-17/A, Flat No. 101, Block-A, MLA Residency, KRM Colony, Visakhapatnam, Andhra Pradesh – 530013.
2. राजस्व/The Revenue – Income Tax Officer, Ward-3(2), Infinity Towers, 50-92-34/1/1, Sankar Matham Road, Santhipuram, Visakhapatnam, Andhra Pradesh – 530016.
3. The Principal Commissioner of Income Tax-1, Visakhapatnam.
4. आयकर आयुक्त (अपील)/ The Commissioner of Income Tax (Appeals)-6, Hyderabad.

5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम/ DR, ITAT, Visakhapatnam
6. गार्ड फ़ाईल / Guard file

आदेशानुसार / BY ORDER

Sr. Private Secretary  
ITAT, Visakhapatnam