

**IN THE INCOME TAX APPELLATE TRIBUNAL
"G" BENCH, MUMBAI**

**SHRI S RIFAUR RAHMAN, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 5524/MUM/2017
(Assessment Year: 2012-13)**

Income Tax Officer-21(1)(4),
Room No. 108, 1st Floor, Piramal
Chambers,
Parel, Mumbai - 400012 Appellant

M/s Gammon OJSC Mosmetrostory Joint-
Venture, Vs
2, Gammon House, Veer Savarkar Marg,
Prabhadevi, Mumbai - 400025
[PAN: AABAG0799C] Respondent

Appearances

For the Appellant/Department : Ms. Richa Gulati
For the Respondent/Assessee : Shri Farooq Irani

Date of conclusion of hearing : 06.12.2022
Date of pronouncement of order : 28.02.2023

ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Revenue has challenged the order, dated 19.06.2017, passed by the Ld. Commissioner of Income Tax, Mumbai - 19 [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2012-13, whereby the Ld. CIT(A) had partly allowed the appeal filed by the Assessee against the Assessment Order, dated 27.03.2015, passed under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').
2. The Revenue has raised following grounds of appeal:

- “1. On the facts and in circumstances of the case and in law, the Ld. CIT(A) has erred in holding that no income attributable on contract receipts could be taxed in the status of the AOP.*
- 2. On the facts and in circumstances of the case and in law, the Ld. CIT(A) has erred in failing to appreciate that the work contract orders issued to the assessee by the contracted were in its name and also the payments were credited to the assessee's account.*
- 3. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in ignoring that assessee being a separate entity u/s. 2(31) of the I.T. Act, 1961.*
- 4. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in ignoring the fact that the assessee AOP was in full control of the contract and it was the responsibility of the assessee to submit the bills and to receive payments from Chennai Metro Rail Ltd. which in turn was passed on by the assessee to co-ventures.*
- 5. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not considering the Landmark Judgment of the Hon'ble Supreme Court in the case of Ch. Atchaiah (1996) 218 ITR 239 wherein it was held that if the share of the profit is determined but AOP, the joint venture agreement, it cannot be anything but AOP, and where the charge is on the income of the AOP, in such status, the AO has no choice but to tax it, irrespective of the fact as to whether such share of profit has been offered to tax or taxed in the hands of members or not ignoring that the assessee.*
- 6. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not considering the recent and elaborate judgment of the Hon,ble Authority for advance ruling in the case of Geoconsultant ZT GMBH, in Re(2008) 304 ITR 283 wherein the Joint Venture was held to be AOP, following the decision of the Hon,ble Supreme Court decision in the case of Ch. Atchaiah.*
- 7. On the facts and in circumstances of the case and in law, the Ld. CIT(A) has erred in holding that the expenses of Rs. 58,15,281/-is.allowable expenses.*
- 8. "The appellant prays that the order of Ld. CIT (A) on the above grounds be set aside and that of the Assessing Officer be restored".*

3. The relevant facts in brief are that Assessee is joint venture between M/s OJSC Moscow Metrostroy, Russia (hereinafter referred to as 'OJSC') - a company established under the laws of Russia, and Gammon India Limited (hereinafter referred to as 'GIL') formed for execution of 2 contracts being UAA 02: Design and Construction of Underground Stations at Government Estate, LIC Building and Thousand Lights and Associated Tunnels, and Contract No. UAA 03: Design and Construction of Underground Stations at Gemini, Teynampet, Chamiers Road and Saidapet and Associated Tunnels, at Chennai awarded by the Chennai Metro Rail Ltd (CMRL). As per Joint Venture Agreement, dated 17.3.2011, the contract work as well as the contract receipts were to be divided in the ratio of 51: 49 between Gammon and OJSC.
4. The Assessee filed return of income for the Assessment Year 2012-13 as Association of Persons (AOP) declaring a loss of INR 58,15,281/-. The case of the Assessee was selected for regular scrutiny. During the course assessment proceedings, on perusal Profit & Loss Account of the Assessee, the Assessing Officer noticed that the Assessee had received contract receipts of INR.193,76,82,122/- and equal amount was paid as sub-contracting expenses to the joint venture-partners. The Assessee was, thus, left with no profits even though the Assessee earned contractual receipts of INR 193,76,82,122/-. Therefore, the Assessing Officer rejected the books of accounts of the Assessee under Section 145 of the Act and estimated the profit of the Assessee at 2% of the total contractual receipts of INR 1,93,76,82,122/- which worked out to INR 3,86,53,642/-. In the process, the Assessing Officer also disallowed deduction for Bank Charges of INR 2,81,609/-, Auditors' Remuneration of INR

68,566/- and Loss on Foreign Exchange Fluctuation of INR 54,75,106/- aggregating to INR 58,15,281/- debited to the Profit & Loss Account. The Assessing Officer, thus, completed the assessment vide order, dated 27.03.2015, passed under Section 143(3) of the Act at assessed income of INR 3,86,53,642/-.

5. Being aggrieved, the Assessee carried the above issues in appeal before the CIT(A). Vide order, dated 19.06.2017, the CIT(A) overturned the order passed by the Assessing Officer and deleted the addition of INR 3,86,53,642/- made by the Assessing Officer and allowed deduction for expenses aggregating to INR 58,15,281/- debited to the Profit & Loss Account by following order, dated 02.05.2016, passed by the CIT(A) in appeal in the case of M/s Jager Gammon Joint Venture, another joint venture in which GIL was a venture partner, for the Assessment Year 2010-11.
6. Being aggrieved, the Revenue has now preferred appeal against the order, dated 19.06.2017, passed by the CIT(A) granting the above relief to the Assessee.
7. We have considered the rival submissions and perused the material on record. The Learned Departmental Representative relied upon the order passed by the Assessing Officer and referred to terms and conditions of contract reproduced therein. While the Learned Authorised Representative for the Assessee supported the order passed by the CIT(A) and referred to decision/judgments relied upon by the CIT(A).

Ground No. 1 to 6

8. Ground No.1 to 6 are directed against the order of CIT(A)

deleting addition of INR 3,86,53,642/- being profits computed by the Assessing Officer at rate 2% of the total contractual receipts of INR 1,93,76,82,122/- after rejecting the books of accounts under Section 145 of the Act.

9. We note that the CIT(A) has granted relief to the Assessee by following the order passed by the CIT(A) in appeal for the Assessment Year 2010-11 in the case of M/s Jager Gammon Joint Venture, wherein GIL was a Joint Venture partner. In the aforesaid order that CIT(A) had relied upon the decision of the Delhi Bench of the Tribunal in the case of ITO vs M/s Oriental Structural Engineers Pvt. Ltd. & Gammon India Limited Joint Venture (JV) passed in ITA No. 3058/Del/2007 for AY 2004-05. The relevant extract of the aforesaid decision of the Tribunal reads as under:

"6. We have considered the rival submissions. From the facts narrated above it is clear that after receipt of the contract from NHAI, the work was to be executed by the members of joint venture directly and no effort was to be made by the assessee as a joint venture itself in execution of the contract awarded to it. Thus, in fact though the assessee is created as a joint venture, it does not carry on any activity. All the activities are to be carried on by the members of the joint venture and for which they are to be remunerated. While invoking section 40A(2) of the Act, what is to be examined is whether the payments made are excessive or unreasonable, having regard to the fair market value of the services or facilities for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him therefrom. Thus the comparison has to be made with regard to the services rendered by the joint venture. Since the nature of work involves the execution of the contract by the members of the joint venture directly and which fact is also made known to NHAI in the bidding process itself, we find that the assessee joint venture is only an entity for name sake i.e. to bid for the project but ultimately it is to be executed by the members of

the joint venture due to their own expertise in the field relating to the project. In the circumstances, it can be held that since the assessee was not to undertake any work but the work was to be executed by the joint venture partners, the amount for work executed was reasonable having regard to the fair market value of the services rendered by them. We, therefore, uphold the order of the learned CIT (A).

7. In the result, the appeal is dismissed." (Emphasis Supplied)

10. On perusal of the above decision of the Tribunal it can be seen that in identical facts and circumstances the Tribunal had confirmed by the order of CIT(A) deleting the addition made by the Assessing Officer bringing to tax, in the hands of the joint venture, the profits arising from the contract awarded to joint venture which was executed by the joint venture partners without any work being done by joint venture/AOP. During the course of hearing, the Ld. Authorised Representative for the Appellant had also pointed out that the appeal preferred by the Revenue against the above decision of the Tribunal has been dismissed by the Hon'ble Delhi High Court vide order, dated 11.02.2010 passed in ITA No. 146/2010 reported in [2010] 195 Taxman 362 (Delhi). Further, the Hon'ble Supreme Court has, vide order dated 18.02.2011 [CC 2598/2011], also dismissed the Petition for Special Leave to appeal against the judgment and order dated 11.02.2010 passed by Hon'ble Delhi High Court in ITA No. 146/2010.
11. Further, in the case of ITO Vs. M/s Gammon Progressive JV [ITA No. 65/PN/2011, A.Y. 2007-08] cited by the Learned Authorised Representative for Assessee, wherein again GIL was a JV partner, the Pune Bench of the Tribunal, in identical facts and circumstances, has held as under:

"17. Looking to the overall facts and circumstances of the

case, in my considered opinion, there is no justification in the action of the AO in rejection of the book results u/s 145(3) of the I.T. Act as well as estimation of the income of the appellant @ 2% of the total contractual receipts, for the year under consideration. Thus the addition of Rs.1,29,09,446/- is deleted. Hence, grounds of appeal no. 1 and 2 are allowed.

18 Grounds of appeal no 3 and 4 are general in nature and hence need no adjudication.

19. In result, appeal of the appellant is allowed.”

12. While rendering the aforesaid decision, reliance was placed by the Tribunal on another decision of the Pune Bench of the Tribunal in the case of ITO vs Rajdeep & PMCC Infrastructure, wherein it has been held that mere existence of an AOP cannot lead to taxability in the hands the AOP unless the AOP received monies in its own right. We note that the aforesaid decision of the Tribunal was confirmed by the Hon'ble Bombay High Court vide judgment, dated 23.01.2014, passed in ITA No. 56 & 61 of 2010 reported in [2016] 73 taxmann.com 255 (Bombay)[23-01-2014]. The Special Leave Petition preferred by the Revenue against the aforesaid judgment of the Hon'ble Bombay High Court has also been dismissed vide order & judgment, dated 10.08.2016, reported in [2016] 242 Taxman 181 (SC). In the present case also the CIT(A) has returned factual finding that the joint venture partners made their own arrangement for execution of work independent and the AOP did not have any control or connection with the work done by GIL and OJSC. While the Assessee is a separate legal entity it was incorporated to be a pass through entity with the joint venture partners agreeing to take on the responsibility to execute the contract independently. The contract receipts of the Assessee were equivalent to the sub-contracting payments made by the Assessee to joint venture partners. There is nothing on record

to show that the sub-contracting payments were not reasonable given the scope of work, thus, triggering the provisions of Section 40A(2)(b) of the Act.

13. On perusal of the above decisions, we find that issues raised by the Revenue in the grounds under consideration stands decided against the Revenue and in favour of the Assessee. The CIT(A) has allowed the appeal of the Assessee by following the above decisions. Accordingly, we do not find any infirmity in the order passed by the CIT(A) and therefore, we decline to interfere with the same. Thus, respectfully following the above decision of the Tribunal, we dismiss Ground No. 1 to 6 raised by the Revenue in the present appeal.

Ground No. 7

14. Ground No. 7 is directed the against disallowance of Bank Charges of INR 2,81,609/-, Auditors' Remuneration of INR 68,566/- and Loss on Foreign Exchange Fluctuation of INR 54,75,106/- aggregating to INR 58,15,281/- debited to the Profit & Loss Account. We have confirmed the order of CIT(A) hereinabove deleting the addition of INR 3,86,53,642/- as profits taxable in the hands of the Assessee, inter alia, for the reason that the Assessee did not undertake any execution of work and sub-contracted entire work to joint venture partners (namely GIL and OJSC). Therefore, the question of allowing deduction in respect of Bank Charges of INR 2,81,609/- and Foreign Exchange Fluctuation of INR 54,75,106/- does not arise. However, in our view, the Assessee would be entitled to claim deduction in respect of INR 68,566/- being remuneration to the auditors to ensure statutory compliance. Accordingly, we overturn the order of CIT(A) of deleting the disallowance of

deduction for Bank Charges of INR 2,81,609/- and Foreign Exchange Fluctuation of INR 54,75,106/- and reinstate the disallowance made by the Assessing Officer. On the other hand, we confirm the order of CIT(A) deleting disallowance in respect of Auditors' Remuneration of INR 68,566/-. Thus, Ground No. 7 raised by the Revenue is partly allowed.

In result the appeal preferred by the Revenue is partly allowed.

Order pronounced on 28.02.2023.

Sd/-

(S Rifaur Rahman)
Accountant Member

Sd/-

(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 28.02.2023

Alindra, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai