

**IN THE INCOME TAX APPELLATE TRIBUNAL,
'SMC' BENCH, KOLKATA**

**Before Shri Rajpal Yadav, Vice-President (KZ)
&
Dr. Manish Borad, Accountant Member**

**I.T.A. Nos. 441, 442 & 443/KOL/2023
Assessment Years: 2012-2013, 2013-14 & 2014-2015**

**SPML HCIL JV,.....Appellant
Block-A, 3rd Floor,
22, Camac Street,
Kolkata-700016
[PAN: AADAS1471P]
-Vs.-**

**Income Tax Officer,.....Respondent
Ward-33(4), Kolkata,
10B, Middleton Row,
Kolkata-700071**

Appearances by:

*Shri S.K. Tulsyan, Advocate and Smt. Mita Rizvi,
appeared on behalf of the assessee*

*Shri Gautam Patra, Addl. CIT, D.R., appeared on
behalf of the Revenue*

Date of concluding the hearing : December 12, 2023

Date of pronouncing the order : December 13, 2023

O R D E R

Per Rajpal Yadav, Vice-President (KZ):-

The present three appeals are directed at the instance of assessee against the separate orders of ld. Commissioner of

Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi dated 10.03.2023 passed for A.Ys. 2012-13, 2013-14 and 2014-15.

2. Though the assessee has taken six grounds of appeal, but in brief its grievances revolve around two-folds, namely-

(a) Whether disallowances of Rs.39,94,111/-, Rs.23,86,420/- and Rs.18,40,168/-made with the help of section 40A(2)(b) of the Income Tax Act in A.Ys. 2012-13, 2013-14 & 2014-15 respectively deserve to be upheld or not;

(b) Whether the assessee is entitled to claim loss of Rs.52,180/-, Rs.11,030/- and Rs.26,030/- in A.Y.s 2012-13, 2013-14 & 2014-15 respectively.

3. With the assistance of Id. Representatives, we have gone through the record carefully. The brief facts are that M/s. Harish Chandra (India) Limited (in short HCIL) and Subhash Projects & Marketing Limited (in short SPML) had formed a joint venture by entering into an agreement on 19th March, 2007. The object of the joint venture was to submit bid with CPWD, Government of India for development of State High-way in the State of Bihar and execution of the aforesaid Project, if awarded. The JV has been named SPML-HCIL JV. The percentage of participation of the JV was determined at HCIL 67% and SPML 33%. The parties to the JV had entered into a supplementary agreement on 22.07.2007

vide which earlier JV agreement dated 19.03.2007 was partially modified because one of the parties i.e. HCIL had expressed certain difficulties in financial participation and in execution of the job. Therefore, SPML had agreed to execute the entire work. The JV got the work and the work was back to back assigned to SPML. SPML had obtained the required Bank guarantee from several Banks. It has completed those contracts, which were received from the Executive Engineer, CPWD, Patna and RSVY Project Division. In other words, various projects obtained under an open bid from the Bihar Government were allotted to the JV, which has been assigned on back to back basis to one of the JV partners for fulfillment/execution of those contracts. One of the partners had executed the contract successfully and offered tax on the profit arose to it from those contracts. The existence of the JV was still intact so that it can bid in future and anyone of the partners to execute those contracts. The JV has filed return of income in all the years declaring 'NIL' income because it has suffered minor losses, which were in the shape of payments for audit fees and payments for certain statutory performances. The cases of JV were selected for scrutiny assessment in all these years and notices under section 143(2) were duly served. The Id. Assessing Officer was of the view that assignment of contractual receipt by the JV to one of the JV partners for execution of the work is to be construed as incurrance of expenditure and, therefore, the JV was not supposed to make total payment of the actual contract receipt from the contractee, i.e. State of Bihar to the JV partner. This total payment to the JV partner is in

contract to one of the partners hence an estimated disallowance of the expenditure is required. For example, in A.Y. 2012-13, total contractual receipt for execution of the contract receipt by the JV partner was Rs.21,35,88,846/-. This is the cost of contract. It was assigned back to back to one of the JV partners. The Id. Assessing Officer estimated unreasonable assignment to the extent of 1.87% of this cost to one of the partners and observed that Rs.39,94,111/- ought to have not been paid to the JV partner out of the cost of the contract. This amount will take care of statutory existence of the JV and it should be assessed for tax in the hands of the JV only. For the facility of reference, we take note of the relevant finding of the Id. Assessing Officer in A.Y. 2012-13, which reads as under:-

“The submission of the assessee has been considered but found to be contradictory. The AR of the JV has accepted that since the co-venturer HCIL had withdrawn from the projects, the JV itself ceased to exist during the Financial Year under consideration. On the other hand, it is ascertained from the documents / details so filed that all the bills were raised by the JV and corresponding payments were made to the JV itself by the Project Authority and revenue sharing ratio between two co-venturer was finalized as well as agreed upon well before the execution of the project work. Moreover, the AR of the assessee JV could not come forward with, any corroborative supporting documents that M/s. HCIL had actually withdrew itself from execution of the project. Hence, the explanation / clarification as offered by the assessee JV is found to be void of any logical footings in normal business parlance.. A comparative study of the activities and accrual of income of other JVs engaged in similar nature of projects and assessed to tax in this jurisdiction, the expenditure as_ incurred by the assessee JV towards payments to M/s. SPML appears to be exorbitant. A comparative study is appended below:-

Name of the JV	PAN	Assessment Year	GP	NP
Simplex - Meinhardt JV	AADAS0500M	2012-2013	3.00%	2.90%
Simplex - Somdatt Builders	AACAS4701M	2012-2013	2.26%	2.69%
Tantia- Gondwana JV	AABAT5389D	2012-2013	N.A.	0.03%

It is quite evident from the above tabular comparison that no other JV had booked loss like the assessee JV [SPML - HCIL JV] by making such back to back: payment of entire project receipts to co-venturer.

In view of the discussion made above, it is logically opined that the amount alleged to have been paid to M/s. SPML, a person referred under section 40A(2)(b) was excessive and unreasonable. Hence, 1.87% of Rs. 21,35,88,846/- being the cost 'of the "project so paid to co-venturer M/s. SPML considering the rate of net profit earned by other JVs, which comes to Rs. 39,94,111/- is disallowed under section 40A[2][a] of the Income Tax Act 1961 and added back to the total income of the assessee for the year under consideration.

05. The assessee had claimed current year's loss at Rs. 52,180/-. In response to the show cause letter, the assessee had admitted that the JV. was only name sake, so the question of allowing current year's loss is not tenable. Hence, the claim of loss of Rs. 52,180/- is disallowed.

4. Dissatisfied with this disallowances in all the three assessment years, the assessee carried the matter in appeals before the Id. CIT(Appeals). It appraised to the Id. CIT(Appeals) that in A.Y. 2011-12, a similar issue arose in the case of the assessee, whereby the disallowance under section 40A(2) has been deleted by the Id. CIT(Appeals) and this order has been accepted by the Department. The Id. CIT(Appeals) was further appraised that this is not an expenditure incurred by the JV. It is the cost of the Project, which has been assigned to one of the JV partners, who has executed that contract and also given Bank guarantee for performance of that contract. But Id. 1st Appellate Authority has taken note of all these arguments upto page nos. 2 to 8 of the impugned order. Thereafter he recorded the following finding:-

“5. In this case, addition has been made by the Assessing Officer on two grounds (i) Addition u/s.40A(2)(b) worth Rs. 39,94,111/- & (ii) Addition on account of loss worth Rs.52,180/-.

On the first addition, the Assessing Officer has made out clear that an agreement was reached between SPML and HCIL on 19th March, 2007 and the members in both the companies are same in the joint venture. The AR of the appellant accepted that the JV ceased to exist during the financial year under consideration. The Assessing Officer has examined the comparative study of the activities and the accrual of the income and found that the payment towards M/s. SPML appears to be exorbitant and excessive. Hence, the Assessing Officer added Rs.39,94,111/- u/s.40A(2)(b) of the Income Tax Act.

I have gone through the grounds of appeal and statement of facts, filed by the appellant. It has been made out that the Assessing Officer has not made out the case of the payment being excessive. The Assessing Officer has clearly made out the case in the table that how the payments are excessive. It is clear from para 6 of the assessment order. Hence, on this ground, order of the Assessing Officer is confirmed and the ground raised by the appellant is dismissed”.

5. The ld. Counsel for the assessee while impugning the order of the ld. CIT(Appeals) in all these three years has reiterated his submission as were raised before the authorities below. He filed written submissions running into 10 pages. He took us through section 40A(2)(b) and pointed out that in this case, this section is not at all applicable. He relied upon the judgment of the Hon'ble Delhi High Court in the case of United Export -vs.- Commissioner of Income Tax reported in 330 ITR page 549 and other judgments of the ITAT.

6. On the other hand, ld. D.R. relied upon the orders of the ld. CIT(Appeals).

7. We have duly considered the rival contentions. Section 40A has a direct bearing on the controversy. Therefore, we take note of the relevant part of this section, which reads as under:-

“Expenses or payments not deductible in certain circumstances.

40A. (1) The provisions of this section shall have effect notwithstanding anything to the contrary contained in any other provision of this Act relating to the computation of income under the head "Profits and gains of business or profession".

(2)(a) Where the assessee incurs any expenditure in respect of which payment has been or is to be made to any person referred to in clause (b) of this sub-section, and the Assessing Officer is of opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, 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, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction :

Provided that for an assessment year commencing on or before the 1st day of April, 2016 no disallowance, on account of any expenditure being excessive or unreasonable having regard to the fair market value, shall be made in respect of a specified domestic transaction referred to in section-92BA, if such transaction is at arm's length price as defined in clause (ii) of section-92F.

(b) The persons referred to in clause (a) are the following, namely :—

<i>(i) where the assessee is an individual</i>	<i>any relative of the assessee;</i>
<i>(ii) where the assessee is a company, firm, association of persons or Hindu undivided family</i>	<i>any director of the company, partner of the firm, or member of the association or family or any relative of such partner or member</i>

(iii) any individual who has a substantial interest in the business or profession of the assessee, or any relative of such individual;

(iv) a company, firm, association of persons or Hindu undivided family having a substantial interest in the business or profession of the assessee or any director, partner or member of such company, firm, association or family, or any relative of such director, partner or

member or any other company carrying on business or profession in which the first mentioned company has substantial interest;

(v) a company, firm, association of persons or Hindu undivided family of which a director, partner or member, as the case may be, has a substantial interest in the business or profession of the assessee; or any director, partner or member of such company, firm, association or family or any relative of such director, partner or member;

(vi) any person who carries on a business or profession,—

(A) where the assessee being an individual, or any relative of such assessee, has a substantial interest in the business or profession of that person; or

(B) where the assessee being a company, firm, association of persons or Hindu undivided family, or any director of such company, partner of such firm or member of the association or family, or any relative of such director, partner or member, has a substantial interest in the business or profession of that person.

.....”

An analysis of this section discloses the following constituent elements in the scheme of disallowance:

- (i) The assessee may be an individual, firm, company, association of persons or Hindu Undivided Family.*
- (ii) The expenditure in question is one which involves a payment to a close associate of the assessee.*
- (iii) The persons treated as associates of the assessee are elaborately defined in clause (b). The determination includes the concepts of ‘relative’ and a person having a substantial interest in the business or profession of the assessee or the associate. One important aspect of the application of the provision will be to establish this associate ship between the payer and the payee.*
- (iv) The expenditure incurred is considered by the officer to be excessive or unreasonable, having regard to—*
 - (a) The fair market value of the goods, services or facilities for which the payment is made; or*
 - (b) The legitimate business needs of the assessee’s business or profession; or*

(c) The benefit derived by or accruing to the assessee from the payment.

If the above conditions are fulfilled, the AO can disallow the expenditure to the extent he considers it excessive or unreasonable by the above objective standards or otherwise”.

8. A bare perusal of this section would reveal that it contains two parts. Clause (a) contemplates that if an assessee has incurred any expenditure for the business purpose and payment of that extent has been made to any person referred to in clause (b). In other words, if an assessee has availed/purchased/incurred any expenditure for the purpose of business towards services/purchase of goods, etc. and such business needs have been availed from the persons mentioned in the list given under sub-clause (b) at a price which is over and above to the one available in the open market, then, such excess payment as deemed by the Id. Assessing Officer would be disallowed to the assessee as an expenditure.

9. A perusal of the assessment order would indicate that cost of a Project given to the JV by the State Government was termed by the Id. Assessing Officer as an expenditure for availing the services of the JV partner for executing that contract. It is an incorrect interpretation of the whole activity undertaken by the JV as well as its partner. The contract has been assigned on cost to cost basis to one of the JV partners. The Id. Assessing Officer cannot assume that JV partner could have completed that work.

Had it been got down in the open market, then, less than 1.87% of the cost. It is totally an absurd view without support of any facts or in law. The cost of any project cannot be construed as expenditure. It is the cost from which the project is to be executed and on execution of that Project resultant profit/loss has to be offered for tax by the JV partner. Thus we are of the view that it is incorrect expectation of the ld. Assessing Officer that JV will earn profit from assignment of contract to its one of partners. The other partner could raise an objection that profit from the Project should give some loss or profit to other partner also, but there is no grievance by the other partner. He has not undertaken any risk from the contract. He has not put any labour or allocated any assets towards that contract, so in the hands of JV, it is incorrect to suggest that some element of profit for even assignment of the contract to one of the partners deserves to be deemed as a profit. On the other hand, ld. CIT(Appeals) has not recorded any analytical finding. The ld. 1st Appellate Authority has taken note of all the details but nowhere mentioned as to how he is not agreeing with the finding of his predecessor ld. CIT(Appeals) in A.Y. 2011-12. There should be demonstrative reasons as to why the finding of the predecessor is not to be followed. The Revenue has not challenged the order of the ld. CIT(Appeals) in A.Y. 2011-12. Therefore, in other words, it is a covered issue in favour of the assessee by the order of the ld. CIT(Appeals) in A.Y. 2011-12, which has been accepted by the Revenue. In view of the above, we allow all these appeals and delete the disallowances.

10. As far as the loss claimed by the assessee is concerned, since existence of the assessee is intact, it is incurred only minimum expenditure for keeping its status as intact. Those expenses deserve to be allowed to the assessee and loss, if cannot be set off in these years, be allowed to carry forward. With the above finding, the appeals of the assessee are allowed.

11. In the result, all the appeals of the assessee are allowed.

Order pronounced in the open Court on 13/12/2023.

Sd/-

Sd/-

(Manish Borad)
Accountant Member

(Rajpal Yadav)
Vice-President (KZ)

Kolkata, the 13th day of December, 2023

*Copies to :(1) SPML HCIL JV,
Block-A, 3rd Floor,
22, Camac Street, Kolkata-700016*

*(2) Income Tax Officer,
Ward-33(4), Kolkata,
10B, Middleton Row, Kolkata-700071*

*(3) Commissioner of Income Tax (Appeals),
National Faceless Appeal Centre, Delhi;*

(4) The Departmental Representative

*(5) Guard File
TRUE COPY*

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.