

**THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'A' NEW DELHI**

**BEFORE SHRI G.S. PANNU, VICE-PRESIDENT AND SHRI
ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No.1782/Del/2022
Assessment Year: 2017-18

Ajay Enterprises Pvt. Ltd., 8 th Floor, Eros Corporate Tower, Nehru Place, New Delhi	Vs.	DCIT, Central Circle-1, New Delhi.
PAN : AAACA1967D		
(Appellant)		(Respondent)

Assessee by	S/Shri Pradeep Dinodia & R.K. Kapoor, CAs
Department by	Shri Manu Chaurasia, Sr.DR

Date of hearing	08.03.2023
Date of pronouncement	05.06.2024

ORDER

PER ANUBHAV SHARMA: JUDICIAL MEMBER:

This appeal has been preferred by the Assessee against the order dated 14.06.2022 of learned Commissioner of Income-Tax(Appeals)-23, New Delhi (hereinafter referred as Ld. First Appellate Authority or

in short Ld. 'FAA') in Appeal No. CIT(A), Delhi 23/10256/2019-20 arising out of an appeal before it against the order 17.12.2019 passed under Section 143(1) of Income-Tax Act, 1961 (hereinafter referred as 'the Act') by the ITO, Ward 4(4), Gurgaon (hereinafter referred as the Ld. AO).

2. The assessee had filed return of income of Rs.92,06,590 which was selected for complete scrutiny and during the course of assessment proceedings, learned Assessing Officer had examined the expenses debited in regard to the sets under consideration. Learned Assessing Officer observed that assessee was following percentage method of accounting in respect of construction business being done by him. The learned Assessing Officer taking into consideration that completion certificate was received and disallowed Rs.5,36,19,000 towards the provisions made for unfinished work and claimed as expenditure. The Assessing Officer also made an addition of Rs.38,93,000 on account of a provision made for land development etc. Learned CIT (Appeals) observes in his order as to what weighed the disallowance made and reconsidered appropriate as follows:

“8. The Assessing Officer in her assessment order has not allowed the claim of the appellant company on the ground that

(a) expenditure is capital expenditure (b) expenditure incurred after completion of the project should be treated as maintenance expenditure which is collected from the resident owners (c) the expenditure was in the nature of provision (d) liability did not crystallize during the year (e) some expenditure are in the nature of payment of taxes which are allowable as per the provisions of section 43B (f) TDS was not deducted.

3. Learned CIT (Appeals) had found these observations of the Assessing Officer to be erroneous. However, learned CIT (Appeals) examined the additions made by the Assessing Officer from the applicability of provisions of TDS. Learned Assessing Officer had also made an addition by way of disallowance under Section 40A of the Act which was sustained by the learned CIT (Appeals).

Accordingly, the assessee is in appeal raising following grounds:

1. That the Ld. CIT(A) grossly erred in law and on facts of the appellant's case in holding that the provisions of section 40(a)(ia)/43B of the Income-Tax Act are attracted on the provisions made towards unfinished work in respect of projects whose revenue has been accounted for as completed project under POCM Method.
2. The order of Ld. CIT(A) of holding the applicability of provisions of section 40(a)(ia)/43B of the Income-Tax Act is bad in law in as much as it is against the system of accounting regularly and consistently followed by the assessee for revenue under POCM method read with Guidance Note on Real Estate Transaction of 2012.

3. That the Ld. CIT(A) has failed to appreciate that there is no finding of the A.O that the estimation of total revenue and total expenditure necessary for determining profit under the POCM Method were not fair and true and further the CIT(A) has also not disputed the same. In absence of such findings no disallowance could be made u/s 40(a)(ia)/43B @30% of Rs.35,60,51,256/- of the Income-Tax Act and Rs.1,30,00,000/- u/s. 43B of the Income-Tax Act out of the amounts provided towards the unfinished work.
 4. That the Ld. CIT(A) erred in law and on facts of the appellant's case in confirming the disallowance of Rs.10,68,15,377/- u/s 40(a)(ia) u/s. 43B of the Income-Tax Act out of the amounts provided towards the unfinished work.
 5. That the upholding the disallowance u/s 14A amounting to Rs.47,63,951/- is bad in law in view of the fact that there was no exempt income in the year under consideration.
 6. That each ground is independent of and without prejudice to other grounds raised herein.
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3. Heard and perused the record.
 4. Learned Authorized Representative submitted that the only question to be determined is whether when following and accepted method of accounting which is POCM Method in this case, the assessee estimates and makes accounting provisions towards the unfinished work, the provisions of TDS under Section 40(a)(ia) of the Act are attracted or not.

5. In this context, it is submitted that on the date of estimating the remaining costs to be incurred on the project which is treated to be completed and in respect of which 100% of the revenue has been recognized, such estimates cannot be subjected to TDS and provisions because neither the payee nor the assessee can calculate the exact amount. Relying upon certain judicial verdicts learned AR submitted that no assessee can be compelled to do the impossible. Learned AR submitted that the learned CIT (Appeals) had accepted the fact that assessee was consistently following system of accounting then the disallowance made by the learned CIT (Appeals) is not sustainable.

6. Learned Departmental Representative, however, submitted that there is no error in the findings of learned tax authorities below.

7. In regard to these ground nos. 1 to 4, it comes up that the learned CIT (Appeals) had benefited the assessee accepting the plea that as the assessee following POCM Method for project to accounting, elements of assumptions is inherent and accordingly made the deletion made by the Assessing Officer. However, learned CIT (Appeals) considered the fact that there were certain expenditure of the nature 'UP VAT tax amounting to Rs.50,00,000 and labour cess amounting to

Rs.80,00,000 for which provisions were made and the same are not allowable as expenditure during the year under consideration being hit by section 43B of the Act. Then, having considered the break up of expenses, learned CIT (Appeals) found that certain expenses were liable to be disallowed as per the provisions of section 40(a)(ia) of the Act and on behalf of the assessee, it was submitted before learned CIT (Appeals) as follows:

“46. In response, the appellant has stated as under:-

“At the outset, it is clarified and respectfully submitted that we have already made our detailed submission on these issues vide our various details/clarifications through letters dated 09.02.2022, 14.04.2022, 25.04.2022, 02.05.2022 and 09.05.2022. It has also been clarified that in accordance with the method of accounting employed by the assessee consistently and on regular basis, there was no requirement of making any TDS on any of the amounts provided in the books of accounts, based on the estimates towards the unfinished work. Without prejudice it has also been submitted before your honour that out of the total provisions/estimates of Rs.53,61,93,000/- only a sum of Rs.6,84,20,113/- was at best liable for the deduction of TDS and such TDS has also been deducted in future as and when the actual work has been undertaken by the respective parties. All such details have already been filed before your honour vide our earlier submissions. It has also been explained as to why the provisions of TDS were not applicable and such method employed by the assessee year after year on completion of project has been explained and accepted in all earlier assessment years.

Keeping in view our detailed submissions and without prejudice to all other submissions especially submission dated 09.05.2022 wherein details of amounts have been provided, it is submitted that the disallowance made by the Assessing Officer at Rs.53,61,93,000/- should be restricted to rs.6,84,20,113/- being 30% as per the applicable provisions of section 40(a)(ia) of the income-tax Act, for which also we request your honour to give directions to allow such amounts as per the provisions of law in the respective year in which the TDS has been deducted on these amounts and deposited as per the provisions of law”.

8. However, learned CIT (Appeals) keeping in mind the provisions of section 40(a)(ia) of the Act, examined the details furnished by the assessee with regard to the nature of work to the extent of Rs.29,54,62,959 as tabulated in para 49 of the order and further there is no expenses with regard to contingencies/escalation to the extent of Rs.2,86,95,297 and provisions for facilities Rs.3,18,93,000 as mentioned in para 50 of the order of learned CIT (Appeals) concluded that this amount of Rs.35,60,51,256 (Rs.29,54,62,959+6,05,88,297) was liable for a tax deduction at source and accordingly in the light of provisions of section 194C of the Act held that 30% of these expenses to the extent of Rs.10,68,15,377 is liable to be sustained for the reason that TDS was not deducted, thus, by coming a part relief to the assessee, learned CIT (Appeals) concluded in para 56 as follows:

S.No.	PARTICULAR	Work	Purchases	Other expenses on which TDS was not applicable	Tax i.e. Service Tax/CGST/SGST etc. including in bills on which no TDS is applicable.
1.	CAPITAL POWER SYSTEM	Purchase of MEETING SYSTEM	1,06,44,840		
2.	TECHNOMARKETING	Transformer purchase	41,00,000		
3.	EBARCO INDIA PVT. LTD.				
4.	HOMEDEC LIGHTING INDIA PVT. LTD.	External lighting purchase	5,19,630		
5.	GLASSTONE MOSAIC TILES PVT. LTD.	Glass Mosaic tiles purchase	1,91,325		
6.	ADITIE ELECTRIC	Electric equipment purchase	6,75,000		
7.	Ranjeet Signage Solution	Signages purchase	17,46,004		
8.	National	Barbed wire purchase	85,793		
9.	Acme C C Product	R CC Drain Cover purchase	26,278		
10.	Dinesh Sanity Store	Upvc pipe & fitting purchase	6,47,862		
11.	Ncubate India service Pvt. Ltd.	R O System purchase	66,65,185		
12.	CEMENT+Steel	Material purchase	7,01,344		
13.	Miscellaneous Exp	Other petty purchases	2,56,78,180		
14.	Project over head	Purchase of day to day item and day to day expenditure		73,30,090	
15.	Employee Cost	Payment to employees		6,13,35,323	
16.	Electricity Charges	Paid to the Government for purchase of connection		1,00,74,488	
17.	Unutilized input Service Tax				14,42,406
18.	Depreciation				2,97,029
19.	Unutilized input GST				3,33,47,631
	SUB TOTAL (8)		5,33,94,777	7,86,59,901	3,50,87,066
		Grand Total			16,71,41,744/-

9. After giving thoughtful consideration to the aforesaid, we are of the considered view that there is no error in the findings of the learned CIT (Appeals) in regard to both the counts of disallowances under

Section 40A(ia) and section 40B of the Act. Once the assessee claims that while following percentage of completion method at 100% of the revenue of the project has been recognized, it was incumbent to also account, expenditures by deducting TDS instead of making provisions. However, as complete details of payment after the close of the accounts and TDS deducted and deposited there from in subsequent years was filed before the learned CIT (Appeals) on 25.04.2022 and which have not been taken into consideration. We consider it appropriate to restore the issue to that extent before the learned CIT (Appeals). Accordingly, ground nos. 1 to 4 raised by the assessee are not sustainable on merits except to the extent required to be considered in the light of aforesaid directions by the learned CIT (Appeals).

10. In regard to ground no.5, it comes up as admitted states of affairs that learned Assessing Officer made a disallowance without considering the fact that there was no exempt income during the year and for it, it is settled proposition of law that in the absence of exempt income, no disallowance can be made. Accordingly, the appeal of assessee is partly allowed.

11. In the result, the appeal is partly allowed.

Order pronounced in the open court on 05/06/2024.

Sd/-
(G.S. PANNU)
VICE-PRESIDENT

Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER

Dated: 05th June, 2024.

Mohan Lal

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi