

आयकर अपीलुीय अधलकरण, हैदराबाद पीठ में
**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A", HYDERABAD**

**BEFORE SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER
&
SHRI MADHUSUDAN SAWDIA, ACCOUNTANT MEMBER**

आ.अपी.सं / **ITA No. 537/Hyd/2023**
(निर्धारण वर्ष / Assessment Year: 2021-22)

Sheladia Associates INC, ADIT (INT TAXN)-2,
Secunderabad Vs. Hyderabad
[PAN No. AAFCS7792F]

अपीलार्थी / Appellant प्रत्यर्थी / Respondent

निर्धारिती द्वारा/Assessee by: Ms. Aluru V. Sai Sudha, AR
राजस्व द्वारा/Revenue by: Ms. L. Sunitha Rao, CIT-DR

सुनवाई की तारीख/Date of hearing: 06/05/2024
घोषणा की तारीख/Pronouncement on: 21/06/2024

आदेश / ORDER

PER K. NARASIMHA CHARY, J.M:

Aggrieved by the final assessment order dated 31/10/2023 passed consequent to the directions of Hon'ble Dispute Resolution Panel, Bengaluru ("DRP"), in the case of M/s. Sheladia Associates Inc ("the assessee") for the assessment year 2021-22, under section 143(3) r.w.s 144C (13) of the Income Tax Act, 1961 (for short "the Act") assessee filed this appeal.

2. Brief facts of the case are that the assessee is a permanent establishment of a foreign company located in the USA. It is engaged in

the business of engineering and engineering consultancy services. It filed its return of income for the assessment year 2021-22 on 30/10/2020, by declaring a total income of Rs. 3,80,95,360/-. Learned Assessing Officer, by order dated 31/12/2022, proposed to make addition of Rs. 61,05,381/- by disallowing certain payments made to third party service providers under section 37 of the Act, Rs. 1,60,78,394/- by disallowing direct expenses u/s. 44C of the Act and Rs. 1,03,35,005/- on the ground of not offering the matching income to tax. The Learned Assessing Officer also disallowed a sum of Rs. 53,17,732/- towards cessation of liability, but it is not subject matter of this appeal, because such a ground is not pressed at the time of arguments.

3. Assessee preferred objections before the learned DRP and submitted certain additional evidences in respect of which the learned DRP obtained remand report from the learned Assessing Officer. Having considered the remand report, the learned DRP issued directions dated 27/09/2023 under section 144C(5) of the Act. Pursuant to such directions, the learned Assessing Officer passed the final assessment order dated 31/10/2023, making addition of Rs. 72,84,429/- under section 37 of the Act, Rs. 1,60,78,394/- under section 44C of the Act and Rs. 1,03,35,005/- disallowing the bad debts claimed by the assessee. Hence, this appeal by the assessee, challenging such additions.

4. Coming to the first addition of Rs. 72,84,429/- under section 37 of the Act, the facts are that since the nature of work to be performed by the assessee, is not perennial in nature and the work has to be moved from place to place, in order to obviate certain problems with work force, the assessee engaged project specific talent as project consultants and has

been paying remuneration to them. For this purpose, they have engaged vehicles etc., and has been incurring expenditure towards payments to such third party service providers. In that process, they have claimed an expenditure of Rs. 17,61,64,409/- towards payments to about 315 third parties. Learned Assessing Officer asked the details supporting the payments in respect of the 27 third parties. Assessee submitted ledger copies, invoices, copy of payment details by furnishing relevant pages of the bank statement evidencing payment made by the assessee, bank account details, PAN of all parties, invoice copies received from the parties and Aadhar cards of majority of the parties, proving the genuineness of the transactions and payments made. Notice under section 133(6), seeking certain specific details was issued, but it seems such notices were not responded to. Hence, the learned Assessing Officer made the addition of Rs. 61,05,381/-.

5. Before the learned DRP, as it could be read from the order of the learned DRP, the assessee furnished certain additional evidences like confirmed ledgers from third party vendors, the copies of invoices, relevant log-books/time sheets, Aadhar card copies for the parties, where it was missing previously and party-wise TDS details with nature of services. Learned DRP sought remand report. Learned Assessing Officer submitted remand report on 24/08/2023 and in respect of the transactions with third parties, the learned Assessing Officer expressed that the agreement copies entered with third parties are in order and can be accepted.

6. Having considered the remand report, the learned DRP opined that lack of third party's confirmations and no response to the notice under

section 133(6) cast shadow on the claim of expenditure and on that ground, learned DRP rejected the plea of the assessee.

7. Learned AR submitted that when the assessee submitted all the information that was sought by way of notice under section 133(6) of the Act, the learned Assessing Officer did not express any adverse opinion or felt the necessity to issue notice under section 133(6) again so as to have any clarification post submission of the additional evidence. Further, learned DRP failed to state how the earlier non-response to the notice under section 133(6) of the Act would vitiate the remand report where the learned Assessing Officer did not express any adverse remarks. Learned AR submitted that the assessee is ready to secure compliance to the notices under section 133(6), if any issued in respect of any clarification, post the additional evidence. She further submitted that out of 315 third parties, the learned Assessing Officer sought information and made addition in respect of 25 third parties and that too disallowance of the total amount is not warranted. Further, according to her, the accounts of the assessee are audited and no discrepancy with the books was identified by either of the Revenue authorities. Merely because on an earlier occasion, there was no proper response to the notice under section 133(6) of the Act, the entire amount paid to the third parties cannot be disallowed.

8. Per contra, learned DR submitted that the assessee merely furnished the agreements, invoices and ledgers without any confirmation letters and it is the duty of the assessee to establish the identity of the parties, creditworthiness of the concerned parties and the genuineness of the expenditure claimed and in the absence of confirmations and logs,

inspection reports, time sheets and communication, authorities rightly rejected the expenditure.

9. We have gone through the record in the light of the submissions made on either side. learned DRP in its directions, clearly stated that during the learned DRP proceedings, the assessee submitted the confirmed ledgers from the third-party vendors, copies of invoices, relevant log books/time sheets, Aadhar card copies of the parties, where it was missing previous and party-wise TDs details with nature of service. It is also not in dispute that all these documents were considered by the learned Assessing Officer, when remand report was served and no adverse opinion is expressed by the learned Assessing Officer and on the other hand, the learned Assessing Officer clearly said that the agreement copies with third parties are in order.

10. Learned Assessing Officer, however, in the remand report stated that there are some discrepancies in the log books where the signatures of the travelled persons or the officer-in-charge was missing and the submissions made by the assessee to substantiate the expenditure claimed are not completely satisfactory. It is not in dispute that the accounts of the assessee are audited and no discrepancy in the books is pointed out nor the books are rejected. The impugned order itself shows that the confirmed ledgers from third party vendors and all other documents were filed in respect of which, no adverse opinion is expressed. Though the learned DRP stated that third party confirmations are not filed, the impugned order itself reads that confirmed ledgers from the third parties, copies of invoices, relevant log books/time sheets, Aadhar card copies of the parties were filed and considered by the learned Assessing

Officer. Further, after all these evidences are filed, the learned Assessing Officer did not think it necessary to seek any further information by issuing another notice under section 133(6) of the Act, during the remand proceedings. Learned DRP failed to spell out how the non-response to the notices under section 133(6) of the Act during assessment proceedings vitiated the remand report.

11. In these circumstances, we are of the considered opinion that disallowing the entire expenditure in the shape of payments to these third parties is not justifiable. Hence, we direct the learned Assessing Officer to delete the addition made on this score. This ground is allowed.

12. Coming to the disallowance of expense under section 44C of the Act is concerned, the assessee under other expenses in the consolidated P&L Account reported expenses of Rs. 1,21,62,145/- allocated head office overheads and Rs. 1,60,78,394/- towards business development and marketing expenses. According to the assessee, the assessee had shown the general and administrative expenses of the head office overheads, allocable to the assessee and took notice by the learned Assessing Officer. The head office incurs certain expenses, namely, review of the tenders/bids called for civil works that are announced in India, viability analysis of the tenders announced, selection of tenders for which the branch/PO has to apply for, assistance in preparation of the tender, critical review of the tender being filed, deciding on the financial aspects of the tender, participating in client meetings and discussions and assistance during the entire bidding process etc., wholly and exclusively for the assessee and the assessee reimburses such expenses to the head office and they are to the tune of Rs. 1.6 crores. According to the learned

Assessing Officer, this expense is also to be considered for the purpose of section 44C of the Act.

13. Before the learned DRP, assessee contended that its personnel were on the pay rolls of the head office, participated in the pre-bid, post-bid and technical aspects relating to the Indian operations and, therefore, such expense of the personnel, which were wholly and exclusively for the purpose of Indian operations are allowable as business expense in the hands of the assessee.

14. Learned DRP, however, opined that the expenses incurred by way of payment of salaries, wages or any other perk also get covered in the definition of head office expenditure, under explanation of (iv) section 44C of the Act and, therefore, falls in the ambit of section 44C of the Act. On this score, learned DRP declined to delete the addition. Learned AR placed reliance on the decision of the Co-ordinate Bench of the Tribunal in the cases of DDIT vs. Samsung Engg. Co. Ltd., [2011] 43 SOT 38, Fraport A.G. Frankfurt Airport Services Worldwide vs. ACIT/ADIT [2023] 151 taxmann.com 370 and Addl. DIT vs. Bank of Bahrain & Kuwait [2011] 44 SOT 693 to support her contentions.

15. Per contra, learned DR, contended that in this case, the expense in question was incurred by way of payment of salaries, wages or any other perks and therefore, covered by explanation of (iv) section 44C of the Act and, therefore, falls in the ambit of section 44C of the Act. Learned DR further argued that the learned Assessing Officer found that this amount of Rs. 1,60,78,394/- is disallowable not only under section 44C of the Act, but also under section 40(a)(i) of the Act, but the assessee challenged the

disallowance under section 44C of the Act, but not under section 40(a)(i) of the Act. According to her, not taking a ground under section 40(a)(i) of the Act amount to acceptance of disallowance under section 40(a)(i) of the Act and, therefore, such an addition cannot be deleted.

16. We have gone through the record in the light of the submissions made on either side. In the case of CIT vs. Emirates Commercial Bank Ltd. [2004] 134 Taxman 682 (Bombay), the Hon'ble Bombay High Court held that, Section 44C is applicable only in the cases of those non-residents, who carry on business in India through their branches; that the said section was introduced to get over difficulties in scrutinising claims in respect of general administrative expenses incurred by the foreign head office insofar as such expenses stand related to their business or profession in India having regard to the fact that foreign companies operating through branches in India sometimes try to reduce incidence of tax in India by inflating their claims in respect of the head office expenses. In other words, section 44C seeks to impose a ceiling/restriction on head office expenses; that, however, section 44C contemplates allocation of expenses amongst various entities; that the expenditure which is covered by section 44C of the Act is of a common nature, which is incurred for the various branches or which is incurred for the head office and the branch; that in the cases where the expenditure was exclusively incurred for the branch, and the officers came from the head office to India to attend to the work its branch and, in connection with that work, the expense was incurred, such expense was initially incurred by the head office which was recovered by the head office from the branch in India by raising a debit note. The Hon'ble Court held that the expense was incurred for the branch office in India, to which

section 44C had no application. This decision has been followed in the case of Bank of Bahrain & Kuwait (*supra*).

17. The requirement *sine-qua-non* for non-applicability of section 44C of the Act is that the assessee must prove the exclusive purpose of the assessee for which the head office incurred such expenditure. In the case of Samsung Engg. Co. Ltd., (*supra*), a Co-ordinate Bench of the Tribunal held that since the expenses were proved to be exclusively incurred for Indian project and are not in the nature of overheads, by producing time sheet on daily basis for each employee in the organization by recording the man hours on daily basis. Since such evidence was produced, the authorities found in that case that the expense in question was exclusively incurred for Indian project and, therefore, excluded from the purview of section 44C of the Act.

18. On a perusal of the details incorporated under International Business Dev & Marketing costs, at page No. 4849 of the paper book, we are satisfied that reason-wise details of the staff working in the Home Office to support marketing and BD efforts in India are maintained and available. Further, learned AR submitted that since this issue of verification of details has not arisen before the Revenue authorities because of their stand that for the salaries and perks section 44C of the Act applies. Since on principle we are satisfied that the expenditure incurred by the head office directly connected to the PE has to be allowed without imposing the restrictions of section 44C of the Act, we are of the considered opinion that the need for verification of such details has arisen and such an exercise could conveniently be done at the end of the learned Assessing Officer. We, therefore, direct the learned Assessing Officer to verify the particulars

on this aspect explaining the details of the expense mentioned at page No. 4849 of the Paper Book and allow such expense which is exclusively attributable to the Indian project. No disallowance, therefore, could be made under section 44C of the Act.

19. Insofar as the amount of Rs. 1,60,78,394/- under section 40(a)(i) of the Act is concerned, though challenged the disallowance made under section 44C of the Act, the assessee did not take any ground before us challenging the disallowance made under section 40(a)(i) of the Act. Not taking such a ground in appeal before us on account of disallowance made under section 40(a)(i) of the Act, in our opinion, amounts to acceptance of such disallowance made by the learned Assessing Officer on account of disallowance under section 40(a)(i) of the Act. On that count, the assessee fails and the disallowance of Rs. 1,60,78,394/- made by the learned Assessing Officer under section 40(a)(i) of the Act, sustains.

20. Now coming to the last addition by disallowing the bad debts in the shape of receiving lesser amount than the recognized revenue in respect of Pali PO and UDRP PO. Contention of the assessee is that for years in the ITRs, the assessee recognized revenue, recorded the same in the books and offered for tax, which were scrutinized and accepted by the department, but ultimately after completion of the project, the NHAI withheld payments of full amounts on the ground of certain deficiencies in service.

21. According to the learned Assessing Officer, the denial of certain amounts by the NHAI to the assessee was due to certain lapses and, therefore, it amounts to penalty and not allowable as deduction under

section 36 of the Act. According to the learned DRP also this amounts to penalty for breach of law during the course of trade and, therefore, the same cannot be allowed as commercial loss or business expense. Learned DRP opined that the claim of the assessee is not adequately proved.

22. Learned AR submitted that when once the assessee declared the entire revenue receivable from NHAI, but subsequently, due to certain lapses or deficiencies, the NHAI does not pay the full amount and there is no possibility of realising the same, there is no real income to the assessee and, therefore, the assessee is entitled to claim the same in the year in which the write off such balance amount.

23. Learned DR, on the other hand, submitted that since the assessee committed breach of contract, NHAI withheld the amounts and, therefore, the assessee cannot claim the same as deduction.

24. On a perusal of the impugned order, we find that the learned DRP held that the assessee has not proved the said claim adequately by demonstrating that the corresponding income was offered to tax in the previous years, and the learned Assessing Officer also did not offer any comments on this aspect in the remand report.

25. Be that as it may, in the facts pleaded by the assessee which are not controverted, we are of the considered opinion that the short payment due to certain lapses on the part of the assessee cannot be equated to expenditure incurred for any purpose which is an offence. Such an expenditure is incurred during the course of business and incidental to it. As rightly pointed out by the learned DRP, the assessee is entitled to claim the same on adequate proof, lest it would amount to taxing the income

which the assessee never realized. Since the learned AR submitted that it can be demonstrated before the learned Assessing Officer, we restore this issue to the file of the learned Assessing Officer to verify whether corresponding income was offered to tax in the previous years, by affording an opportunity to the assessee and if satisfied of such fact, the claim of the assessee shall be allowed. This ground is accordingly treated as allowed for statistical purposes.

26. In the result, appeal of the assessee is treated as partly allowed for statistical purposes.

Order pronounced in the open court on this the 21st day of June, 2024.

Sd/-
(MADHUSUDAN SAWDIA)
ACCOUNTANT MEMBER

Sd/-
(K. NARASIMHA CHARY)
JUDICIAL MEMBER

Hyderabad,
Dated: 21/06/2024

TNMM

Copy forwarded to:

1. M/s. Sheladia Associates Inc., D.No. 9-1-127/4 & 127/4/1 4th Floor,
Amsri Classic, SD Road, Secunderabad.
2. The ADIT (INT TAXN)-2 Hyderabad.
3. The Dispute Resolution Panel (DRP), Bengaluru.
4. The Director of Income Tax (IT & TP), Hyderabad.
5. The Addl. Commissioner of Income Tax (Transfer Pricing), Hyderabad.
6. DR, ITAT, Hyderabad.
7. GUARD FILE

TRUE COPY

ASSISTANT REGISTRAR
ITAT, HYDERABAD