

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ "डी", अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
" D " BENCH, AHMEDABAD

सुश्री सुचित्रा काम्बले, न्यायिक सदस्य एवं
श्री मकरंद वसंत महादेवकर, लेखा सदस्य के समक्ष।
BEFORE MS. SUCHITRA KAMBLE, JUDICIAL MEMBER
AND
SHRI MAKARAND V. MAHADEOKAR, ACCOUNTNAT MEMBER

आयकर अपील सं./ITA No.433/Ahd/2024
निर्धारण वर्ष /Assessment Year : 2021-22

Tehran Jonoob Technical and Construction Company PJS B-705, Mondeal Heights Nr.Wide Angle S.G. Highway Ahmedabad - 380 015 (Gujarat)	बनाम/ v/s.	The ACIT Circle (Intl. Taxation) - 1, Ahmedabad
स्थायी लेखा सं./PAN: AADCT 3091 L		

अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
Assessee by :		Shri Ajay Dholariya, AR
Revenue by :		Shri Sudhakar Verma, Sr.DR

सुनवाई की तारीख/Date of Hearing : 02/07/2024
घोषणा की तारीख /Date of Pronouncement: 10/07/2024

आदेश/ORDER

PER SHRI MAKARAND V. MAHADEOKAR, AM:

This appeal by the Assessee is directed against the order dated 11th January, 2024 passed by the Commissioner of Income Tax (Appeals)-13, Ahmedabad [hereinafter referred to as "the Ld.CIT(A)] for the Assessment Year (AY) 2021-22 in the matter of an appeal filed by the assessee against the assessment order dated 08/02/2023 passed by the Assessing Officer

(hereinafter referred to as "AO") under section 143(3) r.w.s. 144C of the Income Tax Act, 1961 (hereinafter referred to as "the Act").

Facts of the Case:

2. The assessee is a foreign company having a project office in India under the name of Tehran Jonoob Technical and Construction Company PJS (hereinafter referred to as "the Assessee Company"). The assessee is engaged in the business of construction and gas pipeline projects.

2.1. For the AY 2021-22, the Assessee Company filed its Income Tax Return on 15th March, 2022 declaring a business loss of Rs.4,07,37,276/-. The return included a deduction claim towards selling expenses amounting to Rs.56,00,000/- as business expenses under Section 37(1) of the Act.

2.2. During the assessment proceedings, the AO disallowed the claim of selling expenses of Rs.56,00,000/- and added the same to the total income of the assessee on the ground that these expenses were not allowable under Section 37(1) of the Act. Consequently, the business loss to be carried forward was reduced by Rs.56,00,000/-.

3. Aggrieved by this addition, the Assessee Company preferred an appeal before the Ld.CIT(A). The Ld.CIT(A), in the appellate order dated 11th January-2024, upheld the addition made by the AO. Against this order of the Ld.CIT(A), the Assessee Company is now in appeal before us with the following grounds of appeal:

Ground No. 1: General

The learned Commissioner of Income Tax (Appeals), Ahmedabad-13 erred on facts and in law by disallowing expenses of Rs.56,00,000/- on account of selling expenses during the course of first appeal proceedings in the case of Tehran Jonoob Technical and Construction Company PJS (hereinafter referred to as "Appellant") in its appellate order dated 11th January, 2024 passed under section 250 of the Act.

Ground No. 2: Disallowance of Selling Expense of Rs.56,00,000/-

While disallowing the selling expenses, the learned CIT(A) has erred on the following grounds:

- The learned CIT (A) has erred in facts by not considering the clause-7 of the MOU or Consortium deed, which clearly specified that "**this deed shall be operating from the effective date of the contract**" i.e. HPCL contract were applied by the consortium members.
- The learned CIT (A) failed to appreciate the fact that selling expenses have been incurred by the Appellant wholly and exclusively for the purpose of carrying on its business and to expand and getting additional work contract.
- The learned CIT (A) failed to understand that appellant is into the business of construction of pipeline with government companies wherein all bidding of work is done through tender and while applying tender, there is a standard procedure of Earnest money deposit via bank Guarantee and expenses are incurred in connection thereof which are normal/routine business expenses laid out wholly and exclusively for expanding business and getting additional work in form of work contract.
- The learned CIT (A) has failed to appreciate the facts that incorporation of AOP is later in sequence of events than allotment of work order or contract. Since, there is no dispute about the facts that an appellant was not been awarded with the contract, whether a question of Incorporation of AOP is out of place and has no locus standi in the eyes of the law.
- The learned CIT (A) erred in facts by not appreciating the standard procedure adopted in the construction business, Consortium should establish and register itself as legal entity after contract has been awarded

and shall apply for all statutory documents like PAN, GST Registration and Various Licenses etc.

Therefore, the appellant prays that the selling expense of Rs. 56 lakhs be allowed in accordance with Section 37 (1) of the IT Act, 1961."

Arguments of the Assessee On the Grounds of appeal

4. The learned Authorized Representative (AR) for the assessee submitted that the selling expenses of Rs.56,00,000/- were incurred towards the Assessee Company's share in compensation paid to Hindustan Petroleum Corporation Limited (HPCL) for failure to meet eligibility requirements for entering into a tender. The expenses were incurred wholly and exclusively for the purpose of carrying on its business and were therefore allowable under Section 37(1) of the Act.

4.1. The Ld.AR argued that the AO had misunderstood the nature of the consortium and the terms of the MOU. The consortium was between the Assessee Company and Bekem Infra Projects Pvt. Ltd. and had jointly given a bank guarantee of Rs.1,12,00,000/- to HPCL. Due to certain disqualifications, the consortium was unable to meet the tender requirements, resulting in the forfeiture of the bank guarantee. The Assessee Company paid its share of Rs.56,00,000/- towards the forfeiture.

4.2. The Ld.AR contended that the Ld.CIT(A) failed to appreciate the standard industry practices and the sequence of events leading to the incurrance of these expenses. The expenses were genuine business expenses

aimed at securing additional business and should be allowed as a deduction under Section 37(1) of the Act.

5. The Ld.Departmental Representative (DR), on the other hand, relied on the orders of lower authorities and invited our attention towards para 7.4.3 of the Ld.CIT(A)'s order and contented that such expenses are of the Association of Person (AOP) and not that of assessee. For the sake of clarity, we reproduce the same para hereunder:

"7.4.3 From the above, it is observed that the appellant has submitted that the HPCL tender was applied by two parties that are the appellant and M/s Bekem Infra Projects P Ltd respectively. However, the facts available on records suggest that the said tender was applied with the HPCL in the name of TJTC-Bekem Consortium. The facts available on records also suggest that the appellant and M/s Bekem Infra Projects P Ltd has entered into a Memorandum of Understanding (Consortium Agreement) dated 11.02.2020. From the records, it is also observed that the writ application before the Hon'ble Bombay High Court and that before the Hon'ble Supreme Court was filed in the name of "TJTC-Bekem Consortium & Anr". In view of the same, it is important to decide as to whether the said consortium formed represented an "Association of Person (AOP)", i.e. a separate entity for charging tax or not."

6. In rejoinder, the Ld.AR stated that such AOP never came into existence as a separate entity and, therefore, the expenditure was booked in the books of accounts of respective entities. TJTC means the assessee being consortium partner paid 50% towards forfeiture of Earnest Money.

6.1. The Ld.AR also submitted the following documents before us in support of his claim:

1. Copy of HPCL Tender document filed with HPCL indicating that the assessee was a consortium partner of the tender.

2. Copy of Consortium agreement in the form of Memorandum of Understanding, the assessee being one of the parties to it.
3. E-mail correspondence with consortium partner relating to payment of assessee's share of EMD.
4. Copy of writ petition filed in High Court of Bombay against HPCL and copy of dismissal orders.
5. Copy of letter from HPCL in the name of assessee conveying their decision to encash their bank guarantee.

All these documents were also submitted before the Ld.CIT(A).

7. After considering the submissions of both parties and perusal of the material available on record, we find that the selling expenses of Rs.56,00,000/- were incurred by the Assessee Company as part of its business operations to secure contract of HPLC. Correspondence with HPCL and consortium partner is conclusive evidence to support the claim of assessee. These expenses are normal and routine in the industry, where bidding for tenders involves substantial costs, including earnest money deposits and other related expenses.

7.1. Based on the detailed examination of the facts and legal provisions, it is concluded that the Ld.CIT(A)'s assumption regarding the existence of an Association of Persons (AOP) in this case is not substantiated. The appellant's submission and the facts on record indicate that the HPCL tender was applied for by the TJTC-Bekem Consortium, not as a legally separate AOP. The Memorandum of Understanding (Consortium Agreement) dated 11.02.2020 between the appellant and M/s Bekem Infra Projects P Ltd further supports that the consortium was formed solely for

the purpose of tender application and execution. The CBDT Circular No. 7/2016 dated 07.03.2016 provides clarity on the taxability of consortium members, specifically in the context of EPC/Turnkey contracts. The attributes listed in the circular that may prevent a consortium from being treated as an AOP are crucial in this case:

- a) Each member of the consortium was independently responsible for executing its part of the work through its own resources, bearing the risks associated with its scope of work.

- b) Profit or loss was attributable to the performance of the contract within each member's specified area of work.

- c) Men and materials used for any area of work were under the control and risk of the respective consortium members.

- d) The consortium did not have a unified control and management; it was only for inter-se coordination for administrative convenience.

7.2. These attributes indicate that the TJTC-Bekem Consortium operated more as a joint working arrangement rather than a unified entity with common control and management, which are essential elements of an AOP. Therefore, considering the nature of the consortium agreement, the operational structure and the legal precedents, it is evident that the TJTC-Bekem Consortium does not constitute an AOP for taxation purposes. The Ld.CIT(A)'s assumption of the existence of an AOP is therefore incorrect, as the consortium lacks the essential characteristics of an AOP as defined under the Income Tax Act and clarified by the CBDT.

7.3. The AO and the Ld.CIT(A) erred in disallowing the expenses on the ground that they were not incurred for the business purposes of the Assessee Company. The evidence provided by the assessee, including the MOU and the sequence of events, clearly shows that the expenses were incurred wholly and exclusively for the purpose of carrying on the business. An expense is deductible if it is laid out or expended wholly and exclusively for the purposes of the business or profession. It is important that the expenditure should be for the business and not for any other purpose. Therefore, the expenditure incurred by a taxpayer in the course of its business must be allowed if it is for commercial expediency. The test is not the necessity but the commercial expediency of the expenditure. The expression given in section 37 of the Act - "for the purposes of the business" is wider in scope than the expression "for the purpose of earning profits". Therefore, expenditure incurred voluntarily and on the grounds of commercial expediency is allowable.

7.4. Thus, disallowance of selling expenses by the AO and the upholding of such disallowance by the Ld.CIT(A) is not justified. The expenses incurred by the assessee are allowable under Section 37(1) of the Act as they were laid out wholly and exclusively for the purpose of the business.

7.5. In view of the above findings, we allow the appeal filed by the Assessee Company. The AO is directed to delete the addition of Rs.56,00,000/- made on account of disallowance of selling expenses. Consequently, the business loss to be carried forward is to be restored as claimed by the assessee.

8. In the result, the appeal filed by Assessee is allowed.

Order pronounced in the Open Court on 10th July, 2024 at Ahmedabad.

**Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

**Sd/-
(MAKARAND V. MAHADEOKAR)
ACCOUNTANT MEMBER**

अहमदाबाद/Ahmedabad, दिनांक/Dated 10/07/2024

टी.सी.नायर, व.नि.स./T.C. NAIR, Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-13, Ahmedabad
5. विभागीय प्रतिनिधि,अधिकरण आयकर अपीलीय ,राजकोट/DR,ITAT, Ahmedabad,
6. गार्ड फाईल /Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, ITAT, Ahmedabad