IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'H' BENCH, MUMBAI

[Coram: Pramod Kumar AM and Pawan Singh JM]

I.T.A. No.1432/Mum/2014
Assessment year: 2009-10

Peri (India) Pvt. Ltd. ***.....Appellant***
1406, DLH Park, S.V. Road,
Goregaon (West),
Mumbai.
[PAN: AAECP 4115 E]

Vs.

Jt. Commissioner of Income Tax (OSD) ***.....Respondent***
Range ï 8(2), Mumbai.

Appearances by:

M.P. Lohia, Nikhil Tiwri & Ankit Kochar, *for the appellant*
Mallikarjun Utture, *for respondent*

Date of concluding the hearing : January 12th , 2016
Date of pronouncing the order : March 31st, 2016

ORDER

Per Pramod Kumar, AM:

By way of this appeal, the assessee appellant has challenged correctness of the order dated 09.12.2013 passed by the learned CIT(A) in the matter of assessment under section 143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year 2009-10.

2. In the first ground of appeal, the assessee has raised the following grievance:-

> *"On the facts and circumstances of the case and in law, the learned CIT(A) erred in confirming the disallowances of leasehold improvement expenditure of Rs.8,55,485/- without appreciating the facts that the expenditure were incurred by the appellant on leasehold premises to make it more conducive to its business activity."*

3. The assessee is company is engaged in the business of supply of formwork and scaffolding material. During the course of assessment proceedings, the Assessing Officer noticed that the assessee has shown expenditure of Rs.9,00,511/- on account of leasehold improvement. This amount was spent on the premises which was taken on lease towards repairs and furnishing. The claim of the assessee was that this amount has been spent on repairs and is claimed as deduction under section 30(a)(i) of the Act and that the intention was not to bring about any new capital asset. It was stated that the expenditure was incurred on repairing the premises taken on lease so as to make it more conducive for business activity. The explanation so given by the assessee to the Assessing Officer, however, did not satisfy the Assessing Officer. The Assessing Officer noted that Explanation-1 to section 32 provides that "where the business or profession of the assessee is carried on in a building not owned by him but in respect of which the assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the assessee for the purpose of the business or profession on the construction of any structure or doing of any work or in relation to, and by way of renovation or extension of, or improvement to, the building, then, the provisions of this clause shall apply as if the said structure or work is a building owned by the assessee." He was of the view that in view of this specific provision, the expenditure in question is required to be treated as capital expenditure. He was further of the view that such a huge expenditure cannot be categorised as current repairs as claimed by the assessee under section 30(a)(i) of the Act. Accordingly, he proceeded to decline deduction of an amount of Rs.9,00,511/- and granted deprecation @ 5% (being half of 10% i.e. addition made during the second half) which works out to Rs.45,026/- and the balance amount of lease hold improvement i.e. Rs.8,55,485/- was disallowed. Aggrieved by the stand so

taken by the Assessing Officer, the assessee carried the matter in appeal before the ld. CIT(A) but without any success. Learned CIT(A) confirmed the findings of the Assessing Officer and observed as follows :-

> *"3.4 I have considered the facts of the case, submissions of the appellant as against the findings/observations of the AO in the order u/s.143(3) of the I.T. Act. The contentions and submissions of the appellant are being discussed and decided here in under:*
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> *i. The appellant contended that as per lease agreement dated 22.2.2007 and 5.12.2007 it has taken office premises on lease which was renovated. In this connection it is mentioned that in the copy of lease deed filed it is nowhere mentioned that the appellant would be responsible for undertaking repairs of the premises.*
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> *ii. The appellant further contended that the AO has disallowed the amount u/s. 32 read with explanation (1) which can be invoked only when the expenditure is of capital nature. In this regard, it is mentioned that the AO has not only referred to sec. 32 but also to sec. 30(a)(i) and considered the nature of payment made and treated the same as capital in nature. Hence, contention of the appellant is not acceptable.*
>
> *iii. From the details filed is also noted that huge expenditure has been incurred. This expenditure is equivalent to its opening WDV as on 1.4.2008 and hence, I agree with the AO that such a huge expenditure cannot be categorized as current repairs. The ratio of the case laws relied upon by the appellant being based on different set of facts are not applicable to the facts of the appellant's case.*
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> *iv. In view of the above facts and legal position, the disallowance made by the Assessing Officer is upheld."*

4. The assessee is not satisfied and is in further appeal before us.

5. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position. We have noted from the details of expenses produced before us that the expenditure in question pertains *inter alia* for interior designing, for metal, cement & bricks for mockup, for replacing of tiles and allied expenses. In our considered view, these expenses cannot be treated as

capital expenditure, particularly when, given facts of this case, they have limited useful life. As regards the Assessing Officer's reliance upon Explanation-1 to section 32, it could come into play only when the capital expenditure is incurred in connection with a leased premises, but then, merely because it is an expense incurred in connection with the leased premises, it cannot be inferred that it is a capital expenditure. The authorities below have been thus swayed by the considerations which are not relevant. Section 30(a) categorically provides that when a premises used for the purposes of the business or profession, is occupied by the assessee as a tenant and when the assessee has undertaken to bear the cost of repairs to the business, the amounts paid on such repairs is to be allowed as deduction under section 30(a)(i) of the Act. As regards the restriction to the effect that only current repairs can be allowed, it is set out in section 30(a)(ii). It refers to a situation when the premises are occupied by the assessee otherwise than as a tenant. Clearly section 30(a)(ii) does not apply to the facts of the case. The assessee was occupying the premises as a tenant. In this view of the matter, it cannot be said that the repair expenses which are to be allowed as deduction when the assessee is restricted to only current repairs. As stated earlier, on a careful perusal of the material before us, we are satisfied that the repair expenses incurred by the assessee, which have been termed as leasehold improvement, are revenue expenditure in nature. In view of these discussions, as also bearing in mind entirety of the case, we deem it fit and proper to delete the amount of Rs.8,55,485/-. Assessee gets the relief accordingly. Ground no.1 is thus allowed.

6. Ground no.2 was not pressed by the assessee and is dismissed as such.

7. In ground no.3, the assessee has raised the following grievance:-

> ***"On the facts and Circumstances of the case and in law, t****he learned C.I.T. (A) erred in confirming the addition of Rs. 13,49,009/- on account of transfer pricing adjustment without appreciating the facts that it was the prerogative of the assessee to decide whether expenditure or services are required for business expediency or not. Without prejudice to above, appellant also submitted relevant details to prove the bonafide and genuineness of expenses but the Assessing Officer without considering it disallowed the claim of the appellant on the basis of earlier year's T.P.O. order.*

8. Learned representatives fairly agree that this issue is squarely covered by the decision of the co-ordinate bench in assessee's own case for the immediately preceding assessment year i.e. 2008-09. As a matter of fact, in the impugned orders before us, the authorities below have only referred to and relied upon their respective orders for the assessment year 2008-09. In this background, we may refer to the following observations made by the co-ordinate bench of this Tribunal while deciding a similar issue in the immediately preceding year :-

> *"7. We have considered the rival submissions and relevant material on record. It is relevant to take into consideration, for adjudication of the issue, that the assessee was incorporated on 28th Dec. 2006 and this was the first full year of business activity of the assessee, therefore, the assessee was at its initial stage of its business of providing formwork and scaffolding system to the companies engaged in the construction business. The assessee imports the formwork and scaffolding system and then providing the services to its clients. The service activity of the assessee involves the technical work as well as the technical design in specific structures and construction activity. The assessee has produced the drawings regarding the work of RCF Lift at the site of L&T Ltd. It is not the case of revenue that the services claimed to have been availed by the assessee from its AE through their experienced and expert design engineers, otherwise available with the assessee in its own organization. When the assessee was not having such an experienced design engineer to execute the technical services at the site of the clients then the said services which is inevitable for providing services by assessee to its clients was in any case has to be hired from outside. From the record and the design produced by the assessee, we find that the service of providing formwork and scaffolding system involves highly technical activity as well as drawings and designs with precise skills for actual execution of construction work.*
>
> *7.1 The TPO has denied the claim of the assessee on the ground that the assessee failed to establish the need and actual avail of services from the AE. It is pertinent to note that when the services provided by the assessee to its clients involves highly technical services then the nature of business activity of the assessee*

itself demonstrates the requirement of technical design engineer in the field. As the assessee was not having such experienced design engineers in its own organization then availing the services for performing the business activity is otherwise part and parcel of the business activity of the assessee. Thus, the mode and actual service availed by the assessee cannot be doubted keeping in view the nature of business activity and the peculiar fact that the assessee is at its initial stage of providing services that too by the import of the said system and then to provide to the clients. Therefore, when the assessee has produced the relevant record including the nature of work, the design of the work to be carried, the technical nature of the services and assessee's inability to execute such a service on its own then determining the ALP of the expenditure by the TPO at nil is totally contrary to the facts as well as evidence produced by the assessee. The assessee has produced the invoices raised by the AE for providing the services which is based on the total number of hours spent by the engineers of the AE at the site of the clients of the assessee in providing the services. The TPO/Assessing Officer has not disputed the presence of the engineer in India for providing the services, the assessee even produced the record with regard to the actual work executed at the site of L&T Ltd then not accepting the claim of the assessee de hors the evidence, material, record and facts of the case is not justified.

7.2 Though the TPO/Assessing Officer has the power and jurisdiction to verify the price paid by the assessee at arm's length, however, instead of examining whether the price paid by the assessee is at arm's length, the TPO proceeded on the premise that the assessee was not in need of the services and the services was not actually availed by the assessee. When the assessee has produced the sufficient evidence that the said services was an inevitable part of the business activity of the assessee then the action of the TPO is not sustainable. Accordingly, we set aside the orders of authorities below qua this issue. Since the assessee has produced the invoices which is based on the per hour charges actually PERI India Pvt. Ltd. 9 | P a g e spent by the engineer for providing the services to the assessee, therefore, the test of cost sharing arrangement between the assessee and AE as contended by Ld. DR are not at all relevant on this point because the assessee was charged specifically for the hours spent by the engineer for providing the services. It is not a case of performing the composite activities of the assessee and AE by the common staff and then sharing the cost . The cost was incurred by the AE exclusively for providing the services to the assessee then the principle and test as contended by the Ld. DR would not be applicable. The assessee has also produced the comparative cost charged by the AE from other group concerns. In the absence of any contrary record brought by the TPO/Assessing Officer to show that the price paid by the assessee is not at arm's length we allow the claim of the assessee."

9. We see no reasons to take any other view of the matter than the view so taken by the co-ordinate bench in the above said decision. Respectfully following the same, we uphold the grievance of the assessee and delete the

impugned addition of Rs.13,49,009/-. Assessee gets the relief accordingly. This ground of appeal is thus allowed.

10. In the result, appeal is partly allowed. Pronounced in the open court today on 31st day of March, 2016.

Sd/-	*Sd/-*
Pawan Singh	**Pramod Kumar**
(Judicial Member)	(Accountant Member)

Dated: 31st day of March, 2016.
*PBN/**

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*Commissioner*	*(4)*	*CIT(A)*
	(5)	*Departmental Representative*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai