IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1553 OF 2013

The Commissioner of Income Tax-8 … Appellant

v/s

M/s.Veco Engineering Ltd. … Respondent

Mr.Arvind Pinto for the appellant.

Mr.K.B. Bhujle for the respondent.

CORAM: M.S. SANKLECHA &
N. M. JAMDAR, JJ.

DATED : 9TH JUNE, 2015

P.C.:

At the request of the parties, the appeal itself is being disposed of at the stage of admission.

2 This appeal under Section 260-A of the Income Tax Act, 1961 (the Act) by the Revenue challenges the order dated 6 March 2013 passed by the Income Tax Appellate Tribunal (the Tribunal).

3 The concerned assessment year is 2005-06.

4 The appellant urges the following questions of law for our consideration:

(A) Whether the Tribunal was justified in allowing deduction of Rs.13,20,000/- pertaining to Assessment Year 2004-05 without appreciating that as per the mercantile system of accounting, the said expenditure was even otherwise not allowable as a deduction against the profit of the present year ?

(B) Whether the Tribunal was justified in dismissing the Department's appeal and deleting the disallowance to the extent of Rs.64,99,029/- holding that the disallowance intended to be made under Section 40A(2)(b) was apparently made by the Assessing Officer under Section 37(1) and hence the Department's appeal is at infirmity without appreciating the fact that Section 40A of which sub-section 40A(2)(b) is a part, is a non-obstante clause, thereby overriding all the provisions pertaining to computation of income under Chapter, IVD, which includes section 37(1), also and thus there is no contradiction in the Assessing Officer's finding that the expenditure claimed by the assessee under Section 37(1) of the Act on account of the alleged reimbursement of expenses is disallowable in view of the overriding provisions of Section 40A(2)(b) of the Act.

5 The respondent assessee had paid an amount of Rs.78.19 lacs to its sister company as corporate management fee, project management fee, postage, bank charges, telephone expenses, repairs and maintenance and other sundry expenses which were in

the nature of reimbursement for running India operations. During the course of assessment, the respondent assessee filed details of payment made of Rs.78.19 lacs during the subject assessment year. Out of the aforesaid amount of Rs.78.19 lacs, an amount of Rs.13.20 lacs pertains to a payment made in the subject assessment year relateable to an expenditure incurred in the preceeding assessment year. The Assessing Officer did not accept the contention and disallowed the entire expenditure of Rs.78.19 lacs (including Rs.13.20 lacs) under Section 40A(2)(b) of the Act.

6 On appeal, the Commissioner of Income Tax (Appeals), by the impugned order, partly allowed the appeal of respondent assessee. It held that the entire payment of Rs.13.20 lacs pertains to the preceding assessment year and allowed the appeal while it sustained the disallowance at 10% on the balance amount of Rs.64.99 lacs.

7 On further appeal, the Tribunal while dismissing the appeal, observed as under :

> *"7. After hearing the arguments from both the sides, we find that neither the department's side nor the assessee's side has delved into the actual issue of 40A(2)(b). The AO started his observations from Section 40A(2)(b) and ended up making a disallowance on the non-business activity and as seen, the disallowance is as per the issue of expenses not incurred for the purpose of business.*
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> *8. Similarly, even the CIT(A) started his decision on 40A(2)*

(b) but ended up saying that the expenses are vouched and makes an ad-hoc disallowance of 10% on Rs.64,99,029/-. Sections 40A(2)(b) and 37, have different roles to play.

9. *Since neither of the contending parties are on same issue, as to which provision to be followed, even at the time of hearing the department did not ask for the amendment in the grounds, we feel that the appeal filed does not, in effect emanate from the assessment order, hence the appeal filed by the department is at infirmity, hence the same is rejected."*

8 It is a common contention of the parties that, it is Section 40A(2)(b) of the Act which was invoked by the Assessing Officer while passing the assessment order and the challenge to the assessment order by the respondent assessee was also in context of Section 40A(2)(b) of the Act. It is clear from the above observations of the Tribunal that it has not examined the appeal on merits and merely dismissed the appeal on the ground that the revenue ought to have filed an amendment application placing reliance upon Section 37 of the Act.

9 We find that the Tribunal has disposed of the appeal without considering the contentions of the parties before it. The Tribunal was obliged to adjudicate upon the appeal on the basis of the grounds made out by the parties and on examination of the same could have either upheld the order of the Commissioner of Income Tax (Appeals) or set it aside. However, it is not open to the Tribunal to dismiss the appeal without examining the contention of the parties on a ground which is not urged by any of the parties.

We also find that the issue raised by the appellant Revenue with regard to allowing the payment of Rs.13.20 lacs has not been rightly examined by the Tribunal. It merely upheld the order of the Commissioner of Income Tax (Appeals) without considering the grievance of the Revenue.

10 In view of the above, we set aside the impugned order of the Tribunal dated 6 March 2013 and restore to the Tribunal for fresh disposal.

11 Accordingly, the appeal is disposed of in the above terms. No order as to costs.

(N. M. JAMDAR, J.) ***(M.S. SANKLECHA, J.)***