IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL (IT) NO.1742 OF 2017

The Pr. Commissioner of Income Tax-25	…	Appellant
Vs.		
ITD CEM INDIA JV	…	Respondent

Mr. Sham Walve for Appellant
Mr. Tanzil Padvekar for Respondent.

CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.

DATE : JANUARY 20, 2020

P.C. :

Heard Mr. Walve, learned standing counsel Revenue for the appellant and Mr. Padvekar, learned counsel for the respondent.

2. This appeal has been preferred by the Revenue under Section 260-A of the Income Tax Act, 1961 assailing the legality and correctness of order dated 19.10.2016 passed by the Income Tax Appellate Tribunal, Mumbai Bench, 'I', Mumbai (briefly 'the Tribunal' hereinafter) in respect of Income Tax Appeal No.1246/Mum/2015 for the assessment year 2011-12.

3. Two questions have been proposed as substantial questions of law, which are as under:

> "1. Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in confirming the decision of the Commissioner of deleting the disallowance made by assessing officer with respect to administrative expenses to the tune of Rs.1,22,03,188.00 and on account of salary u/s.40(a)(ia) of the Act to the tune of Rs.3,27,57,782.00 even though disallowed amount represented contractual payments covered under Section 194C and the assessee had failed to deduct tax before claim of deduction thereof as expenditure?
>
> 2. Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in deleting the addition

> made by the assessing officer pertaining to salaries and confirmed by Commissioner on account of disallowance u/s.40(ba) of the Income Tax Act, 1961, even though the said payment was made by the assessee which was an AOP to its member, holding that the provision of Section 40(ba) does not get attracted to the present case?"

4. From a reading of the two questions as proposed by the Revenue what is discernible is that there were two disallowances made by the Assessing Officer which were deleted by the first appellate authority i.e., Commissioner of Income Tax (Appeals) as affirmed by the Tribunal. First is administrative expenses to the tune of Rs.1,22,03,188.00 and the other relates to salary for an amount of Rs.3,27,57,782.00.

5. During the course of the arguments, learned standing counsel Revenue has fairly placed before the Court a copy of order of this Court in the case of Commissioner of Income Tax Vs. ITD CEM India JV, (2018) 405 ITR 533 (Bom) and submits that the same issue was gone into by this Court in respect of the same assessee for the assessment year 2008-09. Regarding deletion of the disallowance under the head of 'administrative expenses', it was held that it was a concurrent finding of fact and no substantial question of law arose therefrom. However, on the question of deletion of the amount of salary which was disallowed by the Assessing Officer under Section 40(ba) of the Income Tax Act, 1961, the same was remanded back to the Tribunal for a fresh decision on merit and in accordance with law.

6. We have perused the judgment of this Court in CIT Vs. ITD Cem India JV (*supra*) and we concur with the views expressed therein. However, for the sake of convenience, relevant portion of the decision is extracted hereunder:-

> "22. The Assessing Officer noticed that the assessee had not deducted the Tax at Source while making payment on account of administrative expenses. That was paid by the Joint Venture to their Indian company, namely ITD Cementation India Limited. The payment was hit, according to the Assessing Officer, by Section 40(a)(ia) and thus disallowable. The

Assessing Officer also held that even under Section 40(ba) this expense shall not be allowed because in the case of Association Of Persons, any payment of salary or remuneration by whatever name called, is not allowable.

23. The assessee contended that there were fresh materials to support it's contentions. The Commissioner of Income Tax (Appeals) therefore directed the Assessing officer to consider the further documents and submit a remand report. On remand, the assessee submitted that it reimbursed the expenses (administrative expenses) to ITD Cementation India Limited. They were incurred on behalf of the assessee. Thereafter, debit notes were raised on the assessee by ITD Cementation India Limited. These facts were checked and verified by the Assessing Officer and he found the same to be correct. However, in remand, he could not give any categorical finding, and therefore left the matter to the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals), after considering the remand report and the detailed arguments, sustained the disallowance on account of non deduction of Tax at Source by referring to Section 40(a)(ia). That is how the assessee approached the Tribunal. The assessee inter alia contended that no disallowance has been made in the assessment years 2006-2007 and 2007-2008 which assessment was framed under Section 143(3) of the IT Act. Thus, a consistent stand should be taken and similar treatment should be given to the accounts as in the preceding assessment years. The alternate argument is made and is noted in paragraph 49 of the Tribunal's order. The departmental representative referred to the remand report and thereafter supported the finding of the Commissioner of Income Tax (Appeals). There were written submissions filed by the assessee's representative. In consideration of this issue as well, we note that the Tribunal has made identical observations and to some extent it's observations in paragraphs 15 to 21 accord with paragraphs 50 to 55. However, we are of the firm view that Section 40(ba) was referred in the passing, but not attracted as far as the disallowance of administrative expenses in the sum of Rs.2,39,64,463/-. Once the Assessing Officer has checked debit notes raised by the ITD Cementation India Limited and they were test checked and the amount of expenditure claimed by the assessee was verified and the genuineness of the same has been proved, then, we do not see any reason to interfere with the finding of fact recorded in paragraph 54 of the Tribunal's order. All the more, when Section 40(ba) was not attracted as far as this disallowance is concerned.

24. Despite his persuasive ability, when Mr. Ahuja would submit that even the reframed question (a-1) is the substantial question of law, we are unable to agree with him. We affirm the findings of fact by the Tribunal and dismiss this Appeal to that

extent.

25. However, we have expressed our displeasure and unhappiness at the manner in which the Tribunal approached the matter/issue insofar as the applicability of Section 40(ba) (question no. 10(a) reproduced above) of the IT Act is concerned, we allow this Appeal. We set aside the Tribunal's order to that extent. We restore the issue to the file of the Tribunal for being decided afresh on merits and in accordance with law. The Tribunal shall not be influenced in any manner by it's earlier observations. We also clarify that when we note the rival contentions, beyond that exercise, we have expressed no opinion on the correctness of these contentions. All of them are open insofar as this issue is concerned for being raised before the Tribunal. There will be no order as to costs."

7. Therefore and considering the above, on the point of deletion of the disallowance of the salary amount, the matter is remanded back to the Tribunal for a fresh decision on merit and in accordance with law.

7.1. Needless to say that the Tribunal shall not be influenced in any manner by its earlier decision which we have set aside.

8. The appeal is accordingly disposed of.

(MILIND N. JADHAV, J.) **(UJJAL BHUYAN, J.)**

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