IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH : KOLKATA

[Before Hon'ble Sri M.Balaganesh, AM & Shri Partha Sarathi Chaudhury, JM]

I.T.A No. 365/Kol/2013

Assessment Year : 2009-10

I.T.O., Ward-8(3), Kolkata	-vs.-	M/s. Ruia Sons Pvt. Ltd. Kolkata [PAN : AACCR 3949 Q]
(Appellant)		(Respondent)

For the Appellant : Shri Arup Kumar Sinha, CIT
For the Respondent : Shri Manoj Kataruka, Advocate

Date of Hearing : 02.02.2017.
Date of Pronouncement : 03.03.2017.

ORDER

Per Shri Partha Sarathi Chaudhury, JM

This appeal preferred by the Revenue emanates from the order of ld. CIT(A)-VIII, Kolkata dated 26.11.2012 on the following grounds of appeal.

Ground No.1-15:
"That, on the facts and in circumstances of the case and in law, the CIT(Appeals) erred in allowing in relief to the assessee company holding that the payment of Rs.11,75,82,702 as Standby Letter of Credit charges (SBLC) to M/s. Shalini Properties & Developers Limited was allowable due to commercial expediency; whereas, the CIT(Appeals) has come to such conclusion on misconstrued facts. "
Ground No.16 :
"That, on the facts and circumstances of the case, and in law, the Ld. CIT(A) has erred in deleting the disallowance made by the A. O. of Rs.2,93,4041- u/s 40(a)(ia) of the Act on account of failure to deduct tax from payments of consultancy and professional fees on which tax was deductible u/s 194J of the Act; whereas the assessee had failed to deduct such taxes as per the provisions of the Act and also failed to substantiate with evidences in support of the claim that such payments were only reimbursements and not claimed as deductions. "
Ground No.17 & 18:
"That, on the facts and circumstances of the case, and in law, the Ld.CIT(A) has erred in deleting the disallowance made by the A.O. of Rs.11,32,9251- u/s 40(a)(ia)(B) of the Act on account of failure to deposit within 31st March 2009 the tax deducted at source upto the month of February, 2009 by the assessee from payments u/s 194C and 194J of the Act in contravention of the provisions of section 40(a)(ia)(B) of the Act."

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Ground No.19 :
"That the appellant craves leave to submit additional grounds of appeal, if any, at or before the time of hearing and/or alter, modify, reframe any grounds of appeal at or before the time of hearing."

2. At the very outset, we find that the appeal is time barred by four days and there is a condonation petition filed by the revenue. The ld. AR did not have any objection for condonation of delay. That on the basis of the said condonation petition being filed and no objection of the AR we hereby condone the delay and admit the appeal for regular hearing.

3. The brief facts arising in this case are that the assessee company filed its return of income for A.Y.2009-10 on 24.09.2009 declaring loss of Rs.30,97,3290/-. Notices u/s 143(2) and 143(1) of the Act were issued to the assessee and as and when called for the assessee has produced documentary evidence, books of account, bank statements, agreements etc. The assessment was completed u/s 143(3) of the Act vide order 16.12.2011 on the total income of Rs.11,57,41,510/- after making some additions/disallowances. That in the grounds of appeal appearing before us it is the numerical format as appearing before the ld. CIT(A).Therefore ground no.19 in the grounds of appeal is general in nature and hence no adjudication is required. Ground nos. 1 to 15 relate to the relief granted to the assessee company hold that the payment of Rs.11,75,82,702/- as stand by SBLC to M/s. Shalini Properties & Developers Limited was allowable due to commercial expediency. With regard to this ground the ld. CIT(A) in his order has stated after considering all the facts and circumstances in this case and the remand report of the AO it was observed by the ld. CIT(A) as follows :-

> "In the profit and loss account, an amount of Rs.l1, 75,82-,702/- was debited under the head Bank Charges/Guarantee commission which included payment of Rs.11, 74,12,5001- to M/s: Shalini Properties and Developers Pvt. Ltd. on account of Standby Letter of Credit Charges. However, from the notes contained in the tax audit report, the Assessing Officer observed that (i) "*The company has not taken any loans, secured or unsecured, from Companies, firms or other parties covered in the register maintained under section 301 of the Act and as such clauses (iiitle) to (iii)(g) are not applicable to it,'*

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and (ii) "The Company has not given guarantee for loans taken by others from bank or financial institutions. "

From the details submitted it is noted that the appellant company had given guarantee commission to M/s Shalini Properties and Developers Pvt. Ltd. Thus, it is noted that the report of the Auditor does not commensurate with the accounts and the same was pointed out to the assessee company. The case of the Assessing Officer for making the impugned addition has been that -

the transactions entered into by the assessee company were with group companies having the same management and controlling authority, decisions were taken on behalf of all the companies by only a few;

i) The Directors and the principal persons of the assessee company were only aware of the major decisions taken in the entire group.

ii) Opportunity was provided. to .the assessee to come out clean with a clear picture of the exact disclosure of facts and not fictions. As all the information was within the control and specific knowledge of the assessee, therefore, it was the duty of the assessee to prove and establish the same, which they did not. This brings out a clear picture that the total group companies are engaged in colorable transactions amongst themselves. Similar view had been taken in the case of Logitronics Pvt. Ltd. ITA 4716/DEL of 2009 dated 30.04.2010, ITAT, New Delhi and in the case of Kay Cee Electricals v DCIT (2003) 87.ITD 35 (Delhi).

(iii) the contentions expressed in the copies of the extracts of the board resolution, as claimed by the appellant, has already been duly considered in the assessment stage and strongly refuted in .the assessment order itself with logic as well as relevant case laws.

(iv) It is also pertinent to mention here that it is incumbent on the Assessing Officer to explore the total gamut' of the affairs of the assessee company. The transactions entered into by the assessee company are often not indicative of what meets the naked eye. The intention and actual purpose of the assessee company along with its ramifications on its past, present and future incomes, as well as the effect it is going to case on other affected parties and beneficiaries have to be considered. The Assessing Officer has to lift the corporate veil and bring out the actual purpose of the actions of the assessee company to light. This has also been upheld in the case of CIT vs Indian Express Newspapers Madurai Pvt. Ltd. 238 ITR 70 (Mad.),

Thus, the case of the Assessing Officer is that the group companies were managed by a few, who could manage the affairs to reduce the tax burden through colourable devices.

5.1..9 On the other hand, to support its claim, it was explained that the appellant company is the flagship company of the Ruia Group and during the financial year: 2008-2009, relevant to Asst. Year, 2009-2010 , it had entered into an agreement with Dunlop India Limited with the help and support of M/s Shalini Properties & Developers P Ltd. This agreement with Dunlop India Ltd was for the appellant company to use the 'Dunlop', brand name logo for -a period of ten years commencing from 01.04.2008 to 31.03.iO'18. The manner and influence of M/s Shalini Properties & Developers. P Ltd. in obtaining such brand name by the appellant company and the payment of SBLC charges to Shalini Properties & Developers P Ltd. is the entire ,issue for this addition made by the Assessing Officer. The fact is that prior to Asst. Year 2009-10 i. e. in NY 2008-09, the appellant was

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not having any business activity nor deriving any income and this was also the case in many more previous years.

In sum and substance,. it: is submitted that the appellant was not having source of income prior to A.Y 2009-2010. It was looking for avenues to earn income and steps were being taken by the appellant which is the matter of resolution of the Board of the appellant company as on 20th Feb 2008 placed at page 53 of the paper book. M/s Shalini Properties & Developers p Ltd. are substantial share holders of Dunlop India Limited and the appellant came to an understanding with M/s Shalini Properties & Developers P Ltd. that the latter would help and make all efforts to obtain the 'Dunlop' brand name in favour of the appellant from Dunlop India Ltd. and the appellant would be obliged to bear the SBLC charges to be paid to M/s Shalini Properties & Developers P Ltd. who, in turn, shall pay such charges to ICICI Bank, To this effect, Board of the appellant company passed resolution dated 12th March 2008. Board resolution dated 28th March 2008 was passed by the Board of the appellant which incorporated the agreement entered into by the appellant with Dunlop India Ltd for use of 'Dunlop' Brand and Logo. The Board's resolution also incorporated and thanked M/s Shalini Properties & Developed P Ltd for their efforts in obtaining the brand name from Dunlop India Ltd. and payment of SB Le charges as soon as Mls.Shalini Properties I & Developers P Ltd. requires the sum. Subsequently, when the loan was sanctioned by the ICICI Bank where M/s Shalini Properties & Developers P Ltd. was guarantor, another Board resolution was passed dated 28th of June 2008 for reimbursement of the SBLC charges to M/s Shalini Properties Developers P Ltd.

5.1.10 The A/R further argued that during the year, on use of the 'Dunlop' brand name and logo by way of royalty and SBLC charges the appellant had income of Rs.123643645/-. Not only this, the income earning apparatus of the appellant company being the brand name and logo 'Dunlop' has resulted in much higher income in the subsequent years. Only in respect of royalty income from the use of 'Dunlop' brand name and logo the jump in the royalty income is as under.-

Financial Year	Falcon Tyres	India Tyre & Rubber	Dunlop Goodyear Tyre	Total Rs.
2008-09	33903897	1050305	0	34954202
2009-10	91472539	827016	0	92299555
2010-11	165818393	875089	0	166693482
2011-12	155880408	611723	6314287	162806418
Total Rs.	447075237	3364133	6314287	456753657

The processing fees paid by the company are as under:

Financial Year	Amount Rs.
2008-09	117412500
2009-10	87668527
2010-11	29062500
2011-12	27906250
Total Rs.	26204977

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Referring to the above factual position, the AIR stated that the appellant company was exploring various avenues for augmenting its income and it approached M/s. Shalini Properties and Developers Private Limited to arrange for the assignment of Dunlop brand name and agree to pay/reimburse the standby letter of credit charges to M/s. Shalini. Properties and Developers Private Limited and also agreed to pay a sum of Rs.200 lakhs to Dunlop India Limited directly. Shalini Properties and Developers Private Limited, according to the appellant, informed it that it was the ultimate shareholder of Dunlop India Limited and also it is a guarantor for the loan taken by Wealth Sea Pte. Ltd. Singapore. Shalini was holding the shares of WealthSea Pte. Ltd, Singapore and Wealthsea Pte.Ltd, Singapore, was holding the shares in DIL Rim and Wheel Corporation Limited which was holding the shares of Dunlop India Limited. Thus Shalini was controlling the shares of Dunlop India Limited. In this connection, reference was made to the proceedings of the Board of Directors and the various Resolutions passed by the Directors during the period 20th February 2008 to 28th June 2008 as stated above. The appellant's submissions are that the corporate veil is a mere facade and that the expenditure had been incurred for commercial expediency.

5.1.11. It is noted that the Assessing Officer while disallowing the. claim of the appellant of Rs.117412500/- as SBLC charges paid to M/s Shalini Properties & Developers P Ltd. has held the transaction to be a colourable device to eat into the profit of the appellant company. The Assessing Officer also relied upon the decision in relation to colourful device to hold that the expenses of Rs.117412S00/- could not be said to be laid out or expended wholly and exclusively for the purposes of the business of the appellant company and that the transaction was a colourful device. While holding, the Assessing Officer has considered the agreement and the fact of the case. The Assessing Officer has also gone on to point out the utilization of such loan taken by Wealthsea Pte.Ltd.

In the remand report the Assessing Officer has not mentioned anything new than what has already been I stated in the assessment order and in fact the Board's resolution which was considered as a fresh evidence has been brushed aside by the Assessing Officer by treating the same to be part of the assessment record and not fresh evidence. M/s Shalini Properties & Developers P. Ltd held 100% shares in Hiland Traders Pvt. Ltd. which, in turn, held substantial shares in Dunlop India Ltd. M/s Shalini Properties & Developers P. Ltd. also held 45% in the equity capital of Wealthsea Pte. Ltd. which held the entire share holding in DIL Rim & Wheels Corpn. Ltd. which, in turn, held substantial shares in Dunlop India Ltd. Therefore, Shalini Properties &, Developers Ltd. was having substantial interest in Dunlop India Ltd.. Accordingly, Wealthsea Pte Ltd. had approached ICICI Bank, Singapore which was agreeable to release funds provided a Standby Letter of Credit was given by Shalini Properties & Developers P. Ltd. being the substantial share holder of Wealth sea Pte. Ltd. M/s Shalini Properties & Developers P. Ltd were not having any income and in order to provide such finance charges it approached the appellant company. The resolutions passed by the Board throw light to the affair of. the appellant company and the method adopted for source of earning by the appellant company. The fact that the appellant was looking for a source of income and in previous Asst. Years not having any income cannot be denied. It is also true that M/s Shalini Properties & Developers P Ltd. being substantial shareholders of Dunlop India Ltd. had mutual understanding prior to the agreement made by the appellant company with Dunlop India Ltd. It was in the influence and effort of M/s Shalini Properties & Developers P Ltd.

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that the 'Dunlop' brand name was obtained on lease for a period of ten years by the appellant. It is also a fact that from thy use of the 'Dunlop' brand name, the appellant company has earned substantial income on account of royalty, service charges in the impugned Asst. Year and increasing in subsequent years. It is also illustrated in the chart given above that purely on royalty income-from use of the 'Dunlop' brand name in comparison to reimbursement of SBLC charges in three years, the income has outshown the expenses substantially putting the appellant company in a guided seat and showing the actual picture of the understanding with M/s Shalini Properties & Developers P Ltd. Dunlop India Ltd. is doing business of manufacturing of tyres and tubes and has been constantly in the news and for steps taken for revival of the same. Prior to the acquisition of Dunlop India Ltd. By the Ruia Group the same was a sick unit and subsequently it revived and came out from being a sick unit. The transaction of payments made by the appellant company of the SBLC charges, processing fees/finance charges by whatever name it may be called are a larger picture to the revival of the group company and mainly Dunlop India Ltd. which was to be starting production, up and in running. The arrangement made between the group companies, share holder company has resulted in business in these companies and giving rise to capital generation for benefit of Dunlop India Ltd, as a whole. So, it is incorrect to say that Dunlop India Limited has not been benefited from the finances obtained by Wealthsea Pte. Ltd .. in terms of which the appellant company has paid processing fee, SBLC charges to M/s Shalini Properties & Developers P. Ltd. who in turn has paid the same to ICICI Bank Ltd. . '

5.1.12 One of the allegations of the Assessing Officer is that it is a colourful device which .resort to eat away the profit of the appellant company or diversion of the income. On the facts of the case, it seems to be unusual that at one instance the company would be earning income from utilization of resources from its group companies and on the other hand resort to a colourful device to eat away into the income. It is unusual because it is' not the case of the appellant company that the income is being earned from third party or it is a fixed income being earned from previous year and in order to eat: into such income a method or a resort is being adopted which is colourful in nature. Here, it is from the AN 2009-10 that the source of income has been generated and Board's resolution is absolutely clear as to the gamut of affairs of the appellant company and the involvement of M/s Shalini Properties & Developers Ld. is not in doubt. Even before the agreement was made between Dunlop India Ltd. and ;the appellant company for use of the 'Dunlop' brand name and logo, M/s Shalini Properties & Developers P. Ltd. had made an understanding with the appellant for providing of SBLC charges and once this fact is undisputed by the Assessing 'Officer, then there can be no question raised as to the colourful device or a method adopted to eat into the profit. A Board's resolution is no doubt an important piece of evidence and even though it is made by the Board of Directors, it has to be considered and taken cognizance of and cannot be brushed aside. The Supreme Court in the case of Union of India Vs Azadi Bacho Andolen 263 ITR 706 (SJ~) after considering the decision of the Supreme Court in the case of MacDowell 154 ITR 148 made a distinction between tax avoidance and tax planning. it was held:-

"having anxiously scanned MacDowell' s case, we find no reference therein to having dissented from or overruled the decision of the Privy Council in the Bank of Chettinands case 8 ITR 522 (PC). In any the principles appears to have been reiterated with approval by the Constitution Bench of this court in Mathuram's case 8 SCC 667 para

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12. We are, therefore unable to accept the contention of the respondent that there has been fl very drastic change in the final jurisprudence in India, as would entail a departure. In our judgment from Westminister's case to Bank of Chettinands case to Mathurams case despite the hiccups of Maclrowell's case, the law has remained the same. We are unable to agree with the submission that an Act which is otherwise, valid on law can be treated non-est merely on the base of some underlying motive supposedly resulting in some economic detriment or prejudice to the national interest as perceived by the respondents." In the case of IRC vs Fisher Excecutor 1926 AC 395 it was held " My Lords the highest authorities have always recognized that the subject is entitles to arrange his affairs as not to attract tax imposed by the crown, so far as he can do so within the law, and that he may legitimately claim the advantage of any expressed terms or of any omission that he can find in his favour in taxing Act. In so doing he neither comes under liability nor incurs blame.' In the case of Sankarlal Balabhai 69 ITR 186 (Guj) it was held "Tax avoidance postulates that the assessee is in receipt of amount which is really and in truth his income eligible to tax but on which he avoids payment of tax by some artifice or device. Such artifice or device may apparently show the income as accruing to another person, at the same time making it available for use and enjoyment to the 'assessee as in the case falling within section 44D or mask the true character of the income by disguising it as a capital receipt as in a case falling within section 44E or assume diverse other forms. But there must be some artifice or device enabling the assessee to avoid payment of tax on which is really and in truth his income. If the assessee parts with his income producing asset, so that the right to receive income arising from the asset which therefore belonged to the assessee is transferred to and vested in some other person, there is no avoidance of tax liability, no part of the income from the asset goes into the hands of the assessee in shape of income or under any guise." .'

5.1.13. Reliance has been placed by the Assessing Officer in the case of Kaycee Electrical Vs. DCIT 87 ITD 35 (De i) in which case the facts were that the entire transaction which could generate income were kept secret and not entered into the regular books of account it was held to be undisclosed income. The principle laid down in the said decision was where. any assets is found in the possession and control of the assessee it is not recorded in the regular books of accounts maintained by him then the onus shift upon the assessee to prove the same and on such transactions it was held to be colourful device. Further, in the case of CIT Vs. Indian Express Newspapers (Madurai) P.Ltd. 238 ITR 70 (Mad.) as relied upon by the Assessing Officer, in the said case, it was decided that where the borrowers borrowing money was diverted to the associate concern the interest payment on such borrowers was not deductible u/s 36(1)(iii) and it was held to be a colourful device. The facts of the case are distinguishable and not similar to the facts of the case of the appellant. In the case of Atherton Vs British Insulator and Helsby Cables Ltd. 10 Tax cases 155, 191, it was held - "a sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade ".

5.1.14 Moreover, the facts and material brought on record show that the group of the appellant company are engaged in the manufacture of tyres and It had obtained the benefit of use brand name of "Dun lop India Ltd." and it had increased its revenue by way service charges received from such companies. Information and material evidence brought on

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record also show that the company, M/s Shalini Properties and Developers Ltd., had been controlling the shares of Dunlop India Ltd. The appellant company had furnished copies of resolutions to show that the said company, M/s Shalini Properties & Developers had been instrumental in arranging the transaction of obtaining the rights over the brand name of "Dunlop" to the appellant company. On the other hand, the Assessing Officer has not brought any material on record to show that the transaction is a sham or that the group of companies have adopted a colourable. device to defraud the revenue. Merely because the appellant company had no guarantor or that the appellant had not taken any loan or merely because the expenditure had been debited in the profit and loss account under a different nomenclature) the transaction could not be called into question as a colourable device. In Birla Cotton Spinning & Wvg. Mills Ltd. vs. CIT (1971) 82 ITR 166(SC), it has been held that "It must be remembered that the earning of profits and the payments of taxes ,are not isolated and independent activities of a business. These activities are continuous and take place from year to year during the whole period for which the business continues. If the assessee takes steps for reducing its liability to tax: which results in more fund being left for the purpose of carrying on the business there is always a possibility of higher profits. The expenditure which was incurred by the assessee was, therefore, allowable - Birla Cotton Spg. & Wvg. Mills Ltd vs. CIT (1967) 64ITR 568(Cal) followed. On the facts and in the circumstances of the case, what is to be examined is whether the transaction is a revenue expenditure and if so, whether the said expenditure had been laid out wholly and exclusively for commercial expediency. As the Income- tax Act does not define the terms "capital/expenditure" and "revenue expenditure " one has to depend upon their natural meaning as well as decided cases. General principles to decide whether an expenditure is capital or revenue in nature, the following points of distinction are relevant.

(a) Capital expenditure is incurred in acquiring, extending or improving a fixed asset, whereas revenue expenditure is incurred in the normal course of business as a routine business expenditure;

(b) Capital expenditure produces benefits for several years, whereas revenue expenditure is consumed within a previous year;

(c) Capital expenditure makes improvements in earning capacity of a business. Revenue expenditure, on the other hand, maintains the profit making capacity of a business.

(d) Usually capital expenditure is a non-recurring outlay, whereas revenue expenditure is normally a recurring outlay.

(e) In order to determine whether expenditure is capital or revenue in nature, the fact that it is a lump sum payment or periodic payment is not important.

(f) For determining whether expenditure is of capital or revenue nature, It is immaterial whether expenditure is made out of money withdrawn from capital or out of profits- Schenectady Beck India Ltd. v. CIT [2004] 91 ITD 23 (Mum.).

It is well-settled that capital expenditure cannot be attributed to revenue and vice versa. Secondly, it is equally clear that a payment in lump sum does not necessarily make the payment a capital one. It may still possess revenue character in the same way as a series of payments. Thirdly, if there is a lump sum payment but there is no possibility of a recurrence, it is probably of a capital nature though this is by no means a decisive test. Further, if the payment of a lump sum closes the liability to make repeated and periodic payments in the future, it may generally be regarded as a payment of a revenue character.

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Lastly, if the ownership of the money whether in point of fact or by a resulting trust is still with the taxpayer, then there is acquisition of a capital asset and not an expenditure of a revenue character as per ratio laid down in Indian Mosasses Co.(P.) Ltd. v. CIT [1959] 37 ITR 66 (SC), Hylam Ltd. v. CIT [1973.1,87 ITR 310 (AP). Though the dividing line between a capital and revenue ,expenditure is real, yet sometimes it becomes difficult to draw. Therefore, a decision is to be taken in each case in the light of the facts and surrounding circumstances. However, the following judicial pronouncements should be kept. in view while determining whether a particular expenditure is a capital or revenue in nature. In Empire Jut Co. Ltd. v. CIT [1980] 124 ITR 1 (SC), it has been held that "if the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business-to be carried on more efficiently or profitably while leaving the fixed capita untouched, the expenditure would be on revenue account, even though the advantage-may endure for an indefinite future. The test of enduring benefit is, therefore, not a certain or conclusive test and it cannot be applied blindly and mechanical without regard to the particular facts and circumstances of a given case." In the instant case, the payment has not been made for acquiring a brand name, but for facilitating for acquisition of the brand name, which in turn, made substantial improvement in earning capacity of the appellant's business. The payment is in the form of a brokerage or commission or service charges *(not-withstanding its liability for TDS), Therefore, on the facts and in the circumstances of the case, in my view, the expenditure incurred by the appellant company for the payment made to M/s. Shalini Properties & Developers Pvt.Ltd is a revenue expenditure.*

5.1.15. Now, the issue remaining for consideration is whether the expenditure is allowable as business expenditure under section 37(1) of the Act.

In CIT v. Navsari Cotton &\'Bilk Mills Ltd.(135 ITR 546(Guj), the Hon'ble Gujrat High court have evolved the: following tests(which can be divided into two categories positive tests and negative tests) for deciding whether a particular expenditure can be termed as revenue or capital expenditure. One (at least one) of the positive tests must nod its head and none (not even one) of the negative tests must do so in order to affirmatively hold that the expenditure is deductible under section 37(1).

The *positive tests* are: If the expenditure is incurred: (i) with a view to bring profits or monetary advantage either today or tomorrow; (ii) to render the assessee immune from impending or reasonably apprehended litigation; (iii) in order to save losses in foreseeable future; (iv) for effecting economy in working which may pay dividends today or tomorrow; (v) for increasing efficiency in working; (vi) for removing inefficiency in the working; (vii) where the expenditure incurred is such as a wise, prudent, pragmatic and ethical man of the world of business would conscientiously incur with an eye on promoting his business prospects, subject to the expenditure being genuine and within reasonable limits; (viii) where it is incurred solely by way of a civil duty owed by the assessee to the society having regard to the nature of his business which brings him profits. but results in some detriment to the public at large either by way of health hazard or ecological pollution or serious inconvenience to the citizens with a view to mitigate the aforesaid evil consequences and consequences of a like nature, subject to its being genuine and within reasonable limits.

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The *negative tests* are: If the expenditure incurred: (i) for a mere altruistic consideration; (ii) mainly in order to satisfy his philanthropic urges; (iii) mainly in order to win applause or public appreciation; (iv) for illegal, immoral or corrupt purposes or by any such means or fix any such reasons; (v) mainly in order to oblige a relative or an official; (yi).mainly to earn the goodwill of a political party or a politician; (vii) mainly to show off or impress others with his affluence or for ostentatious purposes; (viii) apparently for a factor listed as a positive factor, but in reality for one of the obnoxious purposes listed as a negative factor; (ix) on a nebulous plea or pretext by way .of an alibi in the name of winning profits in remote future but really for one or the ether tor the purpose listed as negative tests; (x) it is a bogus fictitious or sham transaction; (xi) it is unreasonable and out of proportion; .xii) it is an expenditure merely with a view to avoid tax liability without any genuine purpose or reason in good faith and (xiii) the advantage to be secured by incurring the expenditure is of the nature of a remote possible advantage depending on "ifs" and "buts" and, if at all," to be secured at an uncertain future date which may be considered too remote.

As pointed out earlier, one, of the positive tests must be attracted and none of the negative tests should. be satisfied in order to claim deduction under section 37(1) of the Act. In this case, the expenditure has been incurred with a view to bring profits or monetary advantage either today or tomorrow; the expenditure incurred is such as a wise, prudent, pragmatic and ethical man of the world of business would conscientiously . incur with an eye on promoting his business prospects, subject to the expenditure being genuine and within reasonable limits. Therefore, more than one of the .positive tests have been proved. Coming to the negative tests, it may be mentioned again that the Assessing Officer has not brought any material evidence on record that it is a bogus fictitious or sham transaction; it is unreasonable and out of proportion; and that it is an expenditure merely with a view to avoid tax liability without any genuine purpose or reason in good faith. Therefore, none of the conditions of the negative tests has been satisfied in this case.

In CIT v, Chandulal Keshavlal & Co. [1960] 38 ITR 601(SC) the ratio laid down by the Hon 'ble supreme-Court is that if a payment or expenditure is incurred for the purpose of the trade of the assessee, it is deductible even if it may bring a benefit to a third party. Further, in applying the test of commercial expediency for determining whether an expenditure is wholly and exclusively laid out for the purpose of the business, reasonableness of the expenditure has to be adjudged from the point of view-of businessman and not of the revenue as held in Clef v, Walchand & Co. (P) Ltd.,,[1967] 65 ITR 381(SC). In Sassoon J. David &, Co.(P.) Ltd. v. CIT' [1979]118' ITR 261 (SC). It has been held that the assessee can claim deduction under section 37(1), even though there is no compelling necessity to incur such expenditure. In Goodyear India Ltd. v. ITO[2000] 73 ITD 189/68TTJ(Delhi)™3309 it has been held that expenditure incurred to get right to use licence for limited period (where the assessee-company, manufacturing tyres, entered into an agreement with a foreign company for technical know-how for manufacture of radial tyres and the assessee got the right to use the licence for a fixed period of 8 years) is deductible.

5.1.16. In view of the above discussion and after perusing the facts and circumstances of the case, analyzing the reported cases cited both by the Assessing Officer and the appellant company, after considering the ratio laid down by the Hon'ble Supreme Court in

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the case of Union of India Vs. Azadi Bachao Andolan cited supra and also in view of the under mentioned summerised points of reasons I am of the opinion that the expenditure incurred by the appellant company in making payment under the head SBLC charges of Rs.l1,74,12,500/- to Shalini Properties and Developers Pvt Ltd; is in consideration of commercial expediency of the business of the appellant company and is allowable as deduction under section 37(1) of the IT Act:-

(i) M/s Shalini Properties &. Developers Pvt. Ltd. has arranged for lease of Dunlop Brand name, logo etc. in favor of the appellant company for the period of 10 years. As stated in the Board of Director meeting proceeding dated 12.03.2008 M'/s Shalini has agreed to arrange the brand name and logo of Dunlop in favor of the appellant provided the appellant under takes to pay SBLC charges. In the said board meeting the director decided that taking of Dunlop brand name on lease would result in substantial income to the appellant company hence the payment of SBLC charges would be in the interest of the company. In-the board meeting of the appellant company held on 28.03.2008 the board of director has resolved that payment made to M/s Shalini is quid pro quo for the assignment of the Dunlop brand name etc. The board 6fdirector in their board meeting on 28.06.2008' has agreed that SBLC charges are paid to M/s Shalini for their efforts in arranging the assignment of brand name and logo of Dunlop from Dunlop India Ltd. in favor of the appellant.

(ii) The Id AR has submitted that the appellant company has paid to M/s Shalini Properties & Developers Pvt. Ltd. and Dunlop India Ltd. Rs. 26,20,42,777/- up to F.Y. 2011-12 as SBLC and for 2011-12 as SBLC and for use of brand name. Whereas the appellant has earned Rs. 45,67,53,657/-up to said period by sub leasing Dunlop brand. This shows that the decision of board of directors of appellant company to approach M/s Shalini Properties & Developers Pvt. Ltd. for assignment of Dunlop brand name and logo was a commercially prudent decision.

(iii) The Hon'ble Supreme Court in the case of SA Builders Ltd Vs CIT (Appeals) (2007) 288 ITR I· has confirmed the following observation of the Hon'ble Delhi High Court on page 9 of the report :-

We agree with the view taker) by the Delhi High Court in CIT V Dalmia Cement (B.) Ltd (2002) 254 ITR 377 that once it is established that there was nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself.) the Revenue cannot justifiably claim to put itself in the arm chair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No Businessman can be compelled to maximize his profit. The Income Tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman-would act. The authorities must not look at the matter from their own view point but that of a prudent businessman would act."(emphasis supplied)

(iv) The Hon'ble Madhya Madhya Pradesh High Court in the case of Addl. CIT v Kuber Singh Bhagwandas (1979) 119 fIR. 379 (MP) has held that voluntary donation given in Chief Minister Fund for 'obtaining permit for export of gram is an allowable expense. This decision of Hon'ble Madhya Pradesh High Court has been approved by Hon'ble Supreme Court in the case of Sri Venkata Satyanarayana Rice Mill Contractors Co. v CIT (1997) 113 ITR 101. In that case the Hon 'ble Supreme Court has held as follows :

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"Business expenditure - Contribution made to District Welfare Fund - The correct test of allowability of such expenditure is commercial expediency and not whether it was compulsory or; not. Contribution was not illegal or opposed to public policy but was for the benefit of the general public - Requiring payment to be made for a just cause which would entitle a businessman to obtain a license or permit cannot be regarded as being against the policy - Any contribution made by an assessee to a public welfare fund which is directly connected to related with the carrying on of the assessee's business or which results in the benefit to' the assessee's business has to be regarded as an allowable deduction under s. 37(1) - Assessee doing business of export of rice and contributing 50 paise per quintal to District Welfare maintained by the 'District Collector, without which contribution he would not get permit, is directly: connected with assessee's carrying on of business

- Such contribution is not against public policy, and is allowable under section 37(1)"

(v) The Hon'ble Supreme Court in the case of Vodafone International Holdings B.V. v UOl (2012)341 ITR 1 has considered the McDowell case and it's other decisions and held by majority as follows :-

"(i) It is the task of the court to ascertain the legal nature of the transaction and while doing so it has to look at the entire transaction as a whole and not adopt a dissecting approach,

(ii) All tax planning is not Iegitimate or impermissible.

(iii) There is no conflict between McDowell and Azadi Bachao or between McDowell and Mathuram Agrawal.

(vi) In view of above discussed legal and factual position I am of the view that there is a commercial expediency in payment of SBLC charges of Rs. 11,74,12,500/- by the appellant to M/s Shalini Properties & Developers Pvt. Ltd. and hence this payment is an allowable expense. Accordingly, ground nos. 1 to 15 of the appeal of the appellant are decided in favor of the appellant and the addition of Rs. 11,74,12,500/- made by the AO by way of the disallowance of SBLC is hereby deleted. Thus, the ground nos. 1 to 15 of the appeal of the appellant are allowed. "

4. We have perused the case records and heard the rival contentions and considered the facts and circumstances of the case in its entirety. We do not find any infirmity in the findings of the ld. CIT(A) which is a speaking order in itself. There is a commercial expediency in payment of SLBC charges by the assessee to M/s. Shalini P.Ltd and hence payment of rs.11,74,12,500/- is an allowable expenditure. Therefore the deletion of disallowance made by the ld. CIT(A) is sustained. This ground appearing in ground nos. 1 to 15 is decided in favour of the assessee.

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5. The next ground of appeal as appearing in the grounds of appeal is against the deletion of disallowance made u/s 40(a)(ia) of the Act on account of sustenance of professional charges of Rs.2,93,404/-.

6. This ground of appeal is directed against the disallowance made under sec. 40(a)(ia) on account of consultancy and professional charges of Rs.2,93,404/-.

7. During the course of assessment proceedings, the appellant company furnished details of tax deducted at source from the payments made regarding Consultancy & Professional fees. From such details, the Assessing Officer noted that out of the total payment made for Rs.9,24,547/-, tax was deducted at source on Rs.6,31,143/- only. It was explained on behalf of the appellant that as the balance of Rs.2,93,404/- was 'out of pocket expenses which was reimbursable, tax was not deducted on the same. However, the Assessing Officer observed that as per the clarifications issued by CBDT in· respect of Circular No.715 dt 08.08.1995, reimbursements of payments referred to under sec. 194C and 194J could not be deducted out of the bill amount for the purpose of tax deduction at source. Therefore, the Assessing Officer concluded that the appellant company ought to have deducted tax at source on the reimbursable out of pocket expenses of Rs.2,93,404/- which it failed to do, thereby attracting the provisions of section 40(a)(ia) of the LT. Act, 1961. In this background, the amount of Rs.2,93,404/- was disallowed and added back to the. total income of the appellant.

8. The appellant, on the other hand, submitted that the appellant during the course of assessment proceedings . has furnished details of consultancy and professional charges paid of Rs.9,24,547/- out of which tax was deducted on amount of Rs.6,31,143/- and on the remaining expenses which was reimbursed, no tax has been deducted at source. It is vehemently argued that provision of section 194J on such type of expenses was not applicable and simultaneously there was no applicability of section 40(a)(ia) of the I.T. Act. The appellant also placed reliance on the decision of the Special Bench of the ITA T, Vishakhapatnam in the case of Merilyn Shipping Transports vs ACIT ITA NO.

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477/VIZ/2008, wherein it has been held that only those amounts which are payable at the end of this year can be disallowed and where such payments have been made there is no question of attracting section 40(a)(ia) of the I.T Act. It is stated that in the appellant's case as it has already been stated and admitted that expenses were paid by way of reimbursement, therefore the payments have been made and as per the ratio laid down in the decision of the Special bench no additions are called for. I find much force in the arguments advanced on behalf of the appellant company. Section 40(a)(ia) is applicable only in respect of TDS defaults if amount is payable. If amount is actually paid and taxis not deducted under sections 193, 194A, 194C, 194 H, 194- I, and 194 J either at the time of payment or at the time of giving credit to the recipient, section 40(a)(ia) is not applicable. In view of the decision of the Special Bench of the Hon'ble ITAT, Vishakhapatnam (supra) relied upon by the appellant and also in view of the ratio laid down by the Hyderabad Tribunal in the case of Teja Constructions v. CIT [2010] 39 SOT 13 (Hyd.)(URO), it is noted that going by the rule of strict interpretation, the default with reference to actual 'payment' of expenditure would not entail disallowance.

9. In the light of the above discussion and observation and perusing the facts of the case and keeping in view the emerging legal position as above and also for the following summerised reasons, this ground of appeal is decided accordingly :-

(i)The appellant has paid professional charges of Rs. 9,24,547/- which includes payment of out of pocket expense of Rs. 2,93,404/-.

(ii) As per the Id AR the appellant has paid Rs. 2,93,404/- before the end of the year hence, in view of decision of special bench of ITAT in the case of Merlyn Shipping Transports v ACIT ITA No. 477/VIZ/2008 this payment cannot be disallowed by applying section 40(a)(ia).

(iii) Since in the remand report the AO has not commented on correctness or otherwise of submission of ld AR hence AO has directed to verify and allow all the payment which were made during the year and to disallow only those payment which were

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outstanding as on last day of the accounting year. Accordingly this ground is decided in favour of the appellant as above.

10. At the time of hearing before us, the ld. DR referred to the case law of the Hon'ble High Court of Calcutta in the case of CIT vs Crescent Export Syndicate 262 CTR 525 (Cal) and he stated that the Hon'ble Calcutta High Court have over ruled the decision in the case of Merilyn Shipping & Transports vs. Addl. CIT (2012) 136 ITD 23/20 taxmann.com 244 (Vishakhapatnam). In the case of Crescent Export Syndicte the Hon'ble Jurisdictional High Court had opined that the provisions of section 40(a)(ia) of the Act are application not only in respect of payments outstanding at the end of the year but also in respect of payment which are paid during the year without making TDS. The ld. AR reiterated the submissions made before the subordinate authorities and relied on the order of ld. CIT(A).

11. We have perused the case records and heard the rival contentions analyzing the facts and circumstances herein and we arrive at the considered view that the majority ruling in the case of Merilyn Shipping and Transports (supra) was that if all amounts have been paid then no disallowance can be made u/s 40(1)(ia) of the Act if the amounts are found to be payable as on the year end then no disallowance can be made u/s 40(10(ia) of the Act. That in effect the Tribunal analyzing the section 40(a)(ia) of the Act had held that in the case of omission to deduct tax even the genuine and admissible expenses are to be disallowed. But it sought to remove the rigour of law by holding that the disallowance shall be restricted to the money which is yet to be paid. However, we have observed that in the case of Crescent Export Syndicate (supra) jurisdictional High Court observed that there can be no denial that the provision in question is harsh. But there is no ground which was not intended by the Legislature. The law was deliberately made harsh to secure compliance of the provisions requiring deduction of tax at source. It is not the case of an inadvertent error and accordingly the Hon'ble High Court held that the provision of section 40(a)(ia) of the Act are applicable

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not only to the amounts which is shown as payable on the date of balance sheet but it is applicable to such expenditure which becomes payable at any time during the relevant previous year and was actually paid within the previous year. In the result the question is decided in favour of the revenue and against the assessee. Respectfully following the decision of the Jurisdictional High Court of Calcutta we decide this issue in favour of the revenue and reverse the findings of the order of the ld. CIT(A). Therefore this ground is decided in favour of the revenue.

12. The next ground nos. 17 and 18 as appearing in the grounds of appeal relate to the deletion of disallowance made by the AO of Rs.11,32,925/- u/s 40(a)(ia) of the Act on account of failure to deposit within 31st March, 2009. The tax deducted at source of the month of March, 2009 by the assessee from the payments u/s 194C and 194J of the Act in contravention of the provision of section 40(a)(ia)(b) of the Act.

13. At the very outset, we find on perusal of the case records that the grievance of the revenue should not be that the ld. CIT(A) has deleted the entire disallowance of Rs.11,32,925/- but in fact as appearing in the order of ld. CIT(A) we find that the ld. CIT(A) has deleted Rs.9,38,408/- and has confirmed Rs.1,94,517/-. Therefore in all practicability the grievance of the revenue on this issue should be restricted to Rs.9,38,408/- which is the relief granted to the assessee.

14. In these grounds, the revenue is agitated by the disallowance of Rs..11,32,925/- u/s 40(a)(ia) of the IT Act for default of non-deduction of tax at source under sec. 194I and 194C of the Act.

15. The Assessing Officer on .perusal of the Annexure C of the form 3CD annexed to the Tax Audit Report noticed that the assessee company had defaulted in payment of tax deducted in respect of certain cases. Out of all these cases, there were cases where the default was of the provisions of section 40(a)(ia)(B), i.e. the company had deducted tax within the month of February, 2009 and deposited the same in Central Government

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account after the end of the financial year, i.e. after 31.03.2009, whereas the same should have been deposited within 31.03.2009. The total amount of such deduction works out to Rs.73,556/- U/S 194J and Rs.120,961/- u/s 194C. According to the Assessing Officer, the Authorised Representative of the appellant company did not furnish details of the payments in respect of which these defaults were made, and, therefore, the amount of payment on which such default on payment of the deducted amount was made by the appellant had to be calculated backwards and it worked out to Rs.6,49,210/- u/s 194J and Rs.4,83,715/- u/s 194C. Thus, the total sum of Rs.(649210 + 483715) = Rs.11,32,925/- was disallowed and added back to the total income of ' the assessee company.

Before CIT(A), it is submitted that the Assessing Officer noted from the tax audit report that there was violation of the provisions of the section 40 (a)(ia) of the I.T. Act in so far that the tax which has been deducted within the month of Feb 2009 has not been deposited by the end of the financial year under the provisions of section 194C and 194J of the I.T. Act and the Assessing Officer by calculating backwards of the default in TDS calculated an amount of Rs.6,49,210/- u/s 1941and Rs.4,83,7151 u/s 194C to be in violation of the provisions of section 40(a)(ia) of the I.T Act. It is submitted that the issue is covered by the decision of the' Calcutta High Court in the case CIT vs Virgin Creations in ITAT no. 302 of 2011 which has held that the amendment made in section,40(a)(ia) by the Finance Act 2010 as retrospective in nature. Thus, it is contended that even if the payments are made before the due date of filing of return there cannot be any addition u/s 40(a)(ia) of the IT Act.. It is thus submitted that the addition made by the Assessing Officer be deleted.

The CIT(A) has carefully considered the facts of the case and the submissions put forth on behalf of the appellant company. The CIT(A) is not fully convinced with the arguments of the appellant that in view of the amendment made in section 40(a)(ia) of the Act, the payments made' prior to due date for filing of return of income cannot be disallowed. The amended provisions cover the TDS made in the month of March and

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payable in April and not for the TDS, which had already been made in the month of February and earlier months. TDS made up to February of the financial year had to be deposited within the month of March. The Assessing Officer had found that the company deducted tax within the month of February, 2009 and deposited the same in Central Government account after the end of the financial year, i.e. after 31.03.2009, whereas the same should have been deposited within 31.03.2009. The total amount of such deduction works out to Rs.73,556/- u/s 194J and Rs.l20,961/- u/s 194C of the Act. The disallowances to the extent of the default found by the Assessing Officer, in my view is justified. This view is supported by the decision of die Hyderabad Bench of the Tribunal in the case of Teja Constructions v. CIT [20I0] 39 SOT 13 (Hyd.)(URO), wherein it has been held that section 40(a)(ia) is applicable only in respect of TDS defaults if amount is payable. In this back-ground, the disallowances aggregating to Rs. 1,94,517/- (73556+ 120961) is confirmed.

However, the Assessing Officer did not restrict himself from disallowing the two sums, but, instead he calculated backward default under sec. 194J at Rs. 6,49,210/- and Rs. 4,83,715/- under sec. 194C of the Act. This action of the Assessing Officer, in the absence of any material brought on record and also for the following reasons is held to be not justified :-

(i) The appellant has deducted the tax at source on these payments in the month of Feb. 2009 but has deposited the tax after the end of the accounting year.

(ii) That the provision of section 40(a)(ia) has been amended by Finance Act 2010. As per the amended provision if the TDS amount is deposited before due date of filing of return then no disallowance can be made under section 40(a)(ia).

(iii) It has been held by Supreme Court in the case of CIT v Alom Extrusions Ltd.(2209) 319 ITR 306 that the amendment made in the section 43B is not prospective but is explanatory and will accordingly apply retrospectively. Similarly view has been taken by Kolkata High Court in the case CIT v Virgin Creations in ITAT no.302 of 20 11.

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(iv) In view of above discussed legal and factual position the further addition of Rs. 9,38,408/- made by applying the provision of section 40(a)(ia) is delete and thus the appellant gets relief of Rs. 9,38,408/- (11.32.925-194517) on this ground.

16. We have perused the case records on this issue and we find that the ld. CIT(A) had rightly sustained the disallowance of Rs.73556/- u/s 194J of the Act and Rs.120961/- u/s 194C of the Act in the facts and circumstances of the case. This ground of appeal is dismissed.

17. In the result the appeal by the revenue is partly allowed.

Order pronounced in the Court on 03 .03.2017.

Sd/-	Sd/-
[M.Balaganesh]	[Partha Sarathi.Chaudhary]
Accountant Member	Judicial Member

Dated : 03 . 03.2017.
[RG PS]

Copy of the order forwarded to:

1. M/s. Ruia Sons Pvt. Ltd., 46, Syed Amir Ali Avenue, Kolkata-700017.
2. I.T.O., Ward-8(3), Kolkata.
3. CIT(A)-VIII, Kolkata. 4. CIT-III, Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

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