

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'D' अहमदाबाद ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, AHMEDABAD**

**BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER
& SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 3559/Ahd/2016

(निर्धारण वर्ष / Assessment Year: 2010-11)

DCIT Circle-1(2), 2 nd Floor, Aaykar Bhavan, Race Course Circle, Vadodara	बनाम/ Vs.	M/s. Niyati Construction Co., E-301 & E-307, Kalpvruksh Complex, Near T. B. Hospital, Gotri Road, Baroda
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AACFN0411E		
(अपीलार्थी/Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से/Appellant by :	Shri Purushottam Kumar, Sr. DR
प्रत्यर्थीकीओरसे / Respondent by:	Shri K. P. Singh, AR

सुनवाईकीतारीख/Date of Hearing	11/10/2021
घोषणाकीतारीख /Date of Pronouncement	25/10/2021

आदेश/ORDER

PER AMARJIT SINGH - AM:

The appeal filed by the Revenue for A.Y. 2010-11, arise from order of the CIT(A)-5, Vadodara dated 08.09.2016, in proceedings under Section 143(3) r.w.s. 263 of the Income Tax Act, 1961; in short “the Act”. The Revenue has raised following grounds of appeal:-

“1. On the facts and in the circumstances of the case and in law, the Ld. CIT (Appeals) erred in deleting the disallowance made under section 40(a)(ia) of the Act, without appreciating the fact that the AO has rightly made such disallowance as the assessee has neither at the time of proceedings u/s 263 of the Act not at the time of proceedings u/s 143(3) r.w.s 263 of the Act has produced any material evidences regarding its claim that TDS at specified rate was deducted from the running bills by the contractee with respect to the testing charges.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(Appeals) erred in deleting the disallowance made on account of remuneration to partners, without

appreciating the fact that the AO has rightly made such disallowance as the assessee in his profit and loss account has shown the interest income separately under the head indirect income.

3. *The appellant craves leave to add to, amend or alter the above grounds as may be deemed necessary.”*

2. The fact of the case is that assessment under Section 143(3) r.w.s 263 of the Act was finalized on 28.12.2015 at Rs. 42,09,980/- after making disallowance under Section 40(a)(ia) of Rs. 12,03,690/- and disallowance under Section 40(b) of Rs. 10,18,000/-. The AO has made disallowance of Rs. 12,03,960/- on the ground that assessee has not made any TDS on payment of testing charges of Rs. 12,32,344/-. The assessee has made disallowance under Section 40(b) of Rs. 11,68,000/- on the ground that while calculating the allowable remuneration to the partners, the assessee has not excluded the income of Rs. 20,56,185/- earned on account of interest on fixed deposit.

3. The aggrieved assessee has filed appeal before the Ld. CIT(A) against the aforesaid disallowance made by the AO. The Ld. CIT(A) has allowed the appeal of the assessee on both the issue. In respect of addition of Rs. 12,32,344/- made under Section 40(a)(ia) of the Act the Ld. CIT(A) has given detail finding and held that assessee was not liable to deduct tax as the actual payment to the contractor for testing charges was made by the Government and the assessee had only reimbursed the expenses to the Government. Regarding disallowance of Rs. 10,18,000/- on account of partner's remuneration under Section 40(b) of the Act on the ground that interest received on Fixed Deposit/SSNL Bonds was income from other sources, the Ld. CIT(A) after following the decision of Hon'ble Jurisdictional High Court in the case of CIT vs. J. J. Industries (2013) 35 taxmann.com 103 (Guj.) allowed the appeal of the assessee holding that interest income generated out of surplus fund invested in the Fixed Deposit was a part of the business income.

4. Heard both the parties, perused the relevant material available on record.

5. The AO has made disallowance of Rs. 12,03,690/- under Section 40(a)(ia) being the amount of expenses claimed under the head testing charges on the reason that the assessee has not deducted tax on such payment in accordance with the provision of Section 194C of the Act. The Ld. CIT(A) in his finding held that the assessee has not awarded any contract to any party for testing charges, in fact, the testing charges were deducted by the Government while making payment to the assessee on running bills raised by the assessee upon the Government. The assessee has not made any payment directly for testing charges to any party. The Ld. CIT(A) has also stated in his finding that the Government has awarded a contract to some entity for testing charges and the assessee has only reimbursed the expenses to the Government.

In this regard, we have gone through the material placed in the Paper Book submitted by the assessee during the course of appellate proceedings before us, at Page No. 81 to 85 assessee placed a copy of contract agreement with terms and conditions for project of SSS.Canal with Government department wherein as per Clause 76 stated that deduction to be made toward testing charges from the running account bill of the contractor. In the light of the above facts we do not find any infirmity in the decision of the Ld. CIT(A) holding that testing charges was made by the Government and the assessee has only reimbursed the expenses through the mode of deduction made by the Government out of running bills of contract. Therefore, we do not find any merit in the ground of appeal of the Revenue and the same stand dismissed.

6. Regarding second ground of the Revenue the AO has disallowed Rs. 10,18,000/- under Section 40(b) of the Act on account of remuneration to partner on the ground that remuneration of partner was not allowable on the amount of interest received on Fixed Deposit/SSNL Bonds which was treated as income from other sources. The Ld. CIT(A) has allowed the appeal of the assessee.

7. Heard both the sides and perused the material on record. The assessee has claimed that interest on Fixed Deposit, interest on SSNL Fixed Deposit and interest on SSNL Bonds was made out of surplus funds available with the assessee and the interest income was part of the business income. Therefore, the same was correctly included for calculating remuneration of the partners. The assessee has also placed a copy of decision of the Jurisdictional High Court in the case of CIT vs. J.J. Industries (Supra) wherein it is held that interest from Fixed Deposit on spare funds cannot be excluded from book profit for the purpose of determining allowable deduction of remuneration paid to partners. After taking in to consideration the decision of Hon'ble Jurisdictional High Court we do not find any error in the decision of the Ld. CIT(A), therefore, this ground of appeal of the Revenue is also dismissed.

8. In the result, the appeal of the Revenue is dismissed.

This Order pronounced in Open Court on 25/10/2021

Sd/-

**(MAHAVIR PRASAD)
JUDICIAL MEMBER**

Ahmedabad: Dated 25/10/2021

TANMAY

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आदेश की प्रतिलिपि अग्रहित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

Sd/-

**(AMARJIT SINGH)
ACCOUNTANT MEMBER**

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।