IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: E: NEW DELHI

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA No.436/Del/2018
Assessment Year: 2012-13

M/s. M M Creations, T-481 A, Baljeet Nagar (Behind Patel Nagar Police Station), New Delhi 110008 **PAN AAEFM 9802 A**	vs.	The ACIT, Circle 32(1), New Delhi
(Appellant)		(Respondent)

For Assessee:	Shri Kapil Goel, Adv. Shri Sandeep Goel, Adv.
For Revenue :	Ms. Smita Singh, Sr. DR

Date of Hearing :	19.07.2023
Date of Pronouncement :	13.10.2023

ORDER

PER CHANDRA MOHAN GARG, J.M.

This appeal has been filed against the order of CIT(A)-11, New Delhi dated 13.11.2017 for A.Y. 2012-13.

2. The grounds have been raised by the assessee are as follows:-

1. That the order of the learned CIT(Appeal) is bad both in law and on facts.

2. That the order of the learned CIT(A) on the issue of holding statutory deduction claimed u/s 24(a) as income to tax as "income from other sources" is perverse in as much as he has not classified the stand of granting depreciation which will only enhance the deduction in favour of the appellant.

3. That the learned CIT(A) has not distinguished the facts of the assessee's case as noted by the Hon'ble apex court decision relied upon by the appellant before it at the time of hearing of the appeal.

4. That the learned CIT(A) has therefore not complied with the provision of section 251 of the Income Tax Act ,1961 and the issue be decided in favour of the appellant on the

facts and circumstances in confirmily with the squarely applicable facts as rendered in the case of Raj Dadarkar & Associates VS. ACIT(2017)81 taxman.com 193(SC).

5. That the Id. CIT(A) has erred in holding the sum of Rs. 16,84,235/- to be disallowed us 40(a) (ia) patently wrong on assumptions & presumptions without pointing out contradiction in the submission of the appellant assessee before it. The "cost of sales" cannot be covered by the provision of section 194C(6) & 194C(7) as erroneously discovered by him. There was no contract to be filled by applying the provision of section 194C at all. The same be directed to be deleted.

6. That the learned CIT(A) has erred in holding the expenditure incurred on foreign travel by the employees and partners for non-business purpose by disallowing the claim of Rs. 7,34,657/- is patently incorrect as the assessee is an exporter and had to travel abroad for for exhibiting the products exported where orders are received for conducting the business of the assessee in the impugned year. The same should have been allowed in full.

7. That the learned CIT(A) has erred in confirming the addition u/s 68 inspite of having verified the identity, credit worthiness and genuinity of the credits in the capital amount of the partner being amounts transferred from the partners mother in the same branch of the bank. The learned CIT(A) has misinterpreted the facts of the assessee's case inspite of having been furnished with written submission. The addition is therefore without any basis and should be deleted.

3. Ground no. 1 of assessee is of general in nature.

Ground no. 2 to 4 of assessee

4. The ld. counsel submitted that the order of the learned CIT(A) on the issue of holding statutory deduction claimed u/s 24(a) as income to tax as "income from other sources" is perverse in as much as he has not classified the stand of granting depreciation which will only enhance the deduction in favour of the appellant. He further submitted that the learned CIT(A) has not distinguished the facts of the assessee's case as noted by the Hon'ble apex court decision relied upon by the appellant before it at the time of hearing of the appeal. He also contended that the learned CIT(A) has therefore not complied with the provision of section 251 of the Income Tax Act ,1961 and the issue be decided in favour of the appellant on the facts and circumstances in confirmily with the squarely applicable facts as rendered in the case of Raj Dadarkar & Associates VS. ACIT(2017)81 taxman.com 193(SC).

5. The ld. Senior DR submitted that while dismissing the grounds of assessee the ld. CIT(A) has followed order of ITAT Delhi dated 05.05.2017 in assessee's own appeals ITA No. 5641/Del/2012 & 6550/Del/2013 for AY 2008-09 & 2009-10 respectively wherein the Tribunal held that the rental income earned by the assessee from lease of building would be taxable under the head "income from business and profession and the Assessing Officer was also directed to grant depreciation on the capital asset/building while computing the income from business. On being asked by the bench the ld. counsel of assessee, in all fairness, submitted that the issue has been decided against the assessee by the Tribunal. Since the ld. CIT(A) followed order of the Tribunal for AY 2008-09 & 2009-10 while upholding the action of the Assessing Officer treating the rental receipts as income from business or profession and also directed to grant deprecation on the building.

6. Therefore we are unable to see any valid reason to interfere with the findings recorded by the ld. CIT(A) on this issue based on order of Tribunal in assessee's own appeals for AY 2008-09 & 2009-10 (supra). Accordingly grounds no. 2 to 4 of assessee are dismissed.

Ground no. 5 of the assessee

7. Apropos ground no 5 the ld. counsel submitted that the Id. CIT(A) has erred in holding the sum of Rs. 16,84,235/- to be disallowed us 40(a)(ia) patently wrong on assumptions & presumptions without pointing out contradiction in the submission of the appellant assessee before it. The "cost of sales" cannot be covered by the provision of section 194C(6) & 194C(7) as erroneously discovered by him. There was no contract to be filled by applying the provision of section 194C at all. The ld. counsel vehemently pointed out that all the payments are reimbursement made this is also evident from page no 35 of assessee paper book and thus there was no TDS liability on the assessee. The same be directed to be deleted.

8. He further submitted that the authorities below alleged that the recipient are big transport and logistics companies and also assessed tax therefore as per judgment of ITAT Kolkata Bench in the case of M/s AI Champdny Industries Ltd. vs DCIT in ITA No.

1919/Kol/2013 for AY 2008-09 dated 27.07.2016 the orders of the authorities below may kindly be set aside restoring the matter to the file of Assessing Officer in view of second proviso to sec 40(a)(ia) of the Act which is retrospective and effective from 01.04.2005 therefore if it is found just and proper then the matter may be remanded to the Assessing Officer for necessary verification on the tax payment by the recipient companies as per said proviso as when the assessee tried he could not pursued on recipient to give necessary declaration as per requirement of law.

9. The ld. counsel also stated that placing reliance on the judgment of Hon'ble jurisdictional High Court of Delhi in the case of JDS Apparels reported as 370 ITR 454 (Del) presumption u/s. 40(a)(ia) of the Act is that payee when of big size paying tax on the some receipt and in such a situation the onus is on the revenue to contradict such facts.

10. Replying to the above the ld. Senior DR supporting the First Appellate Order submitted that the assessee failed to establish that the appellant has fulfilled the conditions laid down in the provision of section 194C(6) and 194C(7) of the Act therefore the Assessing Officer rightly invoked provisions of section 40(a)(ia) of the Act and hence ground of assessee may kindly be dismissed.

11. On careful consideration of submissions we are of the view that the ld. CIT(A) in para 9.2.1 has considered relevant provisions of the Act and thereafter observed the all five parties to whom the appellant has made the payment are big transporter and logistic companies which appears to be owning more than carriages and the assessee was required to fulfill the obligation as per requirement of section 194C(7) of the Act by furnishing required information before the Assessing Officer as per specified procedure and no evidence has been filed neither during the assessment non during the first appellate proceedings showing that the assessee has fulfilled the condition as per requirement of section 194C(6) and 194C(7) of the Act.

12. On careful consideration of above submissions and perusal of material available on record, first of all, we note that the Hon'ble Delhi High Court in the case of CIT Vs. Ansal Land Mark Township (1) Pvt. Ltd., in ITA No.160/2015 Judgment dated 26.8.2015

has taken the view that the insertion of the second proviso to Sec.40(a)(ia) of the Act is retrospective and will apply from 1.4.2005. Once it is held that the Assessee is entitled to the benefit of 2nd proviso to Sec.40(a)(ia) of the Act, the CIT(A) ought to have directed the AO to verify whether the recipients have included the receipts paid by the assessee in their respective returns of income and also paid taxes on the same. To the extent the recipients from the Assessee have so included the sum in their returns of income and filed the same, no disallowance u/s.40(a)(ia) of the Act ought to have been sustained by the CIT(A). The CIT(A) ought to have also directed the AO that in case the recipient parties are not cooperating in providing details, the AO should call for the information u/s. 133(6) or 131 of the Act, for verification of the same. We therefore set aside the order of the CIT(A) to the extent to which he had sustained the order of the AO on the disallowance u/s.40(a)(ia) of the Act and remand the issue to the file of the AO to verify whether the recipients have included the receipts paid by the assessee in their respective returns of income and also paid taxes on the same. On being satisfied with the explanation and documentary evidence filed by the assessee the Assessing Officer we also allow due opportunity of hearing to the assessee and will adjudicate the issue a fresh without being influenced with the earlier orders. Accordingly, ground no. 5 of assessee is allowed for statistical purposes.

Ground no. 6 of assessee

13. Apropos ground no. 6 the ld. counsel submitted that the learned CIT(A) has erred in holding the expenditure incurred on foreign travel by the employees and partners for non-business purpose by disallowing the claim of Rs. 7,34,657/- is patently incorrect as the assessee is an exporter and had to travel abroad for exhibiting the products exported where orders are received for conducting the business of the assessee in the impugned year. The same should have been allowed in full. He also submitted that assessee being an exporter and having handsome exports of more than Rs. 6 crore refer audited defect free final accounts addition is not justified existing business connection and business activities in foreign countries not doubted. The ld. counsel submitted that the assessee has documentary evidence such as ledger account of travel expenses, bills and vouchers of travelling expenses and exhibition outside

India for business purposes. Therefore foreign travel expenses incurred for the purpose of business may kindly be allowed.

14. Replying to the above, the ld. Senior DR submitted that the assessee was to ask commercial expediency of the foreign travel as all the travelers were family members of partners but the assessee did not file any reply in this regard and thus failed to proof business expediency and therefore the ld. CIT(A) rightly confirm the disallowance by observing that by observing that the assessee has failed to establish business expediency and the trouble was availed by Shri Manmohan Gaind along with his wife Ms. Mridula Gaind and their son Shri Arjun Gaind and thus it was personal trip and hence disallowance was rightly made and uphold.

15. On careful consideration of above rival submissions we note that the ld. CIT(A) has dismissed ground no assessee with following observations and findings:-

> *10.2 I have perused the facts of the case and the submissions made by the AR. It is contended that the expenses mentioned by the AO pertain to the purchase of foreign currency and air tickets for Sh. Manmohan Gaind who is the CEO of the firm. It is further stated that Sh. Arjun Gaind had also accompanied the CEO on the instructions of the partner. It is observed that Arjun Gaind is son of Manmohan Gaind (CEO) and Ms. Mridula Gaind, partner of the firm. From the details furnished by the AR, it is observed that the partner and CEO of the appellant firm who happen to be husband & wife went to Europe with their son.The AR has furnished the copies of vouchers in respect of booking of tickets etc. However, the AR has failed to prove the business expediency of the above trip to Europe. This primary onus has not been discharged by the appellant either at the time of the assessment or during the course of appellate proceedings. The appellant has failed to prove that these expenses identified by the AO have been incurred wholly and exclusively for the purposes of the business. Accordingly, I am of the opinion that the AO has rightly disallowed these expenses and therefore, the addition made by the AO is confirmed and the ground of appeal is dismissed.*

16. On thoughtful consideration of factual matrix of the issue basis taken by the Assessing Officer and findings returned by the ld. CIT(A) we note that the addition has been upheld by observing that since the assessee failed to prove the business expediency of foreign trip to Europe therefore the primary onus has not been discharged by the appellant either during the assessment or during appellate proceedings. The ld. CIT(A) also rightly concluded that the appellant has failed to prove that these expenses identified by the Assessing Officer, were incurred wholly and

exclusively for the business purpose of assessee. We are unable to see any valid reason to interfere with the findings recorded by the ld. CIT(A) as the submissions of ld. counsel of assessee does not hold merits. Accordingly, ground no. 6 of assessee is dismissed upholding the addition.

Ground no. 7 of assessee

17. Apropos ground no. 7 the ld. counsel submitted that the Assessing Officer has made baseless addition on account of capital contribution to the assessee firm by a partner namely Shri Dinesh Kumar Gaind u/s. 68 of the Act amounting to Rs. 67,45,000/- despite the fact that the capital contribution was reflecting and tallying with the partner capital account in audited books of accounts filed with the income tax return of assessee company. Placing reliance on the judgement of Hon'ble Allahabad High Court in the case of Kesharwani Sheetalya dated 24.04.2020 in ITA No. 17/2007 and order ITAT Delhi dated 15.02.2019 in the case of Alliance Engineers and Construction vs. ACIT in ITA No. 6108/Del/2015 the ld. counsel submitted that where a sum is credited to the books of partnership as capital contribution by a partner and all partners are identifiable and separately assessed to tax then in case the partner is confirming capital contribution then no addition can be made to the income of partnership firm and in the event the is not satisfied the addition could have been made in the hands of partners only and not to the income of partnership firm.

18. Replying to the above the ld. Senior DR supported the action of the Assessing Officer and submitted that the assessee has not filed any confirmation from the said partner Shri Dinesh Kumar Gaind and has only filed ledger account of partner capital account, ITR computation and balance sheet of assessee firm, confirmation of gift from donor to partner and copy of income tax return of donor with computation. He further submitted that there is no confirmation from the contributing partner despite several opportunities therefore the addition was rightly made and upheld by the ld CIT(A).

19. On careful consideration of above submissions, first of all, we note that undisputedly the assessee firm received capital contribution of Rs. 67,45,000/- from

Shri Dinesh Kumar Gaind during the relevant period. From the order of ITAT Delhi Bench in the case of Alliance Engineers and Construction vs. ACIT (supra) para 17 is relevant to note that wherein the Tribunal held that when a partner introduces the money/capital in the firm either in the shape of capital or loan to the partnership firm, addition, if any, can be made only in the hands of partner and not in the hands of partnership firm as long as the partner confirms to have invested towards capital or as loan to the firm. In the present case the assessee has filed documents at pages 2 to 35 of assessee paper book but we are unable to see any confirmation from the contributing partner Shri Dinesh Kumar Gaind confirming the capital contribution to the firm. The Assessing Officer and the ld. CIT(A) has noted detailed findings while confirming the addition u/s. 68 of the Act but they have not show cause the assessee to file relevant documentary evidence including confirmation etc. substantiating the claim of capital contribution. Therefore in our consider view the assessee should be allowed to explain his case before the Assessing Officer with the support of all relevant material, documentary evidence etc. Hence the issue of capital contribution by the partner is restored to the file of the Assessing Officer for readjudication of issue after allowing due opportunity of hearing to the assessee and without being influenced with the earlier order. Accordingly, ground no. 7 is allowed for statistical purposes.

20. In the result, the appeal of assessee is partly allowed for statistical purposes on grounds no. 5 & 7.

Order pronounced in the open court on 13.10.2023.

Sd/-	Sd/-
(DR. B.R.R. KUMAR)	(CHANDRA MOHAN GARG)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 13th October, 2023.

NV/-

Copy forwarded to :

1. Appellant
2. Respondent

3. CIT
4. CIT(A)
5. DR

// By Order //

Asstt. Registrar, ITAT, New Delhi