

आयकर अपीलीय अधिकरण “ए” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH “A”, MUMBAI

श्री पी.एम. जगताप, लेखा सदस्य एवं श्री विवेक वर्मा, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI P.M. JAGTAP, ACCOUNTANT MEMBER
AND SHRI VIVEK VARMA, JUDICIAL MEMBER

आयकर अपील सं. : 384/मुम/2009

निर्धारण वर्ष A.Y. 2005-06

ITA No. : 384/Mum/2009

(Assessment year: 2005-06)

आयकर अपील सं. : 1271/मुम/2010

निर्धारण वर्ष A.Y. 2006-07

ITA No. : 1271/Mum/2010

(Assessment year: 2006-07)

आयकर अपील सं. : 4930/मुम/2011

निर्धारण वर्ष A.Y. 2007-08

ITA No. : 4930/Mum/2011

(Assessment year: 2007-08)

M/s K S Aiyar & Co., F-7, Laxmi Mills, Shakti Mills Lane, Off. Dr. E. Moses Road, Mahalakshmi, Mumbai -400 011 स्थायी लेखा सं.:PAN: AAAFK 6843 P	vs	The Asst. CIT Rg. 11(2), Aayakar Bhavan, Mumbai -400 020
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant by	:	Shri Vijay Mehta
Respondent by	:	Shri Manoj Kumar

सुनवाई की तारीख /Date of Hearing : 04-06-2013

घोषणा की तारीख /Date of Pronouncement : 19-06-2013

आ दे श
ORDER

श्री विवेक वर्मा, न्या स:

PER VIVEK VARMA, JM:

These three appeals are filed the assessee for assessment years 2005-06, 2006-07 and 2007-08 against the orders of CIT(A) XI, Mumbai dated 25.11.2008, CIT(A) 3, Mumbai, dated 16.12.2009 and CIT(A) 3, dated 04.03.2011, respectively.

2. Since the grounds are mostly common, therefore, for the sake of convenience and brevity, we are passing common and consolidated order covering the three impugned appeals with the captioned ITAs number.

ITA No. 384/Mum/2009 : Assessment year 2005-06:

3. Ground no. 1 : The assessee agitates the excessive disallowance of telephone expenses, as against the reasonable *suo moto* disallowance.

4. In the computation, the assessee had made a *suo moto* disallowance of Rs. 2,000/- against the total expense claimed at Rs. 8,02,101/-. Of the total claim of Rs. 8,02,101/-, Rs. 2,48,761/- pertained to mobile phone expenses and Rs. 1,41,621/- pertained to telephones installed at the partner's residence. The AO disallowed 20% of the aggregate of Rs. 3,90,382/- (Rs.2,48,761/- and Rs. 1,41,621/-), i.e. Rs. 78,076/-.

5. In appeal, the CIT(A) reduced the disallowance to 15%, i.e. in money terms, the disallowance of Rs. 78,076/- made by AO was reduced to Rs. 58,557/- by the CIT(A).

6. Before the ITAT, the assessee agitates, that even this disallowance is excessive. To demonstrate, the AR, placed before us a chart showing the total expenses claimed and the disallowance made *suo moto* by the assessee and the disallowance made by the AO. According to the chart, the AR has tried to show that only in the impugned assessment year, there is a disallowance made by the AO. He pointed out that in assessment years 2001-02, 2006-07 and 2007-08, even in scrutiny assessments, no disallowance has been made by the AO and has accepted the *suo moto* disallowance of Rs. 2,000/- made by the assessee. The assessee submitted that mobile phones and

phones installed at residences of the parties are used for professional purposes as well, as, the assessee being the oldest CA firm, having name and reputation and having a number of international clients. He submitted that the assessee has to be at beck and call to receive phone and make call even in non office hours to cater to their international clients. In this back drop, the disallowance made *suo moto* is reasonable and as disallowed by the AO is excessive and unreasonable.

7. He further pointed out that even on the principles consistency, the disallowance is uncalled for, because, even in the subsequent years, no disallowance has been made by the AO.

8. The DR primarily relied on the orders of the revenue authorities and pleaded that the disallowance made by the AO was reasonable, he further pleaded that the disallowance, finally sustained, should be held to be more than reasonable.

9. We have heard the arguments from both the sides and have gone through the details, as submitted by the AR. It is an undenied fact and accepted by the DR, that only in the impugned assessment year, the AO has made a disallowance, which has not been followed up even in the subsequent years, though, the assessments were framed u/s 143(3).

10. In these circumstances, we cannot ignore the rule of consistency, as laid down by a host of decisions in various fora. We, therefore, set aside the order of the CIT(A) sustaining the disallowance at Rs. 58,557/- on this issue and direct the AO to delete the disallowance made at Rs. 78,076/-.

Thus ground no. 1 of appeal is, allowed.

11. Ground no. 2 pertains to disallowance of Rs. 1,12,200/- made by the AO on partners conveyance, which has been restricted to Rs. 56,100/- by the CIT(A), being 10%.

12. The AO has made the disallowance at 20% and computed the disallowance at Rs. 1,12,200/-. The CIT(A), however, reduced the disallowance to 10% at Rs. 56,100/-.

13. Before us, the AR pointed out that partners were allowed fixed conveyance allowance and therefore nothing further could be charged/disallowed in so far as the assessee was concerned. In any case, the disallowance, as per the chart submitted by the AR is only in the impugned year. No disallowance has been made even in the subsequent years. In these circumstances, the disallowance was uncalled for.

14. The DR placed reliance of the orders of the revenue authorities.

15. We have heard the arguments and have gone through the relevant material placed in APB 222. The conveyance allowance are fixed by the company to its partners. This fact, as well as the fact that the disallowance has been made only in the impugned year has not been denied by the DR.

16. In any case, following the rule of consistency, we are of the opinion that no further disallowance is called for.

17. We, therefore, set aside the orders of both the revenue authorities and direct the AO to delete the disallowance made.

In the result, the ground no.2 is allowed.

18. Ground no. 3 is allowance of Rs. 30,000/- out of business development expenses claimed at Rs. 3,30,271/-.

19. The AR has prayed for a reasonable relief, whereas, the DR relied on the orders of the revenue authorities.

20. We have gone through the chart and find that there is no disallowance made even in the subsequent years. Since the AR has pleaded for a reasonable and suitable reduction, we feel that in the circumstance, an ad-hoc disallowance of Rs. 15,000/- would meet the ends of justice. We, set aside the orders of the revenue authorities and direct the AO to make an ad-hoc disallowance of Rs. 15,000/-.

In the result, the ground is partly allowed.

21. Ground no. 4 pertains to the disallowance of Rs. 1,09,037/- out of foreign travel expenses.

22. In the course of assessment proceedings, the AO called for the details, which were duly provided to the AO. On examination of the details, the AO found that the expenditure under this head was incurred primarily by one partner Shri Raghuvir M Iyer, which pertained to air tickets, boarding & lodging, registration fee. The AO also held that since the assessee was not able to substantiate as to how the expenditure could be claimed to be exclusively for professional/business purpose and also that no correspondence indicating any invitation to the partner from foreign parties were filed. The AO, on these bases, concluded that it would be appropriate to disallow 25% of such expenses. He, therefore, disallowed Rs. 1,09,037/-.

23. The CIT(A) sustained the disallowance, as one of his reasons to sustain the disallowance was, "in case of conferences, the tours may be undertaken by the appellant's partners, where the cost may probably be borne by the firm and the partner".

24. Aggrieved, the assessee is now before the ITAT.

25. Before us, the AR submitted that the following details was provided to the revenue authorities (APB 224):

S. No	Name of Person	Purpose	Period	Regn. Fees	Air-Fare	Hotel Exp	Others	To	Place
1	Raghuviar M Aiyar (Partner)	World *Conf.	15.10.04-19.10.04	91,674 US\$1780	71,990	162,335	5,244	331,245	New York
2	Raghuviar M Aiyar (Partner)	Multiple Visa Free for 5 years	24.05.04				8,450	8,450	
3	Lalit Dujari (Employee)	Visa Application- Fees	22.11.04				7,034	7034	-
4	Raghuviar M Aiyar (Partner)	ACC Yambu Audit	01.06.04-01.06.04			22,923		22,923	UK, Saudi
5	K.S. Aiyar & Co.	Public Co. **A/cing oversight Board (PCAOB)		10,865 US\$250				10,865	UK, Saudi
6	Raghuviar M Aiyar (Partner)	Asia Pacific Conf.	03.03.04-06.03.04		32,328			32,325	Hong Kong
7	Kunal Kulkarni (Representative)	Asia Pacific Conf.	03.03.04-06.03.04		32,328			32,339	Hong Kong

NB: * Conf.-Conference. ** A/cing -Accounting

26. The AR submitted that no disallowance was made by the revenue authorities in the preceding years or in the subsequent years and in any case, as per the detail, *per se* the expenses cannot be held to be of personal nature to be disallowed. He, therefore, prayed that the disallowance be deleted.

27. The DR relied upon the orders of the revenue authorities.

28. We have heard the arguments from either side and have also referred to the detail and its breakup. From the above breakup, along with the bills with regard to foreign travel, which do have a positive presumption of carrying professional/business connection, because, durations are small, which can only be presumed to be professional/business oriented. But expenses shown under “others” and “Visa fee”, cannot be allowed, because, visa once given can be used by the person for any number of times, including for personal requirements and there are no details of others (Rs. 20,728/-). We, therefore, set aside the order of the CIT(A) on this issue and direct the AO to restrict the disallowance to Rs. 20,728/- and allow the balance,

i.e. Rs. 1,02,539; Rs. 71,990/- & Rs. 32,328/-; Rs. 1,85,258/-, aggregating to Rs. 3,92,115/-.

In the result, ground no. 4 is partly allowed.

29. Ground no. 5 pertains to disallowance of Rs. 2,17,594/- u/s 40(a)(i) for non deduction of TDS, as per the provisions of section 195.

30. The facts, as reproduced in the assessment order are that the assessee paid Rs. 2,17,594/- as membership fee to Baker Tilly International (BTI), located in England, whose membership is restricted to professional firms worldwide, practicing profession of accountancy. According to the submissions of the assessee recorded by the AO, BTI is a non business & non profit making organization, who circulates to its members, information relating to professional education and updates on the happening in the profession, worldwide. Since it is non business & non profit making organization, it neither receives any income from business connection in India nor it receives any technical fee, as contemplated u/s 9 of the IT Act. In fact, BTI does not render any technical consultancy to anybody world over, which includes its members in India (which includes the assessee). As explained by the assessee to the AO, BTI does not render any services, which could be rendered as business connection and even in the accounts, the only transaction recorded by the assessee was payment of subscription fee. Since, the expense does not involve any business consideration, and since it does not culminate into an element of profit to the recipient, the payment falls outside the scope of section 195. It was also submitted before the AO that deduction of TAS arises only if the payment is chargeable to tax in India. Since there was no part of this payment culminating in India, no tax was deductible u/s 195, as also clarified by the Board Circular No. 786, dated 07.02.2001.

31. The AO, taking into consideration, the above submissions, held,

“First of all it is claimed that the BTI is not involved in any business or professional activities then the question arises as to how the assessee is paying remittances in the form of membership fees. In this connection, in respect of disallowance u/s 40(a)(i) of the I.T. Act, the Chennai I.T.A.T. vide order no. ITA 2037/MDS/2006 dated 28.02.2007 held that the assessee cannot decide the tax liability of the non-resident assessee's. The Hon'ble Chennai ITAT observed that they are at a loss to understand how the assessee sitting in his office can take a decision that the payment they are making to the non-resident would not ultimately be taxable in the hands of non-resident who never filed any I.T. Return in India. Therefore, the assessee's contention that the remittances are not taxable in the hands of BTI is rejected. Further, the remittances of membership fees paid by the assessee to BTI is subject to the TDS provisions u/s. 195 of the I.T. Act, 1961. A similar and identical issue had arisen in the case of Arthur Anderson & Co., Mumbai in which payment was made by Arthur Anderson & Co., Mumbai to M/s. Arthur Anderson & Co. society Corporative Company [Anderson SC] it was claimed that the amount was membership fees and reimbursement of its share of establish expenses incurred by Anderson SC which operates on a no profit basis”.

32. The AO, referring to a host of decisions, finally concluded,

“Therefore, respectfully following the decision of the Mumbai Tribunal in the case of Author Anderson & Co., the assessee's contention that the membership fees paid to BTI is allowable expenditure, the remittances made to BTI are not subject to TDS and the remittances received by BTI is not taxable in the hand of BTI is hereby rejected. Further the Chennai ITAT order dated 28.2.2007 has clearly held that it is not the duty of the assessee to decide the tax liability of non-resident and remittances are subject to TDS provisions u/s.195 to 197 of the I.T. Act. If the assessee failed to deduct TDS from the remittances, such remittances is liable to disallow u/s. 40(a)(i) of the I.T. Act. Further, the words “any other sum” appearing in section 40(a)(i) will be applicable to the amount of the remittances made by the assessee to the BTI.

Considering the above facts and circumstances of the case under consideration, since the assessee failed to deduct TDS on the remittances made to Baker Tilly International (BTI), the amount of membership fees of Rs. 2,17,594/- is being disallowed u/s.40(a)(i) of the I.T. Act, 1961.

The assessee's representative could not establish that such expenditure allowable u/s. 37 of the I.T. Act. Further, such expenditure has been paid to foreign parties. However, no TDS has been deducted. Moreover it is not clear as to what purpose this expenditure has been incurred. Therefore, this expenditure has been disallowed u/s. 40(a)(i) and added back to the total income of the assessee”.

33. The AO, therefore, disallowed the subscription payment of Rs. 2,17,594/- paid to BTI.

34. Aggrieved, the assessee approached the CIT(A), before whom it reiterated its submissions made before the AO. The CIT(A) took into

consideration the order of the AO and the submissions made and concluded, *"I have considered the rival submissions and the materials on record. The appellant is clearly a member of the BTI and has paid the membership fees. The decision of the Tribunal in the case of Arthur Anderson & Co. ITA No. 9125/Mum/1995 AY 1994-95 dated 29/7/03 is squarely applicable in this case. The Tribunal had extensively dealt with the principle of abundant caution in the context of tax deduction at source. THE AO in my opinion, was justified in holding that in terms of the said decision of the Tribunal, the appellant had to make the said TDS. Consequently, Ground No. ... deserves to be rejected"*.

35. He, therefore, sustained the disallowance of Rs. 2,17,594/- made by the AO.

36. The assessee is now before the ITAT.

37. Before us, the AR reiterated the submissions made before the revenue authorities and submitted that the CIT(A), placed reliance on the decision Arthur Anderson & Co. in ITA No. 9125/Mum/1995, wherein the coordinate Bench had extensively dealt with the principles of abundant caution in the context of TDS. The AR, submitted that liability of TDS arises when the payment made by an assessee, involves an element of income in the hands of the recipient. Since, this is case of payment made only as a subscription, there is no element of income, hence the provisions 195 would not get attracted. The AR referred to the important clauses of the agreement between BTI and the assessee, which reads as follows:

Company means Baker Tilly International Limited, a company incorporated in England with registered no. 434879 whose registered office is at 2, Bloomsbury Street, London WC1B 3ST, United Kingdom.

"The objectives of the Company are as follows:

- (a) to operate a worldwide association of independent, high quality accounting firms;*
- (b) to promote the continuing professional development of Members through exchanges of information on subjects of professional interest;*
- (i) the maintenance and continuing development of an intranet and an extranet for use by the Members; and*
- (j) the organization and administration of conferences for the Members.*

- 3.4 *The company is not organized for profit and no part of the net income of the Company shall inure to the benefit of any Member, Director or individual. For the avoidance of doubt, in calculating the net income of the Company, reasonable compensation paid by the Company in respect of services rendered to it shall be taken into account.*
- 3.5 *Nothing in the arrangements envisaged by these Bye-laws shall constitute a partnership, joint venture or agency relationship between the company and the Members or any of them or between any of the Members. No Member is an agent of the Company or of any other Member, and a Member does not have authority to bind or to act on behalf of the Company or any other Member”*

38. The AR, also referred to Circular No. 786 dated 7-2-2000, which reads as under:

“1176. Clarification regarding taxability of export commission payable to non-resident agents rendering services abroad.

1. *In their Audit Report for 1997-98 [D.P. No. 79(I.T.)] the Comptroller & Auditor General (C&A G) Raised an objection that the Assessing Officer in computing the profits and gains of business or profession, in a case in Mumbai charge, had wrongly allowed a deduction in respect of a payment to non-resident where tax had not been deducted at source. The nature of the payment in this case was export commission and charges payable for services rendered outside India. In the view of C & A.G. the expenditure should have been disallowed in accordance with the provisions of section 40(a)(i) of the I.T. Act, 1961. It has come to the notice of the Board that a similar view, on the same set of facts has been taken by some Assessing Officers in other charges.*
2. *The deduction of tax at source under section 195 would arise if the payment of commission to the non-resident agent is chargeable to tax in India. In this regard attention to CBDT Circular No. 23 dated 23rd July, 1969 is drawn where the taxability of ‘Foreign Agents of Indian Exporters’ was considered along with certain other specific situations. It had been clarified then that where the non-resident agent operates outside the country, no part of his income arises in India. Further, since the payment is usually remitted directly abroad it cannot be held to have been received by or on behalf of the agent in India. Such payments were therefore held to be not taxable in India. The relevant sections, namely section 5(2) and section 9 of the Income-tax Act, 1961 not having undergone any change in this regard, the clarification in Circular No. 23 still prevails. No tax is therefore deductible under section 195 and consequently, the expenditure on export commission and other related charges payable to a non-resident for services rendered outside India becomes allowable expenditure. On being apprised of this position, the Comptroller and Auditor General have agreed to drop the objection referred to above”.*

39. The AR, pleaded that since no part of the payment made by the assessee to BTI, generated any income to the recipient, i.e. BTI, which is a non resident and payment having made to a non resident, out side

of Indian tax regime, there was no liability on the assessee to deduct tax at source and, therefore, the assessee did not contravene the provisions of section 195 of the Income Tax Act, 1961.

40. The DR, on the other hand supported the orders of the revenue authorities and submitted that the issue should be restored to the file of the AO, who should examine the element of income, if at all, in the hands of the recipient, in the light of the decision of GE India Technology Centre P Ltd. vs CIT, reported in 327 ITR 456 (SC).

41. We have heard the arguments of both the sides and have also perused the material placed before us and the case laws cited by both the parties. We find that both the parties, i.e. revenue authorities and the assessee have treaded simply on the path of deductibility of TAS and relied on the case laws. When we read the relevant provisions, along the Circular, and the relevant clauses of the agreement, we find that no part of the payment made as subscription to BTI has resulted in income in its hands. Since the payment has been made in a foreign country, TAS provisions have to be applied guardedly. Clause 3.5 of the agreement (*as reproduced herein above*) gathers importance, which reads,

“Nothing in the arrangements envisaged by these Bye-laws shall constitute a partnership, joint venture or agency relationship between the company and the Members or any of them or between any of the Members. No Member is an agent of the Company or of any other Member, and a Member does not have authority to bind or to act on behalf of the Company or any other Member”.

42. The relevant clause, specifies that the company shall not constitute any partnership, joint venture or agency relationship with its members. This clears the deck to come to the conclusion that the subscription paid to BTI does not involve any income element and therefore, the provisions of TAS shall not be applicable. Besides the above observation, it would be worthwhile to mention that the case of Arthur Anderson & Co. (*supra*), relied upon by the DR, was on distinct

facts, hence cannot be relied upon, under the present set of facts and circumstances. So far as the case of GE Technology (*supra*), the Hon'ble Supreme Court explains the applicability of expression "*The expression 'chargeable under the provisions of the Act' in section 195(1) shows that the remittance has got to be of a trading receipt, the whole or part of which is liable to tax in India. If tax is not so assessable, there is no question of tax at source being deducted*". In the present context, we find that none of the conditions gets fulfilled herein, in which case, the case, as cited, is in effect, in favour of the assessee.

43. In these circumstances, we set aside the orders of both the revenue authorities and direct the AO to delete the disallowance of Rs. 2,17,594/- made to BTI.

The ground is, therefore, allowed.

44. Ground no. 6(a) & (b) are on the issue of disallowance of payment of Rs. 20,26,244/- made to the legal heirs of the deceased partner.

45. The facts as reproduced by the AO are as follows,

"The assessee has claimed and debited Rs. 20,26,444/- as revenue expenditure under the head payment to the legal heir of deceased party, partner Mrs. Laxmi M. Iyer. The assessee's representative vide this office order-sheet dated 24.8.2007 was requested to furnish details, nature of allowability of such expenditure claimed. The assessee vide letter dated 8.9.2007 has quoted the extract from deed of partnership of 1992- para 5(a), 5(b) which reads as under:

1. *"The amount is claimed as a normal business expense of earning business income. The various extracts from the Deed above show the details.*
2. *And the same wordings appear in the current deed wherein all previous liabilities from earlier deeds continue.*
3. *Under AS-15, all retirement benefits need to be provided for in the accounts. The standard is mandatory and is applied by all Assessee and the Firm is not exception. However, since cash basis is followed, the payments whether to employees (gratuity etc.) or to past partners are allowed only on cash basis.*
4. *The same treatment has been followed consistently from the last 60 years when such a clause was first introduced. And every assessment has allowed the said expense as a deduction without question or exception over the last so many years.*

5. *It is agreed by and between the partners... .. for their windows and heirs in the event of their death shall be a first and prior charge and a condition precedent before any distribution to the partners is made. The partners as such have mutually agreed that the partnership shall be subject to these overriding and prior obligations and charges. The partners also understand that the firm has to incur these outgoings for the very user of the share of the goodwill of the deceased partners no less than for the very continuance of the partnership business and for earning income therefrom from year to year.*
6. *At last 5 such instances of family partners have taken place and their heirs have been given payments under the same treatment / deed of partnership. Jaya Bhaskaran (1950s) Rekha Aiyar (80s), Mangala Aiyar (90s), Lakshmi Aiyar (2k)*
7. *The payments will end in another two years from date and will be last in the series of payments after which the firm ceases to be obliged to make payments to the Founding Family.. the Founder being Sri KS Aiyar who is known by ICAI as the Father of the Accounting Profession in India and founded the oldest Indian. Firm of Accountants in the country.*
8. *The accounting treatment followed has been the same and continues without any change in the law, the facts of the case, the provisions of the deed of partnership, in term of the High Court judgment”.*

I have verified and considered the assessee's above submission. The assessee's claim of Rs. 20,26,444/- being the amount paid to the legal heir deceased partner is not allowable u/s 37(1) of the I.T. Act. The income earned by the firms is allocated amongst the partners. However in the case of deceased partner no such activities are being carried out and therefore the partner or legal heir are not entitled for any shares from the profit earned by the firm.

The payment to legal heir of the deceased partner is not allowable expenditure u/s 37(1) of the I.T. Act, the assessee could not establish that the expenditure so incurred is really incidental to the business of the firm. Because it is not enough that the expenditure is merely connected with the Trade; it must be incurred and incidental to the business itself. The payments to legal heir of deceased partner represents in a mere division of profit and not ascertained by reference to the profits. The assessee has not furnished any details or basis on which such amount payable to the legal heir of the deceased partners. Such payment out of profit and conditional on profit cannot be treated as incurred for earning profit. The profits earned by the firm which came into existence attract tax at that point and the Revenue is not concerned with the subsequent application of the profits. Therefore, payment made to the legal heir of the deceased partner is not allowable as Revenue expenditure and added back to the total income of the assessee.

The similar issue i.e. payment made to partner or to the legal heir of the partners was considered by the revenue. However, the relief allowed by the appellate authority on this account was not accepted by the Department and the issue is being further contested. The Mumbai High court decision in CIT vs Mullah and Mullah reported in 190 ITR 198 was in favour of the assessee. However, the departmental SLP is still pending with Apex Court. Considering this fact that the issue has not reached its finality, the necessary addition has been made accordingly”.

46. The AO, therefore, disallowed the sums paid the legal heir of the deceased partners, though no disallowance was made prior to this assessment year.

47. Aggrieved, the assessee approached the CIT(A), who, held,

“In the written submissions, the appellant has stated the payment was made to Mrs. Laxmi Aiyar, legal heir of Mr. Mani Arjun Aiyar. That, in terms of the deed of partnership, the widow of the deceased partner was entitled to specified amount on retirement or death of the partner. The appellant has cited several case laws in this regard.

I have considered the rival submissions and the materials on record. The Hon’ble Supreme Court in the case of Sitaldas Tirathdas (1961) 41 ITR 367 expalined the law as under:

“In our opinion, the true test of whether the amounts sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible but where the income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one’s own income, which has been received and is since applied. The first is case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable.”

In the instant case, it is an application of fund in as much as a deed of partnership can be changed from time to time and will not have the same force as that of a court decree for example. I am of the opinion that on the facts and circumstances of the case, the payment does not constitute diversion of funds by an overriding title. This ground is, therefore, rejected”.

The CIT(A), thus, sustained the disallowance, primarily relying on the decision of Sital Das Tirath Das (*supra*) and sustained disallowance, as made by the AO.

48. The assessee, now before ITAT.

49. Before us, the AR referred to the relevant clauses of the partnership deed and submitted that the payment has been made in accordance with the relevant clauses of the partnership deed. The AR has referred to the following decisions:

Sr. No.	Particulars	Page No.
13	Order of the Hon'ble Tribunal in the case of M/s K S Aiyar & Co. for AY 1980-81 in ITA no. 6159 (Bom) of 1983 dated 11.07.1986	277 – 283
14	Judgment of the Hon'ble Bombay High Court in the case of CIT vs Crawford Bayley & Co. (106 ITR 884)	284 – 290
15	Judgment of the Hon'ble Bombay High Court in the case of CIT vs Nariman B. Bharucha & Ors. (130 ITR 863)	291 – 296
16	Judgment of the Hon'ble Bombay High Court in the case of CIT vs Mulla & Mulla and Craigie Blunt and Caroe (190 ITR 198)	297 - 303
17	Order of the Hon'ble Tribunal in the case of M/s RSM & Co. vs Addl. CIT {125 ITD 243(Mum)}	304 – 313
18	Order of the Hon'ble Tribunal in the case of M/s ACIT vs C.C. Chokhi & Co. [2010-TIOL-328-ITAT-MUM]	314 – 327
19	Order of the Hon'ble Tribunal in the case of M/s A.F. Ferguson & Co. vs JCIT [2010-TIOL-445-ITAT-MUM]	328 – 338

50. The AR pointed out that in all the cases as referred to in the decision cited, the case of Sital Das Tirath Das, reported in 41 ITR 367 (SC) has been referred and have allowed the payment made to the legal heir of the deceased partner, as an over riding liability on the concern.

51. The AR also pointed that similar issue was raised, as far back as in assessment year 1980-81 in the assessee's own case, wherein, the claim of payment made to the legal heir of deceased partner was allowed.

52. The DR strongly relied on the orders of the revenue authorities.

53. We have heard the arguments and have perused the material on record and case cited before us. The issue, in so far as the assessee is concerned, can be said to in favour and covered by an order of the coordinate Bench in its own case in assessment year 1981-82. We also find that the AO has himself conceded that the Hon'ble Bombay High Court in the case of Mulla & Mulla has held that an overriding charge to have been created over the assessee, "*where, by the obligation, income is diverted before it reaches the assessee, it is deductible*". Since the payment has been made by the firm to the legal heir of its

deceased partner, as per the clauses of the partnership deed dated 1.4.2000 having unequivocal covenants. In our opinion, the amount so paid to the legal heir of the deceased partner is an allowable expense.

54. In these circumstances, we set aside the orders of both the revenue authorities on this issue & direct the AO to allow Rs. 20,26,244/- paid to the legal heir of the deceased partners.

The grounds no. 6(1) & (2) are allowed.

In the result, the appeal filed by the assessee is treated as partly allowed.

ITA No. 1271/Mum/2010 : Assessment year 2006-07:

55. The assessee has raised the following grounds:

2. *The Commissioner of Income Tax (Appeals) -3 [hereinafter referred to as CIT(A)] erred in confirming disallowance of Rs. 25,45,440/- being payment made to legal heir of the deceased partner on the ground that these payment are not deductible business expenditure u/s 37(1).
The Appellant submits that payment made to legal heir of the deceased partner is not taxable as income of the Appellant in view of diversion of the same by an overriding title.*
3. *The CIT(A) erred in confirming disallowance of payment made to Baker Tilly International (BTI) of Rs. 1,19,601/- u/s 40(a)(i) of the I.T. Act on the ground that no tax has been deducted at source.
The appellant submits that on the facts and circumstances of the case no tax is deductible from the payments made to BTI as no part of the payment is taxable in India.*

56. The grounds, as raised are identical to the grounds no. 6(1) and (2) and 5 raised in assessment year 2005-06, in ITA No. 384/Mum/2009.

57. We have taken the view on the impugned issues in appropriate paras in ITA No. 384/Mum/2009, following the same, the appeal is accordingly disposed.

In the result, the appeal is treated is allowed.

ITA No. 4930/Mum/2011 : Assessment year 2007-08:

58. The assessee has taken the following grounds:

- “1. *The Commissioner Of Income Tax (Appeals)— 3 [hereinafter referred to as CIT(A)] erred in confirming disallowance of Rs 28,84,923/- being payment made to legal heir of the deceased partner on the ground that these payment are not deductible business expenditure u/s 37(1). The Appellant submits that payment made to legal heir of the deceased partner is not taxable as income of the Appellant in view of diversion of the same by an overriding title.*
2. *The CIT(A) erred in confirming disallowance of payment made to Baker Tilly International (BTI) of Rs 82,649/- u/s 40(a)(ia) of the I.T. Act on the ground that no tax has been deducted at source. The Appellant submits that on the facts and circumstances of the case no tax is deductible from the payments made to BTI as no part of the payment is taxable in India.*
3. *The CIT(A) erred in confirming disallowance of subcontracting fees of Rs. 533,992/- (Rs. 596,375 — Rs. 62,383) u/s 40(a)(ia) of the I.T. Act. The Appellant submits that on the facts and circumstances of the case of the Appellant, subcontracting fees paid do not attract deduction of tax at source u/s 194 C or 194J of the I.T. Act.*
4. *The CIT(A) erred in confirming addition of Rs. 24,050/-, being unreconciled entries of AIR as concealed income of the Appellant. The Appellant submits that it has reconciled the major portion of entries reflected in AIR and on the facts and circumstances of the case the AO shall be directed to delete the addition”.*

59. Ground no. 1 is identical to ground no. 2 in ITA No. 1271/Mum/2010 and ground no. 5 in ITA 384/Mum/2009, wherein we have allowed the ground of appeal. Similarly, we allow the ground of appeal, as raised in the present appeal as well.

60. Ground no. 2 is identical to ground no. 5 in ITA No. 384/Mum/2009, wherein we have allowed the ground and directed the AO to allow the expense as claimed. Following the order, as identical facts are involved, we direct the AO to allow the payment of subscription paid to BTI.

61. Ground no. 3 pertains to disallowance of Rs. 5,33,992/- (Rs. 5,96,375/- less Rs. 62,383/-) u/s 40a(ia) of the income-tax Act.

62. In the submissions before the CIT(A), it reiterated its submissions made before the AO. On consideration of the same, the CIT(A) held,

“During the appellate proceedings, it was submitted that the payments were made to non professionals like B.Com., Graduates, non CA’s, person pursuing their CA course. They were assigned routine work i.e. preparing schedules, totaling, cross check, checking bank accounts, bank reconciliations, petty cash vouchers etc. Their findings and queries while performing audit work was of an insignificant level and does not have major impact on audit work. Their work was monitored by Manager/Senior staff as the payment was to non-professionals. This was without deduction of tax which was actually Rs. 5,96,375/- as per the details in the assessment order. Appellant also relied on 2 decisions one in United Hotels Ltd. vs. ITO (2005) 002 SOT 0267 of E-Bench, Delhi on salary vis-a-vis 194J. In the facts of that case when an employee or employer relationship was established, Hon’ble ITAT held that there was no deductibility u/s. 194J. The other case law cited was Parasrampuriah Synthetics Ltd. (2008) 020 SOT 0248, H-Bench, Delhi. That company had made payment to contractor in respect of maintenance support agreement, fabrication of chilled water line, work order for thermal insulation etc. Hon’ble ITAT Delhi held that there may have been use of services of technically qualified persons to render services but that would not bring it u/s. 194J as the use of such services was for delivering the contract

2.2.3 Appellant further responded that as per Section 194J, Clause (a) to the Explanation postulates that the person rendering professional services must have received the fees in the course of carrying on any of the professions mentioned therein. The appellant submits that it cannot be claimed that persons have rendered services in the course of carrying on the profession of accountancy. These individuals are not professionals. They do not carry on the profession of accountancy or audit. They are merely juniors who are assigned petty routine checking, tracing, posting etc. jobs. Appellant argued that section 194J was also not applicable.

2.2.4 Facts and material on record are considered. In the facts and circumstances of Appellant’s case, the two case laws cited and relied upon by Appellant are not applicable as they are on different facts. It is clear from the details given by Appellant that these were not payments made to employees but to independent professionals who were performing accountancy functions. In the facts and circumstances of the case, the argument of the AO of these parties performing professional service for fees is a valid view. Appellant’s statement that the work done by the professional was insignificant is not material when seen that the work was done by the said parties in their professional capacity and not as mere hired labourers. In the facts and circumstances of the case there ought to have been deduction of tax u/s. 194J which has not been done. In fact, there is no deduction of tax. The disallowance, therefore, is sustained in principle. However, the AO is directed to recalculate the disallowability u/s. 194J in view of some amounts being less than the minimum limit prescribed therein while giving effect to this order. Moreover, as per CBDT’s Circular No. 681 dated 8.3.1984 the provisions of Section 194C shall apply to all types of contracts for carrying out any work including service contract. Without prejudice, even if Appellant’s argument i.e. there not being professional services is accepted, the payments made by Appellant would be considered as in pursuance of service contract necessitating deductibility u/s. 194C. For this reason as well, the disallowance u/s. 40(a)(ia) would be sustainable”.

63. The DR relied on the decision of the revenue authorities.

64. We have heard the arguments and have perused the relevant provision, which prescribed TDS on payments made to professionals. In its submissions, all along, the assessee has been praying that the payments had been made to non professional who are contracted for 3-4 months to do and learn the basic concepts of profession of accountancy. The persons are students who are perusing their accountancy degree/diploma or even as interns. The concept of internship during college days has caught the fancy of students and employees alike, because, the students perusing their formative degree/diplomas are in a lookout of internship to get the knowledge of the field and they are paid, which is good enough for their pocket money. It is economical for the employees to engage such persons, who would come, do the basic work of a paid employee, prepare some details/reports and go in 3-4 months time. On going through the submissions as reproduced by both the revenue authorities, we find that assessee has made payments to such students or small time accountants, who take up office job work at certain period of times.

65. In these circumstances, we feel that these payments shall not attract deduction of tax at source and hence would not be hit by section 40(a)(ia).

66. We, therefore, set aside the orders of the revenue authorities and direct the AO to allow Rs. 5,33,992/-.

67. Ground no. 4 is addition of Rs. 24,050/-, being unreconciled entries of AIR.

68. The AR submits that the addition is not pressed on account of smallness of the amount, i.e. Rs. 24,050/-.

69. Since the issue is not pressed, it is dismissed with the above prayer of the AR.

In the result, the appeal filed by the assessee is treated as partly allowed.

To sum up results:

Appeal of the assessee for assessment year 2005-06 is partly allowed

Appeal of the assessee for assessment year 2006-07 is allowed and

Appeal of the assessee for assessment year 2007-08 is partly allowed.

Order pronounced in the open Court on 19th June, 2013.

Sd/-

(पी.एम. जगताप)

लेखा सदस्य

(P.M. JAGTAP)

ACCOUNTANT MEMBER

Sd/-

(विवेक वर्मा)

न्याईक सदस्य

(VIVEK VARMA)

JUDICIAL MEMBER

Mumbai, Date: **19th June, 2013**

प्रति/Copy to:-

- 1) अपीलार्थी /The Appellant.
- 2) प्रत्यर्थी /The Respondent.
- 3) आयकर आयुक्त(अपील) -3 Mumbai / The CIT (A)-3, Mumbai.
- 4) आयकर आयुक्त – 11, Mumbai /The CIT-11, Mumbai,
- 5) विभागीय प्रतिनिधि “ए” , आयकर अपीलीय अधिकरण, मुंबई/
The D.R. “A” Bench, Mumbai.
- 6) गार्ड फाईल
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आदेशानुसार/By Order

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उप/सहायक पंजीकार

आयकर अपीलीय अधिकरण, मुंबई

Dy./Asstt. Registrar

I.T.A.T., Mumbai

*चव्हाण व.नि.स

*Chavan, Sr. PS