

Sec. 40(ba) couldn't be invoked if payment made by AOP to its members was mere reimbursement of exp.

Summary – The Mumbai ITAT in a recent case of ITD Cem India JV., (the Assessee) held that In order to invoke provisions of section 40(ba), payments should constitute 'share income from AOP' in hands of recipient member

Facts

- The assessee, an 'Association of person', was in the business of development of Highway Projects. In the return of income, the assessee, *inter alia*, claimed deduction of salary paid to employees of one of its members namely 'I' Ltd.
- Since the assessee made the payments to its member, *i.e.*, 'I' Ltd. without deducting tax at source, the Assessing Officer took a view that the provisions of section 40(ba) were attracted and, accordingly, held that expenditure in question was disallowable.
- The Commissioner (Appeals) confirmed disallowance made by Assessing Officer.
- On second appeal:

Held

- The issue under consideration related to payment of 'salary and other related expenses'. There should not be any doubt that the 'Salary, bonus, remuneration' is paid for services rendered, which are usually personal in nature. There should not also be any doubt that such kind of services can be provided only by "individuals". However, in the instant case, the members of the assessee-AOP are corporate bodies and hence the question of providing any "personal services" by them would not arise.
- The assessee submitted that the nature of payments mentioned in section 40(ba) are "interest, salary, bonus, commission and remuneration and such payments should acquire the character of income in the hands of the recipients also. He submitted that the member of the assessee 'I' Ltd. has not received any salary, which is assessable in its hands in the nature of share of income from AOP. In this regard, he invited our attention to the provisions of section 67A of the Act, which provides methodology of computation of share income of a member of Association of Persons. He submitted that, as per the provisions of section 67A of the Act, the aggregate amount of interest, salary *etc.*, paid to the members shall be deducted from the net profit and the remaining profit so arrived at shall be distributed between the members in the profit sharing ratio. Thereafter the interest, salary *etc.*, amount shall be added in the hands of respective member and the amount so arrived at shall be assessed as share income of the respective member. He submitted that the provisions of section 67A make it clear that the "salary payment" contemplated in section 40(ba) is the payment made to the member of AOP, which shall constitute income in his hands.

- In the instant case, the submission of the assessee is that the employees of 'I' Ltd. were deputed to the assessee-AOP. The 'I' Ltd. has directly paid salaries and other related expenses to its employees and since the assessee has used the services of those employees, it has recovered the same from the assessee. Hence, in the hands of the assessee, what was paid to 'I' Ltd. was reimbursement of expenses.
- There is considerable force in the arguments of the assessee. A combined reading of sections 40(ba) and 67A would make it very clear that the payments contemplated in section 40(ba) should constitute "Share income from AOP in the hands of the recipient member. In the instant case, the payments made by the assessee to 'I' Ltd. did not constitute 'Share income' in the hands of 'I' Ltd., but it merely offsets the expenditure incurred by it, *i.e.*, the money had been received by 'I' Ltd. towards reimbursement of expenses incurred by it on its employees on behalf of the assessee. At this stage, the bench specifically asked assessee as to whether 'I' Ltd. has duly deducted tax at source from the salary payments made by it to its employees, who were deputed to the assessee. The assessee submitted that 'I' Ltd. has duly deducted tax at source from the salary payments made to its employees and further the assessee has also clarified this aspect to the tax authorities.
- In view of the foregoing discussions, it is opined that the provisions of section 40(ba) would not apply to the payment given to 'I' Ltd., since the said payments have not been received by it on its own account contemplated in sec. 67A, read with section 40(ba) of the Act and hence the same would not acquire the character of "share income from AOP" in its hands. Accordingly, the order passed by Commissioner (Appeals) on this issue is set aside.
- In the result, the appeal of the assessee in respect of the ground regarding applicability of section 40(ba) to salary payments is allowed.