IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH MUMBAI

BEFORE SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER
AND
SHRI SUNIL KUMAR SINGH, JUDICIAL MEMBER

ITA No.4312/MUM/2023
Assessment Year: 2018-19

Deloitte Haskins and Sells LLP 32th Floor, One International Center, Tower-3, Senapati Bapat Mart, Elphinstone Mill Compound, Mumbai – 400 013 (PAN:AACFD4815A)	Vs.	National E Assessment Centre, Assistant Commissioner of Income Tax, Circle 16(2), Mumbai
(Appellant)		**(Respondent)**

Present for:

Assessee : Shri J.D. Mistry and Shri Niraj Sheth
Revenue : Ms. Sanyogita Nagpal, CIT, DR

Date of Hearing : 06.05.2024
Date of Pronouncement : 21.06.2024

O R D E R

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of Ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi, vide order no. ITBA/NFAC/S/250/2023-24/1058201736(1), dated 24.11.2023 passed against the assessment order by National E-Assessment Centre, Delhi u/s.143(3) r.w.s 144B of the Income-tax Act, 1961 (hereinafter referred to as the "Act"), dated 18.04.2021 for AY 2018-19.

2. Grounds taken by the assessee are reproduced as under:

"1:0 Re.: Addition made to the total income of Rs. 147,22,44,468/- being the alleged difference between the turnover/receipts as per the Income-tax return [ITR] Form/ Financial Statements and service tax/ GST return:

1:1 The National Faceless Appeal Centre ["NFAC"]/ the Commissioner of Income-tax (Appeals) ["CIT (A)"] has erred in confirming the addition of Rs. 147,22,44,468/- being the alleged difference between the turnover/ receipts as per the ITR Form/ Financial Statements and the service tax/ GST returns even though the Assessing Officer has analysed and found the explanation provided by the Appellant satisfactory.

1:2 The Appellant submits that it has furnished detailed explanation including the reconciliation between the receipts as per the ITR Form/ Financial Statements and the service tax/ GST returns and hence considering the facts and circumstances of its case, no addition in respect thereof is called for and NFAC/ CIT(A) ought to have held as such.

1:3 The Appellant submits that the NFAC/ CIT(A) has passed the impugned Order merely on the basis of a selective reading of the statement of facts and has merely confirmed the position of the Assessing Officer without even realising that the facts of the case were misinterpreted/ misunderstood by the Assessing Officer.

1:4 The Appellant submits that the Assessing Officer be directed to delete the addition so made by him and to re-compute its total income and tax thereon accordingly.

Without prejudice to the foregoing:

1:5 The Appellant submits that the NFAC/ CIT(A) has erred in confirming the action of the Assessing Officer of considering the alleged difference between the receipts as per ITR Form/ Financial Statements and the service tax/ GST returns as Rs. 147,22,44,468/- as against the correct amount of Rs. 135,73,03,693/-.

1:6 The Appellant submits that the Assessing Officer has inadvertently considered the amount paid to retired partners of Rs. 11,49,40,775/- in the reconciliation amount and also separately made an addition in this regard and thereby making a double addition.

2:0 Re.: Payments made to retired partners amounting to Rs. 11,49,40,775/-:

2:1 The NFAC/ CIT(A) has erred in confirming the action of the Assessing Officer of considering the amount of Rs. 11,49,40,775/- paid to retired partners as income of the Appellant.

2:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, the said amount of Rs.

11,49,40,775/- cannot be considered as its income as it was diverted by overriding title and the Assessing Officer ought to have held as such.

2:3 The Appellant submits that the Assessing Officer be directed to delete the addition so made by him and to re-compute its total income and tax thereon accordingly.

Without prejudice to the foregoing:

2:4 The Appellant submits that the payments made to retired partners ought to be allowed as a deduction u / s 37(1) of the Income-tax Act, 1961 ["the Act"] while computing its total income.

3:0 Re.: Credit for tax deducted at source amounting to Rs. 18,62,08,841/- granted short:

3:1 The NFAC/ CIT(A) erred in not directing the Assessing Officer to grant full credit for tax deducted at source of Rs. 82,84,20,418/- as claimed by the Appellant in its return of income for the year under consideration.

3:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, it is entitled to full credit for tax deducted at source from its income as claimed by it and NFAC/ CIT(A) ought to have held as such.

3:3 The Appellant submits that the Assessing Officer be directed to grant full credit for tax deducted at source as claimed by it and to re-compute its tax liability accordingly.

4:0 Re.: Levy of interest u/s. 234A of the Act:

4:1 The NFAC/ CIT(A) has erred in confirming the stand taken by the Assessing Officer of levying interest u / s / 234A of the Act.

4:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, no interest u / s 234A is leviable as the Appellant has filed its return of income within the stipulated due date as prescribed under the Act and the Assessing Officer ought to have held as such.

4:3 The Appellant submits that the Assessing Officer be directed to delete the levy of interest u/s. 234A of the Act and to re-compute its tax liability accordingly.

5:0 Re.: Levy of interest u/s. 234C of the Act:

5:1 The NFAC/ CIT(A) has erred in confirming the stand taken by the Assessing Officer in levying excessive interest u / s 234C of the Act.

5:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, interest u/s. 234C of the Act ought to be levied on the returned income and the NFAC/ CIT(A) ought to have held as such.

5:3 The Appellant submits that the Assessing Officer be directed to levy of interest u / s 234C of the Act on the returned income and to re-compute its tax liability accordingly."

3. Brief facts of the case as culled out from records are that assessee is a limited liability partnership firm of Chartered Accountants and providing professional services to various clients. It is registered with Institute of Chartered Accountants of India. Assessee renders professional services of assurance, taxation and other consulting services to domestic and international clients. Assurance services includes statutory audit and tax audit u/s. 44AB of the Act, tax services includes opinions, advice on various issues, compliance work, appearance before various authorities. Assessee follows cash system of accounting.

3.1. Assessee filed its return of income on 31.03.2018 reporting a total income of Rs.274,41,67,890/-, which was revised on 31.03.2019 reporting the same total income but with a different claim towards TDS credit. In the course of assessment proceedings, ld. Assessing Officer noted difference of turn over/gross receipts between the income tax return (ITR) and the service tax return filed by the assessee. The turn over/receipts as per the ITR is Rs.1166,90,98,469/- and as per service tax return Rs.3461,31,97,271/- giving rise to a difference of Rs.2294,40,98,802/. Assessee had furnished detailed submission before the ld. Assessing Officer to explain the difference for which all the relevant necessary documentary evidences were placed on record including financials, service tax returns/GST returns.

3.2. Assessee submitted that it follows cash system of accounting and therefore only the fees which is received during the year can be considered as income whereas service tax as well as GST are based on

invoices issued and not on the basis of fees collected which gives rise to a difference. Assessee also furnished a reconciliation of the gross receipts from professional services and explained each of the items giving rise to the difference to reconcile them. The same is reproduced as under:

Particulars	*Amount (in Rs.)*	*Amount (in Rs.)*
Professional Fees as per schedule 9 of the profit and loss account ***(A)***		*1178,40,39,244*
Add:		
i. Out of pocket expenses subject to Service Tax/GST	*49,79,37,371*	
ii. Invoice rendered in FY 17-18 but not paid by client till 31 March 2018	*160,42,16,076*	
iii. Intra firm invoices	*41,47,6 1,648*	
Total ***(B)***		*251,69,15,095*
Less:		
Invoice issued in the earlier years but payment received during the FY 17-18	*(115,96,1 1,402)*	
Total ***(C)***		*(115,96, 1 1,402)*
Total Output Supply as per GST and Service Tax (A+B-C)		***1314,13,42,937***

i. ***Out of pocket expenses subject to S Tax/ GST - Rs.49,79,37,371***

Many clients is required to reimburse expenses incurred by appellant in providing services e.g. travel expenses, hotel stay, etc. Since the expenses are reimbursable by the client, the expense so incurred are not debited to the profit and loss account. Further, when invoice rendered on client for out of pocket expense (OPE') is received, such receipt is credited to the such expense account. Thus, incurrence of expenses and recovery of the same has no impact on the profit and loss account of the appellant. However, under Service tax / GST law OPE invoice rendered on the client is subject to service tax/ GST and accordingly they are considered as taxable service for the purpose of service tax/ GST return. Whereas, OPE invoices being in the nature of reimbursement of expense, do not form part of the professional fees considered in the return of income. Accordingly, for the purpose of reconciliation, the above amount is added to the grosss receipts from profession as per books.

ii. ***lnvoice rendered in EY 17-18 but not paid by client till 31.3.18- Rs.160,42,16,076***

Service tax/ GST is required to be paid on billing basis and accordingly Service tax / GST return include fees for which invoices are rendered. Such invoices may or may not have been paid by the client in the same financial

year. As appellant is following cash system of accounting, fee is accounted and offered to tax in the year of receipt. Accordingly, for the purpose of reconciliation, the above amount is added to the gross receipts Irom profession.

iii. ***Intra firm invoices - Rs. 41,47,61,648***

The appellant has premises all over India and is registered under GST authorities in 9 states under GST regime which are treated as "distinct persons as per GST law. In case of supply of goods or services by such distinct persons to each other (For eg. DHS LLP Maharashtra to DHS LLP Gurgaon), invoice is raised by supplier on the recipient of goods or service with GST. These intra-firm invoices are disclosed in GST returns of the Supplier and forms part of aggregate turnover as per GST law. However, in financials both income and expenses are netted off in P&L since it is income and expenses pertaining to same entity. Therefore, there is a reconciliation difference to the extent of intra-firm invoices between GST returns and income as per financial statements. Therefore, to arrive at the professional fees shown as per GST return, the above amount was added in the reconciliation.

iv. ***Professional fees received - Rs.115,96,1 1,402***

Invoices which was raised during earlier years aggregating to Rs.l15,96,1 1,402 has been received during the current year. These fees are included in the profit and loss account and accordingly offered to tax. Since these invoices were reported in earlier years i.e. in the year of issue in Service Tax return, it is reduced from the gross receipts in the reconciliation.

3.3. Considering the above submissions of the assessee, ld. Assessing Officer observed and accepted that the gross receipt/turn over from professional services is Rs.1314,13,42,937/- only. He analysed the submissions and found it satisfactory. Accordingly, the difference initially computed by the ld. Assessing Officer of Rs.2294,40,98,802/- was recomputed by him at an amount of Rs.147,22,44,468/-. Before concluding to make this addition, ld. Assessing Officer noted that assessee firm has explained this difference. After noting that since the assessee has accepted this difference, he proceeded to make the addition to the total income of the assessee as income from business and profession.

3.4. The ld. Assessing Officer observed from the profit and loss account that an amount of Rs.11,49,40,775/- has been reduced

under the head 'Payments to retired persons' for which explanations were called for. Assessee furnished its details along with documentary evidences and stated that this amount diverted to retired partners and spouses of deceased partners (hereinafter referred as 'retired partners') is in accordance with clauses 11.7, 16.13 and 16.14 of the partnership deed. According to the assessee, these payments were made in accordance to the partnership deed for which detailed compilation of partnership deed, deeds of accession and supplementary deeds were placed on record.

3.5. Assessee explained the practice adopted by it in rendering the professional and recognising revenue on its account. It was submitted that memo of fees is raised on the client upon completion of an engagement. Income in respect of professional fees gets booked only on receipt of professional fees from the client. At any given point of time, there are several ongoing professional engagements for which professional time has been spent and efforts made. Such work in progress is not reflected in the accounts because of the cash method of accounting. This practice results into considerable amount of income which is either unbilled or billed but not received and work in progress to be received from the clients for which costs are incurred, time is devoted and efforts made during the period when retired partners were active in the firm. Such sums will be realised by the firm in the post retirement period of the partner so retired. The firm continues its operations on the engagement even after the retirement of a partner with same name and apparatus. Assessee submitted that it is an ongoing firm which has the base of clients and human and physical infrastructure built over a period of time inter alia with efforts made by the retiring partners.

3.6. In terms of the clauses of the partnership deed and other relevant documents, assessee submitted that there is prior charge in

respect of payments due to the retired partners on the gross fees received by continuing firm. Owing to prior charge arising from the terms and provisions of the partnership deed, sum payable to the retired partners is diverted by way of superior title and is thus not an income in the hands of the assessee firm. It cannot be said to be a part of assessee's income, considering the nature of obligation in respect of such sum payable by it. Assessee placed reliance on several judicial precedents including in its own case, passed by various co-ordinate benches of ITAT.

3.7. In the alternate, assessee also submitted that payment of Rs.11,49,40,775/- is an expenditure allowable u/s. 37(1) of the Act, as it was incurred for the purpose of carrying on the profession of the firm. Further, these payments made by the assessee to the retired partners has been included in the income of the respective retired partners, who have offered the same to tax in their return of income for the year under consideration. However, ld. Assessing Officer did not find favour with the submissions made by the assessee and concluded to disallow the payments so made to the retired partners.

3.8. While completing the assessment, TDS credit to the assessee was restricted to Rs.64,22,11,577/- by ld. Assessing Officer resulting into a short credit of Rs.18,62,08,841/-.

3.9. Aggrieved, assessee went in appeal before the ld. CIT(A).

4. On the first issue relating to difference between the professional receipts as per ITR and service tax return, ld. CIT(A) justified the addition made by the ld. Assessing Officer. On the second issue relating to addition for payments made to retired partners, ld. CIT(A) did not find favour with the assessee by observing that this expenditure has no direct nexus to its profession and therefore justified the addition made by the ld. Assessing Officer. On the third

issue relating to short credit of TDS, ld. CIT(A) directed the ld. Assessing Officer to verify Form No.26AS and other challan details for taxes paid by the assessee and there upon allow credit. Aggrieved, assessee is in appeal before the Tribunal.

5. Before us, ld. Counsel for the assessee reiterated the factual submissions made before the authorities below. On the first issue relating to addition made on account of difference between the gross receipts/turnover between ITR and service tax, ld. Counsel emphasised on the findings recorded by the ld. Assessing Officer in this respect, whereby he has stated that assessee firm has explained the difference of Rs.147,22,44,468/-. He referred to annexure to notice u/s. 142(1) placed in the paper book to point out that a specific query was raised by the ld. Assessing Officer which was replied to his satisfaction. He also referred to the detailed explanation furnished before the Assessing Officer on each of the items of reconciliation of statement corroborated by documentary evidences placed on record. According to him, the authorities below could not appreciate the submissions and the reconciliation in proper perspective.

5.1. Per contra, ld. CIT(DR) placed reliance on the order of ld. Assessing Officer.

6. On this first issue, we note that in the assessment order itself, ld. Assessing Officer has stated that submission of the assessee is found satisfactory. He has also stated that assessee has explained the difference. Assessee has furnished the details with explanations and documentary evidence to reconcile the difference alleged by the ld. Assessing Officer. Assessee had also moved an application u/s. 154 to rectify the mistake on a premise that ld. Assessing Officer had made the addition under a mistaken notion which is pending for disposal.

6.1. From the details furnished and extracted above, we note that there are out of pocket expenses which has been subjected to service tax/GST, there are intra firm invoices which are disclosed in service tax returns and forms part of the aggregate turn over as per Service Tax law. However, in financials these intra-firm invoices are both income and expenses and are netted off in profit and loss account, since it is income and expense pertaining to same assessee firm.

6.2. Further, assessee follows cash method of accounting and only the fees which is received during the year is considered as income whereas for the purpose of service tax and GST, the gross receipts/turnover is based on invoices issued and not on the basis of fees collected. Considering all these facts on record supported by documentary evidences, we find the reconciliation furnished by the assessee is justified. Accordingly, the difference between the gross receipts/turnover as per the ITR and service tax added by the ld. Assessing Officer is deleted. Ground no.1 alongwith with its sub grounds are allowed.

7. Taking up second issue in respect of addition made for payments made to retired partners of Rs.11,49,40,775/-, ld. Counsel for the assessee submitted that professional fees of the said amount was diverted by overriding title to the retired partners as per clause 11.7, 16.3 and 16.14 of the partnership deed, dated 01.04.2017. This amount was reduced from the gross receipts of the assessee for the year under consideration duly reflected in the profit and loss account in schedule 9 placed at page 209 of the paper book.

"Schedule 9:
Fees

Professional fees	*11,78,40,39,244*
Less: Payments under clause 10 of the Partnership Deed	*11,49,40,7 75*
	11,66,90,98,469"

7.1. Ld. Counsel referred to the list of retired partners containing details of payments made to them in the year under consideration placed at page 131 of the paper book. For this purpose, he referred to the clauses contained in the partnership deed. From Clause 11.7, it was pointed out that payments to retired partners in terms of clause 16.14 shall have a prior charge on the gross fees and assets of the assessee firm. Consequent to this, the real income accruing to assessee shall be the income left after satisfying such charge. The said clause of the partnership deed is reproduced as under:

> *11.7.1. It is agreed that payments as provided in Clause l6.14.1 shall have a prior charge on the gross fees and assets of the LLP and consequently the real income accruing to the LLP as constituted from time to time during the period such payments are to be made shall be the income left after satisfying such charge. [It is clarified that similar obligations hitherto incurred shall continue to be fulfilled.]*
>
> *11.7.2. No Partner. his heirs, or his legal representatives or nominees are or shall be entitled to any lump sum payment in lieu of the payments provided in Clause 1l6.14.1.*

7.2. Ld. Counsel also referred to clause 16.13 dealing with right to receive payments on retirement or death from which he pointed out that the sums payable to the retired partners shall be determined on the basis of amounts billed, but not received, work completed, but not billed and work partly completed and not billed as at the date of death or retirement or as the case may be, having regard to the fact that the assessee follows cash system of accounting. He reiterated the practice adopted by the assessee in respect of rendering of professional services and recognising revenue on its account which is already elaborated in above paragraphs and therefore not repeated for the sake of brevity.

7.3. Ld. Counsel took us through the aforesaid clauses of partnership deed relating to payments made to the retired partners in order to explain that there is a prior charge of the gross fees received by the continued partners because of which it is not an income of the assessee firm. He submitted that the amount paid to the retired partners is a consideration to them for the assessee to continue the same business in the same line with the new partners and to retain the retired partners to support competitiveness on their own and not to join a new firm which is a threat to the existing firm as well as to settle the pending bills relating to income earned by them as a partner during their tenure in the assessee firm. On a specific query by the bench, Ld. Counsel for the assessee made a statement and gave the assurance that there is no change in the terms of the Partnership Deed in respect of payments to retired partners, in the case of the assessee. Ld. Counsel, by summarising various clauses of the partnership deed submitted the following:

i. "Under the deed a partner who has served the firm for a qualifying period exceeding 20 years as defined in the deed, is entitled to certain payment for a specified period after the retirement.

ii. such payment is in respect of amounts billed but not received & Work-in Progress as at the date of retirement having regard to the fact that the Partnership follows the cash system of accounting; in consideration of the Retiring Partner permitting the continuing Partners the use of the Firm name & to carry on the profession, along with the clientele and the attendant rights of the Firm and the contribution made by the surviving Partner during his association with the Firm, in increasing the future income earning, for agreeing to assume the liability in respect of payment to retired partners of the legacy firm etc.

iii. every partner including incoming partner agrees to the covenants with the retiring partner by being a party to the partnership deed,

iv. such payment is made by specific provision in the Deed, a prior charge on the gross fees and assets of the firm.

v. retirement of a partner does not affect continuation of the firm

vi. retiring partner does not have any right, title or interest in Goodwill,

vii. retiring partner is bound by negative covenants in respect of not engaging himself in any professional practice, etc.

In view of the facts emanating from the contents of the Partnership Decd. the appellant submitted that:

i. There is a prior charge in respect of payments due to the retired partners on the gross fees received by the continuing firm,
ii. In view of prior charge arising from the provision of the Partnership Deed, the sum payable to the retied partners is diverted away by superior title and therefore is not the income of the appellant firm.
iii. The nature of obligation is such that the sum payable to retired partners cannot be said to be part of appellant income."

7.4. He also contended that this amount has already been included in the income of the retired partners and offered to tax under their return of income for the year under consideration.

7.5. He placed reliance on the decisions of the Co-ordinate Bench of ITAT in assessee's own case for Assessment Year 2008-09 and Assessment Year 2012-13 wherein it was held that payment to retired partners is diverted by overriding title and is not an income of the assessee firm. He also referred to several decisions of the group concerns which are placed on record. Ld. Counsel also placed reliance on the decision of Hon'ble Jurisdictional High Court of Bombay in the case of CIT vs. A.F. Ferguson & Co. in ITA(L)No.97/2011, dated 21.07.2011. From this he referred to the substantial question of law which dealt with the identical issue. The same is reproduced as under:

" (a) Whether on the facts and circumstances of the case and in law the Hon'ble Tribunal was justified in upholding order of the CIT(A) deleting the addition made by Assessing Officer disallowing payment of Rs. 32,85,000/- made to 3partner/spouses of deceased partners, by holding that payment has been paid on account of overriding title on the profits and allowing claim of the Assessee?"

7.6. Hon'ble High Court gave its decision by referring to its own earlier decision in the case of CIT vs. C.C. Chokshi & Co. in ITA No.209 of 2008 and 193 of 2008, dated 25.07.2008 wherein the similar question raised by the Revenue was rejected.

8. Per contra, ld. CIT, DR submitted that payments made to retired partners cannot be regarded as diversion but is an application of

income since it is made from the income of the firm. Ld. DR placed reliance on the orders of the authorities below. In the course of arguments, she placed reliance on the decision of Co-ordinate Bench of ITAT, Mumbai in the case of S.B. Billimoria & Co. Vs. ACIT [2010]125 ITD 122(Mum) to buttress her contention.

9. We have heard the rival contentions and given our thoughtful considerations on the submissions made before us. We have also perused the judicial precedents referred before us by both the parties and also the partnership deed and its relevant clauses. From the various clauses of the partnership deed, we note that they specify the quantification and identification of the amount payable to the retired partners. These clauses also specify the treatment of such amounts by creating a prior charge on the income and assets of the assessee. We have also gone through the practice adopted by the assessee firm for rendering the professional services and recognising revenue thereon as discussed in above paragraphs. The facts narrated above on this issue are undisputed and therefore are not reiterated for the sake of brevity.

9.1. We note that there is long line of judicial precedents dealing with the subject matter which includes decisions by Co-ordinate Benches of ITAT, including those approved by Hon'ble Jurisdictional High Court of Bombay in the case of CCIT vs. C.C. Chokshi & Co. and ACIT vs. A.F. Ferguson & Co. (Supra). Decisions of Co-ordinate Benches of ITAT includes-

I. Chennai Tribunal decision in the case of Deloitte Haskins & Sells in ITA No 2079/CHNY- 2016 for the AY 2011-12.
II. Ahmedabad Tribunal decision in the case of Deloitte Haskins & Sells in ITA NO.1983/AHDI2017- for the AY 2013-14 and ITA No. 1984/AHDI2017 for AY 2014-15.

III. Mumbai Tribunal decision in the assessee's own case for the AY 2006-07 to 2008-09 in ITA No. 5095/Mum/2011, ITA No. 6786/Mum/2011 and ITA No.2221Mum/2011

IV. Mumbai Tribunal decision in the assessee's own case for the AY 2012-13 in ITA No. 7515/Mum/2016

V. Delhi Tribunal decision in the case of Deloitte Haskins & Sells in ITA No.3715/De/20 17 for the AY 2011-12;

9.2. From the decisions of Co-ordinate Benche of ITAT, Chennai in the case of ACIT vs. Deloitte Haskins & Sells in ITA No.2077/MDS/2016, dated 25.11.2016, identical issue was dealt whereby addition so made was deleted. In the said decision, reliance was placed on the order of another Co-ordinate Bench of ITAT, Mumbai in the case of C.C. Chokshi & Co. vs. JCIT in ITA No. 492-495/Mum/2003 for Assessment Year 1995-96 to 1997-98, dated 24.04.2006. Case of C.C. Chokshi & Co. travelled before the Hon'ble Jurisdictional High Court of Bombay, where the appeals by the Revenue were dismissed by placing reliance on the decision of the Hon'ble Court in the case of CIT vs. Mulla & Mulla & Craigie Blunt & Caroe [1991] 190 ITR 198 (Bom).

9.3. On a specific query to the ld. Counsel of the assessee in respect to the findings given in the case of Mulla & Mulla & Craigie Blunt & Caroe (Supra), ld. Counsel took the Bench through the decision and pointed out that Hon'ble' Court has dealt with the issue on identical set of facts by referring to the substantial questions of law. While answering the substantial questions of law, the Hon'ble Court noted that there was a legal obligation in terms of the deed of retirement to pay in a particular manner to the erstwhile partner in respect of realisation fees after their retirement. It was held to be an instance of the source of income being subject to an obligation. Thus, the outstanding fees paid to the retiring partners as per the terms of the

deed of retirement were held not assessable as income of the firm. The Hon'ble Court by relying on the decision of Hon'ble Supreme Court in the case of Sital Das Thirath Das [1961] 41 ITR 367 (SC) noted that the true test for the application of the rule of diversion of income by overriding charge was whether the amount deducted in truth never reached the assessee as income. According to it, there is a difference between the amount which a person is obliged to apply out of his income and amount which by the nature of the obligation cannot be said to be a part of his income where as a result of the obligation income is diverted before it reaches the assessee which is deductable. Thus. the substantial question of law was answered in negative, i.e., in favour of the assessee.

10. Before us, ld. DR had referred to the case of Co-ordinate Bench of ITAT, Mumbai in the case of S.B. Billimoria & Co. (Supra) wherein the payments made to the retiring partners were held to be out of self imposed obligation being gratuitous and hence an application of income. In this decision, the claim of the assessee was disallowed. To this effect, ld. Counsel for the assessee had referred to the decision of Co-ordinate Bench of ITAT, Chennai in assessee's group concern, i.e., ACIT vs. Deloitte Haskins & Sells in ITA No. 1517/CHN/2017 for Assessment Year 2012-13 dated 08.02.2018. In this decision, the case of S.B. Billiomoria & Co. (Supra) was dealt with and was distinguished vis-à-vis principles laid down in the case of C.C. Chokshi & Co. (Supra). The Co-ordinate Bench by relying on the two decisions of Hon'ble Jurisdictional High Court of Bombay (Supra) allowed the claim of the assessee. The relevant findings from this decision are reproduced as under:

> *"We have heard the rival submissions and perused the materials available on record. The facts stated hereinabove remain undisputed and hence the same are not reiterated for the sake of brevity. We find that this tribunal had placed reliance on the decision of Mumbai Tribunal in the case of C.C.Chokshi & Co., which was later approved by the Hon'ble Bombay High Court vide order dated 25.7.2008. Further we find that the Hon'ble Bombay High Court in the case of*

A.F.Ferguson & Co Supra had dismissed department's appeal by answering first substantial question of law with reference to allowability of payments made to retired partners on account of overriding title on the profits, in favour of the assessee. We find that the Mumbai Tribunal in the case of S.B.Billimoria && Co Supra held that the principles laid down in C.C.Chokshi & Co., case was not applicable because of the reason that the covenants in the partnership agreement in S.B.Billimoria's case allowed the partners to carry on the business subject to approval of majority of partners as per Para 20 of the said decision, whereas, in C.C.Chokshi & Co. case, it was not possible and there is no such enabling covenant which allows the remaining partners to carry on business without making payment to retired partners. These two clinching distinguishing features advances the case of the assessee. We find from the perusal of the partnership agreement of the assessee herein, the continuing partners cannot carry on business without making the payment to retired partners. Similarly there is no clause in the partnership agreement of the assessee Which enables the continuing partners to carry on the business with majority partners consent. Hence it could be safely concluded that the decision of S.B.Billimoria is factually distinguishable. We hold that the issue under dispute is now settled by the two decisions of Hon'ble Bombay High Court Supra and respectfully following the same, we do not find any infirmity in the order of the ld CITA in this regard. Accordingly, the grounds raised by the revenue are dismissed."

10.1. Thus, the reliance placed by the ld. DR on the case of S.B. Billimoria & Co. (Supra) is of no support to her.

11. In conclusion, the undisputed facts are that assessee firm made payment to retired partners in terms of its partnership deed where in the basis is that partner would have rendered their professional services during his tenure as a partner but could not enjoy the fruits thereof on account of work having remained incomplete and the concerned client could not be billed for the work already done. Considering the facts on record, documentary evidences forming part of the paper book and long line of judicial precedents referred and discussed above, including those in the case of assessee itself and those by the Hon'ble Jurisdictional High Court of Bombay (Supra) wherein there is no material change in the facts and the applicable law as well as the terms of partnership deed, we respectfully following the judicial precedents, delete the addition made in this respect by the ld. Assessing Officer. Also, with this finding of ours, the alternate plea taken by the assessee of allowing the claim u/s.37(1) of the Act is

rendered infructuous. Accordingly, grounds raised by the assessee in this respect are allowed.

12. On the third issue relating to short credit of TDS, ld. CIT(A) has directed the ld. Assessing Officer to verify the records and allow the credits subject to verification. We concur with the directions given by the ld. CIT(A) and accordingly remit this matter to the file of ld. Assessing Officer in terms of the directions so given. Accordingly, ground no.3 taken by the assessee is allowed for statistical purposes.

13. Ground no.4 and 5 are consequential in nature and therefore need no adjudication.

14. In the result, appeal of the assessee is allowed.

Order is pronounced in the open court on 21 June, 2024

Sd/-	Sd/-
(Sunil Kumar Singh)	(Girish Agrawal)
Judicial Member	Accountant Member

Dated: 21 June, 2024

MP, Sr.P.S.

Copy to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai