

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C': NEW DELHI**

**BEFORESHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI AVDHESH KUMAR MISHRA, ACCOUNTANT MEMBER**

ITA No.1140/Del/2024, A.Y.2019-20

JV of TATA Projects Limited and Chint Electric Company Ltd. First Floor, Tower-1, Okaya Centre, B-5, Sector-62, Gautam Buddh Nagar PAN: AACAJ5141Q	vs.	ITO, Ward 5(1)(3), Noida, Uttar Pradesh
(Appellant)		(Respondent)

Appellant by	Mr. Malay Kalavadia, CA
Respondent by	Shri D.K. Shrivastav, Sr. DR

Date of Hearing	23/07/2024
Date of Pronouncement	14/08/2024

ORDER

PER AVDHESH KUMAR MISHRA, AM

This appeal filed by the assessee for the Assessment Year (In short, the 'AY') 2019-20 is directed against the order dated 05.02.2024 passed by the Additional/Joint Commissioner of Income Tax (Appeals)-Thane [In Short, the JCIT(A)].

2. The grounds raised in this appeal are as under:-

"1. The order of the learned Additional/Joint Commissioner of Income-tax (Appeals), Thane ('CIT(A)') dated 05.02.2024 for the Assessment Year 2019-20 is contrary to law, facts and in the circumstances of the case.

2. *The learned CIT(A) has failed to understand the intention of insertion of section 167B of the Act and also erred in the interpretation of clause (ii) of the sub-section (2) of section 167B of the Act, explained vide CBDT Circular No. 551 dated 23.01.1990, as per which sub-section (2) of section 167B will be applicable, only in cases where the shares of the members are determinate.*
3. *The learned CIT (A) while applying Section 167B(2)(ii) of the Act erred in stating that as per the said section Appellant was liable to be taxed at maximum marginal rate of 40% (plus applicable surcharge and cess) upon the entire income of the Appellant and erred in not applying the higher tax rate (i.e. 40%) only on the proportion of income applicable to a member who is a foreign company and maximum marginal rate (i.e. 30% tax rate) on the balance income applicable to a member who is a domestic company.*
4. *The learned CIT(A) erred in not considering the assessment order of AY 2018-19 wherein section 167B(2)(ii) of the Act has been correctly applied by the Assessing Officer in the Appellant's own case.*
5. *The learned CIT(A) erred in confirming the levy of interest of Rs.46,347/- under section 234A of the Act stating that the ground is not adjudicated separately being consequential in nature.*
6. *The learned CIT(A) erred in confirming the levy of interest of Rs. 10,20,561/- under section 234B of the Act stating that the ground is not adjudicated separately being consequential in nature.*
7. *The learned CIT(A) erred in confirming the levy of interest of Rs.2,34,053/- under section 234C of the Act stating that the ground is not adjudicated separately being consequential in nature.”*

2.1 In nutshell, the appellant/assessee had challenged the applicability of tax @ 40% along with surcharge & cession its total income along with the levy of consequential interest under section 234A, 234B and 234C of the Income Tax Act, 1961 (in short the 'Act').

3. In brief, the facts of the case relevant for deciding this appeal are that it is a joint venture between TATA Projects Limited (In short, the 'TPL') and Chint Electric Company Ltd. (In short, the 'Chint'). It is an Association of Persons (In short, the 'AOP'). The appellant/assessee filed its Income Tax Return (In short, the 'ITR') on 31.10.2019 declaring income of Rs. 3,87,56,280/-. The ITR was processed under section 143(1) of the Act, wherein the Assessing Officer (CPC-ITR) [In short, the 'AO'] applied tax rate of 40% on entire taxable income of Rs.3,87,56,280/- instead of 30% offered by the appellant/assessee on the reasoning that one of the members of the AOP; being Foreign Company, whose income is above the taxable limit, is paying tax @ 40%. The grievance is with respect to the rate of taxability along with surcharge & cess and its consequential effect under section 234A, 234B and 234C of the Act. Aggrieved the appellant/assessee filed appeal before the JCIT(A), who dismissed the appeal.

4. The Ld. Authorized Representative (In short, the 'AR') submitted that the members of the appellant/assessee AOP have determinate share in the profit (TPL 99.99% and Chint 0.01%); therefore, the provisions of Section 167B(2) were applicable for determining the tax rate in the case of the appellant/assessee AOP. It was categorically admitted that the Chint, the non-resident foreign company was liable to be taxed @ 40% whereas TPL, a resident Indian company, was liable to be taxed @ 30%.

Thus, maximum marginal rate (MMR) in one of the members of the AOP was 40% whereas it was @ 30% in another. The AO had taxed the entire income @ 40% whereas the law provided that the income relatable to the member whose income was chargeable to tax above 30% should be charged at the rate higher than the maximum marginal rate of 30%. Thus, it was submitted that at most 0.01% of the total income of the appellant/assessee could be charged to tax @ 40% and remaining 99.99% @ 30%. It was further submitted that the applicability of 40% tax rate was beyond the scope of provisions of section 143(1) of the Act. In support of the contention, the Ld. AR placed reliance on the decision of Hon'ble Rajasthan High Court in the case of JKs Employees Welfare Fund 66 taxman 447.

4.1 The Ld. AR further contended that the appellant/assessee had never been taxed @ 40% in the preceding and subsequent years. The Ld. AR with the help of processing under section 143(1) of the Act for AY 2018-19 2020-21 to 2023-24 demonstrated that the AO had applied the tax rate of 30% in all these years. Only the present case was exception. Accordingly, he prayed for applicability of tax rate of 30% keeping in view the principle of consistency laid down by various judicial pronouncements. In support of the contention, the Ld. AR placed reliance on the decisions in the cases of Madhukar C Ashar 69 taxmann.com 221 (Bom), Salarpuria Simplex Dewelling LLP 143

taxmann35 (Cal), Gujrat Narmada Valley Fertilizers Co. Ltd. 42 taxmann 438 (Guj) and Swami Onkaranad Saraswati Charitable Trust 150 taxmann 428 (Alld).The Ld. AR also drew our attention to the assessment order passed under section 143(3) of the Act in the case of the appellant/assessee for AY 2018-19 wherein the tax rate of 30% was applied.

5. The Ld. Senior Departmental Representative (In short, the 'Sr. DR') reiterated the appellate order and submitted that the appellant/assessee did not demonstrate the share of profit in the net profit of the appellant/assessee AOP and thus, prayed for dismissal of the appeal. In support of his contention the Ld. Sr. DR placed reliance on the order dated 21.10.2019 of the ITAT, Chennai in the case of Herve Pomerleau International CCCL Joint Venture in the ITA Nos.1008/CHNY.2017 and the ITA Nos. 17, 18, 19/CHNY/2019 for AY 2010-11 to 2013-14.

6. We have heard both the parties and have perused the material available on the record. For proper appreciation of the facts of case, the section 167B(2) of the Act is reproduced hereunder:-

“167B ; Charge of tax where shares of members in association of persons or body of individuals unknown, etc. [Inserted by Act 3 of 1989, Section 28 (w.e.f. 1.4.1989)

1. Where the individual shares of the members of an association of persons or body of individuals (other than a company or a co-operative society or a society registered under the Societies Registration Act, 1860 (21 of 1960), or under any law

corresponding to that Act in force in any part of India) in the whole or any part of the income of such association or body are indeterminate or unknown, tax shall be charged on the total income of the association or body at the maximum marginal rate:

Provided that, where the total income of any member of such association or body is chargeable to tax at a rate which is higher than the maximum marginal rate, tax shall be charged on the total income of the association or body at such higher rate.

2. *Where, in the case of an association of persons or body of individuals as aforesaid [not being a case falling under sub-section (1),-*

(i) the total income of any member thereof for the previous year (excluding his share from such association or body) exceeds the maximum amount which is not chargeable to tax in the case of that member under the Finance Act of the relevant year, tax shall be charged on the total income of the association or body at the maximum marginal rate;

(ii) any member or members thereof is or are chargeable to tax at a rate or rates which is or are higher than the maximum marginal rate, tax shall be charged on that portion or portions of the total income of the association or body which is or are relatable to the share or shares of such member or members at such higher rate or rates, as the case may be, and the balance of the total income of the association or body shall be taxed at the maximum marginal rate.

Explanation - For the purposes of this section, the individual shares of the members of an association of persons or body of individuals in the whole or any part of the income of such association or body shall be deemed to be indeterminate or unknown if such shares (in relation to the whole or any part of such income) are indeterminate or unknown on the date of formation of such association or body or at any time thereafter.”

7. From the plain reading of the section 167B of the Act, it is evident that the taxability of an AOP is based on whether the share of its members is determinate or not. When the share of members of the AOP

is indeterminate, then tax is charged at a Maximum Marginal Rate (In short, the 'MMR') or at a rate higher than MMR in case one of the members's income is chargeable to tax at a rate higher than MMR. MMR is defined under the Act as the rate of income tax (including surcharge & cess on income tax, if any) applicable to the highest income slab for an individual, AOP or Body of Individuals. On the other hand, when the member's share is determinate, the income in hands of such an AOP shall be computed based on the following three situations:

(i)	Where member's income exceeds maximum amount not chargeable to tax (before including their share of AOP's income), the tax is charged at the MMR in the hands of such an AOP.
(ii)	Where member's income is less than the maximum amount not chargeable to tax, the income is taxed in the hands of AOP at tax rates applicable to individuals.
(iii)	Where member's income exceeds maximum amount not chargeable to tax (before including their share of AOP's income), the extent of member's share in AOP's income shall be charged at such higher rate and the balance income shall be taxed at the MMR.

8. In this case the appellant/assessee AOP has clearly mentioned in its ITR that the members' share in the AOP's profit is determinate (TPL 99.99% and Chint 0.01%) and both members' income without including their income from AOP are chargeable to tax. The ITR also reveals that

the TPL is the domestic company and Chint is a Chinese company. In view of these facts, it emerges that the income of TPL is chargeable to tax @ MMR (30%) and that of Chint at the rate higher than MMR (@ 40%) as it is a foreign company. By placing reliance on the order dated 21.10.2019 of the ITAT in the case of Herve Pomerleau International CCCL Joint Venture (supra), the Ld. Sr. DR has raised the issue that whether the members' share in the AOP's profit is determinate and the Long-term Agreement, MOU, Consortium Agreements, Profit sharing Agreement, etc. between the member of AOP contain the clause relating to profit sharing of the members of AOP. Further, the Ld. Sr. DR drew our attention to the categorical finding of the ITAT in the case of Herve Pomerleau International CCCL Joint Venture (supra) "*that the member of AOP i.e. HPL was entitled to 2 percent of the project cost, regardless of the fact whether the AOP made profits or losses and such amount was a charge against the profits of the taxpayer, but not a share in profits*" to submit that the shares of members of the AOP needs examination/investigation to determine that whether the members' share in the AOP's profit is determinate. We are of the firm view that this issue cannot be examined/investigated under section 143(1) of the Act as it is beyond its scope.

9. In view of the above discussion, we are of the considered opinion that the total income of Chint, without including the income from the

appellant/ assessee AOP, is chargeable to tax @ 40% plus surcharge, plus Education Cess plus Secondary and Higher Education Cess as applicable on its total income; therefore, the tax shall be charged on that portion or on the part of income of AOP which is relatable to the share of Chintat such a higher rate (40%) plus surcharge, plus Education Cess plus Secondary and Higher Education Cess as the case may be and the remaining/balance of income @ MMR plus surcharge, plus Education Cess plus Secondary and Higher Education Cess as the case may be. Accordingly, we order so. Resultantly, 99.99% of the income of the appellant/assessee AOP has to be taxed @ 30% plus surcharge, plus Education Cess plus Secondary and Higher Education Cess as the case may be and 0.01% @ 40% plus surcharge, plus Education Cess plus Secondary and Higher Education Cess as the case may be. We do not find any merit in the Ld. AR's contention that the interest under the Act has not been charged as per law; therefore, we decline to interfere with the finding of the JCIT(A) on this score.

10. In the result, the appeal of the assessee is partly allowed as above.

Order pronounced in open Court on 14th August, 2024

Sd/-

**(KUL BHARAT)
JUDICIAL MEMBER**

Sd/-

**(AVDHESH KUMAR MISHRA)
ACCOUNTANT MEMBER**

Dated: 14/08/2024
Binita, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. CIT-DR

ASSISTANT REGISTRAR
ITAT, NEW DELHI