

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 2285/Del/2016 (By Assessee)

&

ITA No. 2392/Del/2016 (By AO)

(Assessment Year: 2011-12)

Shri Harish Narinder salve 6E & 6F, White House 10, Bhagwandas Road New Delhi -110001 PAN :- AHFPS7386B	vs	The Assistant Commissioner of Income tax Circle 37 (1) New Delhi
(Appellant)		(Respondent)
The Assistant Commissioner of Income tax Circle 37 (1) New Delhi		Shri Harish Narinder salve 6E & 6F, White House 10, Bhagwandas Road New Delhi -110001 PAN :- AHFPS7386B

Assessee by :	Shri Sachit Jolly , Adv
Revenue by:	Shri Surdendra Pal Sr. DR
Date of Hearing	25/07/2019
Date of pronouncement	13/08/2019

ORDER

PER PRASHANT MAHARISHI, A. M.

- These are the cross appeals filed by the assessee, Shri Harish Narinder Salve and the Asst Commissioner of Income Tax, circle 61 (1), New Delhi (the AO) against the order of The Commissioner of Income Tax (Appeals) – 20, New Delhi dated 23/2/2016 for assessment year 2011 – 12.

2. The assessee has raised the following 2 grounds of appeal in ITA number 2285/del/2016:-
 - i. That on the facts and circumstances of the case and in law, the learned CIT – A grossly erred in holding that the expenditure on scholarship amounting to Rs. 2845372/- was incurred to bring into existence and advantage for the enduring benefit of the profession, thus treating the same as capital expenditure.
 - ii. That on the facts and circumstances of the case and in law, the learned CIT (A) erred in not appreciating that expenditure incurred by the appellant was for the furtherance of profession incurred wholly and exclusively for the purpose of business and ought to be allowed under section 37 of the income tax act, 1961.
3. In ITA number 2392/del/2016 the learned assessing officer has effectively raised following 2 grounds of appeal:-
 - i. In the facts and circumstances of the case, the learned CIT (A) has erred in treating the sum of rupees to 845872/- as capital expenditure instead of disallowance of the same as gift (scholarship) expenses not wholly and exclusively act that in related to the profession.
 - ii. In the facts and circumstances of the case, the learned CIT – A has erred in deleting the addition of INR 1 371818/- made by the assessing officer on account of foreign exchange loss.
4. The brief facts of the case shows that assessee is a leading advocate , derived income from business or profession, income from house property, capital gain and other sources. He filed his return of income on 30/9/2011 declaring income of INR 50,52,50,407/-. The return was subsequently revised on 31/3/2013 at INR 50,05,33,812/-. The assessment u/s 143 (3) of the act was passed by the learned Assessing Officer on 10/3/2014 determining the total income of the assessee at INR 50,47,53,590/-.

5. The learned Assessing Officer made three disallowances to the total income of the assessee which were contested by the assessee before the learned CIT – A, who passed an order on 23/2/2016. Result of these three disallowance before him is as under :-
- i. Disallowance of Rs. 28,45,872/- incurred by the assessee towards the scholarship expenditure claimed by the assessee as wholly and exclusively incurred for the purposes of the business/profession of the assessee. Learned AO was of the view that it is not allowable u/s 37 (1) of the act. The learned CIT – A held it to be a capital expenditure. Therefore, both the parties aggrieved with the order of the learned CIT – A are in appeal before us.
 - ii. Disallowance of expenses of INR 2090/- which have not been paid in the relevant financial year as assessee is following the cash system of accounting. This addition is deleted by the learned CIT – A and is not the subject matter of appeal before us.
 - iii. Disallowance /addition of INR 13,71,818/- on account of foreign exchange loss, being the difference in exchange at the time of raising of the bill and at the time of realization of billed amount. Though assessee is following cash system of accounting, however bills raised to foreign clients are prepared on the basis of foreign exchange rates prevailing on the date of the billing, when amount is realized at the time of actual receipt, there is bound to be difference in exchange, which is written off or back to the profit and loss account. Thus, assessee is recording the cash received only as income. The AO disallowed the same holding that in cash system, it is not allowable. The learned CIT – A allowed the claim as during the year, the transactions have settled after recording of billing and its receipt. Therefore, learned AO is in appeal before us.

6. Now we come to the first ground of appeal of the assessee and the learned assessing officer. The brief facts of the issue revolve around the claim of the assessee of Rs 2845872/- as deductible expenditure under the head scholarship expenses.
7. The Brief facts shows that assessee has paid a scholarship of INR 1 867392/- to Ms Deeksha Sharma and Rs 978480/- to Ms Jasdeep Kaur Randhawa in terms of scholarship agreement entered into by the assessee with The Exeter College, the University of Oxford dated 19/03/2009. According to that, the assessee has committed to providing annual funding for scholarship of graduate student at Oxford University for top Indian student on annual basis. According to the agreement, there is a selection criteria also provided and it is linked to Clarendon Scholarship for maximum 3 years. Assessee has given a justification for claiming the above expenditure as deductible expenditure u/s 37 (1) of The Income Tax Act. Such justification is as under:-
 - 1) Since 2003, I have focused on increasing my international practice and for which purpose I spent considerable amount of time, taking on international arbitration work in London and other international centers such as Singapore.
 - 2) Is not well known in the United Kingdom, in order to become known to the legal fraternity, Indian senior counsel generally attend international conferences, and for which the expenses incurred are claimed as a deduction from the taxable income.
 - 3) I have however not found this a suitable way of developing international contacts. Instead, I have developed contacts in the legal fraternity in the UK by making friends in the academia the fact that I was admitted to the UK barring 2013 on the basis of my Indian qualifications, without any requirement of any training of pupillage in the UK is a testimony to the success of my efforts. I have also been

admitted as a non-resident tenant of the Blackstone Chambers.

- 4) I was introduced to the Rector of Exeter College in Oxford; she told me that the Oxford University is looking for people who could provide financial assistance to Indian students who aspire to study in Oxford.
- 5) From my point of view, this had three distinct advantages. The first advantage was that this helped to introduce me to the legal fraternity in the academia in the United Kingdom, this is very influential. I regularly conducted workshops in the Oxford University, some of which were then discussed on blogs by the students.
- 6) Through this connectivity, I have had the occasion to meet a number of senior lawyers and judges. Last year I was also invited by the law faculty in Oxford University to deliver lectures.
- 7) Secondly, it also increased the number of Indian students who have had the benefit of international education. My Indian practices strongly supported by the number of juniors who are in my Chambers. I have presently for juniors who have educated themselves in either Oxford University (3) or other international universities (1). I do hope that some of the juniors who passed out of Oxford will join my Chambers at some point. In fact, the very first scholar, Ms Deeksha Sharma, did her Masters in International taxation with focus on the Vodafone case. When I was preparing that case for arguing the appeal in the Supreme Court, she sat in the meetings and made valuable contributions.
- 8) All these activities add a lot of value to my CV. Recently the government of Singapore appointed me on committee

constituted to recommend the establishment of international commercial courts in Singapore. None of this would have happened if I did not have the visibility, which I have been able to achieve in this manner.

- 9) That apart, it is necessary for successful lawyers to be seen as being supportive of the profession – to give back to society in some measure. I felt the best way I could support Indian law student was in this manner.
- 10) For a senior professional, there are number of tangible and intangible factors that contribute to building the overall persona. The success of a senior counsel in the Supreme Court does not depend only upon the knowledge of law skills in advocacy, senior lawyers in the present times become public figures, and their activities in all fields directly contribute to their professional stature. The kind of fees that senior counsel command has a direct Nexus with the stature that such counsel has not just in the profession but in society. Thus, all such expenses that are legitimately incurred for building up the overall personnel of a professional (in the professional field) are legitimate business expenses.
- 11) There is complete transparency in the process, the students were given the assistance are selected by the college, and are deserving students who but for such assistance would not be able to afford education in Oxford University.”

Therefore, he submitted that these expenditure are wholly and exclusively incurred for the profession of the assessee and hence is allowable under section 37 (1) of the act.

8. The learned AO held that assessee has paid scholarship to some students for studying in the Exeter University of Oxford is a gift given by the assessee to that college. The AO referred to the memorandum of

understanding entered into by the assessee with that college which refers the above scholarship as a gift. Therefore, he is of the view that it is an act of compassion with philanthropic attitude. He submitted that these two individuals to whom the scholarship are given are no way related to the profession of the assessee and therefore it cannot be said that it has been expended for training/skill development of the employees/retainers of the assessee who would have held him in his profession. He also negated the argument of the assessee that some of the students may join his chamber at some point of time, as there was no agreement between the assessee and those students. He also negated the argument of the assessee that it gives a professional recognition to the assessee. The AO was of the view that going into the conference will enhance the knowledge of the assessee and gives contacts but this scholarship being a gift is totally unrelated to the profession of the assessee. He further held that giving scholarships to the students cannot be a factor, which will lead to building the overall persona of the assessee contributing to the professional stature of the assessee. In nutshell, he held that the above amount of scholarship of INR 2845872/- incurred by the assessee is not an expenditure wholly and exclusively incurred for the purpose of the profession and not allowable u/s 37 (1) of the act. Therefore, he disallowed it.

9. Aggrieved, assessee challenged the same before the learned CIT – A. The assessee raised the similar argument. The learned CIT – A held that the aim and object of the expenditure incurred by the assessee is

- (1) Future expansion of the business,
- (2) Prolonging the life of an existing business,
- (3) Forming a conceivable nucleus for posterior profit earning,
- (4) conduct of the business,

- (5) Avoiding inroads and incursions on its concrete presence,
- (6) Commercial expediency,
- (7) Profit earning advancement.

The learned CIT further held that on going through the aims and objects of the incurring of the expenditure according to him it is incurred to bring into existence and advantage for enduring benefit of the profession and therefore he held it to be capital in nature. Therefore, AO as well as the assessee are in appeal on this issue.

10. The learned authorised representative submitted that assessee is noted lawyer of highest professional standing nationally as well as internationally. He further referred the recent incident of “Kuldeep Jadhav Case” where India was represented before International Court Of Justice by the assessee. He referred this for the simple reason that how the professional recognition of the lawyer of such a stature enhances in the eye of society. He further stated that the profession of lawyers is a regulated profession where the solicitation of clients and advertisement is prohibited, the professional recognitions is earned by a professional by speaking and attending seminars, conferences and workshops. Contributing to journals and periodicals. Looking to the stature of the assessee, who is recognized internationally, he found a way of enhancing his professional image by setting up a scholarship in an internationally renowned university by helping the Indian students to get them educated, so that in future they may join him. According to him, it has happened and one of the student to whom this scholarship is awarded has helped him in a famous Vodafone case, he therefore submitted that, the expenditure incurred by the assessee is wholly and exclusively for the purposes of the business. He further stated that expenditure is revenue in nature no enduring benefit has resulted to the assessee in creating any tangible or intangible asset; therefore, definitely it is not a capital

expenditure. He further submitted that the revenue authorities have failed to understand the nature and the level of the professional services provided by the assessee to appreciate the close and intimate connectivity of such expenditure with the profession. He therefore submitted that above expenditure is allowable to the assessee u/s 37 (1) of the act. He hastened to add that that the scheme of selection of the student is not by the assessee and none of the students to whom this scholarship is is not at all related to the assessee. He therefore submitted that orders of the lower authorities may be set aside.

11. The learned authorised representative submitted that identical issue of contribution by a professional has been considered by the coordinate bench in ITA number 1382/del/2012 for assessment year 2009 – 10 when a noted lawyer contributed to the building of a professional body, which was held to be allowable as revenue expenditure. He further submitted that the above decision has been approved by the honourable Delhi High Court in ITA number 50/2014 dated 11/8/2015 and therefore the issue is squarely covered in favour of the assessee. He submitted that issue is squarely covered in favour of the assessee.
12. The learned departmental representative vehemently supported the order of the learned assessing officer and submitted that assessee has set up an annual scholarship for the Indian students who are going to study in that college which is affiliated with the Oxford University. It is a means of a scholarship to the Indian student, which by no stretch of imagination can be said to be expenditure wholly and exclusively incurred for the purpose of the profession of the assessee. He further stated that the students who are given scholarship are selected by the University and assessee does not have any say, therefore, it is a gift and does not have any correlation with the professional stature of the assessee. He admitted that though the assessee is a noted international lawyer, but, he submitted that these expenditure are required to be

tested strictly under the provisions of the income tax act and specifically u/s 37 (1) of the act. He therefore submitted that it is not wholly and exclusively incurred for the purposes of the business but merely is a scholarship, which is one of the philanthropic actions of the assessee. He further submitted that the learned CIT – A has altogether born on different tangent in considering the above expenditure as capital expenditure which is totally erroneous on the facts of the case as the payment is merely a gratitude is payment by the assessee for scholarship of 2 students.

13. We have carefully considered the rival contention and perused the orders of the lower authorities. Issue involved in this appeal is whether the expenditure incurred by the assessee is allowable u/s 37 (1) of the act or not. Allowability of an expenditure incurred by the assessee u/s 37 (1) of the act is required to be tested in accordance with nature and scale of the business/ profession of the assessee. It may be a case that in case of one assessee, particular expenditure is “ wholly and exclusively “ incurred for the purposes of business and in another case it may not be so. Undoubtedly, assessee is a noted international lawyer who has set up a scholarship for creating his visibility in international arena and his social standing. The assessee has specifically submitted that it has increased lot of value of the CV of the assessee and the government of Singapore has appointed him on certain committees of repute. Even otherwise, it is not open to the revenue to adopt a subjective standard of reasonable as and decide whether the type of the expenditure of the assessee should incur and in what circumstances. The opinion of the learned assessing officer that attending the conferences et cetera would have added more weightage to the professional profile of the assessee is devoid of any merit. It is not the AO but the assessee is carrying on the profession. He knows better that what kind of expenditure he should incur for furtherance of his business. To judge allowability of an

expenditure, the learned assessing officer should put himself into the shoes of the assessee and then decide that whether the expenditure incurred by the assessee is necessary or not for the business of the assessee. Thus, allowability of expenditure should always be judged from the mindset of the assessee. The AO cannot put his thinking to say that the expenditure incurred by the assessee is not wholly and exclusively incurred for his profession, unless, he brings his level of thinking to the level of the professional, like assessee. The requirement of incurring the expenditure by a professional/businessman changes by the changes in the dynamics of the business, its complexities and its uniqueness. The level at which the assessee is carrying on the profession, perhaps, he might not have thought it proper to increase visibility by attending the conferences, seminars et cetera. He has different vision of carrying himself in the professional field to increase visibility and social status. He thought fit to set up a scholarship to Indian students in Oxford University. Thus, in the present case definitely there is a nexus between the expenditure incurred by the assessee and the professional services rendered by the assessee. He has also shown that the student to whom the scholarship has been granted has helped him in famous case of Vodafone represented by him. Therefore, we are of the opinion that the assessee has incurred the above expenditure wholly and exclusively for the purposes of the business. In the professional field there are innovative ways visualized by the professional to make themselves visible in the professional circle and to build their own professional profile for generating higher and value-added business. It may be, sponsoring a seminar, becoming knowledge partners, setting up the prizes and awards, creating the competitive award ceremonies, hosting vibrant summits of various states. Therefore, it is apparent that at least in the case of the professionals, the way they promote themselves, is changing very fast and the benefits of such

expenditure are huge and wide. Therefore according to us the impugned expenditure incurred by the assessee is a revenue expenditure allowable u/s 37 (1) of the income tax act. We do not subscribe to the view of the learned CIT – A these expenditure is capital in nature. The expenditure incurred by the assessee is the routine day-to-day expenditure incurred by the assessee for promoting his professional profile. These expenditure cannot be held to be capital expenditure in nature as no fresh new fixed assets is created by paying the scholarship sum. Further merely because in the agreement it is mentioned as an annual gift in the form of scholarship, it does not become a gift. In fact, it is the expenditure incurred by the assessee in furtherance of his business. While issue arose before coordinate bench in case of another professional firm in ITA number 1382/Del/2012 for assessment year 2009 – 10 wherein substantial contribution was made for a building of an association which promotes the study of taxation. The coordinate bench held that such expenditure incurred by the assessee is wholly and exclusively incurred by the assessee for the purpose of its profession. Revenue carried the matter before the honourable Delhi High Court, which upheld the order of the ITAT in ITA number 50/2014 dated 11/8/2015. The facts of the present case are on the far better footing. Hence, we reverse the order of the lower authorities, and direct the learned assessing officer to delete the above disallowance. In view of this, we allow ground number 1 of the appeal of the assessee and dismiss ground number 1 of the appeal of the learned assessing officer.

14. Thus, we allow ground number 1 and 2 of the ground of appeal of the assessee and dismiss ground number 1 of the appeal of the revenue.
15. Now we come to the 2nd ground of the appeal of the assessing officer, the only issue left in this appeals, wherein the learned AO has challenged the action of the assessing officer in deleting the addition of INR 1 371818/– on account of foreign exchange loss. It is necessary to mention

important facts of the issue. As it is already stated, that assessee is a lawyer by profession and he is following the cash system of accounting. The assessee records the invoices raised on foreign clients in his books of account at the exchange rate prevailing as on that date of raising of the invoice. Thus, at that time, he records his service income as per the exchange rate prevailing on the date of raising of the invoices. When, subsequently the amount received for services, naturally, they are received as per prevailing exchange rate on the date of realization of the foreign invoices. Therefore, naturally, there would be a difference in the recording of the invoices as income and the amount of fees received of those invoices. Sometimes, there would be a foreign exchange gain and on sometimes there would be foreign exchange losses. Therefore, the necessary accounting implication is that in the year itself, 1st, professional fees would be recorded at the higher amount of lower amount and subsequently as soon as the moneys received, it would be adjusted on the credit side of profit and loss account as exchange gain or on the debit side of profit and loss account as exchange loss. The assessee and stated that he is doing this only for maintaining control over those invoices. Admittedly, during the year the assessee has incurred foreign exchange loss. The learned assessing officer has disallowed it for the simple reason that when assessee is maintaining its books of accounts on cash basis, the assessee should have recorded the net realization only when the fees are received. Therefore, he disallowed it. The learned CIT – A understood practice adopted by the assessee and allows the same. According to him, there is no addition is required to be made even in cash system of accounting. Aggrieved, the AO is in appeal before us.

16. The learned departmental representative vehemently supported the order of the learned assessing officer and submitted that when the assessee is maintaining the books of accounts on cash basis, the fees is required to

be recorded only at the time of realization of the invoices and there is no question of any foreign exchange loss or gain incurred by the assessee. He submitted that there is a violation of cash system of accounting the movement the assessee records the invoices at the time of preparation of the bill. He therefore submitted that the learned CIT – A wrongly deleted the addition.

17. The learned authorised representative submitted that there is no difference between the income according to the method suggested by the assessing officer and the method adopted by the assessee. He submitted that eventually the assessee has recorded the income which is only the cash received by the assessee. He vehemently supported the order of the learned CIT – A and referred to the accounting entries made by the assessee which are recorded at page number 45 and 46 of the order of the CIT – A. He therefore submitted that there is no error in the order of the learned CIT – A in deleting the above addition.
18. We have carefully considered the rival contention and perused the orders of the lower authorities. We have already recorded the method of accounting adopted by the assessee, which is cash method of accounting. We have also stated in earlier paragraphs by stating the facts of the issue that how the entries are made in the books of accounts. Admittedly, the method of accounting of the invoices raised in foreign currency adopted by the assessee of recording the same at the foreign exchange rate prevailing as on the date of raising of the invoice. Further when there is a realization, naturally, there would be a difference in the rates of exchange between currencies, such loss or gain would be accounted for in the profit and loss account itself. Whenever, the bills are realized the necessary impact of foreign exchange gain or loss going to profit and loss account will eliminate the difference between the mercantile method of accounting and the cash basis of accounting, and the correct revenue would be derived as per the Cash Method of

accounting. Therefore, merely because of the reason that assessee records the invoices prepared in foreign currency at the rate prevailing thereon for control purposes and subsequently offsetting it whenever the bills are realized by debit or credit to the profit and loss account, the net impact is that whatever is cash received is recorded in the profit and loss account. Thus, according to us, there is no addition is warranted even in cash method of accounting adopted by the assessee. In the result we do not find any infirmity in the order of the learned CIT – A in deleting the addition of INR 13,71,818/- on account of foreign exchange loss. Thus, ground number 2 of the appeal of the learned assessing officer is dismissed.

19. In the result, appeal filed by the assessee is allowed and appeal filed by the assessing officer is dismissed.

Order pronounced in the open court on 13/08/2019.

-Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 13/08/2019
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi