THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 11.02.2010

\+ **ITA 146/2010**

THE COMMISSIONER OF INCOME TAX ..... Appellant

- versus –

ORIENTAL STRUCTURAL ENGINEERS P.LTD ... Respondent

Advocates who appeared in this case:-
For the Petitioner : Ms Rashmi Chopra
For the Respondent : Mr Rajat Navet and Mr Ankit Gupta

CORAM:
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SIDDHARTH MRIDUL

1. Whether Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether the judgment should be reported in Digest?

BADAR DURREZ AHMED, J (ORAL)

1. This appeal by the revenue is directed against the order dated 06.03.2009 passed by the Income-tax Appellate Tribunal in ITA No.3058/Del/2007 relating to the assessment year 2004-05. The Assessing Officer had made a disallowance of Rs 1,22,85,406/- by invoking the provisions of Section 40A(2)(b) of the Income-tax Act, 1961 (hereinafter referred to as 'the said Act'). The respondent / assessee is a joint venture of two companies, namely, Oriental Structural Engineers Pvt. Ltd and Gammon India Ltd. The joint venture was established for the purposes of obtaining works from the National Highways Authority of India. However, it was the arrangement between the joint venture partners that the works that are

assigned by the National Highways Authority of India to the joint venture would be carried out on a back-to-back basis by the partners themselves and that the works would be equally distributed between the partners.

2. During the year in question, the assessee received the contracts from the National Highways Authority of India amounting to Rs.1,24,75,88,242/-. The assessee had, as per the joint venture agreement, sub-contracted the works to the joint venture partners, namely, Oriental Structural Engineers Pvt. Ltd and Gammon India Ltd for execution of the project. 98.47 % of the receipts from the National Highways Authority of India had been paid by the joint venture / assessee to its partners / sub-contractors. A very small amount of expense was incurred by the joint venture / assessee on account of tax, royalty, audit fee, service tax, etc. amounting to Rs.1,03,680/- which amount had been claimed as a loss. The Assessing Officer felt that the payment made by the joint venture / assessee to the extent of Rs.1,22,85,402/- was excessive and, therefore, the said amount was disallowed by invoking the provisions of Section 40 A(2) (b) of the said Act.

3. The assessee, being aggrieved, filed an appeal before the Commissioner of Income-tax (Appels), who deleted the disallowance. The said deletion was confirmed by the Income-tax Appellate Tribunal by virtue of the impugned order. The Tribunal returned a clear finding of fact indicating that the payments made by the joint venture / assessee to its partners was not excessive and, therefore, Section 40A(2) of the said Act would not come into play. The Tribunal held as a fact that the arrangement

between the parties was clear that after receipt of the contract from the National Highways Authority of India, the work was to be executed by the joint venture members directly and no effort was to be made by the assessee/ joint venture itself in the execution of the contract. It was, therefore, found by the Tribunal that the assessee was created as a joint venture for obtaining works from the National Highways Authority of India without there being any requirement or necessity of the joint venture to carry out any activity itself. In fact, all the activities were to be carried out by the aforesaid two members of the joint venture and for which they were to be remunerated. In this context, the Tribunal returned a clear finding that the remuneration of the members of the joint venture was not excessive having regard to the fair market value of the services rendered by them.

4. In any event, no interference with the impugned order is called for inasmuch as the same does not raise any question of law and the findings are those of fact alone. A decision of this court in the case of ***Commissioner of Income-tax v. Dr. R.N. Goel: 2008 (X) AD (Delhi) 545*** was also referred to, wherein it was observed as under:-

> "7. Having perused the record of the case, and after hearing the counsel for both the Revenue, as well as, the assessee, we are of the view that the issue involved before the authorities below was whether the expenses claimed by the assessee towards payment of commission, as well as, service charges to CIL was reasonable having regard to the provisions of Section 40A of the Act. This issue according to us is a pure question of fact. The Supreme Court in Upper India Publishing House Pvt. Ltd. Vs. CIT: (1979) 117 ITR 569 and the Division Bench of this Court in the case of CIT Vs. Northern India Iron & Steel Company Ltd: (1989) 179 ITR 599 and CIT Vs.

> Mohta Electrosteel Ltd: (1995) 215 ITR 522 have held that whether or not an expenditure is unreasonable and hence, merits disallowance under the provisions of Section 40A of the Act, is essentially a question of fact".

5. No question of law, what to speak of a substantial question of law, arises for our consideration. The appeal is dismissed.

BADAR DURREZ AHMED, J

SIDDHARTH MRIDUL, J

February 11, 2010
bs/dutt