IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

BEFORE SHRI AMIT SHUKLA, JM AND SHRI RAJESH KUMAR, AM

आयकर अपील सं./I.T.A. No 2258/Mum/2013

(**निर्धारण वर्ष /** Assessment Year: 2008-09)

M/s Niche International C/o Aniruddhamody & Co Chartered Accountants Flat No.1, 'A' Wing, Neelam Co-op Hsg Soc Ltd, Opp. Varahi Mataji Temple, Next to Manish Building, Shanka Lane, Kandivali(W) Mumbai-400 067.	**बनाम**/ Vs.	A.C.IT CIR 15(2) R.No 113, 1st Floor, Matru Mandir, Nana Chowk, Mumbai-400 007.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAEFN 5380J		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	Shri Nishit Gandhi
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri S.K. Mishra

सुनवाई की तारीख / **Date of Hearing**	:	05/01/2016
घोषणा की तारीख / **Date of Pronouncement**	:	29/01/2016

आदेश / O R D E R

PER RAJESH KUMAR, A. M:

This appeal by the assessee is directed against the order dated 02.01.2013 of Commissioner of Income Tax (Appeals)-26, Mumbai (Hereinafter called as the CIT(A)) for assessment year 2008-09. The assessee has raised the following grounds of appeal:-

1. *"The learned CIT (A) has erred in law as well as in facts by rejecting the contentions of your appellant that both the expenses are of different nature and they have correctly deducted tax at source as may be applicable as per the provision of I.T. Act,1961 and therefore, no disallowance is called for of expenses of different nature by aggregating the same as a single expense U/S 194(1).*

   The learned CIT (A) under the facts and circumstances of the case ought to have accepted the claim of your appellant

2. *The learned CIT (A) has erred in law as well as in facts by confirming and upholding the order of the A.O. in part by directing him to restrict the disallowance of Rs. 2,40,000 only U/S 40(a)(ia) when the A.O. treated two separate expenses as a single expense U/S 194(I) and disallowed the amount in proportion to short fall.*

2.1 *The learned CIT (A) has erred in law as well as in facts by bi-furcating expenses in two part for the short deduction of tax at source as a result he confirmed disallowance of Rs.2,40,000 though, endorsed the view of the A.O. that entire payment of different nature is to be treated as rent U/S 194(1).*

   The learned CIT (A) under the facts and circumstances of the case ought not to have directed to restrict the disallowance to an extent of Rs. 2,40,000 when the different expenses entirely treated as a single expenses U/S 194(I) and therefore, he could have allowed deduction of entire expenses in case of short deduction of tax as no provision of disallowance u/S/40(a)(ia) is applicable in respect of short deduction of tax.

3. *The learned CIT (A) has erred in law by dismissing additional ground of your appellant that no disallowance could be made U/S 40(a)(ia) in respect of the amount of expenses which are not payable and outstanding on the last day of the accounting year as the entire expenses were paid during the year as such the issue of your appellant is covered by the order of the ITAT in the case of Merilyn Shipping & Transport VIS Addl. CIT RgI Visakhapatnam reported in (2012) 20Taxmann.com 244 (Visakhapatnam) (SB) , merely because the Orisa High court has stayed the order of the ITAT.*

The learned CIT(A) ought not to have dismissed the ground of your appellant because of stay granted on operation of ITAT order since, the stay is applicable to the party concerned in that appeal.

Therefore, under the facts and circumstances of the case it is prayed that necessary relief as may be deemed fit and proper under the facts and circumstances of the case be granted.

Without prejudiced to the above

1. *The order of the learned A.O. as partially confirmed by the learned CIT(A) be declared without jurisdiction as much as the A.O has no jurisdiction to determine an applicability of TDS provision to particular transaction while making disallowance U/S 40(a)(ia) because there is a separate jurisdiction in existence to interpret the matter of applicability of TDS provision and assessment thereof.*

The A.O ought to have restricted his power to disallowance of expenses for non deduction of tax at source without interpreting the provision and its' applicability to transaction when separate machinery for the purpose is existed.

2. *That the amendment brought in the Income Tax Act u/s. 40(a)(ia) and other provisions in relation to TDS by finance act, 2012 are remedial and curative in nature hence, be declared having retrospective effect. Since, the payee filed their return of income for the year consideration and discharge their tax liability and therefore, no disallowance be made under the amended provision.*

Therefore, under the facts and circumstances of the case it is prayed that necessary relief as may be deemed fit and proper under the facts and circumstances of the case be granted."

2. The common issue raised in all the grounds of appeal is against the confirmation of addition of Rs.2,40,000/- by the CIT(A) by ignoring the fact that the AO had wrongly applied the provision of section 40(a)(ia) of the Act in respect of rent paid to two persons @ Rs. 1,20,000/- each for two offices taken on rent .

3. The facts in brief are that the assessee filed its return of income on 28.09.2008 declaring total income of Rs.31,27,620/-. During the year the assessee paid rent of Rs. 2,40,000/- for two offices no 605 and 606 rented from Shri Roochir Sanghvi and Shi Rooshabh Sanghvi and rent was paid @ Rs. 1,20,000/- for each office. The case of the assessee was selected under CASS and statutory notices u/s 143(2) and 142(1) of the Act were duly issued and served on the assessee. The ld. AO framed the assessment u/s 143(3) vide order dated 20.12.10 by making additions u/s 40(a)(ia) of Rs.4,36,800/- on account of non deduction of TDS on rent and short deduction of TDS on service charges u/s 194I of the Act for the reasons that the TDS should have been deducted @ 10% under the provision of 194(I) of the Act and the assessee knowing the split the total amount into rent and service charges in order to circumvent the provisions of TDS.

4. Aggrieved by the order of the AO the assessee preferred an appeal before the CIT(A) who partly allowed by the CIT(A) by holding that the assessee has rightly deducted the TDS @ 2% on service charges u/s 194C and AO was wrong in holding that the TDS was required to be deducted u/s 194I and not u/s 194C thereby sustaining the addition to the extent of Rs. 2,40,000/- on account of rent paid. Ld. DR on the other hand relied on the order of the authorities below.

5. We have considered the rival submissions and perused the material on record. We find that the assessee had paid rent to two persons from whom the assessee had taken two offices namely 605 and 606 on rent and rent for each office was Rs.1,20,000/- and was accordingly paid Rs. 1,20,000/- to Mr. Ruchir Sanghvi for office no 605 and Rs. 1,20,000/- to Mr. Rushab Sanghvi for office no 606 which is below the limit as provided by the provisions of section 194I of the Act for deduction of tax at source. The provisions of section 194I are reproduced below.

> *"194-I. Any person, not being an individual or a Hindu undivided family, who is responsible for paying to [a resident] any income by way of rent, shall at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, [deduct income-tax thereon at the rate of-*
>
> *[(a) two percent for the use of any machinery or plant or equipment; and*
>
> *(b) ten percent for the use of any land or building (including factory building) or land appurtenant to a building (including factory building) or furniture or fittings:]]*
>
> *Provided that no deduction shall be made under this section where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be*

credited or paid during the financial year by the aforesaid person to the account of, or to, the payee, does not exceed [one hundred and eighty thousand rupees]:"

5. Thus, it is clear from above that for the purpose of deduction of tax at source under provision of section 194I of the Act the annual rent has paid or credited to one person has to Rs.1,80,000/- whereas in the case before us the rent per person was only paid of Rs.1,20,000/- which is below the limit specified in this section. In view of these facts , the provision of section 194I are not applicable in the present case and the disallowance made by the AO by applying the provision of section 40(a)(ia) of the Act cannot be sustained. We, therefore, delete the addition of Rs. 2,40,000/-by reversing the finding of the CIT(A) on this point. The AO is directed accordingly.

In the result, the assessee's appeal is allowed.

Order pronounced in the open court on 29th January, 2016

Sd/-	Sd/-
(Amit Shukla)	(Rajesh Kumar)
न्यायिक सदस्य / Judicial Member	लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated :29.01.2016
Ps. Ashwini

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**