

**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA BENCH "D" KOLKATA**

Before Hon'ble **Shri Waseem Ahmed, Accountant Member** and  
**Shri S.S.Viswanethra Ravi, Judicial Member**

<b>ITA. No.1399/Kol/2016</b> Assessment Year : 2010-11
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Luxicon Commercial Enterprises Ltd, 40B, Princep Street, Kolkata-700072. <b>PANNo.:AAACL5025 H</b>	<b>V/s.</b>	I.T.O., Ward-1(4), Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-700069.
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Manoj Kataruka, Advocate
प्रत्यर्थी की ओर से/By Respondent	Shri Rajat Kr. Kureel JCIT-DR
सुनवाई की तारीख/Date of Hearing	20.01.2017
घोषणा की तारीख/Date of Pronouncement	17.03.2017

**आदेश /ORDER**

**Per Waseem Ahmed, AM**

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-1, Kolkata dated 10.05.2016. Assessment was framed by I.T.O., Ward-1(4), Kolkata u/s143(3) of the Income tax Act, 1961 (hereinafter referred to as 'the Act ') vide his order dated 04.03.2013 for assessment year 2010-11.

Shri Manoj Kataruka, Ld. Advocate appeared on behalf of assessee and Shri Rajat Kumar Kureel, Ld. Departmental Representative represented on behalf of Revenue.

2. The first issue raised by the assessee in ground no. 1 and 2 is that the ld. CIT(A) erred in upholding the order of AO by sustaining the disallowance of Rs.5,79,837 being an amount of interest paid to bank in cash credit account.

3. The facts in brief are that the assessee in the present case is a limited company and is engaged in the business of sale and servicing of vehicles as well as sale of spare parts and accessories. The assessee, in the year under consideration has made an investment of Rs.3,15,00,023/- which was shown under the head "capital work-in-progress". It means the expenditure incurred on the investment was capitalized by the assessee. It was also observed that the assessee has taken a loan from SBI A/c No.30871938804 for the purpose of investment as discussed above. The assessee claimed interest expenses on such loan for Rs.15,93,440.006/- which was also capitalized and included in the aforesaid capital work in progress. However, the AO observed that a sum of Rs.62.50 lakhs dated 28.08.2009 has also been withdrawn from the cash credit a/c no. 30187727041 of SBI which was also invested in the same capital work-in-progress. But the interest paid on such loan (CC loan) has been claimed as expenditure in profit and loss account and the same was not capitalized. Therefore, the AO called upon the assessee to explain the reasons for non capitalization of interest of cash credit account in proportionate to Rs.62.50 lakhs which was invested in the impugned capital work-in-progress. The assessee in compliance thereto submitted that no fund from the bank has been used in making the investment in the aforesaid capital work-in-progress. In fact a sum of Rs.35 lakhs was invested by its directors in the aforesaid capital work-in-progress. However, the AO disagreed with the submission of the assessee and held that a sum of Rs.62.50 lakhs has been withdrawn from cash credit account and therefore proportionate interest amounting to Rs.5,79,837/- is treated as capital expenditure which was disallowed and added to the total income of the assessee.

4. Aggrieved, assessee preferred an appeal before Id. CIT(A). Before Id. CIT(A) the assessee submitted that the AO has misunderstood the current account maintained with State Bank of India as cash credit account. In fact the cash credit account No.30187727041 is the current account of the assessee and

therefore the interest is not required to be disallowed. Further, the Id. CIT(A) disregarded the claim of the assessee by confirming the order of AO by observing as under :-

*"I have carefully considered the submissions and material on record. It is observed that the argument taken by the appellant that the transactions pertaining to investment of Rs.62,50,000/- in capital WIP were not from CC a/c. NO.30187727041 as per the AO's finding were funded from its current a/c. with SBI is found to be in the nature of an alternative plea. However, no supporting evidence was furnished by the appellant's AR either in the assessment or during the appellate proceedings in support of the plea now being taken. In this regard it is well settled that the onus lies upon the assessee to substantiate the genuineness of its claim with supporting evidence. In view of the above discussion, it is found that there is no infirmity in the finding of the AO and therefore, the disallowance interest of proportionate interest of Rs.5,79,837/- as capital expenditure is confirmed. These ground are not allowed."*

Being aggrieved by the order of Id. CIT(A) the assessee is in second appeal before us on the following grounds of appeal:-

*"1.For that on the facts and in the circumstances of the case the action of the Ld. CIT(A) in upholding the action of the Assessing officer in respect of disallowance of Rs. 579837/- being the proportionate amount of interest paid to Bank in Cash Credit Alc. as Capital expenditure as against Revenue expenditure is arbitrarily bad in law as well as on facts.*

*2. For that in view of the facts and circumstances of the case that the Ld. Assessing officer failed to understand and appreciate the submission made regarding utilization of funds for acquiring the Land & building for the workshop of the company and the Ld. CIT(A) was not justified in confirming the addition made by the Assessing officer on mere surmise supposition and hypothetical reasons which is not justified and the additions needs to be deleted in full."*

5. The Id. AR before us reiterated the submissions made before Id. CIT(A) and submitted paper book which is running pages 1 to 52 and copy of the bank statement of SBI A/c No.30187727041 to justify that it was not cash credit account.

On the other hand the Id. DR vehemently supported the orders of the authorities below.

6. We have heard the rival contentions and perused the material available on record. The issue in the instant case relates to the diversion of funds from the cash credit account maintained with SBI towards capital work in progress of Rs.62.50 lakhs and the capital work-in-progress was categorized under the head "investment" in the balance sheet and therefore any interest paid on any loan in connection with this capital working progress is to be capitalized. As such, the interest on such loan cannot be claimed as revenue expenditure. However, both the lower authorities found that there is a diversion of funds from the cash credit account whereas the assessee claimed that there is no diversion of funds as observed by the lower authorities. On examination of the records, it was found that the account which the lower authorities treated as cash credit account is in fact the current account of the assessee. Therefore, the observations made by the Id. Counsel in their respective years are baseless. The Id. AR before us has submitted the bank statement from where the fund was invested in the capital work-in-progress. On perusal of the bank statement, we find that this is the current account of the assessee and not the cash credit account as held by the lower authorities. Therefore, we are in agreement with the submissions of the Id. AR. The Id. AR in support of his claim has submitted the bank book of the assessee which is placed on pages 42 to 45 of the paper book. The Id. AR also submitted that the current account of the assessee was classified under the head "current assets" in the audited financial statement, which are placed at pages 5 to 30 of the paper book. However, on perusal of the records we find that the bank statement was not submitted by the assessee before the lower authorities. Now the assessee before us has submitted copies of the bank statement which is additional document and needs to be verified by the AO. Therefore, we are inclined to restore this issue to the file of the AO for fresh adjudication in accordance with law and in the light of the above stated discussion this ground of appeal of the assessee is allowed for statistical purposes.

7. The second issue raised by the assessee in this appeal is that the Id. CIT(A) erred in confirming the order of AO by sustaining the disallowance of Rs.3 lakhs under the provision of section 40(a)(ia) of the Act.

8. The assessee in the year under consideration has debited an expenditure of Rs.3 lakhs under the nomenclature of Quality Care Expenses. The AO during the assessment proceedings observed that such expenses is in the nature of fees for professional and technical services and the same has been claimed without deducting TDS u/s 194J of the Act. Accordingly the AO called upon the assessee for the clarification on the non deduction of TDS. The assessee in compliance thereto submitted that the said amount was discharged by way of debit note and the same does not represent the professional services. Therefore, there is no question of deducting TDS on the aforesaid amount. However, the AO observed that the expenses has been claimed in the books of accounts and whether it was claimed by way of debit note or any other reason but the same was liable for the TDS provision which the assessee has failed to comply. Therefore, the same was disallowed under the provision of section 40(a)(ia) of the Act and added to the total income of the assessee.

9. Aggrieved, the assessee preferred an appeal before Id. CIT(A). The assessee before the Id. CIT(A) submitted that the party M/s Ford India Ltd has debited to the assessee for the aforesaid amount which represents the activities of quality care services to dealers. As such, it is not a fee in the nature of professional services and therefore not liable for TDS deduction. However, the Id. CIT(A) disregarded the contention of the assessee and confirmed the order of AO by observing as under :-

*"Hence, based upon a plain reading of section 194J read with explanation 9(1 )(vii) clearly shows that the expression "Fees for Technical Services" includes rendering any managerial services also. In the present case, the appellant company made the payment to a resident company i.e. Four India Ltd. in connection with providing the "Quality Care Services" which are in the nature of professional or technical services. It has been*

*stipulated in the provision of section 194J that the deduction of TDS has to be made at the time of credit in any account in the books of accounts of the assessee or at the time of payment, whichever is earlier. Therefore, the appellant's claim that there was no liability to deduct TDS as the sum of Rs.3,00,000/- was directly debited by the recipient company is not tenable as the liability to deduct had arisen at the time of credit in the appellant's books of accounts. In view thereof, it is found that there is no infirmity in the finding of the A.O. and provisions of section 40(a)(ia) were correctly invoked for non deduction of TDS u/s.194J. Hence, the disallowance of Rs.3,00,000/- u/s.40(a)(ia) is confirmed. Hence, these grounds are not allowed."*

Being aggrieved by the order of CIT(A) the assessee is in second appeal before us on the following grounds of appeal :

*"3. For that in view of the facts and circumstances of the case the Ld. CIT(A) was not justified in upholding the action of the Assessing officer in respect of disallowance of Rs. 300000/- paid to Ford India Ltd by invoking Provision of Section 40(a)(1a) of the IT Act, 1961 for alleged non deduction of TDS U/s. 194J of the IT Act, 1961."*

10. The Id.AR before us reiterated the submissions made before the Id. CIT(A) and drew our attention on pages 48 to 50 of the paper book where the adjustment of Rs.3 lakhs was made by way of debit note. The Id. AR however requested even if it is treated as professional services then also the aforesaid payment is not liable to be disallowed in the light of the amended provision of the Finance Act 2012 in section 40(a)(ia) of the Act. For this purposes, the Id. AR requested to restore the issue for fresh adjudication.

On the other hand, the Id. DR present was duly heard. He fairly submitted that the matter needs to be restored by the Assessing Officer for fresh consideration.

11. We have heard the rival contentions and perused the materials available on record. The issue in this instant case relates to the expenses claimed by the assessee without deducting TDS. The Id. AR before us inter-alia submitted that there is an amendment by the Finance Act 2012 which provides no disallowance if the recipient has included the payment by the assessee in its turnover and has

paid the taxes thereon. In this regard we find force in the alternative arguments of the Id. AR.

11.1 At the outset we find that there is amendment in the 1<sup>st</sup> proviso to Sec. 201, wherein, if any payee has paid the taxes by offering / disclosing the said receipt in its return of income, then the payer (the assessee herein) should not be treated as assessee in default. The said proviso reads as under :

**Consequences of failure to deduct or Pay**

*201. (1) Where any person, including the principal officer of a company,—  
(a) who is required to deduct any sum in accordance with the provisions of this Act; or  
(b) referred to in sub-section (1A) of section 192, being an employer,*

*does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:*

*[Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident—*

- (i) has furnished his return of income under section 139;*
- (ii) has taken into account such sum for computing income in such return of income; and*
- (iii) has paid the tax due on the income declared by him in such return of income,*

*and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed:]*

The said proviso though inserted by the Finance Act 2012 w.e.f. 1-4-2013 has been held to be retrospective in operation by recent decision of the Hon'ble Delhi High Court in the case of *CIT v. Ansal Land Mark Township (P) Ltd.* (2015) 61 taxmann.com 45 (Del) wherein the question raised before the court and the decision rendered thereon is reproduced herein below for the sake of clarity:-

**“Question:** *Whether the second proviso to Section 40(a)(ia) (inserted by the Finance Act, 2012), which states that TDS shall be deemed to be deducted and paid by a deductor if resident recipient has disclosed the*

*amount in his return of income and paid tax thereon, is retrospective in nature or not?"*

**Held:** *Section 40(a)(ia) was introduced by the Finance (No.2) Act, 2004 to ensure that an expenditure should not be allowed as deduction in the hands of an assessee in a situation where income embedded in such expenditure has remained untaxed due to tax withholding lapses by the assessee.*

**Hence,** *section 40(a)(ia) is not a penalty provision for tax withholding lapse but it is a provision introduced to compensate any loss to the revenue in cases where deductor hasn't deducted TDS an amount paid to deductee and, in turn, deductee also hasn't offered to tax income embedded in such amount*

*The penalty for tax withholding lapse per se is separately provided under section 271C and, therefore, section 40(a)(i) isn't attracted to the same. Hence, an assessee could not be penalized under section 40(a)(ia) when there was no loss to revenue.*

*The Agra Tribunal in the case of Rajiv Kumar Agarwal-vs-ACIT [2014] 45 taxmann.com 555 (Agra – Trib) had held that the second proviso to Section 40(a)(ia) is declaratory and curative in nature and has retrospective effect from 1<sup>st</sup> April, 2005, being the date from which sub-clause (ia) of section 40(8) was inserted by the Finance No.(2) Act, 2004, even though the Finance Act, 2012 had not specifically stated that proviso is retrospective in nature.*

*The High Court affirmed the ratio laid down by the Agra Tribunal and held that said provisos is declaratory and curative in nature and has retrospective effect from 1<sup>st</sup> April, 2005."*

Respectfully following the aforesaid decision of the Hon'ble Delhi High Court in the case of *Ansal Land Mark Township (P) Ltd.*, (supra) we deem it fit and appropriate in the interest of natural justice and fair play to set aside this issue to the file of AO to decide the issue afresh in the light of the aforesaid judgment. Accordingly, we direct the AO to verify whether the payees have included the subject-mentioned receipts in their respective returns and paid taxes thereon or not. If that is so, then the assessee should not be treated as assessee in default

u/s. 201(1) of the Act. We also find from the submission of Ld. AR that there were certain transactions for the purchase of the goods and the same has been disallowed for non deduction of TDS. In our considered view, such transactions of purchases are outside the purview of TDS. Therefore, the AO also directed to check whether the transactions represents the purchase of the goods or not and adjudicated the matter in terms of above direction. Accordingly, assessee's ground is allowed for statistical purposes.

**12. In the result the appeal of the assessee is allowed for statistical purposes.**

Order pronounced in the open court 17/03/2017

Sd/-  
(न्यायिक सदस्य)  
(S.S.Viswanethra Ravi)  
(Judicial Member)

Sd/-  
(लेखा सदस्य)  
(Waseem Ahmed)  
(Accountant Member)

\*RG.Sr.PS/Dkp\*

दिनांक:- 17/03/2017 कोलकाता ।

**आदेश की प्रतिलिपि अग्रहित / Copy of Order Forwarded to:-**

1. अपीलार्थी/Appellant-Lexicon Commercial Enterprises Ltd. 84/1A, Topsia Road (S), Kolkata-46
2. प्रत्यर्थी/Respondent-ITO, Ward-1(4), Aaykar Bhawan, P-7, Chowringhee Square, Kolkata-69
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, Kolkata / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

उप/सहायक पंजीकार  
आयकर अपीलीय अधिकरण,  
कोलकाता ।