

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

Before **Shri Mahavir Singh, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.558/Kol/2013
Assessment Year :2009-10

Ranjana Roy 24, Nandalal Dey Street, Baranagar, Kolkata – 700 036 [PAN No.AFPPR 0864 M]	V/s.	Income Tax Officer Ward-42(3), Podder Court, 4 th Floor, 18, Rabindra Sarani, Kolkata – 700 001
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Sandip Kr. Roy, Advocate
प्रत्यर्थी की ओर से/By Respondent	Shri Prabal Chowdhury, JCIT-SR-DR
सुनवाई की तारीख/Date of Hearing	13-11-2015
घोषणा की तारीख/Date of Pronouncement	04-12-2015

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is arising out of order of Commissioner of Income Tax (Appeals)-XIX, Kolkata in appeal No.331/CIT(A)-XIX/ITO, Wd-42(3),Kol/12-13 dated 05.08.2011. Assessment was framed by ITO Ward-42(3), Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 26.12.2011 for assessment year 2009-10.

2. Several grounds raised by assessee in this appeal but common issue in all the grounds is that Ld. CIT(A) erred in confirming the action of Assessing

Officer by disallowing the expenses on account of violation of the provisions of TDS for an amount of Rs. 25,91,026/- .

3. Briefly stated facts are that assessee is an individual and running her business entity under the name and style M/s Chandam. The assessee business is to organize various cultural and musical events. The assessee acts as coordinator/ intermediary between the artistes and parties wish to have cultural/musical events. The role of the assessee is to bring both the parties at common understanding in so far it relates the monetary terms. However the assessee does not become a party to that understanding. As such, the assessee receives the payment from the party and remits the same to the artistes after the negotiation without deducting TDS. The assessee does not deduct the TDS from the payment to the artistes under the belief that he is acting in representative capacity on behalf of the party/ organizers, therefore he is not liable to deduct TDS as per the Income Tax provisions.

During the year under consideration, assessee has debited an expense in the name of artistes remuneration for an amount of ₹41,57,675/-. Out of this amount of payment a sum of Rs. 25,91,026/- was liable to TDS provisions under section 194-J of the Act as the payment was exceeding Rs. 20,000/-. But the assessee failed to deduct the TDS on the said amount.

The AO raised the question to the assessee for non deduction of tax as per the provisions of section 194-J of the Act. The assessee submitted that she is acting as a co-ordinator between artists and the organizer for arranging musical programmes. The role of the assessee is ensure that both the parties honour their commitment and for this purpose the payment from the party/ organizers for the artistes are kept with the co-ordinator i.e. assessee. Hence the role of the assessee is to act as custodian of the money. However, the AO disregarded the claim of assessee and held that such payments are liable for

TDS provision as per Sec, 194-J of the Act. Accordingly, AO added an amount of ₹25,91,026/- to the total income of assessee.

4. Aggrieved, assessee preferred appeal before Ld. CIT(A) who upheld the action of AO by observing as under :-

“8) Due consideration is given to A/R’s submission and A.O’s assessment order as well as further clarification provided through remand report. The appellant vacillating stand clearly shows that when on the merit of the case the appellant failed to substantiate he has submitted fresh explanation / grounds for deletion of such addition. It may be mentioned that the facts which are brought on record by the AO and further clarified in the remand report do establish that the amount of Rs.25,92,026/- was clearly under the purview of section 194J. The appellant has objected to invoking section 194J on the plea that there was no contract entered into. However, it may be emphasized that contract may be written or oral and for attracting TDs provision it is not condition precedent that such written contract is laced on the record. There may be situation where there is neither written contract nor oral contract however, the business arrangement between the two parties may be such which has all the ingredient of a contract. In this case as explained by the AO there exists such business arrangement on which basis it can be inferred that all the ingredients of contract are very much are there. It is very difficult to organize and bring such artists for performance without having some terms and conditions entered into in advance. The disclosures of such terms and conditions may not have been disclosed on a various reasons and this may be one of the reason for not having written contract. However, the existence of all the ingredients of contract are always there for success of such programme. The appellant has organized such programme on large scale involving substantial amount of revenue with many artists which pre-supposes that various terms and conditions were in existence. In view of these facts I am not inclined to accept the A/R’s submission that the provision of section 194J is not applicable.

9) It may also be mentioned that in the fag end of appeal proceedings the A/R placed reliance on the decision of Hon’ble Supreme Court in the case of Hindusthan Coca Cola Beverage Pvt. Ltd. vs- CIT (2007), 293 ITR 226 (SC). It may be mentioned that the A/R can raise additional grounds of appeal on question of law which must arise from the facts, which are lying on the record and the A/R has to explain the reasonable cause for not raising such grounds/ such evidences at appropriate time. The A/R nowhere in the original grounds of appeal or statement of facts have raised such grounds, therefore, the additional ground needs to be adjudicated where it is admissible or not. Since the A/R has not placed

relevant material along with reasonable cause for raising such additional grounds and therefore in principle such ground is not admissible. However, without prejudice to the above I also find that the judgement given in case of Hon'ble Supreme Court in the case of Hindusthan Coca Cola Bevarage Pvt. Ltd. – Vs. CIT (2007), 293 ITR 226 (SC) cannot be applied to the case of appellant as facts and circumstances are entirely different.

10) I also find that the analysis of Hon'ble Supreme Court decision in Coca Cola case can't be applied to the facts and circumstances of Appellant case. It may be mentioned that the judgement of Hon'ble Supreme Court is considered Law of the land, however, its applicability is always to the existence of similar facts and circumstances. It is also to be accepted that the judgement delivered by the Hon'ble Supreme Court cannot be interpreted and implemented in a manner which goes against the objective of basic provisions of the section.

11) It is in this background that the decision rendered by the Hon'ble Supreme Court in the case of Coca Cola (P) Ltd has to be understood and implemented accordingly. In this case it will be against the law to interpret that in each and every case where the deductee has paid the tax, though the onus is on the deductor to deduct the tax, the benefit will be given to the deductor. Such type of interpretation goes against the basic objective of TDS provision which is based on the philosophy "**PAY AS YOU EARN**". It is true that TDS provision is presumptive form of taxation, however, the point and time of collection is integral part of such provision. Because of such intrinsic character of TDS provision it is considered to be the most important tool of tax collection and it is required that strict and harmonious interpretation of TDs provisions should be given.

12) In the background of above stated discussions the judgment of Hon'ble Supreme Court in the case of Coca Cola (P) Ltd., has very limited applicability and it can be restricted to only such genuine and bona fide cases where though there is compliance of TDS provision, however, under honest believe there is understatement of tax deducted at source. The above judgment does not approve the case where an assessee in default failed to deduct tax and taking a plea that the deductee has paid the tax.

13) The facts of the case of Coca Cola (p) Ltd., very much corroborate with such observation as in that case the AO was of the view that the warehousing charges paid by the assessee Coca Cola (P) Ltd., (deductor) to M/s. Pradeep Oil Corporation (deductee) was in fact rent and TDS should have been deducted u/s. 194I at higher rate than the tax deducted by the deductor @ 20% treating it as contractual payment.

It is in this background and fact that the Hon'ble Supreme Court held that no further tax could be recovered from the deductor once it has been paid by the deductee along with interest u/s. 201(1A) of the IT Act. The Hon'ble Supreme Court, however approved the action of the AO in treating assessee as assessee in default”.

14. The facts of the case of the assessee is entirely different than in the case of Coca Cola (P) Ltd., The assessee has not complied with the provision of TDS and even after getting sufficient opportunity failed to produce any evidence that the tax has already been paid by the deductee. On the basis of above judgement of Coca Cola even if it is presumed that the deductee has already paid the tax the assessee cannot get relief on the basis of such judgment because of gross violation of TDS provision with no direct proof that the deductee has already paid the tax in contrast to case of Coca Cola (P) Ltd., where there was honest violation of TDS provision. In view of above stated discussions I am of the considered view that the decision of Hon'ble Supreme Court in case of Coca Cola (P) Ltd., has only restricted application and cannot be applied in the case of appellant.

15) In the case of appellant first of all the applicability of TDS provision was questioned which is unacceptable and thereafter relied on the judgment of Hon'ble Supreme Court in the case of Coca Cola (P) Ltd.,, which is also of no help in view of above stated discussion. The assessee's reliance on other two cases are also misplaced in view of above stated discussion as well as the ratio of such decision are not applicable to the facts and circumstances of the appellant case.

*In view of the aforesaid discussion the payment of **Rs.25,91,026/-** was squarely hit by the TDS provision and non-compliance to such provision has resulted in invoking section 40(a)(ia) of the I.T. Act, 1961. Therefore, the addition of **Rs.25,91,026/- is confirmed on merit.**”*

Aggrieved, assessee preferred second appeal before us on the following grounds of appeal.

“1. That the CIT(A) totally failed to prove the existence of any contractual relationship between the appellant and the Artists eventually admitted at Para 8 Page 6 of the order and only pre-suppose the existences of some ingredients thereof without invoking the provision of section 133(6) when all the relevant particulars and information were readily available with the Department. The CIT(A) may suspect anything but cannot act without concrete proof.

2. That the CIT(A) totally erred in not appreciating that the Hon'ble Supreme Court decided the CocaCola Beverage Co's case relying upon a specific CBDT Circular which has not been mentioned at all in the appeal order and if properly understand, would have put to an end all the controversies raised by the CIT(A).

3. That the CIT(A) did not specify why the declarations under oath filed by the Artists with PAN accepting full responsibility to pay tax thereon were not considered and which are even binding upon the declarants whose credentials, reputation and trustworthiness are beyond all doubts. ”

Shri Sandip Kr. Roy, Ld. Authorized Representative appearing on behalf of assessee and Shri Prabal Chowdhury, Ld. Departmental Representative appearing on behalf of Revenue.

5. We have heard rival contentions and gone through the facts and circumstances of the case. Before us Ld. AR submitted that assessee's part of the role is to negotiate the deal and acts as intermediary in settling the terms of agreement directly between two sides without making herself as any party therein. The performers (artistes) and the organizers are not known to each other as such. The assessee receives the payments from the organizers after TDS and make over the negotiated amount without TDS since the appellant is representing and acting for and on behalf of the organizers. All the artistes are very famous, widely acclaimed and have themselves furnished declaration with PAN that they will be directly responsible for their respective tax matters and one of them, Alka Yagnik even unequivocally stated that she had already paid income tax on such income. On the other hand, Ld. DR vehemently relied on the orders of authorities below. We find from the aforesaid discussion that AO disallowed the expenses claimed by assessee due to violation of provision to Sec. 194-J of the Act. The argument of the assessee that the recipient of income has paid the tax in their respective hands has also been regarded. However, we find that there is an amendment in proviso to Sec. 40(a)(ia) r.w.s. 1st proviso to Sec. 201, wherein, if any payee has paid the taxes by offering / disclosing the said receipt in his / her return of income, then the

payer (the assessee herein) should not be treated as assessee in default and no disallowance u/s/. 40(a)(ia) of the Act could operate in that scenario. The said proviso though inserted by the Finance Act, 2012 w.e.f. 01.04.2013 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.* reported in (2015) 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)(ia) 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 v. ACIT (2014) 45 taxmann.com 555 (Agra-Trib) has held that the second proviso to Section 40(a)(ia) is declaratory and curative in nature and has retrospective effect from 1st 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 proviso is declaratory and curative in nature and has retrospective effect from 1st April, 2005”

Respectfully following the aforesaid decision of Hon'ble Delhi High Court, we deem it fit and appropriate in the interest of justice and fair play to set aside this issue to the file of Assessing Officer to decide the issue afresh in the light of the aforesaid judgment to ensure whether the deductee has paid taxes on their income. Accordingly, we direct the Assessing Officer 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 disallowance u/s. 40(a)(ia) of the Act shall not be made in the hands of the assessee. Accordingly, the ground raised by assessee is allowed for statistical purposes.

6. In the result, appeal filed by assessee is allowed for statistical purposes.

Order pronounced in the open court 04/12/2015

Sd/-
(Mahavir Singh)
(Judicial Member)
Kolkata,
*Dkp

Sd/-
(Waseem Ahmed)
(Accountant Member)

दिनांक:- 04/12/2015 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-Ranjana Roy, 24, Nanadalal Dey Street, Baranagar, Kol-36
2. प्रत्यर्थी/Respondent-ITO Wd-42(3), Poder Court-4th Fl, 18, Rabindra Sarani, Kol-01
3. संबंधित □ यकर □ युक्त / Concerned CIT Kolkata
4. □ यकर □ युक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, □ यकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/□ देश से,
/True Copy/

उप/सहायक पंजीकार
□ यकर अपीलीय अधिकरण,
कोलकाता ।