

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

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

<b>ITA No.769/Kol/2014</b> Assessment Year :2009-10
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M/s S.Dhole & Co 63, Baguiati Road, Kolkata-700 028 <b>[PAN No.ABAFS 8332 A]</b>	<b>V/s.</b>	Commissioner of Income Tax-XX, Rafi Ahmed Kidwai Road, Kolkata-700 016
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri G. Banerjee, FCA
प्रत्यर्थी की ओर से/By Respondent	Shri S. Srivastava, CIT-DR
सुनवाई की तारीख/Date of Hearing	05-01-2016
घोषणा की तारीख/Date of Pronouncement	11-02-2016

**आदेश /ORDER**

**PER Waseem Ahmed, Accountant Member:-**

This appeal by the assessee is against the order of Commissioner of Income Tax-XX, Kolkata No.CIT-XX/Kol/Revenue.u/s.263/13-14/5115-18 dated 20.02.2014 passed u/s 263 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'). Assessment was framed by ITO Ward-55(2), Kolkata u/s 143(3) of the Act vide his order dated 15.12.2011 for assessment year 2009-10 and assessee has raised following grounds:-

*"1. For that in the facts and circumstances of the case, the direction of addition us. 40(a)(ia) of Rs.266,459 representing purchase of material/goods being excluded from TDs u/s. 194C(3) read with sub clause (e) of explanation is wrong, erroneous, excessive, arbitrary and deserves to be deleted/reduced.*

*2. For that in the facts and circumstances of the case, the direction of addition u/s. 40(a)(ia) of Rs.56,04,100 representing expenditure/payments not exigible to tax deduction at source or otherwise not disallowable is wrong, erroneous, excessive, arbitrary and deserves to be deleted/reduced.*

*3. For that in the facts and circumstances of the case, the directing to addition of Rs.130,345 as bank interest income of the assessee is wrong, erroneous, excessive, arbitrary and deserves to be deleted/reduced.*

*4. For that the impugned order u/s.263 dated 20.02.14 is otherwise bad, invalid, time-bared, void authorities below-initio and deserves to be cancelled.”*

2. Facts of the case are that assessee is a partnership firm and engaged in the business of manufacturing of drugs and medicines. Assessment of assessee was completed u/s 143(3) of the Act by Assessing Officer on 15.12.2011. While passing the order of AO Ld. CIT found from the records that assessment order passed by AO is erroneous in so far as prejudicial to the interest of revenue on account of following reasons:-

- (1) assessee claimed advertisement expenses of ₹64,10,506/- in its profit and loss account without deducting the TDS under the Act'
- (2) assessee has under stated the interest income for ₹1,30,145/-

Accordingly, Ld. CIT sought the clarification from assessee by issuing notice u/s 263 of the Act.

### **Issue No.1**

3. In compliance to notice of Ld. CIT(A) assessee submitted that regarding the issue of TDS on advertisement expenses, the correct amount of such advertisement is at ₹66,65,453/- but the objection on the issue of notice u/s 263 of the Act by assessee are as follows:-

- (i) Assessing Officer verified in details of all the expenses in relation to advertisement incurred by assessee during the year under consideration;
- (ii) Even if it is presumed that assessee has defaulted the provision of TDS u/s. 40(a)(ia) of the Act then also the order of AO is not erroneous and prejudicial to the interest of revenue, for the reasons as under:-
  - 1) As per the decision of *Merilyn Shipping & Transort vs. Addl. CIT* in ITA No. 477/Viz/2008 held that the amount remaining outstanding at the end of year attract the Sec. 40(a)(ia) of the Act with respect to Sec. 194C of the Act. The outstanding amount at the end of financial year is at ₹33,21,418/-. So the amount of disallowance shall be restricted to above stated amount
  - 2) As per Amended Finance Act 2012 if the recipient pays the tax then the provision of Sec. 40(a)(ia) would not be attracted to the payer. Accordingly, disallowance cannot be made.
  - 3) Out of the above disallowance of ₹66,65,453/- and sum of ₹2,66,469/- is out of purview of TDS provision as it relates to purchase of printing material from M/s Jyoti Enterprise
  - 4) As per Board's Circular N. 1 of 2014, the service tax component embodied in advertisement expense is to be excluded from the provision of TDS;

The Id. CIT has disregarded the claim of the assessee by observing that the decision of *Merilyn Sipping & Transport* (supra) has been reversed by this jurisdictional High Court in the case of *CIT v. Crescent Export Syndicate* in 216 taxmann 258 (Cal). Therefore the provisions of TDS shall be applied on both the paid as well as payable amount of the expenses for advertisement after excluding the amount quantified as service tax from the bills of advertisement. Similarly the Amendment in Finance Act 2012 came much after the relevant year in consideration. Regarding the expenses of printing materials, Ld. CIT held that expenses incurred in relation to printing banners,

calendars bearing the name of logo of assessee-company therefore it cannot be used by any other persons. So Ld. CIT disregarded the claim of assessee and directed the AO to include the expenses incurred in relation to printing materials for an amount of ₹2,66,459/-.

4.     Aggrieved, assessee preferred an appeal before Ld. CIT(A)

Shri G. Banerjee, Ld. Authorized Representative appearing on behalf of assessee and Shri S. Srivastava Ld. Departmental Representative appearing on behalf of Revenue.

5.     We have heard both the parties and perused the materials available on record. Ld. AR submitted paper book containing pages 1 to 40 and stated that assessment was completed u/s. 143(3) of the Act after detailed scrutiny of its books of account and documents. The issue raised by Ld. CIT was also verified by AO and therefore the order passed u/s 263 of the Act by Ld. CIT holding erroneous and prejudicial to the interest of revenue does not hold any merit. Besides, this assessee submitted in terms of amended provision of Finance Act 2012 where if an assessee fails to deduct TDS but prove that the receiver has paid the tax on the amount then the payer will be exempted from the provision of Sec. 40(a)(ia) of the Act.

6.     On the other hand, Ld. DR cited a decision of the Hon'ble jurisdictional High Court in the case of *Commissioner of Income-tax, Central-I, Kolkata v. Maithan International* (2015) 56 taxmann.com 283 (Cal) and vehemently relied on the order of Ld. CIT.

7.     From the aforesaid discussion, we find that assessee claimed the expense incurred of ₹ 64,10,506/- by debiting from profit and loss account towards advertisement expenses, however, this expense attracts the provision of TDS in terms of provision of Sec. 194C of the Act. Accordingly, assessee

was liable to deduct TDS from the above expenses, but the assessee failed to do so. Besides the above the advertisement expenses were not verified by the AO during the course of assessment proceedings u/s 143(3) of the Act. Therefore, Ld. CIT held the order passed by AO is erroneous and prejudicial to the interest of revenue. We find from the amended provision of Finance Act, 2012 that in case, assessee fails to deduct TDS from the payment of expense to the party concerned and receiver of the payment has paid tax on the amount received then assessee should not be held as guilty for default of TDS u/s 40(a)(ia) of the Act. Ld. AR submitted that a certificate from Chartered Accountant certifying that the party i.e. M/s I.S. Trading to whom the advertisement expenses were paid by assessee that the income tax on the amount received from assessee has been duly paid which is placed on page 26 and 27 of the paper book. Therefore, we are of the considered view that the observation of Ld. CIT u/s. 263 of the Act that the order is erroneous is correct observation. However, as per the provision of Sec. 263 of the Act the order of the AO should not only be erroneous but also to the interest of revenue. So in this view of the matter the order passed by Assessing Officer is not prejudicial to the interest of revenue. Regarding the claim of assessee that the printing material expense is out of the purview of TDS provision, we find that this is a transaction of purchase of printing material as evident from the bill of the party concern M/s Jyoti Enterprise which are placed at page No. 6 to 8 of the paper book. We also find that there was no contract between the assessee and the party M/s Jyoti Enterprise for attracting the provision of Sec. 194C of the Act. In our considered view, we reverse the order of Ld. CIT and accordingly this ground of assessee's appeal is allowed.

**Coming to second issue.**

8. Ld. CIT found from the balance-sheet of the assessee that the interest income has been under stated by an amount of ₹1,30,145/-. The assessee has declared in the balance-sheet the interest on fixed deposit (FD) for an amount of ₹ 4,28,266/- but in the profit and loss account it was shown for

₹2,98,121/-. Accordingly, Ld. CIT issued notice u/s. 263 of the Act. In response thereto assessee submitted that interest accrued on FD for the period from 01.04.2008 to 31.03.2009 is of ₹2,98,120/- only. However, Ld. CIT disregarded the claim of assessee and directed the Assessing Officer to make the addition of ₹1,30,145/-.

9. Aggrieved, assessee preferred an appeal before us.

10. We have heard rival contentions and perused the materials available on records. Ld. AR submitted that the difference in interest on FD has been stated in the balance-sheet and profit and loss account is due to wrong nomenclature. In this regard, Ld. AR drew our attention at pages 12 and 13 of the paper book where the detail of interest income was duly recorded.

11. On the other hand, Ld. DR relied on the order of Ld. CIT.

12. From the aforesaid discussion we find that the Id. CIT found the order of the AO erroneous and prejudicial to the interest of Revenue as the income of the interest was understated by the assessee by an amount of Rs. 1,30,145/-. However before us the Id. AR has submitted the reconciliation statement for the interest income and the explained that part of the interest income was pertaining to the earlier year. Therefore we reverse the order of the Id. CIT passed under section 263 of the Act.

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

Order pronounced in the open court 11/02/2016

Sd/-  
(S.S.Vishwanethra Ravi)  
(Judicial Member)  
Kolkata,  
\*Dkp

दिनांक:- 11/02/2016 कोलकाता ।

Sd/-  
(Waseem Ahmed)  
(Accountant Member)

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

1. अपीलार्थी/Appellant-M/s S.Dhole & Co. 63, Baguiati Road, Kolkata-700 028
2. प्रत्यर्थी/Respondent-CIT-XX, Rafi Ahmed Kidwai Road, Kolkata-700 016
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,  
/True Copy/

उप/सहायक पंजीकार  
आयकर अपीलीय अधिकरण,  
**कोलकाता ।**