

IN THE INCOME TAX APPELLATE TRIBUNAL, "A" BENCH, KOLKATA

Before : **Shri N.V. Vasudevan,** **Judicial Member, and**
Shri M. Balaganesh, **Accountant Member**

I.T.A No. 1617/Kol/ 2012 A.Y : 2009-10

Assistant Commissioner of Income Tax Vs. Sri Ananda Narayan Maity
Circle-Haldia PAN: AGMPM6067H
(Appellant) (Respondent)

For the Appellant/ department : Shri Debasish Banerjee, JCIT, Id.Sr.DR
For the Respondent/assessee: None appeared

Date of Hearing: 15-10-2015

Date of Pronouncement: 27-10-2015

ORDER

SHRI M.BALAGANESH, AM

This appeal of the revenue arises out of the order of the Learned CIT(A) in Appeal No.200/CIT(A)-XXXIII/ACIT.Cir-Haldia/11-12 dated 29-08-2012 for the Asst Year 2009-10 passed against the order of assessment framed by the Learned AO u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act').

2. Shri.Debashish Banerjee, JCIT, the Learned DR argued on behalf of the revenue and none appeared on behalf of the assessee.

3. The only issue to be decided in this appeal is whether disallowance u/s. 40(a)(ia) of the Act in respect of transport charges to the tune of Rs.2,35,500/- and machinery hire charges to the tune of Rs.31,40,232/- could be made in the circumstances of the case.

4. We have heard the Id.DR. The facts stated in the assessment order and the Id.CIT(A)'s order are not disputed by the Id.DR. Hence, they are not reproduced

herein for the sake of brevity. We find that the Id.CIT(A) had deleted the addition by relying on the decision of the Special Bench, ITAT Visakhapatnam in the case of Merilyn Shipping & Transports vs. ACIT in ITA No.477/Vizag/2008 and held that no disallowance u/s. 40(a)(ia) of the Act can be made that amounts were paid by the assessee before the end of the previous year. We find that this proposition has now been reversed by the Hon'ble Jurisdictional Calcutta High Court in the case of CIT Vs. Crescent Export Syndicate in ITAT No.20/13, GA No.190/2013 dated 03/04/2013, wherein their Lordships of Calcutta High Court held that the provisions of section 40(a)(ia) are applicable even in respect of amounts paid before the end of the previous year. However, we find that there is an amendment of proviso to section 40(a)(ia) r.w. 1st proviso to section 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 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 Vs. Ansal Land Mark Township (P) Ltd. reported in (2015) 61 taxmann.com 45(Delhi High Court) 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 –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 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 the 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 the Id.AO to decide the issue afresh in the light of the aforesaid judgment. Accordingly, we direct the Id.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 disallowance u/s. 40(a)(ia) of the Act shall not be made in the hands of the assessee. Accordingly, the grounds raised by the revenue are allowed for statistical purposes.

5. In the result, the appeal of the revenue is allowed for statistical purpose.

THIS ORDER IS PRONOUNCED IN OPEN COURT ON 27 / 10/2015

Sd/-
(N.V. Vasudevan, Judicial Member)
Date 27 /10/2015

Sd/-
(M. Balaganesh, Accountant Member)

*PP/SPS

Copy of the order forwarded to:

- 1.. The Appellant/Department: Asstt. Commissioner of income Tax, Circle-Haldia, Basudevpur, Khanjanchak, Haldia, Purba medinipur-721602
- 2 The Respondent/Assessee- Sri Ananda Narayan Maity, Baishnabchak, Debhog, Haldia, Purba Medinipur-721657
- 3 /The CIT,
/
The CIT(A)
- 4..
5. DR, Kolkata Bench
6. Guard file.

True Copy,

By order,

Asstt Registrar