

IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'A', BANGALORE

BEFORE SHRI. ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

AND

SHRI. VIJAY PAL RAO, JUDICIAL MEMBER

I.T.A No.1796/Bang/2013
(Assessment Year : 2010-11)

Deputy Commissioner of Income tax,
Circle -11(1), Bangalore

.. Appellant

v.

M/s. Aviators (India) P. Ltd,
1309, Brigade Towers, 135, Brigade Road,
Bangalore 560 025
PAN : AABCA4499H

.. Respondent

Assessee by : Shri. G. Venkatesh, Advocate
Revenue by : Dr. P. K. Srihari, Addl. CIT

Heard on : 30.03.2015
Pronounced on : 12.04.2015

ORDER

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER :

This is an appeal of the Revenue directed against an order dt.27.09.2013 of CIT (A) – I, Bengaluru, for the impugned assessment year.

02. There appears six grounds of which grounds 1, 5 and 6 are general needing no specific adjudication.

03. Vide its ground numbers 2 and 3, grievance raised by the Revenue is that CIT (A) scaled down a disallowance made by the AO u/s.40(a)(ia) of the Income-tax Act, 1961 ('the Act' in short). AO had made a disallowance of Rs.44,86,432/- which was restricted to Rs.15,580/- by the CIT (A).

04. Facts apropos are that assessee had effected payments totalling Rs.45,56,334/- as ground handling charges to various companies. Assessee was engaged in the aviation support business and providing related services. As per the AO the payment were in the nature of hire charges, were contractual in nature and also had an element of fee for technical services. According to the AO, assessee was obliged to deduct tax at source. Though the assessee argued that part of the payments were to AAI which was a wing of the Government, and many of the payments were below the threshold limit for deducting TDS, these were not acceptable to the AO. Assessee's pleading that Section 40(a)(ia) of the Act could be applied only to amounts standing payable as at the end of the relevant previous year and not to paid amounts also did not find any positive

response from the AO. Section 40(a)(ia) was applied and a disallowance of Rs.44,86,432/- was made.

05. Aggrieved assessee moved in appeal before the CIT (A). Argument of the assessee was that it was not practicable to deduct tax at source on ground handling charges since the services could be availed only if full payments were made. Further as per the assessee payments effected to M/s. AAI, HAL and Air India Sats Airport services could not be subjected to TDS since these were Government controlled entities. Assessee also relied on a Special Bench decision of this Tribunal in the case of Merilyn Shipping and Transports v. Addl. CIT (2012) 16 ITR (Trib) 1 Vishakapatnam, that of Hon'ble Allahabad High Court in the case of CIT v. Vector Shipping Services (P) Ltd [357 ITR 642], and that of a coordinate bench decision in the case of DCIT v. Ananda Markala [ITA.1584/Bang/2012, dt.13.09.2013], for arguing that Section 40(a)(ia) of the Act could be applied only on 'payable' sums and not paid amounts. CIT (A) was appreciative of the last line of the argument of the assessee i.e., Section 40(a)(ia) could be applied only on payable sums. He found that the sum of Rs.44,86,432/-, but for Rs.15,580/-, was paid during the

currency of the previous year. He thus scaled down the disallowance to Rs.15,580/-.

06. Now before us, Ld. DR strongly opposing the order of CIT (A) submitted that Hon'ble jurisdictional High Court in the case of Ryatar Sahakari Sakkare Karkhane v. ACIT [ITA.100111 to 100120/2015, dt.26.02.2015] had went in depth to the applicability of Section 40(a)(ia) of the Act, to paid amounts, and had held that it applied to both paid as well as payable sums.

07. Per contra, Ld. AR submitted that the companies to which assessee had paid the ground handling and other charges had furnished their respective returns of income, computing their income taking into account the amounts received from the assessee, after paying due taxes. According to him, assessee would be able to demonstrate this if given a chance. Ld. AR further submitted that by virtue of second proviso to Section 40(a)(ia) of the Act, once assessee is not deemed as one in default rigours of the said section could not be applied. As per the Ld. AR, second proviso to Section 40(a)(ia) had to be retrospectively construed by virtue of the judgment of Hon'ble Delhi High Court in the case of CIT v. Ansal Land Mask Townships (P) Ltd [(2015) 124 DTR 185].

08. We have perused the orders and heard the rival contentions. In so far as issue of applicability of Section 40(a)(ia) of the Act, on paid amounts are concerned, Dharwad Bench of Hon'ble jurisdictional High Court in the case of Ryatar Sahakari Sakkare Karkhane (supra), after considering the judgment of Hon'ble Allahabad High Court in the case of Vector Shipping P. Ltd (supra) had held that the said section applied both to paid and payable amounts. Hence we have no qualms in setting aside the order of CIT (A) on this issue. However the claim of the assessee that payees had filed returns after paying due taxes, taking into account the receipts from the assessee and therefore Section 40(a)(ia) of the Act could not be applied merits attention. Hon'ble Delhi High Court in Ansal Land Mask Township's case (supra) held second proviso to Section 40(a)(ia) of the Act, as retrospective in operation. Nevertheless assessee has to positively demonstrate that it could not be considered as one in default by virtue of first proviso to Section 201(1) of the Act, for applying second proviso to Section 40(a)(ia) of the Act. We therefore set aside the orders of the authorities below and remit the issue relating to disallowance u/s.40(a)(ia) of the Act, back to the AO for consideration afresh in accordance with law. Grounds 2 and 3 of the Revenue are treated as allowed for statistical purposes.

09. Vide its ground number 4, Revenue is aggrieved that CIT (A) deleted an addition made by the AO, for cessation of a liability.

10. During the course of assessment proceedings it was noted by the AO that an unsecured loan of Rs.62 lakhs taken by the assessee from one M/s. Samayanallur Investments (P) Ltd, was outstanding for more than five years and there were no transactions in the creditor's account. It seems assessee could not provide a confirmation proving the genuineness of the loan. AO concluded that the loan was no longer a liability of the assessee. He applied section 41(1) of the Act and made an addition of Rs.62 lakhs.

11. In its appeal before the CIT (A) assessee, apart from filing a balance confirmation from the creditor which inter alia stated that latter could enforce a claim for recovery, also argued that there was no cessation of liability coming within the ambit of Section 41(1) of the Act. CIT (A) was appreciative of these contentions. After analysing Section 41(1) of the Act, he held that said section could not be applied since the amount stood payable and also since assessee had not claimed any allowance or deduction of the amount while computing its income for any year. He deleted the addition.

12. Now before us, Ld. DR submitted that judgment of Hon'ble Karnataka High Court in the case of CIT v. Compaq Electric Ltd, [(2012) 66 DTR 0032], relied on by the CIT (A) for ruling in favour of the assessee had not become final and Revenue had preferred an appeal before the Hon'ble Apex Court.

13. Per contra, Ld. AR supported the order of the CIT (A).

14. We have perused the orders and heard the rival contentions. It is not disputed that the creditor had confirmed the balance as due to him. It is also not disputed assessee had not effected any write-back of the amount in its books, squaring up the liability. It continued to exist in its books. Hon'ble jurisdictional High Court in the case of Compaq Electric Ltd (supra) had held as under :

For the application of section 41(1),, the condition precedent is that there should be an allowance or deduction in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee. Then, subsequently, during any previous year, if the creditor remits or waives any such liability, then the assessee is liable to pay tax under section 41. The whole object is to avoid double benefit to the assessee. In the instant case, the amount claimed as capital receipt is in respect to which there was no allowance or deduction claimed by the assessee for the previous year. Therefore, when its creditor has waived the repayment of the said. amount, it amounts to a capital receipt and

not a revenue receipt. As the assessee did not have the benefit of any allowance or deduction in respect of the said amount, section 41 is not attracted.

In that view of the matter, there was no merit in this appeal. No substantial question of law arises for consideration. Accordingly, the appeal is dismissed.

15. Further the conditions of remission / cessation of liability has not been proved by the Revenue. We cannot find any error in the order of the CIT (A) on this aspect. Ground number 4 of the Revenue stands dismissed.

16. In the result, appeal of the Revenue is partly allowed for statistical purpose.

Order pronounced in the open court on 12th day of April, 2016.

Sd/-

(VIJAYPAL RAO)
JUDICIAL MEMBER

Sd/-

(ABRAHAM P GEORGE)
ACCOUNTANT MEMBER