

**IN THE INCOME TAX APPELLATE TRIBUNAL  
BANGALORE BENCH " B "**

**BEFORE SHRI N.V. VASUDEVAN, JUDICIAL MEMBER AND  
SHRI JASON P. BOAZ, ACCOUNTANT MEMBER**

I.T.A. No.325/Bang/2013 (Assessment Year : 2007-08)		
Shri E. Krishnappa, Prop. E.K. Entertainers, Adakamaranahalli, Makali Post, Tumkur Road, Bangalore-560 123	Vs.	The Asst. Commissioner of Income Tax, Circle 7(2), Bangalore.
Appellant		Respondent.

Appellant By : Mrs. Prathibha & Mrs. Sheetal Borkar, Advocates.

Respondent By : Dr. P.K. Srihari, Addl. CIT (D.R)

Date of Hearing : 16.03.2015.

Date of Pronouncement : 14.05.2015.

**O R D E R**

**Per Shri Jason P. Boaz, A.M. :**

This appeal by the assessee is directed against the order of the Commissioner of Income Tax (Appeals)-III, Bangalore dt.20.12.2012 for Assessment Year 2007-08.

2. The facts of the case, briefly, are as under :-

2.1 On 18.6.2007, a survey under Section 133A of the Income Tax Act, 1961 (in short 'the Act') was conducted at the premises of the assessee. Pursuant to the survey, the assessee vide declaration dt.21.6.2007 admitted to having earned income of Rs.17,66,100 from M/s. E.K. Land Developers in the period relevant Assessment Year 2007-08. The

assessee, a film producer, filed the return of income for Assessment Year 2007-08 on 31.10.2007 declaring income of Rs.3,50,27,610. Admittedly, the return filed was processed under Section 143(1) of the Act. Subsequently, the Assessing Officer found that in the return of income filed for Assessment Year 2007-08, the assessee had declared income of Rs.2,64,727 from M/s. E.K. Land Developers, whereas in the course of survey on 18.6.2007, income earned in the relevant period from this concern was admitted at Rs.17,66,100. The Assessing Officer, thus, finding that income of the assessee liable to tax had escaped assessment, initiated proceedings under Section 147 of the Act as he had reason to believe that on account of the assessee not disclosing his true and correct income, income of the assessee had escaped assessment. Consequently, Notice under Section 148 of the Act was issued to the assessee on 17.5.2010. The assessment was concluded under Section 143(3) rws 147 of the Act vide order dt.30.12.2011 wherein the income of the assessee was determined at Rs.6,05,19,415 as against the returned income of Rs.3,50,27,607 in view of the following additions / disallowances thereto :-

- i. Bata charges disallowed : Rs.3,07,588.
- ii. Publicity expenses disallowed : Rs.34,63,362.
- iii. Non-deduction of TDS : Rs.2,17,20,858.

2.2 Aggrieved by the order of assessment for Assessment Year 2007-08 dt.30.12.2011, the assessee preferred an appeal before the CIT (Appeals) - III, Bangalore. The learned CIT (Appeals) disposed off the assessee's appeal vide order dt.20.12.2012 allowing the assessee partial relief.

3. Aggrieved by the order of the CIT (Appeals) - III, Bangalore, the assessee has preferred this appeal before the Tribunal raising the following grounds of appeal :

- " 1. On the facts and in the circumstances of the case, the CIT (Appeals) erred in upholding that there was conditions precedent for re-opening the assessment under Section 147 of the Act.
2. On the facts and in the circumstances of the case, the CIT (Appeals) ought to have appreciated the fact that the return of income filed was accepted by A.O. while issuing intimation under Section 143(1) of the Act for the relevant assessment year and only the A.O. on mere change of opinion had concluded the re-assessment under Section 147 of the Act which is bad in law.
3. On the facts and in the circumstances of the case, the CIT (Appeals) erred in upholding disallowance of Rs.3,07,588 being bata charges paid to Cameramen, Production Staff, Make up Staff and Drivers etc.
4. On the facts and in the circumstances of the case, the CIT (Appeals) erred in upholding the disallowance of Rs.12,91,277 being the post production expenses.
5. On the facts and in the circumstances of the case, the CIT (Appeals) erred in upholding the disallowance of Rs.2,17,20,858 being payment made to M/s. Rockline Ads on the ground that no tax was deducted at source and the disallowance under Section 40(a)(ia) was confirmed.
6. On the facts and in the circumstances of the case, the CIT (Appeals) ought to have considered that the payment made to M/s. Rockline Ads was only Rs.65,00,000 and not Rs.2,17,20,858 as alleged by A.O.
7. On the facts and in the circumstances of the case, the CIT (Appeals) ought to have considered the decision of the Special Bench of Visakhapatnam in the case of M/s. Merlyn Shipping Corporation & Transport Vs. ACIT reported in 16 ITR (Trib) 1 relied on by the appellant and ought to have deleted the disallowance under Section 40(a)(ia).
8. Without prejudice, the learned CIT (Appeals) ought to have accepted the fact that the expenditure incurred during the course of business while producing a movie were all common expenditure and the same was liable to be allowed in full.
9. Without prejudice, the additions / disallowances as upheld are arbitrary, excessive and ought to be deleted in toto.
10. The CIT (Appeals) erred in upholding the interest under Section 234B & 234C of the Act which are liable to be deleted.
11. For these and such other grounds that may be urged at the time of hearing, the appellant prays that the appeal may be allowed."

4. **Grounds at S.Nos.1 & 2 : Initiation of Proceedings u/s.147 of the Act.**

4.1 In the grounds at S.Nos.1 and 2, the assessee alleges that the learned CIT (Appeals) erred in holding that there were conditions precedent for initiating re-assessment proceedings u/s.147 of the Act. It is contended that since the return of income filed for Assessment Year 2007-08 was accepted by the Assessing Officer by issuing the intimation under Section 143(1) of the Act, the learned CIT (Appeals) ought to have realized that the Assessing Officer initiated re-assessment proceedings under Section 147 of the Act as a mere change of opinion. In this context the learned Authorised Representative while reiterating the contentions raised in the grounds, placed reliance on the decision of the Third Member of the ITAT, Mumbai in the case of Delta Airlines Inc. V ITO (International Taxation) in ITA No.3476/Mum/2008 to challenge the validity of proceedings initiated under Section 147 of the Act.

4.2 Per contra, the learned Departmental Representative supported the impugned order of the learned CIT (Appeals) on this issue. It was submitted that the decision of the ITAT, Mumbai relied on by the assessee is clearly distinguishable and not applicable to the facts of the case and would therefore not come to the rescue of the assessee.

4.3.1 We have heard the rival submissions and perused and carefully considered the material on record. The facts of the matter, as emerges from the record, are that whereas in the declaration made on 18.6.2007, pursuant to the survey under Section 133A of the Act in the case on hand, the assessee admitted that he had earned Rs.17,66,100

from M/s. E.K. Land Developers, the Assessing Officer observed that in the return of income filed on 31.10.2007 for Assessment Year 2007-08, the assessee had declared income earned from M/s. E.K. Land Developers at Rs.2,64,727. Thus, we find that the Assessing Officer noticed, that on account of the assessee not disclosing his true and correct income from M/s. E.K. Land Developers, he had reason to believe that income of the assessee exigible to tax had escaped assessment and accordingly initiated proceedings under Section 147 of the Act by recording his reasons for such action followed by issue of notice under Section 148 of the Act on 17.5.2010.

4.3.2 We concur with the finding of the learned CIT (Appeals) that the information gathered in the course of survey action under Section 133A of the Act on 18.6.2007 by way of the assessee's own admission not being borne out by a true and correct disclosure of income in the return of income subsequently filed by the assessee on 31.10.2007 was sufficient reason for initiation of proceedings under Section 147 of the Act. We also agree with the learned CIT (Appeals)'s finding that there is no question of change of opinion being involved since the processing of return under Section 143(1) does not constitute a detailed examination or scrutiny of the return filed. Further, we are also of the view that the fact that perusal of the said return revealed that the income of Rs.17,66,100 admittedly earned by the assessee vide declaration pursuant to survey on 18.6.2007 was not disclosed fully but only declared to the extent of Rs.2,64,277 in the return of income filed for Assessment Year 2007-08, constituted adequate reason for

initiating the assessment proceedings under Section 147 of the Act. In coming to this conclusion, we draw support from the decision of the Hon'ble Apex Court in the case of Rajesh Jhaveri Stock Brokers P. Ltd. (291 ITR 500) and therefore uphold the action of the Assessing Officer in initiating proceedings under Section 147 of the Act, in the facts and circumstances of the case on hand, to be valid. With due respect, we have perused the decision of the ITAT, Mumbai in the case of Delta Airlines Inc. (supra), relied on by the assessee, and find that the facts therein being different, the finding therein would not come to the assessee's rescue. Consequently, Grounds at S.No.1 & 2 raised by the assessee are dismissed.

5. **Ground at S.No.3 - Disallowance of Bata Charges.**

5.1 In this ground, the assessee challenges the action of the learned CIT (Appeals) in upholding the disallowance of bata charges paid to Camera Men, Production Staff, Make-up Staff and Drivers.

5.2 We have heard the rival contentions of both the learned Authorised Representative and the learned Departmental Representative and perused and carefully considered the material on record. From the details on record, it is seen that the Assessing Officer required the assessee to substantiate the expenses of Rs.9,22,765 claimed towards Bata Charges paid to various unit works, make up boys, camera men, drivers, etc by furnishing the party-wise break up of persons to whom such payments have claimed to be made, corresponding TDS and Form 16A thereof. In response thereto, the assessee could only

furnish copies of ledger extracts which reflected mainly cash payments above Rs.20,000 made on various dates but could not justify why TDS was not made thereon. The Assessing Officer subsequently required the assessee to produce the wage disbursement register in case the payments were made as piece meal labour payments. Even these details could not be furnished by the assessee. In this factual matrix, the Assessing Officer disallowed 1/3 rd of the total claim of payment of Rs.9,22,765.

5.2.2 We find that before the learned CIT (Appeals), the assessee was not able to justify the payments claimed to have been made and this fact has been recorded by the learned CIT (Appeals) at para 4.2 of the impugned order. In appellate proceedings before us, except for raising this ground, no material evidence has been brought on record to establish and prove that such payments were either made or justified. In this view of the matter, we are of the opinion that the finding of the Assessing Officer was very reasonable, considering that the assessee failed to prove and justify the claim of having made such payments with any material evidence before the authorities below and consequently dismiss Ground No.3 raised by the assessee.

6. **Ground No.4 : Post production expenses.**

6.1 In this ground, the assessee challenges the finding of the learned CIT (Appeals) in upholding the disallowance of Rs.12,91,277 on account of the post production expenses claimed.

6.2.1 We have heard both learned Authorised Representative and the learned Departmental Representative and perused and considered the material on record. In the course of assessment proceedings, the Assessing Officer noticed that the assessee had claimed expenditure of Rs.3,46,33,626 towards publicity expenses under the head post production expenses which comprised of, inter alia, advertisement charges for hoardings, newspaper, cable, flex printing, poster and pasting charges, sticker charges, press conference, theatre decoration charges, wall painting charges. On being asked by the Assessing Officer to furnish the break up thereof with material evidence to establish the expenditure claimed, the assessee was only able to furnish ledger extracts without supporting evidences. The Assessing Officer then disallowed 10% of the expenditure claimed on the ground of non-submission of material evidence to establish and prove the expenditure claimed was incurred; noting that most of those were in range of Rs.14,000 to Rs.19,000 and were debited as cash payments.

6.2.2 We find that in the impugned order, the assessee has failed to bring on record any material evidence to prove the incurrance of the expenditure claimed. Even in appellate proceedings before us, the assessee apart from raising this ground has failed to substantiate its claim. We, therefore, concur with the observations of the learned CIT (Appeals) that the submissions put forth by the assessee are not at all convincing. We are of the view that the onus upon the assessee has not been discharged; in that the assessee has failed in his duty to provide supporting material evidence to establish the payments

claimed to have been made. In the factual matrix of the case, and considering the nature of the payments and that they are claimed to be made in cash to a large number of parties, we are of the opinion that the disallowance of 10% thereof made and sustained by the authorities below is reasonable and confirm the said disallowance to the extent of the total of post production expenses, less that which has to be disallowed under Section 40(a)(ia) of the Act as per our directions in para 7.2.3 of this order.

7. **Grounds at S.No.5 to 8 : Disallowance u/s.40(a)(ia) of the Act.**

7.1 In these grounds, the assessee contends that CIT (Appeals) erred in upholding the disallowance under Section 40(a)(ia) of the Act of Rs.2,17,20,858 on account of payment made to M/s. Rockline Ads, on the ground that tax was not deducted at source on the said payment. It was also contended that in the facts of the case, the payment to M/s. Rockline Ads was only Rs.65 lakhs and not Rs.2,17,20,858 as held by the Assessing Officer. It was further contended by the learned Authorised Representative that the payments to Rockline Ads are to be considered in the light of the decision of the ITAT, Visakhapatnam Special Bench in the case of Merilyn Shipping Corporation & Transports reported in (2012) 16 ITR (Trib) 1; in support of the proposition that since the said payments are made before 31<sup>st</sup> March of the accounting year, and though no TDS has been made on the said payments, no disallowance under Section 40(a)(ia) of the Act can be made. Reliance was also placed on the decision of the Hon'ble High Court of Allahabad in the case of Vector Shipping Services Pvt. Ltd. (2013) 357 ITR 642. As per the learned Authorised

Representative, SLP filed by the Department against the latter decision stood dismissed by the Hon'ble Apex Court in C.C. No.8065/2014 dt.2.7.2014.

7.2.1 We have heard the rival contentions of both parties and perused and carefully considered the material on record, including the judicial decision cited. As submitted by the learned Authorised Representative, the issue of whether the invoking of the provisions of section 40(a)(ia) of the Act for making disallowance is applicable only to such of those amounts which are payable and/or outstanding as on 31<sup>st</sup> March of the relevant financial year, is covered by the decision of a co-ordinate bench of this Tribunal in the case of Capital Pharma Vs. ITO in ITA No.34/Bang/2013 dt.14.8.2014. In the cited case of Capital Pharma (supra), the co-ordinate bench after duly considering various decisions on this issue, held that the provisions of section 40(a)(ia) of the Act are applicable / attracted to only those amounts which are outstanding and payable as on 31<sup>st</sup> March of the relevant financial year and not to those amounts which have been paid during the relevant financial year.

7.2.2 We find that the Hon'ble Allahabad High Court in the case of Vector Shipping Services P. Ltd. (supra) upholding the view of the Special Bench of the ITAT in the case of Meryln Shipping & Transport Company (supra) has at para 9 thereof held as under :-

*"We do not find that the revenue can take any benefit from the observations made by the Special Bench of the Tribunal in the case of Merilyn Shipping and Transports V. Addl. CIT (2012) 16 ITR (Trib) 1 (Visakhapatnam) (SB); 136 ITD 23 (Visakhapatnam)(SB) quoted as above to the effect section 40(a)(ia) was introduced in the Act by the Finance (No.2) Act, 2004, with effect from April 1, 2005, with a view*

*to augment the Revenue through the mechanism of tax deduction at source. This provision was brought on statute to disallow the claim of even genuine and admissible expenses of the assessee under the head "Income from business or profession" in case the assessee does not deduct TDS on such expenses. The default in deduction of TDS would result in disallowance of expenditure on which such TDS was deductible. In the present case tax was deducted as TDS from the salaries of the employees paid by M/s. Mercator Lines Ltd., and the circumstances in which such salaries were paid by M/s. Mercator Lines Ltd., for M/s. Vector Shipping Services, the assessee were sufficiently explained.*

*It is to be noted that for disallowing expenses form business and profession on the ground that TDS has not been deducted, the amount should be payable and not which has been paid by the end of the year.*

*We do not find that the Tribunal has committed any error in recording the finding on the facts, which were not controverted by the Department and thus the question of law as framed does not arise for consideration in the appeal.*

*The Income Tax Appeal is dismissed."*

The Special Leave Petition ( ' SLP ' ) filed by Revenue against this decision of the Allahabad High Court in the case of Vector Shipping Services P. Ltd. (supra) was dismissed by the Hon'ble Apex Court by order CC No.8068/2014 dt.2.7.2014.

7.2.3 We. Therefore, following the decision of the co-ordinate bench of this Tribunal in the case of Capital Pharma (supra), direct the Assessing Officer to examine the entire issue of the disallowance of Rs.2,17,20,858 under Section 40(a)(ia) of the Act. Moreover, since the assessee in Ground at S.No.6 (supra) contends that the amount paid to M/s. Rockline Ads is Rs.65,00,000 and not Rs.2,17,20,858, the figure to be considered for disallowance under Section 40(a)(ia) of the Act is not clear. The Assessing Officer shall consider only such amounts which are payable and outstanding as on 31.3.2007 for disallowance under Section 40(a)(ia) of the Act and shall consequently not make the disallowance in respect of those amounts which have been paid by the assessee during the

year ended 31.3.2007. In this view of the matter, we remand this issue to the file of the Assessing Officer to decide the issue of disallowance under Section 40(a)(ia) of the Act in the light of our observations and directions as indicated above.

8. Grounds at S.Nos. 9 & 11 are general in nature and therefore no adjudication is called for thereon.

9. In Ground No.10, the assessee denies itself liable to be charged interest under Section 234B and 234C of the Act. The charging of interest is consequential and mandatory and the Assessing Officer has no discretion in the matter. This proposition has been upheld by the Hon'ble Apex Court in the case of Anjum H Ghaswala (252 ITR 1) and we, therefore, uphold the action of the Assessing Officer in charging the said interest. The Assessing Officer is, however, directed to recompute the interest chargeable u/s. 234B and 234C of the Act, if any, while giving effect to this order.

10. In the interest, the assessee's appeal for Assessment Year 2007-08 is partly allowed.

Order pronounced in the open court on 14<sup>th</sup> May, 2015.

Sd/-  
**(N.V.VASUDEVAN)**  
Judicial Member

Sd/-  
**(JASON P BOAZ)**  
Accountant Member

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