

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 1026/Del/2013
(Assessment Year: 2009-10)

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| Shivalik Constructions P Ltd, D-245, Nehru Colony, Haridwar Road, Dehradun, Uttarakhand PAN:AAJCS3277M (Appellant) | Vs. | ITO, Ward-8(2), New Delhi (Respondent) |
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| Assessee by : | Shri Ankit Gupta, Adv |
| Revenue by: | Shri Kaushlendra Tiwari, Sr. DR |
| Date of Hearing | 24/10/2017 |
| Date of pronouncement | 02/01/2018 |

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by the assessee against the order of the Id CIT(A)-XI, New Delhi dated 29.11.2012 for the Assessment Year 2009-10.
2. The assessee has raised the following grounds of appeal:-
 - "1. That the order U/s 143(3) passed by the AO is illegal, bad in law and without jurisdiction.
 2. That in view of the facts and circumstances of the case the CIT(A) has erred on facts and in law in upholding the assessment order passed by the AO and also in upholding the additions made by the AO.
 3. That in view of the facts and circumstances of the case the CIT(A) has erred on facts and in law in upholding the addition/ disallowance of Rs 36,97,366/- U/s 40(i)(a) of the Act on account of non deduction of TDS on the wages paid by the company.
 4. That on the facts and circumstances of the case and in law the Id. CIT(A) has failed to appreciate in upholding the addition/ disallowance U/s 40(a)(i) that the wages are paid by M/s Shring Construction Company (P) Ltd. on behalf of the assessee and TDS was deducted and deposited by the said company by debiting the same to the Assessee's Account. The

Shring construction Company (P) Ltd. has never claimed the paid wages its expense.

5. *That in view of the facts and circumstances of the case the CIT(A) has erred on facts and in law in upholding the addition at Rs. 96,74,22 1/-on account of current liabilities increase during the relevant year. The addition/ disallowance was made purely on the basis of surmises and conjectures.*
6. *That the CIT(A) has failed to appreciate the fact that the appellant has discharged its burden of proof as required under the law and the For Shivalik Constructions PvtLtd. additions are totally illegal , bad in law and based on guesswork and surmises and conjectures .*
7. *That the various observations made by the AO and CIT(A) against the appellant are illegal, bad in law and contrary to facts, evidence and material on record .*
8. *That the evidence and explanation given by the appellant and the material available on record have not been properly considered and judiciously interpreted.*
9. *That in any case the additions are unjust, unlawful and highly excessive and the income has been wrongly and illegally assessed.*
10. *That the interests U/s 234B have been wrongly and illegally charged. The appellant has not committed any default of payment of Advance tax as it could not have anticipated such additions while estimating the current income. In any case the interest charged has been wrongly worked out and is excessive.”*

3. In the grounds of appeal, assessee has raised almost 10 grounds; however, this appeal is contested on only to grounds. The first being the disallowance under section 40a(ia) of Rs. 3697366/- and secondly on the addition of Rs. 9674221/- on account of current liabilities increased during the relevant year.
4. Brief facts of the case shows that assessee is a private limited company engaged in the business of construction work. For the impugned assessment year It filed its return of income on 24/9/2009 declaring income of Rs. 531720/-.
5. On the first issue in appeal, during the course of assessment proceedings, assessee was found to have debited an amount of Rs. 3941789/-. In the profit and loss account is manufacturing expenses which included in amount of Rs. 3697366/- as wages paid. The assessee

got the contract were done from one company. Therefore, the Ld. assessing officer noted that the work has been awarded to the assessee is a contract but the work has been got done by another company as a subcontractor. During the course of assessment proceedings on questioned about the tax deduction at source on payment made to such contractor , the assessee could not show. Therefore, the Ld. assessing officer disallowed the above sum for non-deduction of tax at source. On appeal before the Ld. CIT Appeal who confirmed the above addition. Therefore, assessee is in appeal before us.

6. The Ld. authorized representative submitted that subcontractor has deposited the summoned behalf of the appellant company which was a related company therefore tax has been deducted on the above sum. He reiterated the submission made before the Ld. CIT appeal, which is placed at page No. 18 of the paper book. He further raised an alternative argument that if the recipient of the income has already paid the tax the disallowance should not have been made in the hands of the assessee.
7. The Ld. departmental representative vehemently stated that as the assessee has failed to deduct tax at source on the payment made to the subcontractor, disallowance has rightly been made by the Ld. assessing officer and confirmed by the CIT Appeal.
8. We have carefully considered the rival contention and perused the orders of the lower authorities. It is an admitted fact that assessee has not deducted tax on the payment of wages paid to a subcontractor, which is deductible under section 194C of the Income Tax Act, and therefore the Ld. AO has correctly made the above disallowance. However, after introduction of the second proviso to the provisions of section 40a(ia) which is inserted w.e. f. 1/4/2012 is held to be retrospective in 377 ITR 635 in CIT V Ansal Landmark Township P Ltd (Del) as under :-

"9. It is seen that the second proviso to Section 40(a)(ia) was inserted by the Finance Act, 2012 with effect from 1st April 2013. The effect of the said proviso is to introduce a legal fiction where an Assessee fails to deduct tax in accordance with the provisions of Chapter XVII B. Where such Assessee is deemed not to be an assessee in default in terms of the first proviso to sub-section (1) of Section 201 of the Act, then, in

such event, "it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso".

10. It is pointed out by learned counsel for the Revenue that the first proviso to Section 201(1) of the Act was inserted with effect from 1st July 2012. The said proviso reads as under:

"Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident—

(i)

has furnished his return of income under section 139;

(ii)

has taken into account such sum for computing income in such return of income; and

(iii)

has paid the tax due on the income declared by him in such return of income;

And the person furnishes a certificate to this effect from an accountant in such form as may be prescribed."

11. The first proviso to Section 201(1) of the Act has been inserted to benefit the Assessee. It also states that where a person fails to deduct tax at source on the sum paid to a resident or on the sum credited to the account of a resident such person shall not be deemed to be an assessee in default in respect of such tax if such resident has furnished his return of income under Section 139 of the Act. No doubt, there is a mandatory requirement under Section 201 to deduct tax at source under certain contingencies, but the intention of the legislature is not to treat the Assessee as a person in default subject to the fulfillment of the conditions as stipulated in the first proviso to Section 201(1). The insertion of the second proviso to Section 40(a)(ia) also requires to be viewed in the same manner. This again is a proviso intended to benefit the Assessee. The effect of the legal fiction created thereby is to treat the Assessee as a person not in default of deducting tax at source under certain contingencies.

12. Relevant to the case in hand, what is common to both the provisos to Section 40(a)(ia) and Section 201(1) of the Act is that as long as the payee/resident (which in this case is ALIP) has filed its return of income disclosing the payment received by and in which the income earned by it is embedded and has also paid tax on such income, the Assessee would not be treated as a person in default. As far as the present case is concerned, it is not disputed by the Revenue that the payee has filed returns and offered the sum received to tax.

13. Turning to the decision of the Agra Bench of ITAT in Rajiv Kumar Agarwal's case (*supra*), the Court finds that it has undertaken a thorough analysis of the second proviso to Section 40(a)(ia) of the Act and also sought to explain the rationale behind its insertion. In particular, the Court would like to refer to para 9 of the said order which reads as under:

'On a conceptual note, primary justification for such a disallowance is that such a denial of deduction is to compensate for the loss of revenue by corresponding income not being taken into account in computation of taxable income in the hands of the recipients of the payments. Such a policy motivated deduction restrictions should, therefore, not come into play when an assessee is able to establish that there is no actual loss of revenue. This disallowance does deincestivize not deducting tax at source when such tax deductions are due, but, so far as the legal framework is concerned, this provision is not for the purpose of penalizing for the tax deduction at source lapses. There are separate penal provisions to that effect. Deincestivizing a lapse and punishing a lapse are two different things and have distinctly different, and sometimes mutually exclusive, connotations. When we appreciate the object of scheme of section 40(a)(ia), as on the statute, and to examine whether or not, on a "fair, just and equitable" interpretation of law— as is the guidance from Hon'ble Delhi High Court on interpretation of this legal provision, in our humble understanding, it could not be an "intended consequence" to disallow the expenditure, due to non-deduction of tax at source, even in a situation in which corresponding income is brought to tax in the hands of the recipient. The scheme of Section 40(a)(ia), as we see it, is aimed at ensuring that an expenditure should not be allowed as deduction in the hands of an assessee in a situation in which income embedded in such expenditure has remained untaxed due to tax withholding lapses by the assessee. It is not, in our considered view, a penalty for tax withholding lapse but it is a sort of compensatory deduction restriction for an income going untaxed due to tax withholding lapse. The penalty for tax withholding lapse per se is separately provided for in Section 271C, and, section 40(a)(ia) does not add to the same. The provisions of Section 40(a)(ia), as they

existed prior to insertion of second proviso thereto, went much beyond the obvious intentions of the lawmakers and created undue hardships even in cases in which the assessee's tax withholding lapses did not result in any loss to the exchequer. Now that the legislature has been compassionate enough to cure these shortcomings of provision, and thus obviate the unintended hardships, such an amendment in law, in view of the well settled legal position to the effect that a curative amendment to avoid unintended consequences is to be treated as retrospective in nature even though it may not state so specifically, the insertion of second proviso must be given retrospective effect from the point of time when the related legal provision was introduced. In view of these discussions, as also for the detailed reasons set out earlier, we cannot subscribe to the view that it could have been an "intended consequence" to punish the assessees for non-deduction of tax at source by declining the deduction in respect of related payments, even when the corresponding income is duly brought to tax. That will be going much beyond the obvious intention of the section. Accordingly, we hold that the insertion of second proviso to Section 40(a)(ia) is declaratory and curative in nature and it has retrospective effect from 1st April, 2005, being the date from which sub clause (ia) of section 40(a) was inserted by the Finance (No. 2) Act, 2004.'

14. The Court is of the view that the above reasoning of the Agra Bench of ITAT as regards the rationale behind the insertion of the second proviso to Section 40(a)(ia) of the Act and its conclusion that the said proviso is declaratory and curative and has retrospective effect from 1st April 2005, merits acceptance.

15. In that view of the matter, the Court is unable to find any legal infirmity in the impugned order of the ITAT in adopting the ratio of the decision of the Agra Bench, ITAT in Rajiv Kumar Agarwal's case (supra)."

9. Therefore, respectfully following the decision of the Hon'ble Delhi High Court we set aside the issue back to the file of the Ld. assessing officer with a direction to the assessee to comply with the first proviso to section 201 of the income tax act before the Ld. assessing officer. The Ld. AO is further directed that if the detailed submission furnished by the assessee are in order and in accordance with the law, the about disallowance because of non-deduction of tax at source be deleted. In the result, first issue in the appeal covered by ground No. 3 of the appeal is allowed with above direction.

10. The second issue involved in the appeal is with respect to the addition of Rs. 9674221/- because of increase in current liabilities during the relevant year. During the course of assessment proceedings, it was noted by the Ld. assessing officer that there is any increase in the current liabilities from Rs. 47.19 Lacs to Rs. 1.43 crores. The assessee has not furnished any details for such an increase in the current liabilities. Even in the schedule 5 attached to the balance sheet wherein the details regarding current liabilities have been given it is only been mentioned that current liabilities Rs. 1.43 crores. Therefore in absence of the same, the Ld. assessing officer has made the addition of Rs. 9674221/-. The assessee contested the matter before the Ld. CIT (A) who confirmed the addition as the assessee has not given any details in respect of the sum of Rs. 6359739/- which is pertaining to 1 company. Further, no details with respect to the other accounts were also produced before the Ld. CIT appeal and merely narrations were provided.
11. The Ld. authorized representative submitted before us that it page No. 36, the assessee has submitted the details of various expenditure of Rs. 47.19 Lacs on account of expenses payable as at 31/03/2008 and further a sum of Rs. 1.43 crores as at 31/03/2009. He submitted that the audit fees payable, salaries payable, wages payable, muster roll payable and 2 parties accounts for outstanding. Therefore, complete details were available before the Ld. assessing officer as well as before the Ld. CIT (A), but the addition has been confirmed.
12. The Ld. departmental representative vehemently relied on the orders of the lower authorities and submitted that once the details have not been provided before the lower authorities which are been categorically stated by both the lower authorities, the relief cannot be granted to the assessee at this stage. Even otherwise, he stated that all these liability is required to be verified whether there exist really or not.
13. We have carefully considered the rival contention and perused the orders of the lower authorities. We have also perused the page No. 36 and 37 of the paper book submitted by the Ld. authorized representative wherein the details of the current liabilities with respect to the previous year as

well as for this year are stated. In this year, The amounts are outstanding with respect to the audit fees, salaries, wages, muster roll as well as with respect to 2 parties, where one of the party is the sister concern of the assessee in whose account a sum of Rs. 63.59 Lacs are outstanding. However, the assessee has not given the complete details before the lower authorities. Therefore, at this stage, it is not possible to grant relief to the assessee. Hence, the whole issue is set aside back to the file of the Ld. assessing officer with a direction to the assessee to substantiate existence of its liabilities by producing the relevant details and Ld. assessing officer is directed to examine the claim of the assessee with respect to the existence of these liabilities in accordance with the law. In the result, the second issue of the appeal is also set aside to the file of the Ld. assessing officer.

14. In the result, appeal of the assessee is partly allowed with above direction for statistical purposes.

Order pronounced in the open court on 02/01/2018.

-Sd/-

(AMIT SHUKLA)
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 02/01/2018
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi