

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर  
**IN THE INCOME TAX APPELLATE TRIBUNAL,  
INDORE BENCH, INDORE  
BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER  
AND SHRI MANISH BORAD, ACCOUNTANT MEMBER**

**ITA No.158/Ind/2015  
Assessment Year: 2010-11**

M/s. Nutech Construction, GM 34-35, "C" Block, Mansarovar complex, Hoshangabad Road, Bhopal	Vs.	Income Tax Officer, 2(2) , Bhopal
(Appellant)		(Respondent )
<b>PAN No.AACFN8643E</b>		

Respondent by	Shri Rajeev Jain, Sr.DR
Appellant by	Shri Sumit Nema, Adv & Shri Amit Jain,CA (AR)
<b>Date of Hearing:</b>	<b>02.01.2018</b>
<b>Date of Pronouncement:</b>	<b>... 01.2018</b>

**ORDER**

**PER MANISH BORAD, AM.**

This appeal filed by the Assessee is directed against the order of Id. Commissioner of Income-tax (Appeals)-1, Bhopal [in short referred to as the CIT (A)] dated 31.12.2014 arising out of the order u/s 143(3) of the Income Tax Act dated 18.03.2013 framed by the Dy. Commissioner of Income Tax-1(1), Bhopal pertaining to Assessment Year 2010-11.

2. Assessee has raised following grounds of appeal;

*“1. That on the facts and in circumstances of the case the order passed is vitiated on several grounds hence the same may kindly be quashed.*

*2. That the learned assessing officer erred and was not justified in making addition and the learned CIT(A) in confirming the addition of Rs.1,26,19,795/- (43,10,869 + 83,08,926/-) on account of disallowance u/s 40(a)(ia) of the Act for payment of machine hire charges and freight and cartage respectively.*

*3. That the learned assessing officer erred was not justified in making an addition of Rs.5,33,602/- (1,60,418/- + 3,73,184/-) on account of disallowance u/s 43B of the Act for payment of service tax and provident fund respectively”.*

3. Briefly stated facts as culled out from the records are that the assessee is a partnership firm engaged in civil construction business. Return of income filed on 27.07.11 declaring total income of Rs.19,32,560/-. The case selected for scrutiny. Notices u/s 143(2) and u/s 142(1) of the Act duly served alongwith detailed questionnaire. The assessment u/s 143(3) of the Act was completed, assessing income at Rs.1,50,85,960/- after making disallowance u/s 40(a)(ia) of the Act for non deduction of TDS on sum of Rs.1,26,19,795/- and disallowance of deduction u/s 43B for payment of service tax and provident fund totaling at Rs.5,33,602/-

4. The assessee filed an appeal before the Ld. CIT(A) but could not succeed as both the additions were confirmed.

5. Now the assessee is in appeal before the Tribunal.

6. At the outset the Ld. Counsel submitted that the alleged payment at Rs.1,26,19,795/- which has been added to the income of the

assessee for non deduction of tax stands already offered to tax by the Payee. Further if required necessary verification may be made by the Ld.A.O. The Ld. Counsel further submitted that with regard to addition of Rs.5,33,602/- u/s 43B of the Act the amount stood already paid and same can also be verified from the records placed in the paper book. The Ld. Departmental representative supported the orders of lower authorities.

7. We have heard the rival contentions and perused records placed before us.

8. As regards Ground No.2 disallowance of section 40(a)(ia) of the Act at Rs.1,26,19,795/- the alleged amount related to machine hire charges of Rs.43,10,869/- and freight and cartage expenses of Rs.83,08,926/-. The Tax Auditor mentioned in the Form 3CD annexed to tax audit report that the assessee has not deducted tax at source on these payments. During the course of hearing the Ld. Counsel has submitted that the alleged amount have been offered to tax by the payee. We observe that it has been consistently held by various co-ordinate Benches including the Co-ordinate Bench, ITAT, Agra in the case of Rajiv Kumar Agrawal v/s ACIT, ITA No.337/Agra/2013 order dated 29.5.2013 wherein it has been held that *“the insertion of second proviso to section 40(a)(ia) is declarative and curative in nature and it has retrospective effect from 1<sup>st</sup> April,005 being the date from which sub clause i(a) of section 40(a) was inserted by the Finance (No.2) Act, 2004”*. It has further held that *“the scheme of Section 40 (ia), as we see it, is aimed and*

*ensuring that expenditure should not be allowed as deduction in the hands of the assess in a situation in which income involved in such expenditure has remained untaxed due to tax withholding lapses by the assessee”.*

9. We, therefore respectfully following the decision of Tribunal and in the given facts and circumstances of the case are of the view that if the payee i.e. persons receiving the impugned amount totaling to Rs.1,26,19,795/- have offered the alleged amount to tax by way of showing it as part of revenue in their books of accounts and taxes as applicable has been paid then there is no loss to the revenue. We accordingly deem it fit and proper to remit the matter of disallowances u/s 40(a)(ia) of the Act to the file of the Assessing Officer for fresh adjudication and also direct him to carry out necessary verifications of related payments as the same having been taken into account by the recipients in computation of their income, regarding payment of taxes and filing of income tax return. Necessary certificates from Chartered Accountant of the payee should also be obtained to this effect. Needless to mention that a proper opportunity of being heard is provided to the assessee. In the result Ground No.2 of the assessee's appeal is allowed for statistical purposes.

10. Now we take up Ground No.3 relating to disallowance of deduction u/s 43B of the Act at Rs.5,33,602/- which inter alia includes service tax payment of Rs.1,60,418/- and provident fund payment of Rs.3,73,184/-. Even though the Ld. Counsel has been

consistently arguing that the assessee has paid these amounts and is eligible for deduction u/s 43B of the Act, however no evidences in support thereof has been produced before the lower authorities. However, the Ld. Counsel has requested to provide one more opportunity to go before the Assessing Officer for getting necessary verification of the payments made to the government treasury.

11. We accordingly remit this issue of deduction u/s 43B to the file of the Assessing Officer and direct the assessee to produce the evidence of payment of service tax and provident fund at Rs.1,60,418/- and Rs.3,71,384/- respectively before the Assessing Officer and if they are found correct to the satisfaction of Assessing Officer then the impugned addition may be deleted. Needless to mention that a proper opportunity being heard is given to the assessee. Ground No.3 of the assessee's appeal is allowed for statistical purposes.

12. In the result the appeal of the assessee is allowed for statistical purpose.

The order pronounced in the open Court on 16.01.2018.

Sd/-  
( KUL BHARAT)

**JUDICIAL MEMBER**

Sd/-

(MANISH BORAD)

**ACCOUNTANT MEMBER**

दिनांक /Dated : 16<sup>th</sup> January, 2018

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

**Private Secretary/DDO, Indore**

- 1.** Date of dictation : 11/01/2018
- 2.** Date on which the typed draft is placed before the Dictating Member : 12/01/2018
- 3.** Date on which approved draft comes to the Sr.P.S./P.S: 12.1.2018
- 4.** Date on which the fair order is placed before the dictating Member for pronouncement: 12.1.2018
- 5.** Date on which the fair order comes back to the Sr.P.S./P.S.:15.1.2018
- 6.** Date on which the file goes to the Bench Clerk:17.1.2018
- 7.** Date on which the file goes to the Head Clerk:
- 8.** The date on which the file goes to the Assisstant Registrar for signature of the order.
- 9.** Date of Despatch of the Order: