



IN THE INCOME TAX APPELLATE TRIBUNAL
"F" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA no.5306/Mum./2016
(Assessment Year : 2012-13)

Income Tax Officer
Ward-17(3)(1), Mumbai

..... Appellant

v/s

Shri Ramkrishna Billava
9, Doshi Chambers
Nandlaljani Road
Poona Street, Dena Bunder
Mumbai 400 009 – AINPB8671K

..... Respondent

C.O. no.27/Mum./2016
(Arising out of ITA no.5306/Mum./2016)
(Assessment Year : 2012-13)

Shri Ramkrishna Billava
9, Doshi Chambers
Nandlaljani Road
Poona Street, Dena Bunder
Mumbai 400 009 – AINPB8671K

..... Cross Objector
[Original Respondent]

v/s

Income Tax Officer
Ward-17(3)(1), Mumbai

..... Respondent
[Original Appellant]

Revenue by : Ms. Pooja Swaroop
Assessee by : Shri Viraj Mehta

Date of Hearing – 19.02.2018

Date of Order – 28.02.2018

ORDER

PER SAKTIJIT DEY, J.M.

The aforesaid appeal by the Revenue and the cross objection by the assessee arise out of order dated 29th June 2016, passed by the

learned Commissioner (Appeals)-28, Mumbai, for the assessment year 2012-13.

2. The only issue arising for consideration in the aforesaid appeal and the cross objection is with regard to the validity of the disallowance made under section 40(a)(ia) of the Act for non-deduction of tax at source.

3. Brief facts are, the assessee an individual filed his return of income on 30th September 2012, declaring total income of ₹ 12,31,860. During the scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has debited certain expenditures totalling to ₹ 2,37,02,594 to the Profit & Loss account. Further, he found that the assessee has either not deducted tax at source on such payments or even if he has deducted tax at source, he has not remitted the same to the Government account on/or before the due date of filing of return of income for the impugned assessment year. Therefore, he called upon the assessee to explain why the deduction claimed of the said amount should not be disallowed under section 40(a)(ia) of the Act. In response, it was submitted by the assessee that as on 31st March 2012, only an amount of ₹ 33,72,515, remained payable and the balance amount was paid to the concerned parties. Therefore, it was submitted, no disallowance should be made. The Assessing Officer, however, did not find merit in the submissions of the

assessee. Observing that the Hon'ble Calcutta High Court has reversed the decision rendered by the Special Bench of the Tribunal in *Merilyn Shipping and Transporters*, 136 ITD 23, he disallowed the deduction claimed by the assessee. The assessee challenged the disallowance by filing an appeal before the first appellate authority.

4. The learned Commissioner (Appeals) following the decision of the Hon'ble Allahabad High Court in *Victor Shipping*, 357 ITR 642, held that only the amount remaining payable on 31st March 2012, can be disallowed under section 40(a)(ia). Accordingly, out of the total payment of ₹ 2,37,02,594, the learned Commissioner (Appeals) restricted the disallowance under section 40(a)(ia) to an amount of ₹ 33,72,515.

5. We have heard rival submissions and perused material on record. The learned Counsels appearing for both the parties have converged on the point that the reasoning on which the learned Commissioner (Appeals) granted relief to the assessee is no more acceptable in view of the decision of the Hon'ble Supreme Court in *Palam Gas Service v/s CIT*, [2017] 394 ITR 300 (SC), wherein, it has been held that disallowance under section 40(a)(ia) can also be made in respect of amounts paid during the relevant financial year. However, the learned Authorised Representative submitted, even though the provisions of

section 40(a)(ia) is applicable to amounts paid during the relevant financial year, but, the second proviso to section 40(a)(ia) which is retrospective in operation would still apply. He submitted, since the persons to whom such payments were made have shown the payments as their income and offered to tax in the return of income filed for the relevant assessment year no disallowance under section 40(a)(ia) can be made as the assessee cannot be treated as an assessee in default in terms of first proviso to section 201(1). Learned Authorised Representative submitted, an opportunity may be given to the assessee to demonstrate before the Assessing Officer with documentary evidence the fact that the recipients of the payment made by the assessee have offered it as their income in the relevant assessment year. In support of such contention the learned Authorised Representative relied upon a decision of the Tribunal, Mumbai Bench, in *Vardh Vinayak Township Development Pvt. Ltd. v/s DCIT*, [2018] 89 taxmann.com 85 (Mum.).

6. Learned Departmental Representative submitted, the onus is on the assessee to prove that the payees have offered the amount received as income in their respective returns of income filed for the relevant assessment year.

7. Having considered the rival submissions and perused the material on record, we are of the view that the reasoning on which the learned Commissioner (Appeals) partly deleted the disallowance under section 40(a)(ia) cannot be supported in view of the decision of the Hon'ble Supreme Court in Palam Gas Service (supra). Now, it has become fairly well settled that the provisions of section 40(a)(ia) would apply even to the amounts paid in the relevant financial year without deducting tax at source. Having held so, it is necessary to deal with the contention of the learned Authorised Representative that as per the second proviso to section 40(a)(ia), no disallowance should be made if the recipients have offered the payment received by them from assessee as income in the returns filed by them. Notably, as per the first proviso to section 201(1), a person cannot be treated as assessee in default for non-deduction of tax at source on payment made if the recipients of such payments have offered it as income in their return of income filed by them. A person who is not treated as an assessee in default in terms of first proviso to section 201(1) no disallowance can be made under section 40(a)(ia) as per the second proviso to the said provisions. It is also well accepted that the second proviso to section 40(a)(ia) will have retrospective operation. However, the onus is on the assessee to demonstrate before the Assessing Officer that the conditions of the first proviso to section

201(1) have been fulfilled. Therefore, considering the submissions of the learned Authorised Representative that the recipients have offered the payment received by them from the assessee as income in their respective return of income, we are inclined to restore the issue to the Assessing Officer for providing an opportunity to the assessee to establish its claim with supporting evidence.

8. In the result, Revenue's appeal and assessee's cross objection are allowed for statistical purposes.

Order pronounced in the open Court on 28.02.2018

**Sd/-
RAJESH KUMAR
ACCOUNTANT MEMBER**

**Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER**

MUMBAI, DATED: 28.02.2018

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

(Asstt. Registrar/Sr.P.S)
ITAT, Mumbai