

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH: KOLKATA

Before: **Shri J. Sudhakar Reddy, Accountant Member** and
Shri S.S. Viswanethra Ravi, Judicial Member

I.T.A No. 683/Kol/2015

A.Y: 2010-11

**M/s. Subir Engineering
Works Pvt.Ltd.**

PAN AAEC4716L

[Appellant]

Vs.

A.C.I.T, Cir-2, Durgapur

[Respondent]

For the Appellant

: Smt. Swati Baid, CA, Id.AR

For the Respondent

: Shri U.Dasgupta, Addl.CIT, Id.Sr.DR

Date of hearing : 02-01-2018

Date of pronouncement : 23-03-2018

ORDER

Shri S.S.Viswanethra Ravi, JM:

This appeal by the Assessee is directed against the order of the Commissioner of Income Tax (Appeals), Durgapur dt. 11-03-2015 for the A.Y 2010-11.

2. Ground no. 1 is relating to confirmation of addition of Rs.6,74,976/- made by AO invoking the provisions of section 40(a)(ia) of the Act in the facts and circumstances of the case.

3. The AO during the assessment proceedings found that the assessee debited an amount of Rs.6,74,976/- as interest on motor vehicle loan, which was taken from M/s. Sundram Finance Ltd. The AO asked the assessee to explain why above mentioned amount should not be disallowed for violation of section 194A of the Act. The Id.AR of the assessee submitted before the AO that post dated cheques for short as PDCs were issued against such loan to the said finance company and therefore, the assessee was not in a position to deduct tax at source on interest payments. This explanation of the assessee was not acceptable to AO and as such added said amount

of Rs.6,74,976/- to the total income of assessee for violation of section 194A of the Act by invoking the provisions U/Sec 40(a)(ia) of the Act.

4. Aggrieved by such order, the assessee preferred an appeal before the 1st appellate authority disputing the validity of action u/s. 40(a)(ia) r.w.s. 194A of the Act, which is reproduced as under:-

"As explained in ground no.1 as per the second proviso of section 40(a)(ia) if the recipient of the income makes the payment of tax on such income and furnishes a certificate from a Chartered Accountant that the assessee has taken the above interest as income in its return of income and has paid taxes thereon no disallowance can be made u/s.40(a)(ia). "

5. Considering the above submissions of assessee, the CIT-A sought remand report and relevant portion of remand report dt.11-12-2014 from the AO is reproduced herein below:-

"The assessee had been taken loan from Sundram Finance Limited, an NBFC. During the time of paying interest against that loan to Sundram Finance, the assessee did not deduct tax as per section 194A of the Income Tax Act, 1961. Being a clear cut violation of Sec. 194A, the said amount was added back to the total income of assessee. Moreover, the amount was added u/s. 194A, while assessee is discussing about Sec. 40(a)(ia) in his submissions before the AO. The said ground and the related facts are being a question of law your honour may decide on the same. "

6. The CIT-A found that during the assessment proceedings, the assessee was unable to submit satisfactory explanation and the assessee was default in not deducting the TDS as per section 194A(1) of the Act and confirmed the disallowance made by the AO.

7. Before us the Id.AR submits that the interest on motor vehicle was paid to M/s. Sundaram Finance and EMI's were deducted from bank through PDCs that were issued. There is no chance to assessee to deduct any TDS from such payment. The Id.AR of the assessee referred to pages 22-23 of the paper book and submits that the papers were filed before the CIT-A and the assessee could not file the same before the AO. The Id.AR further submits that the second proviso to section 40(a)(ia) is applicable to the facts of the issue, but the CIT-A did not consider the same by holding that second proviso of section 40(a)(ia) of the Act is not retrospective. The Id.AR of assessee prayed to remand the issue to the file of the AO for

verification of the details available at pages 22 & 23 of paper book to confirm whether the recipient ie. M/s. Sundram Finance declared the said receipt of interest income in its account and in support of this, she placed her reliance on the decision of the Hon'ble High Court of Delhi in the case of CIT-1 Vs. Ansal Land Mark Township(P) Ltd reported in 377 ITR 635 (Del).

8. On the other hand, the Id.DR relied on the orders of the authorities below.

9. Heard rival submissions and perused material on record including the paper book details. We find that the certificate dt. 29-09-2014 at page 22 as filed before the CIT-A, which clearly shows that the said Finance Company considered the impugned amount in its return of income, and admittedly the said referred document was not before the AO. The case laws as relied on by the assessee in the case of *supra* of the Hon'ble High Court of Delhi supports the case of assessee in remanding the issue to the file of the AO for verification of the details in the context whether the said i.e. M/s. Sundram Finance Ltd offered the interest payment to tax or not. For the sake of convenience, the relevant portion of the decision of Hon'ble High Court of Delhi is reproduced herein below:-

"8. Heard rival submissions and perused the relevant material on record. As relied by the Ld.AR on the case law of the Hon'ble High Court of Delhi supra, while dealing with the case on hand, had an occasion to read down the decision of Agra Bench of Tribunal in ITA 337/Agra/2013 as it was relied on, and held and agreed with the reasoning and conclusion to the insertion of second proviso to section 40(a)(ia) of the Act by the legislature. The relevant portion from paras 11 to 14 are reproduced here in below:

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 the as long as the payee/resident (which in this case is APIL) 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 ITA T in *Rajiv Kumar Agarwal v. A CIT (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 de-incentivize 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. De-incentivizing 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 271 C, 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 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 assessee 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.

The assessee agitated that the resident in terms of 2nd proviso also paid tax on receipt of income and pleaded to restore the issue to the file of AO. The Tribunal observed that the 2nd proviso to Section 40(a)(ia) of the Act is curative and takes care of unintended consequence and restored the file to the AO. We are of the view that the facts therein are similar to the facts of the case on hand. Respectfully following the Judgment of the Hon'ble High Court of Delhi *supra* and order of Coordinate Bench of Kolkata Tribunal, we remand the case to AO for examination and for verification of the required details of the respective recipients and direct the assessee to cooperate in completing the assessment. Preliminary ground raised by the assessee is allowed for statistical purposes.

10. Therefore, taking into considerations the facts and circumstances of the case, the submissions of assessee, we deem it fit and proper to remand the issue to the file of the AO for deciding the same afresh in the light of submissions of assessee and the documents placed at pages 22 & 23 of the paper book in terms of the law laid down by the Hon'ble High Court of Delhi in the case of Ansal Landmark Township (P) Ltd. The AO shall pass a fresh order as per law, after giving the assessee adequate opportunity of hearing to the assessee. The assessee shall be at liberty to file necessary details in support of its claim/contention. Therefore, ground no. 1 raised by the assessee is allowed for statistical purpose.

11. Ground no. 2 is relating to confirmation of addition of Rs.80,42,324/- made u/s. 40A(3) of the Act.

12. During the course of assessment proceedings the AO found that the assessee made number of cash payment exceeding Rs.20,000/- and some bearer cheques in excess of Rs.20,000/-. In explanation the assessee submitted that it used to undertake construction business in various remote places in Sikkim. In the urgency of business the payments were made in remote places on holidays. Majority of payments were made on holidays to persons, who are residing in remote areas. This submissions of the assessee were not acceptable to AO and added the impugned addition of Rs.80,42,324/- to the total income of assessee U/Sec 40A(3) of the Act.

13. Before the CIT-A the contention of the assessee was that the AO did not offer reasonable opportunity to the assessee to substantiate its claim. The CIT-A considering the various submissions of assessee sought remand report from the AO. In the said remand report the AO stated that the assessee could reconcile to an extent of Rs.62,17,386/- and inspite of having the finding by the AO to that effect, the CIT-A confirmed the entire addition made by the AO.

14. Before us the Id.AR submits that the entire payments were made in the State of Sikkim, where the assessee constructed the vegetable market and car parking. For non acceptance of cheque payments by labour, the assessee paid the said amounts in cash. The payments were made in cash on Saturday and Sunday. The AO & CIT-A did not make any adverse remark on genuine transactions. The said payments were incurred by the assessee for business expediency and in view of above, prayed to allow the ground of appeal. The Id.AR of the assessee relied on an order dt. 11-12-2015 of the Co-ordinate Bench, ITAT, 'C' Bench, Kolkata, ITA No. 391/Kol/2014 for the A.Y 2010-11, copy of the same is on record and argued that Rule 6DD is not exhaustive. The Tribunal on identical issue vide its order allowed the claim of assessee by observing that in need of the situation and unavoidable circumstances, which is beyond the control of the assessee and forced to make cash payments in the urgency of business is covered by the exception provided in Rule 6DD of the Income-tax Rules, 1962.

15. The Id.DR submits that the CIT-A examined everything in detail and found that the payments are not covered by Rule 6DD of the IT Rules and the CIT-A has rightly confirmed the order of the AO on this issue and prayed to dismiss the ground no.2 of appeal of assessee.

16. Heard rival submissions and perused material on record. We find that the Id.AR did not bring on record any evidence in respect of remaining amount of disallowance of Rs.18,24,938/-, which is impugned before us as well as before the CIT-A and before AO in the remand proceedings. We find that the CIT-A examined and accepted the CA certificates, ITR etc of various recipients to an extent of Rs.62,17,386/- out of Rs.80,42,324/- towards payments made to sub-contractors of remote areas during the course of assessee's business operation. Therefore, taking into consideration the facts, remand report and peculiar circumstances of the case and the order of Co-ordinate Bench in ITA No. 391/Kol/2014 *supra* as relied on by

the assessee, we restrict the addition to an extent of Rs. 18,24,938 (Rs. 80,42,324-Rs.62,17,386/-) on failure bring on record an evidence by the assessee, as discussed above. This ground no. 2 of assessee's appeal is partly allowed.

17. In the result, the appeal of assessee is partly allowed.

Order pronounced in the open court on 23-03-2018

Sd/-
J. Sudhakar Reddy
Accountant Member

Sd/-
S.S. Viswanethra Ravi
Judicial Member

Dated : 23-03-2018

PP(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant/Assessee: M/s. Subir Engineering Works Pvt. Ltd
46D, Rafi Ahmed Kidwai Road, Unit No.4, Kolkata-700 016.
- 2 Respondent : Asstt. Commissioner of Income Tax, Circle-2, Durgapur.
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy, By order,

Sr.PS/H.O.O
ITAT Kolkata