

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

Before: **Shri M. Balaganesh, Accountant Member** and
Shri S.S. Viswanethra Ravi, Judicial Member

I.T.A No. 1642/Kol/2014

A.Y: 2009-10

Joydeb Chandra
PAN: ABZPC 3187E
[Appellant]

Vs.

D.C.I.T, Cir-33, Kolkata

[Respondent]

For the Appellant

: Shri Soumitra Choudhury, Advocate, Id.AR

For the Respondent

: Shri Sallong Yaden, Addl.CIT, Id.Sr.DR

Date of hearing : 05-02-2018

Date of pronouncement : 25-04-2018

ORDER

Shri S.S.Viswanethra Ravi, JM:

This appeal by the Assessee is directed against the order of the Commissioner of Income Tax (Appeals), XIX, Kolkata dt. 29-05-2014 for the A.Y 2009-10.

2. The appeal was filed with a delay of 369 days. For which, the assessee filed a condonation petition. Considering the reasons stated in the delay condonation petition dt. 8-1-18 and after hearing both the parties, we find the reasons stated in the petition are bonafide and reasonable and therefore, we condone the delay in filing the above appeal.

3. Ground nos. 2 to 7 relating to confirmation of additions of Rs.36,15,736/-, Rs.7,75,362/- & Rs.9,60,000/- under the heads 'labour charges', 'installation charges' & 'hire charges'.

4. Brief facts of the case are that the assessee is an individual and a government contractor. The assessee filed his return of income for the A.Y under consideration on 23-0-09 declaring total income at Rs.1,30,14,057/-. Notice u/s. 143(2) and 142(1) of the Act were

issued to assessee. In response to which, the assessee appeared and filed books of account and bank statement.

5. The AO found that the assessee had not deducted TDS on payments/expenses i.e a) labour charges of Rs.36,15,736 b) installation charges of Rs. 7,75,362/- & c) hire charges of Rs.9,60,000/- totaling to 53,51,098/- and for non deduction of TDS by invoking the provisions of section 40(a)(ia) of the Act added a sum of Rs. 53,51,098/- to the total income of assessee by an order dt. 29-12-2011 passed u/s. 143(3) of the Act.

6. Before the CIT-A the assessee filed a written submission along with supporting documents in this regard. The Id.AR of the assessee before him submits that the assessee is a government contractor and incurred the said expenditure towards labour charges, installation charges and hire charges totaling to Rs. 53,51,116/-. During the F.Y 2008-09 relevant to A.Y under consideration the assessee spent a sum of 1,72,23,736/- as labour charges on account of operation & maintenance charges for the different pump house maintained by the PHE(Public Health Engineering), Govt. of W.B during Ganga Sagar Mela. In this connection, the assessee also spent of Rs.12,14,000/- towards installation charges and Rs.9,60,000/- towards hire charges.

7. The CIT-A after considering the above submissions of assessee dismissed the ground by observing as under:-

"5.2 I have perused the assessment order and the contention of the appellant vide written submission dated written submission dated 20-05-2014 on the issue. On consideration of the assessment order, I find that the appellant had conceded to the mistake of not deducting tax at source for the payments made as discussed (supra) before the AO and even filed written submission to the effect that the disallowance u/s.40(a)(ia) may be made and that tax was deducted and deposited in the subsequent year. The Second Proviso to section 40 reads as follows: Where in respect of any sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which tax has been paid. The present submission before during the appellate proceeding is in stark contrast to what transpired at the assessment stage. The assessee had submitted detailed of labor charges before the AO. On perusal of the same it appears that these payments were made to various companies and no TDS was effected on these payments. It is therefore evident that the payments were made to various firms and companies and such payments were in excess of the basic limit of exemption of TDS u/s. 194C of the Act. The assessee is not taking a new line of argument that the payments were made to individual labors, such submissions are not borne out of records

and rather is contrary to the evidences on records. In view of the given facts as narrated in the assessment order that the appellant had deducted tax on these payments and deposited the same in the Govt. A/c subsequently during the FY 2011-12, I find that the appeal on this ground stands to no merit and the same is therefore dismissed."

8. Before us the Id.AR reiterated his same submissions made before the CIT-A. Further, the assessee has given details of said payments and referred to page-2 of the assessment order. Now the assessee is ready to produce all the details of said payees as referred in para- 2 of AO 's order for his verification to find out whether the payees shown respective amounts received from assessee in their accounts and offered the same for taxation in their returns of income and prayed to remand the matter to the file of AO for his verification in terms of 2nd proviso to section of section 40(a)(ia) of the Act.

9. The Id.DR submits that the assessee has admitted during the course of assessment proceedings that it was a mistake in not deducting TDS on such payments and offered to tax vide his reply dt. 12-12-2011 and referred to page 2 & 3 of the AO's order. The assessee has taken a submission before the CIT-A stating that the said payments were made to labour and deduction of TDS on labour payment does not arise. Before this Tribunal the assessee has raised a new submission for remanding the matter to the file of AO. The Id.DR argued that in the submissions of assessee has no force and merit in remanding the matter to the AO for his verification and prayed to dismiss the ground nos. 2 to 7 raised by the assessee in the appeal.

10. Heard rival submissions and perused the material on record. We find that the CIT-A examined the issue in detail and found that the payments were made to various firms and companies and confirmed the additions made by the AO for non deduction of TDS as required u/s. 194C r.w.s 40(a)(ia) of the Act. On perusal of assessment order, it is observed that the assessee had incurred expenditure on account of labour charges, installation charges and

hire charges and all the payments were made to various firms and companies. The contention of the Id.AR is that if another opportunity is given to assessee to submit all the details relating to payments made to said firms and companies and to find out as to whether the payees (firms/companies) considered respective amounts in their accounts and also offered to tax thereon in their respective returns of income in terms of 2nd proviso to section 40(a)(ia) of the Act. We find force in the submissions of the Id.AR and we find support from the decision of the Hon'ble High Court of Delhi in the case of CIT Vs. Ansal Landmark Township (P) Ltd. reported in 377 ITR 635(Del) in remanding the matter to the AO for the said purpose. Relevant findings of the Hon'ble High Court of Delhi in the case of Ansal Land Mark Township(P) Ltd is reproduced herein below:-

"7. *Having aggrieved by order of Ld. CIT(A), the assessee before us prayed to restore the issue on hand to the file of AO and relied on Judgment dt. 26-8-2015 of 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) and on order of Tribunal, Kolkata Benches in the case of DCIT Vs. M/s. Five Star Shipping Agency Pvt. Ltd for assessment year 2006-07. The Ld. DR submits that the section 194C of the Act is applicable to the issue on hand and relied on the order of AO.*

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)(ia1 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.

11. Respectfully following the above, we deem it fit and proper to remand the matter to the file of the AO. Ground nos. 2 to 7 raised by the assessee in the appeal are allowed for statistical purpose.

12. Ground nos. 8 to 10 are relating to confirmation of addition of Rs.77,26,433/- made on account of contractual receipts shown in the P & L account of assessee.

13. During the scrutiny proceedings the AO found that the assessee has debited the following expenses/TDS of Rs.77,26,433/- in the Profit & Loss A/c against receipt of Rs.25,27,52,384/-:-

- a) Rs.11,99,860/- on account of Cess
b) Rs.34,42,284/- on account of TDS
c) Rs.30,84,289/- on account W.C.T, **totaling to Rs. 77,26,433/-**

14. According to AO, the assessee has not considered the contractual receipts of Rs. 77,26,433/- in his P & L A/c. The assessee submitted his explanation on 12-12-2011 stating that an amount of Rs.80,00,000/- received as ad-interim advance during the F.Y 2007-08 and deducted TDS in F.Y 2008-09. The assessee adjusted the contractual receipts in F.Y 2010-11 and paid taxes thereon. The AO found that the submissions of assessee is not acceptable as the assessee has not considered the contractual receipts of Rs. 77,26,433/- in his P & L A/c in the A.Y under consideration and, therefore, added the same to the total income of assessee.

15. Before the CIT-A, the assessee contended that the total contractual receipts based on various TDS certificates received from PHE, Govt. of W.B in which an amount of Rs.80,00,000/- received as ad-interim advance from South 24-Pgs, Mechanical Division, Govt. of W.B. Further contended that TDS certificate(s) shows only contractual value and the payment is decided on various reasons depending upon report verification certificate and final payment is net result of payment after such deduction. The CIT-A has not considered the above submissions of assessee and confirmed the addition made by the AO by stating as under:-

"6.2 I have perused the assessment order and the submission of the appellant on the issue at hand for coming to a decision on merits. At the assessment stage, the appellant admitted in his submission that contractual receipt of Rs.77,26,433/- was not considered by him in his Total Turnover in the P & L A/c and offered the same for taxation. The appellant also paid Rs.10,00,000/- by way of Self Assessment Tax on 08.12.2011, Rs.5,00,000/- on 14.12.2011, Rs.5,00,000/- on 21.12.2011. The AO observed that from the above submission of the assessee, it was proven beyond doubt that the assessee had not considered the contractual receipt of Rs.77,26,433/- in his P&L A/c whereas he had debited the expenses/TDS of Rs.11,99,860/- on account of Cess, Rs.34,42,284/- on account of TDS and Rs.30,84,289/- on account of W.C.T. in the P&L A/c against the receipt of Rs.15,27,52,384/- including Ad-interim advance payment of Rs.80,00,000/-. Therefore, Rs.77,26,433/- is added to the total income of the assessee. I find that difference of turnover as per TDS Statement and Profit & Loss A/c was Rs.1,50,21,171/-. The AO fairly excluded the amounts which were properly explained and or reconciled by the appellant. The appellant could not demonstrate before me why the amount of Rs.77,26,433/- deserves to be deleted. On the other hand the AO made the addition of Rs.77,26.433/- after considering all reconciliation and excluding advances etc., I find that the appeal on this ground stands to no merit and the same is therefore dismissed. "

16. The Id.AR submits that the issue was totally misrepresented before the CIT-A and the assessee is ready to file all documents and prayed to remand the matter to the file of AO. On the other hand, the Id. DR relied on the order of the AO & CIT-A.

17. Heard rival submissions and perused the record. We find that the contention of assessee was that the contractual receipts includes AD-interim advance and the same were adjusted against the report verification certificate and deduction is made on final payment. According to assessee, there were discrepancies between the amount payable and amount receivable from Mechanical Division, Govt. of W.B & TDS certificates issued. The AO & CIT-A did not consider the submissions of assessee in their right perspective. We find that there was difference of turnover as per TDS Statement and Profit & Loss A/c, which requires verification by the AO. Therefore, taking into consideration the facts of the case and the submissions of Id.AR and issue involved in the appeal, we deem it fit and proper to remand the matter to the file of the AO for verification. The assessee has to clarify the difference found by the AO by proper explanation along with evidence in respect of TDS, turnover and total receipts of assessee. The AO shall pass a fresh order as per law, after taking into consideration the submissions and explanations of assessee. The assessee shall be at liberty to file requisite evidences, if any, to substantiate its claim and contention. The ground nos.8 to 10 are allowed for statistical purpose.

18. Ground no. 11 are consequential in nature, which requires no adjudication. Ground no. 12 is general in nature, which requires no adjudication by us.

19. In the result, the appeal of assessee-ITA No. 1642/Kol/2014 for the A.Y 2009-10 is allowed for statistical purpose.

Order pronounced in the open court on 25-04-2018

Sd/-
M. Balaganesh
Accountant Member

Dated :25-04-2018

Sd/-
S.S. Viswanethra Ravi
Judicial Member

PP(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant/Assessee: Shri Joydeb Chandra
7/1A Abhoy Halder Lane, Kolkata-12.
2. Respondent/Revenue: Deputy Commissioner of Income Tax,
Circle-33, 10B, Middleton Row, Kolkata-71.
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy, By order,

Sr.PS/H.O.O
ITAT Kolkata