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

BEFORE SHRI A. T. VARKEY, JM &DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.2413/Kol/2016

(निर्धारणवर्ष / Assessment Year: 2008-09)

ITO, Ward-28(1), Kolkata Aayakar Bhawan Dakhin, 2, Gariahat Road (South), Kol-68.	**Vs.**	**Shri Diptendra Nath Ganguly** M/s. Techcreate India, 110/18A, Selimpur Road, Kolkata – 700031.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. :**AFDPG 7982 D**		
(Appellant)	**..**	**(Respondent)**

Appellant by :Shri Soumyajit Dasgupta, Addl. CIT(Sr. DR)
Respondent by :Shri Pinaki Maji, ACA & Sri Anjan Kr. Maiti, FCA

सुनवाईकीतारीख/ **Date of Hearing : 01/05/2018**

घोषणाकीतारीख/**Date of Pronouncement : 06/06/2018**

आदेश / O R D E R

Per Dr. A. L. Saini:

The captioned appeal filed by the Revenue, pertaining to Assessment Year 2008-09, is directed against an order passed by the Ld. Commissioner of Income Tax (Appeals)-8, Kolkata, which in turn arises out of an assessment order passed by the Assessing Officer u/s 143(3)/147 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'),dated 14.02.2014.

2. The grievances raised by the Revenue as follows:

"1. Was the Ld. CIT(A) right in law and in facts in deleting the addition of Rs.43,17,719/-, stating that the disallowance of entire labour charges just because of technical liability /role u/s 40(a)(ia) will result into absurd assessment of income, thereby going against the provisions of the Act.

2. That the Ld. CIT(A) has erred in deleting the addition of Rs.43,17,719/-,thereby violating the ruling of the Hon'ble Calcutta High Court in the case of CIT vs Crescent Export Syndicate [216 taxman 258 (2013)], wherein it has been ruled that the fact that the impact of s.40(a)(ia) is harsh "is no ground to read the same in a manner which was not intended by the legislature".

3. That the Ld. CIT(A) has erred in directing the A.O. to delete the addition ofRs.6,93,039/-, stating that it was but an advance by the assessee to the party, which is in violation of the ruling of the Hon'ble Calcutta High Court in the case of CIT vs Crescent Export Syndicate [216 taxman 258 (2013)], wherein it has been ruled that the key words in s. 40(a)(ia) are "on which tax is deductible at source under Chapter XVII-B" and this makes it clear that it applies to all expenses. Nothing turns on the fact that the legislature used the word 'payable' and not paid or credited'.

4. That the appellant craves leave to add, alter, modify, delete or include any ofthe grounds of appeal."

3. Ground Nos.1 and 2 raised by the Revenue relates to addition of Rs.43,17,719/- u/s 40(a)(ia) of the Act on account of non-deduction of TDS on labour charges.

4. The brief facts qua the issue are that in the assessee's case under consideration, the assessment was completed u/s. 143(3) on 12.12.2010 with a total Assessed income to the tune Rs. 11,14,940/-. Subsequently, the assessee's case was reopened u/s. 147/148 of the I.T. Act and the Assessing Officer made addition of Rs.43,17,719/- on account of non-deduction of TDS on labour charges. During the reassessment proceedings, the assessee submitted that Labour Charges to the tune of Rs. 43,17,719/- were paid to Labour Sardars and there was no written agreement between the assessee and the Labour Sardars, therefore, TDS was not deducted on the payment made to Labour Sardars. During the reassessment proceedings, the Assessing Officer received information u/s. 133(6) of the I.T. Act from Shri Shopujan Singh, one of the Labour Sardars, who confirmed that he had raised bill of Rs. 61,836/- and had a closing balance of Rs.57,636/ as on 31.03.2008. Therefore, the Assessing Officer noted that there must be some written or verbal agreement between the assessee and the Labour Sardars, that is why, Sri Shopujan Singh has not taken payment like a daily paid labourer. Sri Shopujan Singh (Sardar) had worked throughout the Financial Year 2007-08 and maintained account and therefore he had a closing balance with the assessee. Therefore, the Assessing Officer noted that there is payee and payer relationship existed, and the so called Labour Sardars

are payees and assessee is the payer. Since, the assessee has made the payment to the Labour Sardars and not directly to the labourers, therefore, the assessee was supposed to deduct TDS while paying labour charges to the Labour Sardars. Hence, the Assessing Officer disallowed the amount to the tune of Rs.43,17,719/- u/s 40(a)(ia) of the Act.

5. On appeal by the assessee, the ld. CIT(A) deleted the addition made by the Assessing Officer. Aggrieved by the order of the ld. CIT(A), the Revenue is in appeal before us. The ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

6. On the other hand, the ld. counsel for the assessee submitted before us that in the case of assessee under consideration, for the Assessment Year 2008-09,if he has tax audit obligation in Assessment Year 2007-08, then only he has to deduct tax at source in Assessment Year 2008-09 and onwards. To support his plea, the ld. Counsel for the assessee drew our attention towards relevant provisions of section 194(C)(1) Clause (k) which reads as follows:

> *(k) Any individual or Hindu Undivided Family, whose total sales, Gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause(a) or Clause(b) of Section 44AB during the financial year immediately preceding the financial year in which sum is credited or paid to the account of the contractor, shall , at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of cheque or draft or by any other mode, whichever is earlier.[Enacted by the Finance Act, 2007 take effect from 1st day of June 2007]*

The ld Counsel also submitted that assessment year 2008-09 was the initial year of introduction of the clause (ia) to section 40(a) of the Act and there was no clarity on the subject, therefore, disallowance should be deleted.

7. We have given a careful consideration to the rival submissions and perused the materials available on records, we note that in the assessee's

case under consideration for the Assessment Year 2006-07, which is immediately preceding of the Financial Year 2007-08, the assessee's turnover was to the tune of Rs.38,45,650/- which was below the threshold limit i.e. Rs.40,00,000/- specified in Clause (a) & (b) of Section 44AB of the Act. The assessee submitted Income Tax Return on 29.11.2007 for Financial year 2006-07 and offered Gross total Income of Rs 3,20,675/- (8.34% of Rs.38,45,650/-) under Section 44AD and thus assessee offered profit more than the deemed profit of 8 percent. Therefore, Assessee is not liable to Deduct TDS for the Financial year 2007-08 in respect of labour charges paid to the contractor. Hence, the assessee is not liable to deduct TDS under the provision of Section 194(C)(1) of the Act, as it was the first year of the assessee where the provisions of section 40(a)(ia) of the Act is made applicable to him. Therefore, the provision of Section 40(a)(ia) for making disallowance of expenditure for no-deduction of TDS will not apply. Besides, the assessing officer has not brought any evidence on record to establish the contract between the assessee and Labour Sardars, except a copy of ledger account of Shri Shopujan Singh, one of the Labour Sardars, who had raised bill of Rs. 61,836/- and had a closing balance of Rs.57,636/ as on 31.03.2008.

Considering the factual position explained above, we delete the addition of Rs.43,17,719/- made by the Assessing Officer.

8. Ground No.3 raised by the Revenue relates to addition of Rs.6,93,039/- on account of non-deduction of TDS u/s 40(a)(ia) of the Act on account of advances given by the assessee.

9. The brief facts qua the issue are that during the assessment proceedings, the assessee has shown Gross Receipts from M/s. Dream Bake Pvt. Ltd. to the tune of Rs.53,94,463/- instead of Rs. 60,87,502/-. The Assessing Officer received Information u/s. 133(6) of the I.T. Act 1961, from M/s. Dream Bake Private Limited that they have paid to the assessee during

the Assessment Year 2008-09 Rs. 60,87,502/- and deducted TDS of Rs. 1,37,931/-. During the assessment proceedings, the assessee submitted that these payments were purely advances and advances received is not an income as no bill has been raised during the F.Y. 2007-08. However, the Assessing Officer rejected the contention of the assessee and held that as per Section 198 of the Act, tax deduction of income received is necessary and the AO also noted that as M/s. Dream Bake Pvt. Ltd. has deducted tax while making advance payment to the assessee, therefore, as per section 198 of the Act, the said advance should be assessee's deemed income, as tax was deducted from the advance payment and assessee has also claimed that TDS but failed to show the gross receipts of Rs.60,87,502/- in his return of income for Assessment Year 2008-09. The Assessing Officer noted that assessee has maintained mercantile system of account therefore, he is supposed to take Rs.60,87,497/- as Gross receipt instead of Rs. 53,94,463/- because during the Assessment Year 2008-09 the assessee has received Rs. 60,87,502/- from M/s. Dream Bake Pvt. Ltd. and there was deduction of tax of Rs. 1,37,931/-. According to A.O, the assessee is not allowed to shift the income of a year to the next year. Therefore, the Assessing Officer made the addition to the tune of Rs.6,93,039/- (60,87,502 - 53,94,463/-).

10 On appeal by the assessee, the ld. CIT(A) confirmed the addition only to the extent of tax deducted at source to the tune of Rs.1,37,931/-. Aggrieved by the order of the ld. CIT(A), the Revenue is in appeal before us. The Learned Departmental Representative did not have much to say but he nevertheless relied upon the order of the Assessing Officer. Whereas, ld Counsel for the assessee has defended the order passed by the ld CIT(A).

11. We have heard learned arguments on both sides and we proceed to record our opinion on the issue under consideration. First of all, we think that it is worthwhile to quote the bare provisions of section 198 of the Income Tax Act 1961, which read as under:

"*Section 198:Tax deducted is income received.*

All sums deducted in accordance with the foregoing provisions of this Chapter shall, for the purpose of computing the income of an assessee, be deemed to be income received:
***Provided** that the sum being the tax paid, under sub-section (1A) of section 192 for the purpose of computing the income of an assessee, shall not be deemed to be income received."*

From the above noted provisions of section 198, it is clear that all sums deducted shall, for the purpose of computing the income of an assessee, be deemed to be income received. But this principle does not fit in case of advance received. When an assessee receives an advance, then it would be liability for him, that is, an obligation for him and he will show this obligation in liability side of the Balance Sheet. The assessee under consideration received advance of Rs.60,87,497/- from M/s. Dream Bake Pvt. Ltd, and recorded the said transaction in the books of accounts by passing the following accounting entry:

Cash/Bank Account debit	Rs.60,87,497
To M/s. Dream Bake Pvt. Ltd, credit	Rs.60,87,497

By doing this accounting entry, the assessee has shown in liability side of the Balance Sheet, as M/s. Dream Bake Pvt. Ltd, at Rs.60,87,497/-, as an obligation/liability. This obligation/liability will get converted into income whenever the assessee executes the works/services. Unless and until the assessee executes the contractual works/services against the advance amount so received of Rs.60,87,497/-, it would not be converted into income of the assessee. Therefore, as per accounting principle, by no stretch of imagination said advance amount can be treated as income received by the assessee. In some case out of great caution some companies/assesses deduct TDS on advance payment for safe side, to avoid the future consequences etc, but this does not mean that advance is an income of the assessee, it will be an obligation/liability till the related work/service gets executed as per terms and conditions of the parties. This is the commercial principle.

Therefore, we are of the view that as the assessee has claimed TDS on the advance, as we explained above that advance cannot be treated as income, hence the TDS amount is to be the deemed income received during the year. Thus, the addition should be restricted to the TDS amount to the extent of 1,37,931/-. That being so, we decline to interfere in the order passed by the ld. CIT(A) and his order on this issue is hereby upheld and the Ground raised by the Revenue on this issue is dismissed.

12. In the result, the appeal filed by the Revenue is dismissed.

Order is pronounced in the open court on 06/06/2018.

Sd/-	**Sd/-**
(A. T. VARKEY)	**(A. L. SAINI)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

कोलकाता /Kolkata;
दिनांक Date: 06/06/2018
(RS, SPS)

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant- ITO, Ward-28(1), Kolkata
2. प्रत्यर्थी/ The Respondent-Shri Diptendra Nath Ganguly
3. आयकरआयुक्त(अपील) / The CIT(A),
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, **कोलकाता**/ DR, ITAT, Kolkata
6. गार्डफाईल / Guard file.

सत्यापितप्रति

True Copy

By Order

Senior Private Secretary,
Head of Office/D.D.O,
I.T.A.T, Kolkata Benches,
Kolkata.