

**आयकर अपीलीय अधिकरण, कटक न्यायपीठ, कटक**  
IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK  
BEFORE SHRI N.S.SAINI, AM & SHRI PAVAN KUMAR GADALE, JM

आयकर अपील सं./ITA No.359/CTK/2015

(निर्धारण वर्ष / Assessment Year :2008-2009)

ACIT, Baleswar Circle,	Vs.	M/s Almighty Mining Developers Pvt. Ltd., Asurali, Bhadrak, Odisha
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : <b>AAFCA 4858 E</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

राजस्व की ओर से /Revenue by : Shri Kunal Singh, CITDR

निर्धारिती की ओर से /Assessee by : Shri Sunil Mishra, AR

सुनवाई की तारीख / Date of Hearing : **08/08/2017**

घोषणा की तारीख/Date of Pronouncement **10/08/2017**

**आदेश / ORDER**

**Per Shri Pavan Kumar Gadale, JM:**

The revenue has filed an appeal against the order of CIT(A), Cuttack, passed in ITAppeal No.0009/2014-15, dated 29.05.2015, u/s.147/143(3) of the Income Tax Act, wherein the revenue has raised the following grounds :-

01. *In the facts and circumstances of the Id. CIT(A) is not justified in deleting the disallowance of addition made by the AO u/s.40(a)(ia) amounting to Rs.88,95,480/- - on the ground that assessee has already deducted and deposited the TDS in the previous year before the due date of filing of return of income u/s.139(1).-especially when the proviso to section 40(a)(ia) was entered by the Finance Act, 2010 w.e.f.01.04.2010.*
02. *In the facts and circumstances of the Id. CIT(A) is not justified in deleting the disallowance of statutory provisions of section 40(a)(ia) as the section 201(1) and principle laid down therein could not be adopted for the purpose of interpreting section 40(a)(ia) which was relied by the Hon'ble ITAT, Agra Bench Agra reported in Pramod Kumar Garg Vrs. ITO ITA No.401/Agra/2011 dated 31.08.2012.*

2. Brief facts of the case are that the assessee is in the business of transporting and trading of minerals and filed the return of income on 29.09.2008 with total income of Rs.5,49,024/-. The assessment was completed u/s.143(3) of the Act dated 31.12.2010 assessing total income of Rs.1,19,08,880/-. Subsequently the AO has reason to believe that the income has escaped assessment and issued notice u/s.148 of the Act, further notices u/s.143(2) & 142(1) were also issued. In compliance, Id. AR of the assessee appeared and the case was discussed. On perusal of the profit and loss account, the AO found that the amount of Rs.96,99,567/- has been claimed as payment made to sub-contractors. The AO has identified that these payments were made to three parties and dealt on the issue at page 2 of the assessment order and found in respect of two parties the payment was made within the stipulated period where TDS was deducted and paid within the financial year 2008-09 and the AO dealt on the provisions of Section 40(a)(ia) of the Act and also amended provisions of Finance Act, 2010. The contention of the assessee that the assessee has deducted TDS and paid before filing of the return u/s.139(1) of the Act. Hence, no addition can be made and also the amended provisions are retrospective from the year 2005. But the AO was not satisfied with the explanations and made addition of payments of Rs.88,95,450/- made in October, 2007 and February, 2008 where TDS was deducted and deposited in the month of September 2008 and on the remaining amount where payment was made in the month of March, 2008 and as per the provisions the assessee has deducted TDS and deposited

the amount before due date of filing of return of income u/s.139(1) of the Act, the AO has allowed the claim and Id. AO finally assessed the total income with addition u/s.40(a)(ia) of the Act of Rs.88,95,480/- and determined total income of Rs.1,06,54,290/-.

3. Aggrieved by the order of the AO, the assessee has filed an appeal with the CIT(A). In the appellate proceedings Id. AR explained that the assessee company has deducted TDS and deposited on 26.09.2008 being before the due date of filing return of income u/s.139(1) of the Act. The Id. CIT(A) considered the submissions, ratio of the judicial decisions and amended provisions and was of the opinion that since total payment of TDS was made before the due date of filing return u/s.139(1) of the Act which is a proper compliance of provisions of law and, finally, directed the AO to delete the addition and observed at page 1 para 3 of the order which reads as under :-

*“3. The appellant during appeal hearing stated that the AO in the assessment order has mentioned that all the TDS deducted were deposited on 26.09.2008 which were before the due date of filing of return of income by the assessee u/s.139(1) of the Act. The appellant further stated that as per proviso to Sec.40(a)(ia) of the Act, it is given that any TDS deducted by the prayer within the previous year can be deposited before the due date of filing of return u/s.139(1) of the Act and such sum shall be allowed as a deduction in computing income of the previous year in which such tax has been paid. The appellant further submitted that though the above provision was instituted by the Finance Act 2010 w.e.f.01.04.2010, various higher legal authorities have decided that the provision has retrospective effect. The appellant has submitted the ratio of decision in the case of CIT Vs. Virgin Creations in GA 3200/2011 decided on 23.11.2011 where the Hon’ble High Court of Calcutta (Ca.) have decided that the above provision should have been retrospective effect. The Hon’ble High Court of Delhi in the case of CIT Vs. Naresh Kumar (ITA No.24/2013) and in the case of CIT Vs. M/s Talbors (P) Ltd. (ITA No.218/2013) have given the same view. Considering the above, the AO is directed to delete the addition.”*

4. Aggrieved with the order of CIT(A), the revenue has filed appeal before the Tribunal.

5. Before us, Id. DR submitted that the CIT(A) has erred in deleting the addition made by the AO u/s.40(a)(ia) of the Act as the proviso to Section 40(a)(ia) was amended in Finance Act, 2010 being effective from 1.4.2010, in the present case assessment year is 2008-09, therefore, the CIT(A) was not correct in law in granting the relief and prayed for allowing the appeal. Contra, Id. AR relied on the order of CIT(A) and judicial decisions.

7. We heard the submissions and perused the material on record. The sole and substantive ground raised by the revenue that the CIT(A) has erred in deleting the additions irrespective of the fact that the assessee has deducted TDS and made payment with the Treasury of the Government before the due date u/s.139(1) of the Act. We find that the AO has not disputed on making of payment but his grievance being the time limit of deposit of TDS. The Id. DR further submitted that the payment of TDS of previous year for the period April to February as per the provisions shall be within the end of the previous year and in respect of March the TDS amount can be deposited before filing of the return of income u/s.139(1) of the Act and amendment is prospective. We find the Id. AR relied on the decision of the Hon'ble High Court of Calcutta in the case of CIT Vs. Virgin Creations in GA No.3200/2011, decided on 23.11.2011, wherein it was held as under :-

*“The Court: We have heard Mr. Nizamuddin and gone through the impugned judgment and order. We have also examined the point formulated for which the present appeal is sought to be admitted.*

*It is argued by Mr. Nizamuddin that this court needs to take decision as to whether section 40(A)(ia) is having retrospective operation or not.*

*The learned Tribunal on fact found that the assessee had deducted tax at source from the paid charges between the period April 1, 2005 and April 28, 2006 and the same were paid by the assessee in July and August 2006, i.e. well before the due date of filing of the return of income for the year under consideration. This factual position was undisputed.*

*Moreover, the Supreme Court, as has been recorded by the learned Tribunal, in the case of Allied Motors Pvt. Ltd. and also in the case of Alom Extrusions Ltd., has already decided that the aforesaid provision has retrospective application. Again, in the case reported in 82 ITR 570, the Supreme Court held that the provision, which has inserted the remedy to make the provision workable, requires to be treated with retrospective operation so that reasonable deduction can be given to the section as well.*

*In view of the authoritative pronouncement of the Supreme Court, this court cannot decide otherwise. Hence we dismiss the appeal without any order as to costs.*

Similarly, Id. AR of the assessee drew our attention to the decision of Hon'ble Delhi High Court in the case of CIT Vs. Naresh Kumar (2013) 262 CTR (Del) 389, wherein Their Lordships have considered the amendment and observed as under :-

*“23. Section 43B deals with statutory dues and stipulates that the year in which the payment is made the same would be allowed as a deduction even if the assessee is following the mercantile system of accountancy. The proviso, however, stipulates that deduction would be allowed where the statutory dues covered by Section 43B stand paid on or before the due date of filing of return of income. Section 40(a)(ia) is applicable to cases where an assessee is required to deduct tax at source and fails to deduct or does not make payment of the TDS before the due date, in such cases, notwithstanding Sections 30 to 38 of the Act, deduction is to be allowed as an expenditure in the year of payment unless a case is covered under the exceptions carved out. The amended proviso as inserted by Finance Act, 2010 states where an assessee has made payment of the TDS on or before the due date of filing of the return under Section 139(1), the sum shall be allowed as an expense in*

*computing the income of the previous year. The two provisions are akin and the provisos to Sections 40(a)(ia) and 43B are to the same effect and for the same purpose.”*

8. We considering the ratio of judgment of the Hon'ble High Courts and the amendment of provisions in Finance Act, 2010 which is retrospective, we are of the opinion that the assessee company is eligible for deduction of claim where TDS is deducted on expenditure and such TDS was deposited with Government Treasury within the due date of filing of return of income u/s.139(1) of the Act. We found Id. CIT(A), has dealt on the disputed issue vis-à-vis explanation of the assessee and relied on the judicial decisions and allowed the appeal of the assessee. Accordingly, we are not inclined to interfere with the orders of CIT(A) and uphold the same and dismiss the grounds of appeal of the revenue.

9. In the result, appeal of the revenue is dismissed.

Order pronounced in the open court on this 10/08/2017.

**Sd/-**  
**(N. S. SAINI)**

लेखा सदस्य / ACCOUNTANT MEMBER

**Sd/-**  
**(PAVAN KUMAR GADALE)**

न्यायिक सदस्य / JUDICIAL MEMBER

**कटक Cuttack; दिनांक Dated 10/08/2017**

प्र.कु.मि/PKM, Senior Private Secretary

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant-  
ACIT, Baleswar Circle, Baleswar
2. प्रत्यर्थी / The Respondent-  
M/s Almighty Mining Developers Pvt. Ltd.,  
Asurali, Bhadrak, Odisha
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कटक / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार / BY ORDER,

**(Senior Private Secretary)**

आयकर अपीलीय अधिकरण, कटक / ITAT, Cuttack