

**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.132/CTK/2018**

Assessment Year: 2012-2013

SK.GOLAM MUSTAFA New Siaria, Trijanga, Rehabilitation Colony, Danagadi, Jajpur-755026	Vs.	ACIT, Circle-1(1), Cuttack
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : <b>AKGPM 6161 L</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Shri P.K.Sahoo, AR

राजस्व की ओर से /Revenue by : Shri Subhendu Dutta, DR

सुनवाई की तारीख / Date of Hearing : **30/08/2018**

घोषणा की तारीख/Date of Pronouncement **31/08/2018**

**आदेश / ORDER**

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

This is an appeal filed by the assessee against the order of CIT(A), Cuttack, dated 27.02.2018 passed in I.T.Appeal No.0005/2015-16 for the assessment year 2012-2013.

2. The assessee has raised the following grounds of appeal :-

1. *The order of learned Commissioner of Income Tax(Appeals) Cuttack confirming the addition of Rs 2,35,127/- made by the ACIT,Circle-I(I) Cuttack under section 40A(3) of IT ACT 1961 in computing the business income of the assessee is arbitrary to law and the facts of the case.*
2. *The learned Commissioner of Incometax (APPEATS),Cuttack is not justified in disallowing the professional fees paid amounting to Rs 6,68,680/- on the ground that no TDS has been deducted from such payments.*
3. *The Appellant craves leave to add or amend any grounds of appeal.*

3. Brief facts of the case are that the assessee is engaged in the business of contract work under the name and style of Royal Enterprises

and filed the return of income on 31.03.2012 for the A.Y.2012-2013 declaring total income of Rs.17,00,971/-. The return of income was processed u/s.143(1) of the Act. Subsequently the case was selected under scrutiny under CASS and notices u/s.143(2) & 142(1) of the Act were issued. In compliance of the same, Id. AR appeared before the AO and case was discussed. Thereafter the AO completed the assessment assessing total income at Rs.33,09,561/- and passed order u/s.143(3) of the Act, dated 02.03.2015 making various disallowances.

4. Aggrieved by the order of AO, the assessee preferred an appeal before the CIT(A). In the appellate proceedings, the assessee has reiterated the submissions made before the AO. The CIT(A) after considering the submissions of assessee and findings of the AO, partly allowed the appeal of the assessee.

5. Now, the assessee is in further appeal before the Tribunal.

6. Ld AR on the ground with respect of disallowance u/s.40A(3) argued that the AO has disallowed the safety expenses aggregating to Rs.2,35,127/-. The CIT(A) in appellate proceedings has erred in confirming the addition without considering the details of bank statements of the recipient. Ld. AR's contention that these payments are through account payee cheques and not by cash and in respect of second ground Id. AR submitted that the CIT(A) has erred in confirming the addition of Rs.6,68,680/- for non-deduction of TDS on technical and professional charges. Ld. AR further submitted that the CIT(A) should have disallowed 30% of expenses as per the amended provisions in Section 40(a)(ia) of

the Act and the CIT(A) observed that this provision is w.e.f.01.04.2015, therefore, sustained the addition. Hence, the Id. AR prayed for allowing the appeal.

7. Contra, Id. DR supported the orders of AO and submitted that the assessee has made cash payments under safety expenses and could not support with any evidence or reasons for payment in cash. Similarly, the TDS has not been deduced in respect of professional fees u/s.194J, therefore, Id.DR prayed for dismissal of the appeal.

8. We have heard rival submissions and perused the material on record. On the first disputed issue of disallowance u/s.40A(3), Id. AR submitted that the provision of Section 40A(3) of the Act does not apply in the present case as the payments are made by cheques. We find that the AO on verification of the profit and loss account observed that Rs.15,90,980/- towards safety expenses and also ledger account was furnished in the course of assessment proceedings. On verification it was found that the cash payments were made by the assessee to the shop namely FAIR DEAL in various dates violating the provisions of Section 40A(3) of the Act. We find that in the assessment proceedings the assessee has not filed any details on the above findings and could not substantiate with any reason or reasonable cause for making the payments in cash, whereas in appellate proceedings the assessee submitted that these payments are not cash payments but in account payee cheques. Id. CIT(A) compared the bank statements of fair deal

where account payee cheques were issued. To this effect, Id. CIT(A) has incorporated a chart and observed as under :-

Sl.No.	Date	Head	Amount of payment in cash
01.	09/05/2011	Safety expenses	Rs.25,980/-
02.	06/07/2011	-do-	Rs.26,858/-
03.	22/09/2011	-do-	Rs.26,000/-
04.	22/09/2011	-do-	Rs.58,203/-
05.	04/12/2011	-do-	Rs.21,190/-
06.	16/12/2011	-do-	Rs.76,898/-

Total:Rs.2,35,127/-

*In the appellate proceedings, the counsel for the assessee submitted the bank statement of M/s. Fair Deal to show that the amounts were made by account payee cheques and not in cash. The chart submitted by the counsel is reproduced as under:-*

Sl.No.	Cheque No.	Date	Bank	Amount
01.	5822	23/07/2011	SBI	Rs.25,980/-
02.	6671	16/03/2012	SBI	Rs.1,00,000/-
03.	56914	07/05/2012	SBI	Rs.1,45,000/-

*A comparison of the chart produced above with that produced by the Assessing Officer shows that the dates and the amounts do not tally. Further, item no.s in the assessee's chart relates to the next assessment year i.e. AY.-2013-14. Also, the bank account of M/s. Fair Deals which was produced during the appellate proceedings lacks narration of debit and credit entries which makes it unclear as to whom these cheque payments are being made to. Hence, the explanation of die assessee as regards the disallowance u/s. 40A(3) is rejected and the Assessing Officers addition is confirmed.*

We found that the assessee could not substantiate with any evidence that these payments on particular dates as per the ledger are not the cash payments but through account payee cheques. Even we have found that the dates mentioned by the AO at Sl.No.1 to 6 which are referred at page 4 of the CIT(A)'s order, they are not able to tally, therefore, the assessee could not give proper explanations and reasons and, hence, we are not inclined to interfere with the findings of the CIT(A) and dismiss this ground of appeal of the assessee.

9. In respect of second ground raised by the assessee for non-deduction of TDS paid for professional fees of Rs.6,68,680/-. The AO found that the assessee has debited towards technical and professional cons. charges. On further verification the assessee has not deducted TDS on the amount of Rs.6,68,680/-. Ld. AO applied the provision of Section 194J as the assessee could not substantiate with any evidence and also the reasons for non-deduction of TDS. Similarly, in the appellate proceedings, Id AR submitted that the amount has been paid by account payee cheque and relied on the judicial decisions. Ld. CIT(A) having consider the findings of the AO and submissions of the assessee found that the assessee could not produce any evidence of deduction of TDS and also rejected assessee's contention of disallowance of 30% of the expenses as per the amended provision to Section 40(a)(ia) of the Act w.e.f. 01.04.2015. A query raised in the course of hearing proceedings to the Id. AR whether the recipients have offered this income in their individual assessment, if so evidence to be filed, Id.AR could not submit any details, however, only submitted that income has been offered by them in their individual returns and relied on the decision of the Jaipur Bench of the Tribunal in the case of Shri Rajendra Yadav vs. ITO (Jaipur Trib) ITA No. 895/JP/2012, order dated 29.01.2016, wherein the Tribunal has observed that though the substitution in Section 40 of the Act has been made effective w.e.f.01.04.2015, the benefit of the amendment should be given to the assessee. The observation of the Tribunal reads as under :-

*“6. We have heard rival contentions and perused the material available on record. It is an admitted fact that the appellant carried on the business of trading of marble tiles and slab. It is also an admitted fact that the marble blocks are purchased by the assessee and the same marble blocks are sent to M/s. Garvit Stonex, M/s. Chanda Marbles & M/s. Nidhi Granites for the purpose of sawing and edge cutting with a view to convert the marble blocks into marble tiles. In the assessment year under consideration, the assessee has paid a sum of Rs 1,54,711/- to M/s. M/s. Garvit Stonex, Rs. 3,92,711/- to M/s. Chanda Marbles & Rs. 2,28,700/- to M/s. Nidhi Granites totaling Rs. 7,76,122/- for edge cutting and sawing charges on various dates. From the details given, the AO and the Id. CIT (A) has worked out the average cutting and sawing charges of more than Rs. 2155/- per day paid to the said M/s. Garvit Stonex, M/s. Chanda Marbles & M/s. Nidhi Granites. In our view, the said firms/companies are doing the edge cutting and sawing on regular basis and are also having business relationship with the assessee. The regular bills were being raised by the said concerned persons on the assessee and the assessee had been making the payment to the said persons. We do not agree with the contention of the assessee that there is no written contract or oral contract with the said persons/firms which make the payment amenable for deduction of TDS under section 194C of the IT Act. We do not find force in the submissions, as per our understanding, under the contract at every promise and every set of promises are formed. The consideration for each other is an agreement and an agreement enforceable by law is a contract. In the present case, the contract stands concluded when the assessee asked M/s. Garvit Stonex and others to do the edge cutting and sawing of granite blocks and convert them into marble tiles for it for a consideration. The moment the said contractors/persons doing the sawing and edge cutting of the marble blocks, the said persons are entitled for the amount required to be paid as per the bills raise by them. In fact, in the present case after doing the edge cutting and sawing, the charges were even paid by the assessee, in our understanding, a contract has come into existence between the assessee and M/s. Garvit Stonex and others. In our view, the assessee is responsible for paying the amount to such persons i.e. contractor for carrying out the specific work. Therefore, the assessee is liable to deduct the tax on such payments. Since the assessee has failed to deduct the tax on the amount paid by it to such persons/contractor, the assessee is duty bound to deduct the tax, and non deduction of tax by the assessee, attracts the provisions of section 40(a)(ia).*

*6.1. Recently in the matter of P.M.S. Diesels 2015 ] 59 taxmann.com 100 (Punjab & Haryana), Hon'ble Punjab & Haryana High Court had elaborately discussed the judgment passed by the Hon'ble Calcutta High Court and Hon'ble Gujarat High Court, Hon'ble Allahabad High Court and other judgments as available and thereafter has come to the conclusion that the provisions of section 40(a)(ia) are mandatory in nature and non compliance/non*

*deduction of tax attracts disallowance of the entire amount. Having said so, we will be failing in our duty if we do not discuss the amendment brought in by the Finance (No. 2) Act 2014 with effect from 1.4.2015 by virtue of which proviso to section 40(a)(ia) has been inserted, which provides that if any such sum taxed 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 previous year, and further, section 40(a)(ia) has been substituted wherein the 30% of any sum payable to a resident has been substituted. In the present case, the authorities below has added the entire sum of Rs. 7,51,322/- by disallowing the whole of the amount. Though the substitution in section 40 has been made effective with effective from 1.4.2015, in our view the benefit of the amendment should be given to the assessee either by directing the AO to confirm from the contractors, namely, M/s. Garvit Stonex, M/s. Chanda Marbles and M/s. Nidhi Granites as to whether the said parties have deposited the tax or not and further or restrict the addition to 30% of Rs.7,51,322/-. In our view, it will be tied of justice if the disallowance is only restricted to 30% of Rs. 7,51,322/-. Accordingly, the appeal of the assessee is partly allowed in the above said manner.*

*7. In the result, appeal of the assessee is partly allowed.”*

10. We considering the facts and circumstances of the case and provisions of law and the judicial precedence, are of the substantive opinion that the assessee has made the payment without deduction of TDS in respect of professional income. Accordingly, we remit this issue to the file of AO, who shall examine and verify the details of payee, who have offered their income in their individual assessment and the assessee shall cooperate in submitting the details of income tax of the payees and Form No.26 be submitted. If the AO finds that the recipients have deposited the tax, then the AO may consider the claim of the assessee in accordance with the provisions of law and this ground of appeal of the assessee is allowed for statistical purposes.

11. In the result, appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on this 31/08/2018.

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

लेखा सदस्य / ACCOUNTANT MEMBER

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

न्यायिक सदस्य / JUDICIAL MEMBER

**कटक** Cuttack; दिनांक Dated 31/08/2018

प्र.कु.मि/PKM, Senior Private Secretary

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

1. अपीलार्थी / The Appellant-  
SK.GOLAM MUSTAFA  
New Siaria, Trijanga, Rehabilitation Colony,  
Danagadi, Jajpur-755026
2. प्रत्यर्थी / The Respondent-  
ACIT, Circle-1(1), Cuttack
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