

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
VISAKHAPATNAM BENCH, VISAKHAPATNAM**

श्री वी. दुर्गा राव, न्यायिक सदस्य एवं  
श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष

**BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &  
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A.No.281/Viz/2017  
(निर्धारण वर्ष/ Assessment Year: 2012-2013)

Smt.Vasireddy Jyothi  
D.No.1-83-36/1, G-1, Ramtej Enclave  
Sector-4, MVP Colony  
Visakhapatnam

Income Tax Officer  
Ward-3(1)  
Visakhapatnam

**[PAN : AKQPV2349R]**

**(अपीलार्थी/ Appellant)**

**(प्रत्यर्थी/ Respondent)**

अपीलार्थी की ओर से/ Appellant by : Shri C.V.S.Murthy, AR  
प्रत्यर्थी की ओर से/ Respondent by : Shri D.K.Sonowal, CIT DR  
सुनवाई की तारीख / Date of Hearing : 28.11.2018  
घोषणा की तारीख/Date of Pronouncement : 12.12.2018

**आदेश /ORDER**

**PER D.S. SUNDER SINGH, Accountant Member:**

This appeal is filed by the assessee against the order of the Principal Commissioner of Income Tax (Pr.CIT)-1, Visakhapatnam vide F.No.Pr.CIT-1/VSP/263/2016-17 dated 27.03.2017 for the Assessment Year (A.Y.) 2012-13.

2. All the grounds of appeal are related against the order passed by the Pr.CIT u/s 263 of the Income Tax Act (hereinafter called as 'Act'). In this case, the assessee is an individual carrying on business in construction activity under the name and style of M/s Sun 'N' Sea Constructions, filed her return of income declaring total income at Rs.9,26,000/- for the A.Y.2012-13 on 29.09.2012 by e-filing. The case was selected for scrutiny and the assessment was completed u/s 143(3) on total income of Rs.12,36,750/-. In the assessment order, the Assessing Officer (AO) disallowed meshion charges on estimation at 5%. Subsequently, the Pr.CIT, Visakhapatnam has taken up the case for revision and observed that the assessee has purchased a site admeasuring 597 sq. Yards vide sale deed document No.3924/2010 in the capacity of proprietor of M/s Sun 'N' Sea Constructions. The Ld.Pr.CIT also observed that one of the vendors of the property by name Sri Manthani Padmanabh Reddy, is an NRI and is represented by GPA holder Sri Manthani Ram Reddy. The assessee has made the payment of Rs.50,40,500/- vide two cheques dated 30.06.2010 to Sri Manthani Padmanabh Reddy, the NRI towards his share without deduction of tax at source as required u/s 195 of the Act. The assessee has debited the said expenditure towards the purchase of lands under the head 'Work in Progress' to the P & L account of the year under consideration.

Since the assessee did not deduct the tax at source, as required u/s 195 of the act, the Ld.Pr.CIT was of the view that the expenditure debited to P&L account under the head 'Work-in-Progress' required to be disallowed u/s 40(a)(i) of the Act and accordingly issued notice u/s 263 of the Act.

3. In response to the notice issued the assessee filed the written submissions before the Ld. Pr.CIT objecting for the proposed disallowance and submitted that there was no error in the order passed by the AO which caused prejudice to the interest of the revenue. Further, the assessee submitted that the property was purchased in the Financial Year (F.Y.) 2010-11 and the payment was made in the said F.Y., thus if at all the provisions tax are applicable they should be made applicable only in the year in which the expenditure was incurred by the assessee i.e. in the A.Y.2011-12, but not in the impugned assessment year of A.Y. 2012-13. Since the transaction does not belong to the year under consideration and the asset was purchased initially as capital asset, the Ld.AR argued that there is no case for revision u/s 263 of the Act. However, the Ld.Pr.CIT after considering the explanation of the assessee held that the disallowance required to be made in the year in which the subject expenditure is debited to P&L account but not in the year of payment. Since the assessee has

claimed the expenditure in the year under consideration, held that the disallowance also required to be made in the same assessment year.

4. The next contention of the assessee is that the property was purchased as a capital asset initially, but not as a business asset. The said contention was also rejected by the Ld.Pr.CIT observing that the TDS required to be made irrespective of nature of transaction under the provision of deduction of tax at source in both the cases.

5. The Ld.Pr.CIT has addressed another contention of the assessee that the scrutiny assessment was completed in this case after verification of the details furnished by the assessee thus argued that there is no error in the assessment order which warrants revision u/s 263, observing that from perusal of the assessment order and assessment record, there is no material available to establish that the AO has examined the issue during the assessment proceedings. Accordingly, the Pr.CIT rejected the argument of the assessee and held that the assessment made u/s 143(3) dated 11.02.2015 is erroneous and prejudicial to the interest of the revenue and

directed the AO to revise the assessment order making the addition of Rs.50,40,500/- to the assessed income.

6. Aggrieved by the order of the Ld.Pr.CIT, the assessee is in appeal before us. During the appeal hearing, the Ld.AR argued that in the instant case, the property was purchased during the F.Y. 2010-11 i.e. on 30.06.2010. If at all the disallowance is required to be made, the same should be made in the A.Y.2011-12, but not in the impugned A.Y. of 2012-13. The Ld.AR further argued that the assessee required to deduct the tax at source at the time of payment to the vendor. The time of payment was 30.06.2010 relates to the F.Y. 2010-11. Therefore, the TDS required to be made u/s 195 in the F.Y. 2010-11 and the disallowance also attracts in the same A.Y. The assessee further submitted that the assessee had filed the return of income for A.Y. 2010-11 and declared the asset in the P&L a/c for the F.Y. 2010-11. The assessee also argued that the asset was purchased for the purpose of capital asset and declared the same as capital asset in the balance sheet. The Ld.Pr.CIT is incorrect in holding that the disallowance u/s 40(a)(i) attracts in the impugned A.Y. against the purchase of asset in the F.Y. 2010-11. Therefore, argued that there is no error in the order

passed by the AO and requested to cancel the order passed u/s 263 by the Ld.Pr.CIT.

7. Per contra, the Ld.DR argued that, though, the asset was purchased in the F.Y. 2010-11, the first time, the assessee has debited the expenditure in the P&L a/c in the impugned A.Y., and as per section 40(a)(i) of the Act, the time of allowability of deduction u/s 40(a)(i) is the year in which the tax was deducted and remitted to Government account but not the year of claim. There was no mention in the Act to allow the expenditure on the basis of method of accounting followed by the AO. The very purpose of introducing the provision of section 40(a)(i) in the Income Tax Act is to allow the deduction in the previous year in which such amount was paid to Government account is to ensure the deduction of tax at source and at the same time allow the deduction after remitting the same to the Government account. Accordingly, the Ld.DR argued that in the case of disallowance u/s 40(a)(i), it is mandatory for the assessee to deduct the tax at source and remit to the account of Government of India for claiming the deduction. Unless the assessee comply with the provisions of section 195 and remit the TDS to the Government account, the assessee would not be entitled for deduction u/s 40(a)(i) of the act. Accordingly, the Ld.DR argued that the

Ld.CIT(A) has rightly taken up the case for revision u/263 and requested to uphold the order of the Ld.Pr.CIT.

8. We have heard both the parties and perused the material placed on record. In this case, the assessee has made the payment to the non-resident but not deducted the TDS as required u/s 195 of the Act. The assessee is required to deduct tax at source u/s 195 of the Act and remit to the Government account. Thus, there is a default in the case of the assessee with regard to non-deduction of tax at source and complying with the provisions of section 195 of the Act and there is no dispute. Subsequently also, the assessee has not deducted the tax at source and remitted to the account of Government of India. The assessee claimed the said payment as expenditure in the impugned A.Y., as per the P&L account under the head 'Work-in-Progress'. Though the assessee has filed the returns for the A.Y. 2010-11 and 2011-12, the assessee admitted the income on sale of flats u/s 44AD of the Act on estimation basis in the earlier year and there was no claim of expenditure. The assessee has not filed the P&L account before the Income Tax Authorities. There was no assessment made u/s 143(3) for the A.Y. 2010-11 and 2011-12. Therefore, the assessee has neither claimed the expenditure nor filed the P&L account, thus, there was no occasion to the

AO either to make the disallowance or to go through the nature of expenditure. However, in the balance sheet for the A.Y. 2011-12, the assessee has shown Work-in-Progress under the head 'site' for an amount of Rs.1,02,69,000/- which establishes that the said purchase of piece of land is a business asset. First time, the assessee has furnished the P&L account for the A.Y. 2011-12 and claimed the expenditure under the head 'Work-in-Progress', which was skipped from the attention of the AO and the AO has not verified the issue and no query was raised by the AO in the assessment order as observed from the assessment order which was not rebutted by the Ld.AR during the appeal hearing. Once section 195 of the Act lays the responsibility on the assessee to deduct the tax at source at the time of payment inter alia section 40(a)(i) allows the expenditure only on payment of TDS to the Government account. Section 40(a)(i) specifically places restriction not to allow the expenditure in case of non-deduction of tax at source. Section 40(a)(i) is a non absent clause which overrides provisions of section 30 to 38 of the Act, for computing the profits and gains of the business or profession and places restrictions on the allowability of certain expenditures. Further, the proviso to section 40(a)(i) permits the AO to allow the deduction in the year in which the tax was deducted and paid to Government account. Therefore, the point of

allowability of deduction u/s 40(a)(i) in respect of payments which attracts the tax deducted at source under Chapter XVIIB is on remittance of such tax to Government account, but not before the year in which it was paid/incurred. It is a fact that the assessee has not complied with the provisions of section 195 and Chapter XVIIB of the Act. Therefore, till the expenditure was remitted to Govt. of India account, the assessee would not be entitled for the deduction. In the instant case, there is no dispute that the assessee has made the payment to the NRI and the payment attracts the TDS provisions u/s 195 of the Act and the assessee has neither deducted the TDS nor paid such tax to Govt. of India account. The assessee has claimed the expenditure in the impugned A.Y. and the same is covered by section 40(a)(i) and the AO has not examined the issue at the time of assessment. Therefore, the AO has committed an error in the assessment by not examining the issue which required to be examined consequently, which caused prejudice to the revenue. Therefore, we hold that Ld.Pr.CIT has rightly invoked the jurisdiction u/s 263 and we do not see any reason to interfere with the order of the Ld.Pr.CIT. Accordingly, we dismiss the appeal of the assessee and uphold the order of the Ld.Pr.CIT. Accordingly, the appeal of the assessee is dismissed.

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

Order pronounced in the open court on 12<sup>th</sup> December, 2018.

Sd/-

(बी.दुर्गा राव)

**(V. DURGA RAO)**

न्यायिक सदस्य/**JUDICIAL MEMBER** लेखा सदस्य/**ACCOUNTANT MEMBER**

विशाखापटणम /Visakhapatnam

दिनांक /Dated : 12.12.2018

L.Rama, SPS

Sd/-

(डि.एस. सुन्दर सिंह)

**(D.S. SUNDER SINGH)**

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती / The Assessee – Smt.Vasireddy Jyothi, D.No.1-83-36/1, G-1, Ramej Enclave, Sector-4, MVP Colony, Visakhapatnam
2. राजस्व / The Revenue– Income Tax Officer, Ward-3(1), Visakhapatnam
3. The Pr.Commissioner of Income Tax-1, Visakhapatnam
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम /DR, ITAT, Visakhapatnam
5. गार्ड फ़ाईल / Guard file

आदेशानुसार / BY ORDER

// True Copy //

Sr. Private Secretary  
ITAT, VISAKHAPATNAM