

**IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH 'SMC', LUCKNOW**

BEFORE SHRI T. S. KAPOOR, ACCOUNTANT MEMBER

ITA No.538/Lkw/2018
Assessment Year:2012-13

M/s Adicon Builders & Promoters Pvt. Ltd., 125/19A, U Block, Govind Nagar Kanpur. PAN:AAFCA 9911 N (Appellant)	Vs.	Income Tax Officer, Ward-6(1), Kanpur. (Respondent)
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Appellant by	Shri Abhinav Mehrotra, Advocate
Respondent by	Shri C. K. Singh, D.R.
Date of hearing	11/02/2019
Date of pronouncement	22/02/2019

ORDER

PER T. S. KAPOOR, A.M.

This is an appeal filed by assessee against the order of learned CIT(A)-I, Kanpur dated 19/04/2018 pertaining to assessment year 2012-13.

2. In this appeal, the assessee has taken various grounds of appeal challenging the action of learned CIT(A) whereby he has confirmed the order passed by the Assessing Officer u/s 154 of the Act. The various grounds of appeal are reproduced below:

- "1. That the Ld. CIT Appeals has further erred in law as well as on facts in not appreciating that there was no mistake in the assessment order which is rectifiable u/s. 154.
2. That the Ld. CIT Appeals has further erred in law as well as on facts in confirming the order of the A.O. passed u/s. 154 on the basis of audit objection, without appreciating that there was no mistake of law and the

- issue of non-deduction of TDS has already been considered in assessment proceedings and thus the matter was out of purview of Sec. 154 of the Act.*
3. *That the Ld. CIT Appeals has further erred in law as well as on facts in not appreciating that debatable issues are out of preview of Sec. 154.*
 4. *That the Ld. CIT Appeals has further erred in law as well as on facts in not appreciating that*
 5. *That the Ld. CIT Appeals has further erred in law as well as on facts in not appreciating that the provisions of Sec. 40(a)(ia) of the Act are not applicable in the instant case as nothing was payable at the end of the year i.e. 31.03.2012.*
 6. *That the Ld. CIT Appeals has further erred in law as well as on facts in not appreciating the confirmation of M/S. Shivtej Developers that the entire receipts has been considered by him in his income.*
 7. *That the Ld. CIT Appeals has further erred in law as well as on facts in not appreciating that no expenses has been claimed in the profit and loss account in the year under consideration as such expenses has been added in the closing stock at the end of the year when financial accounts were made up.*
 8. *That the Ld. CIT Appeals has further erred in law as well as on facts in not appreciating that the disallowance will amount to double taxation in the instant case as no expenses has been claimed in the profit and loss account but disallowance has been made on account of non-deduction of TDS.*
 9. *That the Ld. CIT Appeals has further erred in law as well as on facts in not appreciating that considering the hardship, the Finance Act (No.2) Bill, 2014 has reduced disallowance of such expenditure to 30% as against 100% and thus the disallowance may be restricted to 30%, if all the arguments fails, in view of the judgment Smt. Kanta Yadav Vs. ITO ITA No. 6312/DEL/2016."*

4. The brief facts, as noted in the order passed u/s 154 of the Act, are that the assessment of the assessee was completed u/s 143(3) of the Act. Later on, it was noticed that assessee had debited a sum of Rs.34,71,938/- under the head 'purchases' with the explanation that the sum was paid on

development of lanes on account of bolder compounded wall with excavation to M/s Shivtej Developers. The Assessing Officer observed that this payment was made to the contractor without deduction of tax at source and therefore, held that it was not an allowable expenditure in view of the provisions of section 40(a)(ia) of the Act and therefore, he issued notice u/s 154 of the Act for rectification. In view of the notices issued by the Assessing Officer u/s 154 of the Act, the assessee, vide reply dated 09/12/2015, submitted that assessee had not deducted TDS on the transactions but had not claimed expenses in the profit & loss account. It was further submitted that question of disallowance will arise when expenditure has been claimed. It was also submitted that the contractor, to whom the payment was made, had taken the receipt in his income and in this respect the assessee also submitted a certificate dated 18/12/2015 from Shivtej Developers wherein the said contractor had accepted that Rs.34,71,938/- has been received without TDS and entire receipt has been taken in turnover and tax has been paid as per I.T. Act. The Assessing Officer however required Shivtej Developers to furnish the copy of ITR/copy of account of the assessee, balance sheet and profit & loss account but on account of non receipt of any reply, the Assessing Officer held that the contention of the assessee that the contractor company has shown entire receipt of Rs.34,71,938/-, as paid by the assessee company for contract work and had paid tax, do not have any force in view of the fact that proviso to this effect was inserted by Finance Act, 2012 and therefore, the addition was made by disallowing the said amount as per the provisions of section 40(a)(ia) of the Act,. Similar submissions were made before learned CIT(A) who also upheld the addition.

5. Learned A. R., before us, argued that the tax was not at all deductible as the assessee had not claimed the expenditure in the profit & loss

account but had capitalized the same and that is why the stock was increased. It was submitted that the question of deduction of tax at source would have arisen if the amount had been claimed as expenditure in the profit & loss account. It was further argued that learned CIT(A) should have allowed the appeal of the assessee as the due confirmation of the contractor with the certificate, that the entire receipts were considered by him in his return of income, was filed and therefore, assessee was not to be considered as assessee in default and therefore, provisions of section 40(a)(ia) were not applicable. It was submitted that the amendment to section 40(a)(ia) was made by Finance Act, 2013 w.e.f. 01/04/2013 but the Tribunals and courts have held this provision to be applicable retrospectively and reliance was placed on the judgment of Hon'ble Allahabad High Court in the case of Ghandhyam Chaudhury. Without prejudice it was argued that the amount was not payable as on 31/03/2012 and therefore, also the tax was not deductible. In view of all facts, it was argued that the issue of deduction of tax was highly debatable and therefore, rectification was not permissible in this case. Inviting our attention to the order of learned CIT(A), Learned A. R. submitted that learned CIT(A) has confirmed the addition only by holding that consideration of receipt as income in the hands of payee are not relevant for provisions of section 40(a)(ia) of the Act which may be relevant factor for any order to be passed u/s 201/201(1A). It was submitted that the findings of learned CIT(A), that the payment was debited as direct expenses, is also not correct as the expenditure was not claimed in the profit & loss account, either as direct expenditure or indirect expenditure and rather it was added in the figure of closing stock. It was argued that in view of these facts and circumstances, the issue of deduction of tax at source was highly debatable and therefore, was not liable for action u/s 154 of the Act.

6. Learned D. R., on the other hand, heavily relied on the orders of authorities below.

7. I have heard the rival parties and have gone through the material placed on record. I find that original assessment u/s 143(3) was completed vide order dated 13/02/2015 and later on the Assessing Officer observed that assessee had not deducted tax on a payment which was made to Shivtej Developers. The assessee, in view of the notice u/s 154, submitted that the contractor company had shown the entire receipt of Rs.34,71,938/- in its turnover and had paid taxes as per I.T. Act and therefore, in view of amendment to proviso to section 40(a)(ia), the assessee was not an assessee in default and therefore, the provisions of section 40(a)(ia) were not applicable. However, the Assessing Officer held that the amendment was made by Finance Act, 2012 which was effective from assessment year 2013-14 only. However, I find that Hon'ble Allahabad High Court in the case of Ghanshyam Chaudhury vs. Pr. CIT in Income Tax Appeal No. 28 of 2016, vide order dated 22/08/2017, has decided this question in favour of the assessee by answering the following question:

"Whether Under the facts and circumstances of the case, the learned Income Tax Appellate Tribunal erred in law while setting aside the order of CIT (A) and restoring the issue of disallowance u/s 40(a)(ia) of the I.T.Act by retrospective application of second proviso to Section 40(a)(ia) of the Act, which amendment in fact was not curative but prospective w.e.f 01.04.2013."

The answer to this question has been given by Hon'ble court from para 5 onwards, which are reproduced below:

"5. We have gone through the aforesaid authorities. It is not disputed that Section 40(a)(ia) proviso is for the benefit of Assessee. When a provision has been made in fiscal statute for benefit of Assessee, in absence of any express

provision or a provision which by necessary implication gives a different impression, such provision which is beneficial to Assessee must be read and given effect to retroactively and reiterating this principle Constitution Bench of Apex Court in Commissioner of Income Tax Vs. Vatika Township (supra), in particular in paras 27 to 31, has said as under:

"22. Before we proceed to answer the question, it would be necessary to keep in mind the scheme of block assessment introduced in Chapter XIVB to Finance Act, 1995 w.e.f. 1st July, 1995.

23. As already mentioned in brief by us, Chapter XIVB of the Act which deals with block assessment lays down a special procedure for search cases. The main reason for adding these provisions in the Act was to curb tax evasion and expedite as well as simplify the assessments in such search cases.

23.1. Undisclosed incomes have to be related in different years in which income was earned under block assessment. This is because in such cases, the "block period" is for previous years relevant to 10/6 assessment years and also the period of the current previous year up to the date of the search, i.e., from April 1, 2000, to January 17, 2001, in this case. The essence of this new procedure, therefore, is a separate single assessment of the "undisclosed income", detected as a result of search and this separate assessment has to be in addition to the normal assessment covering the same period. Therefore, a separate return covering the years of the block period is a pre-requisite for making block assessment. Under the said procedure, the Explanation is inserted in Section 158BB, which is the computation section, explaining the method of computation of "undisclosed income" of the block period. It is now well accepted that this Chapter is a complete code in itself providing for self-contained machinery for assessment of undisclosed income for the block period of 10 years or 6 years, as the case may be. In case of regular assessments for which returns are filed on yearly basis, Section 4 of the Act is the charging section. However, at what rate the income is to be taxed is specified every year by the Parliament in the Finance Act. In contradistinction, when it comes to payment of tax on the undisclosed income relating to the block period, rate

is specified in Section 113 of the Act. It remains static at 60% of the undisclosed income which is the categorical stipulation in the Section 113 of the Act. Section 158BA(2) of the Act clearly states that the total undisclosed income relating to the block period "shall be charged to tax" at the rates specified Under Section 113 as income of the block period irrespective of previous year or years. Under Section 113 of the Act, the undisclosed income is chargeable to tax at the rate of 60%.

24. From the above, it becomes manifest that Chapter XIVB comprehensively takes care of all the aspects relating to the block assessment relating to undisclosed income, which includes Section 156BA(2) as the charging section and even the rate at which such income is to be taxed is mentioned in Section 113 of the Act. No doubt, Section 4 of the Act is also a charging section which is made applicable on 'total income of previous year'. As per Section 2(45), 'total income' means the total amount of income referred to in Section 5, computed in the manner laid down in the Act. Section 5 of the Act enumerates the scope of total income and prescribes, inter alia, that it would include all income which is received or is deemed to receive in India in any previous year by or on behalf of a person who is a Resident. No doubt, undisclosed income referred to in Chapter XIVB is also an income which was received but not disclosed, therefore, in the first blush, argument of the Department that undisclosed income referred to in Chapter XIVB is also a part of total income and consequently Section 4 becomes the charging section in respect thereof as well. However, a little closer scrutiny leads us to conclude that that is not the position as per the scheme of Chapter XIVB. In the first place, income referred to in Section 5 talks of total income of any 'previous year'. As per Section 2(34) of the Act, 'previous year' means previous year as defined in Section 3. Section 3 lays down that previous year means 'the financial year immediately preceding the assessment year'. Undisclosed income referred to in Chapter XIVB is not relatable to the previous year. On the contrary, it is for the block period which may be 6 years or 10 years, as the case may be.

25. *Consequently, as already mentioned, while analyzing the scheme of Chapter XIVB, such Chapter is a complete code in respect of assessments of 'undisclosed income'. Not only it defines what is undisclosed income, it also lays down the block period for which undisclosed income can be taxed. Further, it also lays down the procedure for taxing that income. It is very pertinent to note at this stage that for this purpose, specific provision in the form of Section 158BA(2) is inserted making it a charging section. Thus, a diagnostic of Chapter XIVB of the Act leads to irresistible conclusion that it contains all the provisions starting from charging section till completion of assessment, by prescribing special procedure in relation thereto, making it a complete Code by itself. Looking it from this angle, the character and nature of 'undisclosed income' referred to in Chapter XIVB becomes quite distinct from 'total income' referred to in Section 5. It is of some significance to observe that when a separate charging section is introduced specifically, to assess the undisclosed income, notwithstanding a provision in the nature of Section 4 already on the statute book, this move of the legislature has to be assigned some reason, otherwise, there was no necessity to make a provision in the form of Section 158BA(2). It could only be that for assessing undisclosed income, charging provision is Section 158BA(2) alone.*

26. *Notwithstanding the aforesaid position clarified with us, we are of the opinion that de hors this discussion, in any case on the application of general principles concerning retrospectivity, the proviso to Section 113 of the Act cannot be treated as clarificatory in nature, thereby having retrospective effect. To make it clear, we need to understand the general principles concerning retrospectivity.*

General principles concerning retrospectivity

27. *A legislation, be it a statutory Act or a statutory Rule or a statutory Notification, may physically consists of words printed on papers. However, conceptually it is a great deal more than an ordinary prose. There is a special peculiarity in the mode of verbal communication by a legislation. A legislation is not just a series of statements, such as one finds in a work*

of fiction/non fiction or even in a judgment of a court of law. There is a technique required to draft a legislation as well as to understand a legislation. Former technique is known as legislative drafting and latter one is to be found in the various principles of 'Interpretation of Statutes'. Vis-à-vis ordinary prose, a legislation differs in its provenance, lay-out and features as also in the implication as to its meaning that arise by presumptions as to the intent of the maker thereof.

*28. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bed rock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as *lex prospicit non respicit*: law looks forward not backward. As was observed in *Phillips v. Eyre (1870) LR 6 QB 1*, a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.*

*29. The obvious basis of the principle against retrospectivity is the principle of 'fairness', which must be the basis of every legal rule as was observed in the decision reported in *L'Office Cherifien des Phosphates v. Yamashita- Shinnihon Steamship Co. Ltd. (1994) 1 AC 486*. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and*

this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later.

30. We would also like to point out, for the sake of completeness, that where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In Government of India and Ors. v. Indian Tobacco Association (2005) 7 SCC 396, the doctrine of fairness was held to be relevant factor to construe a statute conferring a benefit, in the context of it to be given a retrospective operation. The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in the case of Vijay v. State of Maharashtra and Ors. (2006) 6 SCC 286 It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature. However, we are confronted with any such situation here.

31. In such cases, retrospectively is attached to benefit the persons in contradistinction to the provision imposing some burden or liability where the presumption attaches towards prospectively. In the instant case, the proviso added to Section 113 of the Act is not beneficial to the Assessee. On the contrary, it is a provision which is onerous to the Assessee. Therefore, in a case like this, we have to proceed with the normal rule of presumption against retrospective operation. Thus, the rule against retrospective operation is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. Dogmatically framed, the rule is no more than a presumption, and thus could be displaced by out weighing factors”.

6. *In view of above principle laid down in Commissioner of Income Tax Vs. Vatika Township (supra) followed by Division Bench of Delhi High Court in Commissioner of Income Tax Vs. Ansal Land Mark Township (supra), we find no reason to take a different view and held accordingly. We may respectfully submit that judgment of Kerela High Court in ITA No. 278 of 2014 (supra) relied by Revenue did not have the benefit of authority of Constitution Bench in Commissioner of Income Tax Vs. Vatika Township (supra) and has taken a different view with which we respectfully are unable to agree.*

7. *In view of above discussions, we answer the aforesaid questions in favour of Assesses and against Revenue. No other points have been argued."*

7.1 The analysis of this judgment clearly demonstrates that the proviso to section 40(a)(ia) has been held to be effective retrospectively and therefore, the findings of the Assessing Officer that it is to be held prospective from 01/04/2013 is not correct and therefore, also the disallowance was not warranted. Moreover, I find that the assessee has raised various arguments, such as not debiting the expenditure in the profit & loss account and taking the same in the stock figure and also nothing was payable as on 31/03/2012. These all are debatable issues for which the rectification u/s 154 cannot be allowed.

7.2 Learned A. R. has not argued ground No. 2 and 9 therefore, these two grounds are dismissed as not pressed.

8. In the result, the appeal of the assessee stands partly allowed.

(Order pronounced in the open court on 22/02/2019)

Sd/.
(T. S. KAPOOR)
Accountant Member

Dated:22/02/2019
*Singh

Copy of the order forwarded to :

1. The Appellant
2. The Respondent.
3. Concerned CIT
4. The CIT(A)
5. D.R., I.T.A.T., Lucknow

