

2. Although the assessee has raised multiple Grounds of appeal, but the solitary dispute relates to disallowance of Rs.18,27,675/- made out of labour charges paid by invoking provisions of Sec. 40(a)(ia) of the Act.

3. At the outset, the learned representative for the assessee submitted that there was a delay in filing of appeal before the Tribunal and referred to the appellant's plea for condonation of delay. In this context, he has referred to an Affidavit of the Managing Director of the Company enumerating the reasons for the delay, which reads as under:-

"2. I am looking after day to day management of the company and I receive the daily correspondence etc. from the outsiders.

3. Assessment Order for A.Y. 2009-10 was received by us and the company had filed an appeal before Commissioner of Income Tax (A)-20 on 7th September, 2011 in time.

4. The hearing in the case was taken up by the Hon'ble CIT (A) and the case was adjourned sine- die on 16th March, 2012.

5. Somewhere in middle of the February, 2014, the Assessing Officer called the representative of the company to make the payment of outstanding demand. Immediately the representative approached the CIT(A) to find out the outcome the appeal. At that point of time, we came to know that order has been passed by the Commissioner of Income Tax (A)-20.

6. We had filed the letter to CIT (A)-20 and requested to provide copy of Order and paid necessary charges for the same on 18th February, 2014.

7. On 21st February, 2014, the Commissioner of Income Tax (A)-20 had handed over certified copy of appellate order passed by CIT (A).

8. *The appellant company has not received the order or order might have been delivered to unauthorised person who has not given the order to the accounts department or me who are managing the affairs of the company in respect of income tax hearing.*

In view of the above, the appellant pleads that delay in filing of an appeal be condoned and appeal may be admitted. There cannot be any intention of non filing of appeal or there was no malafide intention to delay the matter.”

4. The learned representative vehemently pointed out that the delay in filing of appeal is for *bona fide* reasons and, in any case, the issue in appeal has already been decided in assessee's favour by the Tribunal in Assessment Year 2008-09 in ITA No. 6673/Mum/2011 vide order dated 22.8.2012 and, therefore, there would not have been any justifiable reason for the assessee to deliberately delay filing of appeal.

5. Considering the reasons advanced, and the fact that the bona fide of the reasons have not been assailed by the Revenue, we deem it fit and proper to condone the delay in filing of appeal following the ratio of the judgment of Hon'ble Supreme Court in the case of *Collector Land Acquisition Vs. Mst. Katiji & Ors., 167 ITR 471 (SC)*.

6. Coming to the merits of the dispute, the relevant facts can be understood as follows. The assessee before us is engaged in the business of manufacture of chemicals, solvent purification and distillation activities. In the course of assessment proceedings, Assessing Officer noted that assessee had incurred an expenditure of Rs.22,84,593/- under the head 'Testing charges'. The said payments

were made to one, M/s. Aeromatic & Industrial Chemical Pvt. Ltd. for testing work. The assessee also explained that it had deducted tax at source on such payments in terms of Sec. 194C of the Act, whereas the Assessing Officer was of the opinion that tax was deductible at source in terms of Sec. 194J of the Act since the payments were towards profession/technical fees. The rate of tax deductible u/s 194C of the Act was 2% as against 10% deductible u/s 194J of the Act. In view of the aforesaid default on the part of assessee in short-deducting the tax at source, the Assessing Officer invoked Sec. 40(a)(ia) of the Act and disallowed the corresponding expenditure of Rs.22,84,593/-. In principle, the CIT(A) has also sustained the disallowance, however, he directed that since assessee had deducted tax @ 2% by invoking Sec. 194C of the Act as against 10% required u/s 194J of the Act, the disallowance be limited to the expenditure corresponding to such differential of 8%. Accordingly, the CIT(A) has scaled down the amount disallowable u/s 40(a)(ia) of the Act. Against such a decision of the CIT(A), assessee is in appeal before us.

7. Before us, the limited plea of assessee is that the provisions of Sec. 40(a)(ia) of the Act come into operation only when there is a failure to deduct tax at source, but not in cases where there is a mere shortfall in the deduction of tax at source. In this context, he has referred to the decision of Tribunal dated 22.8.2012 (supra), wherein under identical circumstances, the disallowance out of payments made to M/s. Aeromatic & Industrial Chemical Pvt. Ltd. has been set-aside with the following discussion :-

“7. We have considered the issue. There is merit in assessee’s contention that the amounts paid are not in the nature of technical fees but only reimbursement of expenditure. Without going to the merits of the aspect, whether it is in the nature of technical services or contract payment, assessee has already deducted the tax on this amount under section 194C on which there is no dispute. It is already decided by the Coordinate Benches that wherever there is a short deduction of tax, provisions of section 40(a)(ia) cannot be applied as it can only be invoked in the event of non deduction of tax but not for lesser deduction of tax. This issue was considered by the Coordinate Bench in the case of DCIT vs. Chandabhoy & Jassobhoy (ITA No.20/Mum/2010), vide Para 3 as under:

“3. We have heard the rival arguments and examined the record. Assessee has employed about 18 consultants with whom it entered into agreements for a period of two years renewable further at the option of either parties and they were paid fixed amounts without any share in the profit. These consultants are prohibited from taking any private assignments and worked full time with the assessee firm. There is no dispute with reference to the deduction of tax under section 192 and also the fact that in their individual assessments these payments were accepted as salary payments. It is also not disputed that the entire amount paid for 18 consultants is only an amount of `26,75,535/-, which indicates that they are in employment and not professional consultants. It is also not the case that assessee has not deducted any amount. Assessee has indeed deducted tax under section 192 and so we are of the opinion that provisions of section 40(a)(ia) also do not apply as the said provision can be invoked only in the event of non deduction of tax but not for lesser deduction of tax. In view of this, we are of the opinion that there is no merit in Revenue’s contention that the amount paid to the employees should be disallowed as provisions of section 194J would attract. On the facts of the case, there is no merit in Revenue’s appeal. Accordingly the order of the CIT(A) is confirmed”.

8. *Similar view was also expressed in the case of DCIT vs. DCIT vs. M/s S.K. Tekriwal (ITA No.1135/Kol/2010 dated 21.10.11) vide Para 6 as under:*

“6. In the present case before us the assessee has deducted tax u/s. 194C(2) of the Act being payments made to sub-contractors and it is not a case of non-deduction of tax or no deduction of tax as is the import of section 40a(ia) of the Act. But the revenue’s contention is that the payments are in the nature of machinery hire charges falling under the head ‘rent’ and the previous provisions of section 194I of the Act are applicable. According to revenue, the assessee has deducted tax@ 1% u/s. 194C(2) of the Act as against the actual deduction to be made at 10% u/s. 194I of the Act, thereby lesser deduction of tax. The revenue has made out a case of lesser deduction of tax and that also under different head and accordingly disallowed the payments proportionately by invoking the provisions of section 40(a)(ia) of the Act. The Ld. CIT, DR also argued that there is no word like failure used in section 40(a)(ia) of the Act and it referred to only non-deduction of tax and disallowance of such payments. According to him, it does not refer to genuineness of the payment or otherwise but addition u/s. 40(a)(ia) can be made even though payments are genuine but tax is not deducted as required u/s. 40(a)(ia) of the Act. We are of the view that the conditions laid down u/s. 40(a)(ia) of the Act for making addition is that tax is deductible at source and such tax has not been deducted. If both the conditions are satisfied then such payment can be disallowed u/s. 40(a)(ia) of the Act but where tax is deducted by the assessee, even under bonafide wrong impression, under wrong provisions of TDS, the provisions of section 40(a)(ia) of the Act cannot be invoked. Here in the present case before us, the assessee has deducted tax u/s. 194C(2) of the Act and not under section 194I of the Act and there is no allegation that this TDS is not deposited with the Government account. We are of the view that the provisions of section 40(a)(ia) of the Act has two limbs, one is where, inter alia, assessee has to deduct tax and the second where after

deducting tax, inter alia, the assessee has to pay into Government Account. There is nothing in the said section to treat, inter alia, the assessee as defaulter where there is a shortfall in deduction. With regard to the shortfall, it cannot be assumed that there is a default as the deduction is not as required by or under the Act, but the facts is that this expression, 'on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction has not been paid on or before the due date specified in sub-section (1) of section 139'. This section 40(a)(ia) of the Act refers only to the duty to deduct tax and pay to government account. If there is any shortfall due to any difference of opinion as to the taxability of any item or the nature of payments falling under various TDS provisions, the assessee can be declared to be an assessee in default u/s. 201 of the Act and no disallowance can be made by invoking the provisions of section 40(a)(ia) of the Act. Accordingly, we confirm the order of CIT(A) allowing the claim of assessee and this issue of revenue's appeal is dismissed".

9. Respectfully following the above decisions, we are of the opinion that provisions of section 40(a)(ia) cannot be invoked for short deduction of tax. Therefore, the orders of AO and the CIT (A) on this issue are set aside and AO is directed to allow the amount as claimed."

8. The Id. DR has not controverted the factual matrix brought out by the learned representative for the assessee, but reiterated the stand of the Assessing Officer in support of the stand of the Revenue.

9. We have carefully considered the rival submissions. In view of the aforesaid precedent, it is quite clear that Sec. 40(a)(ia) of the Act can be invoked only in the event of non-deduction of tax at source, but not in cases involving short-deduction of tax at source. Therefore,

following the aforesaid precedent, the impugned disallowance made by the income-tax authorities is unsustainable and is hereby directed to be deleted.

10. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 31st March, 2017.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER

Mumbai, Date : 31st March, 2017

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Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "E" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai