

**IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, AHMEDABAD**

**BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT &
Ms. MADHUMITA ROY, JUDICIAL MEMBER**

I.T.A. No. 1079/Ahd/2016
(Assessment Year : 2012-13)

Hipolin Limited, Vs. Income Tax Officer,
4th Floor, Madhuban, Ward – 2(1)(3),
Nr. Madhalpur Under Bridge, Ahmedabad.
Ellisbridge, Ahmedabad.

And

I.T.A. No. 1178/Ahd/2016
(Assessment Year : 2012-13)

Income Tax Officer, Vs. Hipolin Limited,
Ward – 2(1)(3), 4th Floor, Madhuban,
Ahmedabad. Nr. Madhalpur Under Bridge,
Ellisbridge, Ahmedabad.

[PAN No. AAACH 3876 J]
(Appellant)

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(Respondent)

Assessee by : Shri P. M. Mehta, A.R.
Revenue by : Shri Vinod Tanwani, Sr. D.R.

Date of Hearing 06.06.2019
Date of Pronouncement 12.06.2019

ORDER

PER Ms. MADHUMITA ROY - JM:

These two cross appeals filed by the assessee and revenue are against the same order dated 01.02.2016 passed by the Commissioner of Income Tax (Appeals)-7, Ahmedabad under section 143(3) of the Income Tax Act, 1961

(hereinafter referred as to “the Act”) arising out of the order dated 31.12.2014 passed by the ITO, Ward – 2(1)(3), Ahmedabad for the Assessment Year 2012-13.

Since both the appeals relate to the same assessee, the same are heard analogously and are being disposed of by a common order.

ITA No. 1079/Ahd/2016 A.Y. 2012-13:

2. The assessee has filed the following grounds of appeal:-
 - “1. *On the facts and circumstances of the appellant's case, Learned. CIT(A) has erred in confirming disallowance of Rs.52,45,749/- made in view of provisions of section 40(a)(ia) for non- deduction of TDS on payment made to Marketing Agencies towards sales promotion expenses.*
 2. *On the facts and circumstances of the appellant's case, Learned. CIT(A) has erred in confirming disallowance of Rs.87,130/- in view of provisions of section 40(a)(ia) of the Act for non - deduction of TDS on payment made to Krishna Clearing Agencies towards Transportation charges, when no such disallowance is called for the addition is required to be deleted.*
 3. *On the facts and circumstances of the appellant's case, Learned. CIT(A) has erred in confirming disallowance of Rs.2,19,120/- in view of provisions of section 40(a)(ia) of the Act for non- deduction of TDS on payment made to Maheshwari Enterprise towards Transportation charges, when no such disallowance is called for the addition is required to be deleted.*
 4. *On the facts and circumstances of the appellant's case, Learned. CIT(A) has erred in confirming disallowance of Rs.5,49,100/- in view of provisions of section 40(a)(ia) of the Act for non- deduction of TDS on payment made towards consultancy charges, when no such disallowance is called for the addition is required to be deleted.*
 5. *On the facts and circumstances of the appellant's case, Learned. CIT(A) has erred in confirming disallowance of Rs.3,11,1967/- in view of provisions of section 40A(3) of the Act.*

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3. It appears from the records that the Learned Assessing Officer has disallowed Rs.52,45,749/- u/s 40(a)(ia) for non-deduction of TDS on payment made to the Marketing Agencies towards sales promotion expenses. Disallowance of Rs.87,130/- and Rs.2,19,120/- was also made u/s 40(a)(ia) of the Act for non-deduction of TDS on the payment made to Krishna Clearing Agencies and Maheshwari Enterprise respectively towards Transportation charges. Further that, an amount of Rs.5,49,100/- was also disallowed by the Learned AO u/s 40(a)(ia) for non-deduction of TDS on payment made towards consultancy charges. Such disallowance were also confirmed by the Learned CIT(A) in appeal preferred by the assessee. Hence the instant appeal before us.

4. At the time of hearing of the instant appeal, the Learned Advocate appearing for the assessee prays before us for the addition to be restricted to 30% of the total addition made under section 40(a)(ia) of the Act. In support of his contention he has also relied upon the judgment of different Courts including the judgment passed by the Learned Tribunal, Delhi Bench in the matter of Smt. Kanta Yadav-vs-ITO in ITA No.6312/Del/2016 for A.Y. 2012-13. The Learned representative appearing for the revenue has failed to controvert such contention made by the assessee.

5. Heard the respective parties, perused the relevant materials available on record including the judgment relied upon by the authorized representative appearing for the assessee. The relevant portion of the said judgment passed by the Hon'ble Delhi ITAT Bench while dealing in the identical issue is as follows:

“6. We have considered rival submissions and find that issue is covered in favour of the assessee by order of ITAT Jaipur Bench in the case

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of [Shri Rajendra Yadav vs. ITO](#) and [Smt. Sonu Khandelwal vs. ITO](#). In these orders it was held that the disallowance u/s 40(a)(ia) to be restricted to 30% of the addition. In these orders the Tribunal has considered the amended provisions of [section 40\(a\)\(ia\)](#) of I.T. Act. In these orders the assessment year's involve was 2007-08 and 2008-09. In ITA No. 6312/[Del/2016 Smt. Kanta Yadav vs. ITO](#) the present appeal the assessment year is 2012-13. Therefore facts are identical. In this view of the matter and following the above decisions of Jaipur Bench, we set aside and modify the orders of the authorities below and direct the Assessing Officer to restrict the addition to 30% of the total addition made on account of deduction of TDS u/s 40(a)(ia) of the Act.”

We find substance in the contentions and/or submissions made by the assessee's Counsel taking into consideration the observation made by the Hon'ble ITAT Delhi Bench as above. It also appears that the issue is squarely covered by the aforesaid judgment. Hence, respectfully following the same we set aside and modify the orders passed by the authorities below. We further direct the Learned AO to restrict the addition to 30% of the total addition made on account of deduction of TDS u/s 40(a)(ia) of the Act.

6. In the result, assessee's appeal is partly allowed.

ITA No.1078/Ahd/2016 for A.Y. 2012-13:

7. The instant appeal filed by the revenue with the following grounds:

1. *“The Ld.CIT(A) has erred in law and on facts in restricting the disallowance to the extent of exempt income U/S.14A of the Act, without properly appreciating the facts of the case and the material brought on record.*
2. *The Ld.CIT(A) has erred in law and on facts in restricting the disallowance to Rs.52,45,749/ out of disallowance of Rs.81,55,903/- made u/s.40(a)(ia) of the Act, under the head sales promotion and sales incentive without properly appreciating the facts of the case and the material brought on record.*

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3. *The Ld.CIT(A) has erred in law and on facts in restricting the disallowance to Rs.3,06,250/- out of disallowance of Rs.81,82,676 made u/s. 40(a)(ia) of the Act, under the head Transportation expenses without properly appreciating the facts of the case and the material brought on record.*
4. *On the facts and in the circumstances of the case, the Ld. CIT(A) ought to have upheld the order of the Assessing Officer.*
5. *It is, therefore, prayed that the order of the Ld. CIT(A) may be set aside and that of the Assessing Officer may be restored to the above extent.*
6. *The appellant craves leave to amend or alter any ground or add new ground, which may be necessary.”*

8. **Ground No.1** The revenue has challenged the order passed by the Learned CIT(A) in restricting the disallowance to the extent of exempt income u/s 14A of the Act.

9. In this particular case, during the course of assessment proceeding upon perusal of the Profit and Loss account, it was noticed by the Learned AO that the assessee has debited an amount of Rs.7,48,58,635/- under various heads including Administrative and Other Expenses, Director's Remuneration, salary etc. It also appears from the Balance Sheet that the assessee invested in shares, the dividend income whereof is exempt under Income Tax Act, 1961. The assessee's case was this that the assessee earned dividend income of Rs.1,06,939/- and therefore the disallowance should be restricted to the said amount of dividend income. However, the assessee itself disallowed voluntarily Rs.2,06,868/-. But applying the provision of Section 14A r.w.r. 8D the Learned AO worked out the disallowance at Rs.2,45,941/-. Thus, the balance amount of Rs.39,072/- was further disallowed u/s 14A of the Act and added to the total income of the assessee which was in turn restricted to the exempt income by the Learned CIT(A) in appeal. Hence, the appeal before us.

10. At the time of hearing of the instant appeal the Learned Counsel appearing for the assessee submitted before us that the issue is squarely covered by the series of judgment passed by the Jurisdictional High Court including the case of Chudgar Ranchodlal Jethalal-vs-The DCIT (OSD) in ITA No.245/Ahd/2013 and the judgment passed by the Co-ordinate Bench in the matter of M/s. Amruta Quarry Works-vs-ITO in ITA No.1481/Ahd/2013 copy whereof was also handed over to us. However, the Learned Representative appearing for the department failed to controvert the contention made by the assessee's representative in this respect.

11. Heard the respective parties, perused the relevant materials available on record. It is a settled principle of law that the disallowance u/s 14A should be restricted to the exempt income. The same has been decided in the number of judgments passed by different Courts including the jurisdictional High Court. In this particular case, the exempt income earned by the assessee in the form of dividend income is of Rs.1,06,939/-. Since the disallowance cannot exceed the exempt income, the Learned CIT(A) restricted the disallowance to the dividend income of Rs.1,06,939/-. While doing so the Learned CIT(A) observed as follows:

“6.2 I have considered the assessment order and the submissions made by the appellant. The AO made the disallowance u/s. 14A since as per Rule 8D of the I.T. Rules, the amount of disallowance worked out to Rs.2,45,941/- whereas the appellant had only disallowed an amount of Rs.2,06,864/- on its own. The appellant has submitted that it had earned exempt income in the form of dividend of Rs.1,06,939/- and had suo-moto made a disallowance of Rs.2,06,868/- which in any case exceeded the exempt income. Hence, no further disallowance was justified. It is seen that the Hon'ble Ahmedabad Tribunal in the case of Chudgar Ranchhodlal Jethalal Vs. DCIT (OSD), Range-1 in ITA No.

245/Ahd/2013 dated 20.03.2015 has held that the disallowance cannot exceed exempt income. In the facts of the case and judicial decisions in this regard, the addition made by the Assessing Officer is deleted and the disallowance is restricted to the amount of exempt income."

We have carefully considered the judgment passed by the Co-ordinate Bench in the matter of M/s Amruta Quarry Works, relevant portion dealing with the identical issue is as follows:

"6. The ld. Counsel for the assessee contends that the assessee does not want to go with any other factual arguments except that by amendment in [Section 40\(a\)\(ia\)](#) brought in by [Finance \(No.2\) Act, 2014](#), which reads as under:-

"14.4 Accordingly, [Section 40\(a\)\(ia\)](#) of the Income-tax Act has been amended to provide that in case of non-deduction of tax at source or non- payment of tax so deducted on payments made to residents as specified in [section 40\(a\)\(ia\)](#) of the Income-tax Act, the disallowance shall be restricted to 30% of the amount of expenditure claimed."

6.1 Ld. Counsel for the assessee then contends that the amendment is clarificatory in nature inasmuch as in clause 14.3 of the explanatory notes in this behalf mentioned as under:-

"14.3 As mentioned above, in case of non-deduction of tax at source or non- payment of tax so deducted from certain payments made to residents, the entire amount of expenditure on which tax was deductible is disallowed under [section 40\(a\)\(ia\)](#) for the purposes of computing income under the head "Profits and gains of business or profession". The disallowance of whole of the amount of expenditure causes hardship, especially in case of payment made to a resident in whose case the withholding of tax is only a mode of collection of tax and does not result into final discharge of tax liability."

6.2 Since the amendment has been brought to remove the hardship caused to the assessee, the amendment assumes the character of being clarificatory in nature and is retrospectively applicable. Reliance is placed on Five Members Constitution Bench of Supreme Court in the case of CIT vs. Vatika Township Private Limited, reported in (2014) 367 ITR 466 (SC), wherein it has been observed that in case the amendment is brought to remove the hardship caused to the assessee, the same assumes the character of being clarificatory in nature.

6.3 Ld. Counsel for the assessee contends that the amendment to Section 40(a)(ia) brought in by Finance (No.2) Act, 2014 may be held as retrospectively applicable; in view thereof 30% of the amount on which TDS has not been deducted may be held as disallowable u/s 40(a)(ia).

7. Ld. Departmental Representative is heard.

8. I have heard the rival contentions, perused the material available on record and gone through the orders of the lower authorities. I find merit in the contentions of the ld. Counsel for the assessee. Respectfully following the judgment of Vatika Township Private Limited (supra), the amendment brought in by Finance (No.2) Act of 2014 in Section 40(a)(ia), the same is held to be retrospective in nature; therefore, the amount to be disallowed u/s 40(a)(ia) should be restricted to 30% of the impugned amount. Thus, the assessee's appeal is partly allowed.”

Since the order passed by the Learned CIT(A) is in consequence with the ratio laid down by the aforesaid judgment and the judgment passed by the Hon'ble Jurisdictional High Court in restricting the disallowance to the exempt income of the assessee, we find no infirmity in the said order passed by the first appellate authority so far as to warrant interference. The question is accordingly answered in the affirmative, i.e. in favour of the assessee and against the revenue. Hence, revenue's appeal found to be devoid of any merit and thus dismissed.

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12. **Ground No.2 & 3:** These ground of appeals are identical to that of the issues already been dealt with by us in ITA No.1079/Ahd/2016 for A.Y. 2012-13 and in the absence of any changed circumstances the same shall apply mutatis mutandis. Hence, these ground of appeal preferred by the revenue are dismissed.

13. **Ground No.4, 5 & 6** are usual grounds, hence no order need be passed.

14. In the combined result, assessee's appeal is partly allowed and revenue's appeal is dismissed.

This Order pronounced in Open Court on 12/06/2019

Sd/-
(PRAMOD KUMAR)
VICE PRESIDENT
Ahmedabad; Dated 12/06/2019
Priti Yadav, Sr.PS

Sd/-
(Ms. MADHUMITA ROY)
JUDICIAL MEMBER

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-7, Ahmedabad.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad