

आयकर अपीलीय अधिकरण "F" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री राजेश कुमार लेखा सदस्य के समक्ष ।
BEFORE SRI MAHAVIR SINGH, JM AND SRI RAJESH KUMAR, AM

आयकर अपील सं./ ITA No. 6655/Mum/2017

(निर्धारण वर्ष / Assessment Year 2012-13)

Vilas Transport company private limited 103/104, Vyapar Bhavan, 49 P Demello Road, Carnac Bunder, Mumbai-400009	Vs.	The Income Tax Officer 8(3)(3), Mumbai- 400 020
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
स्थायी लेखा सं./PAN No. AABCV6156A		

अपीलार्थी की ओर से / Appellant by	:	None
प्रत्यर्थी की ओर से / Respondent by	:	Shri Rajeev Gubgotra, DR

सुनवाई की तारीख / Date of hearing:	19.06.2019
घोषणा की तारीख / Date of pronouncement :	19.06.2019

आदेश / ORDER

महावीर सिंह, न्यायिक सदस्य/
PER MAHAVIR SINGH, JM:

This appeal filed by the assessee is arising out of the order of the Commissioner of Income Tax (Appeals)-14, in short CIT(A), in appeal No. CIT(A)-14/IT-11/15-16 vide dated 16.08.2017. The Assessment was framed by the Income Tax Officer, Ward-8(3)(3), Mumbai (in short DCIT/ITO/ AO) for the A.Y. 2012-13 vide order



dated 27.03.2015, under section 143(3) of the Income-tax Act, 1961 (hereinafter 'the Act').

2. The only issue in this appeal of assessee is against the order of CIT(A) confirming the addition made by AO of expenses claimed by assessee without deduction of TDS by invoking the provisions of section 40(a)(ia) of the Act. For this, the assessee has raised the following ground: -

"1. The learned Income Tax Officer erred in making addition of ₹ 3,50,08,933/- under section 40(a)(ia) of the Income Tax Act, 1961 and CIT(A) confirms the addition. "

3. At the outset, it is noticed that none is present from assessee's side and this appeal is decided ex-parte qua the assessee.

4. We have heard the learned Sr. DR and gone through the facts and circumstances of the case. The Brief facts are that the assessee has claimed expenses of Rs. 3,50,68,983/- on account of handling charges, professional fee and contract charges. The AO noted that the assessee has not deducted TDS under section 194C of the Act in respect of following handling charges, contract charges and professional charges: -

S.N	Name of the party	Nature of expenditure	Section under which TDS deductible	Amount (Rs.)
1.	Aditya Enterprises	Handling charges	194C	939910
2.	Laxmidatta Transport	Handling charges	194C	2143384



	<i>Company</i>			
3.	<i>N.G. Bajbalkar</i>	<i>Handling charges</i>	<i>194C</i>	<i>6190376</i>
4.	<i>Nazeer A. Chattarki</i>	<i>Handling charges</i>	<i>194C</i>	<i>75012</i>
5.	<i>Piu Enterprises</i>	<i>Handling charges</i>	<i>194C</i>	<i>2071500</i>
6.	<i>Raj Enterprises</i>	<i>Handling charges</i>	<i>194C</i>	<i>2559984</i>
7.	<i>Rakesh Industrial Stitching</i>	<i>Handling charges</i>	<i>194C</i>	<i>2037754</i>
8.	<i>Salome Enterprises</i>	<i>Handling charges</i>	<i>194C</i>	<i>2052608</i>
9.	<i>S.S. Logestics</i>	<i>Handling charges</i>	<i>194C</i>	<i>969493</i>
10.	<i>S.B. Enterprises</i>	<i>Handling charges</i>	<i>194C</i>	<i>107001</i>
11.	<i>Shree jagdamba Traders</i>	<i>Handling charges</i>	<i>194C</i>	<i>1985414</i>
12.	<i>Tejaswini Enterprises</i>	<i>Handling charges</i>	<i>194C</i>	<i>10992525</i>
13.	<i>Translink Logistics</i>	<i>Handling charges</i>	<i>194C</i>	<i>1914687</i>
14.	<i>Vedant Transport Company</i>	<i>Handling charges</i>	<i>194C</i>	<i>2319008</i>
15.	<i>Vikram P. Singh</i>	<i>Handling charges</i>	<i>194C</i>	<i>1868303</i>
16.	<i>Vilas Transport Company</i>	<i>Handling charges</i>	<i>194C</i>	<i>5703998</i>
17.	<i>Raj Jain</i>	<i>Professional fees</i>	<i>194J</i>	<i>253063</i>
18.	<i>Chitari Travels</i>	<i>Contract payments</i>	<i>194C</i>	<i>680000</i>
19.	<i>Nityanand Tours & Travels</i>	<i>Contract payments</i>	<i>194C</i>	<i>98213</i>

Hence, the AO invoked the provisions of section 40(a)(ia) of the Act and made disallowance of expenses. Aggrieved, assessee preferred the appeal before CIT(A). The CIT(A) also confirmed the action of the AO.

5. We noted that the assessee before CIT(A) claimed that these parties have shown income in their respective income and paid taxes and hence, in view of the second proviso to section 40(a)(ia) of the Act as inserted by Finance Act, 2012 with effect from 01.04.2013 is applicable in the case of the assessee. It was contended that this issue has been decided by ITAT, Agra Bench in the case of Rajiv Kumar Aggarwal Vs. CIT in ITA No. 373/Agra/2013 for AY 2006-07, wherein it is held that the second proviso to section



40(a)(ia) of the Act has inserted by Finance Act, 2012 with effect from 01.04.2013 is retrospective. This decision of ITAT has considered by Hon'ble Delhi High Court and further, affirmed by Hon'ble Delhi High Court in the case of CIT v. Ansal Landmark Townships Pvt. Ltd [2015] 377 ITR 635 (Del). Hon'ble Delhi High Court Held as under: -

“11. The first proviso to Section 210 (1) of the Act has been inserted to benefit the Assessee. It also states that where a person fails to deduct tax at source on the sum paid to a resident or on the sum credited to the account of a resident such person shall not be deemed to be an assessee in default in respect of such tax if such resident has furnished his return of income under Section 139 of the Act. No doubt, there is a mandatory requirement under Section 201 to deduct tax at source under certain contingencies, but the intention of the legislature is not to treat the Assessee as a person in default subject to the fulfilment of the conditions as stipulated in the first proviso to Section 201(1). The insertion of the second proviso to Section 40(a) (ia) also requires to be viewed in the same manner. This again is a proviso intended to benefit the Assessee. The effect of the legal fiction created thereby is to treat the Assessee as a person not in default of deducting tax at source under certain contingencies.



12. *Relevant to the case in hand, what is common to both the provisos to Section 40 (a) (ia) and Section 210 (1) of the Act is that the as long as the payee/resident (which in this case is ALIP) has filed its return of income disclosing the payment received by and in which the income earned by it is embedded and has also paid tax on such income, the Assessee would not be treated as a person in default. As far as the present case is concerned, it is not disputed by the Revenue that the payee has filed returns and offered the sum received to tax.*

13. *Turning to the decision of the Agra Bench of ITAT in Rajiv Kumar Agarwal v. ACIT (supra) , the Court finds that it has undertaken a thorough analysis of the second proviso to Section 40 (a)(ia) of the Act and also sought to explain the rationale behind its insertion. In particular, the Court would like to refer to para 9 of the said order which reads as under:*

"On a conceptual note, primary justification for such a disallowance is that such a denial of deduction is to compensate for the loss of revenue by corresponding income not being taken into account in computation of taxable income in the hands of the recipients of the payments. Such a policy motivated deduction restrictions should, therefore, not come into play when an assessee is able to establish that there



is no actual loss of revenue. This disallowance does deinceivize not deducting tax at source, when such tax deductions are due, but, so far as the legal framework is concerned, this provision is not for the purpose of penalizing for the tax deduction at source lapses. There are separate penal provisions to that effect. Deinceivizing a lapse and punishing a lapse are two different things and have distinctly different, and sometimes mutually exclusive, connotations. When we appreciate the object of scheme of section 40(a)(ia), as on the statute, and to examine whether or not, on a "fair, just and equitable" interpretation of law- as is the guidance from Hon'ble Delhi High Court on interpretation of this legal provision, in our humble understanding, it could not be an "intended consequence" to disallow the expenditure, due to non deduction of tax at source, even in a situation in which corresponding income is brought to tax in the hands of the recipient. The scheme of Section 40(a)(ia), as we see it, is aimed at ensuring that an expenditure should not be allowed as deduction in the hands of an assessee in a situation in which income embedded in such expenditure has remained untaxed due to tax withholding lapses by the assessee. It is not, in our considered view, a penalty for tax withholding lapse but it is a sort of compensatory deduction



restriction for an income going untaxed due to tax withholding lapse. The penalty for tax withholding lapse per se is separately provided for in Section 271 C, and, section 40(a)(ia) does not add to the same. The provisions of Section 40(a)(ia), as they existed prior to insertion of second proviso thereto, went much beyond the obvious intentions of the lawmakers and created undue hardships even in cases in which the assessee's tax withholding lapses did not result in any loss to the exchequer. Now that the legislature has been compassionate enough to cure these shortcomings of provision, and thus obviate the unintended hardships, such an amendment in law, in view of the well settled legal position to the effect that a curative amendment to avoid unintended consequences is to be treated as retrospective in nature even though it may not state so specifically, the insertion of second proviso must be given retrospective effect from the point of time when the related legal provision was introduced. In view of these discussions, as also for the detailed reasons set out earlier, we cannot subscribe to the view that it could have been an "intended consequence" to punish the assesseees for non deduction of tax at source by declining the deduction in respect of related payments, even when the corresponding income is duly brought to tax. That will be going much beyond



the obvious intention of the section. Accordingly, we hold that the insertion of second proviso to Section 40(a)(ia) is declaratory and curative in nature and it has retrospective effect from 1st April, 2005, being the date from which sub clause (ia) of section 40(a) was inserted by the Finance (No. 2) Act, 2004."

14. The Court is of the view that the above reasoning of the Agra Bench of ITAT as regards the rationale behind the insertion of the second proviso to Section 40(a) (ia) of the Act and its conclusion that the said proviso is declaratory and curative and has retrospective effect from 1st April 2005, merits acceptance."

In view of the above position, we are of the view that the assessee has to provide the details to the AO, regarding recipient of the payments, on which no tax is deducted, that:-

- "(i) has furnished his return of income ('ROI') under section 139 of the Act;*
- (ii) has taken into account such sum for computing income in such ROI, and*
- (iii) has paid the tax due on the income declared by him in such ROI."*

6. We noted from the assessee's claim that these parties have shown the above rate as income in the respective return of income and paid taxes, the assessee is eligible for claiming of these



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expenses. However, this needs verification. Hence, we set aside the orders of the lower authorities and remand this matter back to the file of the AO. The AO will allow reasonable opportunity of being heard to the assessee to file the details before the AO as mandated by the provisions. Hence, this issue is remanded back to the file of the AO subject to verification. The AO will allow the claim of the assessee.

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

Order pronounced in the open court on 19.06.2019.

Sd/-

(राजेश कुमार / RAJESH KUMAR)
(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह / MAHAVIR SINGH)
(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 19.06.2019

सुदीप सरकार, व.निजी सचिव / *Sudip Sarkar, Sr.PS*

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai