

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।  
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष  
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.947/PUN/2017

निर्धारण वर्ष / Assessment Year : 2012-13

Shabbir Hasham Sayyed,  
New Ashiyana Enterprises,  
S.No.75/2, Room No.153,  
Sayyed Nagar, Hadapsar,  
Pune-411028.

PAN : ACHPS9564L

.....अपीलार्थी / Appellant

बनाम / V/s.

ITO, Ward-14(2),  
Pune.

.....प्रत्यर्थी / Respondent

Assessee by : Shri Pramod Shingte  
Revenue by : Mrs. Shabana Parveen

सुनवाई की तारीख / Date of Hearing : 26.08.2019  
घोषणा की तारीख / Date of Pronouncement : 05.09.2019

आदेश / ORDER

**PER D. KARUNAKARA RAO, AM:**

This appeal is filed by the assessee against the order of CIT(A)-7,  
Pune dated 08.12.2016 for the Assessment Year 2012-13.

2. The grounds raised by the assessee are as under :-

"1. On the facts and in the circumstances of the case and in law the learned Assessing Officer erred in making a disallowance of Rs. 66,84,217/- by invoking provisions of section 40(a)(ia) of the Income Tax Act, 1961 without realizing the fact that appellant is an individual and this was the first year of applicability of provisions of section 44AB of the Income Tax Act, 1961 and therefore for A.Y. 2012 - 2013 no tax was deductible under chapter XVII B and therefore provisions of section 40(a)(ia) of the Income Tax Act, 1961 do not have any application in the appellant's case.

2. *On the facts and in the circumstances of the case and in law the learned CIT (A) erred in treating the net consideration received on account of sale of capital asset as part of the Gross Receipt, Turnover, Sales, for the purpose of calculating the turnover as per Provisions of Section 44AB of the IT Act, thereby further erred in considering the appellant as eligible for Tax audit and thus eligible for deduction of TDS.*

3. *On the facts and in the circumstances of the case and in law the learned Assessing Officer erred in making a disallowance of Rs. 5,50,527/- by invoking provisions of section 40A(3) of the Income Tax Act, 1961 without appreciating the nature of payment and circumstances under which the payments have been made by the appellant. Your appellant prays for appropriate relief.*

*The appellant craves for to leave, add, alter, modify, delete above ground of appeal before or at the time hearing, in the interest of natural justice.”*

3. Before us, at the outset, ld. Counsel for the assessee submitted that this is a case where the assessee is an individual and is proprietor of New Ashiyana Enterprises, which is engaged in the business of building construction. During the course of assessment proceedings u/s 143(3) of the Act, the assessee's return of income is determined at Rs.88,19,800/-. The Assessing Officer invoked the provisions of section 40(a)(ia) of the Act and made addition of Rs.66,84,217/- and also invoked the provisions of section 40A(3) of the Act made addition of Rs.5,50,527/-. The CIT(A) confirmed the same and dismissed the appeal of the assessee.

4. The facts relating to the addition u/s 40(a)(ia) of the Act includes that the assessee made a payment of Rs.66,84,217/- and the TDS was not done as per the Rules. In view of the said default, the Assessing Officer invoked the provisions of section 40(a)(ia) of the Act and made the entire payments as addition.

5. The assessee argued before the CIT(A) stating that the said provisions of section 40(a)(ia) of the Act are not to be invoked when the turnover of the assessee in the preceding assessment year has not exceeded the limits prescribed u/s 44AB of the Act. On examining the provisions of section 194C of the Act read with turnover details of the assessee for the preceding assessment year 2011-12, the CIT(A) noted that the turnover in the earlier assessment years is Rs.1,28,75,000/- which is higher than the limits prescribed in section 44AB of the Act. There was a discussion about the Cochin Bench decision of the Tribunal in the case of Konthiyaparambil Coir Rubber Products vs. ITO, 54 taxmann.com 22 and the same were distinguished against the assessee. The CIT(A) held that there is a shortfall in making the TDS and the turnover is much higher than the limits prescribed u/s 44AB of the Act. The CIT(A) discussed the provisions of section 194C of the Act read with Explanation with reference to the meaning of "specified person" [para 5.4 of the CIT(A)'s order].

6. Further, the CIT(A) confirmed the addition of Rs.5,50,527/- made u/s 40A(3) of the Act. The assessee's failure to demonstrate the exceptional circumstances forcing the assessee to make cash payment in violation of section 3 of section 40A of the Act was also discussed in para 6.3 of the CIT(A)'s order.

7. Before us, on the issue of invoking the provisions of section 40(a)(ia) of the Act, ld. Counsel submitted that provisions of Explanation with reference to the meaning of 'specified person' is explained and accordingly, a person who makes a payment is not to be called 'specified

person', if the turnover of the assessee in the immediately preceding financial year is within the prescribed limits as mentioned in section 44AB of the Act. Further, demonstrating the turnover of the assessee in the preceding financial year is lower relying on the copy of the computation of income and the return of income, , ld. Counsel submitted that the assessee does not have any turnover in the assessment year 2011-12. Referring to the figure of Rs.1,25,75,000/-, ld. Counsel submitted that the same constitutes the sale proceeds of the land and it falls within the ambit of the capital gain provisions and not the business or profession. Therefore, the CIT(A) erred in mistakenly considered the same as turnover when it is not so. In that case, the exemption provisions already discussed above in the Explanation (i.e. 'specified person') for the purpose of section 194C of the Act. There is no obligation on the part of the assessee to make TDS on the payment of Rs.66,84,217/-. Further, the assessee filed the written submissions and the same are extracted hereunder :-

*"1. Disallowance u/s 40(a)(ia)*

*Your appellant is an individual and is a proprietor of New Ashiyana Enterprises which is engaged in the business of building construction wherein your appellant undertakes the contract as per the specifications of the contractee and carry out the works as per requirement of such contractee. He has filed his return of income electronically by declaring total income at 15,85,060/-.*

*During the course of assessment proceedings Learned Assessing Officer has pointed out that assessee has deducted TDS on payment of Rs.66,84,217/- and there was shortfall on account of lesser deduction than required to be deducted to the tune of Rs.3,84,000/- and with this alleged default of non-deduction of tax Assessing Officer concluded that an amount of Rs.66,84,217/- was liable to be disallowed u/s 40a(ia) and he made disallowance accordingly.*

*At the outset it is clarified that this was the first year in which assessee's turnover has exceeded the prescribed limit u/s 44AB of the Income Tax Act, 1961 and accordingly your appellant has got the accounts audited and submitted the tax audit report. And it is further submitted that in immediately preceding assessment year 2011-12 and earlier years*

*assessee turnover was not exceeding the prescribed in section 44AB. We enclose in Annexure no. 1 the copy of Income Tax Return for Ay 11-12 for your information.*

*In view of this fact it is most humbly submitted that in first explanation clause (i) of section 194C has defined tern specified persons and in that sub-clause (I) reads as follows;*

*“any person, being an individual or a Hindu undivided family or an association of persons or a body of individuals, if such person,—*

*(A) does not fall under any of the preceding sub-clauses; and*

*(B) is liable to audit of accounts under clause (a) or clause (b) of section 44AB during the financial year immediately preceding the financial year in which such sum is credited or paid to the account of the contractor”*

*Meaning thereby the provision of this section will be apply to those assessee in whose case there was audit u/s 44AB in immediately preceding year and then only relevant provisions are made applicable to the assessee, therefore it is submitted that since assessee is an individual and in immediate preceding previous year the provision of section 44AB were not applicable to the assessee therefore since assessee was not liable to deduct the TDS there was no issue of making any corresponding applicability of section 40a(ia).*

*In view of this fact it is most humbly prayed before your honor to delete the entire addition and oblige.”*

8. From the above, it is evident that there is undisputed fact that turnover of the assessee in the immediately assessment year 2011-12 is within the prescribed limits of section 44AB of the Act. The amount of turnover referred by the CIT(A) does not indicate the turnover of the assessee as same is merely capital gains turnover. Thus, it is a case where the assessee's case is not auditable case in the assessment year 2011-12, which gives immunity for the year under consideration from the provisions of section 194C of the Act. Further, we find the Hon'ble Gujarat High Court in the case of Harshadbhai Naranbhai Bagadia vs. ACIT, 24 taxmann.com 47 which is relevant for the following proposition :-

*“Liability of individual/HUF – In case of an individual/HUF, TDS liability under section 194C(2) arises only if in financial year immediately*

*preceding financial year in which payment is made, total sales, gross receipts or turnover exceeded limits provided in section 44AB.”*

9. Considering the same, we are of the opinion that the order of the CIT(A) suffers from inaccuracy on this issue and the same is required to be reversed. Accordingly, we order. Thus, the grounds no.1 and 2 are allowed in favour of the assessee.

10. Ground no.3 is not pressed at the time of hearing. Therefore, the said ground no.3 is dismissed as not pressed.

11. In the result, the appeal of the assessee is partly allowed.

Order pronounced on 05<sup>th</sup> day of September, 2019.

Sd/-	Sd/-
(विकास अवस्थी / <b>VIKAS AWASTHY</b> )	(डी. करुणाकरा राव/ <b>D. KARUNAKARA RAO</b> )
न्यायिक सदस्य/ <b>JUDICIAL MEMBER</b>	लेखा सदस्य/ <b>ACCOUNTANT MEMBER</b>

पुणे / Pune; दिनांक / Dated : 05<sup>th</sup> September, 2019.  
Sujeet

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-7, Pune.
4. The CCIT, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, “ए” बेंच, पुणे / DR, ITAT, “A” Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.