

IN THE INCOME TAX APPELLATE TRIBUNAL

AHMEDABAD “B” BENCH

**(BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER
& SHRI WASEEM AHMED, ACCOUNTANT MEMBER)**

**ITA. No: 361/AHD/2017
(Assessment Year: 2009-10)**

Shri Subodh Ramanlal Desai 125, Saikrupa Society, Opp. Gayatri Mandir, Nr. Amit Nagar Circle, Baroda-390018	V/S	DCIT, Circle-3(1), Baroda
(Appellant)		(Respondent)

PAN: ACAPD 3855C

**Appellant by : Shri Tushar Hemani & Aditi Sheth, AR
Respondent by : Shri Vidhyut Trivedi, Sr. D.R.**

(आदेश)/ORDER

Date of hearing : 06 -02-2020
Date of Pronouncement : 19-02-2020

PER MAHAVIR PRASAD, JUDICIAL MEMBER

1. This appeal filed by the Assessee is directed against the order of the Ld. CIT(A)-2, Vadodra dated 23.11.2016 pertaining to A.Y. 2009-10 and following grounds have been taken:

1. *The learned CIT(A) has erred both in law and on the facts of the case in confirming the action of AO in reopening the assessment u/s 147 of the Act. On the facts and circumstances of the case, learned CIT(A) ought to have held that the action of reopening is without jurisdiction and not permissible either in law or on facts.*
 2. *.The learned CIT(A) has erred both in law and on the facts of the case in confirming the action of the AO of disallowing depreciation of Rs.14,24,343/- claimed u/s.32 of the Act.*
 3. *The learned CIT(A) has erred in law and on facts of the case in confirming the action of the AO of disallowing expense of Rs.30,23,990/- u/s.40(a)(ia)r.w.s.194IoftheAct.*
 4. *Both the lower authorities erred in law and on facts in applying s.1941 of the Act which is not at all applicable on the expense.*
 5. *In any case, appellant having deducted tax at source u/s 194C as against 1941 as per the assessing officer would not attract the provisions of S.40(a)(ia) of the Act as there is no absolute failure to deduct tax at source.*
 6. *Both the lower authorities have passed the orders without properly appreciating the facts and they further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order. This action of the lower authorities is in clear breach of law and Principles of Natural Justice and therefore deserves to be quashed.*
 7. *The Id. CIT(A) has erred in law and on facts of the case in confirming action of the Id. A.O. in levying interest u/s. 234A/B/C/C of the Act.*
2. Out of above said ground, assessee has not pressed ground no. 1 for reopening of assessment u/s. 147. And practically there are two grounds (i) disallowance of depreciation of Rs. 14,24,343/- claimed u/s. 32 of the Act and (ii) disallowance of expenses of Rs. 30,23,990/- u/s. 40(a)(ia) r.w.s. 194I of the Act.
3. Facts of the case are that assessee is a Transport Carting Contractor and also engaged in construction work. During the assessment proceedings, it was noticed that assessee has acquired three TATA trippers (Heavy Goods

- Vehicles) on 31.03.2009. It was further noticed that retails invoices were generated on 31.03.2009. Insurance along with registration was also done on 31.03.2009 and assessee has claimed depreciation on these vehicles @ 50% and same was doubted by the assessing officer.
4. Assessee contention was that vehicles were purchased on 31.03.2009 and were put to use on 31.03.2009. And there was a carting trip for L & T from Nareshwar to Karjan site. But in the absence of any document report with regard to carting trip for L & T from Nareshwar to Karjan site, assessing officer disallowed the claim of depreciation @ 50% by the assessee and made addition of Rs. 14,24,343/-.
 5. Against the said order, assessee preferred first statutory appeal before the Id. CIT(A) who confirmed the action of the A.O.
 6. Now assessee has come before us by way of second statutory appeal.
 7. We have gone through the relevant record and impugned order. Mainly claim of depreciation was disallowed by the lower authorities on the ground that assessee could not produce any proof with regard to put to use the said vehicles on 31.03.2009. But assessee filed a paper book containing it 82 pages wherein in support of its contention, assessee has filed carting sales ledger account wherein trip of L & T from Nareshwar to Karjan site is being mentioned.
 8. And in support of its contention, Id. A.R. cited an order of Co-ordinate Bench wherein on similar facts and circumstances claim of depreciation with regard to

plant and machinery was allowed by the Co-ordinate Bench with following observation:

“Section 32 of the Income-tax Act, 1961 - Depreciation - Allowance/rate of (User of asset) -Assessment year 2004-05 - Assessee purchased plant and machinery and installed and erected same but due to delay in erection and commissioning same could not be used for production - During relevant assessment years, assessee claimed depreciation on value of plant and machinery purchased - Assessing Officer disallowed same on grounds that plant and machinery were installed and erected but they were not put to use - It was found that said machinery were used for trial production - Whether expression 'used' appearing in subsection (1) of section 32, should have a wider meaning so as to include not only actual but also passive user and therefore, machineries kept ready for use could also be treated as in passive use, so that assessee could be allowed depreciation even though its machineries were used for short period - Held, yes [Para 7.3] [In favour of assessee]

Section 40(a)(ia) of the Income-tax Act, 1961 - Business disallowance - Interest etc. paid to resident without deduction of tax at source (Applicability of) - Assessment year 2005-06 -Whether where assessee made payments to C & F agents for purchase of plant and machinery, since no such claim was made in profit and loss account, no addition could be made under section 40(a)(ia), even if no TDS was deducted on same - Held, yes [Para 10] [In favour of assessee]

Section 40A(3) of the Income-tax Act, 1961 - Business disallowance - Cash payment exceeding prescribed limits (Payments to C & F agents) - Assessment year 2005-06 -Whether where cash payments made by assessee to C & F agents did not exceed Rs. 20,000, said payments could not be disallowed under section 40A(3) [Para 12] [In favour of assessee]”

9. Assessee also cited a judgment of Hon’ble Jurisdictional High Court in the matter of ACIT vs. Ashima Syntex Ltd. wherein similar facts and circumstances

depreciation was allowed by the Hon'ble High Court with following observation:

“Installation of machinery or plant and machinery in the building itself is not sufficient to attract the provisions contained in section 32 of the Income-tax Act, 1961. There must be use of plant and machinery for the purpose of business as contemplated in section 32. The term “use” has a wide connotation. Even trial production of a machinery would fall within the ambit of “used” for the purpose of business”. Further, as the statute does not prescribe a minimum time limit for “use” of the machinery, the assessee cannot be denied the benefit of depreciation on the ground that the machinery was used for a very short duration for trial run.”

10. Since vehicle was put to use on 31.03.2009 and in support of its contention, assessee has submitted copies of ledger before the lower authorities and respectfully following the aforesaid judgments, we allow claim of the assessee and this ground of the assessee is allowed and we direct assessing officer to allow the claim of depreciation of Rs. 14,24,343/- u/s. 32 of the Act.
11. Next ground is relating to disallowance of expenses of Rs. 30,23,990/- u/s. 40(a)(ia) of the Act.
12. During the assessment proceedings, A.O. noticed that the assessee had taken four vehicles on rent bearing registration nos. 4585, 8841, 8842 and 8843 from Pallavi S. Desai @ Rs. 45,000/- per month and paid Rs. 21,60,000/- in the year under consideration. Similarly vehicles bearing registration nos. 5282 & 8842 were taken on rent from Shreenathji Transport at Rs. 60,000/- each per month and paid Rs. 12,00,000/- in the year under consideration. Assessee had deducted tax at @ 1% u/s. 194C of the Act. A.O. was of the opinion that

assessee ought to have deduct tax @ 10% u/s. 194I and made disallowance of proportionate expenditure amounting to Rs. 30,23,990/-.

13. Thereafter assessee preferred first statutory appeal before the ld. CIT(A) who confirmed the action of the assessing officer.

14. Now assessee has come before us by way of second appeal.

15. Assessee contention was that lower authorities did not have power to disallowance of proportionate expenditure either they could accept my claim they could reject my claim and disallowance of proportionate expenditure is amounting to miscarriage of justice.

16. Section 194I. *Any person, not being an individual or a Hindu undivided family, who is responsible for paying to [a resident] any income by way of rent shall, at the time of credit of such income to the account of the payee or at the time of payment therefore in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, [deduct income-tax thereon at the rate of-*
(a) Two percent for the use of any machinery or plant or equipment; and
(b) Two percent for the use of any land or building (including factory building) or land appurtenant to a building (including factory building) or furniture or fittings:]]

17. And in support of its contention, ld. A.R. cited an order of Co-ordinate Bench in ITA No. 634 /Ahd/2011 wherein a judgment of Calcutta High Court in the matter of CIT vs. S.K. Tekriwal (2014) 361 ITR 432 (Cal.) wherein relief was granted to the assessee with following observation:

10. The issue whether a disallowance under section 40(a)(ia) can be made even in a situation where there is a short deduction of tax at source, even if that be so, is

no longer res integra, Hon'ble Calcutta High Court, in the case of CIT vs. S K Tekriwal [(2014) 361 ITR 432 (Cal)] has, dismissing the appeal of the commissioner on the ground that no substantial question of law arises, reproduced and confirmed the following stand of a coordinate bench:

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 40(a)(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% 2 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 Id. CIT(A), DR also argued that there is not work 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. Accordingly to him, it does not refer to genuineness of the payment or otherwise but addition u/s. 40(a)(ia) can be made even through 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 bona fide 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 u/s. 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 3(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.

18. In our considered opinion, assessing officer either could accept the claim of the assessee or could disallow the claim of the assessee but he could not have disallowed the proportionate expenditure amounting to Rs. 30,23,990/-.

19. Therefore, in parity with the above said ITAT order, we allow the claim of the assessee.

20. In the result, appeal filed by the Assessee is allowed.

Order pronounced in Open Court on 19 - 02- 2020

Sd/-

Sd/-

(WASEEM AHMED)
ACCOUNTANT MEMBER True Copy
Ahmedabad: Dated 19/02/2020

(MAHAVIR PRASAD)
JUDICIAL MEMBER

Rajesh

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) –
4. The CIT concerned.
5. The DR., ITAT, Ahmedabad.
6. Guard File.

By ORDER

Deputy/Asstt.Registrar
ITAT,Ahmedabad