

INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "E": NEW DELHI  
BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER  
AND  
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 382 & 4219/Del/2017  
(Assessment Year: 2012-13 and 2013-14)

Nuberg Engineering Ltd, 1223, Gali No. 83, Shanti Nagar, Tri Nagar, New Delhi PAN: AAACN3523A	Vs.	DCIT, Circle-18(2), New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Vinay Jain, CA
Revenue by:	Ms. Rakhi Vimal, Sr. DR
Date of Hearing	10/02/2020
Date of pronouncement	15/05/2020

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are the appeals filed by the assessee against the order of the Id CIT(A)-6, New Delhi 09.12.2016 and 23.05.2017 for the Assessment Year 2012-13 and 2013-14.
2. The assessee has raised the following grounds of appeal for Assessment Year 2012-13:-
  - “1. That on the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in confirming disallowance of Rs. 64,57,657/- made by the AO under section 40(a)(ia) of the Act, for alleged failure of the appellant to deduct tax at source on expenditure in the nature of Bank Guarantee Charges termed as Bank Guarantee Commission ignoring the fact that such expenditure is out of the definition of “Commission and Brokerage” as envisaged u/s 194H of the Act.
  2. That the Id. CIT(A) erred in law and on facts in not appreciating that there existed no principal-agent relationship between the appellant and the Bank in bank guarantee transactions, which is sine qua non for invoking section 194H of the Act.
  3. That the Id. CIT (A) erred in law and on facts in not accepting the claim of the appellant that the expenditure made on Bank Guarantee Commission is not subject to deduction of tax at source also in view of the Notification No 56/2012 dated 31.12.2012 issued by the CBDT vide F. No. 275/53/2012-IT(B) which being declaratory and curative in nature was applicable with retrospective effect.

4. *That where no expenditure in the nature of Bank Guarantee Commission was payable as on 31.03.2012 i.e. the last day of the relevant financial year, the Id. CIT(A) erred in law in sustaining disallowance of Rs.64,57,657/- made by the AO under section 40(a)(ia) of the Act, for alleged failure of the appellant to deduct tax at source thereon despite the legal position that disallowance u/s 40(a)(ia) applies only to amounts “payable” as of 31st March and not to amounts already “paid” during the year, as upheld by the Allahabad High Court in CIT v. Vector Shipping Services (P) Ltd. (ALL.) (2013) 357 ITR 642 and against which the SLP of the department was dismissed by the Hon’ble Supreme Court.*
  5. *That without prejudice to the above grounds of appeal and in the alternative, the Ld GIT(A) erred in law and on facts by sustaining the abovementioned disallowance of Rs.64,57,567/- u/s 40(a)(ia) of the Act, despite the fact that the assessee was not deemed to be an assessee in default under the first proviso to sub section (1) of section 201.”*
3. The assessee has raised the following grounds of appeal for Assessment Year 2013-14:-
- “1. *That on the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in confirming disallowance of Rs. 34,34,500/- made by the Ld AO under section 40(a)(ia) of the Act, for alleged failure of the appellant to deduct tax at source on expenditure in the nature of Bank Guarantee Charges termed as Bank Guarantee Commission ignoring the fact that such expenditure is out of the definition of “Commission and Brokerage” as envisaged u/s 194H of the Act.*
  2. *That the Id. CIT(A) erred in law and on facts in not appreciating that there existed no principal-agent relationship between the appellant and the Bank in bank guarantee transactions, which is sine qua non for invoking section 194H of the Act.*
  3. *That the Id. CIT (A) erred in law and on facts in not accepting the claim of the appellant that the expenditure made on Bank Guarantee Commission is not subject to deduction of tax at source also in view of the Notification No 56/2012 dated 31.12.2012 issued by the CBDT vide F. No. 275/53/2012-IT(B) which being declaratory and curative in nature was applicable with retrospective effect.*
  4. *That without prejudice to the above grounds of appeal and in the alternative, the Ld CIT(A) erred in law and on facts by sustaining the abovementioned disallowance of Rs. 34,34,500/- u/s 40(a)(ia) of the Act, despite the fact that the assessee was not deemed to be an assessee in default under the first proviso to sub section (1) of section 201.”*
4. We come to the appeal of the assessee for assessment year 2012 – 13 in ITA number 382/del/2017. Assessee filed its return of income on 29/9/2012 income of Rs. 3 1727100/-. Assessment under section 143 (3) of the income tax act 1961 was passed on 30/3/2015 by The Deputy Commissioner Of

Income Tax, Circle – 18 (2), New Delhi determining the total income of the assessee at ₹ 3 8636980/-.

5. The only dispute is with respect to the disallowance of bank guarantee commission under section 40 (a) (ia ) of the income tax act of Rs 6 457657/- . All the five grounds of appeal before us are related to that only.
6. Assessee company was engaged in the business of manufacturing and export of engineering equipments. The assessee has debited a bank guarantee expenses commission of Rs 6457657/-. The assessee has not deducted any tax on such payment. The AO was of the view that in view of the Central Board Of Direct Taxes notification number 56/2012 dated 31/12/2012 u/s 197A (IF) the assessee should have deducted tax thereon. The assessee explained before the assessing officer that assessee has not deducted tax in payment made to the bank commission for the letter of credit in bank guarantee as these expenses are not liable for deduction of tax at source under chapter XV IIA of the income tax act 1961. Assessee relied on the decision of the decision of the coordinate bench in case of Kotak securities Ltd. The AO was of the view that as per notification number 56/2012 issued by the CBDT on 31/12/2012 which came into force from first day of January 2013 which was issued under section 197A inserted by the finance act 2012 with effect from 1/7/2012. According to the assessing officer as it has come into effect from 1 January 2013 and for assessment year 2012 – 13 there was no exemption provided. According to him, assessee should have deducted tax at source on bank guarantee commission fee of ₹ 6 457657/- and therefore he disallowed the same under section 40 (a) (ia) of the income tax act.
7. Assessee aggrieved with that order has preferred an appeal before the learned CIT – A. He confirmed the same. Therefore assessee is in appeal before us.
8. The learned authorised representative submitted before us that by the order of the coordinate bench in case of ITA number 5454, 5455 to 5456/del/2015 for assessment year 2011 – 12, 2012 – 13 and 2013 – 14 in The Additional Commissioner Of Income Tax (TDS) versus JP AGRA Vikas Ltd, the above circular has been considered in para number six wherein it

has been stated that the two decisions of the coordinate benches stated that above circular issued by the central board of direct taxes applies retrospectively and hence no deduction of tax is required on payment of bank guarantee commission to the banks. He further referred to the decision of the coordinate bench in case of Deputy Commissioner Of Income Tax versus Laqshya media private limited [72 taxman.com 119] wherein for assessment year 2010 – 11 it was held that no tax deduction at source is required to be made on bank guarantee commission. He also relied up on other decision of the coordinate benches. Thus he submitted that the issue is squarely covered in favour of the assessee.

9. The learned departmental representative vehemently supported the orders of the lower authorities. It was submitted that the notification has come with effect from first day of January 2013 and therefore it cannot be applied to the assessment year 2012 – 13.
10. We have carefully considered the rival contentions and perused the orders of the lower authorities. Identical issue has been considered by the coordinate bench in Onkareshwar Properties (P) Ltd. V ACIT in ITA No.:- 1823/Del/2015 for Assessment Year: 2011-12 dated 21/01/2019 has held as under :-

“11. In so far as disallowance u/s 40(a) (ia) is concerned, it is seen that AO has made disallowance on the ground that assessee should have deducted TDS and bank commission / guarantee fee. He has also took note on CBDT Circular No. 56/2012 and held that the said notification was only applicable from 1st January, 2013; and therefore, this notification will not apply upon the assessee. Ld. CIT (A) too has confirmed the said addition.

12. On perusal of the said CBDT circular, it is seen that CBDT has clarified that no TDS is required to be deducted on bank guarantee Commission, etc. Such a circular was brought to reduce the hardship and the compliance cost of the assessee. Once a benevolent circular has been issued to remove the hardship for the assessee then it cannot be held that any such payment made prior to the said circular which was causing hardship to the assessee should continue. It is a well settled proposition that CBDT Circular removing the hardship in

favour of the assessee has to be treated as retrospective and accordingly, we hold that no u/s 40(a)(ia) can be made for non deduction of TDS. In the result this issue is decided in favour of the assessee.”

11. Thus above issue is squarely covered in favour of the assessee by the order of the coordinate bench, therefore, respectfully following the same, we allow the third ground of appeal of the assessee, which in effect leads to disallowance of ₹ 6 457657/- deleted. In the result, we reverse the orders of the lower authorities and direct the AO to delete the disallowance.
12. In the result appeal of the assessee for assessment year 2012 – 13 is allowed.
13. ITA number 4219/del/2017 filed by the assessee for assessment year 2013 – 14 also involves the only issue about the disallowance of ₹ 3 434500/- on account of bank guarantee charges for non-deduction of tax at source. The grounds are also identical compared to the appeal of the assessee for assessment year 2012 – 13.
14. In view of our decision in appeal of the assessee for assessment year 2012 – 13, for the same reasons, we also direct the learned assessing officer to delete the disallowance of ₹ 3 434500/- of bank guarantee charges for non-deduction of tax at source. Thus, ground number three of the appeal of the assessee for assessment year 2013 – 14 is allowed.
15. In the result ITA number 4219/del/2017 for assessment year 2013 – 14 is allowed.
16. In the result both the appeals filed by the assessee are allowed.  
Order pronounced in the open court on 15/05/2020.

-Sd/-  
(BHAVNESH SAINI)  
JUDICIAL MEMBER

-Sd/-  
(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER

Dated: 15/05/2020  
A K Keot

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)

5. DR:ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi