

आयकर अपीलिय अधिकरण, 'बी' न्यायपीठ, चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH: CHENNAI

श्री महावीर सिंह, माननीय उपाध्यक्ष, एवं
श्री मनोज कुमार अग्रवाल, माननीय लेखा सदस्य के समक्ष
BEFORE SHRI MAHAVIR SINGH, HON'BLE VICE PRESIDENT AND
SHRI MANOJ KUMAR AGGARWAL, HON'BLE ACCOUNTANT MEMBER

आयकर अपीलसं./ITA No.993/Chny/2018
निर्धारणवर्ष/Assessment Year: 2013-14

M/s.Shri Kaali Textile,
No.76, Senganaleer Pillayar Street,
(New Street) Mannady,
Chennai-600 001.
[PAN:AARFS 7653 Q]
(अपीलार्थी/Appellant)

v. The Income Tax Officer,
Non-Corporate Ward-12(4),
Chennai.

(प्रत्यर्थी/Respondent)

अपीलार्थीकीओरसे/ Appellant by : None
प्रत्यर्थीकीओरसे /Respondent by : Mr.G.Johnson, Addl.CIT
सुनवाईकीतारीख/Date of Hearing : 22.03.2022
घोषणाकीतारीख/Dt. of Pronouncement : 28.03.2022

आदेश / ORDER

PER MAHAVIR SINGH, VICE PRESIDENT:

This appeal by the assessee is arising out of the order of the Commissioner of Income Tax (Appeals)-13, Chennai, in ITA No.40/CIT(A)-13/2013-14 dated 17.01.2018. The assessment was framed by the ITO, Non-Corporate Ward-12(4), Chennai, for the AY 2013-14, u/s.143(3) of the Income Tax Act, 1961 (hereinafter "the Act") vide his order dated 31.03.2016.

2. The only issue in this appeal of the assessee is as regards to disallowance of job work charges paid without deduction of TDS by

invoking provisions of Sec.40(a)(ia) of the Act, amounting to Rs.2,61,24,420/-. For this, assessee has raised various grounds, but the issue is only one, hence, grounds need not be re-produced.

3. The brief facts of the case are that the AO during the scrutiny assessment proceedings noticed that the assessee has claimed expenses on account of job work charges paid to the master weavers to the extent of Rs.2,61,24,420/-. The assessee has not deducted TDS on the job work charges to claim the same as expenses. Therefore, the AO noted that the assessee failed to deduct TDS as required under Chapter-XVIIIB of the Act and therefore, invoked the provisions of Sec.40(a)(ia) of the Act, made disallowance of this amount of Rs.2,61,24,420/-.

4. Aggrieved, the assessee preferred an appeal before the Ld.CIT(A), who also confirmed the disallowance made by the AO by stating that since the amounts paid towards job work charges to master weavers comes within the preview of provisions of Sec.40(a)(ia) of the Act. The AO has rightly disallowed the same u/s.40(a)(ia) of the Act. Aggrieved, the assessee came in the second appeal before the Tribunal.

5. This appeal was fixed for hearing at least 20 times since 03.09.2018. None was present from the assessee side except on few occasions for seeking adjournment. Hence, we decide the appeal *exparte qua* assessee. On the other hand, the Sr.DR relied on the orders of the lower authorities. We noted that all the arguments raised in the grounds

of appeal by the assessee are already been considered by the decisions of various High Courts viz., the Hon'ble Punjab & Haryana High Court in the case of PMS Diesels v. CIT reported in [2015] 374 ITR 562 (P&H), the Hon'ble Calcutta High Court in the case of CIT v. Crescent Export Syndicate reported in [2013] 1 ITR-OL 1 (Cal), the Hon'ble High Madras Court in the case of Tube Investments of India Ltd. v. ACIT reported in (TDS) [2010] 325 ITR 610 (Mad) and also by the decision of the Hon'ble Supreme Court in the case of M/s.Palam Gas Service v.CIT reported in (2017) 394 ITR 300, wherein, it has been held in Para Nos.10-17 as under:

10. As per Section 194C, it is the statutory obligation of a person, who is making payment to the sub-contractor, to deduct tax at source at the rates specified therein. Plain language of the Section suggests that such a tax at source is to be deducted at the time of credit of such sum to the account of the contract or at the time of payment thereof, whichever is earlier. Thus, tax has to be deducted in both the contingencies, namely, when the amount is credited to the account of the contractor or when the payment is actually made. Section 200 of the Act imposes further obligation on the person deducting tax at source, to deposit the same with the Central Government or as the Board directs, within the prescribed time.

A conjoint reading of these two Sections would suggest that not only a person, who is paying to the contractor, is supposed to deduct tax at source on the said payment whether credited in the account or actual payment made, but also deposit that amount to the credit of the Central Government within the stipulated time. The time within which the payment is to be deposited with the Central Government is mentioned in Rule 30(2) of the Rules.

11. The Punjab & Haryana High Court in P.M.S. Diesels &Ors. v. Commissioner of Income Tax - 2, Jalandhar &Ors., (2015) 374 ITR 562, has held these provisions to be mandatory in nature with the following observations:

"The liability to deduct tax at source under the provisions of Chapter XVII is mandatory. A person responsible for paying any sum is also liable to deposit the amount in the Government account. All the sections in Chapter XVII-B require a person to deduct the tax at source at the rates specified therein. The requirement in each of the sections is preceded by the word "shall". The provisions are, therefore, mandatory. There is nothing in any of the sections that would warrant our reading the word "shall" as "may". The point of time at which the deduction is to be made also establishes that the provisions are mandatory. For instance, under Section 194C, a person responsible for paying the sum is required to deduct the tax "at the time of credit of such sum to the account of the contractor or at the time of the payment thereof."

While holding the aforesaid view, the Punjab & Haryana High Court discussed the judgments of the Calcutta and Madras High Courts, which had taken the same view, and concurred with the same, which is clear from the following discussion contained in the judgment of the Punjab & Haryana High Court:

"A Division Bench of the Calcutta High Court in *Commissioner of Income Tax v. Crescent Export Syndicate*, (2013) 216 Taxman 258 (Calcutta) held:-

"13.....

"The term 'shall' used in all these sections make it clear that these are mandatory provisions and applicable to the entire sum contemplated under the respective sections. These sections do not give any leverage to the assessee to make the payment without making TDS. On the contrary, the intention of the legislature is evident from the fact that timing of deduction of tax is earliest possible opportunity to recover tax, either at the time of credit in the account of payee or at the time of payment to payee, whichever is earlier."

Ms. Dhugga invited our attention to a judgment of the Division Bench of Madras High Court in *Tube Investments of India Ltd. v. Assistant Commissioner of Income-Tax (TDS)*, [2010] 325 ITR 610 (Mad). The Division Bench referred to the statistics placed before it by the Department which disclosed that TDS collection had augmented the revenue. The gross collection of advance tax, surcharge, etc. was Rs.2,75,857.70 crores in the financial year 2008-09 of which the TDS component alone constituted Rs. 1,30,470.80 crores. The Division Bench observed that introduction of Section 40(a)(ia) had achieved the objective of augmenting the TDS to a substantial extent. The Division Bench also observed that when the provisions and procedures relating to TDS are scrupulously applied, it also ensured the identification of the payees thereby confirming the network of assesseees and that once the assesseees are identified it would enable the tax collection machinery to bring within its fold all such persons who are liable to come within the network of tax payers. These objects also indicate the legislative intent that the requirement of deducting tax at source is mandatory. The liability to deduct tax at source is, therefore, mandatory."

13. The aforesaid interpretation of Sections 194C conjointly with Section 200 and Rule 30(2) is unblemished and without any iota of doubt. We, thus, give our imprimatur to the view taken. As would be noticed and discussed in little detail hereinafter, the Allahabad High Court, while interpreting Section 40(a)(ia), did not deal with this aspect at all, even when it has a clear bearing while considering the amplitude of the said provision.

14. In the aforesaid backdrop, let us now deal with the issue, namely, the word 'payable' in Section 40(a)(ia) would mean only when the amount is payable and not when it is actually paid. Grammatically, it may be accepted that the two words, i.e. 'payable' and 'paid', denote different meanings. The Punjab & Haryana High Court, in *P.M.S. Diesels & Ors.*, referred to above, rightly remarked that the word 'payable' is, in fact, an antonym of the word 'paid'. At the same time, it took the view that it was not significant to the interpretation of Section 40(a)(ia). Discussing this aspect further, the Punjab & Haryana High Court first dealt with the contention of the assessee that Section 40(a)(ia) relates only to those assesseees who follow the mercantile system and does not cover the cases where the assesseees follow the cash system. Those contention was rejected in the following manner:

"There is nothing that persuades us to accept this submission. The purpose of the section is to ensure the recovery of tax. We see no indication in the section that this object was confined to the recovery of tax from a particular type of assessee or assesseees following a particular accounting practice. As far as this provision is concerned, it appears to make no difference to the Government as to the accounting system followed by the assesseees. The Government is interested in the recovery of

taxes. If for some reason, the Government was interested in ensuring the recovery of taxes only from assesseees following the mercantile system, we would have expected the provision to so stipulate clearly, if not expressly. It is not suggested that assesseees following the cash system are not liable to deduct tax at source. It is not suggested that the provisions of Chapter XVII-B do not apply to assesseees following the cash system. There is nothing in Chapter XVII-B either that suggests otherwise.

Our view is fortified by the Explanatory Note to Finance Bill (No.2) of 2004. Sub-clause (ia) of clause (a) of Section 40 was introduced by the Finance Bill (No. 2) of 2004 with effect from 01.04.2005. The Explanatory Note to Finance Bill-2004 stated:-

'With a view to augment compliance of TDS provisions, it is proposed to extend the provisions of section 40(a)(i) to payments of interest, commission or brokerage, fees for professional services or fees for technical services to residents, and payments to a resident contractor or sub-contractor for carrying out any work (including supply of labour for carrying out any work), on which tax has not been deducted or after deduction, has not been paid before the expiry of the time prescribed under sub-section(1) of section 200 and in accordance with the other provisions of Chapter XVII-B.'

The adherence to the provisions ensures not merely the collection of tax but also enables the authorities to bring within their fold all such persons who are liable to come within the network of tax payers. The intention was to ensure the collection of tax irrespective of the system of accounting followed by the assesseees. We do not see how this dual purpose of augmenting the compliance of Chapter XVII and bringing within the Department's fold tax payers is served by confining the provisions of Section 40(a)(ia) to assesseees who follow the mercantile system. Nor do we find anything that indicates that for some reason the legislature intended achieving these objectives only by confining the operation of Section 40(a)(ia) to assesseees who follow the mercantile system.

The same view was taken by a Division Bench of the Calcutta High Court in *Commissioner of Income Tax v. Crescent Export Syndicate*, (supra). It was held:-

"It is noticeable that Section 40(a) is applicable irrespective of the method of accounting followed by an assessee. Therefore, by using the term 'payable' legislature included the entire accrued liability. If assessee was following mercantile system of accounting, then the moment amount was credited to the account of payee on accrual of liability, TDS was required to be made but if assessee was following cash system of accounting, then on making payment TDS was to be made as the liability was discharged by making payment. The TDS provisions are applicable both in the situation of actual payment as well of the credit of the amount. It becomes very clear from the fact that the phrase, 'on which tax is deductible at source under Chapter XVII-B', was not there in the Bill but incorporated in the Act. This was not without any purpose.

15. " We approve the aforesaid view as well. As a fortiorari, it follows that Section 40(a)(ia) covers not only those cases where the amount is payable but also when it is paid. In this behalf, one has to keep in mind the purpose with which Section 40 was enacted and that has already been noted above. We have also to keep in mind the provisions of Sections 194C and 200. Once it is found that the aforesaid Sections mandate a person to deduct tax at source not only on the amounts payable but also when the sums are actually paid to the contractor, any person who does not adhere to this statutory obligation has to suffer the consequences which are stipulated in the Act itself. Certain consequences of failure to deduct tax at source from the payments made, where tax was to be deducted at source or failure to pay the same to the credit of the Central Government, are stipulated in Section 201 of the Act. This Section provides that in that contingency, such a person would be deemed to be an assessee

in default in respect of such tax. While stipulating this consequence, Section 201 categorically states that the aforesaid Sections would be without prejudice to any other consequences which that defaulter may incur. Other consequences are provided under Section 40(a)(ia) of the Act, namely, payments made by such a person to a contractor shall not be treated as deductible expenditure. When read in this context, it is clear that Section 40(a)(ia) deals with the nature of default and the consequences thereof. Default is relatable to Chapter XVIIIB (in the instant case Sections 194C and 200, which provisions are in the aforesaid Chapter). When the entire scheme of obligation to deduct the tax at source and paying it over to the Central Government is read holistically, it cannot be held that the word 'payable' occurring in Section 40(a)(ia) refers to only those cases where the amount is yet to be paid and does not cover the cases where the amount is actually paid. If the provision is interpreted in the manner suggested by the appellant herein, then even when it is found that a person, like the appellant, has violated the provisions of Chapter XVIIIB (or specifically Sections 194C and 200 in the instant case), he would still go scot free, without suffering the consequences of such monetary default in spite of specific provisions laying down these consequences. The Punjab & Haryana High Court has exhaustively interpreted Section 40(a)(ia) keeping in mind different aspects. We would again quote the following paragraphs from the said judgment, with our complete approval thereto:

"Further, the mere incurring of a liability does not require an assessee to deduct the tax at source even if such payments, if made, would require an assessee to deduct the tax at source. The liability to deduct tax at source under Chapter XVII-B arises only upon payments being made or where so specified under the sections in Chapter XVII, the amount is credited to the account of the payee. In other words, the liability to deduct tax at source arises not on account of the assessee being liable to the payee but only upon the liability being discharged in the case of an assessee following the cash system and upon credit being given by an assessee following the mercantile system. This is clear from every section in Chapter XVII.

Take for instance, the case of an assessee, who follows the cash system of accounting and where the assessee who though liable to pay the contractor, fails to do so for any reason. The assessee is not then liable to deduct tax at source. Take also the case of an assessee, who follows the mercantile system. Such an assessee may have incurred the liability to pay amounts to a party. Such an assessee is also not bound to deduct tax at source unless he credits such sums to the account of the party/payee, such as, a contractor. This is clear from Section 194C set out earlier. The liability to deduct tax at source, in the case of an assessee following the cash system, arises only when the payment is made and in the case of an assessee following the mercantile system, when he credits such sum to the account of the party entitled to receive the payment.

The government has nothing to do with the dispute between the assessee and the payee such as a contractor. The provisions of the Act including Section 40 and the provisions of Chapter XVII do not entitle the tax authorities to adjudicate the liability of an assessee to make payment to the payee/other contracting party. The appellant's submission, if accepted, would require an adjudication by the tax authorities as to the liability of the assessee to make payment. They would then be required to investigate all the records of an assessee to ascertain its liability to third parties. This could in many cases be an extremely complicated task especially in the absence of the third party. The third party may not press the claim. The parties may settle the dispute, if any. This is an exercise not even remotely required or even contemplated by the section."

16. As mentioned above, the Punjab & Haryana High Court found support from the judgments of the Madras and Calcutta High Courts taking identical view and by extensively quoting from the said judgments.

17. Insofar as judgment of the Allahabad High Court is concerned, reading thereof would reflect that the High Court, after noticing the fact that since the amounts had already been paid, it straightaway concluded, without any discussion, that Section 40(a)(ia) would apply only when the amount is 'payable' and dismissed the appeal of the Department stating that the question of law framed did not arise for consideration. No doubt, the Special Leave Petition thereagainst was dismissed by this Court in limine. However, that would not amount to confirming the view of the Allahabad High Court (See V.M. Salgaocar & Bros. (P) Ltd. v. Commissioner of Income Tax, (2000) 243 ITR 383 and Supreme Court Employees Welfare Association v. Union of India, (1989) 4 SCC 187.

6. In view of the above, respectfully following the above case laws, we find that non-deduction of TDS will attract the provisions of Sec.40(a)(ia) of the Act. Therefore, we find no infirmity in the orders of the AO & the Ld.CIT(A) and hence, the appeal filed by the assessee is dismissed.

7. In the result, the appeal filed by the assessee is dismissed.

Order pronounced on the 28th day of March, 2022, in Chennai.

Sd/-
(मनोज कुमार अग्रवाल)
(**MANOJ KUMAR AGGARWAL**)
लेखा सदस्य / **ACCOUNTANT MEMBER**

Sd/-
(महावीर सिंह)
(**MAHAVIR SINGH**)
उपाध्यक्ष / **VICE PRESIDENT**

चेन्नई/Chennai,
दिनांक/Dated: 28th March, 2022.
TLN

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

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|-----------------------------|------------------------|
| 1. अपीलार्थी/Appellant | 4. आयकरआयुक्त/CIT |
| 2. प्रत्यर्थी/Respondent | 5. विभागीयप्रतिनिधि/DR |
| 3. आयकरआयुक्त (अपील)/CIT(A) | 6. गार्डफाईल/GF |