

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“SMC” “C” BENCH: BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**

ITA No.1172/Bang/2022
Assessment Year: 2019-20

Khadari Syyeadhusenpeera Syyeadkhajaamin Prop. SPR Transport Amingad Karnataka 587112  <b>PAN NO : AOBPK1491C</b>	<b>Vs.</b>	ADIT CPC Bangalore
<b>APPELLANT</b>		<b>RESPONDENT</b>

<b>Appellant by</b>	:	Shri Siddesh Nagaraj Gaddi, A.R.
<b>Respondent by</b>	:	Shri Ganesh R. Gale, Standing Counsel for Department

<b>Date of Hearing</b>	:	16.01.2023
<b>Date of Pronouncement</b>	:	23.01.2023

**O R D E R**

**PER CHANDRA POOJARI, ACCOUNTANT MEMBER:**

This appeal by the assessee is directed against order of CIT(A) Bengaluru-11 dated 25.3.2022 for the assessment year 2019-20. The assessee has raised following grounds of appeal:-

1. *“The impugned intimation passed by the Assistant Director of Income Tax, CPC, Bangalore (the AO), as upheld by the Commissioner of Income Tax (Appeals) - 11 (the CIT(A)), to the extent prejudicial to the Appellant, is not justified in law and on facts and circumstances of the case;*
2. *The Learned CIT(A) & AO has exceeded jurisdiction in incorporating adjustments which are not covered within the scope of section 143(1) of the Act;*

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3. *The Learned CIT(A) and AO have erred in law and on facts in making addition under section 40(a)(ia) of the Act;*
4. *The Learned CIT(A) has erred in law and on facts in imposing conditions which are not prevalent in the Act;*
5. *The Learned AO/ CIT(A) have erred in not granting the benefit of brought forward losses.*
6. *The Learned CIT(A) and AO have erred in law and on facts in reducing the refund due to the Assessee;*  
*(Total tax effect: Rs. Rs.6,41,510/-)*

*On the basis of above grounds and other grounds which may be urged at the time of hearing with the consent of the Honourable Tribunal, it is- prayed that the order passed under section 143(1) read with section 250, to the extent it is against the Appellant, be quashed and relief sought be granted.”*

2. Facts of the case are that the assessee has filed his return of income on 27.11.2019 declaring nil income after adjustment of brought forward losses of Rs.36,06,729/-. The return of income was processed by the Deputy Commissioner of Income-tax, CPC, Bengaluru on 14.05.2020. The total income of the assessee was determined at Rs.26,81,120/- by the AO.

3. Against this assessee went in appeal before CIT(A). The Ld. CIT(A) observed that the assessee claimed benefit under second proviso to Section 40(a)(ia) of the Income-tax Act,1961 [‘the Act’ for short], which was inserted by the Finance Act, 2012 w.e.f. 1.4.2013, which reads as follows:-

*“ Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso.”*

4. According to the Id. CIT(A), the said benefit available to the assessee had the assessee filed Form No.26A along with Annexure-A before DGIT (Systems) or the person authorized by him on necessary

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verification of same under Rule 31ACB (2) of the I.T. Rules. Since no such action has been taken by the assessee to file Form No.26A along with Annexure-A before the DGIT (Systems), the claim of assessee under second proviso to section 40(a)(ia) of the Act has been denied. Further, it was observed by Id. CIT(A) that the judgement of the Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverages Vs. CIT (293 ITR 226) have no application to the facts of the assessee's case. Accordingly, he confirmed the order of the AO making addition u/s 40(a)(ia) of the Act. Against this assessee is in appeal before us.

5. At the outset, it is observed that there was a delay of 216 days in filing the appeal before this Tribunal. The assessee has filed a condonation petition along with petition for condonation of the delay stating that the Id. CIT(A)'s order dated 25.3.2022 was received by assessee on same day i.e. 25.3.2022. The assessee has to file appeal before this Tribunal by 60 days from the date of receipt of Id. CIT(A)'s order which expires on 24.5.2022. However, this appeal has been filed before this Tribunal on 26.12.2022. Thus, there was delay of 216 days in filing the appeal before this Tribunal. It was submitted that the assessee has given the CIT(A)'s order and supporting documents to assessee's counsels Shri Prakashchandra Saremalji Jain and Shri Amit Jain to take appropriate steps to file appeals before this Tribunal. However, Shri Prakashchandra's mother or grandmother of Shri Amit Jain who was suffering from Cancer and thus Chartered Accountants were busy in taking medical care of Smt. Porwal Shukhi Bai, who was finally expired due to the said ailment on 13.11.2022 and hence, it was due to the personal emergency of assessee's consultants and the delay caused was not intentional or wanton and same may be condoned in the interest of justice.

6. On the other hand, the ld. D.R. strongly opposed the admission of appeal before this Tribunal and said that there was no confirmation from the Chartered Accountants that they are handling the assessee's case.

6.1 He also relied on the order of the Tribunal in the case of Dr. Raveendra M. Madraki Vs. ITO Ward-1 Bagalkot in ITA No.670/Bang/2019 dated 10.2.2022 for the AY 2014-15, wherein this Tribunal held as under:

*6. We have heard both the parties and gone through the petition filed by the assessee, his affidavit and also the confirmation letter filed by Advocate, Mr. Prakash R. Badiger. The assessee explained the delay of 310 days on the reason that on the advise of his CA, he handed over the appeal papers to Prakash R. Badiger, Advocate, Dharwad who failed to take necessary steps to file appeal before this Tribunal and thereafter he engaged M/s. K.R. Prasad, Advocates, Bangalore to file appeal. The assessee also furnished a confirmation letter from Mr. Prakash R. Badiger, Advocate, Bangalore stating that due to eagerness or immaturity, he accepted the income tax brief, but not able to deliver and there was a delay from his end.*

*7. However, the assessee has not produced any evidence of his CA, Mr. Sharanagouda Patil who advised assessee to contact Mr. Badiger, Advocate. Further, there is no evidence to suggest about the date of handing over the documents to Advocate and it is not mentioned what are the papers given to Mr. Badiger for preparation of filing of appeal and what is the advise given to the assessee during this 310 days. There is no material to suggest to suggest the professional charges so as take up filing of appeal before the Tribunal. The assessee has failed to bring any material on record to prove his bonafide attempt in filing the appeal. The assessee merely furnished one letter from Mr. Badiger, Advocate for seeking condonation of delay in filing the appeal along with affidavit. Except these, the assessee has not brought out any other material to prove his bonafide attempts to file the appeal. In our opinion, the assessee has not acted with due diligence in prosecuting the appeal. On the other hand, the assessee was negligent in his attitude in taking steps to file the appeal. In the absence of any evidence to prove the bonafides of the assessee, except the self-serving documents, the inordinate delay of 310 days in filing the appeal before the Tribunal cannot be condoned. There are 3 persons involved in this case viz., the assessee, his CA Shri Sharanagouda Patil and Shri Prakash R. Badiger, Advocate, who are required to explain the delay. They are not illiterate and they very well know the law. Ignorance of law is no excuse. We may refer to the judgment of the Hon'ble Supreme Court in the case of The Swadeshi Cotton*

*Mills Co. Ltd. v. The Govt. of UP & Ors. (1975) 4 SCC 378 wherein it was held as follows:-*

*“..... But we are in agreement with the High Court on the other two grounds. As mentioned earlier, the impugned assessments were made in 1949. The writ petition was filed in 1956. The explanation given by the petitioner for this long delay is that he did not know the correct legal position and he came to know about the same after the decision of the Allahabad High Court in the Commissioner of Sales Tax, U.P. Vs. Modi Food Products Ltd. Every individual is deemed to know the law of the land. He courts merely interpret the law and do not make law. Ignorance of law is not an excuse for not taking appropriate steps within limitation. Therefore the argument that the appellant did not know the true legal position is not one that can be accepted in law. ....”*

8. *Further, in the present case, there is no denial on the part of the assessee about the service of the order on the assessee and after receipt of the order of the CIT(Appeals), to whom the assessee wants to entrust the work of filing appeal before the Tribunal is his own concern and this explanation does not constitute sufficient ground to condone the delay. Therefore, we find no merit in the application for condonation of delay. Accordingly, we are of the considered view that the assessee has failed to make out a sufficient and reasonable cause for condonation of delay and reject the petition for condonation of delay. Being so, we refrain from going into other grounds of appeal on merits.*

9. *In the result, the appeal of the assessee is dismissed in limine.*

Hence, he submitted that this appeal of the assessee is to be dismissed in limine.

7. I heard the rival submissions and perused the materials available on record. The assessee has filed an affidavit stating the reason that the delay was due to personal emergency of assessee's Chartered Accountants and explained the delay as unintentional or wanton and the department has not filed any affidavit countering the averments made by assessee in its affidavit. Being so, in the interest of justice, I admit the appeal for adjudication.

7.1 With regard to merit of the issue raised by the assessee, the ld. A.R. submitted that the issue was squarely covered by the order of

the Tribunal in the case of Sanjay Kumar Agrawal in ITA No.15 & 16/CTK/2020 dated 24.6.2020, wherein held as under:

“9. *After hearing both the sides and perusing the material available on record and the orders of lower authorities, It is noticed that the assessee has incurred expenditure without deducting TDS under the head ‘Crane Expenses’ for both the assessment years under consideration. It is observed form the assessment order that the assessee has paid crane charges to one Saurav Mittal, without deducting tax at source and nor the assessee submitted the Form 26A to the prescribed authority as per rules. The coordinate bench of the Tribunal in case of Jai Mata Di Vs. ITO, ITA No.508/CTK/2017, order dated 23.04.2018, has decided the similar issue in favour of the assessee which reads as under:-*

*“7. We have heard the rival submissions, perused the orders of lower authorities and materials available on record. We find that the Mumbai Bench Á' of the Tribunal in the case of Karwat Steel Traders vs ITO, 145 ITD 370 (Mum) has held as under:*

*"The amount cannot be allowed as deduction only in the event when tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction has not been paid. In this case, the assessee was to deduct tax under provisions of section 194A. Section 194A is further qualified by the provisions of section 197A(1A) wherein if a person furnishes a declaration in writing in prescribed Form and verified in the prescribed manner to the effect that tax on his estimated total income is to be included in computing his total income will be nil there is no need to deduct tax. The assessee has received such forms as prescribed from those persons to whom interest was paid/being paid and, accordingly, no deduction of tax was to be made in such cases. The default for non-furnishing of the declarations to the Commissioner as prescribed may result in invoking penalty as per provisions under section 272 A(2)(i), for which separate provision/procedure was prescribed under the Act. However, once Form 15G/Form 15H was received by the person responsible for deducting tax, there is no liability to deduct tax. Once there is no liability to deduct tax, it cannot be considered that tax is deductible at source under Chapter XVII-B as prescribed under section 40 (a)(ia). The provisions of section 40(a)(ia) can only be invoked in a case where tax is deductible at source and such tax has not been deducted or after deduction has not been paid. No such default occurred in this case. Accordingly, the provisions of section 40(a)(ia) are not applicable to the facts of the case. Both the Assessing Officer and Commissioner (Appeals) erred in considering that non-filing of form 15H invites disallowance under section 40(a)(ia).*

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*Suffice to say that on the facts of the case, there is no need to deduct tax at source and thus, there is no default committed by the assessee. Accordingly, disallowance under section 40(a)(ia) does not arise. Non-filing or delayed filing of such forms cannot result in disallowance under section 40(a)(ia). The grounds raised by assessee are allowed. Assessing Officer is directed to modify the order accordingly"*

*In the instant case, we find that it is not in dispute that the assessee filed Form 26A together with income tax return of the recipients of the amount before the CIT(A). The only ground for rejecting the explanation of the assessee was that the said Form was not filed with Director General of Income Tax (Systems) or his authorised persons. Hence, in our considered view, for non-filing of the said Form before the Director General of Income Tax (Systems), the assessee can be visited with penalty as provided under the income [Tax Act](#) but no disallowance of the expenditure can be made u/s.40(a)(ia) of the Act in view of the above quoted decision of the Tribunal in the case of Karwat Steel Traders (supra). Hence, we set aside the order of the CIT(A) and delete the addition of Rs.2,24,662/- and Rs.11,24,266/- made by the Assessing Officer."*

10. *I, respectfully following the above decision of the coordinate bench of the Tribunal, direct the AO to delete the addition made u/s.40(a)(ia) of the Act for both the years under consideration. However, I found substance in the arguments advanced by the ld. DR regarding interest payable by the assessee u/s.201(1A) of the Act. Accordingly, the assessee could not be escaped from the payment of interest as per section 201(1A) of the Act for delayed payment of tax which was required to be made within the stipulated time. Hence, the assessee is directed to pay interest as per Section 201(1A) of the Act on the amounts made to Saurav Mittal of Rs.2,76,000/- for A.Y.2012-2013 and Rs.3,30,000/- for A.Y.2013-2014, respectively on account of crane charges.*

11. *In the result, both appeals of the assessee are allowed."*

7.2 Admittedly, the issue is squarely covered by the order of the Cuttack Bench cited (supra). However, in the present case, the lower authorities have not examined the Form No.26A filed by the assessee and at the outset, they dismissed the contention of the assessee holding that filing form No.26A along with Annexure A before DGIT (Systems) is mandatory and the assessee cannot be granted with the deduction of expenditure, wherein there was no deduction of TDS by

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assessee. In my opinion, the claim of the assessee under second proviso to section 40(a)(ia) of the Act is to be examined with reference to form No.26A filed by the assessee before Id. CIT(A) as the Cuttack bench in its decision cited (supra) has observed that filing of form No.26A along with Annexure-A before CIT(A) is due compliance of proviso to section 40(a)(ia) read with Rule 31ACB, hence, in the interest of justice, we remit the entire issue to the file of AO to examine form No.26A along with Annexure-A so as to grant benefit under second proviso to section 40(a)(ia) of the Act. Accordingly, the orders of the lower authorities are set aside and the issue in dispute is remitted to AO to re-examine the issue in the light of above directions.

8. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 23<sup>rd</sup> Jan, 2023

**Sd/-**  
**(Chandra Poojari)**  
**Accountant Member**

Bangalore,  
Dated 23<sup>rd</sup> Jan, 2023.  
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

**Asst. Registrar,  
ITAT, Bangalore.**