

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "C", MUMBAI**

**BEFORE SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER AND  
SHRI SANDEEP SINGH KARHAIL, HON'BLE JUDICIAL MEMBER**

**ITA.NO.2372/MUM/2022 (A.Y: 2017-18)**

Pennwalt Private Limited {Formerly known as Pennwalt Limited} D-221, TTC-MIDC Industrial Area Thane Belapur Road Navi Mumbai, Thane- 400706  <b>PAN: AAACP6840L</b>	v.	ACIT – Circle – 7(3)(2) Mumbai
<b>(Appellant)</b>		<b>(Respondent)</b>

<b>Assessee Represented by</b>	:	<b>Shri Chetan Agrawal</b>
<b>Department Represented by</b>	:	<b>Shri Satyaprakash Singh</b>
<b>Date of Hearing</b>	:	<b>08.12.2022</b>
<b>Date of Pronouncement</b>	:	<b>17.02.2023</b>

**ORDER**

**PER S. RIFAUR RAHMAN (AM)**

**1.** This appeal is filed by the assessee against order of the Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter in short "Ld.CIT(A)"] dated 20.07.2022 for the A.Y.2017-18.

**2.** Brief facts of the case are, assessee filed its return of income on 30.10.2017 declaring total income of ₹.11,11,18,450/. The case was selected for 'Limited Scrutiny' under CASS for the following reasons: -

- (i). *Default in TDS or payment of TDS made.*
- (ii). *Expenses incurred for earning exempt income.*
- (iii). *Custom Duty paid.*

**3.** Subsequently notice u/s. 143(2) and 142(1) of Income-tax Act, 1961 (in short "Act") were issued and served on the assessee. In response, assessee filed various details through e-portal from time to time. The assessee is engaged in the business of manufacturing of special purpose machinery, etc., during the assessment, Assessing Officer observed that assessee has made short deduction of TDS of ₹.7,22,710/- and including the default on interest as well as late filing fee put together the total default was of ₹.7,81,598/-. Assessing Officer observed that assessee vide letter dated 19.11.2018 submitted the details of default to the sales commission payments made to an UAE based company i.e., related concern namely Pennwalt Middleast FZE of ₹.72.27,108/. The assessee submitted that it had deducted income tax @ of 20% on the above said payment. However, the assessee was liable to deduct income tax @30% on the above said commission. In this regard, a show-cause notice dated

30.07.2019 was issued to the assessee for disallowance u/s.40(a)(ia) of the Act through e-portal. In response, assessee submitted that the aforesaid demand in default was raised by the TDS-CPC which, on rectification by CPC, was removed in totality by order dated 19.01.2019.

**4.** In this regard, Assessing Officer observed that in the rectification order CPC has accepted the submissions of the assessee and nowhere in the order it was mentioned that on what ground the deduction of income tax @20% was accepted by the CPC. By observing that the related concern (Pennwalt Middleeast FZE) to the assessee company and remittance to such related concern, as the income is arising in India in the form of 'commission' through a business connection. Accordingly, provisions laid down in section 195 of the Act is attracted and accordingly, assessee was liable to deduct income-tax @30% not 20%. Accordingly, he proceeded to disallow 30% of the total commission which comes to ₹.21,68,132/- u/s 40(a)(ia) of the Act.

**5.** Aggrieved assessee preferred an appeal before the Ld.CIT(A) and Ld.CIT(A) after considering the detailed submissions of the assessee sustained the addition with the following observations: -

"4.2. I have carefully examined the assessment order u/s 143(3) and reply filed by the appellant during the appellate proceedings. From the perusal assessment order it is seen that appellant has paid commission to UAE based company namely Pennwalt Middle East FZE of Rs 72,27,108/-. The appellant has deducted TDS @ of 20% on this commission payment. The AO has stated that the appellant was liable to pay Income Tax @ of 30% on the commission payment to the foreign entity. The AO has given his finding in assessment order that section 9 of the IT Act applicable in respect of the appellant's remittance to foreign entity Pennwalt Middle East FZE as the income arising in India in the form of 'commission' through a business connection. Further, it has been held by the AO that as per the provision laid down in the section 195 of the IT Act, the appellant was liable to deduct income tax on the sum paid to the foreign entity at the 'rates in force'. which was 30% and not 20% as claimed by the appellant. Hence, AO has stated that the appellant could not comply with the provision of section 195 of the IT Act in respect of income tax deduction on payment made to foreign entity, 30% of said expenses which comes to Rs. 21,68,132/- was disallowed u/s 40(a)(ia) of the IT Act.

4.3. The appellant has challenged the disallowance of 30% of commission payment to foreign entity and has stated that it has complied with the provision of the law. I have duly considered the reply of the appellant. It is seen that the appellant has made income tax deduction @ of 20% of the commission paid the foreign entity. 1.20% of the There is no denying the fact that income tax rate in force on commission payment to the foreign entity is 30%. The invocation of section 40(a)(ia) of the IT Act by the AO is in accordance with provision of law. Hence, disallowances by the AO of 30% of commission payment amounting to Rs. 21,68,132/- is upheld. Therefore, this ground of appeal is dismissed."

**6.** Aggrieved, assessee preferred appeal before us raising following grounds in its appeal: -

"1. In law and in the facts and circumstances of the appellant's case, the learned CIT(A) has erred in dismissing ground no 1 as raised by the appellant with regards to disallowance made u/s 40(a)(ia) of Rs. 21,68,132/- of the Act being 30% of export commission paid for short deduction of TDS @ 20% instead of 30%, without considering the legal position on applicability of TDS provisions on export commission.

*1.1. In law and in the facts and circumstances of the appellant's case, the learned CIT(A) has erred in not considering several authorities which have consistently held that commission payable to Non-residents was not taxable in India in absence of any Permanent Establishment/ Business connection in India and accordingly the question of withholding tax u/s 195 does not arise.*

*1.2. Without prejudice to the above, in law and in the facts and circumstances of the appellant's case, the Ld. CIT(A) ought to have appreciated that no disallowance has been made by the AO having jurisdiction u/s. 195(1) and accordingly no disallowance can be made u/s 40(a)(ia) in view of the CBDT's circular No.3/2015.*

*2. The appellant craves leave to add, alter, amend and/or withdraw any ground or grounds of appeal either before or at the time of hearing of the appeal."*

**7.** At the time of hearing, Ld. AR submitted that assessee has made overseas commission payments to its related concern. Since the concern does not have a PAN in India assessee has to deduct tax @20%. However, the Assessing Officer observed that assessee has short deducted the TDS without considering the TDS-CPC order, he has proceeded to disallow the 30% of the commission u/s. 40(a)(ia) of the Act. Ld. AR submitted that in short the contention of the Assessing Officer is that assessee has short deducted the Income Tax. In such short deduction of income tax, the Assessing Officer cannot invoke the provisions of section 40(a)(ia) of the Act by relying on the decision of the Hon'ble Calcutta High Court in the case of CIT v. M/s. S.K. Tekriwal in ITAT NO. 183 of 2012 dated 03.12.2012.

8. On the other hand, Ld. DR relied on the decision of the lower authorities.

9. Considered the rival submissions and material placed on record, we observe from the record that assessee has deducted TDS @20% instead of 30%. It is the case of short deduction of TDS and the Assessing Officer has invoked section 40(a)(ia) of the Act to disallow proportionate short deduction of Income Tax. On careful consideration of the facts, we observe that Hon'ble Calcutta High Court has considered the similar issue and held as under: -

*"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 40a(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% 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 Ld. CIT, DR also argued that there is no word like failure used in section 40(a)(a) of the Act and it referred to only non-deduction of tax and disallowance of such payments. According to him, it does not refer to genuineness of the payment or otherwise but addition u/s. 40(a)(ia) can be made even though 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 bonafide 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. 1941 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 (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.*

*Accordingly, we confirm the order of CIT (A) allowing the claim of assessee and this issue of revenue's appeal is dismissed."*

**10.** Respectfully following the above said decision of the Hon'ble Calcutta High Court, we allow the ground raised by the assessee.

**11.** In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 17<sup>th</sup> February, 2023

Sd/-  
**(SANDEEP SINGH KARHAIL)**  
**JUDICIAL MEMBER**

Mumbai / Dated 17/02/2023  
Giridhar, Sr.PS

Sd/-  
**(S. RIFAUH RAHMAN)**  
**ACCOUNTANT MEMBER**

**Copy of the Order forwarded to:**

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

//True Copy//

BY ORDER

(Asstt. Registrar)  
**ITAT, Mum**