

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

**SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 858/MUM/2023
(Assessment Year: 2011-12)**

Tirupati Reddy Mukku,

Shop No. 2, Plot No. 9,
Lalsharan CHSL, Near Nityanand Baug CHSL,
Chembur Colony, Mumbai - 400074
[PAN: AJUPM2928A]

..... **Appellant**

**Deputy Commissioner of Income Tax,
27(3), Mumbai**

Vashi, Navi Mumbai - 400705

Vs

..... **Respondent**

Appearance

For the Appellant/Assessee : Shri Nikhil Natekar
For the Respondent/Department : Ms. Richa Gulati

Date : 06.06.2023
Conclusion of hearing : 27.06.2023
Pronouncement of order

ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Appellant has challenged the order, dated 25/01/2023, passed by the Ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2010-11, whereby the Ld. CIT(A) had dismissed the appeal of the Appellant against the Assessment Order, dated 25/10/2016, passed under Section 143(3) read with Section 147 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. The Appellant has raised following grounds of appeal:

"1 The learned Commissioner of Income tax (Appeals) has sustained

the order passed by the Assessing Officer on without considering the fact that tax is already deducted at source and paid to the government treasury and ignoring the fact that tax is deducted at source.

- 2. The Learned Commissioner of Income tax (Appeals) has erred in sustaining the additions made by the assessing officer under section 40(a)(ia) without appreciating various judicial pronouncements wherein no disallowance is made under section 40(a)(ia) of the income tax act if TDS deducted even at lower rates.*
- 3. The Learned ACIT has erred in sustaining the additions made by the assessing officer under section 40(a)(ia) even proportionately on the contention that the act doesn't envisage a situation of partial allowance or disallowance.*
3. The brief facts in brief are that the Appellant is a proprietor of M/s Tirumala Construction, engaged in the work of civil constructions and management of telecom turnkey projects. The Appellant filed return of income for the Assessment Year 2011-12 on 30/09/2011 declaring total income of INR 57,60,090/-. The original return filed by the Appellant was processed under Section 143(1)(a) of the Act. Notice under Section 148 of the Act was issued on 18/02/2013 and assessment was completed under Section 143(3) read with Section 147 of the Act on 28/11/2013 determining total income of the Appellant at INR 1,16,87,760/-. Subsequently, reassessment proceedings were initiated against the Assessee and notice under Section 148 of the Act was issued on 31/03/2016 on the issue of short deduction of tax at source. The Assessing Officer completed the reassessment proceedings under Section 143(3) read with Section 147 of the Act vide order dated 25/10/2016 at total income of INR 1,56,92,247/- after making disallowance of INR 40,04,487/- under Section 40(a)(ia) of the Act.
4. The appeal preferred against the Assessment Order dated 25/10/2016 before CIT(A) was dismissed vide order dated 25/01/2023.

5. Being aggrieved, the Appellant has preferred the present appeal before the Tribunal. All the grounds raised in the appeal are directed against the disallowance of INR 40,04,487/- under Section 40(a)(ia) of the Act and are, therefore, taken up together.
6. We have considered the rival submissions, perused the material on record and analyzed the position in law. It is admitted position that disallowance of INR 40,04,487/- has been made in the hands of the Appellant on account of short-deduction of tax at source by the Appellant under Section 194C of the Act. During the course of hearing, the Learned Authorised Representative for Appellant placed before us the judgment of the Hon'ble Calcutta High Court in the case of Commissioner of Income Tax Vs. S.K. Tekriwal : [2014] 361 ITR 432 (Calcutta). On perusal of the same it emerges that in that case the Hon'ble High Court had dismissed the appeal of the Revenue against the order of the Tribunal holding as under:

"1. We are satisfied that the order under challenge is a just order.

2. The reasoning appearing at paragraph 6 of the judgment and/or order under challenge reads as follows:

"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% 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 Ld. CIT, DR also argued that there is no word 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.

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. 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.

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

3. We find no substantial question of law is involved in this case and therefore, we refuse to admit the appeal. Accordingly, the appeal is dismissed.

4. In view of dismissal of the appeal itself, the connected application has become infructuous and the same is also dismissed."

7. On the other hand, the Learned Departmental Representative had placed reliance on the judgment of the Hon'ble Kerala High Court in the case of Commissioner of Income-tax-1, Kochi Vs. P V S Memorial Hospital Ltd.: [2015] 60 taxmann.com 69 (Kerala) wherein the disallowance of deduction under Section 40(a)(ia) of the Act was upheld by the Hon'ble High Court expressing inability to agree with the judgment of the Hon'ble Calcutta High Court in the case of Commissioner of Income Tax Vs. S.K Tekriwal (supra).
8. However, we note that the above decision of the Hon'ble Calcutta High Court in the case of Commissioner of Income Tax Vs. S.K Tekriwal (supra) has been followed by the Mumbai Bench of the Tribunal in the following cases cited by the Learned Authorised Representative for Appellant – (i) Vijay Cotton Fibre Co. Vs. Joint Commissioner of Income Tax 21(2), [ITA No. 3518 & 3929/Mum/2010, dated 16/01/2013], and (ii) DCIT-14(3)(1), Mumbai Vs. Tag Eco Recycling India Pvt. Ltd. [ITA No. 4160/Mum/2019, Assessment Year 2010-11, dated 23/12/2021],
9. Further, the Hon'ble Delhi High Court has in the case of Principal Commissioner of Income Tax Vs. Oriental Insurance Co. Ltd.: 2022] 447 ITR 299 (Delhi)[14-07-2022], cited by the Learned Authorised Representative for Appellant, has also dismissed the appeal on identical issued raised by the Revenue holding as under:

“5. Further, this Court is of the opinion that in cases of short deduction of TDS, disallowance under section 40a(ia) of the Act cannot be made and the correct course of action would have been to invoke Section 201 of the Act. On similar facts, the Calcutta High Court in CIT v. S.K. Tekriwal [2014] 46 taxmann.com 444/361 ITR 432/[2013] 260 CTR 73/2012 SCC Online CAL 12147 dismissed the Revenue's appeal.”
10. Given the two reasonable interpretation of Section 40(a)(ia) of the

Act taken by the Hon'ble High Courts, we adopt interpretation in favor of the Assessee as was done by the Co-ordinate Bench of the Tribunal in the decision cited by the Ld. Authorised Representative for the Appellant mentioned in paragraph 8 above. Accordingly, we hold that provisions of Section 40(a)(ia) of the Act would not be attracted in the facts and circumstances of this case as there is a shortfall in deduction of tax by the Appellant. In view of the aforesaid we delete the disallowance of INR 40,04,487/- made by the Assessing Officer under Section 40(a)(ia) of the Act. Ground No. 1 to 3 raised by the Appellant is allowed.

11. In result, the present appeal preferred by the Assessee is allowed.

Order pronounced on 27.06.2023.

Sd/-
(S. Rifaur Rahman)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 27.06.2023
Alindra, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai