IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Sanjay Arora, AM & Shri Manomohan Das, JM

ITA No.226/Coch/2012: Asstt.Year:2008-2009

The Assistant Commissioner of Income-tax, Circle 2(2) Ernakulam.	vs.	Time Ads & Publicity 36/1724, Parammel House Shenoy Road, Kaloor Ernakulam – 680 017 [PAN: AACFT- 2946A]
(Appellant)		(Respondent)

ITA No. 27/Coch/2023: Asstt. Year: 2008-2009

Time Ads & Publicity 36/1724, Parammel House Shenoy Road, Kaloor Ernakulam – 680 017 [PAN: AACFT 2946A]	vs.	The Assistant Commissioner of Income-tax, Circle 2(2) Ernakulam.
(Appellant)		(Respondent)

Revenue by: Shri Sajit Kumar Das, CIT-DR
Assessee by: Shri Rajiv Khandelwal, CA

Date of Hearing : 11.07.2023		Date of Pronouncement: 28.08.2023

O R D E R

Per Sanjay Arora, AM:

These are cross appeals, i.e., by the Assessee and the Revenue, in respect of the assessee's assessment under section 143(3) of the Income-tax Act, 1961 ('the Act') dated 23.12.2010 for assessment year (AY) 2008-2009; the first appellate authority, being the Commissioner of Income-tax (Appeals)-2, Kochi [`CIT(A)' for short], having allowed part relief to the assessee vide his order dated 14.5.2012.

2. The case has a chequered history. The assessment entailing, in the main, disallowance u/s.40(a)(ia), for non-deduction of tax at source, i.e., in the sum of Rs.472.60 lakhs (out of a total disallowance of Rs.476.46 lacs effected in assessment), the assessee carried the matter in appeal, whereat it was, following the decision by the Tribunal in *Teja Construction v. Asst. CIT*[2010] 5 taxmann.com 61 (Hyd), allowed substantial relief by the ld.CIT(A). The Tribunal, in second appeal, which was at the instance of the Revenue, vide order dated 31.7.2013, upheld the assessment, restoring both, the disallowances u/s. 40(a)(ia), as well as the disallowance of car expenses for personal user, made at Rs.50,000, which had been sustained in first appeal at Rs.10,000. The assessee carried the matter in appeal to the Hon'ble High Court (ITA No.310/2013) which, vide it's order dated 03.7.2014, set aside the issue of disallowance u/s. 40(a)(ia) back to the file of the Tribunal for consideration afresh. The Tribunal in second round confirmed the disallowance u/s. 40(a)(ia), sustained by the ld. CIT(A) at Rs.10,75,000, i.e., for the balance Rs.4,61,84,752, following, *inter alia*, the decision by the Hon'ble jurisdictional High Court in *Prudential Logistic & Transport v. ITO*(in ITA No.1/2014, dated 13.01.2014 / copy on record), vide order dated 12.12.2014. The assessee again carried the matter in appeal to the Hon'ble High Court which, vide it's order dated 05.02.2015 (in ITA No.36 of 2015), levying a cost of Rs.10,000 on the assessee, again restored the matter back to the file of the Tribunal for a decision on merits. This explains the appeal by the Revenue before us. The assessee's appeal, filed on 10.01.2023, agitates the appellate order dated 14.5.2012, claiming the assessment to have been made at Rs.7,16,68,010, alleging it to be in excess by Rs.1,91,60,958.

3. We have heard parties, and perused the material on record.

3.1 The only issue before us in the Revenue's appeal is the disallowance u/s. 40(a)(ia) to the extent it survives the first appellate order. We begin by examining the decision in *Prudential Logistic & Transport* (supra), followed by the Tribunal on the earlier occasion, which, being by the Hon'ble jurisdictional High Court, would

be, where and to the extent applicable, a binding precedent for us. In the facts of that case, the assessee-appellant challenging the disallowance u/s. 40(a)(ia), contended that the sums on which tax was being claimed by the Revenue to have been omitted to be deducted at source, attracting sec.40(a)(ia), were in fact loans, and not lorry hire or freight charges. The said claim was found false on verification. The second ground taken was that the three parties, of which one was a partner, had in fact disclosed the income in their tax returns. The first objection being without any factual basis, the Hon'ble Court concerned itself with the second objection. The amendment to s.40(a)(ia) providing exception thereto where the assessee is deemed to be not in default under first *proviso* to s.201(1), brought on the statute by Finance Act, 2012, w.e.f. 01.04.2013, it notes, conveys that the requirement on the part of the buyer to deduct tax at source was not so strict, and the mandate of law liable to be regarded as satisfied where it was shown that the payee (or the recipient) had paid tax on the relevant sum (para 5). At para 6, it notes that the assessee had initially taken a different stand, reflecting the impugned sum in it's books as loan, while claiming it as freight in it's return. It was only on the matter being taken up for scrutiny that the real intention of the assessee had come to light. It was never the case of the assessee that there was, pursuant to the amendment, no mandate in law to deduct tax at source. It was in this context that it states that the said amendment was with effect from 01.4.2013, while the year under reference was (fy) 2007-2008. There is no plea as to the retrospective operation, on account of being curative or for mitigating a hardship, before the Hon'ble Court.

A legal issue, it is trite law, can be raised at any stage. So, however, it is only where the relevant facts are on record, or otherwise not in dispute, that a legal ground could be assumed on their basis at any stage, i.e., any appellate authority before whom the matter is alive and being agitated. It is thus an absence of a factual basis for the assessee to raise the legal ground, inferred more as an attempt to bypass the disallowance that the Hon'ble Court regarded that the concession per the amended law, which came much later, would not be available to the assessee. The

same cannot, clearly, be regarded as the *ratio decidendi* of the said decision. As explained in *CIT vs. Prakash Chand Lunia* [2023] 454 ITR 61 (SC), for a precedent to be binding there has to be a conscious consideration of an issue involved.It is, again, well-settled that any person approaching the Court should do so with clean hands. Rather, if anything, the Hon'ble Court observes at para 5 that the requirement for TDS cannot, in view of the amendment, be regarded as strict. It is, again, well settled that it is the *ratio decidendi*, represening the rationale or the principle governing the decision that constitutes the binding precedent. Reference in this context may be made to *Mavilayi Service Co-op. Bank Ltd. v. CIT* [2021] 431 ITR 1 (SC), as well as to *Shri Bhagavati Textiles Ltd v. CIT* [2000] 244 ITR 496 (Ker).

3.2 We, next, consider the decision by the Tribunal in *Teja Construction* (supra), relied upon by the ld.CIT(A). The same not being dealt with by the Tribunal per it's order dated 31.7.2013, was noted by the Hon'ble Court per it's order on 03.7.2014 (at para 16). The said order by the Tribunal, reproduced by the ld.CIT(A) at para 6.1 of his order, draws an exception to TDS provisions for direct expenditure inasmuch as the same is deductible u/s.28(i). It is only the expenditure falling u/ss. 30 to 38 to which the provision of s.40 apply. The said decision, even as observed by the Bench during hearing, ignores sec.29, which provides that income referred to in s.28 shall be computed in accordance with the provisions of ss. 30 to 43D. But for the same, no deduction would be admissible for any expenditure, direct or indirect, in computing business income, which observation is though notional inasmuch as s.29 obtains and, rather, the concept of income itself implies net of expenditure, which though is admissible in terms of the provisions of the Act. Direct expenditure is an accounting concept, which may have relevance in other areas, viz., valuation of goods. There is no concept of direct expenditure *per se* under the Act. As afore-stated, all expenditure, direct or indirect, where incurred *bona fide*, for the purpose of the business, is liable to be deducted in computing business income, subject of course to the limiting provisions of the statute, viz., ss. 40; 40A; 43B, et. al. Any expenditure

not specifically referred to in any section would stand to fall under, as per the provision itself, the residuary section s. 37(1), case law on which is legion. Purchase of goods being traded, for example, would be a direct cost of goods sold, deductible u/s. 37(1). The assessee, in fact, while canvassing so, contradicts itself inasmuch as tax on impugned sums has been deducted and deposited on 29.6.2009, which would entitle it to deduction in respect of the relevant expenditure for the assessment year relevant to the previous year 2009-2010.

3.3 We, next, consider the assessee's alternate plea before us, based on the retrospective operation of the amendment to sec. 40(a)(ia) by Finance Act, 2012, w.e.f. 01.04.2013. And for which it relies on the decision in *CIT v. Ansal Landmark Township Pvt. Ltd*. [2015] 377 ITR 635 (Del), holding that the insertion of the second *proviso* to s. 40(a)(ia) is declaratory and curative in nature, and shall thus have a retrospective effect from 01.4.2005, i.e., the date on which s.40(a)(ia) stands brought on the statute. Even as no contrary decision stands brought to our notice by the Revenue, we are wholly in agreement with the said decision. The reason is that tax deduction at source represents but one of the several modes of recovery of tax. The tax obligation on the payee or the recipient of income, or the Revenue's right to collect tax from him, does not abate on non-deduction of tax at source. As such, visiting the assessee-payer with a consequence of including the sum paid as his income and collecting tax there-from, while the same stands in fact paid by the payee on his own, would be harsh in the extreme and, in fact, may not stand the test of judicial scrutiny. It is for this reason that the Hon'ble Apex Court in *Hindustan Coca Cola Beverages Pvt. Ltd*. *v. CIT* [2007] 293 ITR 226 (SC) restricted the consequence of non-deduction of tax at source to interest for the delayed deposit of tax to the credit of the Central Government where the tax on the relevant sum had been deposited by the payee. The Parliament, recognizing this hardship, has addressed the issue and, further, within the frame-work of law.

4. Under the circumstances, we consider it proper that the matter *qua* the disallowance u/s.40(a)(ia), to the extent deleted by the ld.CIT(A), is restored back to the file of the AO for considering the assessee's case with reference to the second *proviso* thereto, applicable in principle for the current year. Needless to add, the burden to prove it's claims in the matter would be on the assessee. The AO shall also ensure that the claim, where and to the extent allowed, is reversed in the assessment for AY 2010-2011, i.e., in view of the assessee having deposited TDS on 29.6.2009 (and thereby having presumably claimed and been allowed deduction for that year). Further, it was before us claimed by Sh. Khandelwal, the ld. counsel for the assessee, that the disallowance for Rs.65,175, may also be remitted likewise. The same cannot be inasmuch as we are bound by the terms of the set aside by the Hon'ble Court, which is confined to disallowance u/s. 40(a)(ia), while the said disallowance, as apparent from the reading of the assessment order, is u/s.40(a)(ic). The disallowance u/s.40(a)(ia) comprises only three sums: rs.4,61,44,752 (technical service fees); rs.0.40 lakh (professional fees); and rs.10.75 lakh (ground rent), of which the last, being not a direct expenditure, stands sustained in first appeal.

5. Coming to the assessee's appeal, we are at loss to understand the basis thereof. It is, firstly, delayed by 3959 days, and not 3811 days, which is again unexplained. The Hon'ble Court has not remitted the matter for rehearing the entire appeal, as stated in the affidavit, but only the issue/s agitated before it, i.e., disallowance u/s. 40(a)(ia). Even so, the same does not give any right to file the appeal, but canvass it's case *qua* the issues in dispute. No valid reason, much less good and sufficient, stand furnished for filing the appeal at a delay over a decade and after the matter has travelled twice to the Hon'ble High Court, so that this is the third round before the Tribunal. The appeal, thus, is not competent.

Without prejudice, we are unable to fathom it's basis. The assessment stands made in the instant case at Rs.5,24,07,250, upon making the following adjustments/disallowances to the returned income: (Amt. in Rs.)

Total income returned		48,61,090
Additions:		
(i) u/s.40(a)(ia) for tax deducted but not paid in time	4,72,59,752	
(ii) u/s. 40(a)(ic) for non deduction	65,715	
(iii) 10% Repairs & maintenance exp.	2,70,493	
(iv) Expenses on car disallowed	50,000	4,76,45,960
Total income assessed		5,24,07,050

The Grounds before the ld. CIT(A) relate thereto, and form the basis of his adjudication. Further, the sums stated at para 2 above, i.e., *qua* the assessee's appeal, are at variance with that as stated at para 2 of the 'Statement of Facts' before us (which is not a requirement of the rules), without there being any explanation, either therein or even before us. The latter figures are not supported by any document on record, nor referred to in the orders by the Revenue Authorities under appeal before us, nor indeed in the grounds of appeal before us, which are only supportive of the impugned order, and which the assessee even otherwise has the right to defend, i.e., irrespective of it being in appeal or not. The same is, therefore, not maintainable.

We decide accordingly.

6. In the result, the appeal by the Revenue is allowed for statistical purposes, and the assessee's appeal is dismissed.

Order pronounced on August 28, 2023 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963

Sd/-	Sd/-
(Manomohan Das)	(Sanjay Arora)
Judicial Member	Accountant Member

Cochin; Dated: August 28, 2023
Devadas G*

Copy to:

1. The Appellant.
2. The Respondent.
3. The Pr. CIT concerned.
4. The CIT-DR.
5. Guard File.

Assistant Registrar
ITAT, Cochin.