

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

**BEFORE SHRI NARENDER KUMAR CHOUDHRY,
JUDICIAL MEMBER
AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA No.1313/Mum/2023
Assessment Year: 2012-13**

M/s.Super Emirates Exports,
C/o. Mr.Pradeep K. Nikam,
A-301, Shri Ganesh Krupa CHS,
Sector 12, Kamothe,
Panvel, Navi Mumbai-410 209.

v. The ITO,
Ward-28(3)(3),
Mumbai.

[**PAN:** ABQFS 9866 D]
(Appellant)

(Respondent)

Appellant by	:	Ms.Dinkle Hariya, Ld. Adv a/w Simoni Chouhan, Ld. CA
Respondent by	:	Shri Mahesh Parwani – Ld. Sr.DR
Date of Hearing	:	14.02.2024
Date of Pronouncement	:	22.02.2024

ORDER

Per N.K. Choudhry (JM):

This appeal has been preferred by the Assessee against the order dated 26.02.2020 impugned herein passed by the National Faceless Appeal Centre/Learned Commissioner of Income Tax (Appeals) (in short "the Ld. Commissioner") u/s.250 of the Income Tax Act, 1961 (in short "the Act") for the AY 2012-13.

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2. In the instant case, the Assessee being a firm engaged in the business of wholesale trade of onion and vegetables, had declared its total income at Rs.2,09,920/- by filing its return of income on dated 31.01.2013, which was selected for scrutiny under CASS AND resulted into passing the assessment order dated 26.03.2015 u/s.143(3) of the Act, whereby, the total income of the Assessee was assessed at Rs.4,91,48,270/- and the disallowances of Rs.4,84,49,335/- and Rs.4,89,018/- respectively u/s.40(a)(ia) of the Act and on account of prior period expenses, were made.

3. The Assessee being aggrieved, challenged the aforesaid additions/disallowances before the Ld. Commissioner, who vide impugned order dated 26.02.2020 not only affirmed the disallowance/addition of Rs.3,72,39,849/- on account of late deposit of TDS but also partly affirmed the addition/disallowance to the extent of Rs.25,30,667/- u/s.40(a)(ia) of the Act, due to non-furnishing of the explanation qua payment made to the flowing companies.

Name of the party	Payment Head	Amount
Jublee Agro Foods	Rent	12,33,856
MR Traders (Packing)	Packing Charges	4,92,929
MR Traders (Exp)	Packing Charges	8,03,882

4. The Assessee being aggrieved is in appeal before us. The Ld. Counsel for the Assessee, Ms.Dinkle Hariya, at the outset claimed that in the instant case, the last date for deposit of TDS was dated 30.09.2012 which admittedly falls on Sunday and therefore, on the day the banks were closed. However, by using due diligence, the Assessee immediately on the next working day of the bank i.e. 01.10.2012 itself, had deposited the TDS amount in the Government Treasury/Account

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and therefore, cannot be subjected to disallowance u/s.40(a)(ia) of the Act.

The Ld. Counsel further emphasized that even otherwise, as per the second proviso which was inserted in section 40(a)(ia) w.e.f. 01.04.2013 vide Finance Act, 2012, wherein, new provision has been introduced, according to which, if the payee has paid the due tax to the Government account , then the payer can not be held liable for non-deduction of tax and entails no addition/disallowance.

Ld. Counsel further contended that though the Ld. Commissioner has not accepted the contention of the Assessee on the pretext that the Hon'ble Apex Court has admitted the SLP vide order dated 05.08.2016 reported in [2016] 73 Taxmann.com 63 (SC) against the judgment passed by the Hon'ble Delhi High Court in the case of CIT v. Ansal Land Mark Township (P) Ltd., reported in [2015] Taxmann.Com 45 (Delhi), wherein, it was held that second proviso in sec.40(a)(ia) of the Act, has to be applied retrospectively , and therefore, the decision in CIT v. Ansal Land Mark Township (P) Ltd. has not attained finality. However, it is an admitted fact that the Hon'ble Delhi High Court in the case of CIT v. Bhanot Construction & Housing Ltd., reported in [2019] 102 taxmann.com 234 (Delhi) has also dealt with identical issue and by considering the judgment passed in the case of Ansal Land Mark Township (P) Ltd., (supra) applied second proviso to sec.40(a)(ia) of the Act, retrospectively for the AY 2011-12 as well.

6. On the contrary the Ld. DR refuted the claim of the Assessee by claiming that the impugned order is neither perverse nor suffers from any impropriety or illegality.,

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7. Heard the parties and perused the material available on record and relevant provisions of law. Coming to the 1st aspect of the case, we observe that admittedly in this case, the last/due date for filling of the return of income u/s. 139(1) of the Act was 30/09/2012 which falls on Sunday/bank holiday and the Assessee on the first working day of the bank i.e. 01/10/2012 deposited TDS and therefore, as provisions of Sec. 10 of the General Clauses Act, which prescribes as under:

Computation of time.—(1) Where, by any 1 [Central Act] or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open: Provided that nothing in this section shall apply to any act or proceeding to which the 6 Indian Limitation Act, 1877 (15 of 1877), applies. (2) This section applies also to all 2 [Central Acts] and Regulations made on or after the fourteenth day of January, 1887.

the Assessee is entitled to get the benefit of the grace period but subject to verification and thus on this aspect cannot be held liable as **“the Assessee in default”**.

7.1 Coming to the 2nd aspect of the case, we are in agreement with the Ld. Counsel that the Hon’ble Delhi High Court has categorically held that second proviso to sec.40(a)(ia) of the Act, as inserted vide Finance Act, 2012 w.e.f. 01.04.2013 retrospective in nature and therefore where the payees to whom payments were made by the Assessee, infact have already offered the amounts received from the Assessee as receipts, in their income tax returns and paid the relevant taxes on such amounts then the Assessee cannot be held as the “Assessee in default” under the first proviso to section 201(1) of the Act which reads as under:

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First proviso provides that if any person including principal officer of a company who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter i.e. (XVII), on the sum paid to a “payee” or on the sum credited to the account of a payee shall not be deemed to be an Assessee in default qua such tax, if such payee has furnished his return of income under section 139 of the Act and has taken into account such sum for computing income in such return of income and has paid the tax due on the income declared by him in such return of income and the person furnishes a certificate to this effect from an Accountant in such Firm as may be prescribed.

7.2 We observe that the Ld. Commissioner in its order specifically highlighted as under:

Without prejudice to above even it is assumed that second proviso to section 40(a)(ia) was applicable retrospectively , the case of the Assessee holds no water as it has failed to furnish the requisite documentary evidences to establish that it qualifies under the second proviso. The Assessee has not furnished a single documentary evidence in support of his claim with all the deductions had shown the payment made to them in their return of income and have paid that due taxes in the absence of the same, disallowance u/s.40(a)(ia) of the Act is liable to be confirmed on this count also.

NO doubt the observation of the Ld. Commissioner is correct, however before us the Assessee by filing an application for additional evidence claimed that since the business of the Assessee was closed down in the year 2014 due to losses in the business and therefore, the Assessee did not have any educated staff or Accountant to look after the affairs of the Assessee. Even otherwise, Mr. Baskar, one of the three partners of the Assessee’s firm, who was mainly looking after the affairs of the company has migrated to Lucknow and therefore, the

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Assessee faced the difficulties in making appropriate representations before the lower authorities and consequently failed to file the relevant documents to substantiate its claim to the effects that the Assessee is not in default, as the payees have also declared the corresponding income/payments received from the Assessee, in their return of income and paid the necessary taxes on such income/receipts. However, by making necessary and diligence efforts, the Assessee has been able to procure some documents such as Returns of Income and financials etc. pertaining to some of the parties, which are produced before the Hon'ble Tribunal and the same can be admitted as additional evidence in support of the Assessee's case.

The Ld. DR though refuted the claim of the Assessee, however, failed to substantiate that the documents submitted by the Assessee are neither essential nor relevant for just and proper adjudication of the issues involved in the appeal, as claimed by the Assessee.

Considering the peculiar facts and circumstances of the case, we observe that the reasons for not filing the relevant explanation/documents by the Assessee as demonstrated by the Ld. AR, prima facie seems to be unintentional and bona fide, specifically in the absence any material to controvert the same . Even otherwise the documents filed by the Assessee goes to the root of the case and in our considered view, are essential for proper and just decision of the case and fair play and substantial justice, hence, we are inclined to admit the same and consequently direct the Assessee to produce the same before the AO ***who in the aforesaid conclusion/terms as enumerated by us, will examine the claim of the Assessee qua deposit of TDS amount in Govt. treasury on 01/10/2012 and/or as to whether the payees have shown the amounts received from the Assessee, in their income tax returns and paid the relevant***

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taxes on such amounts or not and determine the liability accordingly qua the disallowance of Rs.3,72,39,849/- on account of late deposit of TDS. We clarify that primary onus would be on the Assessee to substantiate its claim before the AO, by producing the relevant parties/documents and additional evidence as filed before us. **Resultantly the issue in hand is remanded to the file of the AO accordingly.**

7.3 Coming to second addition /disallowance to the extent of Rs.25,30,667/- with regard to parties at Sl. Nos.6, 9 & 10 as noted by the Ld. Commissioner as well as by the AO in its order, the Assessee has claimed that for the same reason, as given by the Assessee **qua** non-filing of TDS document due to close down of the business of the Assessee and shifting of one of main partners to Lucknow, the Assessee also failed to produce the documents/explanation qua issue in hand, hence, for the substantial justice and proper just decision of the case, the Assessee may be given one more last and final opportunity to substantiate its claim. The Ld. DR on the contrary refuted the claim of the Assessee.

We by considering the peculiar facts and circumstances of the case and in the interest of justice and for the proper decision of issue involved, are also inclined to remand the instant issue with regard to affirmation of disallowance as noted by the Ld. Commissioner in upper part of Para No.8.3 of the impugned order, to the file of the AO for decision afresh, suffice to say, by affording reasonable opportunity to the Assessee to substantiate its claim. We reiterate that primary onus would be on the Assessee to substantiate its claim qua issue in hand by producing the relevant parties and/or evidence. **Resultantly this issue is also remanded to the file of the AO accordingly.**

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8. In the result, appeal filed by the Assessee stands allowed for statistical purposes.

Order pronounced in open Court on 22nd day of February, 2024.

**Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER**

**Sd/-
(NARENDER KUMAR CHOUDHRY)
JUDICIAL MEMBER**

TLN, Sr.PS (on Tour)

Copy to:

1. The Appellant
2. The Respondent
3. The CIT
4. The DR, ITAT, Mumbai
5. Guard File

// True Copy //

By Order

Dy./Asst. Registrar, ITAT, Mumbai