

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम
IN THE INCOME TAX APPELLATE TRIBUNAL,
VISA KHAPATNAM BENCH, VISA KHAPATNAM

श्री दुव्वूरु आर एल रेड्डी, न्यायिक सदस्य एवं श्री एस बालाकृष्णन, लेखा सदस्य के समक्ष

BEFORE SHRI DUVVURU RL REDDY, HON'BLE JUDICIAL MEMBER &
SHRI S BALAKRISHNAN, HON'BLE ACCOUNTANT MEMBER
(Through Hybrid Hearing)

आयकरअपीलसं./ I.T.A. No. 383/Viz/2017
(निर्धारणवर्ष/ Assessment Year : 2012-13)

The Assistant Commissioner of
Income Tax,
Circle-5(1),
Visakhapatnam.
(अपीलार्थी/ Appellant)

Vs. M/s. Vizag Seaport Pvt Ltd.,
Administrative Block,
S4 Gallery, Port Area,
Visakhapatnam – 530035.
(प्रत्यर्थी/ Respondent)
[PAN :AABCV2484K]

अपीलार्थी की ओर से/ Assessee by
प्रत्यर्थी की ओर से/ Revenue by

: Sri Fenil A Bhatt, AR
: Dr. Satyasai Rath, CIT-DR

सुनवाई की तारीख/ Date of Hearing
घोषणा की तारीख/Date of
Pronouncement

: 15/02/2024
: /04/2024

ORDER

PERS. BALAKRISHNAN, Accountant Member :

This appeal filed by the Revenue is against the order of the
Ld. Commissioner of Income Tax (Appeals)-14, Mumbai in appeal
No. CIT(A)-14/IT-236/15-16, dated 10/02/2017 arising out of
the order passed U/s. 143(3) of the Income Tax Act, 1961 [in
short 'the Act'] for the AY 2012-13.

2. Briefly stated the facts of the case are that the assessee-company filed its return of income declaring book profits U/s. 115JB of the Act on 27/9/2012 for Rs. 8,50,49,898/-. The return was summarily processed U/s. 143(1) of the Act. Subsequently, the case was selected for scrutiny and statutory notices U/s. 143(2) and 142(1) of the Act were issued and served on the assessee. In response to the notices, Shri Vinod Modi, Authorized Representative of the assessee filed details and made various submissions. The Ld. AO on the basis of the submissions made during the assessment proceedings, made the following additions:

Sl no.	Nature of Disallowance	Amount (Rs.)
1.	Disallowance on depreciation of project berth	12,31,27,277
2.	Disallowance of operation and maintenance services expenditure	3,69,00,000
3.	Disallowance of interest U/s. 36(1)(iii) of the Act	14,41,000
4.	Provision for doubtful debts	23,82,970
4.	Disallowance of pay leaves and sick leaves (Rs. 10,48,088 + Rs. 1,53,838)	12,01,926

Aggrieved by the above additions, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) while considering the submissions made by the assessee's Representative relied on the decision of his predecessor for the assessee's own case for the earlier assessment years and thereby partly allowed the appeal of

the assessee. Aggrieved by the order of the Ld. CIT(A), the Revenue is in appeal before the Tribunal by raising the following grounds of appeal:

- “1. *The order of the Ld. CIT(A) is bad in law and fact.*
2. *The Ld. CIT(A) has erred in deleting the entire addition made by the Ld. AO U/s. 40(a)(ia) of the Act.*
 - 2.1. *The Ld. CIT(A) ought to have sustained the addition made by the Ld. AO U/s. 40(a)(ia) to the extent of amount on which TDS was not deducted by the assessee.*
3. *The Ld. CIT(A) has erred in deleting the addition made by the Ld. AO under disallowance of interest U/s. 36(1)(iii), CIT(A) relied on the decision of the Ld. CIT(A) for the AY 2010-11 in the assessee’s own case with out considering the fact that AO has proportionately disallowed interest expenditure on capital work in progress.*
 - 3.1. *The Ld. CIT(A) has not appreciated the fact that the Ld. AO disallowed the proportionate interest relating to capital work in progress with reference to section 36(1)(iii) of the Act to the extent of interest relating to capital asset till the same is put to use.*
4. *Any other ground that may be raised at the time of hearing.”*

3. In addition, the assessee filed an application under Rule 27 of the Income Tax Appellate Tribunal Rules, 1963 and filed additional evidence in the form of Certificate under Rule-31 ACB [Form-26A] of the Income Tax Rules, 1962. Before considering the

application filed under Rule 27, we proceed to adjudicate the grounds raised by the Revenue.

4. **Grounds No.1 and 4 are general** in nature and therefore they need not be adjudicated.

5. **Ground No.2& 2.1** is with respect to deletion of entire addition, made by the Ld. AO U/s. 40(a)(ia) of the Act, by the Ld. CIT(A). On this issue, at the outset, the Ld. Departmental Representative [DR] submitted that the assessee has engaged in availing engineering services from M/s. Vijay Nirman Co. Pvt Ltd., and has paid an amount of Rs. 3,69,00,000/- during the impugned assessment year. The Ld. DR further submitted that the assessee has wrongly deducted the tax at source U/s. 194C of the Act @ 2%. The Ld. DR further submitted that the Ld. AO has rightly considered the agreement and concluded that it is in the nature of engineering services which attracts the provisions of section 194J of the Act and the tax needs to be deducted @ 10%. The Ld. DR further submitted that the Ld. AO has rightly disallowed the sum of Rs. 3,69,00,000/- U/s. 40(a)(ia) of the Act for short deduction of tax. On this ground, the Ld. DR strongly relied on the decision of the Hon'ble Kerala High Court in the case of Commissioner of Income Tax-1, Kochi vs. P V S Memorial

Hospital Ltd reported in [2016] 380 ITR 284 (Kerala) wherein it was held that *deduction under a wrong provision of law will not save an assessee from section 40(a)(ia) of the Act*. The Ld. DR also referred to Explanation (a) to section 194J of the Act wherein it was stated that “professional services include engineering services”.

6. Countering the argument of the Ld. DR, the Ld. Authorized Representative [AR] submitted that the assessee is simply providing maintenance services of Bulk Material Handling System (in short “BMHS”) shall not constitute ‘professional services’. The Ld. AR further referred to the Tender Document submitted in page 54 of the paper book. He referred to para 1.5 of Article-3, Annexure-1 available in page no.62 of the paper book wherein it is mentioned that the materials shall be made available at the storage area for stacking on the belt conveyor. Further, the Ld. AR also referred to page 68 of the paper book wherein the scope of services of the contract clearly mentions “operations / maintenance of various systems & equipment providing necessary supervisory, skilled & unskilled manpower on 24x7 (ie round the clock basis) to man the Plant during the operation and to carry out necessary scheduled, preventive and breakdown maintenance

of various equipment of BMH system”. The Ld. AR further referred to page 109 of the paper book (Article-4) wherein the proposed manpower deployment for maintenance is listed. The Ld. AR argued that most of the maintenance includes unskilled labour and therefore should be considered as contractual. The Ld. AR also placed reliance on the following case laws:

1. CIT vs. S.K. Tekriwal (2014) 361 ITR 432 (Cal.)
2. Dish TV India Ltd vs. ACIT (2017) 167 ITD 412 (Mumbai ITAT)
3. Skylark Hospitality Pvt Ltd vs. DCIT (2018) 53 CCH 19 (Delhi)
4. Mission vs. ITO (ITA No. 1076/Kol/2014, dated 16/6/2015)
5. Roca Bathroom Products Pvt Ltd vs. JCIT (2016) 175 DTR 459 (Chennai ITAT)
6. DCIT vs. Selvel Advertising P. Ltd (2015) 37 ITR (Trib.) 611 (Kolkata ITAT)
7. Element K. India Pvt Ltd vs. ITO (2014) 36 ITR (Trib.) 604 (Delhi ITAT)
8. Hindustan Thompson Associates (P.) Ltd vs. ACIT 2012) 53 SOT 389 (Mumabi ITAT)
9. ITO vs. Premier Medical Suppliers & Stores (2012) 53 SOT 263 (Kolkata ITAT)

7. The Ld. AR also relied on the decision of the Hon’ble Delhi High Court in the case of Principal Commissioner of Income Tax vs. Future First Info Services (P.) Ltd reported in [2022] 447 ITR 299 (Delhi). The Ld. AR also submitted that the Ld. CIT(A) while adjudicating the issues for the impugned assessment year, relied on the orders of his predecessors in the earlier assessment years

ie., AY 2009-10 and 2010-11. The Ld. AR also submitted that this was not contested by the Revenue before the ITAT. Further, the Ld. AR also submitted that various High Courts and Tribunals have held short deduction of tax with a bonafide belief of the considering the transaction as contractual, disallowance u/s 40(a)(ia) cannot be invoked by the Revenue. Further, the Ld. AR also submitted that he has obtained Certificate from the Chartered Accountant as per Rule-31ACB of the IT Rules, 1962 in Form-26A confirming that M/s. Vijay Nirman Co. Pvt. Ltd has offered an amount of Rs. 3,69,00,000/- to tax while filing the return of income for the AY 2012-13.

8. Countering the arguments of the Ld. AR, the Ld. DR submitted that the Maintenance Team as listed in Article-4 & 5 of the Agreement made available in page 109 to 110 clearly stated that qualified Engineers are used in the execution of BMHS. The Ld. DR therefore pleaded that the assessee has engaged engineering services which are professional in nature and hence tax needs to be deducted U/s. 194J of the Act. The Ld. DR also further submitted that section 201 and section 40(a)(ia) of the Act are independent. The Ld. DR therefore pleaded that the order of the Ld. AO be upheld.

9. We have heard both the sides and perused the material available on record and the orders of the Ld. Revenue Authorities including the written submissions placed before us. It is the case of the Ld. AO that the assessee has engaged M/s. Vijay Nirman Co. Pvt Ltd., for providing engineering services to the assessee for Bulk Material Handling System (BMHS) on 24x7 basis as per the terms of the contract entered into between them. On perusal of the contract which is made available in the paper book page No. 54 onwards, we find that the assessee has utilized various engineers in the execution of Bulk Material Handling System for the assessee on 24x7 basis. We find that there is also a merit in the argument of the Ld. DR that the man power used are mainly qualified engineers and hence services needs to be professional in nature. In this context, Explanation (a) to section 194J of the Act is extracted herein below for reference:

“Explanation.—For the purposes of this section,—

(a) "professional services" means services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board for the purposes of section 44AA or of this section;”

From the plain reading of the above Explanation, we find that the ‘engineering services’ are also covered by the definition of

'professional services' for the purpose of section 194J of the Act. In the instant case M/s. Vijay Nirman Co. Pvt Ltd., has provided engineering services using qualified engineers guiding the semi skilled and unskilled workers. We therefore have no hesitation to conclude that the assessee availed engineering services from M/s. Vijay Nirman Co. Pvt Ltd., and hence the assessee ought to have deducted tax at source under the provisions of section 194J of the Act. Having said so, now the next question is whether the provisions of section 40(a)(ia) of the Act can be invoked for short deduction of TDS made by the assessee. On this issue, the Ld. DR submitted that the second proviso to section 40(a)(ia) of the Act, introduced w.e.f 1/4/2013, is only prospective. The Ld. DR relied on the decision of the Hon'ble Kerala High Court in the case of Thomas George Muthoot vs. CIT, Kottayam [2015] 235 Taxman 246 (Kerala) wherein it was held that *second proviso to section 40(a)(ia) is applicable from 1/4/2013 only*. Countering the arguments of the Ld. DR, the Ld. AR submitted that the Hon'ble High Court of Karnataka in the case of Commissioner of Income Tax, Belgaum vs. S.M. Anand [2020] 422 ITR 209 (Karnataka) held that the *second proviso to section 40(a)(ia) inserted by Finance Act, 2012 is clarificatory and it has retrospective effect from 1/4/2013*. On perusal of various case laws submitted by the

assessee as well as the Ld. DR, we find that most of the judicial pronouncements have held that when there is a short deduction of TDS, the correct course of action is to invoke the provisions of section 201 of the Act and disallowance U/s. 40(a)(ia) should not be resorted to. The Hon'ble Delhi High Court in the case of Principal Commissioner of Income Tax vs. Future First Info Services (P.) Ltd [2022] 447 ITR 299 (Delhi) in para 5 has held 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. The relevant para of the said judgement is reproduced herein below:

"We are satisfied that the order under challenge is a just order. 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 40(a)(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 194-I 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)(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 bona fide 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 (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.'" (Emphasis Supplied)

10. Further, the Hon'ble High Court of Kolkata in the case of Commissioner of Income Tax vs. M/s. S.K. Tekriwal (2014) 361 ITR 432 (Cal.) held as under:

“1.

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."

11. Respectfully following the judicial precedents as discussed above, we are of the opinion that when there is short deduction of TDS, no disallowance U/s. 40(a)(ia) of the Act can be made and the correct course of action would be to invoke the provisions of section 201 of the Act. We therefore dismiss this ground raised by the Revenue.

12. Additionally, with respect to the filing of application under Rule 27 of the ITAT Rules, 1963, the Ld. AR heavily relied on the decision of the Hon'ble Delhi High Court in the case of Commissioner of Income Tax vs. Ansal Land Mark Township (P) Ltd in ITA No.160/2015 & 161/2015, dated 26/08/2015 for the proposition that the second proviso to section 40(a)(ia) of the Act is declaratory and curative and has retrospective effect.

Per contra, the Ld. DR relied on the order of the Ld. AO and argued in support of the same.

13. We have heard both the sides and perused the material available on record and the case laws relied on by the Ld. AR and the Ld. DR. The Hon'ble Delhi High Court in the case of

Commissioner of Income Tax vs. Ansal Land Mark Township (P)

Ltd (supra) has held in para 13 as follows:

"13. Turning to the decision of the Agra Bench of ITAT in Rajiv Kumar Agarwal v. ACIT (supra) , the Court finds that it has undertaken a thorough analysis of the second proviso to Section 40 (a)(ia) of the Act and also sought to explain the rationale behind its insertion. In particular, the Court would like to refer to para 9 of the said order which reads as under:

"On a conceptual note, primary justification for such a disallowance is that such a denial of deduction is to compensate for the loss of revenue by corresponding income not being taken into account in computation of taxable income in the hands of the recipients of the payments. Such a policy motivated deduction restrictions should, therefore, not come into play when an assessee is able to establish that there is no actual loss of revenue. This disallowance does de-incentivize not deducting tax at source, when such tax deductions are due, but, so far as the legal framework is concerned, this provision is not for the purpose of penalizing for the tax deduction at source lapses. There are separate penal provisions to that effect. De-incentivizing a lapse and punishing a lapse are two different things and have distinctly different, and sometimes mutually exclusive, connotations. When we appreciate the object of scheme of section 40(a)(ia), as on the statute, and to examine whether or not, on a "fair, just and equitable" interpretation of law- as is the guidance from Hon'ble Delhi High Court on interpretation of this legal provision, in our humble understanding, it could not be an "intended consequence" to disallow the expenditure, due to non deduction of tax at source, even in a situation in which corresponding income is brought to tax in the hands of the recipient. The scheme of Section 40(a)(ia), as we see it, is aimed at ensuring that an expenditure should not be allowed as deduction in the hands of an assessee in a situation in which income embedded in such expenditure has remained untaxed due to tax withholding lapses by the assessee. It is not, in our considered view, a penalty for tax withholding lapse but it is a sort of compensatory deduction restriction for an income going untaxed due to tax withholding lapse. The penalty for tax withholding lapse per se is separately provided for in Section 271 C, and, section 40(a)(ia) does not add to the same. The provisions of Section 40(a)(ia), as they existed prior to insertion of second proviso thereto, went much beyond the obvious intentions of the lawmakers and created undue hardships even in cases in which the

assessee's tax withholding lapses did not result in any loss to the exchequer. Now that the legislature has been compassionate enough to cure these shortcomings of provision, and thus obviate the unintended hardships, such an amendment in law, in view of the well settled legal position to the effect that a curative amendment to avoid unintended consequences is to be treated as retrospective in nature even though it may not state so specifically, the insertion of second proviso must be given retrospective effect from the point of time when the related legal provision was introduced. In view of these discussions, as also for the detailed reasons set out earlier, we cannot subscribe to the view that it could have been an "intended consequence" to punish the assesseees for non deduction of tax at source by declining the deduction in respect of related payments, even when the corresponding income is duly brought to tax. That will be going much beyond the obvious intention of the section. Accordingly, we hold that the insertion of second proviso to Section 40(a)(ia) is declaratory and curative in nature and it has retrospective effect from 1st April, 2005, being the date from which sub clause (ia) of section 40(a) was inserted by the Finance (No.2) Act, 2004."

14. In the instant case, the assessee has filed Form-26A prescribed under Rule 31ACB of the IT Rules, 1962. The argument of the Ld. AR deserves consideration in the light of the ratio laid down in the case of Commissioner of Income Tax vs. Ansal Land Mark Township (P) Ltd (supra). Further, it is also not established by the Revenue that when the assessee failed to deduct the whole or any part of the tax in accordance with the provisions of Chapter-XVII-B is not deemed to be an assessee in default under the first proviso to section 201 of the Act. We are therefore inclined to judicially follow the ratio laid down in the case of Commissioner of Income Tax vs. Ansal Land Mark

Township (P) Ltd (supra) and thereby the addition made U/s. 40(a)(ia) on this count also deserves to be deleted.

15. With respect to Ground No.3 on the deletion of addition of Rs. 14,41,000/- by the Ld. CIT(A) being the interest relating to capital work-in-progress, the Ld. DR submitted that no cash flow statement was submitted by the assessee to substantiate that interest free funds were used for the purpose of capital work-in-progress. He therefore pleaded that the order of the Ld. AO be upheld.

16. Per contra, the Ld. AR submitted that cash flow statements were presented to the Ld. AO along with the financial statements. The Ld. AR also referred to cash flow statement available on page 11 of the paper book. The Ld. AR invited our attention to the net cash generated by operating activities which stood at Rs. 38,58,79,722/- for the impugned assessment year. Further, the Ld. AR also referred to Issued, subscribed and paid-up capital which is detailed in Schedule-2.1 available in page No. 16 of the paper book which stood at Rs. 87,19,12,640/-. On this ground, the Ld. AR heavily relied on the decision of the Hon'ble High Court of Bombay in the case of CIT vs. HDFC Bank Limited in

Income Tax Appeal No. 330 of 2012 dated 23/07/2014. The Ld. AR also placed reliance on the following case laws:

1. CIT vs. Reliance Utilities & Power Ltd (2009) 313 ITR 340 (Bom.)
2. CIT vs. HDFC Bank Limited (2016) 383 ITR 529 (Bom.)
3. S.P. Jaiswal Estates (P.) Ltd vs. CIT (2012) 140 ITD 19 (Mumbai ITAT)

Further, the Ld. AR also submitted that the capital work-in-progress in page No. 9 of the paper book stood at Rs. 2,36,04,888/- whereas own funds included the cash generated from operations stood at Rs. 83,76,74,466/- and Rs. 38,58,79,722/- respectively. Therefore he pleaded that own funds should be assumed to be used for the capital work-in-progress and no interest disallowance is warranted.

17. We have heard both the sides and perused the material available on record and the orders of the Ld. Revenue Authorities. Admittedly, the assessee has incurred Rs. 2.36 Crs as on 31/3/2012 as capital work-in-progress during the impugned assessment year. It is also not in dispute that the assessee has availed borrowed funds for its operations. Further, it is also not disputed about the availability of own funds (Rs. 83,76,74,466/-) and cash generation from the operations of the

assessee during the impugned assessment year (Rs. 38,58,79,722/-) totaling to Rs.1,22,35,54,188/- whereas the capital work-in-progress incurred by the assessee is Rs. 2,36,04,888/-. The Hon'ble High Court of Bombay in the case of CIT vs. HDFC Bank Limited (supra) by relying on the decision in the case of CIT vs. Reliance Utilities and Power Ltd reported in (2009) 313 ITR 340 (Bom.) held as under:

"4.....From the order of the ITAT, the Revenue approached this Court by way of an Appeal. After examining the entire factual matrix of the matter and the law on the subject, this Court held as under :-

"If there be interest-free funds available to an assessee sufficient to meet its investments and at the same time the assessee had raised a loan it can be presumed that the investments were from the interest-free funds available. In our opinion, the Supreme Court in East India Pharmaceutical Works Ltd. v. CIT (1997) 224 ITR 627 had the occasion to consider the decision of the Calcutta High Court in Woolcombers of India Ltd. (1982) 134 ITR 219 where a similar issue had arisen. Before the Supreme Court it was argued that it should have been presumed that in essence and true character the taxes were paid out of the profits of the relevant year and not out of the overdraft account for the running of the business and in these circumstances the appellant was entitled to claim the deductions. The Supreme Court noted that the argument had considerable force, but considering the fact that the contention had not been advanced earlier it did not require to be answered. It then noted that in Woolcombers of India Ltd.'s case (1982) 134 ITR 219 the Calcutta High Court had come to the conclusion that the profits were sufficient to meet the advance tax liability and the profits were deposited in the over draft account of the assessee and in such a case it should be presumed that the taxes were paid out of the profits of the year and not out of the overdraft account for the running of the business. It noted that to raise the presumption, there was sufficient material and the assessee had urged the contention before the High Court. The principle, therefore, would be that if there were funds available both interest-free and over draft

and/or loans taken, then a presumption would arise that investments would be out of the interest-free funds generated or available with the company if the interest-free funds were sufficient to meet the investment. In this case this presumption is established considering the finding of fact both by the Commissioner of Income-tax (Appeals) and the Income-tax Appellate Tribunal."(emphasis supplied)

5. We find that the facts of the present case are squarely covered by the judgment in the case of Reliance Utilities and Power Ltd. (supra). The finding of fact given by the ITAT in the present case is that the Assessee's own funds and other non-interest bearing funds were more than the investment in the tax-free securities. This factual position is not one that is disputed. In the present case, undisputedly the Assessee's capital, profit reserves, surplus and current account deposits were higher than the investment in the tax-free securities. In view of this factual position, as per the judgment of this Court in the case of Reliance Utilities and Power Ltd.(supra), it would have to be presumed that the investment made by the Assessee would be out of the interest-free funds available with the Assessee. We therefore, are unable to agree with the submission of Mr Suresh Kumar that the Tribunal had erred in dismissing the Appeal of the Revenue on this ground. We do not find that question (A) gives rise to any substantial question of law and is therefore rejected."

18. Judicially following the ratio laid down in the case of CIT vs. HDFC Bank Limited (surpa), we are of the opinion that it can be safely assumed that the assessee has incurred capital work-in-progress out of its own interest free funds and hence no interest disallowance U/s. 37 of the Act is required. We therefore direct the Ld. AO to delete addition. Accordingly, this ground raised by the Revenue is dismissed.

19. In the result, appeal of the Revenue is dismissed.

Pronounced in the open Court on 12th April, 2024.

Sd/-

(दुव्वूरु आर.एलरेड्डी)
(DUVVURU RL REDDY)
न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-

(एस बालाकृष्णन)
(S.BALAKRISHNAN)
लेखा सदस्य/ACCOUNTANT MEMBER

Dated : 12.04.2024

OKK - SPS

Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee-M/s. Vizag Seaport Pvt Ltd., Administrative Block, S4 Gallery, Port Area, Visakhapatnam – 530035, Andhra Pradesh.
2. राजस्व/The Revenue –Asst. Commissioner of Income Tax, Circle-5(1), 2nd Floor, Direct Taxes Building, MVP Colony, Visakhapatnam, Andhra Pradesh.
3. The Principal Commissioner of Income Tax,
4. आयकरआयुक्त (अपील)/ The Commissioner of Income Tax
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, विशाखापटणम/ DR,ITAT, Visakhapatnam
6. गार्डफ़ाईल / Guard file

आदेशानुसार / BY ORDER

Sr. Private Secretary
ITAT, Visakhapatnam