

IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH : KOLKATA

[Before Hon’ble Sri N.V.Vasudevan, JM]

I.T.A No. 615/Kol/2015

Assessment Year : 2009-10

Shri Dilip Kumar Roy
Nadia

-vs.-

I.T.O., Ward-1,
Nadia.

[PAN : ACWPR 7333R)
(Appellant)

(Respondent)

For the Appellant : Miss Varsha Jalan, Advocate
For the Respondent : David Z. Chawngthu, Affl.CIT

Date of Hearing : 14.01.2016.

Date of Pronouncement : 3.2.2016.

ORDER

This is an appeal by the Assessee against the order dated 16.3.2015 of CIT(A)-12, Kolkata, relating to AY 2009-10.

2. Ground No.1 & 3 raised by the Assessee can be conveniently decided together.

These grounds read as follows:

“1(a) For that on the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in confirming the addition of Rs.4,93,6501- made by the Ld. A.a. under the head Carriage Charges by wrongly invoking the provisions of sec. 40(a)(ia) r.w. sec. 194C of the Act.

(b) Without prejudice to the ground no. 1 (a), the Ld. CIT(A) ought to have considered that sec. 40(a)(ia) is not applicable in the instant case inasmuch as the entire payments were made within the financial year.

3. For that the assessee is entitled to the benefit of the second proviso to sec 40 (a) (ia) inasmuch as the assessee is not deemed to be an assessee in default under the first proviso to sec 201(1). As such, disallowance under sec.40(a)(ia) in respect of Carriage Charges is not sustainable in law.

4. That the appellant craves leave to add, alter or delete all or any of the grounds of appeal. “

3. The Assessee is an individual. He carries on the business of distribution of Kerosene Oil. In the course of assessment proceedings for AY 09-10, the AO noticed that the Assessee had claimed deduction of expenditure to the tune of Rs.13,70,500/- on account of carriage charges. Out of the said sum a sum of Rs.4,93,600/-, according to the AO, was made payments to contractors for carrying out work on which payment tax at source had not been deducted as required by the provisions of sec.194-

C of the Income Tax Act, 1961 (Act). Invoking the provisions of Sec.40(a)(ia) of the Act, which provides that where there is a duty to deduct tax at source and tax had not been deducted, the expenditure in respect of which tax at source had not been deducted will not be allowed as deduction while computing income from business of an Assessee, the AO disallowed Rs.4,93,650/- and added the said sum to the total income of the Assessee. On appeal by the Assessee, the CIT(A) confirmed the order of the AO. Aggrieved by the order of the CIT(A), the Assessee is in appeal before the Tribunal.

4. I have considered the rival submissions. The prayer of the learned counsel for the Assessee before me was to give a direction to the AO in terms of ground No.3 to verify if the payees have declared the receipt from the Assessee in their return of income and if they have so declared then the addition u/s.40(a)(ia) of the Act should be deleted by the AO. The above submission was made in the context of the following amendments to the provisions of Sec.40(a)(ia) of the Act. With a view to liberalize provisions of Section 40(a)(ia) of the Act Finance Act 2012 brought amendment w.e.f 01.04.2013 as under. The following second proviso was inserted in sub-clause (ia) of clause (a) of Section 40 by the Finance Act, 2012, w.e.f. 1-4-2013 :

“Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of Section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso.”

5. Since provisions of Section 40(a)(ia) as amended by Finance Act, 2012 is linked to Section 201 of the Act, in which a proviso was inserted, it is necessary to look into those provisions which read thus:

“Sec.201: (1) Where any person, including the principal officer of a company –

(a) who is required to deduct any sum in accordance with the provisions of this Act; or

(b) referred to in sub-section (1A) of Section 192, being an employer, does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without

prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:

Provided that any person, including the 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 on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident –

(i) has furnished his return of income under Section 139;

(ii) has taken into account such sum for computing income in such return of income; and

(iii) 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 form as may be prescribed:

6. Memorandum explaining the provisions while introducing Finance Bill, 2012 provides the justification of the amendment to section 40(a)(ia) in the following words:-

“In order to rationalise the provisions of disallowance on account of non-deduction of tax from the payments made to a resident payee, it is proposed to amend section 40(a)(ia) to provide that where an assessee makes payment of the nature specified in the said section to a resident payee without deduction of tax and is not deemed to be an assessee in default under section 201(1) on account of payment of taxes by the payee, then, for the purpose of allowing deduction of such sum, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee.”

7. The provisions of Sec.40(a)(ia) of the Act are meant to ensure that the Assessee's perform their obligation to deduct tax at source in accordance with the provisions of the Act. Such compliance will ensure revenue collection without much hassle. When the object sought to be achieved by those provisions are found to be achieved, it would be unjust to disallowance legitimate business expenses of an Assessee. Despite due collection of taxes due, if disallowance of genuine business expenses are made than that would be unjust enrichment on the part of the Government as the payee would have also paid the taxes on such income. In order to remove this anomaly, this amendment has been introduced. In case of payment to non-resident, the government does not have any other mechanism to recover the due taxes. Hence, no amendment

was made in section 40(a)(i). The legislature has not given blanket deduction under section 40(a)(ia). The deduction as per amended section will be allowed only if the -

- (i) payee has furnished his return of income under section 139;
- (ii) payee has taken into account such sum for computing income in such return of income; and
- (iii) payee has paid the tax due on the income declared by him in such return of income,

and the payer furnishes a certificate to this effect from an accountant in such form as may be prescribed.

8. The question is as to whether the amendment made as above is prospective or retrospective w.e.f. 1.4.2005 when the provisions of Sec.40(a)(ia) were introduced. Keeping in view the purpose behind the proviso inserted by the Finance Act, 2012 in section 40(a)(ia) of the Act, it can be said to be declaratory and curative in nature and therefore, should be given 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. In *CIT Vs. Alom Extrusions Ltd.* 319 ITR 306 (SC), the Hon'ble Supreme Court had to deal with the question, whether omission (deletion) of the second proviso to s. 43B of the IT Act, 1961, by the Finance Act, 2003, operated w.e.f. 1st April, 2004, or whether it operated retrospectively w.e.f. 1st April, 1988? Prior to Finance Act, 2003, the second proviso to s. 43B of the IT Act, 1961 (for short, "the Act") restricted the deduction in respect of any sum payable by an employer by way of contribution to provident fund/superannuation fund or any other fund for the welfare of employees, unless it stood paid within the specified due date. According to the second proviso, the payment made by the employer towards contribution to provident fund or any other welfare fund was allowable as deduction, if paid before the date for filing the return of income and necessary evidence of such payment was enclosed with the return of income. In other words, if contribution stood paid after the date for filing of the return, it stood disallowed. This resulted in great hardship to the employers. They represented to the Government about their hardship and, consequently, pursuant to the report of

the Kelkar Committee, the Government introduced Finance Act, 2003, by which the second proviso stood deleted w.e.f. 1st April, 2004, and certain changes were also made in the first proviso by which uniformity was brought about between payment of fees, taxes, cess, etc., on one hand and contribution made to Employees' Provident Fund, etc., on the other.

9. According to the Department, the omission of the second proviso giving relief to the assessee(s) [employer(s)] operated only w.e.f. 1st April, 2004, whereas, according to the assessee(s)-employer(s), the said Finance Act, 2003, to the extent indicated above, operated w.e.f. 1st April, 1988 (retrospectively). The Hon'ble Supreme Court held that the deletion of the second proviso was retrospective w.e.f.1.4.2004. The Court considered the scheme of the Act and the historical background and the object of introduction of the provisions of S. 43B. The Court also referred to the earlier amendments made in 1988 with introduction of the first and second provisos. The Court also noted further amendment made in 1989 in the second proviso dealing with the items covered in S. 43B(b) (*i.e.*, contribution to employees welfare funds). After considering the same, the Court was of the view that it was clear that prior to the amendment of 2003, the employer was entitled to deduction only if the contribution stands credited on or before the due date given in the Provident Fund Act on account of second proviso to S. 43B. The situation created further difficulties and as a result of representations made by the industry, the amendment of 2003 was carried out which deleted the second proviso and also made first proviso applicable to contribution to employees welfare funds referred to in S. 43B(b).

“15. We find no merit in these civil appeals filed by the Department for the following reasons : firstly, as stated above, s. 43B (main section), which stood inserted by Finance Act, 1983, w.e.f. 1st April, 1984, expressly commences with a non obstante clause, the underlying object being to disallow deductions claimed merely by making a book entry based on mercantile system of accounting. At the same time, s. 43B (main section) made it mandatory for the Department to grant deduction in computing the income under s. 28 in the year in which tax, duty, cess, etc., is actually paid. However, Parliament took cognizance of the fact that accounting year of a company did not always tally with the due dates under the Provident Fund Act, Municipal Corporation Act (octroi) and other tax laws. Therefore, by way of first proviso, an incentive/relaxation was sought to be given in respect of tax, duty, cess or fee by explicitly stating that if such tax, duty, cess or fee is paid before the date of filing of the return under the IT Act (due date), the assessee(s) then would be entitled to

deduction. However, this relaxation/incentive was restricted only to tax, duty, cess and fee. It did not apply to contributions to labour welfare funds. The reason appears to be that the employer(s) should not sit on the collected contributions and deprive the workmen of the rightful benefits under social welfare legislations by delaying payment of contributions to the welfare funds. However, as stated above, the second proviso resulted in implementation problems, which have been mentioned hereinabove, and which resulted in the enactment of Finance Act, 2003, deleting the second proviso and bringing about uniformity in the first proviso by equating tax, duty, cess and fee with contributions to welfare funds. Once this uniformity is brought about in the first proviso, then, in our view, the Finance Act, 2003, which is made applicable by the Parliament only w.e.f. 1st April, 2004, would become curative in nature, hence, it would apply retrospectively w.e.f. 1st April, 1988. Secondly, it may be noted that, in the case of Allied Motors (P) Ltd. Etc. vs. CIT (1997) 139 CTR (SC) 364 : (1997) 224 ITR 677 (SC), the scheme of s. 43B of the Act came to be examined. In that case, the question which arose for determination was, whether sales-tax collected by the assessee and paid after the end of the relevant previous year but within the time allowed under the relevant sales-tax law should be disallowed under s. 43B of the Act while computing the business income of the previous year ? That was a case which related to asst. yr. 1984-85. The relevant accounting period ended on 30th June, 1983. The ITO disallowed the deduction claimed by the assessee which was on account of sales-tax collected by the assessee for the last quarter of the relevant accounting year. The deduction was disallowed under s. 43B which, as stated above, was inserted w.e.f. 1st April, 1984. It is also relevant to note that the first proviso which came into force w.e.f. 1st April, 1988 was not on the statute book when the assessments were made in the case of Allied Motors (P) Ltd. Etc. (supra). However, the assessee contended that even though the first proviso came to be inserted w.e.f. 1st April, 1988, it was entitled to the benefit of that proviso because it operated retrospectively from 1st April, 1984, when s. 43B stood inserted. This is how the question of retrospectivity arose in Allied Motors (P) Ltd. Etc. (supra). This Court, in Allied Motors (P) Ltd. Etc. (supra) held that when a proviso is inserted to remedy unintended consequences and to make the section workable, a proviso which supplies an obvious omission in the section and which proviso is required to be read into the section to give the section a reasonable interpretation, it could be read retrospective in operation, particularly to give effect to the section as a whole. Accordingly, this Court, in Allied Motors (P) Ltd. Etc. (supra), held that the first proviso was curative in nature, hence, retrospective in operation w.e.f. 1st April, 1988. It is important to note once again that, by Finance Act, 2003, not only the second proviso is deleted but even the first proviso is sought to be amended by bringing about an uniformity in tax, duty, cess and fee on the one hand vis-a-vis contributions to welfare funds of employee(s) on the other. This is one more reason why we hold that the Finance Act, 2003, is retrospective in operation. Moreover, the judgment in Allied Motors (P) Ltd. Etc. (supra) is delivered by a Bench of three learned Judges, which is binding on us. Accordingly, we hold that Finance Act, 2003, will operate retrospectively w.e.f. 1st April, 1988 (when the first proviso stood inserted). Lastly, we may point out the hardship and the invidious discrimination which would be caused to the assessee(s) if the contention of the Department is to be accepted that Finance Act, 2003, to the above extent, operated prospectively. Take an example—in the present case, the respondents have deposited the contributions with the R.P.F.C. after 31st March (end of accounting year) but before filing of the Returns under the IT Act and the date of

payment falls after the due date under the Employees' Provident Fund Act, they will be denied deduction for all times. In view of the second proviso, which stood on the statute book at the relevant time, each of such assessee(s) would not be entitled to deduction under s. 43B of the Act for all times. They would lose the benefit of deduction even in the year of account in which they pay the contributions to the welfare funds, whereas a defaulter, who fails to pay the contribution to the welfare fund right upto 1st April, 2004, and who pays the contribution after 1st April, 2004, would get the benefit of deduction under s. 43B of the Act. In our view, therefore, Finance Act, 2003, to the extent indicated above, should be read as retrospective. It would, therefore, operate from 1st April, 1988, when the first proviso was introduced. It is true that the Parliament has explicitly stated that Finance Act, 2003, will operate w.e.f. 1st April, 2004. However, the matter before us involves the principle of construction to be placed on the provisions of Finance Act, 2003.

16. *Before concluding, we extract hereinbelow the relevant observations of this Court in the case of CIT vs. J.H. Gotla (1985) 48 CTR (SC) 363 : (1985) 156 ITR 323 (SC), which reads as under :*

"We should find out the intention from the language used by the legislature and if strict literal construction leads to an absurd result, i.e., a result not intended to be subserved by the object of the legislation found in the manner indicated before, then if another construction is possible apart from strict literal construction, then that construction should be preferred to the strict literal construction. Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction."

17. *For the aforesaid reasons, we hold that Finance Act, 2003, to the extent indicated above, is curative in nature, hence, it is retrospective and it would operate w.e.f. 1st April, 1988 (when the first proviso came to be inserted). For the above reasons, we find no merit in this batch of civil appeals filed by the Department which are hereby dismissed with no order as to costs."*

10. I am of the view that the reasoning of the Hon'ble Supreme Court in the case of Alom Extrusions Ltd(supra) will equally to the amendment to Sec.40(a)(ia) of the Act whereby a second proviso was inserted in sub-clause (ia) of clause (a) of Section 40 by the Finance Act, 2012, w.e.f. 1-4-2013. The provisions are intended to remove hardship. It was argued on behalf of the revenue that the existing provisions allow deduction in the year of payment and to that extent there is no hardship. We are of the view that the hardship in such an event would be taxing an Assessee on a higher income in one year and taxing him on lower income in a subsequent year. To the

extent the Assessee is made to pay tax on a higher income in one year, there would still be hardship.

11. The Hon'ble Delhi High Court in the case of CIT Vs. Ansal Land Mark Township (I) Pvt.Ltd., in ITA No.160/2015 judgment dated 26.8.2015 has taken the view that the insertion of the second proviso to Sec.40(a)(ia) of the Act is retrospective and will apply from 1.4.2005. Thus the alternative prayer of the learned counsel for the Assessee in terms of Ground No.3 is accepted. Ground No.1(a) & (b) therefore does not require any adjudication.

12. Ground No. 2 raised by the Assessee reads as follows:

“2(a) For that on the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in confirming the addition of Rs.6,60, 1501- made by the Ld. A.O. on the ground that the assessee failed to submit the vouchers in support of expenditure to the tune of Rs.6,60,1501- out of the total expenditure of Rs. 13,70,5001- claimed under the head Carriage Charges.

(b) For that the Ld. CIT(A) erred in confirming the action of the Ld. A.O. by making the addition of Rs.6,60,1501- by alternatively invoking the provisions of sec. 40(a)(ia) r.w. sec. 194C of the Act on presumption basis.”

13. As we have already seen while deciding Ground No. 1 & 3 above that the Assessee incurred expenditure towards carriage charges to the tune of Rs.13,70,000/-. The AO disallowed a sum of Rs.6,60,150/- out of the aforesaid expenditure on carriage for the reason that expenditure to that extent was not supported by vouchers. The AO also observed that in respect of the expenditure so disallowed, there was also a possibility of violation of the provisions of Sec.194C of the Act. On appeal the CIT(A) confirmed the order of the AO. Hence ground No.2 by the Assessee before the Tribunal.

14. The learned counsel prayed for alternative relief in terms of ground No.3. For the reasons already discussed while allowing the alternative relief in terms of ground No.3, the prayer made is accepted.

15. As far as the disallowance of carriage expenses for want of vouchers is concerned, the learned counsel for the Assessee filed an application for admission of additional evidence in terms of Rule 29 of the Income Tax Appellate Tribunal Rules,

1963 (ITAT Rules). It was submitted that the vouchers could not be produced earlier because the issue was argued on legal grounds before CIT(A) and the counsel for the Assessee in the proceedings before the lower authorities did not think it fit to file the vouchers, though they were available. I am of the view that the vouchers now sought to be filed by the Assessee as additional evidence is required to be admitted as additional evidence as they are material for deciding the issue in the appeal. Since, the additional evidence requires verification by the AO, I deem it fit and proper to remand the issue to the AO for fresh consideration in the light of the additional evidence now filed. The AO will afford opportunity of being heard to the Assessee before deciding the issue.

16. In the result the appeal of the Assessee is treated as allowed for statistical purpose.

Order pronounced in the Court on 03.02.2016.

Sd/-
[N.V.Vasudevan]
Judicial Member

Dated : 03.02.2016.
[RG PS]

Copy of the order forwarded to:

1. Shri Dilip Kumar Roy, Vivekananda Lane, P.O.-Bethuadahari, Dist.-Nadia. Pin Code-741126.
2. ITO, Ward-1, Nadia.
3. CIT(A)-12, Kolkata 4. CIT-14, Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

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By Order

Asstt.Registrar, ITAT, Kolkata Benches