**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'A' BENCH, KOLKATA**

**Before Shri P.M.Jagtap, Accountant Member
and Shri S.S. Viswanethra Ravi, Judicial Member**

**I.T.A. No. 1919/KOL/ 2013
Assessment Year: 2008-2009**

M/s AI Champdany Industries Ltd .....Appellant
25,Princep Street,
Kolkata-700 072
[PAN: AACCA4860D]

-Vs.-
Dy.Commissioner of Income Tax, ...Respondent
Circle-I,
P-7, Chowringhee Square,
Kolkata-700069

Appearances by:
Shri Subhash Agarwal, Advocate., for the assessee
Shri SallongYaden, Addl.CIT, Sr. D.R., for the Department

Date of concluding the hearing : 25-05-2016
Date of pronouncing the order : 27 -07-2016

O R D E R

Per Shri S.S. Viswanethra Ravi :-

This appeal filed by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-XXIV, Kolkata dated 15.02.2011 for the assessment year 2008-09 on the following grounds:-

(1) For that on the facts and in the circumstances of the case, the ld. CIT(A) was not justified in confirming the disallowance of Rs.25,31,998/- made by the AO being

payments made to M/s. Gordon Woodroffe Logistic ltd. a Shipping agent of non-resident ship owner who carried assessee company's goods, by wrongly invoking the provisions of section 40(a)(ia).

(2) For that the ld. CIT(A) ought to have considered the CBDT Circular No. 723 dated 19.09.1995 which exempted payments made to shipping agents of non-resident ship owners for carriage of goods from the purview of tax deduction u/s 194C.

(3) For that on the facts and in the circumstances of the case, the ld. CIT(A) was not justified in confirming the disallowance of Rs.38,12,856/- made by the AO being payments made to M/s. The shipping Corporation of India Ltd. by wrongly invoking the provisions of section 40(a)(ia).

(4) For that the appellant assessee was under a bonafide belief that the impugned payments were not subject to TDS provisions, as such, ld. CIT(A) ought to have deleted additions made u/s 40(a)(ia).

(5) For that the ld. CIT(A() ought to have considered the issue of disallowance u/s 40(a)(ia) on merit rather than dismissing the assessee's appeal on technical considerations relying solely upon Hon'ble Calcutta High Court's judgment in the case of CIT –vs.- Md. Jakir Hossain Mondal, ITAT No. 13 of 2013.

2. The only issue in this appeal to be decided is as to whether the CIT-A justified in confirming the disallowances made by the AO U/Sec 40(a)(ia) of the Act in the circumstances of the case.

3. The brief facts of the case are that the Assessee is a company and engaged in manufacturing and trading of Jute, Jute blended and flax goods. The Assessee had filed its return of income for the A.Y. 2008-09 on 29.03.2009 declaring a total income at Rs. 6,22,04,220/-. Under scrutiny, notices under section 143(2) and 142(1) were issued to the assessee. In response to the said notices, ld. A.R. of the assessee appeared and filed different details in support of return. The assessee produced documentary evidences to establish that the payments were made to parties claiming exemption for non deduction of tax at source except M/s The Shipping Corporation of India and M/s Gordon Woodroffe Logistic Ltd being Indian residents to whom payments were made without deducting TDS. According to AO the assessee did not file any certificate to supporting claiming exemption u/sec 194C of the Act, thereby, the AO disallowed Rs.38,12,856/- against M/s The Shipping Corporation of India and Rs.25,31,998/- towards M/s Gordon Woodroffe Logistic Ltd U/Sec 40(a)(ia) of the Act.

4. Aggrieved by the assessment order framed by the AO, the assessee preferred an appeal before the CIT-A confirmed the disallowances of Rs.38,12,856/- made against M/s The Shipping Corporation of India and Rs.25,31,998/- made towards M/s Gordon Woodroffe Logistic Ltd U/Sec 40(a)(ia) of the Act against which the assessee before us by raising above mentioned grounds of appeal.

5. At the time of hearing, the Ld.AR prayed before us to direct the AO 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 amendments to the provisions of Sec.40(a)(ia) of the Act by the Finance Act, 2012 w.e.f. 1-4-2013, whereby a second proviso was inserted which provided that if the payees have filed their return of income showing the receipts from the Assessee in their return of income than the 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 Sec.40(a)(ia) of the Act.

6. It was submitted that the Assessing Officer and first appellate authorities are vested with statutory powers u/s 133(6) or 131 and or other provisions and they could have made inquires with the parties or their respective Assessing Officer. In this regard it was submitted that the assessee would furnish all the relevant details of the payees with their PAN and details of their Assessment Officer.

7. It was pointed out that ITAT, Kolkata in the case of Ramakrishna Vedanta Math v. Income-tax Officer, Ward 59 (1), Kolkata, [2012] 24 taxmann.com 29 (Kol.) has taken a view that once assessee furnishes lawfully maintained information about recipients, Assessing Officer should first ascertain related facts about payment of taxes directly from recipients before invoking section 201 (1). The ITAT in its order held:

> *"5. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case as also the applicable position.*

6. Learned counsel's vehement reliance is on Hon'ble Allahabad High Court's judgment in the case of Jagran Prakashan Ltd. v. Dy.CIT (TDS) [2012] 21 taxmann.com 489 wherein Their Lordships have, inter alia, observed as follows:

..... it is clear that deductor cannot be treated an assessee in default till it is found that assessee has also failed to pay such tax directly. In the present case, the Income tax authorities had not adverted to the Explanation to Section 191 nor had applied their mind as to whether the assessee has also failed to pay such tax directly. Thus, to declare a deductor, who failed to deduct the tax at source as an assessee in default, condition precedent is that assessee has also failed to pay tax directly. The fact that assessee has failed to pay tax directly is thus, foundational and jurisdictional fact and only after finding that assessee has failed to pay tax directly, deductor can be deemed to be an assessee in default in respect of such tax .....

7. It is thus argued that the onus is on the revenue to demonstrate that the taxes have not been recovered from the person who had the primarily liability to pay tax, and it is only when the primary liability is not discharged that vicarious recovery liability can be invoked. Learned counsel contends that once all the details of the persons to whom payments have been made, it is for the Assessing Officer, who has all the powers to requisition the information from such payers and from the income tax authorities, to ascertain whether or not taxes have been paid by the persons in receipt of the amounts from which taxes have not been withheld. It is learned counsel's submission that as a result of Hon 'ble Allahabad High Court's judgment in the case of Jagran Prakashan Ltd's case (supra), this paradigm shift in the interpretation of Section 201 (1) has been brought about.

8. The plea is indeed well taken. Learned counsel is quite right in his submission that, as a result of the judgment of Hon 'ble Allahabad High Court in Jagran Prakashan Ltd.'s case (supra) and in the absence of anything contrary thereto from Hon'ble jurisdictional High Court, there is a paradigm shift in the manner in which recovery provisions under section 201 (1) can be invoked. As observed by Their Lordships, the provisions of Section 201(1) cannot be invoked and the "tax deductor cannot be treated an assessee in default till it is found that assessee has also failed to pay such tax directly". Once this finding about the non payment of taxes by the recipient is held to a condition precedent to invoking Section 201(1), the onus is on the Assessing Officer to demonstrate that the condition is satisfied. No doubt the assessee has to submit all such information about the recipient as he is obliged to maintain under the law, once this information is submitted it is for the Assessing Officer to ascertain whether or not the taxes have been paid by the recipient of income. This approach, in our humble understanding, is in consonance with the law laid down by Hon 'ble Allahabad High Court.

9. It is important to bear in mind that the lapse on account of non deduction of tax at source is to be visited with three different consequences - penal provisions, interest provisions and recovery provisions. The penal provisions in respect of such a lapse are set out in Section 271 C. So far as penal provisions are concerned, the penalty is for lapse on the part of the assessee and it has nothing to do with whether or not the taxes were ultimately recovered through other means. The provisions regarding interest in delay in depositing the taxes are set out in Section 201 (1A). These provisions provide that for any delay in recovery of such taxes is to be compensated by the levy of interest. As far as recovery provisions are concerned, . these provisions are set out in Section 201 (1) which seeks to make good any loss to revenue on account of lapse by the assessee tax deductor. However, the question of making good the loss of revenue arises only when there is indeed a loss of revenue and the loss of revenue can be there only when recipient of income has not paid tax. Therefore, recovery provisions under section 201(1) can be invoked only when loss to revenue is established, and that can only be established when it is demonstrated that the recipient of income has not paid due taxes thereon. In the absence of the statutory powers to requisition any information from the recipient of income, the assessee is indeed not always able to obtain the same. The provisions to make good the shortfall in collection of taxes may thus end up being invoked even when there is no shortfall in fact. On the other hand, once assessee furnishes the requisite basic information, the Assessing Officer can very well ascertain the related facts about payment of taxes on income of the recipient directly from the recipients of income. It is not the revenue's case before us that, on the facts of this case, such an exercise by the Assessing Officer is not possible. It does put an additional burden on the Assessing Officer before he can invoke Section 201(1) but that's how Hon 'ble High Court has visualized the scheme of Act and that's how, therefore, it meets the end of justice.

10. The matter thus stands restored to the file of the Assessing Officer for fresh adjudication in accordance with the law and in the light of our observations above. While doing so, the Assessing officer will give a due and fair opportunity of hearing to the assessee and dispose of the matter by way of a speaking order. We direct so."

8. Further submitted that the above decision ITAT Kolkata in the above mentioned case will also apply for the purposes of Section 40(a)(ia) of the Act. Further reliance was also placed on the decision of the ITAT Kolkata in the case of Vas Electronics Vs. ACIT, ITAT Kolkata in I.T.A No. 662/Kol/2013 dated 24-11-2015 wherein it was held as follows:

"3. Briefly stated facts are that assessee has claimed labour charges at Rs. 55, 440/-, carriage inward charges amounting to Rs. 62,07,498/- and hire charges amounting to Rs.29, 12, 123/- in the P&L Account, but no TDS was deducted u/s. 194C of the Act. Ld. Counsel for the assessee before us now clearly admitted that the assessee has not deducted TDS u/s. 194C but he is obliged to deduct TDS u/s. 194C of the act. The AO applied the provisions of section 40(a)(ia) of the Act on the above three payments and made disallowance. Aggrieved, assessee preferred appeal before CIT(A) , who also confirmed the action of AO. Aggrieved, now assessee is in second appeal before us.

4. At the outset, Ld. Counsel for the assessee fairly conceded the grounds but requested only on the issue of applicability of second proviso to section 40(a)(ia) of the Act, which is held to be retrospective by Hon'ble Delhi High Court in the case of CIT Vs. Ansal Land Mark Township P. Ltd. (2015) 377 ITR 635 (Del), wherein the AO is directed to verify whether the recipients have included the receipts paid by the assessee in their respective returns of income and also paid taxes on the same. When this plea of the Ld. Counsel for the assessee was confronted to Ld. Sr. OR, he fairly conceded the position and urged the bench to set aside the matter to the file of the A.O.

5. We have heard rival submissions and gone through facts and circumstances of the case. We are inclined to set aside the issue to the file of the AO and accordingly, we direct the AO to verify whether the recipients have included the income in their respective returns and also paid taxes on the same. The assessee will provide the details of recipients i.e. their assessment particulars etc. to the AO so that the AO can verify. In case the recipient parties are not cooperating in providing details, the AO can call for the information u/s. 133(6) of the Act for verification of the same. Accordingly, this issue is remitted back to the file of AO to decide in terms of the above directions. This issue of assessee's appeal is allowed for statistical purposes."

9. It was therefore submitted that the disallowance u/s.40(a)(ia) of the Act to the extent sustained by the CIT(A) should be set aside and remanded to the AO to verify whether the recipients have included the receipts paid by the assessee in their respective returns of income and also paid taxes on the same. To the extent the recipients from the Assessee have so included the sum in their returns of income and filed the same, no disallowance u/s.40(a)(ia) of the Act should be made by the AO. In case the recipient parties are not cooperating in

providing details, the AO should be directed to call for the information u/s. 133(6) or 131 of the Act, for verification of the same.

10. The learned DR relied on the order of the CIT(A) and submitted that the benefit of the second proviso should not be allowed to the Assessee as the tax deducted at source has not been paid on or before the due date for filing the return of income u/s.139(1) of the Act.

11. Heard rival submissions and perused the relevant material on record. 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. Once it is held that the Assessee is entitled to the benefit of 2nd proviso to Sec.40(a)(ia) of the Act, the CIT(A) ought to have directed the AO to verify whether the recipients have included the receipts paid by the assessee in their respective returns of income and also paid taxes on the same. To the extent the recipients from the Assessee have so included the sum in their returns of income and filed the same, no disallowance u/s.40(a)(ia) of the Act ought to have been sustained by the CIT(A). The CIT(A) ought to have also directed the AO that in case the recipient parties are not cooperating in providing details, the AO should call for the information u/s. 133(6) or 131 of the Act, for verification of the same. We therefore set aside the order of the CIT(A) to the extent to which he had sustained the order of the AO on the disallowance u/s.40(a)(ia) of the Act and remand the issue to the AO to verify whether the recipients have included the receipts paid by the assessee in their respective returns of income and also paid taxes on the same. To the extent the recipients from the Assessee have so

included the sum in their returns of income and filed the same, no disallowance u/s.40(a)(ia) of the Act should be made by the AO. In case the recipient parties are not cooperating in providing details, the AO should be directed to call for the information u/s. 133(6) or 131 of the Act for verification of the same.

12. In the result, the appeal by the Assessee is allowed for statistical purposes.

Order pronounced in the Court on 27 .07.2016.

Sd/- Sd/-

P.M. Jagtap S.S.Viswanethra Ravi
Accountant Member Judicial Member
Dated : 27 .07.2016.

Copy of the order forwarded to:

1. ***M/s AI Champdany Industries Ltd, 25,Princep Street, Kolkata-700 072***
2. ***Dy.Commissioner of Income Tax, Circle-I, P-7, Chowringhee Square, Kolkata-700069***
3. CIT(A)-XXIV, Kolkata
4. CIT(DR), Kolkata Benches, Kolkata.

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By Order

Asstt. Registrar, ITAT,
Kolkata Benches, Kolkata