IN THE INCOME TAX APPELLATE TRIBUNAL "SMC" BENCH : KOLKATA

[Before Hon'ble Sri N.V.Vasudevan, JM]
I.T.A No.687/Kol/2014

Assessment Year : 2007-08

I.T.O., Ward-41(2) Kolkata	-vs.-	Shri Sajjan Kumar Sharma Kolkata (PAN:AQJPS 6509 D)
(Appellant)		(Respondent)

For the Appellant : Shri Amitabh Bhattacharya, JCIT
For the Respondent : None

Date of Hearing : 23.08.2016.
Date of Pronouncement : 02.09.2016.

ORDER

This is an appeal by the Revenue against the order dated 31.12.2013 of CIT(A)-XXX, Kolkata, relating to AY 2007-08.

2. The assessee is an individual. He derives income from rendering services. For AY 2007-08, the AO completed assessment for AY 2007-08 u/s.143(3) of the Income Tax Act, 1961 (Act) on 31.12.2009 determining the total income of the Assessee at Rs.6,34,660/-. After conclusion of the assessment proceedings the AO came across two Tax Deducted at Source (TDS) payments of Rs.20,226/- and Rs.21,849/- respectively u/s.194C(2) of the Act, deducted in the months of January and February of the relevant previous years which were deposited in the next financial year to be exact on 16.6.2007. According to the AO as per the provisions of Sec.40(a)(ia) of the Act, the tax deducted at source ought to have been paid on or before March, 2007. Since the payments were made only on 16.6.2007, the AO was of the view that a sum of Rs.41,25,000/- which is the corresponding payment relatable to TDS which was paid ought to have been disallowed u/s.40(a)(ia) of the Act and ought to have been added to the total income of the Assessee. The AO invoked the provisions of Sec.154 of the Act and passed an order dated 10.11.2010 disallowing the sum of Rs.41,25,000/- u/s.40(a)(ia) of the Act and adding the said sum to the total income of the Assessee.

3. The plea of the Assessee before the AO was that as required u/s. 194C of the Act, tax was deducted, but was paid to credit of Central Govt. before 30.9.2008 i.e., before the last date specified for filing the return of income u/s. 139(1) of the Act. As per the provisions of section 40(a)(ia) of the Act, as it existed prior to its substitution by the Finance Act, 2010, any interest, commission on which tax is deductible at source u/s. 194H and 194A of the act, and where such tax has not been deducted or after deducted has not been paid;

> (A) in a case where the tax was deductible and was so deducted during the last month of the previous year, on or before the due date specified in sub-section (1) of section 139 ; or
>
> (B) in any other case, on or before the last day of the previous year will attract disallowance u/s.40(a)(ia) of the Act.

4. The proviso to section 40(a)(ia) of the Act as it existed after substitution by the Finance Act, 2008 with retrospective effect from 1.4.2005 reads as follows:-

> "Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted-
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> (A) during the last month of the previous year but paid after the said due date ; or
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> (B) during any other month of the previous year but paid after the end of the said previous year, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid." ;

5. According to the AO, as per the above provisions as it existed for A.Y. 2007-08, the assessee ought to have paid the tax deducted at source on or before the last day of the previous year. Since the assessee failed to pay the tax on or before the last day of the previous year i.e., 31.3.2008, the AO was of the view that the commission and interest expenses on which tax deducted at source was not paid within the time limit allowed as above, should be disallowed and added to the total income. The AO accordingly made the impugned disallowance u/s.40(a)(ia) of the Act.

6. On appeal by the assessee, the CIT(Appeals) deleted the additions made by the AO by holding that if the tax deducted at source is paid on or before the due date for filing the return of income u/s.139(1) of the Income Tax Act, 1961 (Act), than no disallowance u/s.40(a)(ia) of the Act could be made. In holding so, the CIT(A) held that the amendment to the provisions of Sec.40(a)(ia) of the Act by the Finance Act, 2010 whereby it was laid down that if the tax deducted at source is paid on or before the due date for filing the return of income u/s.139(1) of the Act than no disallowance can be made u/s.40(a)(ia) of the Act, is retrospective in operation and operates from 1.4.2005 though it is said to be retrospective only from 1.4.2010.

7. Aggrieved, the Revenue has preferred the present appeal before the Tribunal.

8. I have heard the rival submissions. It is not in dispute before me that the Hon'ble Calcutta High Court in the case of Virgin Creations this Tribunal in the case of *Sri Santosh Kumar Shetty* in *ITA No.1194/Bang/2012 by order dated 26.7.2013*, has taken a view that amendment to provisions of section 40(a)(ia) of the Act by the Finance Act, 2010 will operate retrospectively w.e.f. 1.4.2005. As per the aforesaid amendment, tax deducted at source, if it is paid on or before the due date for filing of return of income, then no disallowance u/s. 40(a)(ia) of the Act can be made.

9. The legislative history of the provisions of Sec.40(a)(ia) of the Act is as follows: Section 40 has certain clauses providing for the amounts which are not deductible. Sub-clause (ia) of clause (a) of section 40 was inserted by the Finance (No.2) Act, 2004 with effect from 1st April, 2005 reading as under:-

> "40. Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computed the income chargeable under the head `Profits and gains of business or profession'—.
>
> …..
>
> (ia) any interest, commission or brokerage, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on or, after deduction, has not been paid during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200 :

Provided that where in respect of any such sum, tax has been deducted in any subsequent year or, has been deducted in the previous year but paid in any subsequent year after the expiry of the time prescribed under sub-section (1) of section 200, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

Explanation. – For the purposes of this sub-clause,-

(i)"commission or brokerage" shall have the same meaning as in clause (i) of the Explanation to section 194H;

(ii)"fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;

(iii)"professional services" shall have the same meaning as in clause (a) of the Explanation to section 194J;

(iv)"work" shall have the same meaning as in Explanation III to section 194C; "

10. The Memorandum explaining the provisions in the Finance Bill explained the rationale of the insertion of the new provision in following words :-

> "With a view to augment compliance of TDS provisions, it is proposed to extend the provisions of section 40(a)(i) to payments of interest, commission or brokerage, fees for professional services or fees for technical services to residents, and payments to a resident contractor or sub-contractor for carrying out any work (including supply of labour for carrying out any work), on which tax has not been deducted or after deduction, has not been paid before the expiry of the time prescribed under sub-section (1) of section 200 and in accordance with the other provisions of Chapter XVII-B. It is also proposed to provide that where in respect of payment of any sum, tax has been deducted under Chapter XVII-B or paid in any subsequent year, the sum of payment shall be allowed in computing the income of the previous year in which such tax has been paid.
>
> The proposed amendment will take effect from 1st day of April, 2005 and will, accordingly, apply in relation to the assessment year 2005- 2006 and subsequent years. [Clause 11]"

11. Thereafter the Finance Act, 2008 made amendment to clause (a) in sub-clause (ia) in section 40 with retrospective effect from 1st April, 2005. The section as amended by the Finance Act, 2008 read as under:-

> "(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been paid,-
>
> (A) in a case where the tax was deductible and was so deducted during the last month of the previous year, on or before the due date specified in sub-section (1) of section 139 ; or
>
> (B) in any other case, on or before the last day of the previous year.
>
> Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted-
>
> (A) during the last month of the previous year but paid after the said due date ; or
>
> (B) during any other month of the previous year but paid after the end of the said previous year, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid." ;

12. The Finance Act, 2008 brought out amendment to section 40(a)(ia) w..e.f. 1.4.2005 by relaxing earlier position to some extent. It made two categories of defaults causing disallowance on the basis of the period of the previous year in which tax was deductible. The first category of disallowances included the cases in which tax was deductible and was so deducted during the last month of the previous year but there was failure to pay such tax on or before the due date specified in sub-section (1) of section 139 of the Act. In other words, if any amount on which tax was deductible during last month of the previous year, that is March 2005, but was paid before 31st October, 2005, being the due date u/s 139(1), the deductibility of the amount was kept intact. The second category included cases other than those given in category first. To put it simply, if tax was deductible and was so deducted during the first eleven months

of the previous year, that is, up to February, 2005, the disallowance was to be made if the assessee failed to pay it before 31st March, 2005.

13. Then came the amendment to section 40(a)(ia) by the Finance Act, 2010 with retrospective effect from 1st April, 2010. The provision so amended, now reads as under :-

> "(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), 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.
>
> Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid."

14. From the above provision as amended by the Finance Act, 2010 with retrospective effect from 1st April, 2010 it can be seen that the only difference which this amendment has made is dispensing with the earlier two categories of defaults as per the Finance Act, 2008, as discussed in the earlier para, causing disallowance on the basis of the period of the previous year during which tax was deductible. The first category of disallowances included the cases in which tax was deductible and was so deducted during the last month of the previous year but there was failure to pay such tax on or before the due date specified in sub-section (1) of section 139. The Finance Act, 2010 has not tinkered with this position. The second category of the Finance Act, 2008 which required the deposit of tax before the close of the previous year in case of deduction during the first eleven months, as a pre-condition for the grant of deduction in the year of incurring expenditure, has been altered. The hitherto requirement of the assessee deducting tax at source during the first eleven months of the previous year and paying it before the close of the previous year up to 3 1st March of the previous year as a requirement for grant of deduction in the year of incurring such expenditure,

has been eased to extend such time for payment of tax up to due date u/s 139(1) of the Act. As per the new amendment, the disallowance will be made if after deducting tax at source, the assessee fails to pay the amount of tax on or before the due date specified in sub-section (1) of section 139 of the Act. The effect of this amendment is that now the assessee deducting tax either in the last month of the previous year or first eleven months of the previous year shall be entitled to deduction of the expenditure in the year of incurring it, if the tax so deducted at source is paid on or before the due date u/s 139(1). This is the only difference which has been made by the Finance Act, 2010.

15. The question as to whether the Amendment by the Finance Act, 2010 as aforesaid is prospective or retrospective from 1.4.2005 came up for consideration before the Mumbai Special Bench ITAT in the case of *Bharati Shipyard Ltd.* Before the Special Bench it was argued that the amendment was made with a view to remove the unnecessary hardship caused to the assessee by the earlier provision. The Special Bench by its order dated 9.9.2011 however held that the amendment carried out by the Finance Act, 2010 with retrospective effect from assessment year 2010- 2011 cannot be held to be retrospective from assessment year 2005-2006. The Special Bench held that the amendment brought out by the Finance Act, 2010 to section 40(a)(ia) w.e.f. 01.04.2010, is not remedial and curative in nature.

16. Prior to the decision of the Special Bench, identical issue had come up for consideration before the ITAT Kolkata Bench in the case of *Virgin Creations Vs. ITO, Ward 32(4), Kolkata ITA No. 267/Kol/2009 for AY 05-06.* The issue that arose for consideration was disallowance of expenses u/s.40(a)(ia)claimed as deduction while computing income from business being embroidery charges, dyeing charges, interest on loan and freight charges without deducting tax at source. The Embroidery charges were paid between 22nd may, 2004 to 30.11.2004. Tax had been deducted at source but were paid to the Government only on 28.10.2005 and not within the time contemplated by Section 200(1) of the Act. The dyeing charges were paid between 5.4.2004 to 20.8.2004. Tax was deducted at source but was paid to the Government only on 28.10.2005. Freight outward charges were paid without deduction of tax at source. Interest on loans were credited to the creditors account on 31.3.2005 to the

extent they were paid after the due date for filing return of income u/s.139(1) of the Act, the disallowance was made u/s.40(a)(ia) of the Act. Before the Tribunal, the Assessee contented that the amendment by the Finance Act, 2010 with retrospective effect from 1st April, 2010 whereby amount of tax deducted at the time of making payment in respect of expenditure referred to in Sec.40(a)(ia) of the Act, if paid to the Government on or before the due date for filing the return of income due date u/s 139(1) of the Act should be allowed as a deduction. In other words it was argued that the amendment by the Finance Act, 2010 to the provisions of Sec.40(a)(ia) has to be held to be retrospective w.e.f. 1-4-2005. The ITAT Kolkata Bench by its order dated 15.12.2010, held as follows:

> "8. After hearing the rival submissions and on careful perusal of the materials available on record, keeping in view of the fact that though the Ld. D.R. submitted that the decisions of the Coordinate Benches are not binding and the Kolkata benches may take a different view, since Mumbai Bench after analyzing the provisions of Sec.40(a)(ia) since its inception and various amendments made to the same including the suggestion made by the Industry in the form of representation in their pre-budget memorandum to the Hon'ble Finance Minister and by applying the decision of the Hon'ble Apex Court in the case of Alom Extrusions Ltd., has observed that "The provisions of Section 40(a)(ia) as stood prior to the amendments made by the Finance Act 2010 thus were resulting into unintended consequences and causing grave and genuine hardships to the assesses who had substantially complied with the relevant TDS provisions by deducting the taxes at source and by paying the same to the credit of the Government before the due date of filing of their returns u/s.139(1). In order to remedy this position and to remove the hardships which was being caused to the assessee belonging to such category, amendments have been made in the provisions of Section 40(a)(ia) by the Finance Act, 2010. The said amendments, in our opinion, thus are clearly remedial/curative in nature as held by the Hon'ble Supreme Court in the case of Allied Motors Pvt.Ltd. (supra) and Mom Extrusions Ltd. (supra) and the same therefore would apply retrospectively w.e.f. 1st April, 2005. In the case of R.B.Jodha Mal Kuthiala 82 ITR 570, it was held by the Hon'ble Supreme Court that a proviso which is inserted to remedy unintended consequences and to make the provision workable, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole. In the present case, the amount of tax deducted at source from the freight charges during the period 01/04/2005 to 28/02/2006 was

> paid by the Assessee in the month of July and August 2006 i.e., well before the due date of filing of its return of income for the year under consideration. This being the undisputed position, we hold that the disallowance made by the A.O. and confirmed by the learned CIT(A) on account of freight charges by invoking the provisions of Section 40(a)(ia) is not sustainable as per the amendments made in the said provisions by the Finance Act, 2010 which, being remedial/curative in nature, have retrospective application", we find no reason to deviate from the decisions of the ITAT's Mumbai Bench and Ahmedabad Bench, in the absence of a contrary view, except the other benches decisions or any other High Court. Therefore, respectfully following the decision of the Coordinate Benches (supra), we allow the ground nos. I to 3 of the assessee's appeal."

17. As against the aforesaid decision the Revenue preferred appeal before the Hon'ble Calcutta High Court. The Hon'ble Calcutta High Court in *ITA No. 302 of 2011 GA 3200/2011 decided on 23.11.2011*, held as follows:

> "We have heard Mr. Nizamuddin and gone through the impugned judgment and order. We have also examined the point formulated for which the present appeal is sought to be admitted. It is argued by Mr. Nizamuddin that this court needs to take decision as to whether section 40(A)(ia) is having retrospective operation or not.
>
> The learned Tribunal on fact found that the assessee had deducted tax at source from the paid charges between the period April 1, 2005 and April 28, 2006 and the same were paid by the assessee in July and August 2006, i.e. well before the due date of filing of the return of income for the year under consideration. This factual position was undisputed. Moreover, the Supreme Court, as has been recorded by the learned Tribunal, in the case of Allied Motors Pvt. Ltd. and also in the case of Alom Extrusions Ltd., has already decided that the aforesaid provision has retrospective application. Again, in the case reported in 82 ITR 570, the Supreme Court held that the provision, which has inserted the remedy to make the provision workable, requires to be treated with retrospective operation so that reasonable deduction can be given to the section as well. In view of the authoritative pronouncement of the Supreme Court, this court cannot decide otherwise. Hence we dismiss the appeal without any order as to costs."

18. It can be seen from the above decision of the Hon'ble Calcutta High Court that Amendment to the provisions of Sec.40(a)(ia) of the Act, by the Finance Act, 2010 as aforesaid was held to be retrospective from 1.4.2005. If the amendment is considered

as retrospective from 1.4.2005, the effect will be that payments of TDS to the credit of the Government on or before the last date for filing return of income u/s.139(1) of the Act for the relevant AY have to be allowed as deduction. Admittedly in the case of the Assessee payments were so made before the said due date and in terms of the decision of the Hon'ble Calcutta High Court no disallowance could be made by the AO u/s. 40(a)(ia) of the Act.

19. It was also brought to my notice that the Hon'ble High Court of Karnataka in *ITA No.590/2013 by judgment dated 15.7.2014*, has taken identical view as was taken by the Hon'ble Calcutta High court. In view of the above, I am of the view that the tax deducted at source by the Assessee which have admittedly been paid on or before the due date for filing the return of income for AY 07-08, have to be considered as having been paid within time and therefore the provisions of Sec.40(a)(ia) of the Act cannot be invoked to disallow the payments. The order of the CIT(A) is therefore confirmed and the appeal by the revenue is dismissed.

20. In the result, the appeal by the Revenue is dismissed.

Order pronounced in the Court on 02.09.2016.

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

Dated : 02.09.2016.

[RG PS]

Copy of the order forwarded to:
1.Shri Sajjan Kumar Sharma, 8, Dilip Ganguly Sarani, Dunlop, Kolkata-700035.
2. I.T.O., Ward-41(2), Kolkata.
3. CIT(A)-XXX, Kolkata. 4. CIT-XIV, Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

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By Order

Asstt.Registrar, ITAT, Kolkata Benches