IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'F', NEW DELHI
Before SH. J.S. REDDY, AM And SMT. BEENA A PILLAI, JM

ITA No. 3950/Del/2013 : Asstt. Year : 2009-10

DCIT Circle 13(1), New Delhi.	Vs	Nice Projects P. Ltd. C-56A, Kalkaji, New Delhi. AACCN2830N
(APPELLANT)		**(RESPONDENT)**
PAN No. AFWPC1171P		

Assessee by : Sh. Mohit Gupta, CA
Revenue by : Dev Jyoti Das, CIT-DR

Date of Hearing : 17.02.2016		**Date of Pronouncement : 19.04.2016**

ORDER

PER BEENA A PILLAI, JM:

The present appeal has been filed by the Revenue against the order of the ld. CIT(A)-XVI, Delhi vide order dated 19.03.2012 for A.Y. 2009-10 on the following grounds of appeal:

1. *"Whether on the facts and in the circumstances of the case, the ld. CIT(A) has erred in deleting the addition on account of disallowance of hiring charges u/s 40(a)(ia) of the Act amounting to Rs. 56,96,615/- by not appreciating the contention of the Assessing Officer that the assessee has paid hire charges for hiring of various equipments as per narrations in the said accounts and it has nowhere been mentioned that it is pursuant to contract agreement and payment has been paid to contractor, sub-contractor.*

2. *Whether on the facts and in the circumstances of the case, the ld. CIT(A) has erred in not considering the fact that the assessee did not produce any contract/sub-contract agreement which evidenced that the said payments were in fact for contractual work and not just for hiring of equipment.*
3. *Whether on the facts and in the circumstances of the case, the ld. CIT(A) has erred in not considering the fact that explanation (i) to section 194I of the IT Act states that "rent" means any payment, by whatever name called under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of any machinery or plant or equipment or furniture or fittings whether or not owned by the payee. Therefore, the payments made by the assessee as hire charges for machinery or equipment falls within the meaning of rent and, therefore, TDS u/s 194I of the Act must be deducted on the whole.*
4. *Whether on the facts and in the circumstances of the case, the ld. CIT(A) has erred in not considering the fact that Circular No. 715 of CBDT dated 08.08.1995 says that tax deduction u/s 194I does not depend upon nomenclature the tax is to be deducted from rent paid by whatever name called. Also as per explanation (i) to section 194I of the Act, the incidence of deduction of tax at source (TDS) does not depend upon the nomenclature but on the contents of the agreement.*
5. *Whether on the facts and in the circumstances of the case, the ld. CIT(A) has erred not considering the observance of the Assessing Officer that the assessee itself*

had contradicted its claim by submitting that it had itself deducted TDS @ 11.33% on certain machine hire charges on the payments made to same parties to which payments have also been made under the head hire charges but TDS on the same has been deducted @ 1% or 2% u/s 194C.

6. *Whether on the facts and in the circumstances of the case, the ld. CIT(A) has erred in ignoring the fact that any compensation paid by a person for breach/non fulfillment of contract, the compensation/damages amount so paid is a penalty within the provisions of the Contract Act vis-à-vis Income Tax Act.*
7. *Whether on the facts and in the circumstances of the case, the ld. CIT(A) has erred in ignoring the fact that expenses on liquidated damages paid on the breach of a contract comes within the purview of explanation to section 37(1) of the IT Act, 1961, which states that any expenditure incurred for any purpose which is an offence or which is prohibited by law shall not be deemed to have incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such.*
8. *The appellant craves to be allowed to add any fresh grounds of appeal and/or delete or amend any of the grounds of appeal."*

2. The brief facts of the case are as under:

2.1 The assessee had filed its return of income on 26/09/2009 declaring income of Rs.2,31,74,830/-. The return was processed u/s 143(1) of the Act and the case was selected for scrutiny. Notices u/s 143(2) of the Act was issued to the assessee. During the assessment proceedings the ld.

Assessing Officer observed that assessee is engaged in the business of civil construction, civil engineers, steel structure, plumbing and electric work on contract basis. As per the details filed by the assessee it was observed by the ld. Assessing Officer that TDS was deducted u/s 194C of the Act. The ld. Assessing Officer was of the opinion that the assessee should have deducted TDS u/s 194I of the Act on the payments made to the parties. The ld. Assessing Officer, therefore, made an addition u/s 40(a)(ia) of the Act for non deduction of TDS.

2.2 Aggrieved by the order of the ld. Assessing Officer the assessee preferred an appeal before the ld. CIT(A). The ld. CIT(A) further observed that assessee had never entered into any contract for hiring of machinery and equipments, and the contracts entered with all the contractors were for execution of work which were clearly works contract, within the purview of section 194C of the Act. The ld. CIT(A), therefore, deleted the addition made by the ld. Assessing Officer.

2.3. The ld. CIT(A) also deleted the addition made by the Assessing Officer under the head "liquidated damages". The ld. CIT(A) observed as under:

> *"The 'liquidated damages' paid by the appellant are neither capital expenditure nor these expenditure are incurred by the assessee for any purpose which is an offence or which is prohibited by law. These "liquidated damages" are not in the nature of fine or penalty for infraction of any law. The Assessing Officer in the assessment order has nowhere brought out any infraction of law or breach of any statutory obligation by the appellant. The Assessing Officer has not mentioned under what*

provision of law the liquidated damages paid to different purchasers are an offence or prohibited by law. The 'liquidated damages' are not in the nature of expense mentioned in explanation to sec. 37(1)of the I.T. Act. The expenses are compensatory in nature and these charges are paid to parties for failure to deliver any or all of the goods or to perform the specified terms and conditions within the period specified in the contract. The damages paid to the purchaser for failure to deliver any or all of the goods or to perform the specified terms and conditions within the period specified in the contract are nothing but compensation for failure to complete specific terms of contract. Failure of completion of specific terms of contract is incidental to the business and liability of compensation arising because of such failure is an allowable deduction under the Act. As there was neither breach of law, nor any offence committed nor the said expenditure was prohibited by law, these expenses are not hit by the Explanation to section 37(1). I find support for my views from the following judicial pronouncements:

I. *CIT vs. Sri Rajagopal Transports P. Ltd. (1983) 144 ITR 573 (Mad.);*
II. *Addl. CIT vs. Arvind Mills Ltd. (1977) 109 ITR 212 (Guj);*
III. *CIT vs. Indian Commercial Co. P. Ltd. (1977) 106 ITR 465 (Bom.);*
IV. *CIT vs. Murari Lal Ahuja & Sons, (1989) 177 ITR 228 (P&H).*

3. Aggrieved by the order of the ld. CIT(A) the Revenue is in appeal before us on these two issues.

3.1. We have perused the order of the authorities below.

The assessee deducted tax u/s 194C of the Act instead of section 194I of the Act. There is no allegation against the assessee that the TDS so deducted have not been deposited with the Government account. We are of the view that the provisions of section 40(a)(ia) of the Act has two limbs;

- first is a situation where the assessee has not deducted TDS; and
- the other is a situation where the assessee deducts TDS and does not deposit it into the Government Account or deposit the same beyond the prescribed prices.

There is nothing in the section which say that disallowance could be made u/s 40(a)(ia) of the Act for short deduction of tax at source. The Hon'ble Calcutta High Court in the case of 46 Taxmann 499 (Cal.) held as follows:

"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 short fall of deduction. With regard to short fall, it cannot be assumed that there is a default as deduction is not 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 section3(1) of Section 139." This section 40(a) (ia) of the Act refers to only the duty to deduct tax and pay

to the government account. If there is any short fall due to any difference of opinion as to the taxability of any item or the nature of pay provisions, the assessee can be declared to be an assess 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."

4. Respectfully following the same, we uphold the findings of the ld. CIT(A) in respect of ground nos. 1 to 6.

5. Ground no. 7 relates to the deletion of an addition being liquidated damages paid on the breach of a contract. The ld. CIT(A) has recorded his observation in detail in respect of deletion of the addition made by the ld. Assessing Officer. He has recorded a clear finding that the amount paid by the assessee are in the nature of compensation paid to the parties for failure to deliver any or all the goods, or to perform the specified terms and conditions within the period specified under the contract. By no stretch of imagination can such expenses be hit by Explanation 1 to sec. 37(1) of the Act, as there was neither any breach of law nor any offence committed or the said expenditure was of the nature that was prohibited under law.

6. We find no infirmity in the findings of the ld. CIT(A). Accordingly, the grounds raised by the Revenue stands dismissed.

7. In the result, the appeal filed by the Revenue stands dismissed.

Order Pronounced in the Court on 19.04.2016.

Sd./-	**Sd./-**
(J.S. REDDY)	**(BEENA PILLAI)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated:
*Kavita Arora

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

		Date	
1.	Draft dictated on	22.02.2016	PS
2.	Draft placed before author	23.02.2016	PS
3.	Draft proposed & placed before the second member		JM/AM
4.	Draft discussed/approved by Second Member.		JM/AM
5.	Approved Draft comes to the Sr.PS/PS		PS/PS
6.	Kept for pronouncement on		PS
7.	File sent to the Bench Clerk		PS
8.	Date on which file goes to the AR		
9.	Date on which file goes to the Head Clerk.		
10.	Date of dispatch of Order.		