

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्रीमती दिवा सिंह, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष  
BEFORE: Smt. Diva Singh, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ ITA No.175/JP/16  
निर्धारण वर्ष / Assessment Year : 2011-12

M/s Morani Fourwheels Pvt. Ltd, Plot No. 1, Murti Kala Colony, Gopalpura Bypass, Jaipur	बनाम Vs.	The ACIT, Circle-6, Jaipur
स्थायी लेखा सं./ जीआईआर सं./ PAN No. AAFCM0805P		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारितकी ओर से / Assessee by : Shri S. L. Poddar (Ad.)  
राजस्व की ओर से / Revenue by : Shri O.P. Bhateja (Addl.CIT)

सुनवाई की तारीख / Date of Hearing : 23.03.2017  
घोषणा की तारीख / Date of Pronouncement: 12/05/2017.

आदेश / ORDER

PER SHRI VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Ld.CIT(A) - 2, Jaipur dated 01.01.2016 for A.Y. 2011-12. In its appeal, the assessee has taken following grounds of appeal:-

*"1. Under the facts and circumstances of the case, the learned CIT(A) has erred in sustaining the addition of Rs. 2,45,570/- u/s 40A(3) of the Income Tax Act, 1961.*

*2. Under the facts and circumstances of the case, the learned CIT(A) has erred in sustaining the addition of Rs. 86,76,512/- u/s 40(a)(ia) of the Income Tax Act, 1961 in spite of submission of form no. 26A under rule 31ACB in all the cases.*

*3. Under the facts and circumstances of the case, the Learned Assessing Officer has erred in sustaining the addition of Rs. 26,687/- out of disallowance of interest payment on TDS.*

*4. Under the facts and circumstances of the case, the Learned Assessing Officer has erred in sustaining the addition of Rs. 87,887/- disallowance out of conveyance expenses and travelling expenses.*

*5. Under the facts and circumstances of the case, the Learned Assessing Officer has erred in sustaining the addition of Rs. 1,50,000/- u/s 40(a)(ia) of the Income Tax Act, 1961.*

*6. Under the facts and circumstances of the case the learned Assessing Officer has erred in sustaining the addition of Rs. 4,62,014/- u/s 40(a)(ia) of the Income Tax Act, 1961.*

*7. Under the facts and circumstances of the case, the learned Assessing Officer has erred in sustaining the addition of Rs. 10,00,000/- on account of excess payment of salary.*

2. Firstly in respect of ground No. 3, 4 and 6, the Id AR at the outset submitted that he didn't wish to press these grounds of appeal. Hence, the same are dismissed as not pressed.

3. Now coming to ground No. 1 where the assessee has challenged the addition of Rs. 2,45,570/- made by the AO u/s 40A(3) of the I.T. Act. During the course of assessment proceedings, the Assessing Officer, from perusal of the ledger of account of M/s Bikaner Detective Security Service in the books of the assessee company, observed that on number of occasions, the assessee company has made cash payment above Rs. 20,000/- in violation to section 40A(3) of the I.T. Act. The AO further observed that the assessee is under contract with M/s Bikaner Detective Security Service and has deducted TDS u/s 194C on payment made to M/s Bikaner Detective Security Service.

Further, the AO observed that there was no compelling reason or any unavoidable circumstances which has been brought to his notice by the assessee to make payment in cash. Accordingly, cash payment of Rs. 2,45,570/- was held to be in violation of section 40A(3) of the I.T. Act and the same was disallowed and added to the total income of the assessee.

3.1. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT(A). The Id CIT(A) also observed that the assessee has a contractual arrangement with M/s Bikaner Detective Security Service to provide security services to the assessee and the assessee was under the obligation to pay to the agency, M/s Bikaner Detective Security Service from whom the services has been availed and not directly to the guards to whom the payments have been made in cash. The Id CIT(A) also confirmed the AO's findings that the payments so made are not covered under any exceptional or unavoidable circumstances under Rule 6DD and the disallowance made by the Assessing Officer was confirmed.

3.2. During the course of hearing, the Ld AR submitted that the payment was genuine and was paid to individual guards at the behest of M/s Bikaner Detective Security Service. The security persons engaged by the assessee were not having Bank Accounts and as such under compelling circumstances, the payments were made in cash. It was further submitted that it is not case of the Assessing Officer that the payment is not genuine or that the security guards were not engaged but the disallowance has been made purely on technical grounds and without appreciating the spirit of section 40A(3) of the Act as well as facts of the case. In support, the Id. AR relied on the decision of Hon'ble Supreme Court in case of Attar Singh Gurmukh Singh Vs. ITO 191 ITR 667 (SC). In its said decision, the Hon'ble Supreme Court has laid down the following proposition in law:

*"Section 40A(3) must not be read in isolation or to the exclusion of rule 6DD. The section must be read long with the rule. If read together, it will be clear that the provisions are not intended to restrict the business activities. There is no restriction on the assessee in his trading activities. Section 40A(3) only empowers the Assessing Officer to disallow the deduction claimed as expenditure in respect of which payment is not made by crossed cheque or crossed bank draft. The payment by crossed cheque or crossed bank draft is insisted on to enable the assessing authority to ascertain whether the payment was genuine or whether it was out of the income from undisclosed source. The terms of Section 40A(3) are not absolute. Consideration of business expediency and other relevant factors are not excluded. Genuine and bona fide transactions are not taken out of the sweep of the section. It is open to the assessee to furnish to the satisfaction of the Assessing Officer the circumstances under which the payment in the manner prescribed in Section 40A(3) was not practicable or would have caused genuine difficulty to the payee. It is also open to the assessee to identify the person who has received the cash payment. Rule 6DD provides that an assessee can be exempted from the requirement of payment by a crossed cheque or crossed bank draft in the circumstances specified under the rule. It will be clear from the provisions of section 40A(3) and rule 6DD that they are intended to regulate business transactions and to prevent the use of unaccounted money or reduce the chances to use black money for business transactions. (see Mudiam Oil Company v. ITO (1973 92 ITR 519 (AP)). If the payment is made by a crossed cheque drawn on a bank or a crossed bank draft, then it will be easier to ascertain, when deduction is claimed, whether the payment was genuine and whether it was out of the income from disclosed sources. In interpreting a taxing statute, the court cannot be oblivious of the proliferation of black money which is under circulation in our country. Any restraint intended to curb the chances and opportunities to use or create black money should not be regarded as curtailing the freedom of trade or business."*

3.3. The Id. DR is heard who has relied upon the order of the lower authorities.

3.4. We have heard the rival contentions and pursued the material available on record. It is not in dispute that the assessee is having contractual arrangement with M/s Bikaner Detective Security Service for provision of security guards. In terms of the said arrangement, M/s Bikaner Detective Security Service has raised invoices on the assessee from time to time and which have been accounted for in the assessee's books of account in the name and account of M/s Bikaner Detective Security Service. The assessee has also deducted TDS under section 194C of the Act while making the payment to such security agency. However, the payment have been made in cash to the security guards on behalf of M/s Bikaner Detective Security Service. The genuineness and the bona fide of the transaction are, therefore, not in dispute. The question that arises for consideration is what were the compelling or unavoidable circumstances which required the assessee to make the payment in cash. The Id AR has contended that the security persons engaged by the assessee were not having Bank Accounts and as such under compelling circumstances, the payment were made in cash. As we have noted above, the assessee was having the contractual arrangement with the security agency and it is the security agency which has engaged the security guards whose services were made available to the assessee. It is not a case where the security guards were hired and engaged by the assessee. Hence, the assessee was under an obligation to make payment to the security agency and not to the individual guards as claimed by it. The assessee could have made payment to the security agency through cheque or bank draft and thereafter, it is for the security agency to arrange for payment to the security guards. There could be occasions where the security guards were in need of cash and there is delay on part of security agency to make the payment and in such circumstances, one can understand that the assessee company might have been approached by the security agency to make payment to the guards

on its behalf. But in the instant case, nothing has been brought on record to this effect. Rather, in the instant case, throughout the financial year, the payments have been made in cash exceeding Rs 20,000 and the same will therefore be covered by the provisions of section 40A(3) of the Act. As held by the Hon'ble Supreme Court in case of Atar Singh (Supra), it is open to the assessee to furnish to the satisfaction of the Assessing Officer the circumstances under which the payment in the manner prescribed in Section 40A(3) was not practicable or would have caused genuine difficulty to the payee. Rule 6DD provides that an assessee can be exempted from the requirement of payment by a crossed cheque or crossed bank draft in the circumstances specified under the rule." From perusal of material available on record, the assessee has neither brought on record any such exceptional or unavoidable circumstances to the notice of the Assessing Officer nor the Assessing Officer has recorded any satisfaction in this regard in terms of rule 6DD of the Act. In light of above we are unable to agree to the contention of the Ld. AR. The ground taken by the assessee is thus dismissed.

4. Now coming to ground No. 2, where the assessee has challenged the addition of Rs. 86,76,512/- u/s 40(a)(ia) of the Act. During the course of assessment proceedings the Assessing Officer noticed that the assessee has paid an amount of Rs. 86,76,512/- to various non-banking finance companies without deduction of tax u/s 194A of the Act and which was disallowed by the AO in terms of section u/s 40(a)(ia) of the Act and later on, confirmed by the Id CIT(A).

4.1. During the course of hearing, the Id. AR drawn our reference to the second proviso to section 40(a)(ia) of the Act which was introduced by the Finance Act 2012 and submitted that Hon'ble Delhi High Court in case of CIT Ansal Landmark Township Pvt. Ltd. 234 Taxman 825 has held that second proviso to section 40(a)(ia) of the Act is declaratory and curative and it has retrospective effect from 01.04.2005, and in compliance thereof, the assessee

has submitted Form No. 26A before the lower Authorities which were not considered by the lower authorities by holding that the said amendment is prospective in nature.

4.2. The Id. DR drawn our reference to the decision of Hon'ble Kerala High Court in case of Thomas George Muthoot V. CIT (63 Taxmann.com 99) wherein it has been held that the second proviso to section 40(a)(ia) introduced w.e.f. 01.04.13 is prospective in nature.

4.3 The second proviso to section 40(a)(ia) reads as under:-

*"Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVIIIB 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"*

4.4 Hon'ble Delhi High Court in case of Ansal Landmark Township Pvt. Ltd. has held as under:-

*"13. Turning to the decision of the Agra Bench of ITAT in Rajiv Kumar Agarwal's case (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 deinceivize 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. Deincentivizing 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 271C, 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. The Court is of the view that the above reasoning of the Agra Bench of ITAT as regards the rationale behind the insertion of the second proviso to Section 40(a)(ia) of the Act and its conclusion that the said proviso is declaratory and curative and has retrospective effect from 1st April 2005, merits acceptance."*

4.5 Hon'ble Kerala High Court in case of Thomas George Muthoot has held as under:-

*"A statutory provision, unless otherwise expressly stated to be retrospective or by intendment shown to be retrospective, is always prospective in operation. Finance Act, 2012 shows that the second proviso to Section 40(a)(ia) has been introduced with effect from 01.04.2013. Reading of the second proviso does not show that it was meant or intended to be curative or remedial in nature, and even the appellants did not have such a case. Instead, by this proviso, an additional benefit was conferred on the assesses. Such a provision can only be prospective as held by this Court in prudential Logistics and Transports (supra). Therefore, this contention raised also cannot be accepted."*

4.6 Admittedly, there is no jurisdictional High Court decision that has been rendered in the context of applicability of the second proviso to section 40(a)(ia) of the Act. The question that arises for consideration is that in absence of the Jurisdictional High Court decision and in view of contrary decision taken by two High Courts, which decision will prevail and apply in the instant case. In this regard, we refer to the decision of Hon'ble Supreme Court in case of CIT Vs. Indian Vegetable Products Ltd. (88 ITR 192) wherein the Hon'ble Supreme Court has held that where two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted. In light of that, respectfully following the Delhi High Court decision in case Ansal Lankmark Township Pvt. Ltd. (supra), the second proviso to section 40(a)(ia) of the Act is read as retrospective in

nature and will thus be applicable in the instant case. In light of the above discussion, we set aside the matter to the file of the Assessing Officer to examine the claim of the assessee. The AO shall verify whether payees have filed their return of income and whether such return of income includes the amount paid/credited by the assessee without deduction of tax at source and whether due taxes have been paid thereon. In the result, ground of appeal is allowed for statistical purposes.

5. Now coming to ground No. 5 where the assessee has challenged the addition of Rs. 1,50,000/- u/s 40(a)(ia) of the Act. The TDS on such payment as admitted by the assessee has been deducted in the next financial year. Hence, the same shall be allowed to the assessee in computing its taxable income for the next financial year and there is no basis for claim of the said expenditure in the year under consideration. In the result, ground is dismissed.

6. Now coming to ground No. 7, where the assessee has challenged the action of the Id. CIT(A) in confirming the addition of Rs. 10,00,000/- on account of excess payment of salary. During the course of assessment proceedings, the Assessing Officer carried out the monthly analysis of salary paid by the assessee and noticed that during the month of November, 2010, January, 2011 and March, 2011, the assessee has claimed excess salary expenditure as compared to other months. Regarding the excess salary paid in the month of November, 2010, the plea of the assessee was accepted that the salary expenditure includes payment of bonus which has resulted in increase salary expenditure in that month. However in respect of January and March, 2011, the plea of assessee was not accepted. The Assessing Officer observed that maximum amount of salary has been paid in cash and the assessee company is having permanent establishment and has therefore to employ staff on a regular basis and as such there is least possibility for temporary deployment of staff during these two months. Further, Assessing

Officer observed that the salary sheets furnished by the assessee are incomplete and has finally taken his findings as under:

*"17.3 Thus, on the basis of above facts & circumstances and the discussions conclusion is arrived that the expenditure booked by the assessee company on account of salary is excessive, unreasonable and has been manipulated by the assessee company to avoid tax liability on such excess amount. This is sustained with the fact that the assessee company has allowed petty salaries to relatives of key management personnel (Ms Kanishka Morani for Rs. 1,56,000/- and Ms. Simmy Morani for Rs. 1,56,000/-) in cash. Moreover, the assessee company could not furnish the address, designation, educational qualification and copy of appointment letter of the employees to whom payment of salary has been said to be made. As such, the expenditure of salary is not open to verification. It would not be out of place to mention here that to keep the aforesaid record is an essential element of any establishment. Nevertheless to say that salary payment to maximum employees have been paid in cash.*

*17.4 It is noticed that the average salary paid for the months excluding the salary for the months of January, 2011 and March, 2011 comes to Rs. 10,70,842/-. Considering the average salary paid by the assessee company, the excess salary paid by the assessee company for the months of January, 2011 and March, 2011 comes to Rs. 15,20,391/- [(21,39,285+ 15,22,790)-(10,70,842x2)]. Therefore, in view of above facts excess salary being Rs. 15,20,391/- is hereby disallowed and added to the total income of the assessee."*

6.1. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT(A) who confirmed the finding of the Assessing Officer that the salary sheets produced for the month of January and March were not complete and did not bear the complete details of the employees. The disallowance was

confirmed however the quantum of disallowance was reduced Rs. 10,00,000/- in place of Rs. 15,20,391/- made by the Assessing Officer.

6.2. During the course of hearing the Id. AR submitted are as under:-

"2. Payment of salary is genuine and well supported by vouchers:- In this regard it is submitted that the learned Assessing Officer has nowhere mentioned that payment of salary was bogus or that the employees were not existing. It was of the job of the learned Assessing Officer to opine regarding the reasonableness of the salary. The learned Assessing cannot step into the shoes of the assessee to decide how to conduct the business and which employees to be employed and at what salary. The learned Assessing Officer was concerned only regarding the genuineness of the payment of salary and that the same was incurred for business purposes. While making the disallowance the learned Assessing officer has nowhere observed that payment of salary to any employee was bogus or that it was for purposes other than business. Further during the course of assessment proceedings the salary sheets were produced before the learned Assessing officer. However the learned Assessing Officer rejected the sheets observing that addresses were not complete. However the learned Assessing Officer never insisted for production of any employee for finding out the genuineness of payment. The Learned Assessing Officer was on the mode of rejecting the salary sheets and in finding an excuse for making the addition.

3. Payment of salary to Simmy Morani and Kanishka Morani is below the level of reasonableness:- Payment of salary to Simmy Morani and Kanishka Morani has been observed by the Learned Assessing is very petty which is Rs. 1,60,000/- each for the whole year. The salary comes to Rs. 13,000/- per month. It is submitted that even a peon in the Govt. draws more salary than this. Both Simmy and Kanishka Morani are educated and qualified. The payment of salary has been made to them for general administration and over

all supervision upon the employees. The very presence of a person from the owner's side accelerates the working and efficiency of rest of the employees. Therefore such a petty amount paid to Simmy and Kaniskha Morani did not require any adverse remarks.

4. Disallowance wrongly made on the basis of averaging :- It is further submitted that disallowance of salary has been made purely on estimate basis. The salary has been disallowed which the excess after averaging the salary from April to December. The learned Assessing Officer has only observed that payment of salary January, February and March was excessive. It is submitted that it is towards the close of the finance year that more adhoc employees are employ for meeting the targets of sales and for effecting the outstanding recovery. In view of this no disallowance of salary was required. The addition sustained by the Learned CIT(A) for Rs. 10,00,000/- deserves to be deleted. The entire payment of salary was genuine and for the purpose of business. It is submitted that during the year the sales of the assessee have increased from Rs. 56.40 Crore in Assessment year 2010-11 to Rs. 83.85 Crore. The increase is around 50%. In view of this higher payment of salary was fully justified."

6.3 The Id. DR is heard who has relied on the order of the lower authorities.

6.4 The limited issue under consideration relates to salary payment for the month of January and March 2011 claimed by the assessee company. Contrary claims have been made regarding the claim of the salary expenditure. However, we find that there is not enough material available on record to decide the subject matter. In the interest of justice, it would be appropriate to set aside the matter to the file of the AO to examine the same afresh. Needless to say, the assessee will provide all relevant information and

documents as called for by the AO. In the result, ground taken by the assessee is allowed for statistical purposes.

In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 12/05/2017.

Sd/-  
(Diva Singh)  
न्यायिक सदस्य / Judicial Member

Sd/-  
(VIKRAM SINGH YADAV)  
लेखा सदस्य / Accountant Member

Jaipur

Dated:- 12/05/2017

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- M/s Morani Fourwheels Pvt. Ltd. Jaipur.
2. प्रत्यर्थी / The Respondent- The ACIT, Circle-6, Jaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT,
6. गार्ड फाईल / Guard File (ITA No.175/JP/2016)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar.