



आयकर अपीलीय अधिकरण "ए" न्यायपीठ मुंबई में

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI**

श्री अमित शुक्ला, न्यायिक सदस्य एवं

श्री राजेश कुमार, लेखा सदस्य के समक्ष ।

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

ITA No. 2721/Mum/2013

(Assessment year 2008-09)

Ashish J Potdar, (Prop Solid Vision) 1/27, Narayan Nivas, M G Road, Tilak Nagar No.2, Goregoan (West), Mumbai -400 002 PAN: AAGPP 8158 C	Vs	CIT -24 Room No.507, 5 th Floor, C-13, Pratyaksh Kar Bhavan, Bandra Kurla Complex, Mumbai -400 051
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant by	:	Shri Raju P Sardar
Respondent by	:	Shri Rajesh Kumar

सुनवाईकीतारीख /Date of Hearing : 16-02-2016

घोषणाकीतारीख /Date of Pronouncement : 06-05-2016

आदेश
ORDER

श्री अमित शुक्ला, न्या.स :-

PER AMIT SHUKLA, J. M.:

The aforesaid appeal has filed by the assessee against impugned order dated 30.01.2013 passed under section 263 by Commissioner of Income-tax -24. In the grounds of appeal, the assessee has mainly challenged the impugned order on the following grounds:-

- “1. The learned Commissioner of Income Tax has erred in passing the order.
2. The Original Assessment order passed by the Income Tax Officer Ward 24(3)(1) was neither erroneous nor prejudicial to the interest of the revenue.
3. The learned Commissioner of Income Tax has not specified the matter or errors under which provisions the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the revenue”.

2. At the outset, appeal of the assessee is barred by limitation by 5 days. In the petition for condonation of delay accompanied by an affidavit, it has been stated that the appeal could not be filed in time as the Chartered Accountant who was entrusted with the filing of appeal had to urgently leave for native place to look after his ailing mother who got very sick. Immediately after coming back to Mumbai, the appeal was filed on the next day. In this process, delay of 5 days has occurred. After hearing both the parties and considering the averments made in the affidavit filed by the Chartered Accountant, Mr. Raju Sardar and by the assessee, we are of the considered view that there was a reasonable cause for not filing the appeal within the statutory time limit and accordingly, delay of 5 days is hereby condoned.

3. Brief facts qua the matter of revision u/s 263 by the ld.CIT is that, the assessee has filed his return of income on 30.07.2009 declaring total income of Rs.6,63,610/-. The said return was subjected to scrutiny under section 143(2) and accordingly, the assessment order was passed under section 143(3), vide order dated 03.12.2010 at an income of Rs.7,30,070/- after making ad-hoc disallowances aggregating to Rs.66,460/-under various heads, viz., telephone, travelling and refreshment expenses @ 5%. Later on the Ld. CIT while exercising revisionary jurisdiction and on examination of assessment records noticed that assessee has not deducted TDS in some of the cases and where TDS has been deducted, it has not been deposited into the government account and therefore, provisions of section 40(a)(ia) are clearly applicable. The details of such expenditures as highlighted by him are as under:-

Sr. No.	Name of the Party	Nature of Expenses	Payment to party	Amt. on Which TDS made	Corresponding Amount of Disallowance u/s 40(a)(ia)
1	Designtech Systems(PL) Ltd.	Training & Support maintenance	5,43,046	NIL	5,43,046
2	UGS India P Ltd	Training &	22,36,849	19,57,376	2,79,473

		Support Maintenance			
3	Ask me Software Systems (I) Ltd.	Training & Support Maintenance	3,53,850	NIL	3,53,850
4	Jigan Gala	Commission	40,000	NIL	40,000
5	Shree Shivdavkar	Commission	40,000	NIL	40,000
6	Supriya Patole	Commission	40,000	NIL	40,000
TOTAL					Rs.13,31,369

He noted that, AO has failed to examine the said discrepancy of non-deduction of TDS or wherever the TDS was deducted amount was not deposited in the Government account which entails disallowance of expense claimed u/s 40(a)(ia).

4. Further elaborating the nature of expenses Ld. CIT noted that assessee has claimed training and support maintenance expenses from following three parties:-

Sr. No.	Name of the party	Payment to party (Rs.)
1	Designetch Systems (PL) Ltd.	5,43,046
2	UGS India P Ltd.	22,36,849
3	Ask me Software Systems(P) Ltd.	3,53,850

on which the assessee has not deducted TDS even though TDS provisions were clearly attracted. The assessee's case with regard to the amount paid in respect of training, support and maintenance services was that, it does not attract TDS provision. The Ld. CIT after going through the agreement entered with the above stated parties noted that, following services have been rendered by these parties:

- i) Providing software operation, installation and training for the personnel;
- ii) Providing software maintenance;
- iii) Providing client referrals and assistance.

and accordingly, the TDS provision were clearly applicable.

5. With regard to the claim of commission paid to following three parties:

Sr. No.	Name of the party	Payment to party (Rs.)
1	Jigan Gala	40,000
2	Shree Shivdavkar	40,000
3	Supriya Patole	40,000

he again noted that, assessee though has deducted TDS but has not paid to the Government account. Hence the same are also disallowable under section 40(a)(ia). On the other hand, assessee's case was that the amount paid to above three parties is in the nature of incentive on which TDS is not deductible. Ld. CIT after detailed discussion and going through the records, made the following observations:

"I have gone through the ledger account and find that commission paid and TDS deducted from 3 parties is as under:-

Sr.No.	Name of the party	Commission Paid	TDS deducted
1	Shri Jigan Gala	Rs.40,000	Rs.4,120/-
2	Shri Shivdavkar	Rs.75,000	Rs.7,725/-
3	Supriya Patole	Rs.40,000	Rs.4,20/-

As per ledger account, commission to Jigan Gala is paid consultancy charges for jewellery market. Commission to Shivdavkar is paid for consultancy charges towards ME&S business and commission to Supriya Patole is paid for training on jewellery at Pune. None of the above 3 persons are employees of the assessee. As the assessee has not paid incentives but commission and has also deducted TDS, same was required to be deposited to the government account before due date of filing of the return. As the assessee has infringed provisions of section 40(a)(ia), AO is directed to disallow amount of commission for the AY 2008-09 after giving opportunity to the assessee".

6. Before us, the Ld. Counsel made a very limited argument and stated that, all the six parties have shown this payment as their income in their Income-tax returns and have also paid taxes

thereon. This is evident from the submission made before Id. CIT. He submitted that now in wake of newly inserted *Proviso* in section 40(a)(ia) and in section 201(1) w.e.f. 1st April, 2013, which has been held to be applicable retrospectively by various Courts, the matter can be re-examined by the AO and appropriate relief can be given under the amended *provisos*.

7. Ld. DR too agreed that matter can be re-examined by the Ld. AO in light of this plea.

8. After considering the aforesaid submissions and on perusal of the relevant finding given in the impugned order, we find that it is undisputed fact that assessee has either not deducted TDS on account of payment made to various parties or after deducting TDS has not deposited in the account. This aspect as highlighted by the Ld. CIT has neither been examined by the AO nor considered by the AO, therefore, the order of the AO to this extent is erroneous in so far as prejudicial to the interest of the revenue within section 263 as held by the Ld. CIT. However a new plea has been raised before us by the Ld. Counsel that in the case of all the six parties, the payees have filed their confirmation that they have shown this payment as their income in their return of income and have paid taxes thereto. If that is so then, in the light of the newly amended *second Proviso* to section 40(a)(ia) and *first Proviso* to section 201(1), which has been inserted by the Finance Act, 2012 w.e.f. 1st April, 2013, no disallowance can be made. Therefore, in light of this law the entire matter needs to be re-examined by the AO afresh. So far as the applicability of amended provisions in the impugned assessment year is concerned, this issue stands clarified by Hon'ble Delhi High Court in the case of CIT vs. Ansal Landmark in ITA No.160 & 161 of 2015 vide order dated 26.08.2015, wherein their Lordships have held that the said *Provisos* are declaratory and curative in nature and, therefore, have retrospective effect from 1st April, 2005. Accordingly, we modify the direction of the

CIT and direct the AO to examine the contention of the assessee in the light of the newly inserted *Provisos* and the ratio laid down by the Hon'ble Delhi High Court in the case of CIT vs Ansal Landmark (supra). With this direction, appeal of the assessee is treated as partly allowed.

9. In the result, appeal of the assessee stands partly allowed.

Order pronounced in the open court on 6th May, 2016

Sd/-
(राजेश कुमार)
लेखा सदस्य
(RAJESH KUMAR)
ACCOUNTANT MEMBER

Sd/-
(अमित शुक्ला)
न्याईक सदस्य
(AMIT SHUKLA)
JUDICIAL MEMBER

Mumbai, Date: 6th May, 2016

प्रति/Copy to:-

- 1) अपीलार्थी /The Appellant.
- 2) प्रत्यर्थी /The Respondent.
- 3) The CIT -24, Mumbai.
- 4) The Commissioner of Income Tax-Concerned___/Addl CIT-24(3), Mumbai.
- 5) " प्रतिनिधि विभागीय", अधिकरण अपीलीय आयकर, मुंबई/
The D.R. "A" Bench, Mumbai.
- 6) गार्डफाईल
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आदेशानुसार By Order

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सहायक पंजीकार
मुंबई ,आयकरअपीलीयअधिकरण
Asstt. Registrar
I.T.A.T., Mumbai

*Chavan, Sr.PS