IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : SMC-2 : NEW DELHI

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER

ITA No.50/Del/2015
Assessment Year : 2009-10

Jagdish Prasad Sharma, Proprietor M/s India Offset Printers, X-36, Okhla Industrial Area, Phase II, New Delhi.	Vs.	ACIT, Circle-22(1), Civic Centre, New Delhi.

PAN: ABBPS4640Q

(Appellant) (Respondent)

Assessee By : Shri R.K. Mehra, CA
Department By : Shri S.K. Jain, Sr.DR

Date of Hearing : 27.12.2016
Date of Pronouncement : 28.12.2016

ORDER

PER RAJPAL YADAV, JM:

The present appeal is directed at the instance of the assessee against the order of the CIT(A) dated 21st October, 2014 passed for Assessment Year 2009-10.

2. Ground Nos.1 and 2 are interconnected with each other. In these grounds of appeal, the assessee has pleaded that the ld.CIT(A) has erred in confirming the disallowance of Rs.1,90,387/-.

3. The brief facts of the case are that the assessee has filed his return of income on 27th September, 2009 declaring total income of Rs.44,18,805/-. At the relevant time, he was running a proprietorship concern in the name and style of M/s India Offset Printers. On scrutiny of the accounts by the AO, it was revealed that the assessee has paid interest amounting to Rs.1,90,387/- to M/s Cholamandlam DBC Finance Ltd. The assessee has not deducted the tax at source while making this payment. According to the AO, only banks are exempted from deduction of tax at source on interest paid to them. M/s Cholamandlam DBC Finance Ltd., is a non-banking finance company, therefore, the assessee was required to deduct TDS on the interest payment made by him. Accordingly, he disallowed the claim of the assessee at Rs.1,90,387/- with the aid of section 40(a)(i) of the Income-tax Act,

1961 (for short 'the Act'). Appeal to the CIT(A) did not bring any relief to the assessee.

4. Before me, the ld. counsel for the assessee contended that the loan was taken in personal capacity. He drew my attention towards page 18 of the paper book wherein a copy of the personal loan agreement between the assessee and M/s Cholamandlam DBC Finance Ltd., has been placed on record. The ld. counsel for the assessee pointed out that the loan was taken in the personal capacity and it is duly discernible from this paper. This loan was taken on 5th August, 2007. It was for 24 months. The assessee has used this loan as a capital in the proprietorship concern and the proprietorship concern has paid alleged interest in the shape of compensation to the assessee. Being an individual, the assessee was not supposed to deduct TDS on the payment of interest made to M/s Cholamandlam DBC Finance Ltd. Alternatively, he contended that no amount was outstanding at the end of the year. Section 40(a)(ia) authorize the AO to disallow the expenses on which TDS was not deducted and they are shown as payable. For

buttressing his contention, he relied upon the order of the ITAT passed in the assessee's own case for AY 2006-07. Copy of this order passed in ITA No.209/Del/2012 has been placed on page 20 of the paper book. On the strength of this order, he submitted that the claim of the assessee deserves to be allowed.

5. On the other hand, ld. DR relied upon the finding of CIT(A) recorded in para 9 of the impugned order. He took me through page 17 of the CIT(A)'s order. According to the ld. DR, the assessee ought to have deducted TDS on the interest payment. Since he has failed to do so, the AO has rightly disallowed the claim.

6. Before adjudicating this issue on merits, I deem it appropriate to take Ground Nos.3 and 4 also in which the ld. counsel for theassessee has raised identical submissions on the alternative contention. In Ground Nos.3 and 4, the grievance of the assessee is that the ld.CIT(A) has erred in confirming the disallowance of Rs.1,47,814/- which was added by the AO with the aid of section 40(a)(ia) of the Act.

7. The brief facts of this issue are that the assessee had made payment of Rs.1,47,814/- to two concerns, namely, M/s Classic Printing Ink. Co. Pvt. Ltd. (Rs.51,172/-) and M/s R.K. Gummings Pvt. Ltd. (Rs.96,642/-). According to the AO, the assessee has got done job work from these two concerns and failed to deduct tax at source. The contention of the assessee was that these parties have supplied the material also. 80% of the payment contains material cost and 20% job work bill. The job work bill is of Rs.17,373/- and, therefore, no TDS was required to be deducted. This plea of the assessee has been rejected by the AO and appeal to the CIT(A) did not bring in relief.

8. Before me, the ld. counsel for the assessee placed reliance upon the order of ITAT in the assessee's own case for AY2006-07 and contended that the assessee has already made the payment and, therefore, Section 40(a)(ia) could not be invoked. On the other hand, the ld. DR relied upon the orders of the Revenue authorities.

9. I have duly considered both the issues. As far as the disallowance of interest expenditure is concerned (agitated in Ground Nos.1 and 2), I

am of the view that the alternative contention of the assessee is an acceptable contention. Because, the ITAT for AY 2006-07 has set aside the issue to the file of AO directing him to examine the aspect whether any amount was outstanding before 31st March, 2006 which has been claimed as a deduction without deducting the TDS. According to the ITAT, section 40(a)(ia) cannot be attracted on the amounts which have already been paid because it speaks of the amount payable only. In the present year also, the assessee has already made the payment and the amounts were not outstanding as payable.

10. As far as the amounts agitated in Ground Nos.3 and 4 are concerned, these amounts have also been paid by the assessee. They were not shown as payable on the close of the accounting year. Thus, they cannot be disallowed to the assessee. In order to buttress myself, I would like to make reference to the finding of the Division Bench of the ITAT in AY 2006-07 on similar issues. The order of the ITAT read as under:-

> ""2.(a) On the facts and circumstances of the case, the ld. CIT(A) erred in law and on facts in confirming the

disallowance of Rs. 56,75,983/- u/s 40a(ia) r.w.s 194C of the Act without appreciating the information and facts placed on record.

(b) The ld. CIT(A) further erred in law in not dealing with the legal issue raised by the petitioner about the two different interpretations arising on applying the provisions contained in section 40a(ia) of the Act as dealt with by the Hon'ble Tribunal in the case of Teja Constructions Vs. ACIT reported in [2010] 39 SOT 13 [Hyd.] [URO] which was then followed in the case of Jaipur Vidyut Vitran Nigam Ltd Vs. DCIT [2009] 123 TTJ [JP] 888."

4. Apropos these grounds, the ld. A.R has also placed reliance on the decision of the Hon'ble Allahabad High Court in the case of CIT vs. Victor Shipping Services [P] Ltd reported at 262 CTR 545 [All] and submitted that Special Leave Petition [SLP] of the Revenue CC No. [S] 8068/2014 has been dismissed by the Hon'ble Supreme Court on 02.03.2014. The ld. A.R has also placed reliance on the order of the ITAT Mumbai 'J' Bench dated 4.3.2015 in ITA No. 2293 & 2294/Mum/2013 in the case of Shri Jitendra Mansukhlal Saha Vs. DCIT and submitted that for disallowing expenses from the income from business and profession on the ground that TDS has not been deducted, the ITA No. 209/DEL/2012 4 amount should be payable and not which has not been paid by the end of the year.

5. On careful consideration of above submissions at the very outset, we note that in the case of Shri Jitendra Mansukhlal Saha Vs DCIT [supra] after following the ratio of the judgment of Hon'ble Allahabad High Court, which has been upheld by the Hon'ble Apex Court in the case of CIT Vs. Vector Shipping Services [P] Ltd [supra] has held as follows:

"We have heard both the parties and their contentions have carefully been considered. Recently, Mumbai Tribunal has decided such issue in favour of the assessee by considering the earlier decisions. Judicial Member is one of the party to the said decision The relevant observations of the Tribunal are as under:
"

5. We have heard both the parties and their contentions have carefully been considered. After careful consideration, respectfully following the decision of Co-ordinate Bench in the case of M/s. Vivil Exports P. Ltd. vs. ITO (supra), we delete the disallowance. For the sake of completeness relevant observation of the Tribunal from the said decision are reproduced below:

4. Though number of grounds were urged before us in the grounds of appeal annexed to Form No. 36, at the time of hearing the learned counsel for the assessee submitted that the assessee having made the payment, section 40(a)(ia) cannot be attracted because it speaks of the amount "payable" and it does not cover the amount already paid. In this regard he relied upon ITA No. 209/DEL/2012 5 the following decisions of the ITAT Chennai Benches wherein the Bench had taken into consideration the decision of the ITAT Special Bench in the case of Merilyn Shipping & Transport, the order of which was suspended by the High Court but at the same time there was a subsequent judgement of the Hon'ble Allahabad High Court in the case of M/s. Vector Shipping Services 5 ITA NO.2293/MUM/2013(A.Y. 2005-06) ITA NO.2294/MUM/2013(A.Y. 2006-07) (P) Ltd. wherein it was held that section 40(a)(ia) applies only to those amount which remains payable by the end of the previous year.

In other words, in respect of payments already made section 40(a) (ia) is not attracted: - i. ACIT vs. M/s. Eskay Designs - ITA No. 1951/Mds/2012 dated 09.12.2013. ii. ITO vs. Theekathir Press - ITA No. 2076/Mds/2012 & CO No. 155/Mds/2013 dated 18.09.2013. The learned counsel for the assessee also submitted that though there are contrary decisions of the other Hon'ble High Courts, i.e. Hon'ble Calcutta High Court and Hon'ble Gujarat High Court, in the light of the decision of the Hon'ble Allabahad High Court it can be said the there can be two views possible in this matter in which event the one which is in favour of the assessee has to be followed in the light of the decision of the Hon'ble Supreme Court in the case of Vegetable Products Ltd. 88 ITR 192. Accordingly the Chennai Bench held that section

40(a)(ia)is not attracted in respect of the amount already paid by the assessee. 5. The learned D.R., on the other hand, could not place before us any contrary judgement on this issue. Though the learned D.R. promised to file written submissions within one day, it was not filed. In other words, there is no ITA No. 209/DEL/2012 6 contrary decision on this issue. 6. Having regard to the circumstances of the case, without going into the other aspects, which were in fact not argued either by the assessee or by the Revenue, we hold that section 40(a)(ia) is not attracted in respect of payment already made by the end of the previous year. The AO is directed to verify the claim of the assessee and if it is in line with the view taken herein the same may be considered accordingly. As regards levy of interest under section 234B and 234C of the Act, the same is consequential in nature and need not to be considered independently. 7. In the result, the appeal filed by the assessee is treated as allowed for statistical purposes 5.1 Moreover, Hon'ble Allahabad High Court in the case of CIT vs. Vector Shipping Services (P) Ltd.(supra) has held that for disallowing expenses from business and profession on the ground that TDS has not been deducted, amount should be payable and not which has been paid by end of the year. The said decision of Hon'ble Allahabad High Court was made subject to Special Leave Petition filed before Hon'ble Supreme Court and their Lordships vide their order 6 ITA NO.2293/MUM/2013(A.Y. 2005-06) ITA NO.2294/MUM/2013(A.Y. 2006-07) dated 02/07/2014 in CC No.8068/2014 have dismissed the SLP and copy of this order is filed by the assessee at page 31 of the paper book and the said order read as under:

"SUPREME COURT OF INDIA RECORD OF PROCEEDINGS Petition(s) for Special Leave to Appeal (C).....

CC No.(s) 8068/2014 (Arising out of impugned final judtment and order dated 09/07/2013 in ITA 122/2013 passed by the High Court of Judicature at Allahabad) COMMISSIONER OF INCOME ITA No. 209/DEL/2012 7 TAX-MUZAFFAR NGR.Petitioner(s) VERSUS M/S. VECTOR SHIPPING SERVICES (P) LTD.

Respondents(s) With appln.(s) for c/delay in filing slp and office report) Date:02/07/2014 This petition was called on for hearing today.

CORAM: HON'BLE THE CHIEF JUSTICE HON'BLE MR.

JUSTICE MADAN B LOKUR HON'BLE MR.

KURIAN JOSEPH For Petitioner(s) Mr. Mukul Rohatgi, Attorney General Mr. Rupesh Kumar, Adv. Mr. Sahil Tagotra, Adv. Mrs. Anil Katiya, Adv.

For Respondent(s) UPON hearing the counsel the Court made the following ORDER Heard Mr.Mukul Rohatgi, learned Attorney General, or the petition. Delay in filing and refilling special leave petition is condoned. Special leave petition is dismissed.

Digitally signed by Rajesh Dham Date: 2014.07.02"

5.2 In view of above discussion, the decision relied upon by Ld. DR would have no application and we have to accept the claim of the assessee to the extent of labour payments are made during the year under consideration and to that extent no disallowance should be made. Further the figure given by the assessee in the 7 ITA NO.2293/MUM/2013(A.Y. 2005-06) ITA NO.2294/MUM/2013(A.Y. 2006-07) aforementioned chart may be verified by the AO and to the extent payments are made during the respective years under consideration no disallowance should be made and only rest of the amount should be disallowed. With ITA No. 209/DEL/2012 8 these directions we partly allow the appeals filed by the assessee."

In view of the above, it is settled preposition that for disallowing expenses on the ground that TDS has not been deducted, the amount should be payable at the end of the year and no disallowance can be made on this allegation on the amount which has been paid at the end of the year. In the present case the ld. D.R fairly submitted that the department has no serious objection if the fact submitted by the ld. A.R that all the impugned grounds have been made on or before 31.3.2006 is restored to the file of the AO for proper examination and verification

for this limited purpose. Under the above noted facts and submissions of both the sides, we are of the opinion that respectfully following the dictum of the Hon'ble Apex Court in the case of CIT Vs. Vector Shipping P. Ltd [supra], the AO is directed to examine and verify that which amounts have been paid by the assessee on or before 31.3.2006 and which amounts have not been paid by the end of the financial period as on 31.3.2006. The AO is directed to follow the ratio decidendi laid down by the Hon'ble Apex Court in the case of CIT VS. Vector Shipping Services P. Ltd [supra] and to allow the claim of expenses of the assessee without being prejudiced from the earlier assessment order and impugned order.

The ld. D.R, on the other hand, could not place before us any contrary judgment on this issue and thus we note that there is no contrary decision on this issue.

7. The ld. A.R relying on the submissions made in the grounds of appeal, submitted that the amount was paid before 31.3.2006 to the Exchequer, hence the same should not be disallowed.

8. Per contra, the ld. D.R submitted that the department has no serious objection if the matter is set aside to the file of the AO for verification and examination of the claim of the assessee afresh in the light of the ratio of the decision as relied upon by the assessee in the case of Teja Construction [supra] which was following in the case of Jaipur Vidyut Vitran Nigam Ltd [supra].

9. On a careful consideration of the above submissions of both the sides, we are of the considered view that in the light of the above two recent judgments referred to above [supra], the assessee's claim deserve to be considered afresh at the level of the AO and especially when the ld. D.R. has submitted that the department has no serious objection if the issue is restored back to the file of the AO for a fresh adjudication, we are of the considered opinion that the ends of justice would meet if the issue of impugned disallowance made by the AO u/s 40a(ia) r.w.s 194C of the Act is ITA No. 209/DEL/2012 10 restored to the file of the AO for de novo adjudication after affording due opportunity of hearing to the assessee. Needless to say, the AO shall adjudicate the issue as per the relevant provisions of the Act and the ratio of the

> judgments of the Hon'ble High Court and co-ordinate Bench of the Tribunal and without being prejudiced from the earlier assessment and appellate order. Accordingly, Ground Nos. 2(a) and 2(b) of the Act are restored back to the file of the AO for a fresh adjudication and hence the Ground of appeal raised by the assessee is deemed to be allowed for statistical purposes."

11. Respectfully following the order of the ITAT in earlier year and without going into the merits of the other contentions, I allow these four grounds and delete the disallowances. The reason for deleting the disallowances in brief are that the assessee has already made the payments and these amounts are not shown as payable.

12. In the next ground, the grievance of the assessee is that the ld.CIT(A) has erred in upholding the *ad hoc* disallowance amounting to Rs.1,31,179/-. The ld. Counsel for the assessee, at the very outset, submitted that *ad hoc* disallowance out of vehicle maintenance, business promotion expenses and the 'Diwali' expenses have been made. As far as the 'Diwali' expenses are concerned, he contended that in the remand report, the ld. Assessing Officer did not dispute about the genuineness of the claim. He prayed that these *ad hoc* disallowances be deleted.

13. On the other hand, the ld. DR contended that the Assessing Officer has disallowed 10% of the expenditure out of business promotion and vehicle expenses on account of personal user of these facilities.

14. With the assistance of the ld. Representatives, I have gone through the record carefully. The assessee was not maintaining any log book for using of the vehicles. The possibility of using all these facilities for personal purpose cannot be ruled out. Therefore, the ld. Revenue authorities have made *ad hoc* disallowance. As far as 'Diwali' expenditure are concerned, the ld.CIT(A) has considered all these aspects including the remand report and, thereafter confirmed the disallowance. The Assessing Officer has not made an adverse comment in the remand report does not mean that the finding recorded in the assessment order cannot be considered by the ld. first appellate authority. Therefore, I do not find any error in the order of the ld.CIT(A) on this aspect also. After going through the orders of the authorities below, I do not find any merit in this ground of appeal. It is rejected.

15. In the result, the appeal of the assessee is partly allowed.

The order pronounced in the open court on 28.12.2016.

Sd/-

[RAJPAL YADAV]
JUDICIAL MEMBER

Dated, 28th December, 2016.

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Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT (A)
5. DR, ITAT

AR, ITAT, NEW DELHI.