IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "E", MUMBAI

BEFORE SHRI RAJENDRA, ACCOUNTANT MEMBER AND
SHRI C.N. PRASAD, JUDICIAL MEMBER

ITA No.3243/MUM/2014
(Assessment Year: 2008-09)

Shakti International Pvt. Ltd, C/o D.C. Bothra & Co. (CA), 297, Tardeo Road, Wille Mansion, 1st Floor, Opp. Bank of India, Nana Chowk, Mumbai. PAN : AAICS 4914 J **(Appellant)**	**Vs.**	ACIT – 10(3), Mumbai. **(Respondent)**

Assessee by	:	Shri Rajkumar Singh - CA
Department by	:	Shri Kailash Gaikwad - DR
Date of hearing	:	21/10/2016
Date of pronouncement	:	21/10/2016

O R D E R

PER C.N. PRASAD, JM

This appeal is filed by the assessee against the order of the ld.CIT(A)-22, Mumbai dated 03/02/2014 for the Assessment Year 2008-09.

2. The first issue in this appeal of the assessee is that the ld. CIT(A) erred in confirming the disallowance made by the Assessing Officer under section 40(a)(ia) of the Act in respect of reimbursement of transportation expenses.

3. Brief facts of the case are that the assessee company engaged in the business of generation and sale of electricity through wind-mill and development of housing project, filed its return of income on 27/09/2008 declaring income of Rs. 1,94,49,680/-. The assessment was completed under section 143(3) on 21/12/2010 determining the income of the assessee at Rs. 5,16,46,925/-. While completing the assessment, the Assessing Officer disallowed Rs. 1,41,49,023/- under section 40(a)(ia) of the Act on the ground that the assessee has not deducted TDS on such amount. This amount represents transportation charges paid by the assessee to M/s.SSTA Logistics (I) Pvt. Ltd. for transportation of 1000 MTS of iron ore fines from M/s. Nadeem Mines to Karwar plot.

4. On appeal, ld. CIT(A) confirmed the disallowance made by the Assessing Officer. However, he directed the Assessing Officer to verify the alternative plea of the assessee that TDS on the said amount has been deducted and paid in the subsequent year and therefore, the entire expenditure needs to be allowed in subsequent year.

5. The Authorized Representative of the assessee submitted that these expenses are all reimbursable. There is no income element as it is only a reimbursement and therefore, no TDS is required to be deducted. The Authorized Representative of the assessee further submitted that in any case, the payments were already made by the end of the accounting year and there is no outstanding due payable and therefore, since the entire amount was paid during the year, the provisions of section 40(a)(ia) are not applicable. For this proposition, he placed reliance on the following decisions:-

a) Shri Jitendra Mansukhlal Shah Vs. DCIT [I.T.A.T., Mumbai "J" Bench in ITA No. 2293/MUM/2013, order dated 04/03/2015.]

b) Merilyn Shipping & Transport Vs. ACIT [(2012) 136 ITD 23 (Visakhapatnam)]
c) CIT Vs. Vector Shipping Services (P) Ltd. [SLP CC No.8068/2014 (SC)

6. The Departmental Representative submitted that there is no evidence to show that it is only reimbursement other than debit note. He further submitted that whether it is reimbursement expenses or contractual payments, TDS has to be deducted. Since assessee failed to do so, the provisions of section 40(a)(ia) are attracted in this case.

7. We have heard rival submissions, perused the orders of the authorities below and the case laws relied on. The Authorized representative of the assessee contended that the assessee reimbursed transportation charges to M/s. SSTA Logistics (I) Pvt. Ltd. He submits that as per the mutual consent, M/s. SSTA Logistics (I) Pvt. Ltd. acting an agent for the assessee company has arranged and delivered the consignments of iron-ore goods on their own to the desired destination and also paid the entire transportation charges of Rs. 1,41,49,023/- to various transporters on its own. The assessee contended that after completion of the job, M/s. SSTA Logistics (I) Pvt. Ltd. raised debit note on the assessee claiming reimbursement of actual payment of transportation charges made by them to the transporters. Accordingly, it was the submission that the assessee has reimbursed the transportation charges to M/s. SSTA Logistics (I) Pvt. Ltd. on which no TDS is required to be made. It was the further submission that since all these payments were made within the accounting year and no outstanding amount is payable, the provisions of section 40(a)(ia) have no application. We accept the contentions of the assessee that the provisions of section 40(a)(ia) have no application for payments already made during the current year by the end of the accounting year. This aspect of the matter has been considered by various coordinate Benches of this Tribunal

including the Mumbai Bench in the case of Shri Jitendra Mansukhlal Shah (supra), wherein it was held as under:-

> "5. 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:
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> > "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:
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> > > 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 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 judgment of the Hon'ble Allahabad High Court in the case of M/s. Vector Shipping Services (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 judgment 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 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 judgment and order dated 09/07/2013 in ITA 122/2013 passed by the High Court of Judicature at Allahabad)

COMMISSIONER OF INCOME 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 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 these directions we partly allow the appeals filed by the assessee."

8. Respectfully following the said decision, we hold that the provisions of section 40(a)(ia) have no application for the payments made by the assessee towards reimbursement of transportation charges, which were paid by the end of the accounting year. Thus, this ground of appeal of the assessee is allowed.

9. The next issue in this appeal of the assessee is that ld. CIT(A) erred in restricting the disallowance to 0.90% in respect of handling loss while loading, unloading and storage of iron-ore material as against assessee's claim for 0.99%.

10. Brief facts of the case are that the Assessing Officer while completing the assessment and while making addition towards the closing stock, rejected the contention of the assessee that there is handling loss of iron ore to the extent of 0.99% while loading and unloading, storage, purchase of iron-ore in the course of trading. The Assessing Officer disallowed the entire handling loss claimed by the assessee observing that as per the delivery sheets and challans produced by the assessee, it clearly shows that there is no handling loss since the quantity loaded and unloaded at the port are more or less same. He also observed that the assessee could not furnish any evidence regarding incurring of handling loss while purchase & sale.

11. On appeal, ld. CIT(A) accepted the contention of the assessee that there would be handling loss, hence, he restricted the same to 0.90% as against 0.99% claimed by the assessee.

12. The Authorized Representative of the assessee reiterated the submissions made before the authorities below and further submitted that

handling loss claimed by the assessee is very much reasonable being first year and last year of trading of iron-ore.

13. Departmental Representative supported the orders of the authorities below.

14. We have considered the rival submissions, perused the orders of the authorities below. This aspect of the matter is considered by the ld. CIT(A) with reference to the submissions made by the assessee, the additional evidences filed, remand report of the Assessing Officer and finally restricted the handling loss to 0.90% by observing as under:-

> *"7.10 As far as the handling loss is concerned, the submission of the appellant clearly shows that when the ;iron ore is loaded from the mines, transported and unloaded at the plots in the ports, there is definitely some loss in each stage. The ore loaded from the mines are stored in the plot to accumulate the desired quantify for export which ranges from 20000 MT to 50000 MT and it needs to be stored for 30 to 45 days. Once the desired quantity is accumulated then the iron ore is loaded into the vessel, at this stage certain quantity is lost. Hence, it is inevitable that some amount of loss of Iron Ore at different stages from landing in the mines till it get exported. In view of this, the finding of the Assessing Officer that handling loss is NIL cannot be accepted. During the course of appellate proceeding, the appellant had filed additional evidences to show that M/s. NMDC which is a public sector undertaking had claimed 0.84% as handling loss. The finding of the Assessing Officer in the remand report clearly shows that handling loss of 0.84% in the case of M/s. NMDC has been verified and found to be correct. The appellant had claimed handling loss 0.99%. However, according to appellant's own submission, the public sector undertaking M/s. NMDC had claimed the loss at 0.84%.*
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> *7.11 This is the first and last year the appellant was involved in the business of export of iron ore. Further, NMDC being a public sector undertaking has huge infrastructure and wherewithal to handle million tons of iron ore and other minerals and hence, the wastage 0.84% admitted by it cannot be applied to the appellant, as this is not a regular business. However, in the interest of justice, I feel it would be fair to allow handling loss at 0.90% as against 0.99% claimed by the appellant. The Assessing Officer is hence directed to restrict the*

claim of handling loss to 0.90% and work out the actual value of the closing stock applying the average rate of purchase for the full year. Subject to this direction, this ground of appeal is partly allowed."

15. A careful reading of the order of the ld. CIT(A) and findings thereon, we agree with the ld. CIT(A) that there would definitely be handling loss while the iron ore is uploaded, loaded etc. Therefore, taking the totality of the facts and circumstances into consideration, we feel that the handling loss should be fixed at 0.95% to meet the ends of justice, we do so. Thus, this ground of appeal is partly allowed.

16. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 21st October, 2016

Sd/-	sd/-
(RAJENDRA)	**(C.N. PRASAD)**
Accountant Member	**Judicial Member**

Mumbai
Dated: 21/10/2016

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

Asstt. Registrar)
ITAT, Mumbai

vr/-