आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, CHENNAI

श्री चंद्र पूजारी,लेखा सदस्य एवं श्रीजी. पवन कुमार,न्यायिकसदस्यकेसमक्ष

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SHRI G. PAVAN KUMAR, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No.696 /Mds/2016
निर्धारण वर्ष /Assessment year : 2006-07

S.P.Balasubrahmanyam, No.16, Kamdar Nagar, Chennai 600 034	**Vs.**	The Deputy Commissioner of Income Tax, Media Circle –I, Chennai.

आयकर अपील सं./I.T.A. No.1160 /Mds/2016
निर्धारण वर्ष /Assessment year : 2006-07

The Assistant Commissioner of Income Tax, Non Corporate Circle 20(1) Chennai.	**vs.**	S.P.Balasubrahmanyam, No.16, Kamdar Nagar, Chennai 600 034 **[PAN AADPB 4195J]**
अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

Assessee by	:	Shri. Y. Sridhar, C.A.
प्रत्यर्थी की ओर से /Respondent by	:	Shri. A.V. Sreekanth, JCIT.

सुनवाई की तारीख/Date of Hearing	:	14-07-2016
घोषणा की तारीख /Date of Pronouncement	:	05-08-2016

आदेश / O R D E R

PER G. PAVAN KUMAR, JUDICIAL MEMBER:

The cross-appeal filed by the assessee and Revenue respectively, is directed against order of the Commissioner of Income-tax (Appeals)-14, Chennai in ITA No.81/2011-12, dated 29.01.2016 for the assessment year 2006-2007 passed u/s.143(3) r.w.s. 147 and 250 of the Income Tax Act, 1961 (herein after referred to as 'the Act'). Since the issue in these appeals are common in nature, these appeals are clubbed, heard together, and disposed of by this common order for the sake of convenience, first, we take up assessee appeal in ITA No.696/Mds/2016 of assessment year 2006-2007 for adjudication.

2. The assessee has raised two substantive grounds (i) Challenging the validity of reopening of assessment as assessment is based on change of opinion (ii) The ld. Commissioner of Income Tax (Appeals) erred in confirming the disallowance u/s. 40(a)(ia) of the Act after granting partial relief to the extent of Short deduction of TDS.

3. The Brief facts of the case are that the assessee is a playback singer in film industry and filed his Return of income on 31.10.2006 admitting a loss of ₹2,81,33,449/- and the assessment

was completed u/s.143(3) of the Act determining a loss of ₹2,69,33,394/-. The ld. Assessing Officer subsequently having reasons to believe that income has escaped assessment issued notice u/s.148 of the Act and in compliance the ld. Authorised Representative of assessee filed letter dated 04.04.2011 to treat the original Return filed in response to notice u/s.148 of the Act. Further, the ld. Authorised Representative of assessee appeared from time to time and furnished details. The ld. Assessing Officer on verification of the financial statements and tax Audit Report u/s.44AB of the Act found that the assessee is a proprietor of M/s. Capital Cinema and the assessee is engaged in movie production and Tax was not deducted in respect of payments. The ld. Authorised Representative filed letter dated 05.12.2011 explaining that the tax is deductable only when amounts are payable and shown as liability as on 31st March and relied on the decision of the Tribunal in the case of *Teja Construction vs. ACIT (2010) 129 TTJ 57(Hyd) (UO)* and claimed that provisions to Sec. 40(a)(ia) of the Act are not applicable. But the ld. Assessing Officer distinguished the facts of the case and is of the opinion that TDS has to be deducted when amount is credited or paid. Further, the ld. Assessing Officer made disallowance of expenditure u/sec. 40(a)(ia) of the Act under various heads referred at page 2 & 3 of his order

aggregating to ₹2,60,38,570/- and passed order u/s.143(3) r.w.s. 147 of the Act dated 07.12.2011. Aggrieved by the order, the assessee filed an appeal before Commissioner of Income Tax (Appeals).

4. In the appellate proceedings, the ld. Authorised Representative of assessee argued the grounds and explained that the assessee has incurred loss in the movie production of MAZHAI and in the original assessment proceedings, the ld. Assessing Officer has verified the Books of accounts, Records and made disallowance u/s.40A(3) of the Act and assessment u/s.143(3) of the Act was completed. Hence, the issue of notice u/s.148 of the Act is purely based on the change of opinion for non deduction of TDS and the disallowance u/sec.40(a)(ia) of the Act ₹2,60,38,570/- is bad in law. The provisions of Sec. 40(a)(ia) of the Act are applicable only on the payments outstanding on the year ending but not the payments actually paid during the year. The ld. Commissioner of Income Tax (Appeals) considered the grounds, submissions of the assessee, findings of the ld. Assessing Officer and the validity of provisions of Sec. 147 of the Act. The ld. Authorised Representative also filed submissions on the reassessment proceeding with judicial decisions

and the change of opinion. Further on merits referred at page 4,5 & 6 of Commissioner of Income Tax (Appeals) order and the ld. Commissioner of Income Tax (Appeals) found that TDS was paid belatedly on expenditure and in some cases short deduction and no deduction of tax. The ld. Commissioner of Income Tax (Appeals) observed that the re-assessment proceedings are based on Audit objections/ Audit memo and the argument of the assessee on the judicial aspects does not support the case and dismissed the ground of assessee on validity of re-assessment and confirmed the reassessment order of ld. Assessing Officer as valid.

4.1 On the next ground of Disallowance u/sec. 40(a)(ia) of the Act, it was submitted that in original assessment u/s.143(3) of the Act the details were verified and the ld. Commissioner of Income Tax (Appeals) referred the relevant para of assessment order dated 26.12.2008 in his order at page 9 & 10. The ld. Commissioner of Income Tax (Appeals) on verifying the details furnished by the assessee found that out of total disallowance of ₹2,60,38,570/- made in the re-assessment proceedings ₹1,12,75,678/- was in respect of delayed payment of TDS and ₹78,16,645/- is due to short deduction and the balance of ₹69,46,247/- is due to non deduction of tax. The

assessee filed statement of TDS were tax belatedly deposited with Government on 12.05.2007 being after due date of filing of Return u/s.139(1) of the Act for the assessment year 2006-07. In respect of short deduction of TDS, the ld. Commissioner of Income Tax (Appeals) relied on the decision of the Calcutta High Court in the case of *CIT vs. S.K. Tekriwal 361 ITR 432* wherein it was held as under:-

> *'If there is any shortfall due to any difference of opinion as to taxability of any item or nature of payments falling under various TDS provisions, assessee can be declared to be an assessee in default under section 201 but no disallowance can be made by invoking provisions of Sec. 40(a)(ia)."*

Respectfully following the above decision, the ld. Commissioner of Income Tax (Appeals) has deleted the addition of ₹78,16,645/- in respect of short deduction of tax and partly allowed the appeal. Aggrieved by the order the assessee filed an appeal before Tribunal.

5. Before us, the ld. Authorised Representative of assessee argued the grounds and reiterated the submissions made before assessment and appellate proceedings and also written submissions filed before Commissioner of Income Tax (Appeals). The main contention of the assessee on the validity of re-assessment u/s.147 of the Act, as it was purely due to change of opinion and the original assessment u/sec. 143(3) of the Act was completed in the year 2008. The ld. Assessing Officer has not provided any reasons for reopening

before finalizing the assessment. The ld. Authorised Representative filed paper book, written submissions and judicial decisions supporting the grounds. Th ld. Authorised Representative argued that the provisions of Sec. 40(a)(ia) of the Act shall not be applicable to the assessee as there is no outstanding amounts payable as on 31.03.2006 and relied on the decision of *M/s. Merilyn Shipping & Transports Vs. ACIT 16 ITR (Trib) (1)* and prayed for allowing the appeal.

6. Contra, the ld. Departmental Representative relied on the orders of Commissioner of Income Tax (Appeals) and vehemently opposed to the grounds.

7. We heard the rival submissions, perused the material on records and judicial decisions. The ld. Authorised Representative contention that the re-assessment proceedings is bad in law being due to change of opinion and the assessee has provided complete information in the original assessment proceedings and the same was verified and reopening by issuing notice now amounts to change of opinion and further, the reasons for reopening were not provided. The ld. Authorised Representative vehemently argued on the validity of re-assessment proceedings relying on the Apex Court, High Court decisions and filed paper book. In the course of arguments, the ld.

Authorised Representative mentioned that, request was made to the ld. Assessing Officer by letter dated 04.04.2011 to furnish the reasons for reopening of assessment and the Department has not complied. At the time of hearing the ld. Departmental Representative produced copy of the letter filed from the Income Tax records and there is no mentioning in the letter asking for reasons recorded for reopening. When we compared the letter dated 04.04.2011 as per paper book at page 125 and the letter produced by the ld. Departmental Representative from the Assessing Officer records with same date there exist a difference and as per the copy of letter produced by the Departmental Representative there is no reference of seeking reasons of reopening of assessment but only assessee requested to consider the return filed earlier for re-assessment as Return filed in compliance to notice u/s.148 of the Act. When this was confronted, the ld. Authorised Representative could not give any convincing reply for the difference in the wordings of the letter. In our opinion, it is only misrepresentation of facts which cannot be appreciated by this Tribunal. We find on merits that the ld. Assessing Officer has reopened assessment as the assessee fails to deduct TDS on payments debited in the profit and loss account under the provisions of sec. 40(a)(ia) of the Act. Further, the ld. Assessing Officer and Commissioner of

Income Tax (Appeals) have made findings on the reasons of reopening in their orders. Considering the apparent facts, material evidence and findings of the lower authorities, we are of the opinion that the reopening of assessment is in order and dismiss the grounds of the assessee on the validity of reopening of assessment and upheld the order of Commissioner of Income Tax (Appeals) and dismiss the assessee ground.

7.1 On the second ground of disallowance u/s.40(a)(ia) of the Act. The ld. Authorised Representative explained the provisions and relied on the decision of *M/s. Merilyn Shipping & Transports (supra)* and drew our attention to the paper book were the assessee has filed assessment order dated 26.12.2008 at page 127. On perusal of order, the then ld. Assessing Officer has dealt on the provisions of Sec. 40A(3) of the Act and there was no mention about the payments or verification of TDS deduction and the ld. Authorised Representative also filed computation of income, profit and loss account and Balance sheet in support of the grounds. The ld. Commissioner of Income Tax (Appeals) has bifurcated the impugned disallowance in three categories (i) payment of TDS with delay ₹1,12,75,678/- (ii) Short deduction of TDS ₹78,16,645/- and (iii) balance of ₹69,46,247/- No TDS was effected. The ld. Commissioner of Income

Tax (Appeals) has deleted the addition of ₹78,16,645/- for short deduction of TDS and for the remaining disallowance amount the assessee is before us. The ld. Authorised Representative filed a statement of disallowance u/s.40(a)(ia) of the Act in respect of two parties were the amount disallowed is more than the amount outstanding payable as on 31.03.2006 and in respect of other payments TDS is already paid. The ld. Departmental Representative alleged that the assessee is producing this information for the first time and the ld. Assessing Officer has not verified the outstanding payments. Considering the apparent. facts, findings and submissions in paper book, we are of the opinion that the matter has to be re-examined by the ld. Assessing Officer in lieu of submissions in paper book and statement of TDS furnished in the Tribunal. Therefore, we remit the disputed issue for limited purpose for verification by the ld. Assessing Officer and the assessee shall be provided with adequate opportunity of hearing before deciding the issue on merits and the ground of the assessee is allowed for statistical purpose.

8. Now, we take up Departmental appeal in ITA No.1160/Mds/2016. The Revenue has raised the following grounds of appeal:-

''2.1. The learned CIT(A) erred in deleting the addition of Rs.78,16,645/- made invoking the provision of Sec. 40(a)(ia).

2.2 The learned CIT(A) relied on the decision of the Hon'ble High Court of Calcutta in the case of CIT vs. S.K.Tekriwal (361 ITR 432)(Cal). No jurisdictional High Court decision on the issue is refereed.

2.3. The issue is nqt settled and is pending with various High Courts pronouncing differing judgements. Hence, CIT(A) erred in allowing the assessee's appeal''.

8.1 Before us, the ld. Departmental Representative argued the grounds and explained that the action of the ld. Commissioner of Income Tax (Appeals) in deleting the addition is not in accordance with law and also decision relied by the Commissioner of Income Tax (Appeals) are not of jurisdictional High Court. Further, the ld. Commissioner of Income Tax (Appeals) has not called for remand report or any comments from the ld. Assessing Officer before deleting the addition and prayed for allowing the appeal.

8.2 On the other hand, the ld. Authorised Representative relied on the orders of the Commissioner of Income Tax (Appeals) and vehemently opposed the grounds.

8.3 We heard the rival submissions, perused the material on record and judicial decisions. The ld. Departmental Representative contention that the ld. Commissioner of Income Tax (Appeals) should

not have deleted the disallowance were there is short deduction of TDS. We perused the provisions of Sec. 40(a)(ia) of the Act, the assessee has deducted TDS which is not disputed by the Revenue but at lower rate and remitted to the Treasury of the Government. Similar issue was considered by the Co-ordinate Bench of this Tribunal in the case of *M/s. Swelect Energy Systems Ltd in ITA No. 1344/Mds/2012, assessment year 2008-09, dated 20.11.2015* wherein it was held at page 5.3 as under:-

> *5.3 Aggrieved by the order of ld.CIT(A), the assessee filed an appeal before the Tribunal. Before us, the ld. Counsel has submitted that provisions of section 40(a)(ia) shall not be applicable in respect of short deduction of TDS and prime facie the assessee is following going concern practice of deducting TDS on contract payments and relied on the judgment of Calcutta High Court in the case of CIT vs. S.K. Tekriwal 260 CIT 0073 (Cal) and also on the decision of ITAT Delhi Tribunal in the case of ACIT vs. Pankaj Bhargava in ITA No.59/Del/2011, Dated 24th May, 2013 and pleaded for deletion of addition. On verifying the legal position, we find that the addition u/s.40(a)(ia) of the Act can be made if both the conditions are satisfied in respect of applicability of TDS under chapter XVII B and tax was not deducted by the assessee. In the present case, the assessee had deducted TDS at a lower rate, on perusing the case laws and decisions relied by the ld. counsel. We found that expenses are not liable to be disallowed u/s.40(a)(ia) of the Act on account of short deduction of tax at source. The assessee has further complied with both the limbs of applicability of provisions by deducting TDS on payments and depositing the same with the Government, which is not disputed by the Assessing Officer. We are of the opinion, that if any difference in strategy of taxability or nature of payment arises, in such circumstances alternatively, the Assessing Officer can treat the assessee as defaulter u/s.201 of the Act but not by invoking provisions u/s.40(a)(ia) of the Act. It is also apparent from facts of the case the assessee has deducted TDS*

and remitted to the treasury and we direct the Assessing Officer to delete the impugned addition and allow the grounds of the assessee.

Respectfully following the decision of the Co-ordinate Bench, we are not inclined to interfere with the order of the Commissioner of Income Tax (Appeals) on this ground and we dismiss the grounds of the Revenue.

9. In the result, the appeal of the assessee is partly allowed and Revenue appeal is dismissed.

Order pronounced on Friday, the 5th day of August, 2016, at Chennai.

Sd/-	Sd/-
(चंद्र पूजारी)	**(**जी. पवन कुमार**)**
(CHANDRA POOJARI)	**(G. PAVAN KUMAR)**
लेखा सदस्य /ACCOUNTANT MEMBER	**न्यायिक सदस्य/JUDICIAL MEMBER**

चेन्नई/Chennai
दिनांक/Dated:05.08.2016
KV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant	3. आयकर आयुक्त (अपील)/CIT(A)	5. विभागीय प्रतिनिधि/DR
2. प्रत्यर्थी/Respondent	4. आयकर आयुक्त/CIT	6. गार्ड फाईल/GF