IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI B.R. BASKARAN, ACCOUNTANT MEMBER

ITA No.804/Bang/2017
Assessment year : 2005-06

The Deputy Commissioner of Income Tax, Circle 4(1)(1), Bangalore – 560 095.	Vs.	M/s. Janani Tours & Resorts Pvt. Ltd., # 26, Reddy Building, Tumkur Road, T. Dasarahalli, Bangalore – 560 057. **PAN: AAACJ 9953G**
APPELLANT		RESPONDENT

Appellant by	:	Shri Pradeep Kumar, CIT(DR)(ITAT), Bengaluru.
Respondent by	:	Smt. Pratibha R., Advocate

Date of hearing	:	22.01.2019
Date of Pronouncement	:	15.02.2019

O R D E R

Per N.V. Vasudevan, Vice President

This appeal by the revenue is against the order dated 28.12.2016 of the CIT(Appeals)-4, Bangalore relating to assessment year 2005-06.

2. The issue that arises for consideration in this appeal is as to, whether the CIT(Appeals) was justified in deleting the addition made by the AO of a sum of Rs.6,78,28,697 by invoking the provisions of section 40(a)(ia) of the Income-Tax Act, 1961 ["the Act"].

3. The assessee is a tourist taxi operator. The Hon'ble High Court of Karnataka in ITA No.365/2009 by order dated 19.01.2016 had remitted the

question of disallowance u/s. 40(a)(ia) of the Act for fresh consideration, after verifying the date of payment of TDS by the assessee. On such remand, the AO sustained the addition originally made to the extent of Rs.6,00,93,026 for the following reasons:-

> "3. The assessee has incurred an expenditure during the month of March 2005 and accordingly a TDS sum of Rs.1,62,499 on the payment of Rs.77,35,670 was remitted before 31/10/2005 and hence Rs.77,35,670 is allowable under provision to Section 40(a)(ia) as it stood as on 01/04/2005 inserted by the Finance Act 2005 with retrospective effect from 01/04/2005, before being amended with effect from 01/04/2010 by the Finance Act 2010. Hence, the said sum of Rs.77,35,670 is allowable. The balance of remittances have been made subsequent to the last day of the previous year i.e., in respect of the payments made by the Co. to various parties and hence Rs.6,00,93,026 is not allowable as deduction u/s.40(a)(ia) for the Asst. Year 2005-06 as per provisions of Section 40(a)(ia) as it stood then held that any payment on which taxes have been deducted but not paid in case other than where the tax was deductible and was so deducted during the last month of the previous year shall not be deducted in computing the income chargeable under the head profits and gains of business or profession."

4. The legislative history of the provisions of Sec.40(a)(ia) of the Act is as follows: Section 40 has certain clauses providing for the amounts which are not deductible. Sub-clause (ia) of clause (a) of section 40 was inserted by the Finance (No.2) Act, 2004 with effect from 1st April, 2005 reading as under:-

> "40. Notwithstanding anything to the contrary in sections 30 to 38, **the following amounts shall not be deducted in computed the income chargeable under the head `Profits and gains of business or profession'**—.
>
> …..
>
> (ia) any interest, commission or brokerage, fees for professional services or fees for technical

> services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on or, after deduction, has not been paid during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200 :

5. Thereafter the Finance Act, 2008 made amendment to clause (a) in sub-clause (ia) in section 40 with retrospective effect from 1st April, 2005. The section as amended by the Finance Act, 2008 read as under:-

> "(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been paid,-
>
> (A) in a case where the tax was deductible and was so deducted during the last month of the previous year, on or before the due date specified in sub-section (1) of section 139 ; or
>
> (B) in any other case, on or before the last day of the previous year."

6. The Finance Act, 2008 brought out amendment to section 40(a)(ia) w.e.f. 1.4.2005 by relaxing earlier position to some extent. It made two categories of defaults causing disallowance on the basis of the period of the previous year in which tax was deductible. The first category of disallowances included the cases in which tax was deductible and was so

deducted during the last month of the previous year but there was failure to pay such tax on or before the due date specified in sub-section (1) of section 139 of the Act. In other words, if any amount on which tax was deductible during last month of the previous year, that is March 2005, but was paid before 31st October, 2005, being the due date u/s 139(1), the deductibility of the amount was kept intact. The second category included cases other than those given in category first. To put it simply, if tax was deductible and was so deducted during the first eleven months of the previous year, that is, up to February, 2005, the disallowance was to be made if the assessee failed to pay it before 31st March, 2005.

7. The AO allowed deduction of the sum of Rs.77,35,670 which was expenditure incurred in the month of March, 2005 because the tax deducted was paid on or before 30.10.05, the last date for filing return of income u/s.139(1) of the Act for AY 2005-06 as it fell in the first category referred to in earlier paragraph. In respect of the remaining sum of Rs.6,00,93026, the expenditure was incurred in the first eleven months of the previous year i.e., from 1.4.2004 upto 28.2.2005 and therefore the AO disallowed the claim for deduction even though the TDS in respect of these expenditure was paid or before 30.10.2005 because the case fell within the second category referred to in earlier paragraph.

8. Then came the amendment to section 40(a)(ia) by the Finance Act, 2010 with retrospective effect from 1st April, 2010. The provision so amended, now reads as under :-

> "(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter

> XVII-B and such tax has not been deducted or; after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139."

9. From the above provision as amended by the Finance Act, 2010 with retrospective effect from 1st April, 2010, it can be seen that the only difference which this amendment has made is dispensing with the earlier two categories of defaults as per the Finance Act, 2008, as discussed in the earlier para, causing disallowance on the basis of the period of the previous year during which tax was deductible. The first category of disallowances included the cases in which tax was deductible and was so deducted during the last month of the previous year but there was failure to pay such tax on or before the due date specified in sub-section (1) of section 139. The Finance Act, 2010 has not tinkered with this position. The second category of the Finance Act, 2008 which required the deposit of tax before the close of the previous year in case of deduction during the first eleven months, as a pre-condition for the grant of deduction in the year of incurring expenditure, has been altered. The hitherto requirement of the assessee deducting tax at source during the first eleven months of the previous year and paying it before the close of the previous year up to 3 1st March of the previous year as a requirement for grant of deduction in the year of incurring such expenditure, has been eased to extend such time for payment of tax up to due date u/s 139(1) of the Act. As per the new amendment, the disallowance will be made if after deducting tax at source, the assessee fails to pay the amount of tax on or before the due date specified in sub-section (1) of section 139 of the Act. The effect of this amendment is that now the assessee deducting tax either in the last month of the previous year or first eleven months of the previous year shall be entitled to deduction of the expenditure in the year of incurring it, if the tax

so deducted at source is paid on or before the due date u/s 139(1). This is the only difference which has been made by the Finance Act, 2010.

10. The question as to whether the amendment to the provisions of Sec.40(a)(ia) of the Act by the Finance Act, 2010 whereby it was laid down that if the tax deducted at source is paid on or before the due date for filing the return of income u/s.139(1) of the Act, then no disallowance can be made u/s.40(a)(ia) of the Act, is retrospective in operation and operates from 1.4.2005 though it is said to be retrospective only from 1.4.2010.

11. Before the CIT(Appeals), the assessee submitted that if the TDS has been remitted on or before the due date of filing of return of income, then no disallowance u/s. 40(a)(ia) can be made and therefore the entire addition of Rs.6,78,28,696 made by the AO should be deleted. The assessee relied on the decision of the Hon'ble High Court of Karnataka in *CIT v. Sri Santosh Kumar Shetty in ITA No.590/2013, order dated July, 2014*. The Hon'ble High Court took the view that amendment to provisions of section 40(a)(ia) by the Finance Act, 2010 w.e.f. 1.4.2010 was **retrospective** in its operation and was applicable from 1.4.2005.

12. The CIT(Appeals) accepted the contention of the assessee and found that the entire TDS had been paid on or before the due date of filing of return of income and therefore the entire disallowance u/s. 40(a)(ia) of the Act should be deleted. In doing so, the CIT(Appeals) followed the order of Hon'ble High Court of Karnataka in the case of *Sri Santosh Kumar Shetty (supra)*.

13. Aggrieved by the order of CIT(Appeals), the revenue has preferred the present appeal before the Tribunal. The main grievance of the revenue is projected in the following revised grounds of appeal before the Tribunal:-

"(1) The order of the ld. CIT(A) is opposed to the law and facts of the case.

(2) Whether the ld. CIT(A) is correct in giving relief to the assessee on the ground that the TDS deducted has been paid before filing of Return of Income on the basis of amendment done the Finance Act, 2010.

(3) The ld. CIT(A) ought to have appreciated that the amendment in section 40(a)(ia) introduced by Finance Act, 2010 is not applicable to this Assessment Year.

(4) The Id. CIT(A) has erred in relying on the decision of Hon'ble High Court of Karnataka in the case of M/s. CIT Vs. Santosh Kumar Shetty (ITA no. 590/2013), wherein this issue has not been accepted by the department and SLP has been filed in the case of B. Uday Kumar Shetty vide SLPC-12098-2015-SC which is pending as on date thus has not reached its finality.

(5) For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT(A) in so far as it is relates to the above grounds may be reversed and that of the Assessing Officer may be restored

(6) The appellant craves leave to add, alter, amend, and/or delete any of the grounds that may be urged."

14. We have heard the rival submissions. It is clear from the grounds of appeal raised by the department that the decision of Hon'ble High Court of Karnataka in the case of *Sri Santosh Kumar* Shetty *(supra)* is in favour of the assessee and in the light of the law laid down therein, disallowance u/s. 40(a)(ia) of the Act cannot be sustained. The grievance of the revenue is that the decision of the Hon'ble High Court of Karnataka has not become final and a SLP has been filed by the department before the Hon'ble Supreme Court. In our view, merely because an appeal has been preferred against the judgment of the High Court, it cannot be the basis not

to follow the binding decision of the Hon'ble High Court. In the given facts and circumstances, we find no merit in this appeal by the revenue. Consequently, the appeal by the revenue is dismissed.

15. In the result appeal by the Revenue is dismissed.

Pronounced in the open court on this 15th day of February, 2019.

Sd/-	Sd/-
(B.R. BASKARAN) Accountant Member	(N.V. VASUDEVAN) VICE PRESIDENT

Bangalore,
Dated, the 15th February, 2019.

/ Desai Smurthy /

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore.