

<b>IN THE INCOME TAX APPELLATE TRIBUNAL</b>
<b>COCHIN BENCH, COCHIN</b>
<b>BEFORE S/SHRI CHANDRA POOJARI, AM &amp; GEORGE GEORGE K., JM</b>

I.T.A. No.164/Coch/2016
Assessment Year : 2009-10

Shri P. Gopalakrishnan, Alias Dileep, VIP Road, Aluva. [PAN: ABTPG 3923C]	<b>Vs.</b>	The Assistant Commissioner of Income-tax, Circle-1, Aluva.
<b>(Assessee-Appellant)</b>		<b>(Revenue-Respondent)</b>

<b>Assessee by</b>	Smt. Parvathy Ammal, CA
<b>Revenue by</b>	Smt. A.S. Bindhu, Sr. DR

<b>Date of hearing</b>	29/07/2019
<b>Date of pronouncement</b>	01/08/2019

### **ORDER**

Per CHANDRA POOJARI, AM:

This appeal filed by the assessee is directed against the order of the CIT(A)-II, Kochi dated 07/01/2016 and pertain to the assessment year 2009-10.

2. There was a delay of 10 days in filing the appeal before the Tribunal. The Id. AR has filed condonation petition accompanied by an affidavit wherein it was stated that the assessee received the order of the CIT(A) on 29/01/2016 and as such, the appeal should have been filed before the Tribunal on 08/04/2016. It was submitted that the assessee was having busy schedule of shooting and other activities in connection with films and also some other urgent and unavoidable personal

matters. Hence, the appeal papers could be handed over to the consultants only by 15<sup>th</sup> March, 2016 and they were preoccupied with the finalization of income tax returns/appeals and other related matters. Therefore, there was delay of 10 days in filing the appeal. It was submitted that the delay was not deliberate and it was beyond the control of the assessee. Hence, it was prayed that the Tribunal may condone delay of 10 days in filing the appeal and the appeal may be disposed of on merits.

2.1 We have heard the rival submissions and gone through the reasons advanced by the assessee for filing the appeal belatedly before this Tribunal. We are satisfied with the reasons explained by the assessee for filing the appeal belatedly. Accordingly, we condone the short delay of 10 days in filing the appeal and admit the appeal for adjudication.

3. The assessee has raised various grounds of appeal. However, the assessee has pressed only one ground No. 4(d) relating to the applicability of second proviso to section 40(a)(ia) of the Act.

4. The facts relating to this issue are that there was disallowance u/s. 40(a)(ia) of the Act. The Ld. AR submitted that the assessee had raised this ground before the CIT(A). However, the CIT(A) observed that the assessee had not pressed this ground before him which is incorrect. The Ld. AR submitted that the assessee had raised this ground as Ground Nos. 11 & 12 before the CIT(A) and notes were also

submitted before the CIT(A) at the time of hearing. The Ld. AR had placed reliance on the decisions of ITAT, Vishakapatnam in the case of Merilyn Shipping and Transport vs. ACIT (ITA No.477/VIS/2008 dated 29/03/2012), Emdee Apparels vs. ACIT (2012) 19 ITR (Trib.) 623 (Bangalore), Rajamahendri Shipping & Oil Field Services Ltd. vs. ACIT (2012) 19 ITR (Trib) 616 (Vishakapatnam), Gurdass Mann vs. DCIT (2012) 219 ITR (Trib.) 57 (Chandigarh). The Ld. AR also relied on the judgment of the Calcutta High Court in the case of CIT vs. Virgin Creations (dated 23/11/2011) wherein it was held that amendment to section 40(a)(ia) has retrospective effect. According to the Ld. AR, the CIT(A) could have decided the issue on merit. Further, she submitted that out of the disallowance u/s. 40(a)(ia) of the Act, certain amounts were disclosed by the recipients in the return of income.

5. We have heard the rival submissions and perused the record. The issue before us is whether the assessee gets any benefit or his obligation is absolved if the recipient of the said has already paid taxes on the amounts received by them in the light of the amendment to the second proviso to section 40(a)(ia). Section 40(a)(ia) reads as under:

“40. (a)(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.”

5.1 The second proviso to section 40(a)(ia) is relevant for the purpose of this case which reads as under:

“Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso under the first proviso to sub-section(1) of section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso.”

5.2 It was inserted by the Finance Act of 2012 with effect from April 1, 2013. In order to understand the concession available to the assessee, one has to again refer to section 201(1) and the proviso which reads as under:

“201(1) Where any person, including the principal officer of a company-

(a) who is required to deduct any sum in provisions of this Act; or

(b) referred to in sub-section (1A) of section 192, being an employer, does not deduct, or does not pay, or after so deduce the whole or any part of the tax, as required by or under this Act; then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of of such tax:

Provided that any person, including the principal company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident—

(i) has furnished his return of income under section 139

(ii) has taken into account such sum for computing income in such return of income; and

(iii) has paid the tax, due on the income declared by him in such return of income,

and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed :

Provided further that no penalty shall be charged under section 221 from such person, unless the Assessing Officer is satisfied that such person without good and sufficient reasons, has failed failed to deduct and pay such tax."

5.3 Reading of section 40(a)(ia) along with the second proviso and section 201(1) along with the proviso, it would mean that the mandate or requirement on the part of the payer to deduct tax at source is not so strict if they are able to show that the payee or the recipient of the amounts has paid tax in accordance with the provisions of section 201(1) and the proviso. Since the assessment year in question is 2009-10 and the amendment was introduced by Finance Act, 2012 with effect from April 1, 2013 which is prospective in nature as held the Jurisdictional High Court in the case of Prudential Logistics and Transports vs. ITO (364 ITR 689), the said benefit is not applicable to the assessee. Hence, we decline to interfere with the order of the lower authorities and addition made u/s. 40(a)(ia) is confirmed. The request of the Ld. AR to remit the issue to the file of the Assessing Officer to examine the applicability of second proviso to section 40(a)(ia) of the Act is misconceived in view of the judgment of the Jurisdictional High Court in the case of Prudential Logistics and Transports cited supra. Hence, we are inclined to reject this ground of appeal of the assessee.

5.4 Since all other grounds of appeal were not pressed by the Ld. AR by making an endorsement to this effect, the same are dismissed as not pressed.

6. In the result, the appeal of the assessee is dismissed.

Order pronounced in the open Court on this 1<sup>st</sup> August, 2019

sd/-  
(GEORGE GEORGE K.)  
JUDICIAL MEMBER

sd/-  
(CHANDRA POOJARI)  
ACCOUNTANT MEMBER

Place: Kochi

Dated: 1<sup>st</sup> August, 2019

GJ

Copy to:

1. Shri P. Gopalakrishnan, Alias Dileep, VIP Road, Aluva.
2. The Assistant Commissioner of Income-tax, Circle-1, Aluva.
3. The Commissioner of Income-tax(Appeals)-II, Kochi.
4. The Pr. Commissioner of Income-tax, Kochi.
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)  
I.T.A.T., Cochin