IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT DB-II), MUMBAI

BEFORE SHRI PAWAN SINGH, JM

&

SHRI M.BALAGANESH, AM

ITA No.1760/Mum/2019
(**Assessment Year :2010-11**)

M/s. Mehra Eyetech Pvt. Ltd., 801/B, Lotus Corporation Park, Graham Firth Steel Compound Goregaon (E), Mumbai-400063	Vs.	Add.CIT, Circle 6 (3) 1st Floor, Aayakar Bhavan Mumbai – 400 020
PAN/GIR No.AAACU2684H		
(Appellant)	..	**(Respondent**)

Assessee by	Shri N R Agarwal
Revenue by	Ms. Samatha, Sr. AR
Date of Hearing	**08/07/2020**
Date of Pronouncement	**13/07/2020**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

This appeal in ITA No.1760/Mum/2019 for A.Y.2010-11 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-13, Mumbai in appeal No. CIT(A)-13/Addl.CIT-7(2)(2)/90/2015-16 dated 05/12/2018 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3)of the Income Tax Act, 1961 (hereinafter referred to as Act) by the ld. Addl. Commissioner of Income Tax, Range-6(3), Mumbai (hereinafter referred to as ld. AO).

2. The first issue to be decided in this appeal is as to whether the ld. CIT(A) was justified in confirming the disallowance made u/s.40(a)(ia) of the Act in the sum of Rs.19,05,112/- on account of exhibition expenses paid to Idea House Pvt. Ltd. without deduction of tax at source.

3. We have heard rival submissions and perused the materials available on record. We find from the facts placed on record by the assessee that assessee had made payment to Idea House Pvt. Ltd total sum of Rs.20,65,675/- which included supply of temporary furniture etc., to the tune of Rs.19,05,112/- and for agency fees of Rs.1,60,563/-. The said furnitures were erected in the stall taken in the exhibition hall on hire for advertising products of the assessee company. We find that the assessee was engaged in the business of import and sale of eye testing equipment. The assessee imports equipment mainly from M/s.Topcon Asia Pvt. Ltd., Singapore and sells them to eye doctors, eye hospitals, medical colleges etc., all over India. The assessee also procured only maintenance contracts, brake-down jobs and other services to the customer through its engineers. The entire bills for payment of Rs.20,65,675/- to Idea House Pvt. Ltd., were submitted by the assessee before the ld. AO. The ld. AO on examination of those bills and invoices observed that payments were made to Idea House Pvt. Ltd., towards conceptualization, design and execution of Mehra Eyetech Stalls at Coimbatore, Mumbai and Kolkata. Service Tax @10.3% was claimed by Idea House Pvt. Ltd., on the total bill amount. Accordingly, we find that the ld. AO had observed that the consolidated bill amount of Rs.20,65,675/- paid to Idea House Pvt. Ltd., would suffer deduction of tax at source , whereas, the assessee has deducted tax at source only in respect of payment of Rs.1,60,563/- towards agency fees included in the

said consolidated bill. Accordingly, the ld. AO proceeded to disallow the remaining exhibition expenses in the sum of Rs.19,05,112/- for non-deduction of tax at source u/s.40(a)(ia) of Act in the assessment which was upheld by the ld. CIT(A) in first appeal.

3.1. Before us, the ld. AR argued that similar types of payments were made by the assessee to various parties in the last 25 years without deduction of tax at source and hence the assessee was under bonafide belief that the said payments does not attract deduction of tax at source. The payments made in the earlier years were accepted by the Revenue and hence, the bonafide belief of the assessee that the said payments do not attract any TDS provisions cannot be doubted or faulted with. The ld. AR further submitted that the revenue had accepted the stand of the assessee in the scrutiny assessment proceedings for A.Y.2007-08 and 2009-10, copies of which orders are enclosed in pages 12 and 22 of the paper book respectively. He also placed reliance on the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Kotak Securities Ltd., reported in 340 ITR 333. We find that this argument of the ld. AR cannot be entertained as that would make the entire provisions of Section 40(a)(ia) of the Act redundant. We find that the Hon'ble Madras High Court had already upheld the constitutional validity of the provisions of Section 40(a)(ia) of the Act. Hence, questioning the legislative wisdom of the Parliament cannot be entertained by the Tribunal. We have also gone through the said decision of the Hon'ble Jurisdictional High Court in the case of Kotak Securities Ltd., relied upon by the ld. AR. We find that in that case, the assessment involved was A.Y.2005-06 which was the first year of introduction of provisions of Section 40(a)(ia) of the Act in the statute book and since both the revenue as well as the assessee were under the bonafide belief from the years 1995-2004 that the transaction

charges paid by the assessee to stock exchange for trading were not liable for TDS, the benefit of doubt and the bonafide belief of the assessee was given weightage and accordingly, the Hon'ble Bombay High Court held that for the A.Y.2005-06, being the first year of introduction of provisions of Section 40(a)(ia) of the Act, no disallowance could be made u/s.40(a)(ia) of the Act. We hold that the judgment rendered by the Hon'ble Jurisdictional High Court had to be viewed from the context and the surrounding circumstances in which it was rendered and cannot be made applicable for all assessment years. Hence, in our considered opinion, we hold that the reliance placed on the Hon'ble Jurisdictional High Court by the ld. AR would not advance the case of the assessee.

3.2. However, we find lot of force in the alternative argument advanced by the ld. AR that the entire payments made to Idea House Pvt. Ltd., had been duly disclosed by the payee in its income tax returns filed for A.Y.2010-11 which is also supported by a certificate under first proviso to Section 201(1) of the Act by the Chartered Accountant in the prescribed form and duly certifying that this sum of Rs.20,65,675/- has been duly included in the accounts of the payee i.e. Idea House Pvt. Ltd., for the A.Y.2010-11. Hence, the assessee's case squarely fall within the ambit of second proviso of Section 40(a)(ia) r.w.s. 201(1) of the Act thereon. Since, the subject mentioned transaction has been duly considered in the income tax returns of the payee, no disallowance u/s.40(a)(ia) of the Act could be made in the hands of the assessee payer. We find that this amendment in second proviso has been introduced in the statute only w.e.f. A.Y. 2013-14 onwards. But the said amendment has been held to be retrospective in operation by the Hon'ble Delhi High Court in the case of CIT vs. Ansal Landmark Housing Development Ltd., reported in 377 ITR 635. However, we find that the decision of the Hon'ble Kerala High

Court in the case of Thomas George Muthoot vs. CIT vide order dated 03/07/2015 is against the assessee on the very same issue wherein the second proviso to Section 40(a)(ia) r.w.s. 201(1) of the Act had been held to be prospective in operation. Hence, we could find that there are divergent views taken by different non-jurisdictional High Courts. In such a scenario, the Hon'ble Supreme Court in the case of Vegetable Products reported in 88 ITR 192 had held that the construction that is favourable to the assessee should have to be considered. Accordingly, we would like to place reliance on the decision of the Hon'ble Delhi High Court referred to supra and hold that assessee herein being a payer cannot be treated as an assessee in default and consequently, no disallowance u/s.40(a)(ia) of the Act could be made in the hands of the assessee herein. Accordingly, ground No.1 raised by the assessee is allowed.

4. The next ground to be decided in this appeal is with regard to the action of the ld. CIT(A) in confirming the disallowance made by the ld. AO u/s.40(a)(ia) of the Act in the sum of Rs.56,997/- on account of advertisement expenses incurred without deduction of tax at source.

4.1. We have heard rival submissions and perused the material available on record. We find that assessee had submitted that the payment is made to "The Hindu" newspaper for advertising for hiring staff. It was submitted that this payment was in the nature of one time payment and no contract exist with the newspaper and accordingly, the provisions of Section 194C of the Act would not be applicable. The assessee enclosed entire details of incurrence of this expenditure before the ld. AO. The ld. AO and the ld. CIT(A) observed that payment was not made by the assessee directly to 'The Hindu' , but instead it was made to Harsha

Agencies which is a franchisee of 'The Hindu' and accordingly, assessee was liable to deduct tax at source u/s.194C of the Act thereon.

4.2. We find that there is absolutely no dispute that the said payment was made towards advertisement charges to Harsha Agencies which is a franchisee of 'The Hindu'. On bare reading of provisions of Section 194C of the Act, we find that any person responsible for paying any sum to any resident for carrying out any work in pursuance of a contract shall deduct tax at source thereon. Explanation to Section 194C of the Act defines the term 'work' to include 'advertising'. Hence, the very fact that assessee had given the advertisement material to M/s. Harsha Agencies, constitutes a contract entered into by assessee and Harsha Agencies. Hence, all the ingredients of Section 194C of the Act get squarely attracted in the instant case. Hence, we hold that assessee is indeed liable for deduction of tax at source on the said payment of Rs.56,997/-. Accordingly, the ld. AO is justified in making disallowance u/s.40(a)(ia) of the Act for the said sum for violation of TDS provisions. Accordingly, the ground No.2 raised by the assessee is dismissed.

5. The last issue to be decided in this appeal is as to whether the ld. CIT(A) was justified in confirming the disallowance of transport expenses made u/s.40(a)(ia) of the Act in the sum of Rs.2,06,255/- paid without deduction of tax at source.

5.1. We have heard rival submissions and perused the materials available on record. We find that assessee had made payment to the following transporters:-

- Sambhathe Carriers - Rs. 95,600/-
  (PAN -AGOPP6247J)

- Gati Limited - Rs.1,10,655/-
  (PAN - AADCG2096A)

5.2. Assessee submitted that since PAN was obtained from the respective transporters to whom payments were made, pursuant to the amendment brought in the provisions of Section 194C of the Act w.e.f. 01/10/2009, there was no requirement for the assessee payer to deduct tax at source once PAN is obtained. We find that the ld. AO however, ignored the contentions of the assessee and observed that the said payment would attract provisions of Section 194C of the Act and proceeded to make disallowance of Rs.2,06,255/- u/s.40(a)(ia) of the Act in the assessment. We find that before the ld. CIT(A), the assessee had indeed made a submission that the respective transporters had included these sums in their returns and hence, the assessee should not be invited with disallowance u/s.40(a)(ia) of the Act in terms of second proviso to Section 40(a)(ia) r.w.s. 201(1) of the Act. The assessee also placed reliance on the decision of the Hon'ble Supreme Court in the case of Hindustan Coca-Cola Beverages Pvt. Ltd., reported in 293 ITR 226 to support its contentions in this regard. We find that the ld. CIT(A) had not discussed on this particular submission of the assessee at all and had not given any finding in its appellate order regarding the same. We find that this is a statutory benefit provided to the assessee which should not be taken away. However, even before us, we find that the ld.AR exceot making oral statement that the payees have included the said receipts in their income tax returns, had not produced any documentary evidence before us. However, in order to avoid double taxation, we deem it fit and appropriate, in the interest of justice and fair play, to remand this issue to the file of the ld. AO for the limited purpose of verification of the income tax returns for the Asst Year 2010-11 of the respective payees in

the light of the second proviso of Section 40(a) (ia) r.w.s. 201(1) of the Act. We have already held that second proviso has already been held to be retrospective in operation by the decision of the Hon'ble Delhi High Court reported in 377 ITR 635 supra. We hold that if the payees have included the subject mentioned transaction in their income tax returns, then the assessee payer should not be treated as assessee in default and disallowance u/s.40(a)(ia) of the Act should be deleted in its hands. IF the subject mentioned transaction is not reflected in the income tax returns of the payees, then disallowance made in the hands of the assessee u/s 40(a)(ia) of the Act would remain in force. Accordingly, the ground No.3 raised by the assessee is allowed for statistical purposes subject to directions contained hereinabove.

6. In the result, appeal of the assessee is allowed for statistical purposes.

Order pronounced on 13/07/2020 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(PAWAN SINGH)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 13/07/2020
KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai