IN THE INCOME TAX APPELLATE TRIBUNAL, MUMBAI BENCH "C", MUMBAI

BEFORE SHRI N.V.VASUDEVAN(J.M) & SHRI N.K. BILLAIYA(A.M)

ITA NO. 1321/MUM/2009(A.Y. 2005-06)

| | | |
|---|---|---|
| Shri Piyush C. Mehta,<br>701/702, Radhika Apts,<br>Asha Nagar, Behind Saidham,<br>Kanivali (E), Mumbai 400 101.<br>PAN:aacpm 6771K<br>(Appellant) | Vs. | The ACIT 25(3),<br>Mumbai.<br><br><br><br>(Respondent) |

| | | |
|---|---|---|
| Appellant by | : | Shri Prakash K. Jotwani |
| Respondent by | : | Shri Pitambar Das |
| Date of hearing | : | 29/03/2012 |
| Date of pronouncement | : | 11/04/2012 |

ORDER

PER N.V.VASUDEVAN, J.M

This is an appeal by the assessee against the order dated 28/11/2008 of CIT(A) -25, Mumbai relating to assessment year 2005-06. The grounds of appeal raised by the assessee read as follows:

" On the facts and in the circumstances of the case and in law:

1(a) The learned Commissioner of Income-tax erred in confirming disallowance u/s.40(a)(ia) on payments made to the following subcontractors:

| | |
|---|---|
| (i) Vaibhav Enterprises | Rs. 1,12,38,889/ - |
| (ii) Rapid Inexci Services P.Ltd. | Rs. 7,42,155/-<br>CIT(A) took figure at 7,50,000/-) |
| (iii)VijayYadav | Rs. 5,07,625/- |
| (iv) Parshuram | Rs. 7, 16,232/- |
| (v) Tejuali Shaikh | Rs. 4,85,401/- |
| (vi) Ganesh Ramsingh | Rs. 2,39,762/- |

(b) The learned CIT(A) failed to consider that payments made by the appellant were advances and treated as bills for payment on the last

day of the accounting year, when tax deduction has taken place and thus there was no violation of provisions of sec. 194C.

(c) The learned CIT(A) failed to consider the amended provisions of sec.40(a)(ia) w.e.f. from 1.4.2005 which held that if tax deducted has been paid before the due date of return u/s. 139(1), no disallowance can be made.

4. The appellant craves leave to add, amend, alter or cancel any Ground or Grounds before or at the time of hearing of the appeal.

2. The assessee is an individual engaged in the business of building repairs, labour & construction works contracts as Prop. "Constructive Concrete Constructions". In the course of assessment proceedings for AY 05-06, the AO on going through the details filed noticed that the assessee has not paid the TDS deducted on the labour charges/ advances paid to M/s Vaibhav Enterprises within the time stipulated u/s 200(1). The assesses had made payments / advances to Vaibhav Enterprises throughout the year but has deposited the TDS only on 31.5.05 i.e., beyond the stipulated time. The assessee submitted that Vaibhav enterprises was working as a liaison partner cum subcontractor for the assessee for his construction project of Bhopal. The amounts were sent on account to M/s Vaibhv for organizing work and payment to small contractors at Bhopal because of their local contacts. It was also submitted that the assessee was residing at Mumbai & was executing a project at Mumbai. Hence having a liaison partner at Bhopal was to his advantage. Since the final bill was submitted by M/s Vaibhav Enterprises in May 2005, the amounts sent to them were shown as loans and advances.

3. The AO however concluded that the assessee has paid amounts to the ato M/S.Vaibhav Enterprises for organizing work and payments for execution of its contract to M/s. Vaibhav enterprises who is subcontractor of the assessee. He held that in terms of provisions of sec. 200(1) the assessee was required to deduct TDS from the advances / payments made on account on

the dates the payments were made. Since that was not, he held that in terms of provisions of sec. 40(a)(ia) the payments of Rs. 1,12,38,889/- paid to Vaibhav Enterprises (which though in the nature of sub-contractual payments / advances towards contract have been shown as loans and advances given by the assesse) were disallowed and added back to the assessee's total income.

4. Similarly in the case of labour charged paid / payable to M/s. Rapid Inexci Services P Ltd. of Rs.7,42,155/- which were shown as credited on 31/3/05, the AO noticed that the assessee has been making payments to the said company from Sept. 04 onwards upto Feb. 05 towards the labour charges and on 31//3/05 in fact there was a debit balance of Rs. 25,247/-. Hence though the labour charges have been paid during the year, the account has been credited only on 31/3/05. In terms of provisions of sec. 200(1) the assessee was required to deduct TDS from the advances / payments made on account on the dates the payments were made. The amounts were deposited to the credit of the Government only on 31.5.2005. However, this has not been done son. Hence in terms of provisions of sec. 40(a)(ia) the advance payments of Rs. 7,42,155/- paid to Rapid Inexi P. Ltd. which though in the nature of sub-contractual payments / advances towards contract shown as loans and advances given by the assessee were disallowed and added back to the assessee's total income.

5. Similarly in respect of subcontractual payments to Vijay Yadav, Parshuram, Tejuali Shaik, the AO noticed that the assesee has made payments through out the year, but has credited the concerned persons only on 31/3/2005 and has deducted tax on 31/3/05 and deposited the same on 31/5/05. In terms of provisions of sec. 200(1) the assessee was required to deduct TDS from the advances / payments made on account on the dates the payments were made. However this has not been done so. Hence, in terms of provisions of sec. 40(a)(ia) the advance payments of Rs. 5,02,500/-

paid to Vijay Yadav, Rs.6,89,000 paid to Parshuram Rs. 4,80,500 paid to Tejuli Shaikh Rs.2,50,000 paid to Khatri Rs. 2,37,000/- paid to Ganesh Singh, which though in the nature of sub-contractual payments / advances towards contract have been shown as loans and advances given by the assessee were disallowed and added back to the assessee's total income.

6. Accordingly total disallowance out of the sub-contractual payments in terms of provisions of sec. 40(a)(ia) was Rs. 1,41,40,044/- (Rs. 1,12,38,889/- + 7,42,155 + 5,02,500 + 6,89,000 + 4,80,500 + 2,50,000 + 2,37,000).

7. On appeal by the Assessee against the aforesaid disallowances, the CIT(A) confirmed the order of the AO, giving raise to the present appeal by the Assessee before the Tribunal.

8. We have heard the rival submissions. The legislative history of the provisions of Sec.40(a)9ia) of the Act have to be first seen. 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 :
>
> Provided that where in respect of any such sum, tax has been deducted in any subsequent year or, has been deducted in the previous year but paid in any subsequent year after the

expiry of the time prescribed under sub-section (1) of section 200, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

Explanation. – For the purposes of this sub-clause, -

(i)"commission or brokerage" shall have the same meaning as in clause (i) of the Explanation to section 194H;

(ii)"fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;

(iii)"professional services" shall have the same meaning as in clause (a) of the Explanation to section 194J;

(iv)"work" shall have the same meaning as in Explanation III to section 194C; "

9. The Memorandum explaining the provisions in the Finance Bill explained the rationale of the insertion of the new provision in following words :-

"With a view to augment compliance of TDS provisions, it is proposed to extend the provisions of section 40(a)(i) to payments of interest, commission or brokerage, fees for professional services or fees for technical services to residents, and payments to a resident contractor or sub-contractor for carrying out any work (including supply of labour for carrying out any work), on which tax has not been deducted or after deduction, has not been paid before the expiry of the time prescribed under sub-section (1) of section 200 and in accordance with the other provisions of Chapter XVII-B. It is also proposed to provide that where in respect of payment of any sum, tax has been deducted under Chapter XVII-B or paid in any subsequent year, the sum of payment shall be allowed in computing the income of the previous year in which such tax has been paid.

The proposed amendment will take effect from 1st day of April, 2005 and will, accordingly, apply in relation to the assessment year 2005- 2006 and subsequent years. [Clause 11]"

10. 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.

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted-

(A) during the last month of the previous year but paid after the said due date ; or
(B) during any other month of the previous year but paid after the end of the said previous year, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid." ;

11. The Finance Act, 2008 brought out amendment to section 40(a)(ia) w.r.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.

12. 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
>
> Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid."

13. 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.

14. The question as to whether the Amendment by the Finance Act, 2010 as aforesaid is prospective or retrospective from 1.4.2005 came up for consideration before the Mumbai Special Bench ITAT in the case of Bharati Shipyard Ltd. Before the Special Bench it was argued that the amendment was made with a view to remove the unnecessary hardship caused to the assessee by the earlier provision. The Special Bench by its order dated 9.9.2011 however held that the amendment carried out by the Finance Act, 2010 with retrospective effect from assessment year 2010- 2011 cannot be held to be retrospective from assessment year 2005-2006. The Special Bench held that the amendment brought out by the Finance Act, 2010 to section 40(a)(ia) w.e.f. 01.04.2010, is not remedial and curative in nature.

15. Prior to the decision of the Special Bench, identical issue had come up for consideration before the ITAT Kolkata Bench in the case of Virgin Creations Vs. ITO, Ward 32(4), Kolkata ITA No. 267/Kol/2009 for AY 05-06 The issue that arose for consideration was disallowance of expenses u/s.40(a)(ia)claimed as deduction while computing income from business being embroidery charges, dyeing charges, interest on loan and freight charges without deducting tax at source. The Embroidery charges were paid between 22nd may, 2004 to 30.11.2004. Tax had been deducted at source but were paid to the Government only on 28.10.2005 and not within the

time contemplated by Section 200(1) of the Act. The dyeing charges were paid between 5.4.2004 to 20.8.2004. Tax was deducted at source but was paid to the Government only on 28.10.2005. Freight outward charges were paid without deduction of tax at source. Interest on loans were credited to the creditors account on 31.3.2005 to the extent they were paid after the due date for filing return of income u/s.139(1) of the Act, the disallowance was made u/s.40(a)(ia) of the Act. Before the Tribunal, the Assessee contented that the amendment by the Finance Act, 2010 with retrospective effect from 1st April, 2010 whereby amount of tax deducted at the time of making payment in respect of expenditure referred to in Sec.40(a)(ia) of the Act, if paid to the Government on or before the due date for filing the return of income due date u/s 139(1) of the Act should be allowed as a deduction. In other words it was argued that the amendment by the Finance Act, 2010 to the provisions of Sec.40(a)(ia) has to be held to be retrospective w.e.f. 1-4-2005. The ITAT Kolkata Bench by its order dated 15.12.2010, held as follows:

> "8. After hearing the rival submissions and on careful perusal of the materials available on record, keeping in view of the fact that though the Ld.D.R. submitted that the decisions of the Coordinate Benches are not binding and the Kolkata benches may take a different view, since Mumbai Bench after analyzing the provisions of Sec.40(a)9ia) since its inception and various amendments made to the same including the suggestion made by the Industry in the form of representation in their pre-budget memorandum to the Hon'ble Finance Minister and by applying the decision of the Hon'ble Apex Court in the case of Alom Extrusions Ltd., has observed that "The provisions of Section 40(a)(ia) as stood prior to the amendments made by the Finance Act 2010 thus were resulting into unintended consequences and causing grave and genuine hardships to the assesses who had substantially complied with the relevant TDS provisions by deducting the taxes at source and by paying the same to the credit of the Government before the due date of filing of their returns u/s.139(1). In order to remedy this position and to remove the hardships which was being caused to the assessee belonging to such category, amendments have been made in the provisions of Section 40(a)(ia) by the Finance Act, 2010. The said amendments, in our

> opinion, thus are clearly remedial/curative in nature as held by the Hon'ble Supreme Court in the case of Allied Motors Pvt.Ltd. (supra) and Mom Extrusions Ltd. (supra) and the same therefore would apply retrospectively w.e.f. 1st April, 2005. In the case of R.B.Jodha Mal Kuthiala 82 ITR 570, it was held by the Hon'ble Supreme Court that a proviso which is inserted to remedy unintended consequences and to make the provision workable, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole. In the present case, the amount of tax deducted at source from the freight charges during the period 01/04/2005 to 28/02/2006 was paid by the Assessee in the month of July and August 2006 i.e., well before the due date of filing of its return of income for the year under consideration. This being the undisputed position, we hold that the disallowance made by the A.O. and confirmed by the learned CIT(A) on account of freight charges by invoking the provisions of Section 40(a)(ia) is not sustainable as per the amendments made in the said provisions by the Finance Act, 2010 which, being remedial/curative in nature, have retrospective application", we find no reason to deviate from the decisions of the ITAT's Mumbai Bench and Ahmedabad Bench, in the absence of a contrary view, except the other benches decisions or any other High Court. Therefore, respectfully following the decision of the Coordinate Benches (supra), we allow the ground nos. I to 3 of the assessee's appeal.

16. As against the aforesaid decision the Revenue preferred appeal before the Hon'ble Calcutta High Court. The Hon'ble Calcutta High Court in ITA No. 302 of 2011 GA 3200/2011 decided on 23.11.2011, held as follows:

> "We have heard Mr. Nizamuddin and gone through the impugned judgment and order. We have also examined the point formulated for which the present appeal is sought to be admitted. It is argued by Mr. Nizamuddin that this court needs to take decision as to whether section 40(A)(ia) is having retrospective operation or not.
> The learned Tribunal on fact found that the assessee had deducted tax at source from the paid charges between the period April 1, 2005 and April 28, 2006 and the same were paid by the assessee in July and August 2006, i.e. well before the due date of filing of the return of income for the year under consideration. This factual position was undisputed. Moreover, the Supreme Court, as has been recorded by the learned Tribunal, in the case of Allied Motors Pvt. Ltd. and also in the case of Alom Extrusions Ltd., has already decided that the aforesaid provision has retrospective application. Again, in the case reported in 82 ITR 570, the Supreme Court held that the provision, which has inserted the remedy to make the provision workable,

> requires to be treated with retrospective operation so that reasonable deduction can be given to the section as well. In view of the authoritative pronouncement of the Supreme Court, this court cannot decide otherwise. Hence we dismiss the appeal without any order as to costs."

17. It can be seen from the above decision of the Hon'ble Calcutta High Court that Amendment to the provisions of Sec.40(a)(ia) of the Act, by the Finance Act, 2010 as aforesaid was held to be retrospective from 1.4.2005. If the amendment is considered as retrospective from 1.4.2005, the effect will be that payments of TDS to the credit of the Government on or before the last date for filing return of income u/s.139(1) of the Act for the relevant AY have to be allowed as deduction. Admittedly in the case of the Assessee payments were so made before the said due date and in terms of the decision of the Hon'ble Calcutta High Court no disallowance could be made by the AO u/s. 40(a)(ia) of the Act.

18. The question now is as to whether to follow the decision of the Hon'ble Special bench which has taken the view that Amendment by the Finance Act, 2010 to the provisions of Sec.40(a)(ia) of the Act is prospective and not retrospective from 1.4.2005 or the decision of the Hon'ble Calcutta High Court taking a contrary view. On the above question, the learned counsel for the Assessee brought to our notice the decision of the ITAT Delhi in the case of Tej International (P) Ltd. v. Dy. CIT (2000) 69 TTJ (Del) 650, wherein it was held that in the hierarchical judicial system that we have in India, the wisdom of the court below has to yield to the higher wisdom of the Court above, and therefore, once an authority higher than this Tribunal has expressed its esteemed views on a an issue, normally, the decision of the higher judicial authority is to be followed. The Bench has further held that the fact that the judgment of the higher judicial forum is from a non-jurisdictional High court does not really alter this position, as laid down by the Hon'ble Bombay High Court in the case of CIT v. Godavaridevi Saraf 113 ITR 589(Bom).

19. In view of the above, we hold following the decision of the Hon'ble Calcutta High Court that Amendment to the provisions of Sec.40(a)(ia) of the Act, by the Finance Act, 2010 is retrospective from 1.4.2005. Consequently, any payment of tax deducted at source during previous years relevant to and from AY 05-06 can be made to the Government on or before the due date for filing return of income u/s.139(1) of the Act. If payments are made as aforesaid, then no deduction u/s.40(a)(ia) of the Act can be made. Admittedly in the present case the Assessee had deposited the tax deducted at source on or before the due date for filing return of income u/s.139(1) of the Act and therefore the impugned disallowance deserves to be deleted. We order accordingly and allow the appeal by the Assessee.

20. In the result, the appeal by the Assessee is allowed.

Order pronounced in the open court on the 11th day of April 2012

Sd/- Sd/-
(N.K.BILLAIYA ) (N.V.VASUDEVAN)
ACCOUNTANT MEMBER JUDICIAL MEMBER
Mumbai, Dated 11th April 2012
Copy to: 1. The Appellant 2. The Respondent 3. The CIT City –concerned
4. The CIT(A)- concerned 5. The D.R"A" Bench.

(True copy) By Order

Asst. Registrar, ITAT, Mumbai Benches

MUMBAI.

Vm.

| | Details | Date | Initials | Designation |
|---|---|---|---|---|
| 1 | Draft dictated on | 29/02/2012 | | Sr.PS/PS |
| 2 | Draft Placed before author | 01/03/2012 | | Sr.PS/PS |
| 3 | Draft proposed & placed before the Second Member | | | JM/AM |
| 4 | Draft discussed/approved by Second Member | | | JM/AM |
| 5. | Approved Draft comes to the Sr.PS/PS | | | Sr.PS/PS |
| 6. | Kept for pronouncement on | | | Sr.PS/PS |
| 7. | File sent to the Bench Clerk | | | Sr.PS/PS |
| 8 | Date on which the file goes to the Head clerk | | | |
| 9 | Date of Dispatch of order | | | |