IN THE INCOME TAX APPELLATE TRIBUNAL
CHANDIGARH BENCH 'B', CHANDIGARH

BEFORE Ms. SUSHMA CHOWLA, JUDICIAL MEMBER
AND SHRI MEHAR SINGH, ACCOUNTANT MEMBER

ITA No.834/Chd/2011
(Assessment Year: 2008-09)

Punjab State Cooperative Federation Of Housing Building Societies Ltd., SCO 150-152, Sector 34-A, Chandigarh.	Vs.	The D.C.I.T., Circle 4(1), Chandigarh.
PAN: AAAAT0759L (Appellant)		(Respondent)

Appellant by : Shri M.R.Sharma
Respondent by : Shri S.K.Mittal, DR

Date of hearing : 29.05.2012
Date of Pronouncement : 31.05.2012

ORDER

PER SUSHMA CHOWLA, J.M, :

The present appeal filed by the assessee is against the order of Commissioner of Income Tax (Appeals), Chandigarh dated 15.06.2011 relating to assessment year 2008-09 against the order passed under section 143(3) of the Income-tax Act (in short 'the Act').

2. The assessee has raised the following grounds of appeal:

1. That the order of the assessing officer as upheld by the Commissioner of Income Tax (Appeals) Chandigarh is bad in law and is beyond all the cannons of law and justice.

2. That the order of the Assessing Officer as upheld by the Commissioner of Income Tax (Appeals) Chandigarh disallowing Rs. 1,01,33,9537- u/s 40(a)(ii) of the Income Tax Act being the amount of advance made to the contractor for acquisition of its capital asset more so when the same has been adjusted within 3 months and tax has been deducted and deposited before the filing of the return is bad in law and needs to be set-aside.

3. The only issue raised in the present appeal is against the disallowance made by the Assessing Officer by invoking provisions of section 40(a)(ia) of the Act for non-deduction of tax at source under section 194C of the Act.

4. The brief facts of the case are that the assessee is a cooperative society and is providing credit facility to its member cooperative societies within the State of Punjab. The assessee is also engaged in the activity of constructing residential houses in the State of Punjab which are allotted in favour of primary cooperative housing societies under the scheme of Government of Punjab from time to time. The lands for the said project are allotted by the Government of Punjab and the plans are also approved by them. During the year under consideration the assessee had made payment of Rs.1,21,75,828/- on 22.2.2008 to M/s Deepak Builders. As per the contract between the parties, the assessee had to pay 75% of the estimated value of any material that had to be procured and stored. As per the statement of facts filed by the assessee, the explanation filed before the Assessing Officer during the assessment proceedings was as under :

> *"In order to satisfy the said clause the above noted assessee at paid and/advance of Rs. 50,61,506.25 paise vide Ch. No. 984219 dated 22.02.20083 The details of the material against which advance has been made are being enclosed for your perusal and record. Similarly [another advance on the same date i.e. 22.02.2008 amounting to Rs. 71,14,322.25 paise was paid to M/s Deepak Builders Ludhiana vide Ch. No. 984218 dated 22.02.2008. The details of the material against which advance has been made are being enclosed for your perusal and record. These advances were paid for project at Ludhiana and Amritsar respectively Since these advances were paid at the fag and of the year under consideration as such these advances were adjusted out of the*

payments made to the contractors against the work done on 18.03.2008 at Rs. 55,84,598.35 paise being the gross value of the bill out of which advance amounting to Rs. 20,41,8757- has been adjusted on which TDS amounting to Rs. 1,26,5477- has been deducted, on 02.05.2008 at Rs. 17,21,787.50 paise, on 09.06.2008 at Rs. 23,98,9507-, on 08.07.2008 at Rs. 37,93,612.50 paise. In respect of Amritsar Project and Rs. 55,26,8867- on 02.05.2008 in respect of Ludhiana project am also enclosing herewith photocopies of the bills paid on 02.05.2008 HHowing the deduction made on account of Income Tax at Rs. 1,79,6377- on the gross value of the bill at Rs. 79,27,5117-, a photocopy of the bill for Rs. 1,01,95,1457- paid on 09.06.2008 out of which income tax amounting to Rs. 2,31,0227- has been deducted on the gross value of the bill, a photocopy of the bill and vouchers for Rs. 89,30,960.50 paise being the value out of which Rs. 1,38,0697- in respect of the Amritsar project i.e. Rs. 50,61,506.25 paise. Further I am also enclosing a copy of the bill and other connected documents in respect of Ludhiana project whereby the advance of Rs. 55,26,886.70 paise has been adjusted out of the gross amount of the bill at Rs. 1,37,30,122.70 paise against which tax has been deducted at Rs. 3,11,1257- on the gross value of the bill. It may however be submitted here that after seeking the legal advice in this behalf the above noted assessee deducted TDS at the time of payment only i.e. in the case of secured advances at the time of extending the advance however the same was adjusted while deducting the tax at source at the time of making the payment of the bill."

5. The TDS deducted on the said payment was deposited on or before 8.7.2008 i.e. before the date of filing the return of income which in the present case was 30.9.2008.

6. The Assessing Officer while completing the assessment had allowed the benefit of adjustment made at Rs.20,41,875/- on 18.3.2010 and made disallowance of Rs.1,01,33,953/- for non deduction of tax at source in line with the provisions of section 40a(ia) of the Act.

7. The CIT (Appeals) upheld the order of the Assessing Officer for non deduction of tax at source and consequent disallowance under section 40a(ia) of the Act.

8. The learned A.R. for the assessee pointed out that the issue in the present case stands covered by the order of the Special Bench of Vishakhapatnam reported in ACIT Vs. Merilyn Shipping & Transports[140 TTJ 1(SB)(Vishakhapatnam)].

9. The learned D.R. for the Revenue placed reliance on the orders of the authorities below.

10. We have heard the rival contentions and perused the record. The issue arising in the present appeal is against the disallowance aof expenses for non deduction of tax at source in view of the provisions of section 40a(ia) of the Act. The assessee had made an advance payment of Rs.1,21,75,828/- to M/s Deepak Builders on 22.2.2008. The said payment as per the contract between the party was to be adjusted on a later date and the same was adjusted. The case of the assessee is that the said amount was paid to the said party in view of the agreement between the parties for making advance payment for supply of material requisitioned for the construction of the project undertaken by the assessee. The assessee was to pay 75% of the amount of the bill in advance and when the amount was paid in total the assessee claimed to have deduced the TDS and deposited the same. The tabulated details of the amount adjusted against the payments due from the assessee and the consequent deduction on TDS are as under:

Date of payment/ adjustment of advance	*Gross* value of payment	Amount of advance adjusted	TDS on amount adjusted	Date of deposit of TDS
02.05.2008	79,27,511.0	17,21,787.5	1,79,637.0	02.05.2008
09.O6.2008	1,01,95,145.0	23,98,950.0	2,31,022.0	11.06.2008
08.07.2008	89,30,960.5	37,93,612.5	1,38,069.0	09.07.2008
02.O5.2OO	1,37,30,122.7	50,61,506.2	3,11,125.0	02.05.2008

11. The perusal of the above said details and the explanation filed before the Assessing Officer which is referred to by us in paras hereinabove reflect the assessee to have made payment of Rs.1,21,75,828/- on 22.2.2008 i.e. at the fag of the financial year 2007-08 and the said advance was adjusted in the months of the next financial year 2008-09 and once the total bill was raised the tax was deducted and deposited in the account of the Government. The said TDS has been deducted by the assessee before filing of return i.e. before 8.7.2008, whereas the return of income was due to be filed by the assessee on or before 30.9.2008.

12. The issue arising in the present case is whether in view of the non deduction of tax out of the advance payment made by the assessee to the contractor for supply of material is hit by the provisions of section 40a(ia) of the Act.

13. Section 40(a)(ia) of the Act provides that in case where any interest, commission or brokerage, rent, royalty, fees for professional services or technical services were payable to a resident, or amounts payable to a contractor or sub-contactors, being resident, on which tax was deductible at source under Chapter XVII-B and where such tax has not been deducted or after deduction has not been paid, then such amount would not be deducted while computing income under the head income from profits and gains of business or profession.

14. We find that the issue of deductibility of expenditure where the payment has been made during the year and nothing is outstanding at the close of the year, was considered and the Special Bench of Vishakhapatnam Tribunal in ACIT Vs. Merilyn Shipping & Transports (supra) have laid down the principle that in cases where the expenditure has been paid, then even where no tax has been deducted at source or after deduction has not been paid, the provisions of section 40(a)(ia) of the Act are not applicable. The majority view of the Bench as per para 12 of the order dated 14.3.2012 is as under:

> *"12. In view of the above judicial pronouncements of Hon'ble Supreme Court and Hon'ble High Courts, materials placed before us, arguments made by both the sides and in view of the provisions of section 40(a)(ia) of the Act, on comparison between the proposed and enacted provision, the only conclusion which I can reach is that the Legislature consciously replaced the words "amounts credited or paid" with the word "payable" in the final enactment. By changing the words from "credited" or "paid" to "payable", the legislative intent has been made clear that only outstanding amounts or the provisions for expenses liable for TDS under chapter XVII-B of the Act is sought to be disallowed in the event there is a default in following the obligations casted upon the assessee under chapter XVII-B of the Act. I agree with the arguments made by Id. Counsel for the assessee and other Counsels for the Intervenes that while interpreting the word "payable" in this provision, the word of a statute must be understood in its natural, ordinary or popular sense and construed according to its grammatical meaning. According to me, such construction would not lead to absurdity because there is nothing in this context or in the object of this statute to suggest to the contrary. It is a cardinal principle of interpretation that the words of a statute must be prima facie given their ordinary meaning, when the words of the statute are clear, plain and unambiguous then the courts are bound to give effect to that meaning. The literal rule of interpretation really means that there should be no interpretation of the statute, rather in other words, we should read the statute as it is without doing any violence to the language. In the present dispute before us, the word "payable" used in section 40(a)(ia) of the Act is to be assigned strict interpretation, in view of the object of Legislation, which is intended from the replacement of the words in the proposed and enacted provision from the words "amount credited or paid" to "payable". Hence, in my view, my answer to the question referred by Hon'ble President to the Special Bench is as under:*

> *The provisions of section 40(a)(ia) of the Act are applicable only to the amounts of expenditure which are payable as on the date 31st March of every year and it cannot be invoked to disallow which had been actually paid during the previous year, without deduction of TDS."*

15. In view of the ratio laid down by the Special Bench (supra), the provisions of section 40(a)(ia) of the Act are not applicable on the amount of expenditure which has been paid by the assessee. Applying the above said ratio laid down by Special Bench in ACIT Vs. Merilyn Shipping & Transports (supra) to the facts of the present case, where the amount totaling Rs.1,21,75,828/- has been paid to M/s Deepak Builders, contractor during the year under consideration itself, mere non-deposit of TDS deducted thereon does not merit any disallowance in the hands of the assessee.

16. Further the provisions of section 40(a)(ia) of the Act have been amended by the Finance Act, 2010 wherein the proviso has been substituted. Earlier proviso substituted by the Finance Act, 2008 with retrospective effect from 1.4.2005 provided that where in respect of any sum, tax had been deducted in any subsequent year or has been deducted during the last month of the previous year, but paid after the said due date or deducted during any other month of the previous year but paid after the end of the previous year, the deduction of said sum shall be allowed in computing the income of the previous year in which such tax had been paid. The proviso as substituted by Finance Act, 2010 provides that in respect of any sum, where tax has been deducted in any subsequent year or deducted during the previous year but paid after the due date specified in sub-section 139(1) of the Act, such sum shall be allowed as a deduction in computing income of the previous year in which such tax has been paid; implying thereby that where the assessee has deducted the tax and deposited the said tax not within due date but

before the due date of filing return of income under section 139(1) of the Act, such sum is to be allowed as a deduction to the assessee in computing income of the previous year in which such deduction has been made and deposited.

17. The Special Bench of Mumbai Tribunal in DCIT Vs.Bharti Shipyard Limited (2011) 132 ITD 53 (Mumbai) had held that the amendment brought by the Finance Act, 2010 to proviso to section 40(a)(ia) of the Act, by way of substituted proviso was to be applied w.e.f. 1.4.2010 and was not retrospective in nature. However, the Hon'ble Calcutta High Court in CIT Vs. Virgin Creations (supra) have held that the said amendment to proviso to section 40(a)(ia) of the Act was retrospective in nature.

18. In the facts of the present case and as brought out by the assessee before us, the assessee had deducted tax at source out of payments made to contractor totaling Rs.1,21,75,828/- which was deposited before 8.7.2008. The due date for filing return of income of the assessee was 30.09.2008. Following the ratio laid down by the Hon'ble Calcutta High Court in CIT Vs. Virgin Creations (supra) and various Benches of the Tribunal we hold that once the tax has been deducted and deposited by the assessee before the due date of filing return of income, there is no merit in disallowing the expenditure relatable to such tax deducted at source. The assessee succeeds on both the counts. Accordingly, we direct the Assessing

Officer to allow the claim of expenditure of Rs.1,01,33,953/-. The grounds of appeal raised by the assessee are thus allowed.

19. In the result, the appeal filed by the assessee is allowed.

Order Pronounced in the Open Court on 31st of May, 2012.

Sd/-	Sd/-
(MEHAR SINGH)	**(SUSHMA CHOWLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated : 31st May, 2012

Rati

Copy to: The Appellant/The Respondent/The CIT(A)/The CIT/The DR.

Assistant Registrar,
ITAT, Chandigarh