IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : CHENNAI

[BEFORE DR. O.K. NARAYANAN, VICE-PRESIDENT
AND SHRI S. S. GODARA, JUDICIAL MEMBER]

I.T.A.No.1951/Mds/12
Assessment year : 2009-10

The Asstt. Commissioner of Income-tax Circle XV Chennai (Appellant)	**vs**	M/s Eskay Designs No.25, 1st Street, Cenotoph Road Teynampet, Chennai 600 018 **[PAN AAAFE 1480C]** (Respondent)

Appellant by	**:**	Shri Shaji P. Jacob, Addl. CIT
Respondent by	**:**	None
Date of Hearing	**:**	03-12-2013
Date of Pronouncement	**:**	09-12-2013

O R D E R

PER S.S.GODARA, JUDICIAL MEMBER

This appeal filed by the Revenue for assessment year 2009-10, is directed against the order of the Commissioner of Income-tax (Appeals)-XII, Chennai, dated 23.7.2012, passed in Appeal No.553/2011-12, in proceedings under section 143(3) of the Income-tax Act, 1961 (in short the 'Act').

2. In the course of hearing, the Revenue submits that its grievance is in two folded i.e the CIT(A) has erred in directing the Assessing Officer to assess the rental income on property taken on lease by the assessee and thereafter in sub-letting it on commercial basis under the head 'income from house property' from 'business income'; as done by the Assessing Officer. The other plea of the Revenue is that the CIT(A) has wrongly deleted the disallowance for non-deduction of TDS u/s 40(a)(ia) of the Act amounting to ₹ 41,000/-.

3. None has come present on behalf of the assessee inspite of RPAD notice dated 3.10.2013. Hence, it is proceeded ex-parte.

4. The assessee is a 'firm' engaged in architecture business. On 18.9.2009, it had filed its return disclosing income of ₹ 3,69,76,790/- which was 'summarily' processed.

5. In the course of 'scrutiny', the Assessing Officer found the assessee to have declared income from house property by first taking on lease the properties and thereafter sub-letting them. In the assessment order dated 30.12.2011, he held that since the assessee was not owner of the property, in view of section 269UA(f), its contention that the receipts in question had to be declared as income

from 'house property' could not be accepted. In Assessing Officer's opinion, the assessee was involved in business of leasing properties. In this manner, he considered the rent paid of ₹ 33,85,467/- and treated balance amount of ₹ 90,02,160/- as business income. Out of this, since the assessee had already offered a sum of ₹ 63,01,512/-, the remaining sum of ₹ 27,00,648/- stood added in the returned income.

6. In assessee's appeal, the CIT(A) has relied upon the order of the 'tribunal' for assessment year 2007-08 holding similar receipt as 'income from house property' and deleted the addition.

Therefore, the Revenue has raised the instant ground.

7. We have heard the Revenue and perused the case file. So far as the findings under challenge of the CIT(A) in principle are concerned, in the absence of any distinction on facts pointed out by the Revenue vis-à-vis facts of assessment year 2007-08 , we see no reason to adopt a different approach in the impugned assessment year. At the same time, we find force in the consequential argument of the Revenue that since present is an issue of head of income i.e the Assessing Officer had treated the receipts in question as 'business income' and the CIT(A) under the head 'income from house property',

the Assessing Officer has to examine the case afresh for the purpose of appropriate computation. In our view, this consequential argument deserves to be accepted since at the time of computing the income under the head 'house property' the case of the assessee has to be considered for the purpose of deductions u/s 24 of the Act. So, we restore this ground to the Assessing Officer for limited purpose of computing the assessee's income in view of our above discussion.

8. Now, we come to the second ground of the Revenue regarding disallowance u/s 40(a)(ia) for non-deduction of TDS. In the course of assessment, the Assessing Officer noticed the assessee to have made professional payments without deduction of TDS. Therefore, he added the impugned sum of ₹ 41,000/- in its income.

9. In lower appellate proceedings, the CIT(A) has taken into consideration the case law of Merilyn shipping & Transports vs. Addl. CIT 20 Taxman.com 244) (Vizag SB) and held that the disallowance could only be made qua the amount which was payable as on 31.3.2009 and not qua that stood paid. In light aforesaid, the issue stands restored to the file of the Assessing Officer.

10. Before us, the sole argument of the Revenue is that 'paid' and 'payable' distinction drawn by the CIT(A) whilst issuing aforesaid

directions to the Assessing Officer on the basis of Special Bench decision (supra) is no longer sustainable in view of the decision of the Hon'ble Calcutta High Court in the case of CIT vs Md. Jakir Hossain Mondal dated 4.4.2013 in I.T.A.No. 31 of 2013 and Gujarat high court's decision in the case of CIT vs Sikandarkhan N. Tunvar, 33 Taxman.com 133. In this backdrop, we find that the co-ordinate bench of the 'tribunal' in I.T.A.No. 2076/Mds/2012 dated 18.9.2013 in the case of ITO vs M/s Theekathir Press [authored by one of us, Dr.O.K.Narayanan, VP] has held that since there is variation of decisions on 'paid' and 'payable' issue in view of the fact that the hon'ble Calcutta high court and Gujarat high court have decided the question in favour of the Revenue and the hon'ble Allahabad high court in the case of CIT vs M/s Vector shipping Services (P) Ltd has proceeded in favour of the assessee, the case law of hon'ble supreme court in the case of CIT vs Vegetable Products Ltd., 88 ITR 192 would apply so as to decide the issue in assessee's favour. The relevant findings read as follows:

> "2. In the present case, the Assessing Officer has disallowed the claim of certain expenditure made by the assessee under section 40(a)(ia) on the ground that tax has not been deducted at source and paid to the credit of Government of India. But, the Commissioner of Income-tax(Appeals) deleted the disallowance stating that the amount 'payable' alone would attract the disallowance under section 40(a)(ia) and the amount already paid would not attract the above provision.

The Revenue is aggrieved and, therefore, this second appeal before us.

3. The Income-tax Appellate Tribunal, Visakhapatnam-Special Bench, had held in the case of Merilyn Shipping and Transports vs. Addl. CIT, 16 ITR (Trib) 1, that the provisions of section 40(a)(ia) do apply only to those amounts remained payable by the end of the previous year and the said provisions do not apply to the amounts already paid by the assessee before the close of the relevant previous year. In that way, the order of the Commissioner of Income-tax(Appeals) in the present case is conducive to the decision of the Special Bench. The very same view has been upheld by the Hon'ble Allahabad High Court in the case of CIT vs. M/s. Vector Shipping Services(P) Ltd. The Hon'ble Allahabad High Court, through their judgment dated 9-7-2013 in ITA No.122 of 2013, has held that the decision of the Special Bench of the Tribunal in the case of Merilyn Shipping and Transports vs. Addl. CIT is good law. In that way, the present appeal filed by the Revenue is liable to be dismissed.

4. But, at the same time, the learned Joint Commissioner of Income-tax appearing for the Revenue has relied on three other judgments rendered by the Hon'ble Calcutta High Court and Gujarat High Court, in which their Lordships have held that the law stated by the Special Bench of the Tribunal in the case of Merilyn Shipping & Transports vs. Addl.CIT was not acceptable. The Hon'ble Calcutta High Court, through their judgment delivered on 3rd April, 2013 in ITA No.20 of 2013 in the case of CIT vs. Crescent Export Syndicates, has held that the order of the Special Bench of the Tribunal in the case of Merilyn Shipping & Transports vs. Addl.CIT is not acceptable. The same view has again been repeated by the Hon'ble Calcutta High Court in the case of CIT vs. Md. Jakir Hossain Mondal, through their judgment delivered on 4th April, 2013 in ITA No.31 of 2013. The Hon'ble Gujarat High Court in the case of CIT vs. Sikandarkhan N.Tunvar, 33 Taxman.com.133, has also held that the disallowance under section 40(a)(ia) does not distinguish between amounts "paid" and "payable". In view of the above judgments of two High Courts, the learned Officer contended that the appeal of the Revenue needs to be allowed.

5. We find that the judgment of the Hon'ble Allahabad High Court is in favour of the assessee. At the same time, we find that the orders of the Calcutta High Court and the Gujarat High Court are against the assessee. In such circumstances, the rule of Judicial Precedence demands that the view favourable to the assessee must be adopted, as held by the Hon'ble Supreme Court in the case of CIT vs. Vegetable Products Ltd., 88 ITR 192. Following the above fundamental rule declared by the Hon'ble Supreme Court, we have to

> follow the judgment of the Hon'ble Allahabad High Court, which is in favour of the assessee. Accordingly, we hold that the disallowance under section 40(a)(ia) applies only to those amounts 'payable' and not to those amounts 'paid'. Accordingly, we uphold the order of the Commissioner of Income-tax(Appeals) in the present case. The appeal filed by the Revenue is liable to be dismissed."

In view thereof, we also hold that the CIT(A) has rightly directed the Assessing Officer to examine the assessee's claim on the basis of 'paid' and 'payable' issue as stated hereinabove. So, the relevant grounds of the Revenue are decided in favour of the assessee.

11. The Revenue's appeal is partly allowed for statistical purposes.

Order pronounced on Monday, the 09th of December, 2013, at Chennai

Sd/-	Sd/-
(DR. O.K. NARAYANAN)	**(S. S. GODARA)**
VICE-PRESIDENT	JUDICIAL MEMBER

Dated: 09th December, 2013
RD

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