.LATE TRIBUNAL " A " BENCH, AHMEDABAD

A Kr. YADAV & SHRI ANIL CHATURVEDI, A.M.)

I.T. A. No. 907/AHD/2011
(Assessment Year: 2007-08)

M/s. Bansidhar Construction Co. B/5, Meera Park, Shahibaug, Ahmedabad	V/S	ITO, Ward 9 (2), Ahmedabad
(Appellant)		(Respondent)

PAN: AANFM1310Q

Appellant by : Shri Tej Shah, A.R.
Respondent by : Shri B.L. Yadav, Sr. D.R.

(आदेश)/ORDER

Date of hearing : 14-10-2014
Date of Pronouncement : 07 -11-2014

PER SHRI ANIL CHATURVEDI,A.M.

1. This appeal is filed by the Revenue against the order of CIT(A)-I, Ahmedabad dated 19.01.2011 for A.Y. 2007-08.

2. The facts as culled out from the material on record are as under.

3. Assessee is a partnership firm stated to be engaged in the business of civil construction activity. Assessee electronically filed its return of income for A.Y. 07-08 on 12.10.2007 declaring total income of Rs. 8,51,200/-. The case was selected for scrutiny and thereafter the assessment was framed u/s. 143(3) vide order dated 23.11.2009 and total income was determined at Rs. 32,72,390/-. Aggrieved by the order of A.O, Assessee carried the matter

e order dated 19.1.2011 dismissed the appeal of the Assessee. Aggrieved by the order CIT(A), Assessee is now in appeal before us and has raised the following grounds:-

1. *That the Ld. CIT (A) erred in law and in the facts of the case in conforming the order of the AO in disallowing Rs. 21,47,621/- being Labour/Carting Charges u/s 40 (a)(ia) of the act for failure to deduct tax at source u/s 194C of the Act.*
2. *That the Ld. CIT (A) erred in law and in the facts of the case in not only conforming the order of the AO but enhancing the disallowance to Rs. 4,34,719/- as JCB Rent u/s 40 (a)(ia) of the act for failure to deduct tax at source u/s 1941 of the Act.*
3. *That the Ld. CIT (A) erred in law and in the facts of the case in not appreciating the fact that the amount of tax deducted has been deposited before the due date of filing return of income.*
4. *That the Ld. CIT (A) erred in law and in the facts of the case in not appreciating the fact that the amount of payment for hiring JCB machine do not attract provisions of S. 1941 for the period under consideration.*
5. *That the Ld. CIT (A) erred in law and in the facts of the case in not appreciating the fact that the appellant himself being a sub-contractor was not liable to deduct tax at source u/s 194C of the act.*
6. *That the Ld. CIT (A) erred in law and in the facts of the case in not appreciating the fact that the labour charges do not fall within the ambit of S. 30 to 38 of the act but under S. 28 of the act and hence could not have been disallowed u/s 40 (a)(ia) of the act.*

1st ground is with respect to disallowance of Rs. 21,47,621/- u/s 40(a)(ia).

4. During the course of assessment proceedings, A.O noticed that Assessee had paid Rs. 21,43,621/- on various dates up to February 2007 to the various persons listed at page 2 of his order but the TDS that was deducted from such payments had been deposited beyond the prescribed date and as per the A.O deposit of TDS after the prescribed date was violation of Section 194C r.w.s. 200 of the Act. He accordingly disallowed the aggregate payment of Rs. 21,47,621/-. Aggrieved by the order of A.O, Assessee carried the matter before CIT(A) who confirmed the addition made by the A.O by holding as under:-

4 After going through rival submissions it is seen that TDS on payments made to following 4 parties was deposited late in government account:

New Varinath Transport Service	*89,829*
Rameshbhai G. Vanjara	*45,000*
Mukthar Foundation	*9,60,140*
Dwarkesh Infrstructure Pvt. Ltd.	*8,32,709*

he case of the above parties are all before 1.3.2007 and TDS should have count by 31.3.2007 as per the provisions of section 40(a)(ia) but it was addition of the above amounts u/s.40(a)(ia) is thus upheld.
From submission dated 16.10.2010 of the appellant it is seen that TDS was not deposited at all by the appellant with repect to payments made to following 2 parties:

Amrishbhai G. Pancholi	*Rs. 50,000*
Geo Dynamic	*Rs. 31,427*

The addition of the above two amounts made by the A.O u/s. 40(a)(ia) is therefore confirmed.

5. Aggrieved by the order of CIT(A), Assessee is now in appeal before us.

6. Before us ld. A.R. with respect to late deposit of TDS submitted that Assessee had deducted and deposited the TDS before the stipulated time but only for the month of January and February 2007, there was delay in depositing the TDS but however the TDS was deposited on 23rd February 2007 which is before the due date of filing of return of income. He further submitted that Hon'ble Gujarat High Court in the case of Royal Builders (2013) 40 Taxman.com 464 (Gujarat) has held that if the amount of TDS is deposited on or before the due date of filing of return of income than the provisions of Section 40(a)(ia) will not apply. With respect to the payment of Rs. 31,427 made to Geo Dynamics and Rs. 50,000 made to Amrishbhai Pancholi, he submitted that though the Assessee has not deducted tax but if the payee has paid the tax than the Assessee cannot be considered to be ñAssessee in defaultò and therefore no disallowance u/s 40(a)(ia) can be made in the case of Assessee and for this proposition he relied on the decision of Hon'ble Agra Tribunal in the case of Rajiv Kr. Agarwal (2014) 45 Taxman.com 555 (Agra). He therefore submitted that the issue where Assessee had not deducted TDS may be restored to the file of A.O for deciding the issue in the light of decision of Hon'ble Agra Bench. The ld. D.R. on the other hand supported the order of A.O and CIT(A). With respect

A.R. that the matter be remitted to A.O, he objected to the suggestion of ld. A.R.

7. We have heard the rival submissions and perused the material on record. It is an undisputed fact that out of the total amount of 21,47,621/- listed at page 2 of the assessment order, with respect to aggregate payments of Rs. 20,66,194/- , Assessee had deposited the TDS on 23.04.2007 which though was beyond the prescribed date but was before the filing of return of income. For cases where the Assessee had belatedly deposited TDS, we find that Hon'ble Gujarat High Court in the case of Royal Builders (supra) has held that when Assessee has deducted tax at source on or before due dates specified in Section 139(1), provisions of Section 40(a)(ia) would not apply. Before us Revenue has not brought any binding contrary decision in its support. We therefore direct the deletion of addition of Rs. 20,66,194/- being the amount on which TDS was belatedly deposited. With respect to two cases namely Amrishbhai Pancholi (Rs. 50,000) and in Geo Dynamic (Rs. 31,427), we find that CIT(A) has noted that TDS was not deposited by the Assessee. We find that the Co-ordinate Bench in the case of Rajiv Kr. Agarwal vs. ACIT (supra) has held as under:-

Section 40(a)(ia) of the Income-tax Act, 1961 - Business disallowance - Interest, etc., paid to resident without deduction of tax at source (Second proviso) - Assessment year 2006-07 - Whether insertion of second proviso to section 40(a)(ia) with effect from 1-4-2013 is declaratory and curative in nature and it has retrospective effect from 1-4-2005, being date from which sub-clause (ia) of section 40(a) was inserted by Finance (No. 2) Act, 2004 - Held, yes [Para 9] [In favour of assessee]

It further at para 8 has held as under:-

we are of the considered view that section 40(a)(ia) cannot be seen as intended to be a penal provision to punish the lapses of non deduction of tax at source from payments for expenditure- particularly when the recipients have taken into account income embedded in these payments, paid due taxes thereon and filed

with the law. As a corollary to this proposition, in our considered view, expenditure relating to lie/payments of this nature cannot be treated as an "intended consequence" of Section 40(a)(ia).

8. In the present case before us, the ld. A.R. has not placed any material on record to demonstrate that the 2 payees, namely Amrishbhai Pancholi and Geo Dyanmic had offered the amounts received from Assessee as its income and has paid the tax on such income. Further, we find that the decision of the Co-ordinate Bench was not available before A.O and CIT(A). We therefore feel that the issue where the Assessee has not deducted TDS but the payee has paid the taxes needs to be re-examined by the A.O in the light of the aforesaid decision of Agra Tribunal and therefore set aside the issue to the file of A.O for him to decide the issue in the light of decision of Agra Tribunal and in accordance with law. Needless to state, that A.O shall grant adequate opportunity of hearing to the Assessee. We thus partly allow this ground of Assessee for statistical purposes.

2nd ground is with respect to disallowance of Rs. 4,34,719/- as JCB rent.

9. During the course of assessment proceedings, A.O noticed that Assessee had paid/credited machinery rent to Akshar Earth Movers on various dates but had deducted tax at 1% which according to the A.O should have been deducted at 10% u/s 194I of the Act. He accordingly worked out the disallowance u/s 40(a)(ia) r.w.s. 194I of the Act at Rs. 2,73,578/-. Aggrieved by the order of A.O, Assessee carried the matter before CIT(A) who confirmed the addition made by the A.O by holding as under:-

5. The table on page 2 of the assessment order mentions 7 names. 6 have been discussed in para 4 above. Out of 7 names one name mentioned at Sr.No.2 of the table of the AO is that of Shri Akshar Earth Movers.

: concern of Rs.4,37,719 the AO has treated Rs.22,625 as tractor carting nt and after deducting the aforementioned two amounts he has proceeded s.4,34,719-Rs.1,61,141 [Rs.22,625 + Rs.1,38,516]) as JCB rent on which TDS at the rate of 10% u/s.194l should have been deducted according to the AO. The AO has reduced Rs.1,61,141/- under a belief that he has added this amount in the table mentioned on page 2 of the assessment order, but the fact is that the AO has added only Rs. 1,38,516.

During the course of appellate proceedings detailed ledger account of Shree Akshar Earth Movers enclosed as Annexure-1 of this order was submitted. This ledger account shows total payment of Rs.4,34,719 to this concern and the entries are mentioned as JCB labour charges. It was stated during appellate proceedings that JCB machine is utilized in construction work and the payments made for it are actually labour payments instead of that of rent payments. This contention of the appellant is not correct because the observation of the AO that payment in earlier years was put under the head 'JCB rent' but as it was below Rs. 1,20, 000 the assessee was not required to deduct IDS but this year the payments exceeded Rs. 1,20,000 and warranted TDS and just for the sake of availing itself of the lower rate of 1% u/s.194 C, instead of 10% u/s.194 I the payment was treated as labour payment. In my opinion the payments made for hiring JCB machine would come under the head of rent payments only which include labour and carting involved in taking this machinery on rent which the provider of the machine gives along with the machine. I am therefore of the view that payment of Rs.4,34,719 should attract TDS u/s.194 I and not u/s.194 C.

Out of Rs.4,34,719 TDS has been deducted on Rs.1,38,516 only, that too has been deposited in government account on 23.4.2007 instead of before 31.3.2007 (the date of credit / payment has been informed as 28.2.2007 vide submission dated 16.10.2010) thus contravening the time limits prescribed u/s.40(a)(ia) .

The addition is confirmed of Rs.4.34.719 u/s.40(a)(ia) because TDS at 10% u/s.194 I has not been deducted on Rs.4,34,719. Rs.1,38,516 added by the AO in the table totaling to Rs.21,47,621 is reduced and taken into consideration in Rs.4,34,719 u/s.40(a)(ia).

10. Aggrieved by the order of CIT(A), Assessee is now in appeal before us.

11. Before us ld. A.R. reiterated the submissions made before A.O and CIT(A) and further submitted that even though Assessee might not have deducted TDS but if the payee has paid the tax, Assessee cannot be considered to be an ñAssessee in defaultò for making disallowance u/s 40(a)(ia) and for this proposition he relied on the decision of Hon'ble Agra Bench in the case of Rajeev Kumar Agarwal (supra). He therefore submitted that the matter may be restored to the file of A.O to decide the issue in the light of decision in the case of Rajiv Kr. Agarwal vs. ACIT (supra). The ld. D.R. on the other hand supported the order of A.O and CIT(A).

12. We have heard the rival submissions and perused the material on record. Before us, ld. A.R. relying on the decision of Agra Tribunal in the case of

has submitted that no disallowance can be made if the payee has already paid the taxes on the amounts paid by Assessee. We find that the Co-ordinate Bench of Agra Tribunal has held as under:-

Section 40(a)(ia) of the Income-tax Act, 1961 - Business disallowance - Interest, etc., paid to resident without deduction of tax at source (Second proviso) - Assessment year 2006-07 - Whether insertion of second proviso to section 40(a)(ia) with effect from 1-4-2013 is declaratory and curative in nature and it has retrospective effect from 1-4-2005, being date from which sub-clause (ia) of section 40(a) was inserted by Finance (No. 2) Act, 2004 - Held, yes [Para 9] [In favour of assessee]

It further at para 8 has held has under:-

we are of the considered view that section 40(a)(ia) cannot be seen as intended to be a penal provision to punish the lapses of non deduction of tax at source from payments for expenditure- particularly when the recipients have taken into account income embedded in these payments, paid due taxes thereon and filed income tax returns in accordance with the law. As a corollary to this proposition, in our considered view, declining deduction in respect of expenditure relating to lie/payments of this nature cannot be treated as an "intended consequence" of Section 40(a)(ia).

13. In the present case, Assessee has not placed any material on record to demonstrate that the payee has offered the amounts received from Assessee as its income and has paid taxes on the same. We are of the view that the issue needs to be re-examined in the light of the aforesaid decision of the Co-ordinate Bench of Agra Tribunal. We therefore restore the matter to the file of A.O to decide the issue de novo in the light of the aforesaid decision of Agra Tribunal. Needless to state that A.O shall grant adequate opportunity of hearing to the Assessee. Thus this ground of Assessee is allowed for statistical purposes.

Ground no. 5 & 6 as not pressed and therefore not adjudicated and therefore dismissed.

al of the Assessee is partly allowed for statistical purposes.

Order pronounced in Open Court on 07 -11 - 2014.

Sd/-
(SHAILENDRA Kr. YADAV)
JUDICIAL MEMBER

Sd/-
(ANIL CHATURVEDI)
ACCOUNTANT MEMBER

Ahmedabad. **TRUE COPY**

Rajesh

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) ï
4. The CIT concerned.
5. The DR., ITAT, Ahmedabad.
6. Guard File.

By ORDER

Deputy/Asstt.Registrar
ITAT,Ahmedabad