

**IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD BENCH "C" AHMEDABAD**

Before **Shri, A.K.Garodia, Accountant Member** and
Shri Kul Bharat, Judicial Member

ITA No.2869/Ahd/2011
Assessment Year:2005-06

M/s. Alpha Projects Society P. Ltd., Level No.4, ADM Building, Alembic Campus, Alembic Road, Vadodara -390 004 PAN No.AABCA9331L	V/s.	DCIT, Circle-1(1), Aaykar Bhavana, Race Course, Vadodara
(Appellant)	..	(Respondent)

अपीलार्थी की ओर से /By Appellant	Nikita Brahmhatt, AR
प्रत्यर्थी की ओर से/By Respondent	Shri Vinod Tanwani, SR-DR
सुनवाई की तारीख/Date of Hearing	14-03-2012
घोषणा की तारीख/Date of Pronouncement	23-03-2012

ORDER

PER Kul Bharat, Judicial Member:-

The present appeal has been filed by the assessee against the order directed by Ld. Commissioner of Income-tax (Appeals)-I, Baroda dated 14-09-2011 for assessment year 2005-06.

2. The facts in brief are that the in this case the assessment u/s. 143(3) of the Income-tax Act, 1961 was completed on 24-04-2007. Subsequently it was noticed by the Assessing Officer that the income chargeable to tax has escaped income and a notice u/s. 148 of the Act after recording the reasons u/s. 147 of the Act was served upon the assessee on 22-02-2010. The reasoning given for reopening of the assessment reproduced as under:-

"From the perusal of the return of income filed by the assessee it is seen that assessee company made payment to contractors and to professional and technical service. TDS was deducted on various dates from April 2004 to Feb 2005, but paid after the financial year i.e. 31.3.2005 i.e. assessee had remitted the TDS amount in govt. Account on 11.4.2005 and 6.4.2005.

<i>Particulars of head under which tax is deducted at source</i>	<i>Amount of tax deducted at source</i>	<i>Due date of remittance</i>	<i>Dt. Of payment</i>	<i>Amount disallowable u/s.40(a)(ia)</i>	<i>Percentage</i>
<i>Contractor/subcontractor</i>	<i>1049</i>	<i>31.3.2005</i>	<i>11.4.2005</i>	<i>Rs.50,168</i>	<i>2.09%</i>
<i>Professional</i>	<i>16699</i>	<i>31.3.2005</i>	<i>6.4.2005</i>	<i>Rs.3,19,400</i>	<i>5.2275%</i>
<i>Total amount disallowable</i>				<i>Rs.3,69,568</i>	

In view of the above facts of the case and the provisions of law, I have reason to believe that disallowance u/s.40(a)(ia) of Rs.3,69,568/- remained to be made & thereby income to the tune of Rs.3,69,568/- has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts for its assessment.

As per column 27(a) of Form No. 3CD, assessee has made payments to contractor/sub-contractor and professional/tech service, TDS was deducted on various dates from April 2004 to Feb 2005 but paid after the financial year i.e. 31.3.2005.

The assessee objected to the reopening of the assessment, however, the objection of the assessee was not accepted by the Assessing Officer and he proceeded to disallow the expenses u/s. 40(a)(ia) of the Act.

3. The assessee feeling aggrieved by the order of the Assessing Officer approached the Ld. CIT(A) who dismissed the appeal of the assessee.

4. Again the assessee feeling aggrieved by the order of Ld. CIT(A) has approached before the Tribunal by way of this present appeal and raised the following ground:-

"1. The Learned Commissioner of Income Tax (Appeals) erred in fact and in law in confirming the action of AO in reopening the assessment completed by

way of regular assessment by invoking the provision of section 147 of the Income Tax Act, 1961 and completing the assessment, commenced under invalid exercise of powers u/s. 147 of the Act.

2. The Learned Commissioner of Income Tax (*Appeals) erred in fact and in law in confirming the action of AO in making disallowance u/s.40(a)(ia) amounting to Rs.3,69,568/-

Particulars	Due date of remittance	Date of payment	Amount disallowed (Rs)
Contractor/Sub contractor	31/03/2005	11/04/2005	50,168
Professional	31/03/2005	06/04/2005	3,19,400
			3,69,568

3. The Learned Commissioner of Income Tax (Appeals) erred in fact and in law in charging interest u/s.234B of the Income Tax Act, 1961.

4. Learned Commissioner of Income Tax (Appeals) erred in fact and in law in initiating penalty proceedings u/s. 271(1)(c) of the Income Tax Act, 1961.”

5. At the time of hearing Ld. Counsel for the assessee has not pressed the ground No.1. Hence, we dismiss the same as not pressed.

6. Ground No.2 is with regard to disallowance of u/s. 40(a)(ia). The Ld. CIT(A) has given view which reproduced as under:-

“3.2 I have considered the matter. Disallowance of Rs.3,69,568/- made u/s. 40(a)(ia) was in respect of amount credited in months of February and January, 2006, tax deducted from which was deposited to the credit of Government in April/August 2006. Appellant has relied upon decision of ITAT, Ahmedabad in the case of Kanubhai Ramjibhai Makwana (2011) 44 SOT 264 (Ahd) that provisions of section 40(a)(ia) as amended by Finance Act, 2010 w.e.f. 1.4.2010 are to be treated as having retrospective application with effect from 1st April, 200-5. However, ITAT's Mumbai Special Bench in the case of Bharati Shipyard Ltd. v DCIT in order dated 12.9.2011 (itatonline.org) has overruled decision in the case of Kanubhai Makwana, 135 TTJ (Ahd) 364 as well as Bansal Parivahan 43 SOT 619 (Mumbai and has held as under:-

‘The amendment to s.40(a)(ia) by the FA 2010 was made retrospectively applicable only from AY 2010-11 and not earlier. **It is nowhere stated that the amendment is curative or declaratory in nature nor is such an intention discernible.** Ordinarily, a substantive provision is “prospective” in operation and courts cannot give it “retrospective effect” except in limited circumstances where, say, the amendment makes explicit what was earlier implicit or where the amendment was to remove unintended consequences in the existing

provision and to make it workable. **A provision giving relief cannot be regarded as retrospective only because the original provision caused hardship to the assessee.** S.40(a)(ia) caused "intended difficulty" with the object of discouraging non-compliance with the TDS provisions. A partial relaxation in its rigor, inserted with prospective effect, cannot be treated as "retrospective".

In view of this, disallowance of Rs.3,69,568/- u/s. 40(a)(ia) in respect of payments in months of January & February, 2006, tax deducted at source from which was not deposited to the credit of Government before 31.3.2006 is confirmed."

7. We have heard both the parties and perused the materials available on record and orders passed by the authorities below. The issue involved in the present appeal has now been decided by the Hon'ble Calcutta High Court in the case of *CIT v. Virgin Creators* in **GA No.3200/2011** dated 23-11-2011 against the Revenue. However, it is noteworthy that the Special Bench of ITAT Mumbai in the case of *Bharati Shipyard Ltd. v. DCIT* in **ITA No.2404/Mum/2009** in order dated 12-09-2011 has taken a view that the amendment is prospective in nature and would apply accordingly. Respectfully following the decision of Hon'ble Calcutta High Court in the case of *Virgin Creators* (supra) the order of Ld. CIT(A) is not sustainable. Hence, this ground of assessee's appeal is allowed. The Assessing Officer is directed to delete the disallowance of Rs.3,69,568/- as made u/s. 40(a)(ia) of the Act.

8. **In the result, appeal of assessee is allowed.**

Order pronounced in Open Court on 23/03/2012

Sd/-
(A.K.Garodia)
(Accountant Member)

Sd/-
(Kul Bharat)
(Judicial Member)

Ahmedabad,

*Dkp

/True Copy/

दिनांक:- 23/03/2012 अहमदाबाद ।

आदेश की प्रतिलिपि अद्येषित / Copy of Order Forwarded to:-

1. अपीलार्थी / Appellant
2. प्रत्यर्थी / Respondent
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,
उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD BENCH "A"
Before Shri D K TYAGI – JUDICIAL MEMBER
And Shri A MOHAN ALANKAMONY - AM
ITA no.673/Ahd/2010
(Assessment Year:-2006-07)

Shri Sureshbhai G Patel, 21, Nalkunj Society, Shahibaug, Ahmedabad	V/s	The Income-tax Officer, Ward-9(1), Ahmedabad
PAN: ABCPP 1758 M		
[Appellant]		[Respondent]

Assessee by :-	Shri V P Patel, AR
Revenue by:-	Shri Dinesh Singh, Sr. DR

Date of Hearing:-	28-03-2012
Date of Pronouncement:-	30-03-2012

ORDER

PER D K TYAGI (JM):- This appeal by the assessee is directed against the order of the learned CIT(A)-XV, Ahmedabad dated 18-11-2009 for Assessment Year 2006-07. The assessee has taken the following grounds of appeal:-

1. The ld. CIT(A) erred on facts and in laws in sustaining the addition of Rs.60.91 lacs under the provision of section 40a(ia) of the Act, where the appellant had made TDS under the provision of section 194C of the Act and paid before the 30th May 2006.
2. The ld. CIT(A) erred on facts and in laws in sustaining the addition of Rs.60.91 lacs towards labor payments, without considering the facts that none of the labour contractor have taxable income and provisions of section 43B and 191 r.w.s other provisions of chapter XVII of the Act.

2 The brief facts of the case are that the assessee is an individual engaged in the business of civil construction in the name and style of Elevate Construction. During the assessment proceedings, the AO observed that the assessee did not deduct tax at source or tax deducted at source was not deposited before 31-03-2006 in respect of payments of Rs.60,91,078/- made to various parties as per the detailed table given in the assessment order, giving the amounts, names, dates of payments / credits and dates of various deposits in Govt. A/c. Invoking the provisions of section 40(a)(ia) the addition of this amount was made.

3 In appeal, the learned CIT(A) confirmed this action of the AO by observing that there is no dispute that TDS should have been deposited in Govt. A/c., by March, 2006 and not later and whereas the assessee deposited TDS on dates after 31-03-2006.

4 Further aggrieved, the assessee is now in appeal before us. At the time of hearing, the learned counsel of the assessee conceded that in respect of payment of Rs.2,85,750/- since no tax was deducted by the assessee, the addition of this amount has rightly been made. As far as the remaining amount of Rs.58,05,328/- is concerned, he argued that the tax was deducted and was deposited in Govt. Account before filing of return for the year under appeal. In view of the amendment of the provisions of section 40(a)(ia) by the Finance Act, 2010 with effect from 1-4-2010 which has been treated as having retrospective application with effect from 1-4-2005, by the decision of the ITAT Ahmedabad in the case of M/s Alpha

Projects in 2869/Ahd/2011, order dated 23-03-2012, no addition u/s 40(a)(ia) was called for. Concluding his arguments, he submitted that the addition made by the AO and confirmed by the learned CIT(A) deserves to be deleted.

5 The learned DR, on the other hand, relied on the order of the AO.

6 After hearing both the parties and perusing the record, we find that the Tribunal in the case of M/s Alpha Projects in 2869/Ahd/2011, order dated 23-03-2012, has held as under:-

“6. Ground No. 2 is with regard to disallowance of u/s. 40(a)(ia). The Ld. CIT(A) has given view which reproduced as under:-

"3.2 I have considered the matter. Disallowance of Hs.3,69,568/- made u/s. 40(a)(ia) was in respect of amount credited in months of February and January, 2006, tax deducted from which was deposited to the credit of Government in April/August 2006. Appellant has relied upon decision of ITA T, Ahmedabad in the case of Kanubhai Ramjibhai Makwana (201 1) 44 SOT 264 (Ahd) that provisions of section 40(a)(ia) as amended by Finance Act, 2010 w.e.f. 1.4.2010 are to be treated as having retrospective application with effect from 1st April, 200-5. However, ITAT's Mumbai Special Bench in the case of Bharti Shipyard Ltd. vs. DCIT in order dated 12.9.2011 (itatonline.org) has overruled decision in the case of Kanubhai Makwana, 135 TTJ (Ahd) 364 as well as Bansal Parivahan 43 SOT 619 (Mumbai and has held as under:-

The amendment to s.40(a)(ia) by the FA 2010 was made retrospectively applicable only from AY 2010-11 and not earlier. It is nowhere stated that the amendment is curative or declaratory in nature nor is such an intention discernible. Ordinarily, a substantive provision is "prospective" in operation and courts cannot give it "retrospective effect" except in limited circumstances where, say, the amendment makes explicit what was earlier implicit or where the amendment was to remove unintended consequences in the existing provision and to

make it workable. A provision giving relief cannot be regarded as retrospective only because the original provision caused hardship to the assessee. S.40(a)(ia) caused "intended difficulty" with the object of discouraging non-compliance with the IDS provisions. A partial relaxation in its rigor, inserted with prospective effect, cannot be treated as "retrospective".

In view of this, disallowance of Rs.3,69,568/- u/s. 40(a)(ia) in respect of payments in months of January & February, 2006, tax deducted at source from which was not deposited to the credit of Government before 31.3.2006 is confirmed."

7 We have heard both the parties and perused the materials available on record and orders passed by the authorities below. The issue involved in the present appeal has now been decided by the Hon'ble Calcutta High Court in the case of CIT vs. Virgin Creators in GA No.3200/2011 dated 23-11-2011 against the Revenue. However, it is noteworthy that the Special Bench of ITAT Mumbai in the case of Bharati Shipyard Ltd. v. DCIT in ITA No.2404/Mum/2009 in order dated 12-09-2011 has taken a view that the amendment is prospective in nature and would apply accordingly. Respectfully following the decision of Hon'ble Calcutta High Court in the case of Virgin Creators (supra) the order of Ld. CIT(A) is not sustainable. Hence, this ground of assessee's appeal is allowed. The Assessing Officer is directed to delete the disallowance of Rs.3,69,568/- as made u/s. 40(a)(ia) of the Act."

7 In view of the above, the disallowance of Rs.58,05,328/- u/s 40(a)(ia) is deleted. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the court today on 30-03-2012

Sd/-

Sd/-

(A MOHAN ALANKAMONY) ACCOUNTANT MEMBER	(D K TYAGI) JUDICIAL MEMBER
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Date	:	30-03-2012
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Copy of the order forwarded to:

1.	Shri Sureshbhai G Patel, 21, Nalkunj Society, Shahibaug, Ahmedabad
2.	The Income-tax Officer, Ward-9(1), Ahmedabad
3.	CIT concerned
4.	CIT(A)-XV, Ahmedabad
5.	DR, ITAT, Ahmedabad Bench-A, Ahmedabad
6.	Guard File

BY ORDER

Deputy Registrar
Assistant Registrar
ITAT, AHMEDABAD