

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES, 'B', MUMBAI

BEFORE SHRI P.M.JAGTAP, ACCOUNTANT MEMBER AND
SHRI VIJAY PAL RAO, JUDICIAL MEMBER

ITA No. 6628/Mum/2009
(Assessment Years: 2005-06)

Bapushaeb Nanasaheb Dhumal
Prop M/s N & Brothers,
Opp.H P Refinery
Govan Pada, Mahule Rd.
Chember
Mumbai-400074
PAN: AABPD9282A

....Appellant

V/s

ACIT RG
22(2)
Mumbai

...Respondent

Appellant by : Shri Anil J Sathe
Respondent by : Shri S S Rana

ORDER

PER VIJAY PAL RAO, JM

This appeal by the assessee is directed against the order dated 12.10.2009 of CIT(A)-33, Mumbai arises from giving effect order dated 7.8.2009 passed by the AO in consequence of the direction given by the CIT(A) order dated 31.03.2009 passed under section 154 for the assessment year 2005-06.

2 The assessee has raised following ground in this appeal:

"1. The learned CIT(A) has erred in confirming the action of the AO in restricting the relief arising

out of the proviso to section 40(a)(ia) at Rs.23,28,567/- instead of Rs.2,83,43,188 as claimed by the appellant;

2. The learned CIT(A) has erred in concluding that the appellant has interpreted the proviso to section 40(a)(ia) to suit his convenience.;

3. In the alternative and without prejudice to the above the learned CIT(A) erred in rejecting the contention of the appellant that the entire tax was deductible in March i.e. the last month of the previous year in respect of the entire sum of Rs.2,83,43,188 and thus the proviso squarely applied in respect of that sum.

4. The Id. CIT(A) erred in not appreciating that the method of accounting of crediting income on 31st March, from which tax was deducted was consistently followed by the assessee, explained to the assessing officer and accepted by him."

3. From the grounds of appeal, the only issue arises for our consideration and adjudication is whether in the facts and circumstances of case, the CIT(A) is justified in confirming the disallowance made by the AO u/s 40(a)(ia) in respect of the payment against which the TDS was deduced in the month of March 2005 and deposited before the due date of filing of the return.

4. The relevant fact emerging from the record are as under:

4.1 The assessee is carrying on the agency work of various corporate and transporting the petroleum to various locations. During the year, the assessee paid Rs.2,83,43,188 to various contractor. The AO noticed that the payment of TDS was not made within the statutory period in respect of payments of the

contractors and therefore, it required to be disallowed u/s 40(a)(ia). The assessee claimed before the AO that the entire payment was made in the month of March 2005 and tax was deducted in the month of March 2005 only. Therefore, the tax deposited on 21.09.2005 is within the statutory period as provided u/s 40(a)(ia) being before the due date of filing the return of income as per section 139(1) of the Act. In the original assessment framed on 28.11.2007, the AO disallowed the entire expenditure of Rs.2,83,43,188/- on the ground that the payment of TDS were made beyond the statutory period. The assessee challenged the disallowance before the CIT(A)

5. The CIT(A) dismissed the appeal of the assessee and confirmed the disallowance made by the AO vide order dated 21.05.2008. Subsequently, The assessee filed the petition u/s 154 for rectification of the order dated 21.05.2008 of the CIT(A) on the ground that the due date for filing of the return in the case was 31.10.2005 and the return was filed on 29.10.2005, the assessee paid the tax on 21.09.2005 which is before the due date of filing of the return as prescribed u/s 139(1). Thus the assessee pleaded in the petition u/s 154 that in view of the retrospective amendment in section 40(a)(ia) vide Finance Act (No.2), 2008 with effect from 01.04.2005 the expenditure should be allowed as deduction. Consequently, the CIT(A) passed the order date 32.03.2009 u/s 154 and

thereby directed the AO to give relief to the assessee directly in compliance with the said section and after making the proper verification as available before him. While giving effect to the order, the AO has given a finding that the actual payment made /credited in respect of those parties in the Month of March only of Rs. Rs.2,83,43,188/ and rest of the amount was paid before the month of March, 2005 during he Financial Year relevant to the assessment year under consideration. Therefore, the AO has allowed the deduction only to the extent of Rs..2,83,43,188/- and maintained the disallowance of the balance expenditure.

6. On further appeal, the CIT(A) confirm the addition made by the AO vide impugned order.

7. Before us, the learned AR of the assessee has submitted that the provision of section 194C are relevant only to the extent of ascertaining the deductibility of the tax on certain payment and not the actual deduction and deposit of the tax. The condition for actual deduction and deposits are prescribed u/s 40(a)(ia) for disallowing the expenditure. He has referred the sub-clause A and B of clause (ia) of sub-section (a) of section 40 and submitted that when the tax was deducted during the last month of previous year the same was required to be paid on or before the due date as per sub-section (1) of

section 139. The assessee has deducted the tax only on 31.03.2005, and duly deposited the tax on 21.09.2005 which is before the due date of filing of the return as per the provisions of section 139(1). He has further referred the proviso to section 40(a)(ia) and submitted that in the cases where the tax is deducted in the subsequent year then such sum is allowable as deduction in the previous year in which such tax has been paid and similarly, when the tax has been deducted during the last month of the previous year but paid after the due date the said sum is allowable only in the previous year in which it has been paid. The another instance when the tax has been deducted during any other month of the previous year (except the last month) but paid after the end of the previous year then the same is allowable as deduction in computing the income of the previous year in which it has been paid. Thus, the learned AR has submitted that the actual deduction and payment is governed by the provisions of section 40(a)(ia) for disallowance of the expenditure and not by the provisions of section 194C or any other provisions of Chapter –XVII B. He has further contended that the provisions of section 40(a)(ia) has been amended by the Finance Act, 2010 applicable for the assessment year 2010-11 and as per the amended provisions if the tax deducted at source can be deposited with the government on or before the due of filing of the return of income then the deduction will not be denied.

8. The learned AR of the assessee has submitted that the amendment brought in to section 40(a)(ia) is remedial in nature and therefore shall be retrospective. He has relied upon the following case laws:

- i) *CIT V/s Apar Industries Ltd –(323 ITR 411)*
- ii) *CIT V/s Alom Extrusions Ltd –(319 ITR 306(SC))*
- iii) *Allied Motors (P) Ltd V/s CIT –(224 ITR 677))*

9. On the other hand, the learned DR ha submitted that as per the provisions of section 194C tax is required to be deducted at source at the time of crediting of such payment to the account of the contractor or at the time of payment thereof which ever is earlier and the due date for depositing the same is 7 days from the end of the month in which the tax is deducted. Relaxation of time period in depositing the TDS is given under the provisions of section 40(a)(ia) is only in the case when the tax was deductible and deducted in the last month of the previous year which means when the tax is deductible and deducted on the close of the accounting year the same can be deposited on or before the due date of filing of the return of income under section 139(1). If it is deductible and deduced prior to the month of March then has to be deducted before the end of last month of the previous year. Section 40(a)(ia) of the Act has deterrent to the assessee to

ensure timely deposits of TDS in the government treasury. As far as the time of payment of deposit of the tax, the same is relaxed under the provisions of section 40(a)(ia) but deductibility and time of deduction is provided under the provisions of section 194C and other provisions of Chapter – XVII of the Act. Therefore, when the assessee in the case in hand has not deducted the tax in time and thereafter also not deposited in time from the date when it was to be deducted the provisions of section 40(a)(ia) are attracted and the expenditure so made without compliance of Chapter –XVII are to be disallowed. He has relied upon the orders of the lower authorities. He has also relied upon the decision of the Hon.Supreme Court in the case of Madurai Mills and Co.ltd. reported in 89 ITR 445 and submitted that the proviso can not enlarge the scope of the main provision when the said can be fairly and properly construed without attributing to it with effect. The learned DR has submitted that the assessee has relied upon the proviso to section 40(a)(ia) in support of its claim but when the proviso can not enlarges the scope of the main provision/enactment then the proviso cannot be read in isolation and independently.

10. We have considered the rival contentions and relevant record as well as case law relied upon by both the parties. The controversy in the present case revolves around the

applicability of the provisions of section 194C while disallowing the expenditure under the provision of section 40(a)(ia) of the Act. It is undisputed fact that the assessee made the payment to the sub-contractor during the previous year but the tax was deducted only on 31.3.2005. The AO has already allowed the deduction in respect of payment made during the month of March 2005 but disallowed the deduction in respect of the payment which were credited and made during the period other than the month of March 2005. No doubt that as per the provisions of Chapter -XVII B and particularly section 194C as the payment under consideration are covered under the provisions of section 194C, the tax has to be deducted at the time of payment or credit of such sum in which the tax is deducted within 7 days from the end of the month and has to be deposited with the government within the period prescribed under section 194C. In case of failure of deduction of tax and/or depositing the same as per the provisions of section 194C or the provisions of chapter -XVII as the case may be, the assessee has to face the consequences as provided under the said chapter-XVII of the Act by attracting the penalty or interest. The provisions of section 40(a)(ia) are in addition to the provisions of Chapter XVII as well as Chapter XXII to ensure the deduction and deposit of the TDS. It is appropriate to quote the provisions of section 40(a)(ia):

40. Notwithstanding anything to the contrary in [sections 30 to 38](#)], the following amounts shall not be deducted in computing the income chargeable under the head “Profits and gains of business or profession”,—

(a) in the case of any assessee—

[(i)

(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, ⁷¹[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.]

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](#);

[(v) “rent” shall have the same meaning as in clause (i) to the Explanation to [section 194-I](#);

(vi) “royalty” shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of [section 9](#);

11. As per the clause (ia) of sub-section (a) of Section (40) when tax is deductible at source on the payment under chapter –XVII and such tax has not been deducted or after deduction has not been paid then the said deduction is not allowable. As per the sub-clause “A” of Clause (ia) if the tax is deducted during the last month of previous year and paid on or before the due date of filing of return as per the provisions of section 139(1) then such sum shall be allowed as deduction. In the cases where the tax is deducted during previous year other than the last month of previous year but is deposited before the last day of previous year then it will be allowed as deduction. Therefore, the conditions for allowability of the deduction is prescribed under section 40(a)(ia) itself and provisions of Chapter –XVII and Section 194C under chapter XVIIB at that relevant point of time are relevant only for the purposes of ascertaining the deductibility of the tax on the payment. Once, the nature of payment is falling under the provisions of chapter –XVII/VIIB then the disallowance u/s 40(a)(ia) shall be as per the condition as provided under this section itself. The proviso to section 40(a)(ia) makes it further clear that even in the case when the tax has been deductible as per the provisions of Chapter-XVII but deducted in the subsequent year or deducted during the last month of previous year but paid after the due date u/s 139(1) or deducted during the other month of the previous year except last month but

paid after the end of the said previous year then the said sum shall not be allowed as deduction in computing the income of the previous year but allowed in the previous year in which the said tax has been paid. If the condition of deduction and payment prescribed u/s Chapter XVII/XVII B are applicable for disallowance of the deduction 40(a)(ia) then the provisions of section 40(a)(ia) will be rendered as meaningless, absurdity and etios. As per the provisions of section 40(a)(ia) the deduction is disallowed only in the case when either no tax was deducted or it was not paid after deduction. But when the tax is deducted may be belatedly and deposited belatedly then deduction is allowable in the previous year in which it was so deposited. Therefore, if the provisions of section 194C with respect to the time of deduction and payments are applied for the disallowance u/s 40(a)(ia) then there will be no purpose or object for providing the certain conditions of actual deduction of tax and payment of tax u/s 40(a)(ia). In our view, the provisions of chapter XVII are relevant only for ascertaining the deductibility of the tax at source and not for the actual deduction and payment for attracting the provisions of section 40(a)(ia). Since in the case in hand when the assessee had deducted the tax in the last month of the previous year i.e March 2005 and deposited the same before the due date of filing of the return u/s 139(1) then it is covered under clause "A" of section 40(a)(ia). Therefore when the assessee's case

covered under the main provisions of existing law then we need not to go to the issue of prospective or retrospective effect of the amendment in the provisions by the Finance Act, 2010. As regards the decision relied upon by the learned DR when the proviso to section 40(a)(ia) is not contrary to the main section/enactment then the said decision will not help the case of the revenue. Even otherwise when the case of the assessee falls under the main provisions of section 40(a)(ia) then the said decision relied upon by the learned DR in the case of CIT V/s Madurai Mills and Co.ltd (supra) is not relevant. Accordingly, we set aside the orders of the lower authorities and allow the claim of the deduction of the assessee.

12. In the result, appeal of the assessee is allowed.

Pronounced in the Open Court on 25.06.2010

Sd

(P.M.JAGTAP)
ACCOUNTANT MEMBER

Mumbai, Dated 25 th June 2010

SRL:23610

sd

(VIJAY PAL RAO)
JUDICIAL MEMBER

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2. ACIT RG
22(2)
Mumbai

3. CCIT -XII, Mumbai.
4. CIT-22, Mumbai
5. CIT (A)-XXXIII, Mumbai.
6. DCIT -22(2), Mumbai
7. DR ""B'Bench

BY ORDER

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ASSTT. REGISTRAR, ITAT, MUMBAI