

**आयकर अपीलीय अधिकरण, मुंबई**

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES 'J' MUMBAI**

सर्वश्री आय.पी. बंसल, न्यायिक सदस्य एवं श्री आर.सी. शर्मा , लेखा सदस्य के समक्ष

**BEFORE SHRI I.P. BANSAL, JUDICIAL MEMBER AND  
SHRI R.C.SHARMA , ACCOUNTANT MEMBER**

ITA NO.2293/MUM/2013(A.Y. 2005-06)

ITA NO.2294/MUM/2013(A.Y. 2006-07)

Shri Jitendra Mansukhlal Shah,  
191, Pilla Building, Nagdevi Street,  
Mumbai 400 003.  
PAN:AADPS 1282P  
(Appellant )

Dy. Commissioner of Income  
Tax,  
Vs. Central Circle 45,  
Mumbai.  
(Respondent)

Appellant by : S/Shri Prakash Jhunjhunwala  
& Ketan Jain  
Respondent by : Shri Akhilendra Yadav  
Date of hearing : 04/03/2015  
Date of pronouncement : 04/03/2015

**ORDER**

**PER I.P.BANSAL, J.M:**

Both these appeals are filed by the assessee and they are directed against consolidated order passed by Ld. CIT(A)-38, Mumbai dated 19/12/2012 for assessment year 2005-06 and 2006-07.

2. It may be mentioned here that apart from main grounds of appeal the assessee has also raised additional ground agitating the validity of reopening of the assessment. However, during the course of hearing Ld. AR did not press any

grounds except Ground No. 4(b) and the fact that he did not press other grounds is mentioned on the ground of appeal itself on the date of hearing. Ground No.4 in both the appeals read as under:

“Ground No.4: in ITA No.2293/Mum/2013:

*4.0 The Ld. CIT(A) before confirming the disallowance u/s. 40(a)(ia) r.w.s. 194C of labour charges of Rs. 1,35,05,623/- ought to have appreciated the understated vital facts, being;*

*a) There is no oral or written contract executed by the appellant with the labourers.*

*b) The provision of Sec. 40(a)(ia) shall apply only in respect of the amounts payable at the end of the year and shall not apply on the amounts actually paid by the appellant during the year.*

*c) The labour charges had been paid against the labour recoveries thereby having profit neutral effects.”*

“Ground No.4: in ITA No.2294/Mum/2013:

*4.0 The Ld. CIT(A) before confirming the disallowance u/s. 40(a)(ia) r.w.s. 194C of labour charges of Rs.97,93,037/- ought to have appreciated the understated vital facts, being;*

*a) There is no oral or written contract executed by the appellant with the labourers.*

*b) The provision of Sec. 40(a)(ia) shall apply only in respect of the amounts payable at the end of the year and shall not apply on the amounts actually paid by the appellant during the year.*

*c) The labour charges had been paid against the labour recoveries thereby having profit neutral effects.”*

3. The amount mentioned in Ground No.4 for each of the assessment year was disallowed on account of application of section 40(a)(ia) of the Income Tax Act, 1961 (the Act) for the reason that assessee did not deduct tax under section 194C

of the Act. Ld. AR has furnished a chart describing the position, copy of which was also given to Ld. DR. The chart read as under:

*SUMMARY OF LABOUR CHARGES PAID AND PAYABLE FOR THE ASSESSMENT YEAR 2005-06 & 2006-07:*

A.Y. 2005-06:

<i>Particulars</i>	<i>Amount (Rs.)</i>
<i>Labour charges on which TDS is not deducted (disallowed in assessment)</i>	<i>Rs. 1,35,05,623</i>
<i>Less: Labour charges Paid</i>	<i>Rs. (65,83,283)</i>
<i>Balance Labour charges Payable on which TDS is not Deducted</i>	<i>Rs. 69,22,340</i>

A.Y. 2006-07:

<i>Particulars</i>	<i>Amount (Rs.)</i>
<i>Labour charges on which TDS is not deducted (disallowed in assessment)</i>	<i>Rs. 97,93,037</i>
<i>Less: Labour charges Paid</i>	<i>Rs. (96,65,685)</i>
<i>Balance Labour charges Payable on which TDS is not Deducted</i>	<i>Rs. 1,27,353</i>

It was mentioned by Ld. AR that to the extent labour charges are paid during the year the issue may be taken as covered in favour of the assessee by the following decisions:

(1) CIT vs. Vector Shipping Services (P) Ltd., ITA- 122/2013 (SC)

And 262 CTR 545 (HC-All)

(2) Merilyn Shipping & Transports vs. Addl. CIT,

136 ITD 23 (ITAT –Visakhapatnam)(SB)

Copies of these decisions are filed in the paper book at page 31 to 33 and 34 to 37 respectively. Thus, it was claimed that to the extent the amount is paid during the respective years no disallowance should be made.

3.1 For the remaining amount, it was submitted by Ld. AR that disallowance may be upheld. It was further submitted by Ld.AR that for verification of the aforementioned facts the matter may be sent to the AO.

4. On the other hand, Ld. DR submitted that disallowance has to be made irrespective of the fact that whether payment is made during the year or not and for this purpose Ld. DR has relied upon the decision of Mumbai Tribunal in the case of ITO vs. Pratibhuti Viniyog Ltd. order dated 22/08/2014 in ITA No.1689/Mum/2011. Thus, it was pleaded by Ld. DR that entire disallowance should be sustained.

5. We have heard both the parties and their contentions have carefully been considered. Recently, Mumbai Tribunal has decided such issue in favour of the assessee by considering the earlier decisions. Judicial Member is one of the party to the said decision The relevant observations of the Tribunal are as under:

*“5. We have heard both the parties and their contentions have carefully been considered. After careful consideration, respectfully following the decision of Co-ordinate Bench in the case of M/s. Vivil Exports P. Ltd. vs. ITO (supra), we delete the disallowance. For the sake of completeness relevant observation of the Tribunal from the said decision are reproduced below:*

*4. Though number of grounds were urged before us in the grounds of appeal annexed to Form No. 36, at the time of hearing the learned counsel for the assessee submitted that the assessee having made the payment, section 40(a)(ia) cannot be attracted because it speaks of the amount “payable” and it does not cover the amount already paid. In this regard he relied upon the following decisions of the ITAT Chennai Benches wherein the Bench had taken into consideration the decision of the ITAT Special Bench in the case of Merilyn Shipping & Transport, the order of which was suspended by the High Court but at the same time there was a subsequent judgement of the Hon'ble Allahabad High Court in the case of M/s. Vector Shipping Services*

*(P) Ltd. wherein it was held that section 40(a)(ia) applies only to those amount which remains payable by the end of the previous year. In other words, in respect of payments already made section 40(a) (ia) is not attracted: - i. ACIT vs. M/s. Eskay Designs - ITA No. 1951/Mds/2012 dated 09.12.2013. ii. ITO vs. Theekathir Press – ITA No. 2076/Mds/2012 & CO No. 155/Mds/2013 dated 18.09.2013. The learned counsel for the assessee also submitted that though there are contrary decisions of the other Hon'ble High Courts, i.e. Hon'ble Calcutta High Court and Hon'ble Gujarat High Court, in the light of the decision of the Hon'ble Allahabad High Court it can be said there can be two views possible in this matter in which event the one which is in favour of the assessee has to be followed in the light of the decision of the Hon'ble Supreme Court in the case of Vegetable Products Ltd. 88 ITR 192. Accordingly the Chennai Bench held that section 40(a)(ia) is not attracted in respect of the amount already paid by the assessee. 5. The learned D.R., on the other hand, could not place before us any contrary judgement on this issue. Though the learned D.R. promised to file written submissions within one day, it was not filed. In other words, there is no contrary decision on this issue. 6. Having regard to the circumstances of the case, without going into the other aspects, which were in fact not argued either by the assessee or by the Revenue, we hold that section 40(a)(ia) is not attracted in respect of payment already made by the end of the previous year. The AO is directed to verify the claim of the assessee and if it is in line with the view taken herein the same may be considered accordingly. As regards levy of interest under section 234B and 234C of the Act, the same is consequential in nature and need not to be considered independently. 7. In the result, the appeal filed by the assessee is treated as allowed for statistical purposes*

5.1 Moreover, Hon'ble Allahabad High Court in the case of CIT vs. Vector Shipping Services (P) Ltd.(supra) has held that for disallowing expenses from business and profession on the ground that TDS has not been deducted, amount should be payable and not which has been paid by end of the year. The said decision of Hon'ble Allahabad High Court was made subject to Special Leave Petition filed before Hon'ble Supreme Court and their Lordships vide their order

dated 02/07/2014 in CC No.8068/2014 have dismissed the SLP and copy of this order is filed by the assessee at page 31 of the paper book and the said order read as under:

*“SUPREME COURT OF INDIA*

*RECORD OF PROCEEDINGS*

*Petition(s) for Special Leave to Appeal (C).....*

*CC No.(s) 8068/2014*

*(Arising out of impugned final judgment and order dated 09/07/2013 in ITA 122/2013 passed by the High Court of Judicature at Allahabad)*

*COMMISSIONER OF INCOME TAX-MUZAFFAR NGR.Petitioner(s)*  
*VERSUS*

*M/S. VECTOR SHIPPING SERVICES (P) LTD. Respondents(s)*  
*With appln.(s) for c/delay in filing slp and office report)*

*Date:02/07/2014 This petition was called on for hearing today.*

*CORAM: HON'BLE THE CHIEF JUSTICE HON'BLE MR.*  
*JUSTICE MADAN B LOKUR HON'BLE MR.*  
*KURIAN JOSEPH*

*For Petitioner(s) Mr. Mukul Rohatgi, Attorney General Mr. Rupesh*  
*Kumar, Adv. Mr. Sahil Tagotra, Adv. Mrs. Anil*  
*Katiya, Adv.*

*For Respondent(s)*

*UPON hearing the counsel the Court made the following*  
*ORDER*

*Heard Mr.Mukul Rohatgi, learned Attorney General, or the petition.*  
*Delay in filing and refilling special leave petition is condoned.*  
*Special leave petition is dismissed.*

*Digitally signed by*  
*Rajesh Dham*  
*Date: 2014.07.02”*

5.2 In view of above discussion, the decision relied upon by Ld. DR would have no application and we have to accept the claim of the assessee to the extent of labour payments are made during the year under consideration and to that extent no disallowance should be made. Further the figure given by the assessee in the

aforementioned chart may be verified by the AO and to the extent payments are made during the respective years under consideration no disallowance should be made and only rest of the amount should be disallowed. With these directions we partly allow the appeals filed by the assessee.

6. In the result, the appeals are partly allowed for statistical purposes in the manner aforesaid.

Order pronounced in the open court on 04/03/2015

आदेश की घोषणा खुले न्यायालय में 04/03/2015 को की गई ।

Sd/-

Sd/-

(आर.सी. शर्मा /R.C.SHARMA )

(आय.पी. बंसल / I.P. BANSAL)

लेखा सदस्य /ACCOUNTANT MEMBER

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated 04/03/2015

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,  
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai

व.नि.स./Vm, Sr. PS