

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'C': BANGALORE**

**BEFORE SHRI N.V.VASUDEVAN, JUDICIAL MEMBER
and
SHRI JASON P.BOAZ, ACCOUNTANT MEMBER**

**ITA No.1832/Bang/2013
(Assessment year: 2005-06)**

Shri G.Shankar,
PWD Contractor,
Gyani Colony, Station road,
Bijapur. ... Appellant
PAN: AJDPS2341E

Vs.

Asst. Commissioner of Income-tax,
Circle-1,
Bijapur. ... Respondent

Appellant by: Shri Narendra Sharma, Advocate.
Respondent by: Shri K.Shankar Prasad, JCIT(DR).

Date of hearing : 23/09/2014.
Date of pronouncement: 10/10/2014.

O R D E R

Per JASON P BOAZ, AM:

This appeal by the assessee is directed against the order of the CIT(A), Belgaum, dated 10/10/2013 for assessment year 2005-06.

2. The facts of the case, briefly, are as under:

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2.1 The assessee is registered as a class I PWD contractor carrying on the business of civil construction, including Government contracts for construction of canals, etc., For assessment year 2005-06, the assessee filed the return of income on 31/10/2005 declaring income of Rs.1,05,66,787/-. The return was processed u/s 143(1) of the Income-tax Act, 1961[hereinafter referred to as 'the Act'] and the case was subsequently taken up for scrutiny. The assessment was completed u/s 143(3) of the Act by order dated 07/12/2006 wherein the income of the assessee was determined at Rs.1,16,47,065/-.

2.2 The order of assessment for assessment year 2005-06 dated 7/12/2006 was the subject matter of revisionary proceedings by the CIT(Central), Karnataka. The Id.CIT(Central), by order u/s 263 of the Act dated 31/3/2009 held that the order of assessment passed u/s 143(3) of the Act by order dated 7/12/2006 was both erroneous and prejudicial to the interest of revenue as the assessee had failed to deduct tax at source as per the provisions of section 194C of the Act in the period relevant to assessment year 2005-06 in respect of payments of Rs.1,53,78,795/- made to a sub-contractor Shri Uday Kumar Shetty. The Id.CIT(Central) directed the Assessing Officer to consider disallowance of the entire payments of Rs.1,53,78,795/-

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u/s 40(a)(ia) of the Act for non-deduction of tax at source in accordance with the provisions of sec.194C of the Act.

2.3 Consequent to the order of the Id.CIT(Central), Karnataka u/s 263 of the Act dated 31/3/2009, the Assessing Officer in pursuance thereof passed an order of assessment u/s 143(3) r.w.s.263 of the Act dated 5/10/2009 for assessment year 2005-06 wherein the entire payments made by the assessee to Shri Uday Kumar Shetty amounting to Rs.1,53,78,795/- were disallowed u/s 40(a)(ia) of the Act for non-deduction of tax thereon as per the provisions of section 194C of the Act.

2.4 Aggrieved by the order u/s 263 dated 31/3/2009, the assessee preferred an appeal before the Tribunal. The Tribunal vide order in ITA 421 & 422/Bang/2009 dated 26/4/2010 remitted the matter back to the file of the Assessing Officer. Pursuant to the above order of the Tribunal, the Assessing Officer passed order u/s 143(3) r.w.s 254 of the Act vide order dated 23/12/2011.

2.4 Aggrieved by the order of assessment passed u/s 143(3) r.w.s.254 of the Act by order dated 23/12/2011, the assessee preferred an appeal before the CIT(A), Belgaum. Before the Id.CIT(A), the assessee submitted that the amounts in question amounting to Rs.1,53,78,795/- had already been paid

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to Shri Uday Kumar Shetty and that no amounts were payable as on 31/3/2005. It was also submitted that Shri Uday Kumar Shetty had accounted for the payments of Rs.1,53,78,795/- in his books of account; had offered the same in his return of income for assessment year 2005-06 and paid taxes thereon and therefore there was no loss to revenue. The Id.CIT(A), however, was of the view that the contention raised by the assessee that the provisions of section 40(a)(ia) of the Act was applicable only to amounts payable as on 31st March of any year is not acceptable since the correct position of law is that section 40(a)(ia) of the Act covers not only amounts which are payable as on 31st March of a particular year but also those amounts that are payable at any point during the year. In that view of the matter, the Id.CIT(A) confirmed the disallowance of Rs.1,53,78,795/- made by the Assessing Officer u/s 40(a)(ia) of the Act and accordingly dismissed the assessee's appeal by order dated 10/10/2013.

3. Aggrieved by the order of the CIT(A), Belgaum, dated 10/10/2013 for assessment year 2005-06, the assessee is in appeal before us raising the following grounds:

1. *The order of the learned Commissioner of Income-tax(Appeals) in so far as it is against the appellant, is opposed to law, weight of evidence, natural justice, probabilities, facts and circumstances of the appellant's case.*
2. *The appellant denies himself liable to be assessed on a total income of Rs.2,68,05,860/- as determined by the learned Assessing Officer and*

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confirmed by the learned CIT(A) as against the reported income of Rs.1,14,27,065/- by the appellant under the facts and circumstances of the case.

3. The learned CIT(A) is not justified in law in confirming the disallowance of a sum of Rs.1,53,78,795/- made by the learned Assessing Officer under the provisions of section 40(a)(ia) of the Act, being the payments made by the appellant to Sri.Uday Kumar Shetty, under the facts and circumstances of the case.
4. The learned authorities failed to appreciate the fact that the provisions of section 40(a)(ia) of the Act is not applicable to the facts of the instant case since the recipient/payee i.e. Sri.Uday Kumar Shetty has already declared the payments made by the appellant in his respective returns and also he is maintaining his books of account as per the scheme of the Act and is further subject to audit under the provisions of section 44-AB of the Act and hence no disallowance is warranted under the provisions of section 40(a)(ia) of the Act under the facts and circumstances of the case.
5. The learned authorities below are not justified in law in not appreciating that the deduction of tax is only one mode of recovery of tax and once the tax is recovered by any other mode and the recovery of tax on the amount which has suffered tax in the hands of payee is not permissible since the same will amount to taxing the same income twice i.e. once disallowance of expenditure in the hands of the payer and once again the amounts being taxed in the hands of the payee under the facts and circumstances of the case.
6. The learned authorities below failed to appreciate that the provisions of section 40(a)(ia) of the Act is attracted only to the amounts which are payable at the end of the year and not to the entire actual payments paid during the year under the facts and circumstances of the case.
7. The learned authorities below failed to appreciate the fact that disallowance under section 40(a)(ia) is permissible only if the deduction is claimed under section 30 to 38 of the Income-tax Act, 1961 under the facts and circumstances of the case. Where the payment to contractor partakes

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the payment made under section 28 of the Income-tax Act, 1961.

8. *Without prejudice to the right to seek waiver as per the parity of reasoning of the decision of the Hon'ble Apex Court in the case of Karanvir Singh 349 ITR 692, the appellant denies itself liable to be charged to interest under section 234 B of the Income Tax Act under the facts and circumstances of the case. Further the levy of interest under section 234B of the Act is also bad in law as the period, rate, quantum and method of calculation adopted on which interest is levied are all not discernible and are wrong on the facts of the case.*
9. *The appellant craves leave to add, alter, delete or substitute any of the grounds urged above.*
10. *In view of the above and other grounds that may be urged at the time of the hearing of the appeal, the appellant prays that the appeal may be allowed in the interest of justice and equity.*

4. The grounds at Sl.Nos.1, 2, 9 and 10 are general in nature and therefore no adjudication is called for thereon.

5. **Disallowance u/s 40(a)(ia) of the Act:**

5.1 The grounds at Sl.No.3 to 7 are in respect of the only issue of dispute before us. They challenge the order of the Id.CIT(A) in confirming the disallowance of Rs.1,53,78,795/- made by the Assessing Officer by invoking the provisions of sec.40(a)(ia) of the Act in respect of payments made to Shri Uday Kumar Shetty for non-deduction of tax thereon u/s 194C of the Act.

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5.2 Before us, the Id.AR reiterated the stand taken by the assessee before the Id.CIT(A). It is submitted that there is no dispute with regard to the facts of payments amounting to Rs.1,53,78,795/- being made by the assessee to Shri Uday Kumar Shetty; that the said payments have been accounted by the payee in his books of account and that the payee has offered this as part of his computation in his return of income for this year and paid relevant taxes thereon as applicable. The Id. AR submitted that the newly inserted second proviso to section 40(a)(ia) of the Act inserted by Finance Act 2013 w.e.f. 1/4/2013 mandates that if the recipient has accounted the said amounts in his books of account and has offered the said amounts a part of his income and paid taxes thereon, then there cannot be any disallowance u/s 40(a)(ia) of the Act. It is contended that though the second proviso to section 40(a)(ia) was we.f. 1/4/2013, the said proviso has to be given retrospective effect and it is therefore equally applicable to the factual matrix of the assessee's case. In support of this proposition, the Id. AR placed reliance on the following decisions of the co-ordinate bench of this Tribunal, as being squarely applicable in the case on hand:

- i) *DCIT vs. Ananda Marakala ITA No.1584/Bang/2012 and CO No.58/Bang/2013 dated 13/9/2013.*
- ii) *S.M.Anand vs. ACIT in ITA NO.1831/Bang/2013 dated 21/2/2014*

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The Id.AR prayed that, in view of the above submissions, the assessee's appeal be allowed.

5.3 Per contra, the Id. DR supported the orders of the authorities below.

5.4.1 We have heard the rival submissions and perused and carefully considered the material on record, including the judicial decisions cited. Admittedly, the undisputed fact is that the assessee in the case on hand, has not deducted tax at source on the payments made to Shri Uday Kumar Shetty amounting to Rs.1,53,78,795/-. As submitted by the Id.AR, as far as the payments made by the assessee to Shri Uday Kumar Shetty, the fact that the payee has accounted for these payments in his books of account, financial statements and the same have been offered for tax in his return of income for the period relevant to assessment year 2005-06, has not been controverted by the authorities below. In our considered opinion, since the payee/ recipient i.e. Shri Uday Kumar Shetty has accounted for these payments in his books of account, audited u/s 44AB of the Act and has offered the same for tax in his return of income for the relevant period, thus, by virtue of the amendment, by way of insertion of the second proviso to section 40(a)(ia) of the Act w.e.f. 1/4/2013, the provisions of section 40(a)(ia) of the Act would not be attracted to the payments made by the assessee to

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Shri Uday Kumar Shetty amounting to Rs.1,53,78,795/-. In coming to this view, we draw support from the two above cited decisions of the co-ordinate benches of this Tribunal in the case of *DCIT vs. Anand Marakala* (ITA No.1584/Bang/2012 and CO No.58/Bang/2013 dated 13/9/2013) and *S.M.Anand vs. ACIT* (ITA No.1831/Bang/2013 dated 21/2/2014) wherein it was held that insertion of the second proviso to section 40(a)(ia) of the Act should be read retrospectively from 1/4/2005 and not prospectively from 1/4/2013. In this view of the matter, the provisions of section 40(a)(ia) of the Act is not attracted to the payments made by the assessee to Shri Uday Kumar Shetty amounting to Rs.1,53,78,795/- since the object of introduction of section 40(a)(ia) is achieved for the reason that the payee/recipient has accounted for, declared and offered for taxation the payments received from the assessee in his hands.

5.4.2 Earlier, we have held that the second proviso to section 40(a)(ia) of the Act is retrospective in operation w.e.f. 1/4/2005. As per this newly inserted proviso, the assessee is required to file Form No.26A as per rule 31ACB of the IT Rules,1962 so as not to be held as an assessee in default as per the proviso to section 201 of the Act. As held in the decision of the co-ordinate bench in the case of *S.M.Anand vs. ACIT* (supra), since the assessee in the period under consideration i.e. assessment year 2005-06, could not have contemplated that

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such a compliance was to be made, we also in the case on hand, remit the matter to the file of the Assessing Officer. The Assessing Officer is directed to consider the allowance or otherwise of the expenditure claimed amounting to Rs.1,53,78,795/- on account of payments to Shri Uday Kumar Shetty after affording the assessee adequate opportunity to file Form No.26A and verification of whether the said payee has reflected the payment/receipt in his books of account and offered the same to tax in the period under consideration. In these circumstances, we set aside the order of the Id.CIT(A) to the file of the Assessing Officer only for the limited purpose as directed above.

6. In the result, the assessee's appeal is treated as allowed for statistical purposes.

Pronounced in the open court on 10th October, 2014.

sd/-
(N.V.Vasudevan)
JUDICIAL MEMBER

eksrinivasulu

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

sd/-
(Jason P Boaz)
ACCOUNTANT MEMBER

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore