IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.667 OF 2018

Pr. Commissioner of Income Tax-28 … Appellant

V/s.

Crescent Construction Co. … Respondent

Mr.Akhileshwar Sharma for the Appellant.
Ms.Aasifa Khan for the Respondent.

CORAM : DHIRAJ SINGH THAKUR AND
ABHAY AHUJA, JJ.
DATE : JULY 29, 2022.

ORAL ORDER : (*Per Abhay Ahuja, J.*)

1. This is an appeal relating to assessment year 2005-06 filed by the revenue under section 260A of the Income Tax Act, 1961 ("the Act") seeking to challenge the order of the Tribunal dated 26th May, 2017 and proposing the following questions as substantial questions of law:-

> "a. Whether on the facts and circumstances of the case and in law, the Hon'ble Tribunal was correct in holding that the assessee disclosed true and correct facts in the return of income whereas the facts related to further disallowance u/s 40(a)(ia) of the Income Tax Act, 1961 was not available in the return of income and therefore, there was failure on the part of the assessee within the meaning of proviso to section 147 of the Income Tax Act, 1961?
>
> b. Whether on the facts and circumstances of the case and in law, the Hon'ble Tribunal was correct in holding that the disallowance u/s 40(a)(ia) of the Income Tax Act, 1961 cannot be made in assessment year under consideration i.e. A.Y. 2005-06 as the assessee paid TDS within the due date

prescribed u/s 139(1) of the Income Tax Act, 1961 without appreciating that the amendment to section 40(a)(ia) of the Income Tax Act, 1961 by Finance Act, 2010 w.e.f. 01.04.2010 was prospective and is not applicable for A.Y. 2005-06?

c. Whether on the facts and circumstances of the case and in law, the Hon'ble Tribunal was correct in not appreciating the fact that the assessee was granted relief of Rs.3,97,76,005/- u/s 40(a)(ia) of the Income Tax Act, 1961 in A.Y. 2006-07 based on the provision applicable for A.Y. 2005-06 and accordingly, an amount of Rs.3,97,76,005/- was required to be disallowed u/s 40(a)(ia) of the Income Tax Act, 1961 in A.Y. 2005-06?"

2. Earlier, before the Tribunal, the assessee as well as the revenue filed cross appeals against the order of the CIT (Appeals). The assessee challenged the reopening of the assessment whereas the revenue challenged the deletion of the disallowance/addition made under section 40(a)(ia) of the Act by the CIT (Appeals). The argument with respect to the reopening was that the reopening cannot be done beyond the period of four years. The Tribunal after considering the law on the subject with respect to the facts of this case and after considering the rival contentions observed that there is no justification in reopening the assessment beyond the period of four years. Tribunal accordingly allowed the appeal of the assessee holding that reopening of assessment was not valid beyond four years when the material facts were duly disclosed by the assessee and the tax deducted at source was deposited in the state exchequer before due date of filing of return. It appears that finding on this issue has not been challenged in this appeal. Coming to the issue relating to the section 40(a)(ia) raised by the

department in this appeal, the Tribunal considered the following question in appeal of the revenue which was raised as an additional ground by the department :-

> "On the facts and in the circumstances of the case and in law, the Ld. Commissioner of Income Tax (Appeal) is not justified as the assessee has been allowed relief of Rs.3,97,76,005/- in Assessment Year 2006-07 on account of disallowance made u/s 40(a)(ia) of the Act in Assessment Year 2005-06, resultantly the deduction has been allowed twice."

3. The Tribunal after considering the various submissions observed that since the amendment of section 40(a)(ia) is retrospective with effect from 1st April, 2005, payment of TDS can be deposited in the state exchequer on or before the last date of filing of return under section 139(1) of the Act for the relevant assessment year and such a deduction has to be allowed. The Tribunal relied upon the decision of the Calcutta High Court in the case of **Virgin Creations(order dated 23rd November, 2011 in ITA No.302 of 2011)** as well as the decision of the Bombay High Court in the case of **Commissioner of Income Tax, Vidarbha Vs. Smt. Godavaridevi Saraf Bombay**[1] as well as decision of the Delhi High Court in the case of **Commissioner of Income Tax Vs. Rajinder Kumar**[2] observing that no contrary facts were brought to their notice by the revenue establishing that the deduction under the said section had been granted twice to the assessee, and that a mere claim /allegation is not enough, but has to be substantiated with facts, the Tribunal upheld the decision of the CIT (appeals) and dismissed the appeal

1 113 ITR 589 Bombay
2 (2013) 90 DTR (Del) 297

of the revenue. The addition of Rs.5,30,91,745/- made by the Assessing Officer under section 40(a)(ia) of the Act was legitimate in view of the amendment to section 40(a)(ia) and its first proviso by the Finance Act, 2010 with effect from 1st April, 2010.

4. Now therefore do the questions as proposed raise any substantial question(s) of law.

5. A brief background would be useful. The assessee had made payment on account of sub-contracting, expenses, transporters, machine hiring charges etc.. Out of the payments to sub-contractors, the Assessing Officer found that tax deducted at source (TDS) was deposited beyond due dates prescribed under chapter XVII-B but before the due date of furnishing of return of income. The Assessing Officer disallowed a total of Rs.5,30,91,742/- on various accounts under section 40(a)(ia) of the Act. The disallowance was stated to be in view of the decision of the Tribunal in the case of **Bharati Vs. Deputy CIT**[1].

6. When the matter came up before the CIT(A), the CIT(A), observing that there was no dispute that the assessee had incurred certain expenses on which it shall liable to deduct TDS and there being no dispute that the said amount was deposited within the due date of filing of the return of income, held that no disallowance could be made for delayed deposit of tax

1 142 ITD 53

at source for the previous year in which tax was deducted. Since as per the amended section 40(a)(ia) where tax deducted at source at any point of time during the previous year is deposited by the deductor on or before the due date of filing return of income under Section 139(1) of the Act,

7. The relevant portion of section 40(a)(ia) alongwith the first proviso quoted as under :-

> "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--
> (ia) Thirty percent of any sum payable to a resident on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction has not been paid on or before the due date specified in sub-section (1) of section 139:
> Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, thirty percent of such sum sh all be allowed as a deduction in computing the income of the previous year in which such tax has been paid:
> The above provision has been substituted by the Finance Act, 2010 w.r.e.f. 1-4-2010. Prior to its substitution, proviso , as substituted by the Finance Act, 2008, w.e.f. 1-4-2005, read as under:
> 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."

8. The proviso was originally inserted by Finance Act, 2008 with retrospective effect from April 1, 2005. The proviso was again amended by Finance Act, 2010 with effect from April 1, 2010. A bare perusal of the aforesaid proviso clearly indicates that the amendment is retrospective in nature which means that if the TDS has been deposited prior to filing of the return then there shall be no disallowance. The Supreme Court in the case of **Commissioner of Income Tax Vs. Calcutta Export Company**[1] has clearly observed that the amended provision of section 40(a)(ia) should be interpreted liberally and equitably and applied retrospectively from the date when section 40(a)(ia) with effect from assessment year 2005-06 so that an assessee should not suffer unintended and deleterious consequences beyond the object and purpose of the provision mandates. The Apex Court observed that as the developments with regard to the section show that the amendment was curative in nature, it should be given retrospective operation as if the amended provision existed even at the time of its insertion. In the facts of that case, it was held that since the assessee filed its return on 1st August, 2005 i.e. in accordance with the due date under the provisions of section 139, the claim of the benefit of the amendment made by Finance Act, 2010 to the provisions of section 40(a)(ia) was allowed. The following paragraphs of the decision of the Apex Court are relevant and are quoted as under :-

> "18) With a view to mitigate this hardship, Section 40(a)(ia) was amended by the Finance Act, 2008 and the provision so amended read as under:-

1 (2018) 302 CTR (SC)201

"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 "profit and gains of business or profession (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 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."

19) The above amendments made by the Finance Act, 2008 thus provided that no disallowance under Section 40 (a) (ia) of the IT Act shall be made in respect of the expenditure incurred in the month of March if the tax deducted at source on such expenditure has been paid before the due date of filing of the return. It is important to mention here that the amendment was given retrospective operation from the date of 01.04.2005 i.e., from the very date of substitution of the provision.

20) Therefore, the assesses were, after the said amendment in 2008, classified in two categories namely; one; those who have deducted that tax during the last month of the previous year and two; those who have deducted the tax in the remaining eleven months of the previous year. It was provided that in case of assessees falling under the first category, no disallowance under Section 40(a) (ia) of the IT Act shall be made if the tax deducted by them during the last month of the previous year has been paid on or before the last day of filing of return in accordance with the provisions of Section 139(1) of the IT Act for the said previous year. In case, the assessees are falling under the second category, no disallowance under Section 40(a)(ia) of IT Act where the tax was deducted before the last month of the previous year and the same was

credited to the government before the expiry of the previous year. The net effect is that the assessee could not claim deduction for the TDS amount in the previous year in which the tax was deducted and the benefit of such deductions can be claimed in the next year only.

21) The amendment though has addressed the concerns of the assesses falling in the first category but with regard to the case falling in the second category, it was still resulting into unintended consequences and causing grave and genuine hardships to the assesses who had substantially complied with the relevant TDS provisions by deducting the tax at source and by paying the same to the credit of the Government before the due date of filing of their returns under Section 139(1) of the IT Act. The disability to claim deductions on account of such lately credited sum of TDS in assessment of the previous year in which it was deducted, was detrimental to the small traders who may not be in a position to bear the burden of such disallowance in the present Assessment Year.

22) In order to remedy this position and to remove hardships which were being caused to the assessees belonging to such second category, amendments have been made in the provisions of Section 40(a) (ia) by the Finance Act, 2010.

23) Section 40(a)(ia), as amended by Finance Act, 2010, with effect from 01.04.2010 and now reads as under:

“4(a)(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, has not paid on or before the due date specified in sub-section (1) of Section 139:

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deducted in computing the income of the previous year in which such tax has been paid.”

24) Thus, the Finance Act, 2010 further relaxed the rigors of Section 40(a)(ia) of the IT Act to provide that all TDS made during the previous year can be deposited with the Government by the due date of filing the return of income. The idea was to allow additional time to the deductors to deposit the TDS so made. However, the Memorandum explaining the provisions of the Finance Bill, 2010 expressly mentioned as follows: “This amendment is proposed to take effect retrospectively from 1st April, 2010 and will, accordingly, apply in relation to the Assessment

Year 2010-11 and subsequent years."

25) The controversy surrounding the above amendment was whether the amendment being curative in nature should be applied retrospectively i.e., from the date of insertion of the provisions of Section 40(a)(ia) or to be applicable from the date of enforcement.

26) TDS results in collection of tax and the deductor discharges dual responsibility of collection of tax and its deposition to the government. Strict compliance of Section 40(a)(ia) may be justified keeping in view the legislative object and purpose behind the provision but a provision of such nature, the purpose of which is to ensure tax compliance and not to punish the tax payer, should not be allowed to be converted into an iron rod provision which metes out stern punishment and results in malevolent results, disproportionate to the offending act and aim of the legislation. Legislature can and do experiment and intervene from time to time when they feel and notice that the existing provision is causing and creating unintended and excessive hardships to citizens and subject or have resulted in great inconvenience and uncomfortable results. Obedience to law is mandatory and has to be enforced but the magnitude of punishment must not be disproportionate by what is required and necessary. The consequences and the injury caused, if disproportionate do and can result in amendments which have the effect of streamlining and correcting anomalies. As discussed above, the amendments made in 2008 and 2010 were steps in the said direction only. Legislative purpose and the object of the said amendments were to ensure payment and deposit of TDS with the Government.

27) A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the Section, is required to be read into the Section to give the Section a reasonable interpretation and requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the Section as a whole.

28) The purpose of the amendment made by the Finance Act, 2010 is to solve the anomalies that the insertion of section 40(a)(ia) was causing to the bonafide tax payer. The amendment, even if not given operation retrospectively, may not materially be of consequence to the Revenue when the tax rates are stable and uniform or in cases of big assessees having substantial turnover and equally huge expenses and necessary cushion to absorb the effect. However, marginal and medium taxpayers, who work at low gross product rate and when expenditure which becomes subject matter of an order under Section 40(a)(ia) is substantial, can suffer severe adverse consequences if the amendment made in 2010 is not given retrospective operation i.e., from the date of substitution of the provision. Transferring or shifting expenses to a subsequent year, in such cases, will not wipe off the adverse effect and

> the financial stress. Such could not be the intention of the legislature. Hence, the amendment made by the Finance Act, 2010 being curative in nature required to be given retrospective operation i.e., from the date of insertion of the said provision."

9. In view of the above decision of the Apex Court, it would not be necessary for us to deal with the other decisions cited by the Tribunal.

10. We observe that in the case at hand there are concurrent findings of fact of the CIT(A) and the Tribunal that the subject TDS in the present case was deposited in the state exchequer before the due date of filing of return which is not disputed by the revenue. Also no material or facts have been brought before us even to suggest that the deduction has been granted twice to the assessee. Therefore, there cannot be any disallowance on this count. The Assessing Officer could not have made a disallowance of Rs.5,30,91,745/- under section 40(a)(ia) of the Act in view of the retrospective nature of the proviso to the said section. We do not find any error apparent or perversity in the order of the Tribunal in confirming the order of the CIT (A) holding that no disallowance is called for under section 40(a)(ia) of the Act.

11. In the circumstances, the appeal does not raise any substantial questions of law. Appeal therefore stands dismissed. No costs.

(ABHAY AHUJA, J.) **(DHIRAJ SINGH THAKUR, J.)**