IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 17TH DAY OF MARCH 2016

PRESENT

THE HON'BLE MR.JUSTICE JAYANT PATEL

AND

THE HON'BLE MRS.JUSTICE B.V.NAGARATHNA

ITA No.660/2015

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX
C.R.BUILDING,
ATTAVARA,
MANGALORE-575 001

2. THE INCOME-TAX OFFICER
WARD-1(2)
C.R.BUILDING,
ATAVARA,
MANGALORE-575 001 ...APPELLANTS

(BY SRI.K.V.ARAVIND, ADVOCATE)

AND:

KISHORE RAO & OTHERS (HUF)
14-2-112/4, CANARA MOTORS,
ARVIND BUILDING, BALMATTA ROAD,
BANGALORE-560 016
PAN:AAEHK 25551A ...RESPONDENT

THIS ITA IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED:24/07/2015 PASSED IN ITA NO.1737/BANG/2013, FOR THE ASSESSMENT YEAR 2010-2011 PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED ABOVE AND ALLOW THE APPEAL AND SET ASIDE THE ORDERS PASSED BY THE ITAT, BENGALURU IN ITA NO. 1737/BANG/2013 DATED:24/07/2015 AND CONFIRM THE ORDER OF THE APPELLATE COMMISSIONER CONFIRMING THE ORDER PASSED BY THE INCOME TAX OFFICER, WARD-1(2), MANGALORE.

THIS APPEAL COMING ON FOR ADMISSION THIS DAY, ***JAYANT PATEL J.***, DELIVERED THE FOLLOWING:

JUDGMENT

Revenue has preferred the present appeal by raising the following substantial questions of law:

> "Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that disallowance of expenditure claimed by the assessee towards payments amounting to Rs.3,42,86,912/- under Section 40(a)(ia) of the Act is not proper by relying upon the decision which is

not applicable to facts of the present case and when the ingredients of Section 194H and 40(a) (ia) are satisfied in the instant case?

2, We have heard Mr.Arvind, learned counsel appearing for appellant-Revenue.

3. The relevant discussion in the impugned order of the Tribunal on the aforesaid aspect is at paragraphs 5.3 to 5.3.3 which read as under:

> *"5.3.1 We have heard the rival contentions on the ground at S.No.5 and perused and carefully considered the material on record; including the judicial pronouncements cited and placed reliance upon. It is not in dispute that the assessee had made short deduction of tax at source @ 1% instead of 2% on certain payments and failed to remit the said TDS within the due date of filing the return of income for Assessment Year 2010-11 under Section 139(1) of the Act. On examination by the Assessing Officer, the assessee explained that subsequently, on realisation that TDs on the said payments were to be made @ 2% thereon, instead of 1% as had been done by the assessee, the balance TDS was paid on 31.1.2011 along with interest under Section*

201(1A) of the Act. The Assessing Officer, on examination of the assessee's claim, was of the view that deduction of tax at a lower rate cannot be taken as TDS made in accordance with the provisions of Chapter XVII-B and, following the decisions of the Chennai ITAT in the case of Frontier Offshore Exploration (I) Ltd. (supra) and Pixie Enterprises (supra), held that even in case of short deduction, the liability to deduct tax exists as on the date of filing the return of income and therefore those amounts which have not suffered TDS was liable to disallowance under Section 40(a)(ia) of the Act. On appeal, the learned CIT (Appeals) upheld the decision of the Assessing Officer.

5.3.2 According to the learned Authorised Representative if, as in the case on hand, there is any shortfall in deduction of tax at source due to any difference in understanding or opinion as to the taxability of any payment or the nature of payments made under TDS provisions, no disallowance can be made by invoking the provisions of Section 40(a)(ia) of the Act. We have had occasion to peruse the decision of the Hon'ble High Court of Calcutta in the case of S.K. Tekriwal (supra), wherein their Lordships had considered the very same issue of the applicability of the provisions of Section 40(a)(ia) of the Act in a case where there was short deduction of tax at source on payments made to sub-contractors and find that the facts of that case are similar to those of the case on hand. In the cited case, the

Hon'ble Calcutta High Court has held that if there is any shortfall in deduction of tax due to difference in opinion or understanding as to the taxability of any item or nature of payments falling under various TDS provisions, no disallowance can be made by invoking the provisions of Section 40(a)(ia) of the Act. We are of the considered view that the cited case would cover the issue squarely in favour of the assessee and against Revenue. At paras 2 and 3 of its order, the Hon'ble High Court of Calcutta has held as under :-

"2. The reasoning appearing at paragraph 6 of the judgment and/or order under challenge reads as follows:

"In the present case before us the assessee has deducted tax under Section 194C(2) of the Act being payments made to sub-contractors and it is not a case of non-deduction of tax or no deduction of tax as is the import of section 40a(ia) of the Act. But the revenue's contention is that the payments are in the nature of machinery hire charges falling under the head 'rent' and the previous provisions of section 194I of the Act are applicable. According to revenue, the assessee has deducted tax @ 1% 2 under Section 194C(2) of the Act as against the actual deduction to be made at 10% under Section 194I of the Act, thereby lesser deduction of tax. The revenue has made out a case of lesser deduction of tax and that also

under different head and accordingly disallowed the payments proportionately by invoking the provisions of section 40(a)(ia) of the Act. The ld. CIT, DR also argued that there is no word like failure used in section 40(a)(ia) of the Act and it referred to only non-deduction of tax and disallowance of such payments. According to him, it does not refer to genuineness of the payment or otherwise but addition under section 40(a)(ia) of the Act can be made even though payments are genuine but tax is not deducted as required under section 40(a)(ia) of the Act. We are of the view that the conditions laid down under section 40(a)(ia) of the Act for making addition is that tax is deductible at source and such tax has not been deducted. If both the conditions are satisfied then such payment can be disallowed under section 40(a)(ia) of the Act but where tax is deducted by the assessee, even under bonafide wrong impression, under wrong provisions of TDS, the provisions of section 40(a)(ia) of the Act cannot be invoked.

Here in the present case before us, the assessee has deducted tax under Section 194C(2) of the Act and not under Section 194I of the Act and there is no allegation that this TDS is not deposited with the Government account. We are of the view that the provisions of section 40(a)(ia) of the Act has two limbs one is where, inter alia, assessee has to deduct tax and the second where after deducting tax, inter alia, the assessee has to pay into Govt. Account. There is nothing in the

said section to treat, inter alia, the assessee as defaulter where there is a shortfall in deduction. With regard to the shortfall, it cannot be assumed that there is a default as the deduction is not as required by or under the Act, but the facts is that this expression, 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 3(1) of section 139. This section 40(a)(ia) of the Act refers only to the duty to deduct tax and pay to government account. If there is any shortfall due to any difference of opinion as to the taxability of any item or the nature of payments falling under various TDS provisions, the assessee can be declared to be an assessee in default under Section 201 of the Act and no disallowance can be made by invoking the provisions of section 40(a)(ia) of the Act.

Accordingly, we confirm the order of CIT (Appeals) allowing the claim of assessee and this issue of revenue's appeal is dismissed."

3. We find no substantial question of law is involved in this case and therefore, we refuse to admit the appeal. Accordingly, the appeal is dismissed."

5.3.3 Respectfully following the decision of the Hon'ble High Court of Calcutta in the case of S.K. Tekriwal (supra), which is factually similar to the case on hand, we hold that no disallowance can be made by invoking the provisions of Section 40(a)(ia) of the Act if

there was any shortfall in deduction of tax at source due to any difference of understanding or opinion as to the taxability of any item or the nature of payments falling under various TDS provisions and therefore reverse the findings of the authorities below and allow the assessee's appeal in respect of Ground No.5."

The aforesaid shows that the Tribunal has gone by the decision taken by the High Court of Calcutta and has found that it was not a case of no deduction of TDS whatsoever and therefore, the provisions of Section 40(a) and (ia) of the Act cannot be attracted and resultantly the assessee's appeal has been allowed.

4. However, Mr.Aravind, learned counsel appearing for appellant contended that the decision of Calcutta High Court in case of ***Commissioner of IT vs. S.K.Tekriwal*** reported in (2014) 361 ITR 432(Cal.) is wrongly applied by the Tribunal. The facts of the case in the decision of Calcutta High Court were altogether different. He submitted that, in the said case, the TDS

was deducted at a lesser percentage but the payment was credited in the Revenue in time whereas, in the present case, the TDS was deducted at a lesser rate but no payment was credited with the revenue in time.

5. He submitted that, as per Scheme of Sec.40(a)(ia) of the Act read with proviso, if no deduction is made, the amount is disallowable as revenue expenditure and if TDS is made succeeding year, it would be admissible in that year and not the year in which the claim has been made. In his submission, the decision of Calcutta High Court in case of S.K.Tekriwal has not laid down that, if the deduction is at a lesser percentage than required, then expenses cannot be disallowed. In his submission, the Tribunal has committed an error and hence this Court may consider the matter.

6. In our view, as per the decision of the Calcutta High Court, the view taken by the Tribunal is that Section 40(a)(ia) of the Act may be invoked only in case of there being an absence of deduction. Further, in case of *bona fide* wrong impression, if the deduction is at a lesser rate, the same cannot be a ground for disallowance by invoking the provisions of Section 40(a)(ia).

7. Examining the matter, we find that there are two angles to the matter: The first is, whether it was a case of `no deduction' or not in the present case. The answer would be in the negative because, the deduction was already made at the rate of 1%. The second angle would be as to whether it was under a *bona fide* wrong impression that only 1% was deducted instead of 2%. The contention of the assessee was that, having realized that deduction was 2% instead of 1%, the amount of

TDS has been paid with interest. It is also a matter of fact that, two separate rate of deductions have been provided for the same work of contractor, one is at the rate of 1% if the contractor is individual or HUF, whereas, it is 2% if the contractor is other than individual or HUF. The Tribunal, in view of facts and circumstances, found that, it is a *bona fide* wrong impression.

8. As such, on the aspects of the *bona fide* wrong impression keeping in view the contention of the assessee that in the middle of year, there is change of law about the deduction, as well as on the non-availability of the provisions of Section 40(a)(ia), when the issue is covered by the Calcutta High Court Judgment in case of S.K.Tekriwal supra, we do not find that any substantial question of law would arise for consideration as sought to be canvassed.

Hence, the appeal is dismissed.

Sd/-
JUDGE

Sd/-
JUDGE

Sk/-