

आयकर अपीलीय अधिकरण, कटक न्यायपीठ, कटक

IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK
श्री सी.एम.गर्ग, न्यायिक सदस्य एवं श्री एल.पी.साहु, लेखा सदस्य के समक्ष

BEFORE SHRI C.M. GARG, JM & SHRI L.P. SAHU, AM

आयकर अपील सं./ITA No.376/CTK/2016

(निर्धारण वर्ष / Assessment Year : 2011 - 2012)

Kendrapara Urban Co-operative Bank Limited, College Square, Tinimuhani, Kendrapara-754211	Vs.	ACIT, Circle-1(2), Cuttack
स्थायी लेखा सं./PAN No. : AAATK 8347 E		

(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
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निर्धारिती की ओर से /Assessee by	:	Shri P.C.Sethi, Advocate
राजस्व की ओर से /Revenue by	:	Shri J.K.Lenka, DR

सुनवाई की तारीख / Date of Hearing	:	21/02/2020
घोषणा की तारीख/Date of Pronouncement	:	16/03/2020

आदेश / ORDER

Per L.P.Sahu, AM:

This is an appeal filed by the assessee against order of CIT(A), Cuttack, dated 27.03.2015 for the assessment year 2011-2012 on the following grounds :-

1. *That, the learned Commissioner of Income-tax (Appeals), Cuttack [Hereinafter referred as "the learned CIT (A)"] has committed serious error in not quashing the assessment order passed by the learned Assessing Officer which is per se illegal, unjust, without jurisdiction, arbitrary and contrary to the provisions of the Act and has been passed on gross violation to the principles of natural justice.*
2. *That, the learned CIT (A) has committed serious error in not quashing the assessment order which has been passed on the basis of illegal notice u/s 143(2) of the Income-tax Act, 1961 (hereinafter referred as "the Act").*
3. *That, the learned CIT (A) has committed serious error in not deleting the addition made by the learned Assessing Officer of Rs.1,16,05,262/- u/s 36(1)(vii)(a) of the Act.*

4. *That, the learned CIT(A) has committed serious error in disallowing of amount of Rs.2,37,600/- u/s 40(a)(ia) of the Act.*
5. *That, the appellant may add, alter, delete or modify any of the grounds at the time of hearing of the matter with the leave of the Hon'ble ITAT.*

2. At the outset, ld. AR did not press the ground Nos.1 to 3, therefore, we dismiss the ground Nos.1 to 3 as not pressed.

3. Now, the only ground remained as ground No.4 which relates to disallowance u/s.40(a)(ia) of the Act.

4. Ld. AR relied on the order of this Bench of the Tribunal in the case of Om Sri Nilamadhab Builders Pvt. Ltd., ITA No.296/CTK/2018, order dated 26.11.2019 and submitted that the Tribunal has restricted the disallowance to 30% as against 100% made by the AO and confirmed by the CIT(A), therefore, the ld. AR submitted that the disallowance made by the AO u/s.40(a)(ia) of the Act deserves to be reduced to 30%.

5. On the other hand, ld. DR relied on the orders of authorities below.

6. After hearing both the sides and perusing the entire material available on record, we find that the issue involved in the present appeal has already been decided by the coordinate bench of the Tribunal in the case of Om Sri Nilamadhab Builders Pvt. Ltd.(supra), wherein it is held that if a statute is curative of the previous law,

retrospective operation is generally intended. The observations of the Tribunal in this regard are reproduced hereunder :-

7. *After considering the rival submissions of both the parties and carefully perusing the entire material available on record as well as the case laws cited by the Id. AR of the assessee, we find that the assessee has actually claimed expenses of Rs.35,46,286/- in the profit and loss account as against the addition made by the AO of Rs.39,62,695/-, which has been accepted by the CIT(A) at para 3.2 of the appellate order. On perusal of both assessment and appellate order, it is vivid that the total addition made by the AO includes Rs.4,16,409/- which was not claimed by the assessee as expenditure in its profit and loss account. Therefore, in our considered opinion, the disallowance of Rs.35,46,286/- upheld by the CIT(A) is to be held as 100% disallowance, which has been claimed by the assessee as expenditure in its profit and loss account. However, as per the amendment brought to the Finance Act, 2014 in Section 40(a)(ia) of the Act w.e.f. 01.04.2015, if 100% disallowance made u/s.40(a)(ia) of the Act, that would be restricted to 30% only. Now, the moot question arises before us as to whether the said amendment is having the retrospective effect or not. Ld. AR before us submitted that the above proviso inserted in the Act to be a curative one having retrospective effect and the assessee is entitled the benefit of 30% disallowance as against 100% disallowance made by the AO and confirmed by the CIT(A). In this regard, he placed reliance on the decision rendered by the Gauhati Bench of the Tribunal in case of Tripura State Electricity Corporation Ltd. (supra), wherein it is held as under :-*

"6. Mr. Goenka vehemently submits during the course of hearing that both the lower authorities have erred in disallowing assessee's impugned expenditure claim(s) on account of non-deduction of TDS. His case is that the assessee had not availed any technical services from its payees. The fact remains that this taxpayer has not tendered any details of the actual nature of expenditure. We therefore find no reason to disagree with the lower authorities' conclusion quoting assessee's failure in filing the relevant details. Coupled with this, the fact also remains that the legislature has itself amended Section 40(a)(ia) vide the Finance Act, 2014 w.e.f. 01.04.2015 restricting a disallowance made u/s 40(a)(ia) from 100% to 30% only. This tribunal's order in ITA No. 767/Kol/2016 Dipak Parui vs. JCIT decided on 20.07.2018 holds the above proviso inserted in the Act to be a curative one having retrospective effect. We therefore, direct the Assessing Officer to restrict the impugned disallowance to the extent of 30% only. Necessary computation to follow. This first substantive ground is taken as partly accepted in foregoing terms."

Similarly, the Kolkata Bench of the Tribunal in the case of Dipak Parui (supra), wherein it has been held that the amendment w.e.f.

01.04.2015 to be retrospective effect being curative nature and observed as under:-

"5. Latter issue before us is that of correctness of section 40 (a)(ia) disallowance of Rs.1,79,800/- out of assessee's total claim of Rs.,3,05,364/-. His only argument before us is that section 40(a)(ia) as amended by Finance Act 2014 w.e.f. 01.04.2015 prescribing such disallowance to be restricted to 30% only than the entire amount of Rs.1,79,800/-; applies with retrospective effect. Learned Departmental Representative vehemently opposes this legal plea. He pleads that the said proviso does not carry any retrospective effect. We find no force in Revenue's instant arguments as a coordinate bench of this tribunal in Shri Rajendra Yadav in ITA No.895/JP/2012 decided on 29.01.2016 already concludes the above amendment w.e.f. 01.04.2015 to be retrospective effect being curative in nature. We therefore direct the Assessing Officer to restrict the impugned disallowance to 30% only to be followed by necessary ITA No.767/Kol/2016 Dipak Parui A.Y.2011-12 3 computation as per law. This latter substantive ground is treated as partly accepted in above terms."

Further, the Delhi Bench of the Tribunal in the case of Smt. Kanta Yadav (supra) while considering the similar issue has held as under :-

"6. We have considered rival submissions and find that issue is covered in favour of the assessee by order of ITAT Jaipur Bench in the case of Shri Rajendra Yadav vs. ITO and Smt. Sonu Khandelwal vs. ITO. In these orders it was held that the disallowance u/s 40(a)(ia) to be restricted to 30% of the addition. In these orders the Tribunal has considered the amended provisions of section 40(a)(ia) of I.T. Act. In these orders the assessment year's involve was 2007-08 and 2008-09. In ITA No. 6312/Del/2016 Smt. Kanta Yadav vs. ITO the present appeal the assessment year is 2012-13. Therefore facts are identical. In this view of the matter and following the above decisions of Jaipur Bench, we set aside and modify the orders of the authorities below and direct the Assessing Officer to restrict the addition to 30% of the total addition made on account of deduction of TDS u/s 40(a)(ia) of the Act."

8. From the above observations of the different benches of the Tribunal, we find that the 100% disallowance made u/s.40(a)(ia) of the Act has been directed to be restricted to the extent of 30% only giving retrospective effect. Ld. DR before us submitted that there is no mention in the amendment that the same shall be applied retrospectively, however, in our considered opinion, if a statute is curative of the previous law, retrospective operation is generally intended. The Hon'ble Supreme Court in the case of CIT vs. Calcutta Export Company, [2018] 93 taxmann.com 51 (SC), while deciding the issue as to whether amendment made by Finance Act, 2010, to provisions of section 40(a)(ia) is curative in nature and it should be given retrospective operation from date of insertion of said provision i.e. with effect from assessment year 2005-06, has held as under :-

"The purpose for bringing said amendment is to ensure tax compliance. The fact that the intention of the legislature was not to punish the assessee is further reflected from a bare reading of the provisions of section 40(a)(ia). It only results in shifting of the year in which the expenditure can be claimed as deduction. In a case where the tax deducted at source was duly deposited with the Government within the prescribed time, the said amount can be claimed as a deduction from the income in the previous year in which the TDS was deducted. However, when the amount deducted in the form of TDS was deposited with the Government after the expiry of period allowed for such deposit then the deductions can be claimed for such deposited TDS amount only in the previous year in which such payment was made to the government. [Para 16]"

9. On careful perusal of the amendment brought to the Section 40(a)(ia) of the Act by the Finance Act, 2014 w.e.f. 01.04.2015, it is clear that the intent of legislature to reduce the hardship, it is proposed that in case of non-deduction or non-payment of TDS on payments made to residents as specified in section 40(a)(ia) of the Act, the disallowance shall be restricted to 30% of the amount of expenditure claimed. The Hon'ble Supreme Court in the case of *Allied Motors (P) Ltd.* [1997] 224 ITR 677 (SC) has held that amendment was remedial in nature, designed to eliminate unintended consequences which may cause undue hardship to the assessee and which made the provision unworkable or unjust in a specific situation. Finally, after considering various case laws, the Hon'ble Supreme Court held that the purpose of amendment would not serve its object in such a situation unless, it is construed as retrospective after observing as under :-

10. Therefore, in the well-known words of Judge Learned Hand, one cannot make a fortress out of the dictionary; and should remember that statutes have some purpose and object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning. In the case of *R.B. Jodha Mal Kuthiala v. CIT* [1971] 82 ITR 570, this Court said that one should apply the rule of reasonable interpretation. 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 and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole.

11. This view has been accepted by a number of High Courts. In the case of *CIT v. Chandulal Venichand* [1994] 209 ITR 7/ 73 Taxman 349, the Gujarat High Court has held that the first proviso to section 43B is retrospective and sales-tax for the last quarter paid before the filing of the return for the assessment year is deductible. This decision deals with the assessment year 1984-85. The Calcutta High Court in the case of *CIT v. Sri Jagannath Steel Corpn.* [1991] 191 ITR 676, has taken a similar view holding that the statutory liability for sales-tax actually discharged after the expiry of the accounting year in compliance with the relevant statute is entitled to deduction under section 43B. The

High Court has held the amendment to be clarificatory and, therefore, retrospective. The Gujarat High Court in the above case held the amendment to be curative and explanatory and hence retrospective. The Patna High Court has also held the amendment inserting the first proviso to be explanatory in the case of Jamshedpur Motor Accessories Stores v. Union of India [1991] 189 ITR 70/ 54 Taxman 521. It has held the amendment inserting first proviso to be retrospective. The special leave petition from this decision of the Patna High Court was dismissed. The view of the Delhi High Court, therefore, that the first proviso to section 43B will be available only prospectively does not appear to be correct. As observed by G.P. Singh in his Principles of Statutory Interpretation, Fourth edn., page 291, "It is well-settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended". In fact the amendment would not serve its object in such a situation unless it is construed as retrospective. The view, therefore, taken by the Delhi High Court cannot be sustained.

10. *Respectfully following the above decisions of the Tribunal as well as Hon'ble Supreme Court, we direct the AO to restrict the 100% disallowance confirmed by the CIT(A) to the extent of 30% only taking into account the actual claim of the assessee in its profit and loss account. We order accordingly. Thus, the sole ground of appeal of the assessee is partly allowed.*

7. Respectfully following the above decision of the Tribunal, we direct the AO to restrict the disallowance to 30% made u/s.40(a)(ia) of the Act. Accordingly, we partly allow the ground No.4 of the assessee.

8. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 16/03/2020.

Sd/-
(C.M.GARG)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(L.P.SAHU)

लेखा सदस्य / ACCOUNTANT MEMBER

कटक Cuttack; दिनांक Dated 16/03/2020

Prakash Kumar Mishra, Sr.P.S.

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

1. अपीलार्थी / The Appellant-
Kendrapara Urban Co-operative Bank
Limited, College Square, Tinimuhani,
Kendrapara-754211
2. प्रत्यर्थी / The Respondent-
ACIT, Circle-1(2), Cuttack
3. आयकर आयुक्त(अपील) / The CIT(A),

4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कटक / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(Senior Private Secretary)

आयकर अपीलीय अधिकरण, कटक / ITAT, Cuttack