

आयकर अपीलीय अधीकरण, न्यायपीठ – “ए” कोलकाता,
**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “A” KOLKATA**

Before **Shri S.S.Godara, Judicial Member** and
Dr. A.L. Saini, Accountant Member

ITA No.665/Kol/2018
Assessment Year :2009-10

M/s A.K. Industries 6/9 Nabin Banerjee Lane, Howrah-711104 [PAN No.AAKFA 2281 R]	V/s.	ACIT, Circle-46, 3, Government Place (West), Kolkata-700 001
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर स/By Appellant	None
प्रत्यर्थी की ओर स/By Respondent	Shri Dhruvajyoti Ray, JCIT-DR
सुनवाई की तारीख/Date of Hearing	28-01-2020
घोषणा की तारीख/Date of Pronouncement	19-02-2020

आदेश /ORDER

PER S.S.Godara, Judicial Member:-

This assessee's appeal for assessment year 2009-10 arises against the Commissioner of Income Tax-14, Kolkata's order dated 28.02.2018 passed in case No.294/CIT(A)-14/Cir-46/2015-16, involving proceedings u/s 147 r.w.s 143(3) of the Income Tax Act, 1961; in short 'the Act'.

Case called twice. None appears at the assessee's behest. It is accordingly proceeded *ex parte*. The case is now taken up for adjudication on merits.

2. Coming to merits, we notice that both the lower authorities' have invoked sec.40(a)(ia) disallowance of 1,19,95,048/- on account of non-

deduction of TDS u/s. 194C of the Act on various head(s) of payments. The CIT(A)'s detailed discussion to this effect reads as follows:-

"4. लिखित प्रबिद्धि / Written submission

The A/R of the appellant submitted written submission, to substantiate its claim, which is re-produced as under:

"We write the above references, wherein the A. O. has instructed us to make payment of the demand of Rs.54,26,960/- (Rupees Fifty Four Lakhs Twenty Six Thousand Nine Hundred Sixty) only which has been raised pursuant to the assessment order dt.22.02.2016, purportedly passed u/s. 154/143(3) R. W 147 of u/s the Income Tax Act 1961.

In this connection, the following submission preferred:

A. The impugned demand has been raised to the act of applying provision of Section 40(a)(ia) read with Section 194C of the I. T. Act 1961. Based on such allegation the A.O. have taxed to the tune of Rs.54,26,960/- and also levied interest u/s 234B & 234C respectively.

B. Against such allegation we have already preferred an appeal before your goodself on and validity and legality of the amount framed u/s 143(3)/154/r.w147 has also challenged. A copy of the acknowledgement is enclosed.

C. Further, a Stay Petition has also been filed before the A.O. requesting to keep the impugned demand in abeyance till the appeal preferred before your honour be disposed off and not to treat the assessee to be at fault in not spaying the impugned demand.

D. Without prejudice to the aforesaid contentions the following further submission preferred before your kindself.

1. It may be pertinent to note that, the Income for all the assessment years have been assessed at a more than two (2) times - than the returned Income.

In this connection your kindself's attention is drawn to the instruction of the Central Board of Direct Taxes, which is binding on' all the authorities of Income Tax Department, including your kindself.

The Central Board of Direct Taxes, vide Notification No. 96 [F.No.1/6/69- ITCC] dated 21/08/69 - has rendered the following instructions - "Where the income determined on assessment was substantially higher than the returned income, say twice or more than the returned amount The collection of the tax in dispute should be held in abeyance till the decision on the appeals provided there were no lapse on the part of the assessee".

As stated above, we have been assessed at much more than twice that of the income returned, in the assessment years, against which we have preferred an appeal before the learned CIT (A) and following the aforesaid instructions of the CBDL which is "binding" on you and all the officers working under the, Board, it is requested to keep the collection of demand in abeyance, till the matters are being disposed off, by the learned CIT(A).

2. Reliance may kindly be placed on the following judicial pronouncements -

A. The decision of the Gujarat High Court rendered in the case of Sakarpatlal Vibhag JKSM Ltd. Vs ITO &Ors, reported in 198 ITR 685 (Gui). While delivering the judgment in the case, the Hon'ble Court has held that - 'before rejecting the application of imposing conditions, the AC should consider all relevant aspects-

without such, the order of the AO and CIT, rejecting the assessee's stay petition was set aside.

B. The question which came up for consideration before the Hon'ble High Court. in the case of *Ganjana Agencies Vs. ITO & Ors.* Reported in 210 ITR 865 (Ker) was whether the ITO was justified in directing the assessee to make payment to the tax demanded in the instalments. The Hon'ble High Court at Kerala has held that the AO as not justified as grant of.

Instilments is only another mode of recovery and not an order u/s. 220 £6). Accordingly, the AC was directed to stay the recovery of the remand. till the disposal of the appeal.

Following the aforesaid decision of the Hon'ble High Court at Kerala (supra) it is requested before your kindself to kindly keep the recovery of the impugned demand in abeyance, till the learned CIT (A) disposes off the appeals.

C. The Hon'ble High Court at Delhi while rendering the judgment in the case of *Maruti Udvog Ltd. Vs .Adl. CIT.* reported in 264 ITR 487 (Del)has held that the AC has not acted in a reasonable way by directing the assessee to deposit certain amount as a precondition of staving the recovery of demand, pending the disposal of the first appeal by the learned CIT(A). The AC was directed by the Hon'ble High Court at Delhi, not to take any coercive steps for recovery till the CIT(A) decided the assessee's case.

3. Reliance may kindly be placed on the following judicial pronouncements, including that of the jurisdictional High Court at Calcutta, which is binding on your kindself:

A. The jurisdictional High Court at Calcutta, while rendering the judgment In the case of *Debashis Moulik Vs. DCIT*, reported in 231 ITR 737 (Cal) has held that - "the ITO has no jurisdiction u/s. 220 (6) to grant stay for a -limited period and not till 'the appeal remains undisposed off'".

It is submitted that the aforesaid decision of the jurisdictional High Court at Calcutta is squarely covered in the case of the assessee.

B. The jurisdictional High Court at Calcutta, while deciding the case of *Dunlop India Ltd. Vs. ACIT & Ors*" reported in 183 ITR 532 (Ca!), has held that the power to use the discretion u/s 220 (6), which has been reposed on the officer concerned must be used and exercised as a "**reasonable man**".

Based on a joint reading of the principles as laid down by the aforesaid two decisions of the Hon'ble High Court at Calcutta (supra), as prudent and "reasonable Tax Officer", it is requested before your kindself, to stay of- the recovery of demand till the matters are disposed off by the learned CIT(A).

The Hon'ble High Court at Kerala, while rendering the judgment, in the case of *Rajan Nair Vs. ITO & Another*, reported in 165 ITR 650 (Ker). has held that the powers conferred upon the AC u/s. 220 (6) is discretionary though coupled with a duty, which is to be exercised judiciously and reasonable, based on relevant grounds. The Learned Court further held that the ITO has to act as a quasi-judicial authority and not as a mere tax gatherer. Accordingly, the order passed by the AC u/s. 220 (6) was held to not be in accordance with law and such order was held, liable to be quashed.

Considering the aforesaid submission, the judicial pronouncements relied upon and the circular of the CBDT (supra), e would request your kindseif to kindly grant the

stay of recovery of demand after seized for the assessment year referred to in above, till the appeal filed before the LD. CIT (A) is being disposed off.

So, in the context we also prefer your honour that we have deducted the tax on the basis of order u/s 197(1) submitted by the deductee. In event of any shortfall of deduction of tax fully on the basis of declaration filed by the deductee on which several case laws can be produced at the time of personal hearing before your honour.

In any event, we would request you to kindly provide us with a chance of Personal hearing and filing of a written submission, before the aforesaid issue is being finally disposed off.

Should your honour seek any clarification, please let us know."

4. निर्णय/ Decision:

Since all the grounds relate to the issue of disallowance under 40(a)(ia) made by the AO of an amount of Rs 1,94,47,590, the same are dealt together. During the course of assessment proceedings the AO noticed that the appellant was required to deduct TDS in respect of various expenditures under different heads but failed to comply with the provisions of the IT act in respect of TDS deduction. The AO observes that the appellant was liable to deduct TDS of Rs4,08,954 under section 194C of the Income Tax Act from the total expenditure of Rs.2,08,88,541 relating to can outwards, labour charges, car hire charges, security charges, advertisement and office decoration charges. However, deduction was made only of Rs.1,61,856 resulting in short deduction of rupees 2,47,098. Therefore, the proceeded to disallow the sum of Rs.19,95,048 under section 40(a)(ia) respect of which no TDS was deducted. During the appellate proceedings the AR of the appellant submits that TDS was deducted at a lower rate and hence provisions of section 40(a)(ia) are not applicable in respect of the appellant. Appellant's contentions were carefully analysed. It is observe that the appellant has not come up-with any evidence either before the AO or during the appellate proceedings that it has deducted the due TDS in respect of the impugned sum disallowed by the AO. It is also observed from the assessment order that having" regard to the lower deduction TDS certificates in respect of M/s Maheswari Transport Agency Private Limited and M/s Rohit Transport Organisation, the AO has given due allowance in respect of the TDS liability of the appellant. Therefore, the appellant's contentions that it has deducted TDS at a lower rate as per the certificates granted is bereft of any logic. As section 40(a)(ia) mandates that failure to deduct the whole or any part of the tax entails disallowance, it was mandated upon the appellant to deduct the desired TDS at the time of credit or payment of the sum. The appellant having failed to do so violated the provisions of section 194C and, therefore, the AO is duty bound to disallow the impugned sum in respect of which no TDS deduction has been made. During the appellate proceedings the AR of the appellant further submits that vide order dated 22 February 2016 the AO has given certain relief to the appellant by rectifying apparent mistake under section 154. That be so, subject to the same, in view of the discussions mentioned above the undersigned does not find any anomaly in the action of AO in disallowing the expenditure against which due TDS deduction has not been made. Appellant's grounds therefore, fail and the appeal is dismissed."

3. It is sufficiently clear from a perusal of the foregoing lower appellate discussion that this is not an instance of non-deduction of TDS per se. Learned departmental representative fails to dispute that gong by the

Assessing Officer's detailed discussion in pages 2 to 3 in his assessment order dated 07.01.2016, the assessee had indeed deducted TDS u/s.194C albeit at a lesser rate followed by three other head(s) of 194-H, 194-I and 194-J involving nil deduction. And also that the Assessing Officer had disallowed the impugned sum under the first head only. We observe in this factual backdrop that hon'ble jurisdictional high court's decision in Commissioner of Income Tax vs. S.K. Tekriwal 361 ITR (Cal) holds that the impugned disallowance u/s 40(a)(ia) does not apply in a case involving short deduction of TDS. We therefore go by the very reasoning and direct the Assessing Officer to delete the impugned disallowance.

4. This assessee's appeal is allowed.

Order pronounced in the open court 19/02/2020

Sd/-
(लेखा सदस्य)
(A.L.Saini)
(Accountant Member)
Kolkata,

Sd/-
(न्यायिक सदस्य)
(S.S.Godara)
(Judicial Member)

*Dkp Sr.P.S

दिनांक:- 19/02/2020 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-M/s A.K.Industries, 6/9 Nabin Banerjee Lane, Howrah-711104
2. प्रत्यर्थी/Respondent-ACIT, Cir-46, 3, Govt. Place (West), Kolkata-700 001
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।