

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD " C " BENCH – AHMEDABAD

Before Shri S. S. Godara, JM & Shri Manish Borad, AM.

ITA No.3128/Ahd/2013
Asst. Year: 2009-10

M/s Shiv Build India (previously known as M/s Shiv Builders), 7- Virbhadra Shopping Centre, Nilambaug Circle, Bhavnagar.	Vs.	JCIT, Range-1, Bhavnagar.
Appellant		Respondent
PAN AAUFS 0989G		

Appellant by	Shri Tushar Hemani, AR
Respondent by	Shri Prasoon Kabra, Sr.DR

Date of hearing: 9/3/2017
Date of pronouncement: 16/03/2017

O R D E R

PER Manish Borad, Accountant Member.

This appeal of assessee for Asst. Year 2009-10 is directed against the order of Id. Commissioner of Income Tax(A) –XX, Ahmedabad, dated 22.08.2013 vide appeal no. CIT(A) -XX/394/11-12, arising out of order u/s 143(3) of the Income-tax Act, 1961 (in short the Act) framed on 31.12.2011 by Jt.CIT, Range-1, Bhavnagar.

2. This appeal is time barred by 63 days. In support of the reason for delay in filing the appeal Id. Authorised Representative has placed

an affidavit of Mr. Rakesh Pandya, Asstt. Accountant of assessee firm i.e. M/s Shiv Build India. In this affidavit Mr. Rakesh Pandya, Asstt. Accountant has accepted that the order of Id. Commissioner of Income Tax(A) was received by the assessee on 30.08.2013 and was handed over to him for passing on to the concerned advocate for filing the appeal before the Tribunal but inadvertently he forgot to pass on the appealable order to the concerned counsel. Later on when he was enquired by the. Concerned Id. counsel, he realized his mistake of not passing on the Id. Commissioner of Income Tax(A)'s order to the office of counsel. Thereafter immediately he did so. Under these circumstances the delay of 63 days occurred in filing the appeal.

3. We have heard the Id. counsel and perused the affidavit placed on record and observe that mistake was committed by the employee of the assessee firm and it seems to be an apparent mistake on the part of the employee. We, therefore, in the interest of natural justice condone the delay of 63 days in filing the appeal before the Tribunal and proceed to adjudicate the appeal on merits

4. Briefly stated facts as culled out from the records are that assessee is a partnership firm engaged in the business of undertaking road contracts. Return of income for Asst. Year 2009-10 was filed on 27.09.2009 declaring total income of Rs.1,03,10,380/-. The case was picked up for scrutiny assessment under CASS. Notice u/s 143(2) of the Act was issued on 18.08.2010 along with notice u/s 142(1) of the Act which were duly served on the assessee, calling for

various details which were duly supplied by assessee and duly verified by Id. Assessing Officer. Id. Assessing Officer after making addition of Rs.11,31,028/- which inter alia included disallowance of interest on late payment of Indian Oil Corporation Ltd.(IOCL) of Rs.9,00,832/- and disallowance u/s 40A(3) of the Act towards cash payment Rs.1,36,960/- assessed the income at Rs.1,14,41,410/-.

5. Aggrieved, assessee went in appeal before Id. Commissioner of Income Tax(A) and partly succeeded.

6. Aggrieved assessee is now in appeal before the Tribunal raising following grounds of appeal :-

1. The learned CIT(A) has erred both in law and on the facts of the case in confirming the disallowance of Rs.9,00,832/- made u/s 40(a)(ia) of the Act for non-compliance of provisions of S.194A. On the basis of facts and circumstances of the case, provisions of S.194A are not at all applicable and hence, no disallowance is called for u/s 40(a)(ia).

2. The learned CIT(A) has erred both in law and on the facts of the case in confirming the addition to the extent of Rs.30,000/- made by AO purely /on the basis of estimation after holding that the appellant has incurred V / such transportation expenses for Wet Mix Paver and Soil Compactor out of its undisclosed income.

3. The learned CIT(A) has erred both in law and on the facts of the case in confirming the disallowance of Rs.1,36,960/- made u/s 40A(3) of the Act in respect of cash payment towards purchase of stamp papers.

4. Both the lower authorities have passed the orders without properly appreciating the fact and that they further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the

impugned order. This action of the lower authorities is in clear breach of law and Principles of Natural Justice and therefore deserves to be quashed.

5. The learned CIT(A) has erred in law and on facts of the case in confirming action of the Id. AO in levying interest u/s 234A/B/C of the Act.

6. The learned CIT(A) has erred in law and on facts of the case in confirming action of the Id. AO in initiating penalty u/s 271(1)(c) of the Act.

The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal.

7. Ground no.1 –

1. The learned CIT(A) has erred both in law and on the facts of the case in confirming the disallowance of Rs.9,00,832/- made u/s 40(a)(ia) of the Act for non-compliance of provisions of S.194A. On the basis of facts and circumstances of the case, provisions of S.194A are not at all applicable and hence, no disallowance is called for u/s 40(a)(ia).

Ld. counsel for the assessee submitted that Id. Assessing Officer made disallowance of Rs.9,00,832/- interest of late payment to IOCL without appreciating assessee's case in its entirety.

8. On the other hand, Id. Departmental Representative could not controvert the submissions made by Id. Authorised Representative.

9. We have heard the rival contentions and perused the record placed before us. Through this ground assessee has challenged Id. Commissioner of Income Tax(A)'s order confirming disallowance of Rs.9,00,832/- in respect of interest for late payment to IOCL on which tax was not deducted at source by the assessee. We also find that

assessee makes regular purchase of asphalt (bitumen) from IOCL. Assessee needs to make the payment at the agreed dates to the IOCL and in case assessee is unable to do so then late payment charges in the shape of interest is charged by IOCL. The impugned sum fo Rs.9,00,832/- was the total amount of late payment of charges paid to IOCL. It is undisputed fact that assessee has not taken any loan or advance from IOCL and the payment of Rs.9,00,832/- was purely late payment charges paid during the year at various point of time for not making the payment towards purchase of bitumen on the agreed dates.

9.1 We further observe that Id. Assessing Officer contended that assessee has not deducted tax at source u/s 194A of the Act and accordingly disallowed this expenditure of Rs.9,00,832/-. However, Hon. Jurisdictional High Court in the case of CIT vs. Krishak Bharati Co-op. Ltd. 349 ITR 68 (Guj) relied on by the assessee has held that “the transportation charges for transporting the gas by the seller to its buyer was inter alia in furtherance of contract of sale of goods and such transportation charges cannot be covered u/s 194C of the Act. It was further held that transportation charges do not depend on the consumption of quantity of gas but a fixed monthly charges to be borne by the assessee as part of the agreement between the parties and, therefore, the application of section 194C does not arise.” Analyzing the facts in the light of above judgment of Hon. Jurisdictional High Court we find substance in the case relied on by the Id. counsel that such interest was not actually in the nature of interest which was paid on the loan taken but actually it is of nature of

purchase cost of asphalt (bitumen) as the impugned amount has been paid in the course of making purchases. Therefore, the issue is raised in this appeal of not charging tax deducted at source u/s 194A of the Act on the interest amount of Rs.9,00,832/- is squarely covered by the judgment of Hon. High Court in the case of CIT vs. Krishak Bharati Co-op Ltd. (supra). We further observe that Id. Authorised Representative has made an alternative submission by placing reliance on the Co-ordinate Bench decision in the case of Janak Bhupatrai Parekh (HUF) vs. ITO in ITA No.2891/Ahd/2011 pronounced on 22.1.2016 wherein Co-ordinate Bench has followed the judgment of Hon. Delhi High Court in the case of CIT vs. Ansal Landmark Township (P) Ltd. 377 ITR 635 (Delhi) by observing as follows :-

3. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position. We have noted that as held by the Hon'ble Delhi High Court in the case of " CIT vs. Ansal Landmark Township (P) Ltd, 377 ITR 635 [Delhi] the second proviso to section 4U(ia) even though it is stated to be effective from 01.04.2013 is to be taken as retrospective in effect and, therefore, as long as recipients of the income have discharged their tax liability, disallowance under section 40a(ia) cannot be made. As we note this legal proposition, we are alive to this fact that the authorities below have not addressed themselves to this aspect of the matter. In view of this legal and factual position, we deem it fit and proper to remit the matter to the file of Assessing Officer for the factual verification as embedded in the above legal proposition on the fact of this case. In the event of recipients of referral commission having duly discharged their tax liabilities, obviously there cannot be any occasion for disallowance under section 40[a](ia) of the Act. In any other case, the matter is to be examined on merits and the arguments that the assessee seeks to advance regarding non application of section 194D on fact of this case may also to be examined

by the Assessing Officer. Our dealing with the arguments of the assessee in respect of non application of section 194D will be somewhat academic at this stage. We, therefore, refrain from making any observation on merits and remit the matter to the file of Assessing Officer with our directions as above.

We observe that the issue raised in this appeal is also covered by the decision of Co-ordinate Bench in the case of Janak Bhupatrai Parekh (HUF) (supra) so much so that payment has been made to a Govt. owned Public Sector Undertaking namely IOCL. However, as we have already deleted the impugned disallowance of Rs.9,00,832/- by following the judgment of Hon. Jurisdictional High Court in the case of CIT vs. Krishat Bharat Co-op. Ltd. (supra) we find it academic to adjudicate this issue by following the Tribunal's decision in the case of Janak Bhupatrai Parekh (HUF) vs. ITO (supra) as discussed above. In the result, this ground of assessee is allowed.

10. Ground no.2-

2. The learned CIT(A) has erred both in law and on the facts of the case in confirming the addition to the extent of Rs.30,000/- made by AO purely /on the basis of estimation after holding that the appellant has incurred V / such transportation expenses for Wet Mix Paver and Soil Compactor out of its undisclosed income.

11. During the course of hearing looking to the smallness of the amount of disallowance, Id. Authorised Representative has not pressed this ground. Therefore, we dismiss this ground as not pressed.

12. Ground no.3

3. The learned CIT(A) has erred both in law and on the facts of the case in confirming the disallowance of Rs.1,36,960/- made u/s 40A(3) of the Act in respect of cash payment towards purchase of stamp papers.

13. Ld. Authorised Representative submitted that AO made impugned disallowance of Rs.1.36,960/- u/s 40A(3) in respect of cash payments to stamp vendor for purchasing stamp papers and the same was confirmed by CIT(A) as well. AO and CIT(A) failed to appreciate the facts in its entirety. As and when assessee is awarded some contract work, an agreement is executed between the assessee and the State Govt. agency allotting such work. Assessee is required to pay duty to the **Govt.** on execution of such agreement. Stamp paper is a way of collecting such "duty" / levy from the citizens and whenever a stamp paper is purchased from a vendor, such person actually pays "duty" to the Govt. It is not a case of purchase of any commodity. Thus, payment for purchasing stamp paper is nothing but payment **of "duty"** to the Government and hence, such payment is not hit by S.40A(3). Reliance is placed on CIT(A)'s order dated 06.03.13 in the case of "M/s. Universal Associates" (Pgs. 13-26 @ 22-25 of P/B. Para 8 to 8.3). Revenue has not preferred an appeal against the said order and hence, such order passed by CIT(A) has attained finality. In light of the above, the impugned addition deserves to be deleted.

14. On the other hand, Id. Departmental Representative supported the orders of lower authorities.

15. We have heard the rival contentions and perused the record placed before us. The only issue raised in this ground is against Id. Commissioner of Income Tax(A)'s order confirming the disallowance of Rs.1,36,960/- u/s 40A(3) of the Act in respect of cash payment to stamp vendor for purchasing stamp papers. We observe that the assessee purchased the stamp paper for executing the work-contract documents with the Govt. agency and paid the amounts of Rs.23,630/-, Rs.32,150/- & Rs.81,180/- on 11.09.2008, 11.02.2009 and 26.02.2009 respectively. The point of discussion in this issue is whether payment in cash for purchase of stamp paper is covered in the exception mentioned in Rule 6 DD of the IT Rules 1963 relating to cases and circumstances in which payment or aggregate payment of exceeding Rs.20,000/- may be made to a person in a day otherwise by an account payee cheque drawn on bank or account payee draft. We further observe that under rule 6DD(b) refers to such circumstances where the payment is made to the Government and under the rules framed by it, such payment is required to be made in legal tender. It is an admitted fact that stamp papers are issued by State Government only and they are sold through various agents appointed by the Government. During the year under appeal assessee had made cash payment to such agents of the State Government who have the valid stamp papers and assessee paid in total Rs.1,36,960/- on various dates and paid in cash.

16. In the given facts and circumstances we are of the confirm view that such payments for purchase of Govt. Stamp Papers is covered

under the exception provided under rule 6DD(b) of the IT Rules and, therefore, no disallowance is called for u/s 40A(3) of the Act and, we therefore, allow this ground of assessee.

17. Other grounds are of general nature which need no adjudication.

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

Order pronounced in the open Court on 16th March, 2017

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

sd/-
(Manish Borad)
Accountant Member

Dated 16/03/2017

Mahata/-

Copy of the order forwarded to:

1.	The Appellant
2.	The Respondent
3.	The CIT concerned
4.	The CIT(A) concerned
5.	The DR, ITAT, Ahmedabad
6.	Guard File

BY ORDER

Asst. Registrar, ITAT, Ahmedabad

1. Date of dictation: 14/03/2017
2. Date on which the typed draft is placed before the Dictating Member: 15/03/2017 other Member:
3. Date on which approved draft comes to the Sr. P. S./P.S.:
4. Date on which the fair order is placed before the Dictating Member for pronouncement: _____
5. Date on which the fair order comes back to the Sr. P.S./P.S.:
6. Date on which the file goes to the Bench Clerk: 17/3/17
7. Date on which the file goes to the Head Clerk:
8. The date on which the file goes to the Assistant Registrar for signature on the order:
9. Date of Despatch of the Order: