**IN THE INCOME-TAX APPELLATE TRIBUNAL**
**BANGALORE BENCH 'A', BANGALORE**

**BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER**
**AND**
**SHRI JASON P. BAOZ, ACCOUNTANT MEMBER**

**I.T.A. No.660(Bang.)/2011**
**( Assessment year : 2008-09)**

The Asst. Commissioner of Income-tax ,
Circle-3(1),,
Bangalore. Appellant

Vs

Shri M.G.Vishwanath Reddy,
Prop: M/s Exotic Granites & Marbles, 5, Lalbagh Hosur Road,
Bangalore-560 027 Respondent
**PAN No.AAYPV2165M**

**Revenue by : Shri B. Saravanan, JCIT**
**Appellant by : Shri S. Ranganath, CA**

**Date of hearing on : 28-03-2012**
**Date of pronouncement : 30-03-2012**

**O R D E R**

**PER SMT.P.MADHAVI DEVI, JM;**

This is revenue's appeal for the assessment year : 2008-09.

2. The revenue has raised the following grounds of appeal;

"1. The orders of the CIT(A) is contrary to the facts of the case

2. The CIT(A) is not correct in deleting the addition of Rs.18,80,085/- made by the AO as the assessee had belatedly deducted tax from April, 2007 to February 2008 in the month of March, 2008 and deposited the same before the due date of filing

the return u/s 139(1) but not before the end of the previous year i.e 31-03-2008.

3. The CIT(A)'s decision that sec.40(a)(ia) is not attracted where the tax has been deducted at source on an expenditure incurred or payment made in the month of the relevant previous year but deposited to the Govt. account on or before the due date of filing of return is not acceptable.

4. The tax deductable during the period other than that of the last month of the year is covered by proviso B of sec.40(a)(ia), according to which the due date for remitting the tax deducted would be the last day of the previous year in order to avoid disallowance u/s 40(a)(ia) of the Act.

2. 1 The brief facts of the case are that the assessee, an individual who is engaged in the business of trading in Granites and Marbles, filed his return of income on 26-09-2008 declaring an income of Rs.41,41,090/-. There was search u/s 132 of the IT Act in the premises of the assessee on 08-03-2007. Thereafter the assessee's return was selected for scrutiny and during the assessment proceedings u/s 143(3) of the IT Act various details were called for. In response to notice issued by the AO the assessee appeared and produced the books of accounts and also furnished the details called for. During the course of assessment proceedings, the AO observed that the assessee had claimed Rs.41,762/- as tax deducted at source

in his profit and loss account without actually deducting the same from the payments and when this was pointed out to assessee's representative, the representative of the assessee requested to disallow the same and therefore, the AO disallowed the same and added it to the total income of the assessee. The AO further observed that the assessee has made payments before 1st March, 2008 to various persons without deduction of tax, and that the assessee, vide his submission dated 30-11-2010 has stated that the assessee has incurred a sum of Rs.19,85,500/- towards labour charges paid on various works and the assessee was not able to deduct the TDS on these charges and as per the provisions of Sec.195A of the IT Act where the TDS has to be borne by the assessee himself the amount has to grossed up and thus, the assessee has borne the TDS and made the provisions for the same in the month of March, 2008 and TDS was remitted before the due date for filing the return of income, and that in the case of Bapu Saheb Nanasaheb Dhumal, wherein the Bombay Bench of ITAT in ITA No.6628/Mum/2009 dated 25-06-2010 for the AY: 2005-06 has given a finding that Sec.40a)(ia) cannot be invoked if the assessee remitted the TDS within the due date of filing of the return prescribed u/s 139(1) of the IT Act. The AO was however, not convinced with the said explanation of the assessee and held that for the purpose of Sec.194C,194H & 194J, the tax has to be deducted

at the time of credit or payment thereof in cash or by issue of cheque or draft or by any other mode whichever is earlier and where such credit is made in the books of accounts, it shall be deemed to be credit of such account of the payee and provisions of Sec.194C shall apply accordingly. He held that the assessee was paying labour charges monthly/periodically to the recipients, but has failed to deduct tax at thereon and therefore, the provisions of Sec.40(a)(ia) are attracted. With regard to the ruling of the Tribunal at Mumbai Bench, he has stated that the said decision has not reached the finality and therefore, he does not accept the contention of the assessee. He accordingly, disallowed a sum of Rs.18,80,085/- and added to the total income of the assessee. Aggrieved, the assessee preferred an appeal before the CIT(A) reiterating the submissions made before the AO and also placed reliance upon the provisions of Sec.195A of the IT Act.

3. After considering the assessee's contentions the CIT(A) observed that the assessee has made payments towards labour charges to nine parties between April, 2007 to February, 2008. He observed that as per Sec.40(a)(ia) of the IT Act when the tax is deductible at source on the payments made under Chapter – XVII and such tax has not been deducted or after deduction has not been paid then the said deduction is not allowable. He further observed that as

per sub-clause-A of clause-(ia); if the tax is deducted during the last month of previous year and paid on or before the due date of filing of return as per the provisions of sec.139(1) then such sum shall be allowed as deduction. He also considered the decision of the ITAT at Mumbai Bench in the case of Bapu Saheb Nanasaheb Dhumal Vs ACIT in ITA No.6628/Mum/2009 dated 25-06-2010 for the AY: 2005-06 and held that the AO is not justified in disallowing the amount of Rs.18,80,085/- debited to the profit & loss account as labour charges. Accordingly, he allowed the assessee's appeal.

3.1 Aggrieved, the revenue is in appeal before us.

4. The learned DR Shri Saravanan, while placing reliance upon the order of the AO drew our attention to the provisions of Sec.40(a)(ia) and also Secs.194C,19H and 194J of the IT Act to demonstrate that tax is to be deducted at the time of payment and not at the end of the year. He submitted tht the TDS is deemed to be deducted when the payment is credited to the account of the party and in such a case, the assessee is bound to remit the said amount to the Government account within the prescribed time limit. According to him, the CIT(A) has erred in accepting the assessee's contention that the assessee has deducted tax at source in March 2008, whereas the assessee in fact had made the provision from its own account and has not deducted

tax from the payments. Thus, according to him, the order of the CIT(A) has to be set aside and the order of the AO has to be restored.

5. The learned counsel for the assessee Shri S. Ranganath, on the other hand, supported the order of the CIT(A) and also drew our attention to the provisions of Sec.40(a)ia) and sub-clause –A of clause-(ia) thereof wherein it has been held that in the case where the tax was deductible and so was deducted during the last month of the previous year on or before the due date specified in sub-clause-A of Sec.139, such sum has to be allowed as deduction in computing the income of the previous year but allowed in the previous year in which the said tax has been paid. He also drew our attention to page-10 of the paper book which is the ledger account of TDS on contractors was for the period 01-04-02007 to 31-03-2008 wherein the entry dated 31-03-2008 is given reflecting that the TDS on contractors not deducted but now provided on company account of Rs.41,762/- is given. He also drew our attention to page-11 of paper book wherein the said amount has been debited to Government account on 25-09-2008. The learned counsel for the asseseee also drew our attention to the decision of the various Benches of the Tribunal which are filed in the paper book and also decision of the Hon'ble Calcutta High Court in the case of CIT Vs M/s Virgin Creations in support of his contentions.

6. Having heard both the parties and having considered the rival contentions, we find that by virtue of Sec.194C of the IT Act..., "Any person responsible for paying any sum to any resident for carrying out any work in pursuance of a contract between the contractor and a specified person, shall at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode whichever is earlier, has to deduct tax at source. Sec.195A provides that in a case other than that referred to in sub-sec.(1A) of sec.192 where under an agreement or other arrangement, the tax chargeable on any income referred to in the foregoing provisions of this Chapter is to be borne by the person, by whom the income is payable, then for the purposes of deduction of tax under those provisions such income shall be increased to such amount as would, after deduction of tax thereon at the rates in force for the financial year in which such income is payable, be equal to the net amount payable under such agreement or arrangement. Sec.40(a)(ia) provides that where... any amount payable to a contractor for carrying out any work is paid without deducting tax at source under Chapter-XVII(B) and also even after deduction it has not been paid on or before the due date specified in sub-sec.(1) of sec.139 and such amount will not be allowed as a deduction.

6.1 In the case before us, the assessee was liable to pay labour charges to various parties and made the payment without deducting tax at source. However, at the end of the financial year, the assessee has made a provision for tax deductible at source and has remitted to the Government account before the due date of filing of return u/s 139(1) of the IT Act. The question before us is whether the assessee has to deduct the tax from the payments made to contractors only or can be make a provision for the same from his own income. According to learned counsel for the assessee, Sec.195A allows the assessee to make such a provision. For the purpose of clarity the provision of Sec.195A is re-produced here under;

> *"Sec.195A where under an agreement or other arrangement, the tax chargeable on any income referred to in the foregoing provisions of this Chapter is to be borne by the person by whom the income is payable, then for the purposes of deduction of tax under those provisions such income shall be increased to such amount as would, after deduction of tax thereon at the rates in force for the financial year in which such income is payable, be equal to the net amount payable under such agreement or arrangement".*

6.2. From the literal reading of the above provision, it is clear that the provision for grossing up of the tax can be made only if the

same forms part of the income concerned, where there is an agreement or arrangement to pay the income-tax by the prayer itself. In the case before us, the assessee has not stated anywhere that the labour charges to be paid are agreed to be paid tax free or that the assessee has to bear the taxes. Another aspect of the issue before us is where the assesee has paid the TDS amount into the account of the Government before the due date of filing of the return, whether the disallowance u/s 40(a)(ia) is called for. In the provisions of Sec.195A, there is reference to agreement or arrangement for the payment of tax free income. However, it is not clear as to whether such an agreement or arrangement has to be in writing. In the absence of specific provision for the arrangement or agreement to be in writing, it can be presumed that the agreement or arrangement can be oral also. From the fact that the assessee has failed to deduct the tax at source and has made the provision for such payment of tax at the end of the year, it is to be presumed that there is an arrangement for paying tax free income to the labourers. The second aspect i.e whether the tax deducted at source at the end of the year can be deposited before the due date of filing of the return of income, we find that this issue is covered by the decision of the co-ordinate Bench of the Tribunal at Mumbai in the case *of Bapu Saheb Nanasaheb Dhumal Vs ACIT in ITA No.6628/Mum/2009 dated 25-06-2010 for the AY: 2005-06 cited supra*

on which the CIT(A) has placed reliance for allowing the assessee's appeal and deleting the addition. As the learned CIT(A) followed the decision of the co-ordinate Bench of the Tribunal which is a precedent on the issue and the learned DR has not been able to rebut this finding of the Tribunal with any other contrary decision, we do not see any reason to take any other view. In view of the same, the appeal of the revenue is dismissed.

7. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on the 30th March, 2012.

Sd/- Sd/-

**(JASON P BOAZ)** **(SMT. P. MADHAVI DEVI)**

**ACCOUNTANT MEMBER** **JUDICIAL MEMBER**

**Place: Bangalore**

**Dated: 30-03-2012**

am*

**Copy to :**

1. The Assessee
2. The Revenue
3. CIT(A)
4. CIT
5. DR
6. GF(B'lore)

By Order

AR, ITAT, BANGALORE