

IN THE INCOME TAX APPELLATE TRIBUNAL
VISAKHAPATNAM BENCH, VISAKHAPATNAM
BEFORE: SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND
SHRI BR BASKARAN, ACCOUNTANT MEMBER

ITA No.352/Vizag/2008
Assessment Year: 2005-06

**Rajamahendri Shipping & Oil
Field Services Ltd.,
Rajahmundry.**
(Appellant)
PAN No: AABCR0422R

Vs.

**Addl. CIT, Rjy Range,
Rajahmundry.**
(Respondent)

Appellant By: **Shri GVN HARI, CA**
Respondent By: **Shri T L PETER, CIT-DR**
Date of Hearing: **11.04.2012**
Date of Pronouncement: **13.04.2012**

ORDER

Per Shri B. R. BASKARAN, Accountant Member:

The assessee is aggrieved by the order dated 31-3-2008 passed by Learned CIT(A), Rajahmundry relating to the assessment year 2005-06 in respect of following two issues:-

- (a) Allocation of common expenditure between shipping business and non-shipping business.
- (b) Disallowance made under section 40(a)(ia) of the Act.

3. The facts relating to the above said issues are stated in brief. The assessee is engaged in shipping business and also in other business activities. For Shipping business, the assessee preferred to offer income under tonnage tax scheme under section 115VJ of the Act, under which the income is assessed on some fixed basis without referring to the book results. The Assessing Officer noticed that the assessee has not properly distributed the common expenses between the shipping business and other business. Accordingly he identified the common expenses and allocated it in the ratio of gross receipts between the two businesses. In this process,

the Assessing Officer made an addition of Rs.8,00,103/- to the total income. The assessee had made payments towards Painting and blasting contract to the tune of Rs.52,26,577/-. The assessee had deducted tax on Rs.47,26,577/-, but the said tax was remitted only on 23.11.2005, i.e. not within the due date prescribed for the said purpose. The assessee did not deduct tax on the balance amount of Rs.5.00 lakhs. Hence the Assessing Officer disallowed the above said aggregate amount of Rs.52,26,577/- u/s 40(a)(ia) of the Act. The Learned CIT(A) confirmed both the additions. The Learned CIT(A) also enhanced the income by making further disallowance of Rs.1,40,000/- u/s 40(a)(ia) of the Act. Aggrieved, the assessee is in appeal before us.

4. The Learned Authorised Representative first addressed the issue of disallowance made under section 40(a)(ia) of the Act. He submitted that the Assessing Officer disallowed a sum of Rs47,26,577/- for the reason that the assessee has failed to remit the tax deducted at source in time. He submitted that though there was delay in remitting the TDS amount, yet the assessee has remitted the same before the due date for filing return of income for the year under consideration. He submitted that the Finance Act 2010 has amended the provisions of sec. 40(a)(ia) w.e.f. 1.4.2010, whereby no disallowance is required to be made if the TDS is paid on or before the due date specified in sec. 139(1) of the Act. He contended that the said amendment shall have retrospective operation, since it is a beneficial amendment. For this proposition, he placed reliance on the decision dated 23-11-2011 rendered by Hon'ble'ble Calcutta High Court in the case of CIT Vs. Virgin Creations. Accordingly he submitted that the impugned disallowance made by the Assessing Officer is liable to be deleted as the assessee has remitted the TDS amount before the due date for filing the return of income.

5. With regard to other two disallowances viz., Rs.5,00,000/- and Rs.1,40,000/- made u/s 40(a)(ia) of the Act, the Learned A.R, by placing reliance upon the decision of Visakhapatnam Special bench of Tribunal in the case of M/s Mrilyne Shipping & Transports which was pronounced on 09-04-2012, submitted that the provisions of sec.40(a)(ia) cannot be invoked to disallow the amounts which have already been paid during the previous year and does not remain payable as at the end of the financial year. He submitted that the assessee has paid both the amounts referred (Supra) and hence the provisions of sec.40(a)(ia) cannot be invoked to disallow the same.

6. On the contrary, the Learned D.R submitted that the provisions of sec. 40(a)(ia) of the Act shall apply to all payments covered by sec. 194C of the Act whether they have already been paid or remain as payable as at the end of the relevant financial year. He drew support from the following case law:-

- (a) Dey's Medicals (UP) (P) Ltd (216 ITR 83 (All))
- (b) Sree Chaudhry Transport (225 CTR 125 (Raj))
- (c) CIT Vs. Orient Goa (P) Ltd (325 ITR 554 (Bom))

With regard to the amendment brought out by the Finance Act, 2010 in sec. 40(a)(ia) of the Act, the Learned D.R submitted that the same shall not have retrospective effect and for that proposition he placed reliance on the decision of Mumbai Special Bench of ITAT in the case of Bharti Shipyard Ltd Vs. D.C.I.T reported in (2011)(132 ITD 53). He further submitted that the decision has been rendered by the Hon'ble Calcutta High Court by passing a non-speaking order and hence the decision of Special bench is binding on this division bench.

7. We have heard the rival contentions and perused the record. We find that the Hon'ble Calcutta High Court in the case of Virgin Creasions, (Supra), has passed a reasoned order in holding that the amendment brought out in sec. 40(a)(ia) is retrospective in nature. The binding nature

of the decision of Special Bench when a lone decision of non-jurisdictional High Court is available on the very same issue was examined in the Third Member decision of Ahmedabad bench in the case of Kanel Oil & Export Inds. Ltd (121 ITD 596). For the sake of convenience, we extract below the relevant observations made by the Third Member:-

"7. I have considered the rival arguments presented before me by both the sides. It all boils down to this, viz., whether the order of the Special Bench upholding the levy of interest in light of sub-section (4) of section 115JA should be followed or the judgment of the Bombay High Court in *Snowcem India Ltd.'s case (Supra)*, also rendered in the context of section 115JA, has to be applied. Both the decisions are under section 115JA with which we are concerned. One is of a Special Bench of the Tribunal, Ahmedabad and the other is of a High Court, though not the jurisdictional High Court. A simple answer would be that the judgment of a High Court, though not of the jurisdictional High Court, prevails over an order of the Special Bench even though it is from the jurisdictional Bench (of the Tribunal) on the basis of the view that the High Court is above the Tribunal in the judicial hierarchy. But this simple view is subject to some exceptions. It can work efficiently when there is only one judgment of a High Court on the issue and no contrary view has been expressed by any other High Court. But when there are several decisions of non-jurisdictional High Courts expressing contrary views, it has been recognized that the Tribunal is free to choose to adopt that view which appeals to it. In *kishiroop Chemicals Co. (P.) Ltd. V. ITO [1991] 36 ITD 35 (SB) (Delhi)*, it was held by the Special Bench, Delhi that "if there were conflicting decisions of the High Courts, other than the jurisdictional High Court, the Benches of the Tribunal were free to adopt the view which to the Benches appear to be better and that in certain circumstances the view which was favourable to the taxpayer should be adopted"

8. There is no dispute that the decision rendered by the Hon'ble Calcutta High Court is the lone decision available on the issue under consideration as on date. Accordingly, we are inclined to follow the same in the instant case in preference to the decision rendered by the Special bench of ITAT in the case of Bharti Shipyard Ltd, referred (Supra). Accordingly, by following the decision of Hon'ble Calcutta High Court, we hold that the assessee herein is

entitled to claim deduction of expenses if the TDS deducted there on is remitted before the due date for filing the return of income. In the instant cases, it is stated that the assessee has remitted the TDS amount on 23.11.2005. However, the details of due date for filing return of income for the year under consideration was not furnished to us. Accordingly, we are of the view that this matter requires to be verified at the end of the Assessing Officer.

9. The assessee would also get benefit of the decision of Special bench in the case of Merilyne Shipping and Trasports, referred (Supra). The issue viz., whether the provisions of sec.40(a)(ia) would apply to all payments made during the course of the year or it would apply only to the expenditure which remain payable as at the end of relevant year was considered by the Visakhapatnam Special Bench in the case of Marilyn Shipping & Transports, referred (Supra) and the Special bench, by majority view, has held that the provisions of section 40(a)(ia) of the Act would apply only to the expenditure which is payable as on 31st March of every year and cannot be invoked to disallow the amounts which have already been paid during the previous year without deducting tax at source. With regard to the decisions relied upon by the Learned D.R, it was specifically observed at paragraph 11 of the Judicial Member's order that the specific issue regarding "paid", "credited" or "payable" has not been considered in those decisions and even it was not argued. Accordingly it was held by the Judicial Member that these judgments will in no way affect the issue before them. Accordingly, by following the decision rendered by the Special bench referred (Supra), we hold that the provisions of sec.40(a)(ia) would apply only to the expenditure which remain payable as at the end of the relevant financial year.

10. In the instant case, the submission of the assessee is that it has paid the entire amount of expenditure subjected to disallowance under section

40(a)(ia) of the Act before the end of the financial year and hence the provisions of sec.40(a)(ia) cannot be invoked on them. However this claim is not borne out of the orders of tax authorities. Accordingly, we are of the view that the said claim requires verification at the end of the Assessing Officer.

11. In view of the foregoing discussions, we set aside the order of Learned CIT(A) on the issue of disallowances made u/s 40(a)(ia) of the Act and restore the same to the file of the Assessing Officer with the direction

(a) to verify the details of remittance of TDS and delete the additions, if the due TDS had been remitted before the due date for filing return of income or/and

(b) to verify whether the impugned expenditure has been paid before the end of the relevant financial year and restrict the disallowance only to those amount which remain payable as at the end of the relevant financial year in respect of those items of expenditure on which the TDS was not deducted at all or in respect of those cases where the TDS was remitted after the due date for filing the return of income.

12. The next issue pertains to the allocation of common expenditure between the shipping business and other business. The Learned A.R contended that the Managing Director is exclusively looking after the shipping business and hence the salary paid to him amounting to Rs.4,20,000/- should not have been taken as common expenditure. He also submitted that the assessee has allocated the common expenses in a fair and reasonable manner and accordingly prayed that the addition made in this regard may be deleted. On the other hand, the Learned D.R strongly defended the order of Learned CIT(A). On a careful consideration of the rival submissions and the order of Learned CIT(A), we notice that the assessee, apart from offering oral submissions, has failed to substantiate its claim with tangible material before the tax authorities and hence the Learned CIT(A) has confirmed this addition. Before us also, the assessee did not file any

evidence in support of its claim. Hence, we do not find any reason to interfere with the order of Learned CIT(A) on this issue.

13. In the result the appeal of the assessee is treated as partly allowed for statistical purposes.

Pronounced in the open Court on 13.04.2012.

Sd/-
(SUNIL KUMAR YADAV)
Judicial Member

Sd/-
(B R BASKARAN)
Accountant Member

Visakhapatnam,
Date: 13th Apr, 2012

Copy to

- 1 Rajamahendri Shipping & Oil Filed Services Ltd., Plot No.C156, Aishwarya Enclave, Venkateswara Nagar, Walkers Road, Rajahmundry 533 103.
- 2 Additional CIT, Rajahmundry Range, Aayakar Bhavan, Near Kambala Tank, Rajahmundry.
- 3 The CIT – Rajahmundry
4. The CIT(A), Rajahmundry
- 5 The DR, ITAT, Visakhapatnam.
- 6 Guard file.

By Order

Senior Private Secretary
INCOME TAX APPELLATE TRIBUNAL
VISAKHAPATNAM