IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E': NEW DELHI

BEFORE SHRI R.P. TOLANI, JUDICIAL MEMBER AND
SHRI K.D. RANJAN, ACCOUNTANT MEMBER

I.T.A.No.5114/Del/2010
Assessment Year : 2006-07

Asstt. Commissioner of Income-tax, Circle-1, Meerut.	Vs.	M/s. Meerut Rubber Factory, 158, Vill. Achronda, Partapur, Meerut, U.P. PAN: AABFM7311B.
(Appellant)		(Respondent)

Appellant by : Shri R.S. Negi, Sr. DR.
Respondent by : Shri O.P. Sapra, Advocate.

O R D E R

PER K.D. RANJAN, ACCOUNTANT MEMBER

This appeal by the Revenue for Assessment Year 2006-07 arises out of the order of Commissioner of Income-tax (Appeals), Meerut. The grounds raised by the Revenue are reproduced as under:-

"1. Whether the Ld. Commissioner of Income tax (Appeals) has erred in law and on facts in deleting the addition of Rs.4,50,818/- ignoring the fact that the sums in partners capital account were advanced by the assessee firm without interest was not related to the business activity of the assessee firm (Reliance is placed in the case of CIT vs. H.R. Sugar Factory (P) Ltd. (All.) 187 ITR 363.

2. Whether the Ld. Commissioner of Income tax (Appeals) has erred in law and on facts in deleting the addition made u/s 40A(ia) of IT Act ignoring the fact that the assessee had not

received any form no. 15H/15G in time from the persons to whom the interest has been paid/credited?

3. Whether the Ld. Commissioner of Income tax (Appeals) has erred in law and on facts in deleting the addition of Rs.4,47,907/- ignoring that the same has been held to be the bogus creditor by the AO as the assessee failed to prove the identity, genuineness and the creditworthiness of these creditors?

4. In the facts & circumstances of the case, the order of the Ld. Commissioner of Income Tax (Appeals) may be set aside and that of the AO restored."

2. The first issue for consideration relates to deleting the addition of Rs.4,50,818/- being the interest disallowed on debit balances of the partners capital account. During the year under consideration the assessee had not carried out any business activity. In earlier years it was engaged in the business of production of cycles and rickshaw tubes and trading thereof but this business was stopped in 2004. During the year under consideration the assessee had neither purchased nor sold any item nor engaged in manufacturing activities. The opening stock declared at Rs.34,13,030/- was shown as closing stock at the same value. The assessee had shown to have received interest on loan amounting to Rs.4,41,819/- against which the assessee had shown expenses on interest and financial commission amounting to Rs.14,11,896/-. The assessee had shown some other expenses and net loss has been returned at Rs.9,77,706/-. The AO asked the assessee

to give the details of interest paid. From the details submitted it was noticed that out of loan amount of Rs.1,86,19,956/- the assessee had given interest bearing loan only to the extent of Rs.52,33,267/- and amount of Rs.32,55,670/- was outstanding as sundry debtors. Besides there was debit balance in the account of partners totaling to Rs.59,46,974/- on which no interest was charged by the assessee though it was paying interest on loan. The assessee was asked to explain as to why interest has not been charged from the partners. It was explained by the assessee that partners had decided not to charge interest on their capital account. This contention of the assessee was not accepted by the AO on the ground that the assessee had paid interest on loans which have not been utilized for the purpose of business or for purpose of earning interest to the extent of debit balances outstanding in the account of four partners. The total loan taken by the assessee as per balance-sheet was Rs.1,86,19,956/- out of which there is debit balance in the name of partners amounting to Rs.59,46,947/- on which interest has not been charged. The amount given to the partners worked out to 31.93% of the total loan. The AO therefore, disallowed 31.93% of interest of Rs.14,11,890/- which was determined at Rs.4,50,818/-.

3. Before the CIT(A) it was submitted that that assessee incurred losses in Assessment Year 2003-04, 2004-05, 2005-06 and 2006-07 totalling to

Rs.83,19,086/-. The partners of the assessee firm introduced fresh capital of Rs.9,726/- during the year ending 31st March, 2004 and Rs.33,39,922/- during the year ending 31st March, 2005. Out of fresh introduction the partners of the assessee firm withdrew a sum of Rs.10,01,000/- during the year under consideration. The credit balance of partners as on 31st March, 2006 was Rs.23,72,111.69. The resultant debit balance after considering the credit balance of the partners was at Rs.59,46,974.68. The debit balance was not on account of withdrawals made by the partners but it was on account of incurrence of recurring losses by the assessee firm. The AO was therefore, not justified in disallowing the interest of Rs.4,50,818/- out of interest payment to the creditors. The learned CIT(A) deleted the addition on the ground that debit balance in the account of partners was at Rs.59,48,974/- on account of losses suffered by the assessee. The amount of Rs.59,48,974/- did not represent the withdrawal made by the partners. Therefore, the learned CIT(A) came to the conclusion that no disallowance of interest could be made on account of debit balances of the partners. He accordingly deleted the addition.

4. Before us the learned Sr. DR supported the order of the AO by stating that the AO has rightly charged interest on debit balance standing in the names of the partners. On the other hand, the learned AR of the assessee

submitted that losses suffered by the assessee firm had not been debited in the account of the partners but shown separately. There was credit balance of Rs.33,73,111/- as on 31st March, 2005 which is evident from the balance-sheet. Credit balance as on 31st March, 2006 in the partners' account was Rs.23,72,111/-. The debit balance after adjusting the credit balance in partners' account was Rs.59,46,974/-. Since the partners have not withdrawn any amount, interest cannot be charged on the debit balance resulted because of losses suffered by the assessee firm. He accordingly pleaded that the learned CIT(A) has rightly deleted the addition.

5. We have heard both the parties and gone through the material available on record. There is no dispute about the fact that the assessee had suffered losses of Rs.83,19,086.27 in Assessment Year 2003-04 to Assessment Year 2006-07. There is also no dispute about the fact that as on 31st March,2006, there was credit balance in the partners account at Rs.23,72,111.69. Again the partners of the assessee firm have introduced about Rs.33.47 lakhs in Assessment Year 2004-05 and 2005-06 out of which Rs.10 lakhs were withdrawn in the year under consideration. From these facts it is clear that the outstanding debit balance in the names of the partners at Rs.59,46,974/- is on account of losses suffered by the firm and not because of withdrawal of borrowed funds. The AO had also not shown any

nexus between the funds borrowed and the debit balance which in fact is the outcome of losses suffered by the assessee. Therefore, interest cannot be disallowed. Accordingly, we do not find any infirmity in the order of the CIT(A) deleting the addition of interest charged on debit balances of the partners.

6. Next issue for consideration relates to deleting the addition made under sec. 40(a)(ia) of the Act. The AO noted that the assessee had paid interest of Rs.5,31,386/-. The assessee was required to deduct tax at source u/s 194A of the Act. Since the assessee did not deduct tax at source, the assessee was asked to explain as to why the amount of Rs.5,31,386/- should not be disallowed u/s 40(a)(ia) of the Act. It was submitted by the assessee that persons had filed form No.15G and 15H on the basis of which tax was not deducted on interest payment. The assessee was asked to furnish Form No.15G & 15H claimed to have been furnished by the persons to whom the interest was paid. The AO found that the interest was paid either on 31st March, 2006 or prior to that during F.Y. 2006-07 whereas Form 15G & 15H were filed in the month of April, 2006. Since the assessee did not deduct tax at source, the AO disallowed interest under sec. 40(a)(ia) of the Act.

7. Before the CIT(A) it was submitted that interest in the account of unsecured deposits was credited on 31st March, 2006. Tax was not deducted

at source on an understanding that Form 15G/15H for non-deduction of TDS was submitted from various unsecured depositors received by the firm on 4.4.2006, 5.04.2006 and 6.04.206 and same were duly filed before the Commissioner of Income-tax, Meerut. Only on the strength of these forms no TDS was deducted by the assessee. It was also submitted that filing of From No.15G/15H was a technical mistake not to be conclusive in order to decide that the same were either not received in time or the liability for making TDS from the said payees had already arisen before that date. In any case except the technical mistake no loss whatsoever either procedural or factual has been caused to the department by obtaining the forms No.15G/15H on 4th, 5th and 6th April, 2006 instead of obtaining the same on or before 31st March, because the due date for filing thereof was 7th April, before which date the same were actually filed before the CIT, Meerut. The learned CIT(A) on consideration of the above submissions made by the assessee observed that the addition u/s 40(a)(ia) has been only on technical ground of accepting form No.15G/15H after the close of the financial year. No loss either procedural or factual was caused to the department by acceptance of such forms at a later date by 4 to 6 day from close of the financial year. The said forms were filed with appropriate authority within time. The learned CIT(A) therefore, deleted the addition.

8. Before us the learned Sr. DR submitted that the assessee had paid interest without deducting tax at source. Therefore, provisions of sec. 40(a)(ia) are attracted and the AO has rightly disallowed the interest. On the other hand, the learned AR of the assessee has submitted that it was a technical default and the assessee cannot be penalized for the same. Form No.15G/15H were filed before the Commissioner of Income-tax within the time allowed under the Act. Therefore, the learned CIT(A) was justified in deleting the addition.

9. We have heard both the parties and gone through the material available on record. There is no dispute about the fact that the assessee was required to deduct tax at source u/s 194A of the Act. Under section 40(a)(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-sec.(1) of sec. 139 of the Act, shall not be deducted in computing total income chargeable under the head “Profits and gains of business or profession”. The assessee had not deducted tax at source on the ground that the depositors intended to file form No.15G/15H

in time but Form No.15G/15H were not filed by the date on which the interest was credited/paid to the depositors. In section 40 the word "shall not be deducted in computing the income chargeable under the heads "Profits and gains of business or profession" have been employed. It is a settled law that where the word "shall" is used, it is mandatory. Therefore, for allowance of deduction u/s 40(a)(ia) the assessee should have either obtained form No.15G/15H on or before the 31st March, 2006 or should have deducted tax at source. The provisions of sec. 40(a)(ia) are mandatory in nature and where the assessee had not deducted tax at source, the deduction will not be allowable. There is no discretion with the CIT(A) to extend the time of filing of form No1.5G/15H beyond the last date of accounting year. Therefore, in our considered opinion, the learned CIT(A) was not right in directing the AO to allow the deduction on the ground that no loss of revenue has occurred and delay in filing was technical in nature. We, therefore, set aside the order of the CIT(A) and restore the order of the Assessing Officer on this ground.

10. The last issue for consideration relates to deleting the addition of Rs.4,47,907/- u/s 68 for alleged unexplained unsecured loans. The facts of the case relating to this ground are that the AO added the amount of Rs.3,97,907/- being the amount of fresh unsecured loan in the form of

deposits received from 55 persons on the ground that the assessee did not file copy of account of said depositors even after acquiring the same during the assessment proceedings. The AO has added total of all fresh deposits below Rs.50,000/-. The fresh evidences submitted by the assessee during appellate proceedings in the form of copies of accounts were confronted to the Assessing Officer. The Assessing Officer had not commented upon in remand proceedings on the ground that the same was not be admitted at appeal stage. The AO did not consider the evidences filed by the assessee at all in the remand report. Besides this amount he has further added a sum of Rs.50,000/- received as deposit in the name of one Shri Manoj Kumar holding that the depositor was not assessed to tax and that before giving cheque of Rs.50,000/- to the assessee, cash of Rs.50,000/- was deposited on the same date in his bank account.

11. During the appeal proceedings the assessee filed confirmed copies of accounts from all depositors as fresh evidence requesting that the same to be admitted under Rule 46A of the Income-tax Rules, 1962. It was submitted by the assessee that the said evidences could not be filed during the assessment proceedings for the reason that the counsel of the assessee met with severe accident and the person representing the assessment proceedings could not take note of the requirement of the AO to submit confirmed copies

of account of the depositors making deposit of less than Rs.50,000/- each. It was further submitted that the assessee had fully cooperated in assessment proceedings and had filed all confirmed copies of accounts and other requisite details with reference to all depositors whether new or old. Regarding the deposit of Rs.50,000/- from Shri Manoj Kumar it was submitted that there was no cash deposit on the date of issuance of cheque to the assessee which was issued on 8.4.2005 and cleared from the depositor's bank account on 11.04.2005. It was also submitted that there were bank deposits of Rs.90,000/- and Rs.1,00,000/- on 4.04.2005 and 5.04.2005 in the bank account of the depositor. He further submitted that to assume that for getting a deposit of Rs.50,000/- from the said depositor, the assessee had deposited the sum of Rs.1,90,000/- in his bank account was beyond imagination. He therefore, submitted that the depositor was a man of means and during a period of 37 days during 13.03.2005 to 19.04.2005 there were various bank deposits totaling to Rs.3,22,000/-.

12. The learned CIT(A) considered the submissions made by the assessee in respect of deposit of Rs.50,000/- by Shri Manoj Kumar. He observed that there was deposit of Rs.3,22,000/- within a period of 37 days. Therefore, Shri Manoj Kumar was a man of means. The learned CIT(A) has deleted the addition. As regards other additions of Rs.3,97,907/- the learned CIT(A)

observed that additional evidence was confronted to the AO but she did not comment thereupon. The learned CIT(A) therefore, treated the deposits by 55 persons at Rs.3,97,907/- as genuine and deleted the addition.

13. Before us, the learned Sr. DR submitted that the assessee had not filed confirmation before the AO and the AO has objected to admission of additional evidence. The AO has not examined the creditors. He also submitted that the learned CIT(A) has also not examined the genuineness of transactions and creditworthiness of the loan deposits. Therefore, the learned CIT(A) was not correct in deleting the addition. On the other hand, the learned AR of the assessee submitted that the assessee had produced before the CIT(A) the details of deposits in the names of depositors, amounts deposited by them with supporting documents to prove their identity etc. besides specifically mentioned therein that such deposits included Rs.84,010/- renewal of old deposits. As regards deposits of Rs.50,000/- made by Shri Manoj Kumar, it was submitted that he had filed confirmation. It was also submitted that it was an old account with opening credit balance of Rs.4,345/-. He has further advanced Rs.50,000/- by cheque. Therefore, no addition was to be made. He therefore, submitted that the learned CIT(A) was justified in deleting the addition.

14. We have heard both the parties and gone through the material available on record. From the details above, it is clear that Shri Manoj Kumar has deposited Rs.50,000/- during the year under consideration. The learned AR of the assessee has also submitted that Rs.84,010/- represented the renewal of old deposits. The AO had not given any comments on the ground that she objected to the admission of additional evidence. In our considered opinion the issue required to be examined by the Assessing Officer afresh with reference to identity, creditworthiness of the creditors and genuineness of the transaction as the learned CIT(A) while deleting the addition has not mentioned anything in the order. We, therefore, set aside the issue to the file of the Assessing Officer with the direction to examine the creditors and decide the issue afresh after affording a reasonable opportunity of being heard to the assessee.

15. In the result, the appeal filed by the Revenue is partly allowed for statistical purposes.

16. This decision is pronounced in the Open Court on 13th July, 2012.

Sd/-	Sd/-
(R.P. TOLANI)	(K.D. RANJAN)
JUDICIAL MEMBER	ACOUNTANT MEMBER

Dated: 13th July, 2012.

Copy of the order forwarded to:-

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

By Order

*mg

Deputy Registrar, ITAT.