

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'H': NEW DELHIA**

**BEFORE SHRI U.B.S. BEDI, JUDICIAL MEMBER AND
SHRI K.D. RANJAN, ACCOUNTANT MEMBER**

I.T. A. No.2303/Del/2011
Assessment Year : 2007-08

UE Trade Corporation (India) Ltd., Dy. Commissioner of I.Tax,
1-C, Vandhna Building, Vs. Circle-18(1), New Delhi.
11 Tolstoy Marg, New Delhi.
PAN/GIR No.AAACU5216A.

(Appellant)

(Respondent)

Appellant by : Shri Rajan Bhatia & Ms. Ruchi Luthra, CAs
Respondent by : Ms. Reena S. Puri, CIT-DR.

ORDER

PER K.D. RANJAN, ACCOUNTANT MEMBER:

This appeal by the assessee for Assessment Year 2007-08 arises out of the order of the Commissioner of Income-tax (Appeals)-XXI, New Delhi.

The grounds of appeal raised by the assessee are reproduced as under:-

“1. That the Order of the learned Commissioner of Income Tax (Appeals) (CIT(A)) is bad in law and on the facts of the case.

2(a). That the learned CIT(A) has erred in confirming the disallowance of expense of Rs.2,024,455/- u/s 40(ia) of the Income Tax Act by wrongly interpreting the provisions of Income Tax Act and disregarding the facts on record.

(b) On the facts and circumstances of the case the provisions of the section 40(ia) are not applicable, as it only prohibits the

disallowance when the tax has not been deducted at source and not where tax has been deducted but at lower rate of income tax/surcharge.

(c) Without prejudice to above and alternatively the proportionate allowance of expenditure should be directed to be allowed.”

2. The only issue for consideration relates to confirming the disallowance of expenses of Rs.20,24,455/- under sec. 40(a)(ia) of the Act. The facts of the case stated in brief are that the assessee during the relevant Assessment Year was engaged in trading in agricultural products. In the previous year relevant to Assessment Year 2007-08 which is under consideration the assessee was in process of winding up and the only stock left of yellow peas was sold from the Calcutta office which was also shut down in October, 2006. Some left over stock of pistachio was sold off from Delhi office. During the course of assessment proceedings from the tax audit report in Form No.3CD the Assessing Officer noted that the tax auditor had quantified the amount of 40,41,233/- disallowable under sec. 40(a)(ia) of the Act. However, in computation of income the assessee had added back only Rs.20,16,778/-. The remaining amount of Rs.20,24,455/- was therefore, disallowed by the Assessing Officer.

3. Before the CIT(A) it was submitted that the Assessing Officer ought to have allowed expenditure on which tax has been deducted and should

have disallowed the expenditure on which no tax has been deducted. Therefore, the learned AR of the assessee contended that no disallowance should have been made. Alternatively, it was argued that proportionate disallowance of Rs.15,75,239/- should have been made.

4. The learned CIT(A) on examination of the contention of the assessee observed that there was no scope for making proportionate disallowance under sec. 40(a)(ia) on the ground that section clearly applies where there is lower deduction of tax and as such tax has not been paid before the due date, disallowance has to be made. When tax auditor has pointed out the figures in 3CD report and out of the same, a portion had been added back, the same provision is attracted on the remaining part also. Therefore, there was scope of making proportionate disallowance. The learned CIT(A) accordingly upheld the disallowance made by the AO.

5. Before us, the learned AR of the assessee submitted that the assessee had made payment after deducting lower tax in respect of certain items. The assessee had not included surcharge on professional charges of Rs.56,000/- and rent of Rs.1,96,000/-. As regards storage charges of Rs.16,90,982/- as per the assessee, the TDS is to be deducted under sec. 194C whereas the AO has applied provisions of sec. 194-I. Similarly with reference to survey fee of Rs.81,473/-, the assessee had applied provisions of sec. 194-C whereas as

per AO, the provisions of sec. 194-J have been applied. The learned AR of the assessee placed reliance on the decision of ITAT, Mumbai Bench `C' in the case of DCIT vs. Chandabhoy & Jassobhoy, 17 taxmann.com 158 (Mum.) for the proposition that provisions of sec. 40(a)(ia) can be invoked only in event of non-deduction of tax at source but not for lesser deduction of tax at source. He also placed reliance on the decision of Kolkata Bench `B' in the case of DCIT vs. S.K. Tekriwal, 15 taxman.com 289 (Kol.) for the proposition that if there is shortfall in deduction of tax at source due to any difference of opinion as to taxability of any item or nature of payments falling under various TDS provisions, assessee can be declared to be an assessee-in-default under sec. 201 but no disallowance can be made by invoking provisions of section 40(a)(ia). On the other hand, the learned CIT(DR) strongly objected to the proposition made by the assessee. She submitted that in tax audit report, the tax auditor has quantified the amount which is in violation of provisions of sec. 40(a)(ia). Therefore, the learned CIT(A) is justified in confirming the disallowance. She also submitted that there is no concept of allowance of deduction on proportionate basis as suggested by the learned AR of the assessee.

6. We have heard both the parties and gone through the material available on record. We have also gone through the Tax Audit Report in

Form No.3CD placed at Pages 20 to 49 of the Paper Book. Annexure-XIV of the Tax Audit report gives the details of tax deductible under various sections of the Act. Page 1 of Annexure-XIV gives the details of payments on which tax has not been deducted at all. The total amount of expenditure is at Rs.7,32,827/-. Pages 2 to 6 of Annexure-XIV give the details where there is a shortfall due to lesser deduction than required to be deducted. The total amount of expenses is at Rs.20,24,455/- on which shortfall of tax at Rs.3,26,011/- has been worked out by the tax auditors. Page 3 of the Annexure gives the details where tax has been deducted but not paid to the credit of the Central Government. The assessee has added back the expenditure on which tax was deductible but no tax was deducted at all and also where tax was deducted at source but not paid to the credit of Central Government amounting to Rs.20,16,778/-. Detail of such expenditure is given at page 1 and page 3 of the Annexure-XIV to the Tax Audit Report. The learned AR of the assessee has claimed the benefit of two decisions, one by the Kolkata Bench and other by the Mumbai Bench of ITAT. In the case of DCIT vs. Chandabhoy & Jassobhoy (supra) the assessee made payment to the consultants by way of salary after deduction of tax at source under sec. 192 and claimed the deduction for the same. Those consultants were working for a period of two years with the assessee. However, the AO

applied the provisions of sec. 194-J. In this case it was held that provisions of sec. 192 were applicable to the facts of the assessee's case. Another decision relied upon by the assessee is of Kolkata Bench in the case of DCIT vs. S.K. Tekriwal (supra). In this case also the difference in shortfall was due to the applicability of provisions. The assessee has deducted tax at source u/s 194C whereas according to the Assessing Officer provisions of section 194I are applicable. Thus the assessee's case is covered by the decisions of the Tribunal referred to above. No doubt assessee is in default as per provisions of sec. 201 but disallowance of the expenditure is not permissible u/s 40(a)(ia). Respectfully following the precedents it is held that disallowance of Rs.20,24,455/- is not justified. The Assessing Officer is directed to delete the addition.

7. In the result, the appeal filed by the assessee is allowed.
8. This decision is pronounced in the Open Court on 18th May, 2012.

Sd/-
(U.B.S. BEDI)
JUDICIAL MEMBER

Sd/-
(K.D. RANJAN)
ACCOUNTANT MEMBER

Dated: 18th May, 2012.

ITA No.2303/Del/2011

Copy of the order forwarded to:-

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

By Order

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Deputy Registrar, ITAT.