

**IN THE INCOME TAX APPELLATE TRIBUNAL,
AGRA BENCH, AGRA**

[Coram : Pramod Kumar AM and Joginder Singh JM]

I.T.A. No.: 61/Agra/2013
Assessment year:2008-09

**Income Tax Officer
Ward 1, Aligarh**

.....**Appellant**

Vs.

Ram Prakash
Prop Ram Prakash Rohini Kumar
Khair, Aligarh [PAN: ACWPP9847J]

.....**Respondent**

Appearances by:

S D Sharma, *for the appellant*
Deependra Mohan, alongwith Prarthana Jalan,*for the respondent*

Date of concluding the hearing :June 3, 2014
Date of pronouncing the order :July 18th, 2014

ORDER

Per Pramod Kumar:

1. This appeal, filed by the Assessing Officer, is directed against learned CIT(A)'s order dated 6th December 2012, in the matter of assessment under section 143(3) of the Income Tax Act, 1961 for the assessment year 2008-09
2. In ground nos. 1, and 2, which we will take up together, the assessee has raised the following grievances:

"1. The order of the Ld. CIT(A) is erroneous in law and on facts in deleting the addition of Rs.10,00,000/- since the assessee failed to

produce all the creditors and thus voluntarily surrendered an amount of Rs.10,00,000/- out of the credit balance of Rs.80,27,616/- for taxation.

2. The Ld. CIT(A) has erred in law and on facts in holding that surrender letter submitted by the assessee is ambiguous/defective and being made without any basis, was accepted by the AO in part, finds no place on order sheet and not in the hand writing of the assessee.

3. So far as these grievances are concerned, the relevant material facts are like this. The assessee is engaged in the business of foodgains. During the course of the assessment proceedings, the Assessing Officer noticed that the assessee has shown unsecured creditors amounting to Rs 80,27,616 but, as certain payments made to these persons were in cash, "the assessee was required to produce all the 12 creditors for verification". Even though the assessee produced all these persons, and apparently there were no infirmities in the documents produced too, the Assessing Officer made an addition by observing as follows:

3.2 On the date fixed that assessee filed a reply stated that "..... I am here with producing the 12 sundry creditors along with photo identity & khasra Khatoni and filed all the affidavits & khasra of sundry creditors. I am here with surrendering Rs.10,00,000/- subject to no penal action"

3.3 I have considered the reply of the assessee, it is true that in the trade of adartia mostly payment has been made in cash. As account confirmations, names and addresses of the parties mentioned above have already been provided by the assessee, there appears a prima facie evidence to show that the said parties are real and having business relations with the assessee. Merely on the basis of not being income tax assessee or in absence of banking transaction, the identity of the creditor cannot be doubted. It is also true that the small traders and agriculturist living in small villages scare to come forward before any authority and scared to be examined on oath. Moreover, barring the credits surrendered by the assessee of Rs.10,00,000/-. In these circumstances, it would be better to accept the surrender of the assessee as voluntary disclosure. Accordingly, the amount of Rs.10,00,000/- is added to the income of the assessee.

4. Aggrieved by stand so taken by the Assessing Officer, assessee carried the matter in appeal before the CIT(A). Learned CIT(A) noted that “ all the sundry creditors were and are verifiable” and that “considering the entire documentary evidences, I am of the clear view that there was no reason with the appellant to make such a surrender”. Accordingly, he concluded that “the surrender is held to be unwarranted and is being cancelled as objected and claimed by the appellant”. The addition of Rs 10,00,000 was, accordingly, deleted. The Assessing Officer is aggrieved and is in appeal before us.

5. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case in the light of the applicable legal position.

6. We have noted that even though learned CIT(A) has given categorical findings on merits as also on the admissibility of surrender, the Assessing Officer has raised grievance only against the latter. The issue raised before us is thus infructuous inasmuch as even if the surrender is in order but the addition was not warranted on merits, it is only elementary that merely because the assessee has, under misconception of facts or law, surrendered an income, no addition can be made in respect of the same. We have also noted that as evident from the observations of even the Assessing Officer, there were no specific reasons for making the addition of Rs 10,00,000 save and except for the alleged surrender made by the assessee. The issue in appeal is also covered, in favour of the assessee, by a coordinate bench of this Tribunal in the case of ACIT Vs Satya Narayan Agarwal (91 TTJ 481) wherein it is held that no addition can be made on the basis of a surrender simplicitor even when surrender is made during the course of survey proceedings under section 133 A. In view of these discussions, as also bearing in mind entirety of the case, we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

7. Ground No. 2 and 3 are thus dismissed.

8. In ground no 3, the Assessing Officer has raised the following grievance:

3. The Ld. CIT(A) in his order dated 06.12.2012 in appeal No.761/2010-11/GZB-Alg and further appeal number 1006/2011-12/GZB-Alg has erred in law and on facts in accepting the contention of the assessee that disallowance made u/s 40A(3) at Rs.3,62,202/- (which was rectified u/s 154/143(3) to Rs.18,11,008/-) was covered by clauses (1) of Rule 6DD and find support by clause (f) and (h) of Rule 6DD.

9. So far as this grievance is concerned, it is sufficient to take note of the fact that when the Assessing Officer issued a show cause notice in respect of the cash payments aggregating to Rs 23,47,561, it was pointed out by the assessee that the assessee is an aarattia and purchases the foodgrains from farmers or his agents i.e. kachcha aarattias. It was thus pointed out that the exceptions set out in rule 6DD(e) come into play and, accordingly, disallowance under section 40A(3), as proposed by the AO, cannot be made. Without assigning any reasons, the contentions of the assessee were simply brushed aside. The disallowance of Rs 3,62,202, by excluding payments made on weekends, was made. Aggrieved, assessee carried the matter in appeal before the CIT(A). It was noted by the CIT(A) that the payments were made to the farmers or the kacha aarattias who defacto act as agents of the farmers and are simply conduits for payments. Under these circumstances, and taking note of the judicial precedents holding that section 40A(3) disallowances cannot be invoked in such cases, learned CIT(A) deleted this disallowance as well. The Assessing Officer is aggrieved and is in appeal before us.

10. Having heard the rival contentions, and having perused the material on record, we find no reasons to interfere in the findings on this issue either. We find that, as is the settled position, even a payment to kacha aarattia is to be taken as a payment to the farmer as such aarattia holds agency relationship; he does not receive payment in his own right. We have also taken note of coordinate bench decisions in the cases of Shri Renkushwara Rice Mills vs ITO (93 TTJ 912) and DCIT Vs Hind Industries Ltd (26 SOT 196) which support this proposition. Once the payment is treated as having been made to the farmer, Section 40A(3) will not come into play. In view of these discussions, as also bearing in mind entirety of the case,

we approve conclusions arrived at by the CIT(A) and decline to interfere in the matter.

11. Ground No. 3 is thus dismissed.

12. In ground nos. 4 and 5, the Assessing Officer has raised the following grievances:

4. The Ld. CIT(A) has also erred in law and on facts in deleting the addition made u/s 40(a)(ia) at Rs.5,54,023/- by accepting, on one hand, applicability of section 40(a)(ia) on the other hand on the basis of judgment delivered by the Hon'ble ITAT in the case of Merylyn Shipping & Transports Vs. Addl. CIT, Range-1, Vishakhapatnam (2012)(136ITR 23); as an interim suspension against this judgment has been granted by the Hon'ble A.P. High Court on appeal.

5. The Ld. CIT(A) has erred in law and on facts in ignoring the jurisdictional High Court's decision in the case of Dey's Medical (U.P.) (P) Limited Vs. Union of India and others (316 ITR 445) that once a deduction of a particular amount is not allowable under the Act, it is liable to be taxed."

13. The relevant material facts are like this. In the course of the assessment proceedings, the Assessing Officer disallowed a sum of Rs 5,42,023 on the ground that the assessee has not deducted tax at source from these payments made to the transporters. In appeal, learned CIT(A) deleted the disallowance on the ground that entire payment was made during the year itself and nothing survived for being 'payable' at the year end which could justify a disallowance under section 40(a)(ia). In coming to this conclusion, learned CIT(A) followed Special Bench decision by this Tribunal in the case of Merylyn Shipping & Travels Vs ACIT (136 ITR AT 23). The Assessing Officer is aggrieved and is in appeal before us.

14. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case as also the applicable legal position.

15. We find that as the assessee is in the jurisdiction of Hon'ble Allahabad High Court, this issue is to be treated as covered in favour of the assessee by a decision of Agra bench of this Tribunal, in the case of DCIT Vs Gupta Overseas [2014] 42 taxmann.com 42 (Agra - Trib.), wherein the Tribunal has, *inter alia*, observed as follows:

38. We are, however, saved of taking this call as, at this stage, it is useful to take note of the CBDT Circular 10/DV/2013 [F No. 279/Misc/M 61/2012 – Section 40 (a)(i) of the Income Tax Act, 1961] dated 16th December 2013, which, *inter alia*, observes as follows:

3.3. The Hon'ble Allahabad High Court in CIT Vs Vector Shipping Services Pvt Ltd [2013] 38 taxmann.com 77 (Allahabad) has affirmed the decision of the Special Bench in Merilyn Shipping that for disallowance under section 40(a)(ia) of the Act, the amount should be payable and not which has been paid during the year.....

39. The said circular then expressed the departmental view to the effect that the disallowance under section 40(a)(ia) will not only include the amount payable at the year-end but also the amount paid during the year. Having said so, the circular also observed as follows:

5. Where any High Court decides an issue contrary to the 'departmental view', the 'departmental view' thereon shall not be operative in the area falling in the jurisdiction of the relevant High Court.....

40. An analysis of the stand so taken by the CBDT, which is binding on all the field officers under section 119 of the Act, leads us to the conclusion that so far as Allahabad High Court decision is concerned, it is to be treated as approval of Merilyn Shipping decision (*supra*), and, accordingly, there is no requirement for tax withholding with respect to payments actually made to the residents during the relevant previous year itself. No doubt, this circular does not bind this Tribunal, but, as is the binding legal position in the light of a series of decisions by Hon'ble Supreme Court, such a circular, being in the nature of a benevolent circular, binds the income tax authorities. This circular is, therefore, required to be given effect by us, to that extent, as well. Once it is accepted, as has been accepted by the CBDT itself, that Hon'ble Allahabad High Court has decided this issue in favour of the assessee, the rigour of disallowance under section 40(a)(ia) must stand relaxed in the area falling

within the jurisdiction of Hon'ble Allahabad High Court. It cannot, therefore, be said that there for the purposes of disallowance under section 40(a)(ia), so far as the assessee before us is concerned, it is necessary that the assessee should have deducted tax at sources so far as payments made during the relevant previous year are concerned

16. Following the view so taken by Agra bench of the Tribunal, we uphold the stand of the learned CIT(A) on this issue as well, and decline to interfere in the matter.

17. Ground No. 4 and 5 are also dismissed.

18. In the result, the appeal is dismissed. Pronounced in the open court today on 18th day of July, 2014.

Sd/-

Joginder Singh
(Judicial Member)

Sd/-

Pramod Kumar
(Accountant Member)

Agra, the 18th day of July, 2014.

Copies to :

- (1) *The appellant*
- (2) *The respondent*
- (3) *CIT*
- (4) *CIT(A)*
- (5) *The Departmental Representative*
- (6) *Guard File*

By order etc

*Assistant Registrar
Income Tax Appellate Tribunal
Agra bench, Agra*