Paper on Recent Controversies and Issues on Income Tax (By Kapil Goel FCA LLB Advocate advocatekapilgoel@gmail.com 9910272806)

1. Landmark Supreme Court orders

1.1 Supreme Court in case of Excel Industries 358 ITR 295

27. Applying the three tests laid down by various decisions of this Court, namely, whether the income accrued to the assessee is real or hypothetical; whether there is a corresponding liability of the other party to pass on the benefits of duty free import to the assessee even without any imports having been made; and the probability or improbability of realisation of the benefits by the assessee considered from a realistic and practical point of view (the assessee may not have made imports), it is quite clear that in fact no real income but only hypothetical income had accrued to the assessee and Section 28(iv) of the Act would be inapplicable to the facts and circumstances of the case. Essentially, the Assessing Officer is required to be pragmatic and not pedantic.

31. It appears from the record that in several assessment years, the Revenue accepted the order of the Tribunal in favour of the assessee and did not pursue the matter any further but in respect of some assessment years the matter was taken up in appeal before the Bombay High Court but without any success. That being so, the Revenue cannot be allowed to flip-flop on the issue and it ought let the matter rest rather than spend the tax payers' money in pursuing litigation for the sake of it.

32. Thirdly, the real question concerning us is the year in which the assessee is required to pay tax. There is no dispute that in the subsequent accounting year, the assessee did make imports and did derive benefits under the advance licence and the duty entitlement pass book and paid tax thereon. Therefore, it is not as if the Revenue has been deprived of any tax. We are told that the rate of tax remained the same in the present assessment year as well as in the subsequent assessment year. Therefore, the dispute raised by the Revenue is entirely academic or at best may have a minor tax effect. There was, therefore, no need for the Revenue to continue with this litigation when it was quite clear that not only was it fruitless (on merits) but also that it may not have added anything much to the public coffers.

1.2 Supreme Court order in MAK Data case 358 ITR 593

7. The AO, in our view, shall not be carried away by the plea of the assessee like "voluntary disclosure", "buy peace", "avoid litigation", "amicable settlement", etc. to explain away its conduct. The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income. Explanation to Section 271(1) raises a presumption of concealment, when a difference is noticed by the AO, between reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the explanation, has been discharged by him, the onus shifts on the Revenue to show that the amount in question constituted the income and not otherwise.

8. Assessee has only stated that he had surrendered the additional sum of Rs.40,74,000/- with a view to avoid litigation, buy peace and to channelize the energy and resources towards productive work and to make amicable settlement with the income tax department. Statute does not recognize those types of defences under the explanation 1 to Section 271(1)(c) of the Act. It is trite law that the voluntary disclosure does not release the Appellant-assessee from the mischief of penal proceedings. The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he had to be absolved from penalty.

9. We are of the view that the surrender of income in this case is not voluntary in the sense that the offer of surrender was made in view of detection made by the AO in the search conducted in the sister concern of the assessee. In that situation, it cannot be said that the surrender of income was voluntary.

Aforesaid order is explained Madras high court in case of Gem Granites (Karnataka) case as follows:

IN THE HIGH COURT OF JUDICATURE AT MADRAS
Dated : 12.11.2013
Commissioner of Income Tax,
Chennai -IV ... Appellant

-vs-

M/s.Gem Granites (Karnataka),
The short question which falls for consideration is whether the order of penalty under Section 271(1)(c) of the Act passed by the Assessing Officer and confirmed by the first Appellate Authority, is just and proper.

11. In a recent decision of the Hon'ble Supreme Court in Civil Appeal No.9772 of 2013, dated 30.10.2013 (Mak Data P. Ltd., vs. Commissioner of Income Tax-II), the Hon'ble Supreme Court while considering the Explanation to Section 271(1), held that the question would be whether the assessee had offered an explanation for concealment of particulars of income or furnishing inaccurate particulars of income and the Explanation to Section 271(1) raises a presumption of concealment, when a difference is noticed by the Assessing Officer between the reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence and when the initial onus placed by the explanation, has been discharged by the assessee, the onus shifts on the Revenue to show that the amount in question constituted their income and not otherwise. Factually, we find that the onus cast upon the assessee has been discharged by giving a cogent and reliable explanation. Therefore, if the department did not agree with the explanation, then the onus was on the department to prove that there was concealment of particulars of income or furnishing inaccurate particulars of income. In the instant case, such onus which shifted on the department has not been discharged. In the circumstances, we do not find that there is any ground for this Court to substitute our interfere with the finding of the Tribunal on the aspect of the bonafides of the conduct of the assessee.

12. In the circumstances, following the decision of the Hon'ble Supreme Court, we uphold the order of the Tribunal and the Tax Case Appeal stands dismissed. No costs.

1.3 Supreme Court in Price Waterhouse 348 ITR 306 case

"17. Having heard learned counsel for the parties, we are of the view that the facts of the case are rather peculiar and somewhat unique. The assessee is undoubtedly a reputed firm and has great expertise available with it. Notwithstanding this, it is possible that even the assessee could make a "silly" mistake and indeed this has been acknowledged both by the Tribunal as well as by the High Court.

18. The fact that the Tax Audit Report was filed along with the return and that it unequivocally stated that the provision for payment was not allowable under Section 40A(7) of the Act indicates that the assessee made a computation error in its return of income. Apart from the fact that the assessee did not notice the error, it was not even noticed even by the Assessing Officer who framed the assessment order. In that sense, even the Assessing Officer seems to have made a mistake in overlooking the contents of the Tax Audit Report.

19. The contents of the Tax Audit Report suggest that there is no question of the assessee concealing its income. There is also no question of the assessee furnishing any inaccurate particulars. It appears to us that all that has happened in the present case is that through a bona fide and inadvertent error, the assessee while submitting its return, failed to add the provision for gratuity to its total income. This can only be described as a human error which we are all prone to make. The calibre and expertise of the assessee has little or nothing to do with the inadvertent error. That the assessee should have been careful cannot be doubted, but the absence of due care, in a case such as the present, does not mean that the assessee is guilty of either furnishing inaccurate particulars or attempting to conceal its income.

20. We are of the opinion, given the peculiar facts of this case, that the imposition of penalty on the assessee is not justified. We are satisfied that the assessee had committed an inadvertent and bona fide error and had not intended to or attempted to either conceal its income or furnish inaccurate particulars"

Further refer:

Delhi high court Societex 259 CTR 325

Similarly, as far as the provision for taxation is concerned, we notice that the Tribunal by the impugned order had stated in the extract reproduced above that the assessee had made a claim for deduction of the provision for the first time in the year under appeal; in other words, there was no history of furnishing such accurate particulars by the assessee for the previous years. Having regard to these circumstances and the fact that the CIT(Appeals) as well as the Tribunal had held in favour of the assessee, this Court is of the opinion that no substantial question of law arises in this case.

Bombay High Court in Bennet Colemn 259 CTR 383

2. So far as question (i) is concerned, the respondent assessee has claimed deduction of interest on tax free bonds of Rs.5,60,11,644/-. During the course of the assessment proceedings, the assessee was asked to give details of interest on tax free bonds. While preparing the said details, it was noticed that 6% Government of India Capital Index Bonds purchased during the year had inadvertently been categorized as tax free bonds and, therefore, interest of Rs.75,00,000/- earned on such bonds had also inadvertently escaped tax. The assessing officer levied penalty under Section 271(1)(c) of the Income Tax Act, 1961 (the Act). The CIT(A) upheld the order of the Assessing Officer. On further appeal, the Tribunal in the impugned order records a finding of fact that by inadvertent mistake interest @ 6% on the Government of India Capital Index Bonds was shown as tax free bonds. The Tribunal concluded that there was no desire on the part of the respondent-assessee to hide or conceal the income so as to avoid payment of tax on interest from the bonds. In that view of the matter, the Tribunal deleted the penalty imposed upon the respondent assessee under Section 271(1)(c) of the Act. In view of the fact that the decision of the Tribunal is based on finding of fact that there was an inadvertent mistake on the part of the assessee in including the interest received of 6% on the Government of India Capital Index Bonds as interest received on tax free bonds. It is not contended by the Revenue that above finding of fact by the Tribunal is perverse. In these circumstances, we see no reason to entertain the proposed question (i).

Andhra Pradesh High Court Sania Mirza 259 CTR 386

8. We have heard learned counsel for the Revenue and find that there is nothing to suggest that the assessee acted in a manner such as to lead to the conclusion that she had concealed the particulars of her income or had

furnished inaccurate particulars of income. The admitted position is that the amount of Rs.30,63,310/- was shown by her in the return. That being the position, it cannot be said that there was any concealment. There is no dispute about the fact that the amount was correctly mentioned and therefore, there is also nothing inaccurate in the particulars furnished by her. The only error that seems to have been committed was that it was not shown as a capital receipt. But as soon as this was pointed out, the error was accepted and the amount was surrendered to tax.

9. In our opinion this is not a fit case for imposition of penalty

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH
ITA No. 428 of 2009(O&M)
Date of decision: 16.8.2013 **Commissioner of Income Tax, Jalandhar I, Jalandhar**
-----Appellant
Vs.
Shri Rajiv Bhatara Whether on the facts and in the circumstances of the case, the findings of the Tribunal that the assessee was not guilty of furnishing inaccurate particulars of income were made without properly appreciating the facts available on record? II)Whether on the facts and in the circumstances of the case and in view of the provisions contained in Section 271(1)(c) of the Income Tax Act, 1961 and Explanations thereto, the Tribunal was right in law in confirming the deletion of penalty by the CIT(A) without considering judgment of Supreme Court in the case of **Union of India and others v. Dharmendra Textile Processors and others, (2008) 306 ITR 277 (SC)?"** Learned counsel for the appellant-revenue submitted that an addition of ` 17,11,065/- was sustained in the income of the assessee on account of capital gains arising from acquisition of agricultural land which was within 8 kms. from municipal limits of sonepat. It was urged that the Assessing Officer had rightly levied penalty under Section 271(1) (c) of the Act as the assessee had furnished inaccurate particulars in as much as certificate furnished by the assessee that the land was beyond 8 kms. from the limits of the Municipal Committee, Sonepat, was not correct; The Tribunal while upholding deletion of penalty by the CIT(A) noticed that the assessee had furnished a certificate dated 19.6.1996 from Sub Divisional Engineer Maintenance Sub Division, B&R wherein it was specified that distance from Sonepat Municipal Committee to Village Kamaspur, Tehsil and District Sonepat was 8.2 kms. It was also noticed that there were various certificates wherein different distances had been mentioned. After considering the matter, the Tribunal came to the conclusion that there was no intention on the part of the assessee to furnish inaccurate particulars. Still further, the Hon'ble Apex Court in ***Commissioner of Income Tax v. Reliance Petro Products (P) Ltd*.** (2010) 322 ITR 158 had held that mere making of a claim which was ultimately found to be unsustainable may not by itself amount to furnishing of inaccurate particulars regarding the income. In view of the above, the substantial questions of law are answered against the revenue and in favour of the assessee

THE HIGH COURT OF PUNJAB AND HARYANA AT

CHANDIGARH ITA No.122 of 2012 (O&M) Date of decision:08.8.2013 Commissioner of Income Tax I, Ludhiana Appellant Versus M/s Tudor Knitting Works Pvt. Limited Respondent

It had been noticed by the Tribunal that there was no false claim made by the assessee though the same was found to be incorrect. There was no *mens rea* on the part of the assessee to claim the deduction and therefore, the case did not fall under Section 271(1) (c) of the Act as there are divergent judicial opinions on the claim made by the assessee.

In view of the above, the substantial questions of law are answered against the revenue and in favour of the assessee.

(Whether on the facts and circumstances of the case, Hon'ble Income Tax Appellate Tribunal is justified in deleting the penalty levied under Section 271(1) (c) of the IT Act, 1961 by AO on account of excess claim of deduction under Section 80IB on surrendered income ignoring the fact that the assessee had knowingly claimed deduction under Section 80IB inspite of a categorical knowledge that such a claim was patently wrong and against the law and also that it was ab initio void claim?

Whether on the facts and circumstances of the case, Hon'ble Income Tax Appellate Tribunal is justified in deleting the penalty levied under Section 271(1) (c) of the IT Act, 1961 by applying the decision of Hon'ble Supreme Court in the case of **M/s Reliance Petro Products (P) Limited 322 ITR 158** as the facts and legal position of this case are different and the assessee knowingly made a false claim of deduction under Section 80IB?")

Income Tax Appeal No.183 of 2013 1 IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH Income Tax Appeal No.183 of 2013 Date of Decision:06.09.2013 Bal Kishan Dhawan HUF, Prop. M/s B.K.D.Enterprises,Amritsar The revenue impugns order dated 8.3.2013 passed by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar and order dated 25.5.2012 passed by the Commissioner of Income Tax (Appeals), deleting the penalty imposed by the Assessing Officer. Counsel for the appellant submits that as the assessment order was upheld by the Income Tax Appellate Tribunal, the order imposing penalty, under Section 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as the "Act"), has been wrongly set aside by the Commissioner of Income Tax (Appeals) and the Income Tax Appellate Tribunal, by relying upon a judgment of the Hon'ble Supreme Court in Commissioner of Income Tax (Appeals) versus Reliance Petro Products Private Limited 322 ITR 158 (Supreme Court). The judgment is not applicable as it is distinguishable on facts. The controversy, in the present case, is fully covered against the assessee by a judgment of the Delhi High Court in Commissioner of Income Tax versus Zoom Communication Private Limited, 2010 (327) ITR 510 (Delhi). The Income Tax Appellate Tribunal as well as the Commissioner of Income Tax (Appeals) have fallen into error while holding that mere disallowance of deduction claimed, would not necessarily invite penalty. We have heard counsel for the appellant, perused the impugned orders and find no reason to entertain the appeal, much less on the questions of law raised by the appellant. Counsel for the revenue's contention that as claim for deduction was not bona fide, penalty was rightly imposed. The controversy, herein, is covered against the assessee by a judgment of the Delhi High Court in Zoom Communication Private Limited's case (supra) and not by judgment of the Hon'ble Supreme Court in Reliance Petro Products' case (supra) as the latter judgment is distinguishable on facts. We are not inclined to accept the submissions made by counsel for the revenue While considering the scope and ambit of penalty levied under Section 271(1)(c) of the Act, the Hon'ble Supreme Court has held in Reliance Petro Products' case (supra) that mere raising of a claim, even if not sustainable in law, is not by itself, sufficient to hold that it denotes furnishing of inaccurate particulars with an intent as would invite a penalty. The Hon'ble Delhi High Court has held in Zoom Communication Private Limited's case (supra), that if an assessee is unable to explain as to in what circumstances and on account of whose mistake, deductions were claimed, it would amount to raising a mala fide claim that would invite penalty. We cannot, but agree with the observations by the Delhi High Court, but, as the situation, on facts, in the present case, is entirely different, find no reason to depart from the ratio laid down by the Hon'ble Supreme court in Reliance Petro Products' case (supra). The deductions were claimed in a bona fide exercise of the right of an assessee to claim deduction. The fact that this claim was rejected, does not raise inference of a mala fide attempt to evade tax. A penalty is imposed only if the claim is mala fide or raised with intent to evade tax.

IN THE INCOME TAX APPELLATE TRIBUNAL AHMEDABAD "D" BENCH ITA No. 2920/Ahd/2012

Assessment Year 2001-02 Nishant Construction Pvt. Ltd. Date of pronouncement : 19-07-2013 6. After hearing both the parties and perusing the record, we find that the AO levied penalty of Rs. 3,16,400/- u/s 271(1)(c) of the Act against receipt of unsecured loans of Rs. 8 lacs. There is no dispute about the fact that these loans were received by the assessee through banking channels. The Ld. CIT(A) was of the view that if the assessee has failed to discharge onus cast upon him by the provision of Section 68 of the Act, the AO can make addition against such loans u/s 68 of the Act. The deeming provisions of section 68 are enabling provisions for making an addition but these deeming provision itself are not good enough for levying the penalty u/s 271(1)(c). To levy penalty u/s 271(1)(c) against such loans, he AO should disprove the fact that loans were not received by the assessee. Since in the instant case, the AO failed to bring any material on record to disprove the contentions of the assessee, penalty was rightly found to be not leviable by the Ld. CIT(A) in view of the decision of Gujarat High Court in the case of National Textile reported in 249 ITR 225. Therefore, we feel no need to interfere with the order passed by him deleting the penalty and the same is hereby upheld

IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI **Shri Samson Perinchery** /Date of Pronouncement : 11.10.2013 I.T.A. No.4625/M/2013 (AY:**2003-2004**) Briefly stated relevant facts of the case are that the assessee is an individual and received income from brokerage. Assessee filed the return of income u/s 139(1) for the AY 2003-04 declaring the total income of Rs. 97,669/-. There was a search action u/s 132 of the Act on the assessee on 18.12.2008. In response to the notice issued u/s 153A of the Act, assessee filed return of income

on 30.3.2009 declaring the total income of Rs. 30,26,460/-, which includes an additional income of Rs.29,28,791/-. Assessment was completed u/s 143(3) of the Act on 29.12.2010 and the total income of the assessee was determined at Rs. 31,98,460/- for the AY 2003- 2004 and the details of assessed income for other AYs are given in the table above. During the assessment proceedings, AO accepted the income returned u/s 153A of the Act. Accordingly, AO initiated penalty proceedings u/s 271(1)(c)

of the Act by levying minimum penalty at 100% of tax i.e., Rs. 9,30,200/- and passed penalty order on 29.6.2011. Thus, the Ld Counsel argued stating that the Assessing Officer is not clear, at the time of initiating the penalties whether the proceedings are initiated for „concealment of particulars of income" or „for furnishing the inaccurate particulars of

such income". Further, Ld Counsel mentioned that Assessing Officer **initiated** the penalties for "furnishing inaccurate particulars of such income" and however, he **levied** the penalty for "concealment of the particulars of such income". Thus, the initiation was done under one limb of the provisions of the Act and penalties were levied in another limb of the section 271(1)(c) of the Act. Further, he extended the

arguments by stating that such penalty proceedings are not sustainable in law. For this proposition, Ld Counsel relied on the judgment of the Hon"ble **Karnataka High Court** in the case of CIT vs. **Manjunatha Cotton & Ginning Factory** [2013] 35 Taxmann.com 250 (Kar.) dated 13.12.2012. Bringing our attention to para 59 to 61 of the said High Court judgment, Ld Counsel mentioned that relying on the judgment of the Hon"ble Supreme Court in the case of**Ashok Pai** 292 ITR 11 and

also the judgment of the Hon"ble Gujarat High Court in the case of **Manu**

Engineering 122 ITR 306 together with Delhi High Court judgment in the case of **Virgo Marketing** 171 Taxmann 156, the levy of the penalty has to be clear as to the limb of which it is levied and the position being unclear, penalty is not sustainable. **Without going into the merits**, at the outset, we have under taken the assessee"s legal propositions whether the penalty is sustainable on technicalities, considering the cited judgment of the

Hon‟ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory (supra). From the above, it is clear that the penalty should be clear as to the limb for which it is levied and the position being unclear here the penalty is not sustainable. Therefore, considering the same, we are of the opinion that the ground raised by the assessee should be allowed on technical grounds Accordingly, adjudication of the
penalties on merits become an academic exercise. Therefore, the grounds raised in all the six assessment years are **allowed.** 14. In the result, 6 appeals filed by the assessee are allowed.

Mere mention of 'Penalty proceedings u/s 271(1)(c) are initiated separately' in assessment order, does not mean 'direction' u/s 271(1)(c) for levy of penalty; Clear and unambiguous direction in assessment order to initiate penalty proceedings must; Absent such direction, conditions prescribed u/s 271(1)(c) not attracted; Confirms ITAT's order deleting penalty : Karnataka HC The ruling was delivered by division bench of Justice N. Kumar and Justice Rathnakala. Senior Counsel Mr. D.L.N. Rao along with Ms. Anuradha argued successfully on behalf of the assessee. The Revenue was represented by Mr. K.V. Aravind and Mr. B. Pramod. ***MWP Ltd.*** *[TS-617-HC-2013(KAR)]*

1.4 Supreme Court in Bangalore Club 350 ITR 509

The assessee was a member's club. It also earned on deposit of surplus funds with member-banks. The interest was not exempt from tax on principle of mutuality. S.4 of the Income Tax Act, 1961.

2. Misc Issues : Books rejection & Adhoc disallowance etc

2.1 In case books rejected : No option but to estimate profits as per section 145/144 and no possibility to make separate disallowances u/s 40A(3); 40(a)(ia); 43B etc (refer Asr bench ITAT in landmark colonizers) refer Delhi high court 336 ITR 400 (duty of AO to bring comparable on records); Stock register not must (refer 316 ITR 125; 320 ITR 70; 324 ITR 95; 326 ITR 223) ; Adhoc disallowance expense (Delhi high court in 332 ITR 269)

2.2 Overriding cost and principle of netting: Delhi high court in 212 Taxmann 399 (section 57(iii))

2.3 New claim before AO & appeal against wrong admission'

Chennai ITAT in 146 TTJ 315; Bombay high court in 349 ITR 404

3. TDS related issues

IN THE INCOME TAX APPELLATE TRIBUNAL 'A' BENCH : CHENNAI I.T.A.No.1951/Mds/12 Assessment year : 2009-10 M/s Eskay Designs Date of Pronouncement : 09-12-2013 10. Before us, the sole argument of the Revenue is that 'paid' and 'payable' distinction drawn by the CIT(A) whilst issuing aforesaid directions to the Assessing Officer on the basis of Special Bench decision (supra) is no longer sustainable in view of the decision of the Hon'ble Calcutta High Court in the case of CIT vs Md. Jakir Hossain Mondal dated 4.4.2013 in I.T.A.No. 31 of 2013 and Gujarat high court's decision in the case of CIT vs Sikandarkhan N. Tunvar, 33 Taxman.com 133. In this backdrop, we find that the co-ordinate bench of the 'tribunal' in I.T.A.No. 2076/Mds/2012 dated 18.9.2013 in the case of ITO vs M/s Theekathir Press [authored by one of us, Dr.O.K.Narayanan, VP] has held that since there is variation of hon'ble Calcutta high court and Gujarat high court have decided the question in favour of the Revenue and the hon'ble Allahabad high court in the case of CIT vs M/s Vector *shipping Services (P) Ltd* ***357 ITR 642*** *has proceeded in favour of the assessee, the case law of hon'ble supreme*

court in the case of CIT vs Vegetable Products Ltd., 88 ITR 192 would apply so as to decide the issue in assessee's favour,….. In view thereof, we also hold that the CIT(A) has rightly directed the Assessing Officer to examine the assessee's claim on the basis of 'paid' and 'payable' issue as stated hereinabove. So, the relevant grounds of the Revenue are decided in favour of the assessee.

Refer cbdt circular no. **Department's Circular No. 10/DV/2013 dated 15.12.2013**

IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD " B " BENCH, HYDERABAD ITA No.1425/Hyd/2010
Assessment Year 2006-07. M/s. UAN Raju IVRCL
Hyderabad. Constructions JV Date of pronouncement 18-10-20

The only issue in this appeal of the department is with regard to CIT (A) deleting the addition made by the Assessing Officer on account of disallowance u/s 40(a)(ia) of the Act for not deducting tax at source In course of reassessment proceedings, the Assessing Officer apart from holding that the assessee is not entitled to deduction claimed u/s 80IA of the Act made further disallowance on various counts one of them being disallowance of interest u/s 40(a)(ia) of the Act amounting to Rs.1,56,72,913. It was noticed by the Assessing Officer during the assessment proceedings that the assessee had paid an amount of Rs.1,56,72,913/- as interest to M/s Konkan Railway Corporation Ltd., on mobilisation advance. The Assessing Officer noticing that the assessee had not deducted tax at source on such interest payment, proposed to disallow he same by applying the provisions of section 40(a)(ia) of the Act assessee however contended that the provisions of section 40(a)(ia) is not applicable as the interest on mobilization advance was recovered by Konkan Railway Corporation Ltd., from the running bill and was not paid by the assessee. The Assessing Officer though accepted the position that there is factual difficulty on the part of the assessee in making TDS on interest payment as interest was recovered by the contractee Konkan Railway Corporation Ltd., while making payment of contract charges but he nevertheless held that the assessee was obliged under law to deduct tax at source and accordingly disallowed the interest payment of Rs.1,56,72,913 u/s 40(a)(ia) of the Act. The assessee challenged the disallowance u/s 40(a)(ia) of the Act by preferring an appeal before the CIT

(A). 5. The CIT (A) after considering the submissions of the assessee in the light of the terms of the contract as well as the statutory provisions contained u/s 194A of the Act concluded that no disallowance can be made u/s 40(a)(ia) of the Act…

We have considered submissions of the parties and perused the material on record. As can be seen from the finding of the Assessing Officer, he has not disputed the fact that the interest on mobilisation advance was recovered by the contractee M/s Konkan Railway Corporation Ltd., from running bills of the assessee and the Assessing Officer also accepts that it is difficult on the part of the assessee for making TDS as interest was recovered by the contractee M/s Konkan Railway Corporation Ltd., while making the payment of contract charges. Therefore, in real sense it cannot be said that the assessee has credited the interest to the account of the contractee in terms of section 194A of the Act. As observed by the CIT (A) in his order the terms of the contract entered into between the parties authorises the contractee to recover interest on the mobilisation advances and also prescribes the mode andmanner of calculation of interest. Therefore, when the interest on mobilisation advance was recovered by the contractee from the running bills before releasing the contract charges to the assessee, it cannot be said that the assessee has credited the interest paid or payable to the account of the assessee. In fact, the CIT (A) has also noted that the assessee has not credited any such amount towards payment of interest to the account of the contractee in its books of accounts. ***In the aforesaid factual situation, it cannot be said that there is any violation of provisions of section 194A of the Act. A liability cannot be fastened on the assessee or a default cannot be attributed to the assessee for not discharging an obligation which is impossible on its part to perform***

IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH " B " I.T.A. No.1523/Bang/2012
(Assessment Year : 2005-06) M/s. Dhaanya Seeds Pvt. Ltd., Date of Pronouncement : 27.09.2013

Disallowance u/s.40(a)(ia) – Reimbursement of Expenses to C&F Agents – Rs.4,78,499.. 6.1.1 In the order of assessment, the Assessing Officer had made disallowances u/s.40(a)(ia) of the Act under various heads aggregating to Rs.43,93,515 for non-deduction of tax on such payments. However, what is before us in the present appeal is the issue of disallowance u/s.40(a)(ia) of the Act in respect of reimbursement of expenses amounting to Rs.4,78,499 made to C&F Agents.

6.4.1 We have heard both parties and perused and carefully considered the material on record, including the judicial decisions cited. In terms of sub-section (2) of Section 4 of the Act, which is the charging section, in respect of income chargeable under sub-section (1), income tax shall be deducted at source or paid in advance, where it is so deductible or payable under any provision of this Act. From this, it is clear that tax is to be deducted only where the element of income is part of the payment. Since reimbursement of expenses do not constitute trading receipts or have any element of income therein, TDS is not liable to be made from reimbursements. Though section 194C of the Act mentions TDS being made on "any sum" paid to a resident in pursuance of a contract, the term "any sum" cannot be stretched to mean even expenses incurred on behalf of the client and later recovered from them. When a C& F agent incurs expenses like custom duty, port dues, and other sundry charges, he is merely acting as a front man of his client and on his behalf. These expenses do not normally have any nexus with the commission he is supposed to earn for his work. Though the decision of the Hon'ble Apex Court in Transmission Corporation was rendered in relation to TDS to be made on payments to non-residents, the principle could be applied to section 194C of the Act as well. The Hon'ble Court held that any such payment must constitute a trading receipt of the recipientand must bear the character of income either wholly or partiallyand in either case it would call for deduction of tax at source. It is, therefore, important to first establish that the receipt should bear the character of income for making it liable to TDS. The fact that the reimbursement of expenses have been separately billed, in the case on hand, is not disputed. The C&F Agents are appointed to provide the service of carrying out sales for which they are paid service charges on which TDS has been made and not for the purpose of incurring expenses on behalf of the assessee. In this view of the matter, the reimbursement of expenses by C&F Agents cannot be held to be contract / service on which the provisions of section 194C of the

Act would come into play and apply. In view of the factual position as laid out above and following the decision of the Hon'ble Delhi High Court in the case of Van Oord ACZ India (P) Ltd. (supra), we hold that there is no need to deductTDS on reimbursement of expenses to C& F Agents which are separately billed and accordingly uphold the order of the learned CIT(Appeals). Consequently, we dismiss ground No.2 raised by revenue.

Pfizer Ltd., Pfizer Centre IN THE INCOME TAX APPELLATE TRIBUNAL
"C" Bench, Mumbai ITA No.1667/Mum/2010
(Assessment year: 2007-08) Mumbai, dated 31st October, 2012

12. As already explained and evidenced from the computation of income as well as the orders of AO in the assessment proceedings, the entire provision has been disallowed under section 40(a)(ia) and section 40(a)(i). Once the amount has been disallowed under the provisions of section 40(a)(i) on the reason that tax has not been deducted, it is surprising that AO holds that the said amounts are subject to TDS provisions again so as to demand the tax under the provisions of section 201 and also levy interest under section201(1A). We are unable to understand the logic of AO in considering the same as covered by the provisions of section 194C to 194J. Assessee as stated has already disallowed the entire amount in the computation of income as no TDS has been made. Once an amount was disallowed under section 40(a)(i)/(ia) on the basis of the audit report of the Chartered Accountant, the same amount cannot be subject to the provisions of TDS under section 201(1) on the reason that assessee should have deducted the tax. If the order of AO were to be accepted then disallowance under section 40(a)(i) and 40(a)(ia) cannot be made and provisions to that extent may become otiose. In view of the actual disallowance under section 40(a)(i) by assessee having been accepted by AO, we are of the opinion that the same amount cannot be considered as amount covered by the provisions of section 194C to 194J so as to raise TDS demand again undersection 201 and levy of interest under section 201(1A). Therefore assessee's ground on this issue are to be allowed as the entire amount has been disallowed under the provisions of section 40(a)(i)/(ia) in the computation of income on the reason that TDS was not made. For this reason alone assessee's grounds can to be allowed. Considering the facts and reasons stated above assessee's grounds are allowed.

udgement Last Updated on: **06 Jun 2013** LexDoc Id:**449978**

Category - Direct Tax

Issuing Authority/Forum: ITAT

ICICI Bank Ltd. vs DCIT

Citation 156 TTJ 569

Followed Hindustan Coca Cola Beverage (P) Ltd. vs CIT

(5) Supreme 886; 163 Taxman 355; 2007 8 SCC 463; 202 Taxation 210; 211 CTR 545; 293

ITR 226; LexReported

Jagran Prakashan Ltd. vs DCIT

209 Taxman 92; 251 CTR 65; 345 ITR 288; LexReported

ITAT, Lucknow

ICICI Bank Ltd. vs DCIT

ITA No. 667/Luck/2011; Asst. yr. 2008-09

Sunil K. Yadav, Judicial Member and Pramod Kumar, Accountant Member

6 June 2013

None for the Appellant
Ranu Biswas for the Respondent

ORDER

Pramod Kumar, Accountant Member:-

1. By way of this appeal the assessee has challenged correctness of CIT(A)'s order dt. ast Aug., 2011, in the matter of demand raised under s. 201(1A) r/w s. 194A of the IT Act, 1961 on the following grounds:-

"1. On the facts and circumstances of the case and in law, the learned lower authorities erred on facts and in law in holding the appellant liable for short deduction of tax at source while making payment of interest to M/s Software Technology Parks of India, Lucknow, a society registered under the Societies Registration Act, 1860.

2. On the facts and circumstances of the case and in law, the learned lower authorities erred on facts and in law in holding the appellant liable for interest on late deposit of the amount of TDS while making payment of interest to various deductees as per the provisions of s. 194A of the IT Act, 1961 r/w r. 30(1)(b)(i)(1) of the IT Rules, 1962 respectively."

2. Briefly stated, the relevant material facts are like this. It is a case of short deduction of tax at source in as much as while the assessee tax deductor has deducted tax @ 10.3 per cent, the AO (TDS) was of the view that tax should have been deducted @ 11.33 per cent. Aggrieved assessee tax deductor carried the matter in appeal but without any success. As a matter of fact, the assessee has conceded the issue, so far as the fact of short deduction of tax at source was concerned, as evident from following observations made by CIT(A):-

"3.2 Ground No. 2 is regarding short deduction of TDS on payment of interest to Software Technology Parks of India, a society registered under the Societies Registration Act, 1860. It is contended that the PAN of the society is AAATS2468J and as per the TDS rates prevailing for the financial year 2007-08 for a society, the rate applicable

was 10.3 per cent which was applied correctly. However, it was informed to the Authorized Representative vide order sheet entry dt. 16th March, 2011 that gross payments to the society were Rs. 12,64,682 and, for the year under consideration, the TDS made was also liable to be subjected to surcharge @ 10 per cent. The Authorized Representative conceded the same during the course of the appeal on 30th May, 2011. Hence, as the payment had exceeded Rs. 10 lakhs, the deductor was liable to deduct tax at source along with surcharge @ 10 per cent with the effective rate of TDS being @ 11.33 per cent. Hence, the short deduction has been correctly computed and ground No. 2 of the appeal is rejected."

3. The assessee is in second appeal before us.

4. None appeared for the appellant but we have heard the Departmental Representative, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

5. We find that as the amount of interest payment exceeded Rs. 10 lakhs, the assessee was required to deduct surcharge @ 10 per cent, in addition to the prescribed rate of tax as well. The appellant did not dispute so before any of the authorities below, or in the documents filed before us. In this view of the matter, there was indeed a short deduction of tax at source. To that extent, authorities below are indeed correct.

6. It is, however, important to bear in mind the settled legal position that a short deduction of tax at source, by itself does not result in a legally sustainable demand under s. 201(1) and under s. 201(1 A). As held by Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverage (P) Ltd. vs. CIT (2007) 211 CTR (SC) 545 : (2007) 293 ITR 226 (SC), the taxes cannot be recovered once again from the assessee in a situation in which the recipient of income has paid due taxes on income embedded in the payments from which tax withholding requirements were not fully or partly complied with. Hon'ble jurisdictional High Court, in the case of Jagran Prakashan Ltd. vs. Dy. CIT (2012) 251 CTR (All) 65 : (2012) $3 DTR (All) 233 : (2012) 21 taxmann.com489 (All) also has, inter alia, observed as follows:-

".....it is clear that deductor cannot be treated an assessee in default till it is found that assessee has also failed to pay such tax directly. In the present case, the IT authorities had not adverted to the Explanation to s. 191 nor had applied their mind as to whether the assessee has also failed to pay such tax directly. Thus, to declare a deductor, who failed to deduct the tax at source as an assessee in default, condition precedent is that assessee has also failed to pay tax directly. The fact that assessee has failed to pay tax directly is thus, foundational and jurisdictional fact and only after finding that assessee has failed to pay tax directly, deductor can be deemed to be an assessee in default in respect of such tax....."

7. It is thus clear that the onus is on the Revenue to demonstrate that the taxes have not been recovered from the person who had the primary liability to pay tax, and it is only when the primary liability is not discharged that vicarious recovery liability can be invoked. Once all the details of the persons to whom payments have been made are on record, it is for the AO, who has all the powers to requisition the information from such payers and from the IT authorities, to ascertain whether or not taxes have been paid by the persons in receipt of the amounts from which taxes have not been withheld. As a result of the judgment of Hon'ble Allahabad High Court in Jagran Prakashan's case (supra), there is a paradigm shift in the manner in which recovery provisions under s. 201(1) can be invoked. As observed by their Lordships, the provisions of s. 201(1) cannot be invoked and the "tax deductor cannot be treated an assessee in default till it is found that assessee has also failed to pay such tax directly". Once this finding about the non-payment of taxes by the recipient is held to a condition precedent to invoking s. 201(1), the onus is on the AO to demonstrate that the condition is satisfied. No doubt the assessee has to submit all such information about the recipient as he is obliged to maintain under the law, once this

information is submitted, it is for the AO to ascertain whether or not the taxes have been paid by the recipient of income. This approach, in our humble understanding, is in consonance with the law laid down by Hon'ble Allahabad High Court.

8. It is important to bear in mind that the lapse on account of non-deduction of tax at source is to be visited with three different consequences—penal provisions, interest provisions and recovery provisions. The penal provisions in respect of such a lapse are set out in s. 271C. So far as penal provisions are concerned, the penalty is for lapse on the part of the assessee and it has nothing to do with whether or not the taxes were ultimately recovered through other means. The provisions regarding interest in delay in depositing the taxes are set out in s. 201(1A). These provisions provide that for any delay in recovery of such taxes is to be compensated by the levy of interest. As far as recovery provisions are concerned, these provisions are set out in s. 201(1) which seeks to make good any loss to Revenue on account of lapse by the assessee tax deductor. However, the question of making good the loss of revenue arises only when there is indeed a loss of revenue and the loss of revenue can be there only when recipient of income has not paid tax. Therefore, recovery provisions under s. 201(1) can be invoked only when loss to Revenue is established, and that can only be established when it is demonstrated that the recipient of income has not paid due taxes thereon. In the absence of the statutory powers to requisition any information from the recipient of income, the assessee is indeed not always able to obtain the same. The provisions to make good the shortfall in collection of taxes may thus end up being invoked even when there is no shortfall in fact. On the other hand, once assessee furnishes the requisite basic information, the AO can very well ascertain the related facts about payment of taxes on income of the recipient directly from the recipient of income. It is not the Revenue's case before us that, on the facts of this case, such an exercise by the AO is not possible. It does put an additional burden on the AO before he can invoke s. 201(1) but that's how Hon'ble High Court has visualized the scheme of Act and that is. how, therefore, it meets the end of justice.

9. As far as levy of interest under s. 201(1 A) is concerned, this interest is admittedly a compensatory interest in nature and it seeks to compensate the Revenue for delay in realization of taxes. Hon'ble Bombay High Court, in the case of Bennet Coleman and Co. Ltd. vs. Mrs. V.P. Damle, ITO (1985) 47 CTR (Bom) 342 : (1986) 157 ITR 812 (Bom) has held so. Therefore, levy of interest under s. 201(1 A) is applicable whether or not the assessee was at fault. However, since it is only compensatory in nature, it is applicable for the period of the date on which tax was required to be deducted till the date when tax was eventually paid. However, in a case in which the recipient of income'had no tax liability embedded in such payments, there will obviously be no question of delay in realization of taxes and the provisions of s. 201(1 A) will not come into play at all. The computation of interest is to be redone in the light of this legal position.

10. The matter thus stands restored to the file of the AO for fresh adjudication in accordance with the law and in the light of our observations above. While doing so, the AO will give a due and fair opportunity of hearing to the assessee and dispose of the matter by way of a speaking order. We direct so.

11. In the result, the appeal is allowed for statistical purposes in the terms indicated above.

4. Reopening Section 148

Orders based on 354 ITR 536 **CIT vs Orient Craft Ltd.** High Court of Delhi

(a) The powers of the Assessing Officer to reopen an assessment, though wide, are not plenary.
(b) The words of the statute are “reason to believe” and not “reason to suspect”.

(c) The reopening of an assessment after the lapse of many years is a serious matter. Since the finality of a judicial or quasi-judicial proceedings are sought to be disturbed, it is essential that before taking action to reopen the assessment, the requirements of the law should be satisfied.

(d) The reasons to believe must have a material bearing on the question on escapement of income. It does not mean a purely subjective satisfaction of the assessing authority; the reason be held in good faith and cannot merely be a pretence.

(e) The reasons to believe must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Assessing Officer and the formation is belief regarding escapement of income.

(f) The fact that the words "definite information" which were there in section 34 of the Act of 1922 before 1948, are not there in section 147 of the 1961 Act would not lead to the conclusion that action can now be taken for reopening an assessment even if the information is wholly vague, indefinite, far-fetched or remote

- **IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA** Sri Sushil Kr. Chopra **I.T.A No. 1862/Kol/2009**

  Date of pronouncement: 12.04.2013
- Hyd Bench ITAT in S.Ranjith REDDY ITA 292/Hyd/2012 Date of order 07/06/2013
- Mumbai bench ITAT in Delta Airlines ITA No. 3476/Mum/2008 date of order 30.11.2012; Manu Parpia ITA No. 8507/M/2010 (Date of order: 3/7/2013)
- Delhi bench ITAT in case of K.L.Arora **ITA No. 5504/Del/2011**
- **Assessment Year: 2003-04** 8 August, 2013.

Further Patna high court in case of Kumar Stores 340 ITR page 90 has held reopening cannot be made on basis of presumption and imaginary reasons, for sake of correction of errors.

Kolkatta bench ITAT in Meheria Reid & Co. (28/12/2012 order) 151 TTJ 545, on reopening on basis of alleged difference between receipts as per TDS certificate and as **disclosed in P&L Account: has held to same to be mere Hunch not sufficient to form tangible material as per SC order in Kelvinator (having no live nexus with income escapement) To same effect is order of Gujarat high Court reported at 306 ITR 221.**

5. Cash withdrawal and deposits

IN THE INCOME TAX APPELLATE TRIBUNAL

'D' BENCH – AHMEDABAD **ITA No.2335/Ahd/2012**

A. Y.: 2009-10 Navinchandra RAmjibhai Chavda 12-04-2013 Though the assessee has raised four grounds in his appeal the crux of the issue relates to confirmation of addition of Rs.11,000,000/- made by the learned AO u/s 68 of the Act on account of cash credit. On perusing the bank statements it reveals that the assessee had received the sale proceeds of shares on 11-01-2008 for Rs.5,15,676.82 and from the same an amount of Rs.5,00,000/- was withdrawn by the assessee on 12-01-2008. Similarly, sale proceeds of shares amounting to Rs.4,54,621.51 was received by the assessee on 18-03-2008 and from the same Rs.5,00,000/- was withdrawn by the assessee on 19-03-2008. Subsequently, on 11-07-2008 the assessee had re-deposited the amount of Rs.11,00,000/- in the same bank S/B account. Thus, the assessee had held cash in hand with him for Rs.5,00,000/- for a period of six months and another amount of Rs.5,00,000/- for a period of four months. ***There could be various reasons for the assessee to keep liquid cash with him in his possession which is not unnatural. Moreover, the revenue has not brought out any materials on record to establish that the assessee had deposited cash other than what he had withdrawn from his bank account.*** It is pertinent to note that the assessee is an employee of ONGC a public sector undertaking and do not have any other occupation. Both the learned AO and the learned CIT(A) had proceeded to tax the assessee based on presumptions and assumptions which is harsh and not justifiable. Therefore, we hereby delete the addition of Rs.11,00,000/- made by the learned AO u/s 68 of the Act. The appeal of the assessee is decided in his favour.

IN THE INCOME TAX APPELLATE TRIBUNAL

" A " BENCH, AHMEDABAD ./I.T.A. No.2075/Ahd/2012 Assessment Year : 2009-10) Shri Saurin Nandkumar Shodhan **30/4/13** From the bank statements as also from the cash flow statements prepared by the assessee, we have noted that there was a pattern of regular withdrawals in round figures on several occasions. There were huge withdrawals as pointed out to us, such as, a sum of Rs.1,80,000/- on 29/05/2007, then again a withdrawal of Rs.1 lac on 6/09/2007, further there was a withdrawal of Rs.2 lacs on 25/10/2007, then a withdrawal of Rs.70,000/- and Rs.1 lac in the month of December-2007. *If those withdrawals have not been found utilized by the assessee towards investments, then naturally those were available with the assessee to be used or redeposited in the bank as per his desire/sweet will. The AO has drawn a conclusion that it was not humanly possible and against the human tendency. However, it was merely a supposition and such a presumption has no cogent legal basis*. As far as the furnishing of cash flow statement was concerned, naturally it was not made out of the cash book maintained by the assessee, since it was not required being a salaried person, but it was prepared on the basis of the bank statements of the assessee. The entries in the bank should not be doubted.

Those entries in the bank were in the nature of deposits and withdrawals which were incorporated in the cash flow statements. *If the AO is drawing a presumption on a surmise against the assessee, then on the other hand, a presumption can also be drawn in favour of the assessee*. If the Revenue Department has not established that the cash available with the assessee was not utilized elsewhere, then on the basis of the preponderance of probabilities, it can be assumed that that very cash was redeposited in the bank (In support of the possibility of cash available with the assessee, she has placed reliance on ACIT vs. Buldev Raj Charla & Ors (2009)121 TTJ 366(Delhi), Shailesh Rasiklal Mehta (2009)176 Taxman 270 and ITO vs. Raj Rani Arya (2011) TaxPub (DT) 1200 (Del-Trib). She has also cited a decision of ITAT "C" Bench Ahmedabad pronounced in the case of Patel Prahladbhai Harjivanbhai vs. ITO in ITA No.2347/Ahd/2012 for A.Y. 2009-10 dated 15/03/2013)

IN THE INCOME TAX APPELLATE TRIBUNAL

'A' BENCH : CHENNAI I.T.A.Nos.2072 & 2073/Mds/2012

Assessment year : 2009-10 Shri S. Sundar 12-02-2013 We find from the order of the CIT(A) wherein the CIT(A) quoted a chart which was tabulated by the assessee to show that except ` 39,243/- the balance deposits in the bank account were lesser than the amount which were withdrawn from the very same bank account on earlier dates. The pattern of various deposits and withdrawals shows that the assessee was carrying on some business outside the books of account and receipts of that business was deployed in the bank account in question. In the above circumstances, in our considered view, the profit of the said business or peak fresh credits during the year whichever is higher should only be treated as the assessee's income of that business and should alone be added in the income of the assessee. In the instant case, it is observed that the assessee has deposited around ` 18 lakhs from the receipts of the business carried on outside the books of account and withdrawn around ` 22 lakhs for the purposes of that business and fresh credit in the bank account was ` 39,243/- alone. In the above circumstances, in our considered opinion, it shall meet the ends of justice to accept the submission of the assessee to accept ` 3,86,103/- as income from the business carried on outside the books of account and to add the same to the income of the assessee We, therefore, restrict the addition to ` 3,86,103/- in place of ` 17,89,900/- and consequently the ground of appeal is partly allowed. (At last, the

A.R submitted that as the closing balance in the aforesaid bank account was ` 3,86,103/- the addition can be restricted to ` 3,86,103/-.)

P&H High Court in decision of CIT vs Surinder Pal Anand 242 CTR 61: "Once under the special provision, exemption from maintaining of books of account has been provided and presumptive tax @ 8% of the gross receipt itself is the basis for determining the taxable income, **the assessee was not under obligation to explain individual entry of cash deposit in the bank unless such entry had no nexus with the gross receipts**. The stand of the assessee before Commissioner of Income-tax (Appeal) and the ITAT that the said amount of Rs.14,95,300/- was on account of business receipts had been accepted. Learned counsel for the appellant with reference to any material on record, could not show that the cash deposits amounting to Rs.14,95,300/- were unexplained or undisclosed income of the assessee."

Allahabad High Court in case of CIT vs Nitin Soni 207 Taxman 332 It is not in dispute that the assessee has got eight trucks. It was also not disputed by the learned standing counsel for the department that the provisions of Section 44AE of the Act are applicable. Emphasis was laid by him that the additions made in the hands of the assessee was justified as the assessee has income more than that which is calculated as per Section 44AE of the Act. It is difficult to accept the aforesaid submission of the learned standing counsel. The very purpose and idea of enactment of such provision like Section 44AE of the Act is to provide hassle free proceedings. Such provisions are made just to complete the assessment without further probing provided the conditions laid down in such enactments are fulfilled. The presumptive income, which may be less or more, is taxable. Such an assessee is not required to maintain any account books. This being so, even if, its actual income in a given case, is more than income calculated as per sub-section

6. TDS credit related issues

Andhra Pradesh High Court in I.T.T.A.Nos.117 and 222 of 2012
ORDER dated 23-11-2012 BHOORATNAM & COMPANY 357 ITR 396

With respect to the contract work receipts, TDS was done but the assessee claimed credit of the tax mentioned in the said TDS certificates , the assessing officer , in the assessment orders of both the firm and the company, refused to give credit on the ground that some of the TDScertificates belong to the joint venture and some other TDS certificates are in the name of Directors and do not relate to the assessee firm/company. Aggrieved thereby, the present appeals under Section 260-A of the Income Tax Act, 1961 have been filed contending:

a) that the credit for TDS given on theTDS certificates produced in the names of the Joint Venture is not in accordance with Rule 37-B A of the Rules framed under the I.T. Act.

b) The assessee is not eligible for TDScredit on the certificates produced in the names of the Directors when the same is not in accordance with Rule 37-B A of the above Rules

HELD

The Revenue cannot be allowed to retain tax deducted at source without credit being available to anybody. If credit of tax is not allowed to the assessee, and the joint venture has not filed a return of income, then credit of the TDS cannot be taken by anybody. This is not the spirit and intention of law.

Therefore, in our view, the Assessing Officer erred in denying the benefit of the TDS mentioned in the TDS certificates filed by the assessees on the ground that the TDS certificate is issued in the name of the joint venture or a Director and not the assessee.

In this view of the matter both the appeals are dismissed as they are without any merit.

IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH : CHENNAII.T.A. No. 844/Mds/2011
Assessment Year : 2006-07 Kal Comm P. Ltd Date of pronouncement **:** 21-10-2013

The assessee is engaged in providing billing and collection services to M/s. Sun TV Network Ltd. The assessee is collecting subscriptions on behalf of M/s. Sun TV Network Ltd., from various cable operators. For the services rendered by the assessee, the assessee is receiving commission from M/s. Sun TV Network Ltd. The cable operators while making payments towards subscription charges to the assessee, deduct tax at source. Whereas, the assessee is reimbursing the gross amount to M/s. Sun TV Network Ltd., For the AY. 2006-07, the assessee filed its return of income declaring its income as `2,08,66,850/- . The case of the assessee was taken up for scrutiny and notice u/s. 143(2) of the Act was issued to the assessee. The Assessing Officer vide order dated 03-12-2008 completed the assessment by accepting the income returned by the assessee. The CIT was of the view that the assessment order is erroneous and is prejudicial to the interest of the Revenue and thus issued notice u/s. 263 on 28-02-2011. The CIT issued notice on the following grounds:

"A Sum of `2,69,44,843/- has been received and transferred by you to Sun TV Newtwork Ltd., without routing through your Profit and Loss Account.
II. You have charged service tax on the above subscription receipts from the Cable TV Operators AO has not verified whether the TDS provisions have been applied while transferring the amount to Sun TV Network Ltd., and also the applicability of Section 40(a)(ia) when the amount was paid to Sun TV Network Ltd … As per provisions of Sec. 199(2) credit for TDS can be allowed only when the corresponding income is offered for taxation in the year in which such TDS is claimed. Deductions of TDS of 6,50,910/- supra was allowed without the corresponding income being declared in your Profit and Loss Account.
V. There is difference of `1,80,68,601/- between the income as per TDS certificates and income as per Profit and Loss Account" The subscription collected by the assessee is not its income and hence is not taxable in the hands of the assessee. The assessee is only a nodal agency for collecting subscription on behalf of M/s. Sun TV Network Ltd. The amounts collected by the assessee are credited to the separate account 'Subscription Charges'. The said account is debited at the end of Financial Year when the amounts are paid to M/s. Sun TV Network Ltd. As the subscription collected by the assessee from various cable operators is not the income of the assessee, the same

is not shown in Profit & Loss account. The subscription amount is the income of M/s. Sun TV Network Ltd. and as such is taxable in the hands of M/s. Sun TV Network Since tax has already been deducted and paid to the Government at the time of making collections, the assessee is entitled to get the credit of the same while receiving commission income. M/s. Sun TV Network Ltd., had engaged the services of the assessee for collection of the subscription amount against commission. However, the cable operators at the time of payment of subscription, deducted the tax at source and remitted the remaining amount to the assessee. Ltd. However, the cable operators are deducting tax at source on the payments of subscription made to assessee, whereas, the assessee is remitting the gross amount to M/s. Sun TV Network Ltd., the assessee is entitled to receive credit of the tax deducted at source u/s. 199 of the Act subject to production of TDS Certificates received from respective deductors. The levy of tax on the commission received would amount to double taxation

7. Charitable Trust taxation (also see 219 Taxman 162; 219 Taxman 205 and 260 CTR page 1)

IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH 'A', HYDERABAD ITA No. 1767/Hyd/2011
Assessment year : 2003-04 M/s. Prathima Educational
Society, Date of pronouncement: 08.11.2013

Facts of the case, in brief, are that the main objects for which the assessee society was formed are as under-
(a) Medical relief to the poor and general public
(b) Advancement of medical education, para medical education, education of health sciences and research and development relating thereto.
Findings in respect of ITA No. 720/Hyd/2012:
26. We have heard both the parties and perused the material on record. In this case registration granted to the assessee w.e.f. 1.4.2000 u/s. 12AA of the Income-tax Act, 1961 was cancelled by the CIT vide order dated 22.3.2012. The reasons for cancellation of registration are that the assessee has violated the provisions of sections 11 and 12 of the Act and the assessee has not conducted itself in accordance with the object for which it was established and registered u/s. 12A of the Act. The basis for such conclusion are the materials collected by the Department in the course of search action conducted u/s. 132 of the Act on 10.9.2009. In this case, Sri E. Tirupathi Reddy was examined by the Department on 4.11.2009. He stated in his answer to question Nos. 7, 8 and 10 that he has not paid any excess fees. However, finally he said that the contents in the letter are correct. The assessee asked for cross examination of him. No cross-examination opportunity has been given to the assessee. Sri E. Tirupathi Reddy has changed his stand. As held by the Calcutta High Court in the case of CIT vs. Eastern Commercial Enterprises (207 ITR 103) (Cal), Sri E. Tirupathi Reddy cannot be considered as a reliable person. He has changed his version and proved to be shifty person as a witness. At one stage he has claimed that he has not paid the amount over and above the prescribed fees, as evidenced by his statement placed on record at page Nos. 147 to 149 of Paper Book Vol. I. Later he has changed his version, being so, little value can be attached to his statement and his conduct neutralised his value as a witness. A man indulging in double speaking cannot be said by any means a truthful man at any stage and we cannot decide on which occasion he was truthful. Further, the assessee was not given any opportunity to cross examine him. Therefore, the Department cannot consider his statement as an evidence against the assessee. Further the judgement of Supreme Court in the case of Kishan Chand Chellaram vs. CIT (125 ITR 713) also supports the assessee case, wherein held that evidence collected from witness cannot be considered without giving opportunity of cross-examination to the assessee.
32. Coming to the provisions of section 12AA of the IT Act, the Department can cancel registration granted to a society u/s.
12AA in the following circumstances:

(1) The activities of the trust are not genuine.

(2) The activities of the trust are not carried on in accordance with the object of the trust 33. In the present case the CIT is not alleging that the assessee is not carrying on imparting of education. It is admitted fact that the assessee has been carrying on educational institution imparting medical education and it fulfilled the requirement of imparting education and the question of imparting education by the assessee has not been doubted or challenged by the Department. Being so, on this reason, registration cannot be cancelled. 34. The next question is whether the trust activities are carried out in accordance with the object of the trust. The CIT has relied on the materials that were discussed in earlier paragraphs to demonstrate that the activities of the trust are not being carried out in accordance with the object of the trust. He expressly referred to the seized material to hold that the assessee's activities cannot be said to be for charitable purpose. As we have discussed in earlier paras regarding the reliance placed on this material, these materials are independently not corroborated. Collection of capitation fee by the assessee was made out on the basis of Excel sheets found during the course of search. The Department is not conclusively sure whether the assessee has collected capitation fee or not so that it made assessment in the hands of the chairman, Sri B. Srinivasa Rao as well as the assessee. The cash found during the search action at Rs. 8,09,526 was tallied with the books of account. The document relating to Sri E. Tirupathi Reddy cannot be relied as this was not subject matter of cross-examination. Similarly, the evidence relating to Sri Madhav Reddy cannot be relied upon since he denied payment of any fees more than what was prescribed. He said that his son got admission in normal course. Similarly, in the case of Kum. Nikita, the evidence is demolished by the assessee, that the details cannot be used against the assessee as the papers submitted to the assessee by the parents of Kum. Nikita were for the purpose of facilitating the financial assistance from bank. Being so, the activities of the trust cannot be held as non-genuine or it can be said that the activities of the assessee are not being carried out in accordance with the object of the trust or institution. There cannot be any other legally sustainable reasons for cancelling or withdrawing the registration granted to the assessee on 4.10.2000 w.e.f. 1.4.2000. 35. To come to the above conclusion, we place reliance on the order of the Tribunal in the case of Maharashtra Academy of Engineering & Educational Research vs. CIT (133 TTJ 706); The Karnataka High Court considered similar issue in the case of Director of Income-tax (Exemptions) & Anr. vs. Sri Belimatha Mahasamsthana Socio Cultural and Educational Trust (336 ITR 694).; We also place reliance on the orders of the Tribunal Bangalore Bench in the case of Venkatesh Education Society in ITA Nos. 100 to 106 of 2012 and M.J. Balachander in ITA Nos. 90 to 94 of 2012 dated 21.12.2012 where in similar circumstances it was held that M.J. Balachander was collecting extra tuition fees on his own without any authority or consent of the society and conclusion of the CIT was that extra tuition fees was collected by M.J. Balachandran on his own and the society has nothing to do with the extra tuition fees collection. Being so, the assessee cannot be faulted and the registration granted to the assessee should not be withdrawn so as to deny the benefit of section 11 of the Act.; In the case of Oxford Academy for Career Development v. Chief CIT and Others (315 ITR 382) (All), Kalinga Institute of Industrial Technology vs. CIT and Another (336 ITR 389) (Orissa) CIT vs. Sarvodaya Ilakkiya Pannai (343 ITR 300) (Mad)

43. Considering the above argument of the assessee's counsel, in our opinion, the seized material in the form of Excel sheets said to be recovered from the assessee's office cannot be considered as sufficient evidence so as to decide collection of capital fees by the assessee as it lacked independent corroboration. The Department failed to collect sufficient evidence to show that the assessee has actually collected the amount mentioned in the Excel sheets and the statement of Sri B. Srinivasa Rao is also not supporting the collection of capitation fees by the assessee. Moreover, no data confirming the contents of Excel sheets were recovered from the seized computer hard disk. In the absence of corroborative material, the Excel sheets recovered from the computer cannot be considered as a sufficient evidence so as to confirm collection of capitation fee. The seized material being Excel sheets which is an unsigned document and not being identified by the Department regarding author of these Excel sheets and it cannot be considered as an independent evidence. Being so, it has no evidentiary value as held by the co-ordinate Bench in the case of Smt. K.V. Lakshmi Savitri Devi vs. ACIT (148 TTJ 517) (Hyd.) and in the

case of CIT vs. Krishna Yadav (2011) 12 taxmann.com 4 (Hyd). Further, various judgements relied on by the assessee's counsel also support the assessee's case to hold that Excel sheets are dumb documents and therefore, do not form the reason to cancel registration granted to the assessee u/s. 12AA of the IT Act.

46. Being so, even if it is presumed that there is collection of capital fees by the assessee in relevant assessment year 2010- 11, it cannot be said by any stretch of imagination that the assessee has collected capitation fees in earlier assessment years commencing from 2000-01 so as to cancel the registration granted to the assessee u/s. 12AA with effect from 1.4.2000. 47. Considering entire facts and circumstances of the case, we are of the opinion that the evidence collected by the Revenue authorities is not sufficient to establish the stand that the assessee has collected the capitation fee/excess fee for admission under management quota seats in assessee society. We are aware that the entire evidence has to be appreciated in a wholesome manner and even where there is documentary evidence the same can be overlooked if there are surrounding circumstances to show that the claim of the assessee is opposed the normal course of human thinking and conduct and human probability. Even applying this principle to the present case, we have difficulty in rejecting the assessee's plea as opposed to the normal course of human conduct. The circumstances surrounding the case also not strong enough to reject the assessee's plea. We have considered all the material available on record and also statements of the parties concerned as discussed in earlier paras and we are of the opinion that the Department cannot rely on those statements, more so, when it was not confronted to the assessee for cross examination, the same cannot be relied upon. Being so, considering the above precedents, in our opinion, the assessee society cannot be deprived of the registration granted to the assessee us. 12AA of the Act. Accordingly, we vacate the order of the CIT dated 22.3.2012. However, the aforesaid findings given by us arenothing to do with the allowability of exemption u/s. 11 of the Act. In case of discrepancy or irregularity with regard to allowability of exemption u/s. 11 is noticed by the AO, he can make independent enquiry or examination at the time of assessment for each assessment year in accordance with law. Accordingly, the registration granted to the assessee u/s. 12AA of Income-tax Act, 1961 is hereby restored back. In the result, ITA No. 720/Hyd/2012 is allowed.

57. It is, no doubt, evident from a close reading of the above provisions of S. 147 that it is only satisfaction of the AO with regard to escapement of income from assessment to tax in a particular year which is an essential element and pre-requisite for reopening of the assessment, and the basis/material which prompted the AO to arrive at such a satisfaction is of no relevance. However, the action of the AO to derive at such a satisfaction from the specified material/basis, has to be logical and should stand to the test of scrutiny. It is an undisputed fact that the material found at the time of search action under S. 132 of the Act on the premises of the assessee on 10.9.2009, which prompted the AO in the instant case to reopen the assessment proceedings for the assessment year 2003-04. The said search has unearthed material which revealed collection of amounts by the assessee over and above the fee prescribed by the Government for admission into medical courses particularly in respect of students admitted in the academic years 2006-07, 2007-08 and partly for 2009-2010. The said material found at the time of search did not reveal anything specifically relating to assessment year 2003-04, which is the year under appeal. In that circumstances, based on that material alone, the AO cannot reasonably believe that the assessee collected amounts over and above the fee prescribed by the Government even during the year under appeal. It is pertinent to note at this juncture that the assessee started its college in the academic year 2002-03. So, the AO based on the material found at the time of search in 2009 in relation to the academic years 2006-07, 2007-08 and partly for 2009-10, proceeded to make imputations almost right from the beginning of the commencement of activities by the assessee. The ultimate fact that the AO in the re-assessment proceedings made addition, estimating, based on the material found at the time of search for other years, the amounts that the assessee must have collected by way of capitation for year under appeal, over and above the prescribed fee. In the absence of any specific and concrete material possessed by the assessee to suggest collection of amounts over and above the prescribed fee, at the time of initiating proceedings under S. 147, the reopening of

assessment cannot be held to be legal or valid, and it has to be held to be just based on the suspicion that the assessee might have collected such amounts even in the year under appeal. The ultimate action of estimation of such capitation fee collected during the year under appeal, based on the material found at the time of search, which relate to other years, clearly establishes the absence of any concrete material to indicate the actual collection of capitation fee by the assessee. In these facts and circumstances of the case, the decision of the jurisdictional High Court in the case of Rajnik and Company (supra) relied upon by the learned counsel for the AO, cannot come to the rescue of the Department, in the absence of any clinching evidence to suggest collection of capitation fee in the year under appeal. In this view of the matter, the CIT(A), in our considered opinion is justified in holding the issue relating to the legality and validity of the reopening of assessment under S. 147 in favour of the assessee. We accordingly uphold the order of the CIT(A) on this issue and reject the grounds of the Revenue in this behalf.

65. Being so, extrapolation of income cannot be made for the assessment year in question on the basis of seized material relating to some other assessment years

M*/s. J.B. Educational Society, IN THE INCOME TAX APPELLATE TRIBUNAL HYDERABAD BENCH 'B', HYDERABAD Date of pronouncement: 28.10.2013*

64. In view of the above discussion, we are of the opinion that voluntary contributions in the nature of tied up grant received by the assessee cannot be brought to tax even the trust is not registered u/s. 12AA of the Act. The tied up donations received by the assessee should not be taxable as income of the assessee, if it is used for specific purpose for which it has been given and it cannot be considered as revenue receipts so as to tax the same. On the other hand, the donations used for the benefit of the trustees it should be brought to tax as income of the assessee. The AO is directed to segregate these donations which are diverted for personal benefit of the Members of the trust and tax the same accordingly. Further, other than tied up grant/donations, if any, should be treated as income in the hands of the assessee in accordance with law as business income after allowing usual deductions under the provisions of the Act while computing income under the head 'business income', more so, deduction u/ss. 30 to 38 of the Act is to be allowed, if it is not already granted to the assessee

Income Tax Appeal No.70 of 2013 1 IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH. Date of Decision: 21.08.2013 Ved Niketan Dham, Public Charitable Trust A trust is registered under Section 12AA of the Act after due consideration of its activities. **Section 12AA(3)** of the Act empowers the Commissioner to cancel registration if the activities of the trust or institution are not genuine or are not being carried out, in accordance with the objects of the trust or the institution.. perusal of Section 12AA(3) of the Act, reveals that a precondition to cancellation of registration are findings that activities of the trust are not genuine or are not being carried out, in accordance with objects of the trust. Thus, before cancelling registration, a Commissioner is required to record a finding that activities of the trust are not genuine or are not being carried out, in accordance with objects of the trust. A perusal of the order passed by the Commissioner reveals that he did not record any finding as required by Section 12AA(3) of the Act. The Income Tax Appellate Tribunal, therefore, rightly reversed the order passed by the Commissioner. We find no reason arising whether from arguments advanced or from the order passed by the Commissioner to take a different view.

Anonymous Income U/s 115BBE :

Income Tax Appeal No.189 of 2012 IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH Date of Decision:10th September, 2013 Dulari Digital Photo Services Private Limited. ..Appellant Versus Commissioner of

Income Tax, Ludhiana (Punjab) ..Respondent A perusal of findings recorded by the Assessing Officer reveals that the matter was considered in a great degree of detail and as referred to in preceding paragraph (which we have reproduced). The expression "income from other sources" would come into play only where income is relatable to a known source. Where the income is not relatable to any known or any bona fide source, it would necessarily be brought to tax or considered as income of the assessee, under Section 68 of the Act. Section 68 of the Act clearly provides that where a sum is credited in the books of assessee and the assessee is unable to offer any explanation about the nature and source thereof, or the explanation offered is not satisfactory, the sum so credited may be charged to income tax as the income of the assessee of that previous year. What is brought to tax under Chapter IV of the Act is an income from a known source, i.e., a particular source from which the income flows but the source of a particular revenue receipt cannot be pegged down to any particular source, provisions of Section 14 of the Act, particularly "income from other sources", would not apply and such income would necessarily fall under Section 68 of the Act, being unexplained cash receipts that do not fall within the definition of "income from other sources".

IN THE INCOME TAX APPELLATE TRIBUNAL

HYDERABAD BENCH 'B', HYDERABAD Shri V.Ramchandra Rao,

Hyderabad Date of Pronouncement 22.11.2013 Briefly the facts relating to the issue in dispute are during the assessment proceedings, the Assessing Officer noted that the assessee had shown receipts from execution of civil contract works at Rs.32,23,129 and computed net profit thereon at the rate of 8% under S.44AD and shown income of Rs.2,57,850. The Assessing Officer, observing that the assessee had not produced any evidence to prove that the above receipts were from execution of civil contract works, treated the same as income from other sources and added it to the total income of the assessee, holding in the process that the provisions of S.44AD is not applicable to such receipts. Being aggrieved of such addition, the assessee challenged the same before the CIT(A). We heard the submissions of the parties, perused the orders of the authorities below as well as other material on record. As can be seen from the order of the CIT(A), the amount of Rs.32,23,129 represents the receipts from execution of civil contract works. This factual aspect is beyond any pale of doubt, since it is substantiated by the documentary evidence furnished by the assessee. This has also been accepted by the Department in the assessment under S.143(1) of the Act, made prior to the date of search. A perusal of the TDS certificate issued by the contractee, M/s. Soma Enterprises Limited, in favour of M/s. Srinivasa Constructions which is proprietary concern of the assessee, clearly establishes the fact that the aforesaid receipt of Rs.32,23,129 is towards execution of civil contract work entrusted by the contractee M/s. Soma Enterprises Ltd., to the proprietary concern of the assessee as a subcontractor. It is also a fact on record that the assessee has not only disclosed this receipt from civil contract works in the return of income filed for the impugned assessment year in the normal course, prior to the date of search, but has also estimated income from such receipts by applying the provisions of S.44AD of the Act and paid taxes on such income. In the aforesaid circumstances, the Assessing Officer could not have treated the entire contract receipts as income from other sources, more so in a proceeding under S.153A of the Act, when the assessee has already declared such receipts and offered income therefrom in the return filed in the normal course prior to the search. In the aforesaid view of the matter, we find no infirmity in the order of the CIT(A). We accordingly uphold the same, rejecting the appeal of the Revenue for the assessment year 2003- 04.

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No. 388 of 2009 (O&M)

Date of decision: 24.9.2013 **Commissioner of Income Tax, Faridabad**

-----Appellant

Vs.

M/s Pooja Metal Processors (P) Limited, 89, DLF Indl.Estate

Learned counsel for the revenue submitted that the assessee had invested the amount in the shares of M/s Pooja Decarb (P) Limited and the said amount was taken from borrowed funds. It was urged that the investment of ` 48,50,000/- in the shares of M/s Pooja Decarb, the sister concern of the assessee, having been utilised from loans taken by the assessee, the interest paid on the loan to that extent was not admissible deduction under Section 36(1) (iii) of the Act in view of the judgment of the this Court in ***Abhishek Industries Limited'***s case (supra). It was argued that the CIT(A) and the Tribunal had erred in deleting the addition made by the Assessing Officer. After hearing learned counsel for the parties, we do not find any merit in the submissions made by learned counsel for the revenue

The observations of the Tribunal are as under:-

"On appeal, learned CIT(A) deleted the addition by giving the following reasons:-

i) The fact of the case was that M/s Pooja Decarb Pvt. Limited was doing the business of decarbonising i.e. conversion of ordinary steel into electrical grade material and the present assessee company is turning ordinary steel after punching it and getting it converted into electrical grade material after processing raw material of CR sheets supplied to the assessee company by M/s Pooja Decarb Pvt. Limited. ii)A copy of account of M/s Pooja Decarb Pvt. Limited in the books of assessee company shows the inter unit business transaction with the assessee company. iii)List of creditors of raw material included M/s Pooja Decarb Pvt. Limited having balance at ` 25,62,325/-. iv)These points taken together would show that the investment in the shares of M/s Pooja Decarb Pvt. Limited in the year 1999-2000 was a commercially viable decision and for business interest v)When the investment in the shares of M/s Pooja Decarb Pvt. Limited was made in 1999-2000, the assessee company had no borrowed funds in that year. Accordingly, the substantial question of law reproduced in para 1 above, is answered against the revenue and in favour of the assessee. ("Whether, on the facts and in the circumstances of the case, the learned ITAT was right in law in upholding the order of the learned CIT(A) in deleting the addition of `7,25,000/- made by the Assessing Officer on account of interest on funds diverted for non business purposes by giving interest free loans on investments in shares etc. in contradiction with the judgment of the Hon'ble Punjab and Haryana High Court in the case of ***CIT v. Abhishek Industries Limited,*** (2006) 286 ITR 1?"))

In the case of Munjal Sales Corporation Vs. CIT, 298 ITR 298, the Hon'ble Supreme Court has observed as follows.

"17. One aspect needs to be mentioned during the Assessment Year 1995-96, apart from the loan to its sister concern amounting to Rs.5 lakhs. According to the Tribunal, there was nothing on record to show that the loans were given to the sister concern by the assessee firm out of its own funds, and, therefore, it was not entitled to claim deduction under Section 36(1)(iii). This finding is erroneous. The opening balance as on April 1, 1994, was Rs.1.91 crores whereas the loan given to the sister concern was a small amount of Rs.5 lakhs. In our view, the profits earned by the assessee during therelevant year were sufficient to cover the impugned loan of Rs.5 lakhs"

As held by Hon'ble Bombay High Court in the case of *CIT* v. *Reliance Utilities & Power Ltd.* [2009] 313 ITR 340, the presumption has to be that the interest free advances are given out of the interest free funds available to the assessee. It is also covered in favour of the assessee by the decision Hon'ble Bombay High Court's observations, in the case of *Reliance Utilities & Power Ltd.* (*supra*), as follows: *"If there be interest-free funds available to an assessee sufficient to meet its investments and at the same time the assessee had raised a loan it can be presumed that the investments were from the interest-free funds available."*

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

I.T.A. No.122 of 1999.

Decided on:-October 22, 2013. The Commissioner of Income Tax, Patiala. .....Appellant.

Versus

Dulla Ram, Labour Contractor, Kotkapura. .....Respondent perusal of the questions of law would reveal that in essence the only substantial question of law that arises is, "Whether after rejection of books of accounts, an Assessing Officer can make any further addition on account of unexplained entries treating them as undisclosed income from other sources by invoking Section 68 of the Act?" An Assessing Officer may, while considering a return of income, inspect the account books and, if satisfied, that account books do not reflect the true income of an assessee, reject the same. Account books once rejected, are ruled out of consideration and cannot be pressed into service whether by the assessee or the revenue. Thus, when account books are rejected, it would follow, as a necessary corrolary, that entries in the account books whether suspicious or not cannot be relied by the revenue or the assessee. To hold otherwise, would, in essence, render account books valid for certain purposes and invalid for others, a course impermissible in law. The Assessing Officer rejected the account books in their entirety and thereafter proceeded to assess income by applying a flat rate of profit of 10%. After applying a flat rate of profit of 10%, the Assessing Officer added Rs.1,98,298/- to the income of the assessee on the basis of certain 'entries' deemed to be suspicious. The Commissioner of Income Tax (Appeals) as well as the Tribunal have rightly held that as books of accounts were rejected in their entirety, the Assessing Officer could not rely upon any entry in the books of accounts for making an addition of Rs.1,98,298/-. A bare reading of Section 68 of the Act would reveal that it would not apply to a situation where account books have not been rejected answer the questions of law against the revenue and in favour of the assessee. The appeal is, consequently, dismissed

8. Section 221 Penalty : Mumbai ITAT landmark order

INCOME TAX APPELLATE TRIBUNAL,MUMBAI - 'D' BENCH. Diamondstar Exports Ltd.

04-10-2013 ITA No.761/Mum/201 Assessment Year-2009-10

5.1. It will be useful to understand the basic principles of section140A.As per the provisions of section 139 of the Act,every person whose total income,during the previous year,exceeds the maximum amount not chargeable to tax is supposed to furnish a return of income in the prescribed manner within the prescri -bed period. Provisions of the Act also provide for payment of advance tax by scuh assessee.Advance tax is payable in instalments.The liability to pay advance tax is based upon the theory'pay as you earn'. It is said that section 140A is one of the modes/stages of collection of tax devised by Parliament.The principle behind the said section is that if at the end of the year the assessee is liable to pay any tax according to his own estimate of his income,he should normally pay almost the entire tax in the shape of advance tax.In other words it is reasonable to presume that every person earning taxable income knows approximately the tax due from him and is expected to and has to pay the same in accordance with law.So,it can safely said that the portion of income,due towards incometax, should not be treated 'income'by a prudent and reasonable assessee,because what is due towards tax is a debt due to the State.The mere fact that it is not quantified by the department on that date would not make it anything less the tax due under section 140A(1). **5.1.a.**If an assessee required to pay advance tax,does not do so,he is treated to be an assessee in default in respect of such instalment or instalments, as the case may be.As a result,penalty can be levied by the AO for said default.

5.1.b.A discretion is conferred upon the AO in the matter of levying the penalty. In a proper case, he may decline to levy any penalty.There is nothing in the provisions of section 140A that compel the AO to levy such a penalty in each and every case and/or up to the maximum limit.In other words failure to pay the tax,as provided in section 140A of the Act,does not automatically lead to the levy of penalty under sub-section(3).The proviso to Sec.140A(3)expressly provides for giving reasonable opportunity to the assessee before levying penalty.In short,the power to levy penalty u/s.140A(3) of the Act is not absolute but discretionary.

5.1.c. Even if there is a default,AO is bound to consider the circumstances of the case and give his reasons as to why the penalty should be imposed as per the provisions of section140A(3). **5.1.d.**The question whether the facts of a given case will constitute good and sufficient reason for not imposing a penalty is a question of fact.

5.1.e. Financial crisis can be one of the sufficient and good reason for not levying penalty.But,the closing cash balance cannot provide a basis for ascertaining the actual financial condition of the assessee.

5.2. Undisputed facts of the case are that the assessee had not paid due taxes before filing of retrun,that it was not the first year of commencement of business,that assessee paid taxes after it received a letter from the AO.Provisions of Sec.140A(3)r.w.s.221(1)of the Act are very clear.Section140A(3) stipulates that if any assessee fails to pay the whole or any part of such tax /interest/both in accordance with theprovisions of sub-section (1),he shall, be deemed to be an assessee in default in respect of the tax or interest or both remaining unpaid, and all the provisions of this Act shall apply accordingly. Section 221(1)comes in to play once it is found that default has been committed by any assessee in payment of tax.Explanation to the section 221(1)provides that an assessee shall not cease to be liable to any penalty under this sub-section merely by reason of the fact that before the levy of such penalty he has paid the tax.In our opinion,explanation has made it clear that mere payment of taxes will not exonerate the assessee and he cannot claim immunity from the penal provisions as envisaged in the section.As per the provisions of the section penalty is not to be levied if assessee proves,to the satisfaction of the AO,that the default was for good and sufficient reasons.Second condition for levying penalty is that before levying any such penalty the assessee has to be given a reasonable opportunity of being heard.As far as first condition is concerned,onus is on the assessee to prove the existence of good and sufficient reason,whereas AO has to establish that he afforded a reasonable opportunity of hearing to the assessee.In the case under consideration it is found that the AO had levied the penalty after issuing show cause notice to the assessee.Thus,as far as AO is concerned,he has followed the mandate of the Act.We are of the opinion that same cannot be held in the case of the assessee.Assessee did not file any reply before the AO and before the FAA it submitted that because of the mistake committed by the members of the staff tax could not be in time.FAA has clearly held that before him the assessee did not furnish any good or sufficient reason.Words 'Good and Sufficient reason' have not been defined in the Act.But,courts are of the view that beyond control of the assessee can be termed sufficient cause.We find that the assessee had not shown any cause as why it could not pay taxes in time.Assessee is a corporate entity paying tax of lacs of Rupees every year.It is not functioning from a remote village.It is not the case that assessee was facing financial crunch and because of that it could not pay taxes in time.

As discussed earlier,paucity of funds or financial problems have been considered sufficient cause for not making payment of taxes by the Courts.In the matters of Indo American Electricals Ltd.(155ITR 63)Sreedharan and Company Ltd.(195 ITR 807) and Ramachandra Pesticides(285ITR45) Hon'ble High Courts of Calcutta,Kerala and Karnataka have held that siphoning off of funds or poor recoveries from consumers or shortage of fund due to natural calamities can be considered the reasonable cause for not paying advance tax.But,such extra ordinary situation were not present in the case under conside -ration.Assessee cannot claim ignorance of its duty of paying taxes in stipulated time-frame.For last so many year Income-tax department launches audio visual campaign to remind the assessees about the due dates of tax-payment.The fact that the assessee is maintaining a separate section to deal with accounts,including taxation matters,prove that it is aware of the duties regarding tax payment.Besides, assessee is also assisted by qualified professionals who have represented it before the departmental authorities.We are of the opinion that penalty imposed/confirmed by the AO/FAA is in the nature of additional tax for securing compliance with the provisions of the Act.Penal provisions for non-payment of taxes have been incorporated in the Act,as stated earlier,so that the tax is paid,by the assessees, within the time allowed u/s.140A(1) of the Act.We are aware that income of an assessee belongs to him,but his right is subject to

payment of dues to the Sovereign i.e.taxes.State has all the rights to recover taxes and a make reasonable provision to secure payment of tax on due date.In our opinion that the assessee had not offered any good and sufficient reason for not paying taxes on due dates,so FAA was justified in rejecting appeal filed by it.We are of the opinion that payment of tax,along with interest,after due dates cannot be considered a sufficient cause for adhering to the provisions of section 140A of the Act.We find that the facts of the case relied upon by the assessee is not relevant for deciding the issue before us.Therefore,upholding the order of the FAA,we decide effective ground of appeal against the assessee-company.

9. Section 41(1) IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED: 18.06.2013 M/s.Rayala Corporation P. Ltd. assessment year 2001-02

"1. Whether on the facts and the circumstances of the case, the Tribunal was right in holding that claim of deduction of interest, in the return which was allowed to become non est, by opting not to rectify the defects, pursuant to notice under Section 139(9) cannot be treated as disallowance of deduction?

2. Whether on the facts and circumstances of the case, the Tribunal was right in consequently holding that the interest waived by the bank for the prior period pertaining to assessment years 1994-95 to 1998-99 during financial year pertaining to assessment year 2001-02 cannot be assessed as income that arose due to cessation of liability under Section 41(1) of the Act?"

2. The assessment year under consideration herein relates to 2001-02. The assessee herein derived income from leasing of properties. It is seen from the facts narrated that the Assessing Officer brought to tax the amount waived by Canara Bank amounting to Rs.3.81 crores on the income chargeable under Section 41(1) of the Income Tax Act, 1961 (hereinafter called the "Act"). It is seen from the facts that during the assessment year under consideration, the assessee availed one-time settlement scheme of Canara Bank, by which the Bank waived the interest portion accrued and payable by the assessee, relating to the assessment years 1988-89 to 1998-99, which the assessee had claimed deduction in the return filed for the respective years. On account of the waiver granted by the Bank, the said interest amount became assessable as income as per Section 41(1) of the Act. ***According to the assessee, since the returns filed for the assessment years 1994-95 to 1998-99 were held as non-est, the interest claimed as deduction in those returns had to be held as not allowed. Hence, the said interest for those period could not be treated as income that arose on account of cessation of liability under Section 41(1) of the Act. The Assessing Officer rejected the said contention that it was the assessee who had not responded to the notice issued under Section 139(9) offered to rectify its returns. In the absence of specific order on disallowance, the said interest relating to the period 1994-95 to 1998-99 was liable to be included as income under Section 41(1) of the Act****.*

8. Learned Standing Counsel appearing for the Revenue placed heavy reliance on the opening part of Section 41(1) of the Act and submitted that the expression "Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee" has to be read as a claim made in the accounts and it need not be followed by an assessment order. He further submitted that when the expression used in the Section does not contemplate an order to be passed on the claim, a mere entry made in the self-assessment made by the assessee in the account would be sufficient enough to invoke Section 41(1) of the Act; in other words, even in the absence of an assessment order passed on the question of allowance or deduction, the expression "where an allowance or deduction made for any year" has to be considered as a claim made per se. He further pointed out that on the facts of this case, the assessee's returns were treated as non-est as per Section 139(9) of the Act; however, considering Section 140A of the Act, which provides for self-assessment, the assessee had remitted the tax based on self-assessment on the state of affairs. Thus, even in the

absence of returns, the self-assessment being an assessment made for any year, the Income Tax Appellate Tribunal committed serious error in allowing the appeal filed by the assessee.

12. Even though learned Standing Counsel appearing for the Revenue does not dispute the similarity of the provisions between the Indian Income Tax Act, 1922 and the Income Tax Act, 1961, yet, he emphasizes that the payment of tax being one under self-assessment and even though the return is non-est in the eye of law, by virtue of Section 139(9) of the Act, yet, one cannot ignore the state of affairs as regards the deduction claimed leading to the payment of tax.

13. We do not agree with the said view of the learned Standing Counsel appearing for the Revenue. A reading of Section 140A of the Act shows that while sub section (1) imposes an obligation on an assessee to pay tax on self assessment basis, sub section (2) provides that after a regular assessment under Section 143 or 144 is made, the tax so paid will be deemed to have been paid towards such regular assessment. Thus, when an assessee makes a self-assessment under Section 140A of the Act and pays the tax thereon, this self-assessment under Section 140A is for expediting collection of tax. *This, however, cannot stand in the way of determination of the liability to tax at the time of making the regular assessment. Thus, the assessment made by an assessee as to his taxable income does not mean an assessment to be made by a competent authority under the provisions of the Act.*

14. As far as the present case is concerned, in the context of Section 139(9) of the Act, with the return filed treated as non est in the eye of law, we hold that the expression "where an allowance or deduction has been made in the assessment for any year" has to be read as any allowance or deduction considered in the assessment for the purpose of invoking Section 41(1) of the Act…

IN THE INCOME TAX APPELLATE TRIBUNAL

HYDERABAD BENCH 'A', HYDERABAD

Sri K. Ramachandra Reddy
Hyderabad
PAN: AGFPK2421G
vs. The DCIT

But the admitted fact is that there is no clear evidence to suggest that the assessee deposited the amounts into the account of Andhra Bank from any sources other than business receipts, though there was a search u/s. 132 of the Act on 12.8.2009 at the premises of the assessee. The assessee's only plea since beginning is that the deposits in the Andhra Bank A/c. represent sale proceeds of the assessee. Unless and until the Department locates any particular source of income, it has to be treated as business receipt of the assessee. The entries found in the Bank A/c. may be assessed as business profit or as income from other sources, as the case may be. There is no rule that the amount credited to the Bank A/c. must be taken as income from other sources. It always depends upon the evidence and explanation furnished by the assessee. In the present case, the Department having carried on the search action in the case of the assessee and found no material to suggest that the impugned receipts are from any other source, then it is natural to infer that the assessee had deposited business receipts only into the Bank A/c. and to estimate the income on it at 15% as its sale proceeds. Being so,it is not appropriate to consider the entire deposits in the Bank A/c. as income of the assessee. In our opinion, it is appropriate to estimate the income at the same rate of net profit as applied to the undisclosed turnover of the

assessee i.e., at 15% instead of 100% as considered by the AO. Accordingly, we direct the AO to consider 15% of the deposits in the Bank A/c. No. 446, Andhra Bank Jubilee Hills Branch, Hyderabad

IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH 'A', HYDERABAD ITA No.22/Hyd/12 : Asstt. Year 2008-09
Dy. Commissioner of Incometax Central Circle 9, Hyderabad
V/s. M/s. Prapurna Properties P. Ltd Date of Pronouncement 10.1.2014

The Assessing Officer accordingly made an addition of Rs.79,00,000 on account of unexplained cash deposits into the above two bank accounts with Andhra Bank, besides another addition of Rs.1,72,49,411, representing aggregate amount of advances of Rs.1,72,49,411 received from five customers both under S.68 of the Act, while completing the assessment on a total income of Rs.2,92,52,891, while completing the assessment on a total income of Rs.2,92,52,891, vide order of assessment dated 30.12.2010 under S.143(3) of the Act. On appeal before the CIT(A), it was pointed out duly furnishing copy of the extract of cash book for the relevant period, that the deposits were out of cash balance available with the assessee, as on the respective dates of deposits; and that cash balances represented both the balance as at the beginning of the year and withdrawals made from the bank accounts, during the year. It was also submitted that the books of account of the assessee are subject to statutory audit, both under the company law and income-tax law; and the Assessing Officer neither rejected the books of account, nor gathered any evidence to show that there was any discrepancy in such books. It was also submitted that the bank statements filed support the withdrawals made during the year, and the nature of the business of the assessee mandates maintenance of huge cash balances to meet the requirement of suitable properties whose owners insist for cash. Reliance was also placed on the Abmedabad bench of the Tribunal in the case of Anand Autoride Ltd. V/s. JCIT (99TTJ 1250). The CIT(A), on careful consideration of the submissions of the assessee, found no justification for holding the cash deposits into bank accounts as unexplained and consequently making the addition made under S.68 of the Act. Effective grounds of the Revenue in this appeal read as follows-

"1. The order of the learned CIT(A) is erroneous both on the facts and in the eyes of law .

2. The learned CIT(A) ought to have appreciated the reasoning of the Assessing Officer as to why the explanation of the assessee is not satisfactory in respect of the cash deposits made into bank account. 3. The learned CIT(A) ignored the abnormality of the cash book maintained by the assessee so as to create fictitious cash balance to accommodate the cash deposits into bank accounts. 4. The learned CIT(A) ought to have appreciated the fact that the assessee's explanation is only a theory and not based on documentary evidence. heard both sides and perused the material on record.

It is the huge cash deposits aggregating to Rs.79,00,000 made into two bank accounts of the assessee with Andhra Bank, that led to the addition under dispute, made by the Assessing Officer under S.68 of the Act. We are in agreement with the view taken by the CIT(A). In the absence of any evidence brought on record by the Assessing Officer in support of his observation that the assessee has cleverly used the technique of treating fictitious cash in its books, we find no justification for the addition made by the Assessing Officer on that count, and the CIT(A), in our considered view, is justified in deleting the same. Even before us, the Revenue has not brought on record any evidence either to contradict the findings of the CIT(A) discussed above or to support the observation of the Assessing Officer that the assessee has indulged in the technique of treating fictitious cash in its books, so as to camouflage the unaccounted money in the form of re-deposits into the bank accounts.

IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A" : HYDERABAD ITA.No.115/Hyd/2011
Assessment Year 2006-2007
Infotech Enterprises Limited, Hyderabad
PAN AAACI4487J Date of pronouncement : 16.01.2014

We have heard the parties and perused the material available on record. We find that the decision in the case of GE India Technology Centre Pvt. Ltd. vs. CIT 327 ITR 456 has clearly stated that the obligation to deduct tax at source is however limited to appropriate proportion of income chargeable under the Act forming part of the gross sum of money payable to the non-resident. In other words, if the tax is not so assessable, there is no question of tax at source being deducted. Hence, the short point is that one has to see whether the amount of Rs.52,55,881/- represents amount chargeable to tax in the hands of the non-resident both in terms of sec.9(1)(i) and 9(1)(vi) of the I.T. Act and also DTAA between India and Netherlands.

25. We find that the amount in question is not taxable u/s 9(1)(i) because even assuming for a moment there is a business connection between the assessee and the foreign software supplier there are no operations in India of the foreign company to which income may be reasonably attributed to as required under Explanation 1(a) to section 9(1)(i). Hence we find there is no applicability of S.9(1)(i) in the instant case. *26. Now we address the issue of characterization of these payments as Royalty so as to fall under Section 9(1)(vi) or Article 12 of India-Netherlands DTAA. We find that the assessee has purchased the Small World Software from Netherlands and bundled it with its own software and thus customised it and sold it to its own customers both in India and abroad. The assessee cannot meddle with the copies of the software in the process of its customization.* We also observe that the assessee has to purchase the said software each time it wanted to sell the bundled software to its customers and We have heard the parties and perused the material available on record. customers both in India and abroad. The assessee cannot meddle with the copies of the software in the process of its customization. **We also observe that the assessee has to purchase the said software each time it wanted to sell the bundled software to its customers and if it had got any right to the copyright to the said software it would not have bought it every time when it wanted to sell. Further, perusing the books of the assessee at pages 170 to 175 of the paper book, we find that there are multiple purchases of software during the year and each purchase of single item on software is merely one thousand rupees and not huge amount. Hence, we are of the opinion that they are simply purchase cost of trading goods especially when the licence in respect of software is not obtained by the assessee and the perpetual licence is given directly to the end customer by the vendor company. Copies of the invoice raised by Net Work Solutions on the assessee and at paper book 176 to 178 support the view of the assessee where the invoice mentioning name of the end customer supports our view.**

Hence, in our opinion, when there is no transfer of even the license to the assessee even though it is the purchaser, it cannot be said that there is any royalty payment by the assessee to the vendor company. *The amount of Rs.52,55,81/- is simply the cost of imported trading goods and not royalty payment. 27. It is therefore clear that the payments made by assessee to the Netherlands company will not fall under the ambit of Royalty as per Article 12 of the India-Netherlands DTAA. Hence there is no question of tax withholding required by the assessee and hence S.40(a)(i) disallowance is erroneous. Accordingly, ground No.5 is allowed.*

We have heard both the parties. We find that the A.O. disallowed the amount of Rs.19,48,02,907/- on the ground that there is a business connection in terms of Explanation 2 to Section 9(1)(i) of the I.T. Act between the assessee and its concerned foreign subsidiaries to whom the said amount has been paid. He held that the assessee has been "habitually/ securing orders in India for the benefit of non-resident in terms of clause (c) of the said Explanation. **36. With respect to IEAI USA, we find that factually the assessee has secured the orders from PRATT (PWC) for its own benefit and it only parceled out a portion of the work entrusted to it by PRATT & WHITNEY to IEAI USA.** The said Explanation to Section 9(1)(i) can be invoked only when the Indian company secures orders for the benefit of non-resident. In the present case, the assessee has not canvassed / secured any orders for its non resident subsidiaries. Hence, section 9(1)(i) cannot be invoked**. 37. We have gone through the copy of the "Master Terms Agreement" (in short "MTA") entered into by the assessee with United Technology Corporation (PWC) which is filed at pages 179 to 196 of the paper book. Similarly, we have perused intercompany agreement entered into by the assessee with its subsidiaries placed in the paper book at page 197 to 222. This proves that the assessee obtained orders on its own behalf and it has only parcelled out a portion of its work to its foreign subsidiaries.** As per the terms of the agreement, the assessee "shall release the work order" before the commencement of the work by IEAI USA and each work order shall be supported by end customers order copy. **We also find that no operations have been undertaken by foreign subsidiaries in India and no engineers have been deputed by them to India and even they do not have permanent establishment in India. In terms of the respective DTAA, no income of the foreign subsidiary is taxable in India in terms of either section 9(1)(i) of the I.T. Act or the concerned Articles r elating to business profits (Article 7r.w. Article 5) in the respective DTAAs.** Hence there is no income taxable in India u/s 9(1)(i) and hence no requirement for TDS and there can be no application of S.40(a)(i).

Firstly, under the Act, the payments made to the subsidiaries may indeed be construed as Fees for Technical Services. However this is only due to the fact of the retrospective amendment by Finance Act 2010. Prior to that, the Hon'ble Supreme Court in *Ishikawajima-Harima Heavy Industries Ltd., Vs DIT (2007)[288 ITR 408]* had held

that Section 9(1)(vii) as it stood then envisaged two conditions which need to be met simultaneously namely that services have to be rendered in India and said services have to be utilized in India.

We also point that even under the India-USA and India-UK treaties (not the India-Germany treaty though) due to the presence of the "make available" clause in these two Treaties the payments made by the assessee will not fall under FTS. This is because no technical knowledge has been made available by the non-resident to the assessee. Further, no technical plan or technical design placement has been transferred by US subsidiary to the assessee. What IEAI did was only in fulfilment of contractual requirement with PRATT & WHITNEY and not for the benefit of the assessee. The non resident has simply executed the portion of work parcelled out to it by the assessee. **The Karnataka High Court in CIT vs. De Beers India Minerals Pvt. Ltd. (ITA No.549 of 2007 dated 15th May 2012) lucidly explained the concept of "make available". In the instant case, the UK and USA subsidiaries did only contractual work parcelled out to it whose results were given to clients directly and no technical knowledge was made available to assessee. Hence, even under the respective DTAA, the payments made to UK and US subsidiaries/companies would not fall under the ambit of FTS.**

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH ' D ': NEW DELHI Lakhani India Ltd.

ITA No. 2657/Del/2011 dated 31.12.2013. (earlier order of assessee relied wherein it was held that:……

Ground Nos. 4 and 5 are inter - connected with each other. In these grounds of appeal, revenue has pleaded that Learned CIT(Appeals) has erred in deleting the addition of Rs.21,83,917. This addition was made by the Assessing Officer by making a disallowance under sec. 40(a)(i) of the Act on the ground that assessee has failed to deduct TDS under sec. 195 while making payment to the non -resident. The brief facts of the case are that assessee has engaged Mr. Andrea Bonotto and Mr. Frank Decavelle of Italy for designing and development for Springs Summer 2005 Collection. They were paid a fee of Euro 10,000 in three installments. According to the Assessing Officer, the assessee has claimed payment of Rs.21,83,917. He observed that it is a payment of fee for technical services, because the consultancy for designing and development clearly comes in the ambit of provisions of sec. 9 of the Act. According to the Assessing Officer, before making payment to a non -resident, assessee ought to have deducted the TDS, therefore, he invited the explanation of the assessee as to why the claim of the assessee be not disallowed under sec. 40(a)(i) of the Act. According to the assessee, Article 15 of the DTAA between India and Italy notified on 25.4.1996 contemplates that if income has been derived by a resident of a contracting in respect of professional services or other independent activity of a similar character may be taxed in either state, if such services are provided in that other state and the performer is present in that state for a period aggregating 183 days in the relevant fiscal year or such person has any fixed place regularly available to him in that other contracting state for the purpose of performing his activities. According to the assessee, Mr. Andrea Bonotto was not having any permanent fixed place in India and he never remained in India more than 183 days. The assessee further disputed the services rendered by him as technical services. Learned Assessing Officer did not take cognizance of the assessee's submissions. He observed that as per Article 13 of the DTAA, the income is chargeable to tax in India @20%, assessee failed to deduct the TDS on the payments which has element of income, therefore, a disallowance of the total payment has to be made under sec. 40(a)(i) of the Act 21. We do

not feel it necessary to go into the issue, whether the payments made by the assessee to Mr. Andrea Bonotto is a fee for technical services or not, because even for the sake of argument, we presume that it is fee for technical service then also TDS would be deductible only when element of income is involved in such payment. Learned Assessing Officer has restricted himself qua Article 13 only. He did not look into Article 15 learned first appellate authority has made lucid enunciation of the fact and law on the impact of Article 15.Learned first appellate authority has recorded a finding that Mr. Andrea Bonotto is entitled for the beneficial provisions of the DTAA. He is covered by Article 15 of the DT AA. Hence, the income would not be taxable in his hand in India and, therefore, no TDS would be deductible.)

IN THE INCOME TAX APPELLATE TRIBUNAL 'D' BENCH : CHENNAI I.T.A. No. 2136/Mds/2010*Assessment Year : 2007 M/s. Wheels India Ltd.,Padi, Date of Pronouncement* ***:*** *26-11-2013*

Revenue has assailed the order of CIT(Appeals) primarily on Deleting the dis-allowance made by the Assessing Officer u/s.40(a)(ia) in respect of legal charges paid toM/s. Reed Smith, LLP, USA. With regard to third issue raised in the grounds of appeal in respect of legal charges paid to M/s. Reed Smith, LLP, USA, the ld.DR submitted that the assessee neither approached the department u/s.195(2) before remitting the above payments to non-residents nor filed the prescribed undertaking and the certificate from the Chartered Accountant. As far as payment of legal fee to M/s. Reed Smith, LLP, USA, the ld. Counsel submitted that the legal charges have been paid for the services rendered outside India and the recipients of fees do not have any permanent establishment in India. Therefore, no dis-allowance u/s.40(a)(i) is warranted. In order to support his contentions the ld. Counsel relied on the order of Mumbai Bench of the Tribunal in the case of Maharashtra State Electricity Board Vs. DCIT reported as 90 ITD 793 (Mum) and GE India Technology P. Ltd. Vs. CIT reported as 327 ITR 456 (SC). In the Fourth ground of appeal, the assessee has raised objection in deleting the dis-allowance made by the Assessing Officer u/s.40(a)(ia) in respect of legal charges paid to M/s. Reed Smith, LLP, USA without deduction of tax at source. It is a well settled law that, if the payments are made for professional services rendered abroad and the party does not have any permanent establishment in India, the tax is not to be deducted at sources. Moreover, as per article 15 of DTA agreement between India and USA, the professional services rendered by the lawyers in USA are chargeable only in USA unless they have a fixed base regularly available in India or has stay in India exceeding ninety days in the taxable year. In the present case, the foreign party has confirmed that they do not have any permanent establishment in India nor it is a case where they stay in India is more than ninety days as aforesaid. Accordingly, for the services rendered by the foreign law firm outside India there is no question of deduction of tax on the payments made. Accordingly, this ground of appeal of the Revenue is also dismissed. (Also see citations at 154 TTJ 537; 318 ITR 237 Clifford chance)

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL
Income Tax Appeal No. 01 of 2012
Samsung Heavy Industries Co. Ltd.
Date: December 27, 2013

We are only concerned with bringing in of 25 per cent of the money received by the appellant under the contract, but in connection with allegedly outside India activities within the tax network of this country. There is no finding anywhere that the revenue earned and said to have been on account of out of India activity was earned, in fact, on account of within India activity In terms of the said Agreement (Agreement for avoidance of double taxation of income and the prevention of fiscal evasion entered by the Union of India with the Republic of Korea.) , as it appears to us, if an enterprise does not have a tax identity in India in the form of a permanent establishment, it has no obligation to either submit any tax return with, or pay any tax to India. The question still remains, whether

it was right on the part of the Taxing Authority to assess income-tax liability of the appellant as was assessed in the instant case. In other words, can it be said that the Agreement permitted the the Indian Taxing Authority to arbitrarily fix a part of the revenue to the permanent establishment of the appellant in India? As aforesaid, appellant held out that a part of the revenue was received by it for doing certain work in India. It did not contend that even those works were done by or through its Project Office at Mumbai. On the other hand, there is not even a finding that 25 per cent of the gross revenue of the appellant was attributable to the business carried out by the Project Office of the appellant. One has to read Article 5 of the Agreement in order to understand what a permanent establishment is, in terms whereof "permanent establishment" means a fixed place of business through which business of an enterprise is wholly or partly carried on. In the instant case, according to the revenue, the Project Office of the appellant in Mumbai is the "permanent establishment" of the appellant in India through which it carried on business during the relevant assessment year and 25 per cent of the gross receipt is attributable to the said business. Neither the Assessing Officer, nor the Tribunal has made any effort to bring on record any evidence to justify the same….the real question was, whether the tax liability could be fastened without establishing that the same is attributable to the tax identity or permanent establishment of the enterprise situate in India and the same, we think, is answered in the negative and in favour of the appellant…..