

Amendment safeguarding TDS disallowance on payment of tax by payee has retro-effect

Summary – The Kolkata ITAT in a recent case of Mitra Guha Builders (India) Co., (the Assessee) held that Amendment made in section 40(a)(ia) by Finance Act, 2012, with effect from 1-4-2013, could be said to be declaratory and curative in nature and, therefore, should be given retrospective effect from 1-4-2005

Facts

- During the period relevant to the assessment year 2008-09, the assessee, a civil works contractor, made payment to various parties towards commission and claimed deduction of same.
- The Assessing Officer disallowed the payment invoking the provisions of section 40(a)(ia), as they stood at the relevant time.
- The Commissioner (Appeals) confirmed the order of the Assessing Officer.
- On second appeal, the assessee relied on second proviso inserted in sub-clause (ia) of clause (a) of section 40 by the Finance Act, 2012, with effect from 1-4-2013. It submitted that the Kolkata Bench of the Tribunal in the case of *Santosh Kumar Kedia v. ITO* [IT Appeal No. 1905 (Kol.) of 2014, dated 4-3-2015] took a view that the insertion of second proviso to section 40(a)(ia) by the Finance Act, 2012 was retrospective in operation. The recipients of the payment were all income-tax assesseees and had duly declared the receipts in their return of income and had paid taxes on the same. Therefore, the issue of disallowance under section 40(a)(ia) be remanded to the Assessing Officer for fresh consideration.

Held

Provisions of section 40(a)(ia)

- The provisions of section 40(a)(ia) are meant to ensure that the assesseees perform their obligation to deduct tax at source in accordance with the provisions of the Act. Such compliance will ensure revenue collection without much hassle. When the object sought to be achieved by those provisions are found to be achieved, it would be unjust to disallow the legitimate business expenses of an assessee. Despite due collection of taxes due, if disallowance of genuine business expenses are made then that would be unjust enrichment on the part of the Government as the payee would have also paid the taxes on such income. In order to remove this anomaly, amendment has been made in section 40(a)(ia) by way of insertion of second proviso to section 40(a)(ia) by the Finance Act, 2012, with effect from 1-4-2013.
- The legislature has not given blanket deduction under section 40(a)(ia). The deduction as per amended section will be allowed only if the –

- (i) Payee has furnished his return of income under section 139;
- (ii) Payee has taken into account such sum for computing income in such return of income; and
- (iii) Payee has paid the tax due on the income declared by him in such return of income, and the payer furnishes a certificate to this effect from an accountant in such form as may be prescribed.

Whether amendment made in section 40(a)(ia) is prospective or retrospective with effect from 1-4-2005

- The question is as to whether the amendment made in section 40(a)(ia) is prospective or retrospective with effect from 1-4-2005, when the provisions of section 40(a)(ia) were introduced. Keeping in view the purpose behind second proviso inserted by the Finance Act, 2012 in section 40(a)(ia), it can be said to be declaratory and curative in nature and, therefore, should be given retrospective effect from 1-4-2005, being the date from which sub-clause (ia) of section 40(a) was inserted by the Finance (No.2) Act, 2004.
- The amendment to section 40(a)(ia) by the Finance Act, 2012 is intended to remove hardship. It was argued by the revenue that the existing provisions allow deduction in the year of payment and to that extent there is no hardship. The hardship in such an event would be taxing an assessee on a higher income in one year and taxing him on lower income in a subsequent year. To the extent the assessee is made to pay tax on a higher income in one year, there would still be hardship.

Conclusion

- In view of the aforesaid, the order of the Commissioner (Appeals) was liable to be set aside. The matter required to be remanded to the Assessing Officer for fresh consideration.