

Only deductible expenditure could be subjected to sec. 40(a)(ia) disallowance for TDS default, says ITAT

Summary – The Delhi ITAT in a recent case of Jaguar Enterprises., (the Assessee) held that in order to fall within ambit of section 40(a)(ia), it is sine qua non that assessee should have been otherwise eligible for deduction of sum which is sought to be disallowed by invoking provisions of section 40. Where assessee, a custom clearing agent, received certain amount from its clients as reimbursement of expenses which did not contain any profit element, Assessing Officer was not justified in applying gross profit rate at 8 per cent on estimate basis on amount so reimbursed in order to make addition to assessee's taxable income

Facts

- The assessee was a custom clearing agent. During relevant year assessee made payment of godown rent on behalf of its clients.
- In course of assessment, the Assessing Officer charged 8 per cent profit on reimbursement of godown rent. Accordingly, certain addition was made to assessee's taxable income.
- The Commissioner (Appeals) held that there was no income element in payment of godown rent. He, however, held that the assessee was required to deduct tax at source under section 194-I on such payment. Since no tax was deducted at source on it, he made enhancement of income with the equal amount by making disallowance under section 40(a)(ia).
- On second appeal:

Held

- In order to fall within the ambit of section 40(a)(ia), it is sine qua non that the assessee should have been otherwise eligible for deduction of the sum which is sought to be disallowed by invoking the provisions of section 40.
- At this juncture, it is worthwhile to note that the Assessing Officer treated *inter alia* the amount of Godown rent as having income element and that is how he brought to tax income at the rate of 8 per cent of this amount. When the assessee assailed such finding in the first appeal by contending that there was no income element in it, the assessee's contention came to be upheld by the first appellate authority.
- However, in order to buttress his view of the applicability of section 40(a)(ia) of the Act, the Commissioner (Appeals) held that there is income as well as expenditure of the godown rent and since the assessee failed to deduct tax at source, the expenditure part was disallowable by keeping the taxability of the income part intact. One is unable to comprehend the view canvassed by the Commissioner (Appeals) on this score.

- In order to qualify as income or expenditure, it is of paramount importance that the assessee must have earned the income or incurred the expenditure in his own right. The expenditure should be directed towards the earning of income and the income should ordinarily be the result of incurring of expenditure. If the expenditure is incurred or income is earned not in own capacity, but as representative of some third person, then it is the expenditure or income of such third person and not that of the assessee.
- In such a later situation, neither the amount of expenditure incurred can be treated as the expenditure of the assessee nor the income so earned can be construed as that of the assessee. The assessee in such circumstances merely acts as representative of the third person on whose behalf he is acting. The real effect of incurring such expenditure or earning such income by the assessee is that the such incurring of expenditure is invariably coupled with the right to recover the same and earning of such income is always saddled with the liability to repay to the person on whose behalf it was earned. Such transactions cannot be considered to have been undertaken by the assessee for his own business so as to form part of its expenditure or income.
- Reverting to the facts of the instant case, it is found that in so far as the payment of godown rent is concerned, the assessee merely acted as an intermediary between its customers, being the ultimate importers on one hand and the godown owners on the other. If one peruses the invoices raised by Container Corporation of India for the charge of godown rent, it can be seen that the assessee nowhere figures in them inasmuch as only the name of importers are depicted on them.
- It as an admitted position that the business of the assessee is of custom clearing agent. In that view of the matter, the remuneration allowed by its customers as per the terms of the contracts, is its income. Similarly, expenditure incurred by the assessee for earning such income in his own right and without any obligation or instruction from the clients, is his expenditure. These income and expenses find place on the credit and debit sides of its Profit and loss account. These items of income and expenditure earned/incurred by the assessee in his own capacity, are either includible in the total income or qualify for deduction as per law.
- On the other hand, other expenses, including customs duty, freight paid and godown rent etc. incurred for the customers can by no stretch of imagination be construed as the expenses incurred by the assessee for his business so as to make them eligible for deduction. Here is a case in which the assessee did not claim any deduction for godown rent which was paid by it on behalf of its customers and got reimbursement as such. Neither any expenditure was claimed towards payment of godown rent nor any income was offered on this account. The transaction of actually paying godown rent was for and on behalf of its customers. It was for these customers to claim deduction for the payment of godown rent etc. in their accounts.
- Once these items of expenses including godown rent are otherwise not eligible for deduction under any of the sections 30 to 38 of the Act in the hands of the assessee and further the assessee has neither claimed such deduction nor is it lawfully entitled to the same, the natural corollary which

follows is that there can be no question of making disallowance under section 40(a)(ia) of the Act in this regard.

- In view of aforesaid, the disallowance made by the Commissioner (Appeals) by invoking the provisions of section 40(a)(ia) is deleted.