

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'A' BENCH, KOLKATA**

**Before Shri P.M. Jagtap, Accountant Member
and Shri S.S. Viswanethra Ravi, Judicial Member**

**I.T.A. No. 1914/KOL/ 2013
Assessment Year: 2007-2008**

Martin Burn Limited,.....Appellant
1, R.N. Mukherjee Road,
Kolkata-700 001
[PAN: AABCM 9913 A]

-Vs.-

Income Tax Officer,.....Respondent
Ward-4(2), Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata-700 069

Appearances by:

Shri Soumitra Choudhury, Advocate, for the assessee
Shri Sallong Yaden, Additional CIT, D.R., for the Department

Date of concluding the hearing : July 13, 2016

Date of pronouncing the order : July 20, 2016

O R D E R

Per Shri P.M. Jagtap :-

This appeal filed by the assessee is directed against the order of Id. Commissioner of Income Tax (Appeals)-IV, Kolkata dated 14.03.2013 for the assessment year 2007-08 and the solitary issue arising out of the same for our consideration relates to the disallowance of Rs.37,98,048/- made by the Assessing Officer and confirmed by the Id. CIT(Appeals) under section 40(a)(ia) on account of assessee's failure to deduct tax at source from the rent paid to Calcutta Port Trust.

2. The assessee in the present case is a Company, which is engaged in real estate business. The return of income for the year under consideration was filed by it on 31.10.2007 declaring total income at Rs.1,74,18,919/-. In the assessment completed by the Assessing Officer

under section 143(3) of the Act vide an order dated 29.12.2008, an addition of Rs.37,98,048/-, inter alia, was made by the Assessing Officer to the total income of the assessee under section 40(a)(ia) towards payment of rent made by the assessee to Calcutta Port Trust without deduction of tax at source.

3. On appeal, the said disallowance was confirmed by the Id. CIT(Appeals) by observing that the assessee could not produce non-deduction of tax certificate from Calcutta Port Trust. Aggrieved by the order of the Id. CIT(Appeals), the assessee has preferred this appeal before the Tribunal.

4. We have heard the arguments of both the sides and also perused the relevant material available on record. As agreed by the Id. representatives of both the sides and the solitary issue involved in the appeal of the assessee is squarely covered in favour of the assessee and against the Revenue by the decision of the Coordinate Bench of this Tribunal in the case of M/s. Gourishankar Bihani -vs.- DCIT rendered vide its order dated 18.12.2014 passed in ITA No. 1127/KOL/2011, wherein similar disallowances made under section 40(a)(ia) were non-deduction of tax at source from the payment made by the assessee towards rent to Calcutta Port Trust was deleted by the Id. CIT(Appeals) after discussing all the relevant aspects in detail in paragraphs no. 4 to 7 of its order, which are reproduced hereunder:-

"4. We have heard rival submissions and gone through facts and circumstances of the case. Facts are admitted and no dispute on the same. Before us, Ld. Sr. Advocate Shri J. P. Khaitan argued that the assessee has paid rent to KPT, which is a Public Charitable Trust registered u/s.12AA of the Act. His first argument is that income of Public Charitable Trust registered u/s. 12AA of the Act is exempt and once the income is exempted, assessee is not liable to TDS. We find from the order of Tribunal dated June, 8, 2007 passed in ITA No. 2011/Kol/2006 in the case of Kolkata Port Trust v. DIT(Exemption), Kolkata that Kolkata Port Trust is a charitable institution eligible for registration u/s 12A of the Act and such registration was directed to be granted with effect from April, 1, 2005. Hon'ble Tribunal in deciding Kolkata Port Trust's case, placed reliance, inter alia, on the judgment of the Hon'ble Gujarat High Court in the case of CIT v. Gujarat Maritime Board (2007) 289 ITR 139 (Guj). The revenue's appeal against the judgment of Hon'ble Gujarat High Court was dismissed by Hon'ble Supreme Court in CIT v. Gujarat Maritime Board (2007) 295 ITR 561 (SC).

5. In such circumstances, we are of the view that Kolkata Port Trust is a charitable institution entitled for registration under section 12A of the Act. For assessment year 2007-08 involved in this appeal, Kolkata Port Trust was assessed in the status of a charitable institution and there was no demand raised against it and refund of the order of Rs.91.61 crores was issued to it. The aforesaid facts are mentioned in the letter dated May 4, 2012 of the Kolkata Port Trust enclosed at page 17 of assessee's paper book. In view of the above facts and as argued by Ld. counsel for the assessee that the aforesaid position obtained in the case of Kolkata Port Trust viz. that it was granted registration and assessed as a charitable institution under the provisions of the Act, it cannot be disputed that the income of Kolkata Port Trust is not chargeable to tax under the provisions of the Act. Section 11 under which Kolkata Port Trust was assessed, inter alia, for the assessment year 2007-08 falls under Chapter III of the Act for "incomes which do not form part of total income". We find that when income is not to be included in the total income, it is without a doubt, not chargeable under the provisions of the Act. In view of the above, we here referred to Section 2(45) of the Act, which defines "**total income**" and to mean the total amount of income referred to in section 5, computed in the manner laid down in the Act. Section 4 is the charging section and provides for levy of income tax on the total income, whereas, Section 5 lays down the scope of total income. Both sub-sections (1) and (2) of Section 5 of the Act start with the expression "subject to the provisions of this Act" and then go on to say what total income includes. Thus, where any income is not to be included in the total income, it is clearly not chargeable under the provisions of the Act. We then went through the provisions of section 194-I, which provides for deduction of tax from rent has to be read in conjunction with section 204(iii) of the Act. Section 194-I imposes the obligation to deduct tax on person "responsible for paying" income by way of rent. The expression "person responsible for paying" has been defined in section 204 of the Act. Clause (iii) of section 204 is relevant in the context of section 194-I. The material portion of section 204 relevant for the purposes of the instant appeal is set out herein below:-

"204. For the purposes of the foregoing provisions of this Chapter and section 2885, the expression "person responsible for paying: means-

(iii) in the case of credit, or, as the case may be, payment of any other sum chargeable under the provisions of this Act, the payer himself, or, if the payer is a company, the company itself including the principal officer thereof"

The obligation to deduct tax from payments to residents is in respect of "sum chargeable under the provisions of this Act." Section 195 is applicable in respect of payments to non-residents and also stipulates deduction of income tax at source from "sum chargeable under the provisions of this Act." Thus, the obligation to deduct tax would arise only when the amount is "sum chargeable under the provisions of this Act", whether the payee is a resident or non-resident. In respect of payments to residents, each of the provisions requiring tax deduction at source including section 194-I has to be read in conjunction with section 204 and no tax is required to be deducted if the amount payable is not chargeable under the provisions of the Act. The case of payment to a non-resident was considered by the Hon'ble Supreme Court in GE India Technology Centre P. Ltd. v CIT, (2010) 327 ITR 456 (SC), where it was held that provisions relating to tax deduction at source applied only to those sums which were chargeable to tax under the Act. The said case dealt with section 195 of the Act but the principle laid down therein is equally applicable even in respect of provisions relating to deduction of tax at source from payments to residents which have to be read along

with section 204 of the Act. In the said case, the provisions of section 204 of the Act did not come up for consideration.

6. In term of the above, we are of the view that in the instant case no tax was deductible at source under section 194-I read with section 204 comprised in Chapter XVII-B from the rent paid by the assessee to KPT. This is because such rent was not to be included in the taxable total income of the KPT and was, therefore, not chargeable under the provisions of the Act. As argued by Ld. Senior Advocate that in the instant case no tax was at all payable by KPT for AY 2007-08. U/s 191 of the Act the person making the payment can be deemed to be an assessee in default within the meaning of sub-section (1) of section 201 only where the deductee/payee has also failed to pay such tax directly. This issue has been considered by Hon'ble Allahabad High Court in the case of Jagran Prakashan Ltd. V. DCIT (TDS) (2012) 345 ITR 288 (All) and by ITAT Kolkata bench in the case of Ramakrishna Vedanta Math v. ITO (2013) 55 SOT 417 (Kol). In the instant case, KPT was not required to pay any tax and in turn the assessee cannot be treated to be in default within the meaning of section 201(1). Accordingly, we are of the view that no disallowance ought to have been made under section 40(a)(ia) of the Act. But, Ld. Senior DR, Shri Amitava Roy relied on this Tribunal's order of 'B' Bench in ITA No.1091/Kol/2012 dated 14-10-2014 for the AY 2009-10 in the case of ACIT v. Hitech Logistics Ltd. wherein exactly the similar facts were there and the same party that KPT was the recipient of rent without the deduction of TDS and Hon'ble Bench decided the issue vide para-4 of its order as under:-

"4. We have heard rival submissions and gone through facts and circumstances of the case. We find that the CIT(A) has deleted the disallowance for the reason that the payments made to Kolkata Port Trust do not attract the TDS provision. For this, he observed that "I find that the Kolkata Port Trust is under the Ministry of Surface Transport, where in the Govt. of India has full beneficial interest. Therefore, any payment made to Kolkata Port Trust will be covered u/s. 196 of the I. T. Act, 1961 and as such assessee's appeal on this ground is allowed." We find that the findings of CIT(A) is totally perverse and against law for the reason that the TDS from rent payment to Kolkata Port Trust is liable to TDS u/s. 194-I of the Act. Kolkata Port Trust is assessable entity within the provisions of Income Tax Act and it is not Government itself. It is a Corporate entity assessable to tax. Once the payment of rent on account of warehouse by the assessee was made to Kolkata Port Trust and is claimed as expenditure, the same is liable for TDS u/s. 194-I of the Act, for which the assessee has not deducted any TDS. The disallowance made by invoking the provisions of section 40(a)(ia) of the Act by the AO is within the provisions of law. Hence, we restore the disallowance and the order of CIT(A) is reversed. This issue of revenue's appeal is allowed."

Accordingly Ld Senior DR stated that the issue is covered in favour of Revenue. But other facet of arguments has not been countered.

7. In view of the above fact, we are of the view that in the instant case no tax was deductible at source under section 194-I read with section 204 comprised in Chapter XVII-B from the rent paid by the assessee to KPT. This is because such rent was not to be included in the total income of the KPT and was, therefore, not chargeable under the provisions of the Act. In the case law referred by Ld. Sr. DR the fact relating to the claim of exemption of the income of KPT was not before Tribunal or that issue was not raised but in the instant case, KPT was not required to pay any tax and in turn cannot

be treated to be in default within the meaning of section 201(1). Accordingly, we are of the view that no disallowance ought to have been made under section 40(a)(ia) of the Act”.

5. As the issue involved in the present case as well as the relevant material are similar to the case of M/s. Gourishankar Bihani (supra), respectfully following the decision of the Coordinate Bench of this Tribunal rendered in the said case, we delete the disallowance made by the Assessing Officer under section 40(a)(ia) and confirmed by the Id. CIT(Appeals) on account of rent paid to Calcutta Port Trust.

6. **In the result, the appeal of the assessee is allowed.**

Order pronounced in the open Court on July 20, 2016.

Sd/-
(S.S. Viswanethra Ravi)
Judicial Member

Sd/-
(P.M. Jagtap)
Accountant Member

Kolkata, the 20th day of July, 2016

Copies to : (1) **M/s. Martin Burn Limited,**
1, R.N. Mukherjee Road,
Kolkata-700 001

(2) **Income Tax Officer,**
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Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata-700 069

(3) *Commissioner of Income-tax (Appeals)-IV, Kolkata*
(4) *Commissioner of Income Tax, Kolkata*
(5) *The Departmental Representative*
(6) *Guard File*

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.