

आयकर अपीलीय अधिकरण, कोलकाता पीठ “ए”, कोलकाता

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA

श्री राजेश कुमार, लेखा सटस्य एवं श्री प्रदीप कुमार चौबे, न्यायिक सदस्य के समक्ष
[Before Shri Rajesh Kumar, Accountant Member & Shri Pradip Kumar Choubey, Judicial Member]

I.T.A. No. 2249/Kol/2024
Assessment Year: 2012-13

PBN Constructions Pvt. Ltd. (PAN: AAACP 4743 L)	Vs.	DCIT, Circle-3(1), Siliguri
Appellant / (अपीलार्थी)		Respondent / प्रत्यर्थी

Date of Hearing / सुनवाई की तिथि	08.01.2025
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	03.02.2025
For the assessee / निर्धारिता की ओर से	Shri Sujit Basu, Advocate Shri Rajib Mukherjee, Advocate
For the revenue / राजस्व की ओर से	Shri Sailen Samadder, Addl. CIT Sr. DR

ORDER / आदेश

Per Pradip Kumar Choubey, JM:

This is the appeal preferred by the assessee against order of Commissioner of Income Tax (Appeal)-NFAC, Delhi (hereinafter referred to as the Ld. CIT(A)] dated 07.11.2024 for AY 2012-13.

2. Brief facts of the case of the assessee is that the scrutiny assessment order of the assessee for the assessment year 2012-13 had been passed u/s 143(3) of the Act on 31.03.2015 by erstwhile DCIT, Circle-3(1), Siliguri by making the following additions:

i) Disallowance u/s 40a(ia) for non-deduction of TDS Rs. 1,08,42,694/-.

ii) Difference of interest paid Rs. 1,42,337/-

iii) Unexplained cash credit u/s 68 of the act Rs. 1,04,55,206/-

iv) Income from other source read with Section 68 of the Act Rs. 89,55,000/-

v) Unexplained money receipt from M/s Darjeeling Cement Pvt. Ltd. Siliguri Rs. 69,95,500/-

vi) Addition of share application money with high premium Rs. 78,00,000/-

vii) Interest on penalty Rs. 13,711/-

viii) ROC Fee Rs. 17,650/-

ix) Expenses not properly vouched Rs. 58,71,442/-

Total Rs. 5,10,93,540/-

3. Being aggrieved the assessee preferred an appeal before the Ld. CIT(A), Siliguri against the assessment order. The Ld. CIT(A) in his order u/s 250 of the Act dated 27.05.2015 had deleted the additions to the extent of Rs. 5,09,32,182/- made by the AO in the assessment order u/s 143(3) of the act dated 31.03.2015. Against the order of the Ld. CIT(A), Siliguri the department preferred a second appeal before the Hon'ble ITAT, Kolkata. The Hon'ble ITAT {A} Bench, Kolkata, pronounced its order in ITA No. 1034/Kol/2015 dated 19.06.2019 and deleted the entire additions made by the AO except where the additions made u/s 40a(ia) for total Rs. 1,08,42,694/- and by setting aside the order of CIT(A), the AO has been directed the AO verify the facts whether the recipient of income has taken into account the amount received from the

payer(assessee) in computing its income and declared in the return and has paid tax on the returned income..

In view of the order passed by the Hon'ble ITAT, Kolkata Bench in ITA No. 1034/Kol/2015 (supra) an order u/s 254/143(3) of the Act was passed on 30.09.2021 and revised the assessed total income at Rs. 2,09,03,092/-.

4. The said order has been challenged by the assessee before the Ld. CIT(A) wherein the appeal has been dismissed thereby holding that in the instant case the same confirmation has been given by each payee certificate in Form no. 26A was not there.

Being aggrieved and dissatisfied the present appeal has been preferred by the assessee.

5. The Ld. Counsel for the assessee challenges the impugned order on the following grounds:

1. For that on the facts and circumstances and legal position of the case, the order u/s 250 passed by the Hon'ble CIT(A) is against the principle of natural justice.

2. For that on the facts and circumstances and legal position of the case, the Ld. AO has failed to appreciate the facts that the recipients of interests from the assessee had duly offered the same as their incomes in their returns. The Ld. CIT(A) ought to have appreciated the said facts by allowing the appeal.

3. For that on the facts and circumstances and legal position of the case, the ld. AO had failed to appreciate the facts and law that the same evidences were produced before him as had been produced before the Ld. CIT(A) as per the direction of the Hon'ble ITAT. The Ld. AO ought not to have refused to accept the same on the ground that the same were not as per Rule 32ACB of the I.T Rules, 1962. The Ld. CIT(A) ought not to have confirmed the order of the Ld. AO on mere technical default without appreciating the facts on record.

4. For that on the facts and circumstances and legal position of the case, the ld. AO had failed to appreciate the fact that Rule 31ACB has been inserted w.e.f 12.09.2012 and did not apply for assessment year 2012-13. The Ld. CIT(A) ought not to have confirmed the order of the Ld. AO by holding that rule 31ACB is having retrospective effect from 01.04.2005.

5. That the appellant craves permission to add, amend, alter or vary all or any of the ground of appeal on or before the date of hearing of the appeal.

6. Contrary to that the Ld. D.R supports the impugned order.

7. The main contention of the Ld. Counsel of the assessee is that the Ld. AO has failed to appreciate the facts and law that the evidences were produced before the AO as has been placed before the Ld. CIT(A) as per the direction of the ITAT. In this context, we have perused the order of the ITAT passed in ITA No. 1034/Kol/2015 (supra) in the assessee's case which is as follows:

“4. In the present case, the assessee has made payment to M/s Ajmer Vidyut Vitran Nigam Ltd., which is a State Government Undertaking. Taking into consideration the judicial decisions as cited above, we set aside the impugned order of Ld. CIT(A) and remand this issue back to AO and the AO is directed to verify the fact regarding the fulfillment of condition as stated in para 3 (supra) by the recipient payee and if the AO finds that the recipient / payee has included the amount in its total income in its return of income and paid taxes thereon, then the disallowance made by the AO by invoking the provisions of Section 40a(ia) of the Act be deleted. Thus, we confirm the order of Ld. CIT(A) and dismiss these grounds of appeal of revenue. For the aforesaid decision of ours, we rely also on the decision of the Hon'ble Calcutta High Court in the case of Pr. CIT vs. M/s Tirupati Construction in GA 2146 of 2016 in ITAT No. 287 of 2016 passed on 23.08.2016.”

8. The only issue is that the disallowance made by the AO by invoking the provision of Section 40A(ia) of the Act. It is pertinent to mention herein that the assessee has paid the following interest to the following non-banking finance company during AY 2012-13 and certificate issued by the loan creditor. Before us, the following certificate has been furnished by the assessee and it has already been filed before the Ld. CIT(A) which is as under:

- i) Certificate issued by L & T Finance Ltd.
- ii) Certificate issued SREI Equipment Finance Ltd.
- iii) Certificate issued by TATA Motors Finance Ltd.
- iv) Certificate issued by Sree Ram Finance Co. Ltd.
- v) Certificate issued by CA in Form 26A, vide Rule 31ACB of IT Rules, 1962
- vi) Audited Statement of Accounts (AY 2012-13)

9. It appears to us that during the course of remand proceedings, the assessee has furnished above certificates issued by the recipient of interest and which were submitted before the Ld. CIT(A). We further find that the Ld. CIT(A) had granted relief on the basis of certificate issued by recipient, the AO had made the point on disallowance for non-furnishing of certificate from an Accountant in Form no. 26A despite of the fact that rule 31ACB of IT Rules, 1962 had been inserted by the Income Tax Rules, 2012 w.e.f 12.09.2012 for AY 2013-14. We further find that Hon'ble ITAT in its order passed in ITA No. 1034/Kol/2015 had made it clear that if the recipient / payee had included an amount in its total income and paid taxes thereon then the disallowance made by the AO by making the provision of Section 40a(ia) of the Act should be deleted. It is further important to mention herein that the form issued by NBFC loan creditors were produced before the AO for due examination but the AO had simply confirmed by the assessee on the plea that the assessee did not produce the certificate in Form 26A as per Rule 31ACB of Income Tax Rules, 1962. We have also gone through the following judgment which are as follows:

In Grindlays Bank vs. CIT (1992) 193 ITR 457 (Cal), the jurisdictional High Court at Calcutta had held that if the amount of tax has already been realized from the employees concerned directly, there cannot be any question of further realization of tax as the same income cannot be taxed twice.

The Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverages Pvt. Ltd. (2007) 293 ITR 226 (SC) has held that if the recipient of income has paid tax on the income received from the assessee and has filed the return of income, assessee should not be treated as an 'assessee in default'.

Assessee cannot be forced to deduct TDS if there is no tax liability in the hands of the

loan creditors. This law had been accepted by CBDT in its Circular No. 275/201/95-IT(B), dated 29.1.1997. Subsequently, recognized by the legislators by inserting proviso in sub-section (1) of section 201 by Finance Act, 2012. Thus, the settled position of law is that if the deductee / payee has paid tax, no recovery can be made from the person responsible for paying of income from which he failed to deduct or deposit any tax at source - Santosh Kumar Kedia vs. ITO, ITA No.1905/Kol/2014, dated 4.3.2015.

In Royal Western India Turf Club Ltd. vs. ACIT, ITA No.6625/Mum/2017, dated 28.6.2019 (Asst. Yr. 2012-13), it was contended by the assessee that Rule 31ACB and Form 26A are only directory in nature and non submission of information by the Horse Owners in this Form cannot result in assessee being held liable u/s 201. The Hon'ble Tribunal has held that if the assessee furnishes confirmation from the recipient of income to the effect that they have included the incomes received from assessee in their respective returns, assessee ought to be allowed benefit of decision of Supreme Court in the case of Hindustan Coca Cola Beverages Pvt. Ltd.

*In **Datacrop Traffic Pvt. Ltd. vs. ACIT, ITA No. 502/Bang/2022, dated 20.7.2022 (Asst year 2019-20)**, a sum of Rs.3,48,000/- was disallowed by invoking the provisions of section 40(a)(ia) of the IT Act, since the assessee has not deducted tax at source on some payments made by it. The assessee submitted before the CIT(A) that income has already been offered to tax by the payee and certificate has been collected by the assessee in this regard. However, the CIT(A) rejected the claim of the assessee and held that assessee has not complied with Rule 31ACB of the IT Rules, 1962. The Hon'ble Tribunal has held that once the payee has paid the taxes, admittedly the assessee cannot be liable u/s 201 of the IT Act by virtue of the judgment of the Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverages Ltd. vs. CIT (2007) 293 ITR 226 (SC). The principle enunciated by the Hon'ble Apex Court has been incorporated in proviso to section 40(a)(ia) of the IT Act by Finance Act, 2012 and refers to the proviso to section 201(1) and states when assessee is not treated as an "assessee in default" under the first proviso to section 201, then for the purpose of section 40(a)(ia), the assessee shall be deemed to have deducted and paid tax on such sum on furnishing the return of income by the resident payee referred to the said proviso. Therefore, it is clear that when the payee has paid the taxes, the benefit of proviso to section 201 of the IT Act is extended even for claiming deduction of expenses wherein the assessee failed to deduct tax at source.*

The Hon'ble ITAT has held that the compliance Rule 31ACB is directory.

10. Going over the facts of the case, the order passed by ITAT in favour of the assessee in ITA No. 1034/Kol/2015 (supra) and the various judicial pronouncements, we find substance in the argument of the Id. Counsel of the assessee that the AO did not express any issue about fact in the recipient company NBFC loan creditors have not been offered the income received from the assessee in their return and had not paid taxes thereon. Accordingly, mere non-furnishing form 26A addition made by AO confirmed by the Ld. CIT(A) are hereby directed to be deleted.

In the result, the appeal filed by the assessee is allowed.

Order is pronounced in the open court on 3rd February, 2025

Sd/-

Sd/-

(Rajesh Kumar/राजेश कुमार)

(Pradip Kumar Choubey /प्रदीप कुमार चौबे)

Accountant Member/लेखा सदस्य

Judicial Member/न्यायिक सदस्य

Dated: 3rd February, 2025

SM, Sr. PS

Copy of the order forwarded to:

1. Appellant- PBN Constructions Pvt. Ltd., Plot 154/4, 5 & 7, Sevoke Road, Siliguri-734001.
2. Respondent – DCIT, Circle-3(1), Siliguri
3. Ld. CIT(A)-NFAC, Delhi
4. Ld. Pr. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata