

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "बी" मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

BEFORE S/SHRI I.P. BANSAL, (JM) AND B.R.BASKARAN (AM)
सर्वश्री आय.पी. बंसल, न्यायिक सदस्य एवं बी.आर.बास्करन, लेखा सदस्य के समक्ष

आयकर अपील सं./I.T.A. No.6901/Mum/2011
(निर्धारण वर्ष / Assessment Year : 2006-2007)

Marissa Clarissa Dominique Alveyn, 104, Rodhol Apartments, St.Roque Road, Bandra (W), Mubmai-400050	बनाम/ Vs.	Income Tax Officer -19(3)(3), Piramal Chambers, Lalbaug, Mumbai.
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. :ABMPA2076M

अपीलार्थी ओर से / Assessee by:	None
प्रत्यर्थी की ओर से/ Revenue by::	Shri Vivek Batra

सुनवाई की तारीख / Date of Hearing : 5.1.2015
घोषणा की तारीख /Date of Pronouncement : 9. 1.2015

आदेश / O R D E R

Per B.R.BASKARAN, Accountant Member:

The assessee has filed this appeal challenging the order dated 21.7.2011 passed by the Id. CIT(A)-30, Mumbai and it relates to the assessment year 2006-07.

2. The assessee is aggrieved by the decision of the Id. CIT(A) in confirming the disallowance made under section 40(a)(ia) of the Income tax Act, 1961 (the Act) for not deducting the tax at source u/s 194J of the Act from some of the expenses incurred by the assessee.

3. None appeared on behalf of the assessee though, on an earlier occasion, the case was adjourned at specific request of the assessee. Hence we proceed to dispose of the appeal ex-parte, without the presence of the assessee.

4. Facts relating to the issue under consideration are stated in brief. The assessee is an individual and working as Creative Consultant Artiste. According to the assessee, she is engaged in the business of creating promotional campaigns for medical brands especially for pharmaceutical companies. In the immediately preceding year i.e. in assessment year 2005-06, the assessee had disclosed gross receipt of Rs.14,18,150/- and declared profit/income as "business income". However, in the year under consideration (AY 2006-07), the assessee disclosed gross receipt of Rs.24,00,382/- and the profit was declared as "professional income". It is pertinent to note that the assessee got her accounts audited u/s 44AB of the Act and filed Tax audit report along with her return of income filed for AY 2006-07. It is also pertinent to note that the provisions of section 44AB of the Act prescribe different monetary limits for persons carrying on business or carrying on profession for getting the accounts audited. As per the provisions of sec. 44AB existing at the relevant point of time, the monetary limit of total sales, turnover or gross receipts, as the case may be, for getting the accounts audited was Rs.40 lakhs for "business" and Rs.10 lakhs for "Profession".

5. During the course of assessment proceedings, the AO noticed that the assessee has incurred expenditure under the head Illustration charges, Assistant Artiste Charges, Computer Graphics and Visual Charges etc., aggregating to Rs.8,37,093/-. The AO also noticed that the assessee has got her accounts audited for the year under consideration treating her activity as "Professional activity". In the immediately preceding year, the gross receipts declared by the assessee had exceeded Rs.10.00 lakhs, but the assessee did not get her accounts audited. As per the proviso to sec. 194J of the Act, the TDS provisions of sec. 194J shall apply to an Individual, if his gross sales or gross receipts or turnover of the immediately preceding year has exceeded the monetary limits prescribed in sec. 44AB of the Act. Since the assessee herself has treated her activity as her professional activity in the present year and since the gross receipts of the immediately preceding year exceeded the monetary limit of

Rs.10.00 lakhs, the AO took the view that the provisions of proviso to sec. 194J shall apply and hence the assessee was liable to deduct tax at source on the aforesaid expenditure in terms of provisions of section 194J of the Act. Since, the assessee did not deduct tax at source, the AO disallowed aforesaid expenditure by invoking the provisions of section 40(a)(ia) of the Act.

6. Before the Id. CIT(A), the assessee contended that her activity was business activity and hence the monetary limit of Rs.40.00 lakhs prescribed in sec. 44AB of the Act shall apply. Since her gross receipts did not exceed the monetary limit, she contended that she was not liable to deduct tax at source u/s 194J of the Act. The Id. CIT(A), however, rejected the said claim on the reasoning that the assessee had declared income for the year under consideration as professional income and also got her accounts audited under section 44AB of the Act, even though the gross receipts were less than Rs.40.00 lakhs, meaning thereby the assessee herself has accepted that she was carrying on profession. Accordingly, the Id. CIT(A) held that the provisions of section 194J are applicable to the assessee. Accordingly, he confirmed the addition made by the AO u/s 40(a)(ia).

7. We have heard the Id. DR and perused the material available on record. We notice from the paper book filed by the assessee that the assessee has furnished certain documents in the form of invoices issued by her to various clients in order to substantiate her claim that she was actually engaged in the business activity relating to promotional campaign. However, we notice that the First Appellate Authority did not consider those materials and also did not express any opinion thereon. The Id. CIT(A) was simply carried away by the fact that the assessee got her accounts audited u/s 44AB of the Act during the year under consideration by treating her activity as Professional Activity.

8. In the instant case, the contention of the assessee is that she is carrying on business. Accordingly it is contended that the provisions of section 44AB shall not apply to her, since her turnover was less than Rs.40 lakhs for the year under consideration as well as for the immediately preceding year. However, both the tax authorities have held that the activity carried on by the assessee was in the nature of professional activity and accordingly held that provisions of section

44AB shall apply, since her gross receipt have exceeded Rs.10 lakhs during the year under consideration and also in the immediately preceding year. The applicability of the TDS provisions of sec. 194J would depend upon the question as to whether the activity carried on by the assessee would fall in the category of "Business" or in the category of "Profession".

9. We have already noticed that the tax authorities have formed their view only on the basis of the fact that the assessee has got her accounts audited in the year under consideration u/s 44AB, even though the turnover was less than Rs.40 lakhs. In our view, the nature of activity carried on by the assessee should be examined objectively by the tax authorities. It is well settled proposition of law that the claim made by the assessee in the return of income or books of account can not be considered to be the sole determining factor for deciding any issue and they need to be examined objectively. For example, the activity of a civil engineer providing mere consultancy services would fall in the category of "Profession", while the activity of construction and sale of buildings would fall in the category of "Business".

10. We notice from the paper book furnished by the assessee that she has placed some documents to substantiate her claim that she was carrying on the business activity. However, neither the Id.CIT(A) nor the AO has examined those documents. In the absence of such examination and also in the absence of a clear finding thereon, we find it difficult to adjudicate the issue relating to the nature of activity carried on by the assessee. We have already noticed that the clear decision about the nature of the activity of the assessee is required in order to adjudicate the dispute relating to the applicability of provisions of sec. 194J / 40(a)(ia) of the Act.

11. Hence, in our view, the issue relating to the nature of activity of the assessee requires fresh examination at the end of the Id. CIT(A). Accordingly, we set aside the order of Id. CIT(A) and restore all the matters to his file with a direction to examine whether the activity of the assessee would fall in the category of business or profession by duly considering the various materials / explanations that may be may be furnished by the assessee before him and accordingly decide the issue of applicability of provisions of sec. 194J / 40(a)(ia)

of the Act. The assessee is also directed to co-operate with tax authorities for expeditious disposal of the appeal.

12. In the result the appeal filed by the assessee is allowed for statistical purposes.

The above order was pronounced in the open court on 9th Jan, 2015.

घोषणा खुले न्यायालय में दिनांक: 9th Jan, 2015 को की गई ।

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(आय.पी. बंसल/I.P. BANSAL)

(बी.आर. बास्करन,/ B.R. BASKARAN)

न्यायिक सदस्य / **Judicial Member**

लेखा सदस्य/**Accountant Member**

मुंबई Mumbai: 9th Jan, 2015.

व.नि.स./ SRL , Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned
4. आयकर आयुक्त / CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

true copy

सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai