

Sec 40 disallowance is not applicable when deduction is not claimed: Calcutta HC

LINDE INDIA LIMITED (ITAT/338/2016)

Facts:

1. The assessee has paid fees for technical services outside India or in India to a non-resident but the fees have not been debited such amount to the profit and loss account and has also not been claimed as deduction in computing the income chargeable under the head profits and gains of business or profession.
2. The AO held that fees for technical service paid to a nonresident shall be deemed to be the income that had arisen in India under Section 9(1)(vii) of the Income Tax Act for which the assessee ought to have deducted TDS under Section 195. Thus, the AO made disallowances aggregating to Rs.128,48,02,479/- under Section 40(a)(ia).

Note:

1. Sec 40 provides that certain amounts which are otherwise allowable as deductions U/S 30 to 38 shall not be deducted in computing the income charging under the head profits and gains of business or profession unless tax has been deducted at source or after deduction has not been paid within the due date for filing the return of income in case tax is deductible at source on such amount.
2. Thus, amounts mentioned under Section 40, on which tax is deductible at source, shall not be deducted unless tax is deducted at source or after deduction has not been paid within the stipulated time frame.
3. Therefore, if the disputed amount is neither debited from the profit and loss account of the business or profession nor has been deducted while computing the profits and gains of business or profession, Section 40 shall not be applicable.

Hon Calcutta HC held as below:

1. While computing the income chargeable to tax under the head profits and gains of business or profession an amount may be deducted from the profits and gains of business and profession U/S 30 to 38, in order to take away the said amount from the total chargeable amount under the said head.

2. The effect of the non obstante clause in Section 40 of the Income Tax Act is only to restrict the operation of Section 30 to 38 in cases where the conditions mentioned in Section 40 are not complied with and not where no deduction is claimed U/S 30 to 38.

3. The first appellate authority was justified in deleting the disallowance made by the assessing officer by involving the provisions of Section 40(a)(ia).