

IN THE INCOME TAX APPELLATE TRIBUNAL  
“SMC-B” BENCH : BANGALORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER

ITA No. 144/Bang/2017
Assessment year : 2013-14

Shri Azmath ulla, No. 48/49, MEI Factory, Tumkur Road, Yeshwanthpur, Bangalore – 560 022.  <b>PAN: ABGPA 0983R</b>	Vs.	The Assistant Commissioner of Income Tax, Circle – 6(2)(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri C.R. Nulvi, CA
Respondent by	:	Shri M.K. Biju, JCIT

Date of hearing	:	24.05.2017
Date of Pronouncement	:	07.06.2017

**ORDER**

*Per Vijay Pal Rao, Judicial Member*

This appeal by the assessee is directed against the order dated 23.11.2016 of CIT(A) for the assessment year 2013-14. The assessee has raised the following grounds.

*“1.The order of the A.O is bad in law and against the fact and circumstances of the case.*

*2.On the facts and circumstances of the case and under the provisions of the law, the A.O erred in making the addition u/s 40(a)(ia) for the interest paid to NBFC's without TDS for the loan*

*availed, as the Section 194A(1) is not applicable to financial corporation's i.e., NBFC's.*

*3. On the facts and circumstances of the case and under the provisions of the law, the A.O erred in making the addition u/s 40(a)(ia), as the said section is not applicable for the interest paid during the year without TDS prior to the assessment year 2014-15.*

*4. On the facts and circumstances of the case and under the provisions of the law, the A.O erred in making the addition u/s 40(a)(ia) for the interest paid to NBFC's, where the second proviso to Section 40(a)(ia) is complied by the NBFC's by filing the return of income, declaring such interest and paying tax thereon.*

*5. For these and other reasons which may be adduced at the time of hearing, the appellant prays before Your Honour to delete the addition made by the A.O, which is bad in law.*

*6. Appellant Craves Leaves to add, to alter, to amend and to delete any of the other grounds at the time of hearing."*

2. The only issue arises in the appeal of the assessee is whether in the facts and circumstances of the case the authorities below have erred in disallowing the interest payment to Non Banking Financial Corporations (NBFCs) u/s. 40(a)(ia).
3. In the course of assessment proceedings the AO made a disallowance of Rs. 17,79,823/- on account of interest payment made by the assessee to NBFCs without deduction of tax at source by invoking the provisions of section 40(a)(ia). The assessee challenged the action of the AO before the CIT(A) and contented that Non Banking Financial Corporations are falling under the exclusion from TDS as per provisions of section

194A(3)(a)(b) of the Act. The CIT(A) did not accept the contention of the assessee and confirmed the disallowance made by the AO.

4. Before the Tribunal the ld. AR of the assessee has submitted that the NBFCs have already taken into consideration the interest amount in question for computation of their income offered to tax. He has referred to the certificates issued by the auditors of the NBFCs thereby it has been certified that all these NBFCs namely M/s. Bajaj Finance Limited, M/s. Kotak Mahindra Prime Limited and Reliance Capital Limited have considered these interest amounts in computation of their incomes for the purpose of tax in accordance with the provisions of Act. Thus the ld. AR has submitted that in view of the second proviso to section 40(a)(ia) no disallowance can be made when the recipients of the amount have already considered the same as part of their income offered to tax. He has further contented that though these certificates were not produced before the AO however, the assessee raised this issue before the CIT(A) and now filed these certificates in support of his claim. Hence it is pleaded that the additional evidence filed by the assessee may be admitted and the matter may be remitted to the record of the AO for verification and deciding the same. On the other hand, the ld. DR has objected to the prayer of the assessee for admitting the additional evidences. He has relied upon the orders of the authorities below.

5. I have considered the rival submissions as well as relevant material on record. As regards the applicability of the second proviso to section 40(a)(ia) retrospectively an identical issue was considered by the Hon'ble Delhi High Court in case of CIT Vs Naresh Kumar (362 ITR 256) and held that the proviso inserted in section 40(a)(ia) is an explanatory and remedial in nature and therefore will be applicable with retrospective effect in para 26 to 29 as under.

*“26. Principle of matching which is disturbed by Section 40(a)(ia) of the Act, may not materially be of consequence to the Revenue when the tax rates are stable and uniform or in cases of big assesseees having substantial turnover and equally huge expenses as they have necessary cushion to absorb the effect. However, marginal and medium taxpayers, who work at low G.P. rate and when expenditure which becomes subject-matter of an order under Section 40(a)(ia) is substantial, can suffer severe adverse consequences as is apparent from the case of Naresh Kumar. Transferring or shifting expenses to a subsequent year, in such cases, will not wipe off the adverse effect and the financial stress. Nevertheless the Section 40(a)(ia) has to be given full play keeping in mind the object and purpose behind the section. At the same time, the provision can be and should be interpreted liberally and equitable so that an assessee should not suffer unintended and deleterious consequences beyond what the object and purpose of the provision mandates. Case of Naresh Kumar is not one of rare cases, but one of several cases as we find that Section 40(a)(ia) is invoked in large number of cases.*

*27. One important consideration in construing a machinery section is that it must be so construed so as to effectuate the liability imposed by the charging section and to make the machinery workable.*

*However, when the machinery section results in unintended or harsh consequences which were not intended, the remedial or correction action taken is not to be disregarded but given due regard.*

*28. It is, in this context, that we had in Rajinder Kumar's case (supra) observed as under:*

*'22. Now, we refer to the amendments which have been made by the Finance Act, 2010 and the effect thereof. We have already*

quoted the decision of the Calcutta High Court in *Virgin Creations (supra)*. The said decision refers to the earlier decision of the Supreme Court in the case of *Allied Motors (P.) Ltd (supra)* and *Commissioner of Income Tax v. Alom Extrusions Ltd*, [\[2009\] 319 ITR 306 \(SC\)](#). In the case of *Allied Motors (P.) Ltd. (supra)*, the Supreme Court was examining the first proviso to Section 43B and whether it was retrospective. Section 43B was inserted in the Act with effect from 1st April 1984 for curbing claims of taxpayers who did not discharge or pay statutory liabilities but claimed deductions on the ground that the statutory liability had accrued. Section 43B states that the statutory liability would be allowed as a deduction or as an expense in the year in which the payment was made and would not be allowed, even in cases of mercantile system of accountancy, in the year of accrual. It was noticed that in some cases hardship would be caused to assessees, who paid the statutory dues within the prescribed period though the payments so made would not fall within the relevant previous year. Accordingly, a proviso was added by Finance Act, 1987 applicable with effect from 1st April, 1988. The proviso stipulated that when statutory dues covered by Section 43B were paid on or before the due date for furnishing of the return under Section 139(1), the deduction/expense, equal to the amount paid would be allowed. The Supreme Court noticed the purpose behind the proviso and the remedial nature of the insertion made. Of course, the Supreme Court also referred to Explanation 2 which was inserted by Finance Act, 1989 which was made retrospective and was to take effect from 1st April, 1984. Highlighting the object behind Section 43B, it was observed that the proviso makes the provision workable, gives it a reasonable interpretation. It was elucidated:

"12. In the case of *Goodyear India Ltd. v. State of Haryana* this Court said that the rule of reasonable construction must be applied while construing a statute. Literal construction should be avoided if it defeats the manifest object and purpose of the Act.

13. Therefore, in the well-known words of Judge Learned Hand, one cannot make a fortress out of the dictionary; and should remember that statutes have some purpose and object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning. In the case of *R.B. Judha Mal Kuthiala v. CIT*, this Court said that one should apply the rule of reasonable interpretation. A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole.

14. This view has been accepted by a number of High Courts. In the case of *CIT v. Chandulal Venichand*, the Gujarat High Court has held that the first proviso to Section 43-B is retrospective and sales tax for the last quarter paid before the filing of the return for the assessment year is deductible. This decision deals with Assessment Year 1985-85. The Calcutta High Court in the case of *CIT v. Sri Jagannath Steel Corpn.* has taken a similar view holding that the statutory liability for sales tax actually discharged after the expiry of the accounting year in compliance with the relevant statute is entitled to deduction under Section 43-B. The High Court has held the amendment to be clarificatory and, therefore, retrospective. The Gujarat High court in the above case held the amendment to be curative and explanatory and hence retrospective. The Patna High court has also held the amendment inserting the first proviso to be explanatory in the case of *Jamshedpur Motor Accessories Stores v. Union of India*. The special leave petition from this decision of the Patna High Court was dismissed. The view of the Delhi High Court, therefore, that the first proviso to Section 43-B will be available only prospectively does not appear to be correct. As observed by G.P. Singh in his *Principles of Statutory Interpretation*, 4th Edn. At p. 291: "It is well-settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended." In fact the amendment would not serve its object in such a situation unless it is construed as retrospective. The view, therefore, taken by the Delhi High Court cannot be sustained."

23. Section 43B deals with statutory dues and stipulates that the year in which the payment is made the same would be allowed as a deduction even if the assessee is following the mercantile system of accountancy. The proviso, however, stipulates that deduction would be allowed where the statutory dues covered by Section 43B stand paid on or before the due date of filing of return of income. Section 40(a)(ia) is applicable to cases where an assessee is required to deduct tax at source and fails to deduct or does not make payment of the TDS before the due date, in such cases, notwithstanding Sections 30 to 38 of the Act, deduction is to be allowed as an expenditure in the year of payment unless a case is covered under the exceptions carved out. The amended proviso as inserted by Finance Act, 2010 states where an assessee has made payment of the TDS on or before the due date of filing of the return under Section 139(1), the sum shall be allowed as an expense in computing the income of the previous year. The two provisions are akin and the provisos to Sections 40(a)(ia) and 43B are to the same effect and for the same purpose.

24. In *Podar Cement (P.) Ltd. (supra)*, the Supreme Court considered whether term "owner" would include unregistered owners who had paid sale consideration and were covered by

*Section 53A of the Transfer of Property Act. The contention of the assesseees was that the amendments made to the definition of term "owner" by Finance Bill, 1987 should be given retrospective effect. It was held that the amendments were retrospective in nature as they rationalise and clear the existing ambiguities and doubts. Reference was made to Crawford: "Statutory Construction" and "the principle of Declaratory Statutes", Francis Bennion: "Statutory Interpretation", Justice G.P. Singh's "Principles of Statutory Interpretation", it was observed that sometimes amendments are made to supply an obvious omission or to clear up doubts as to the meaning of the previous provision. The issue was accordingly decided holding that in such cases the amendments were retrospective though it was noticed that as per Transfer of Property Act, Registration Act, etc. a legal owner must have a registered document.*

*25. In view of the aforesaid discussion in paras 18,19 and 20, it is apparent that the respondent assessee did not violate the unamended section 40(a)(ia) of the act. We have noted the ambiguity and referred their contention of Revenue and rejected the interpretation placed by them. The amended provisions are clear and free from any ambiguity and doubt. They will help curtail litigation. The amended provision clearly support view taken in paragraphs 17 - 20 that the expression "said due date" used in clause A of proviso to unamended section refers to time specified in Section 139(1) of the Act. The amended section 40(a)(ia) expands and further liberalises the statute when it stipulates that deductions made in the first eleven months of the previous year but paid before the due date of filing of the return, will constitute sufficient compliance.'*

*29. In view of the aforesaid discussion, we do not find any merit in the present appeals filed by the Revenue and they are dismissed."*

6. Having held that the second proviso to section 40(a)(ia) shall have retrospective effect the question arises that if the recipients of interest in question have already considered the same for computing their income offered to tax then the disallowance u/s. 40(a)(ia) is not attracted. In this case though the assessee did not file the relevant material before the AO in this regard however, it is a fact which existed right from the beginning and the relevant details are available with the revenue regarding the

income offered by these NBFCs. Therefore, in view of the facts and circumstances of the case if the certificates filed in support of the claim that the NBFCs have included this amount of interest in computation of their income offered to tax are found to be correct then the compliance u/s. 40(a)(ia) is deemed to have been made and no disallowance is called for. Therefore this issue is set aside to the record of the AO for verification of the fact that the recipient NBFCs have already taken into account the amount of interest received by them for computing the income in their return of income. In case the AO is satisfied that the NBFCs have considered this amount for computation of income in their return of income then no disallowance is called for u/s. 40(a)(ia).

5. In the result, the appeal of the assessee is allowed for statistical purposes.

6. Pronounced in the open court on this 07<sup>th</sup> day of June, 2017

Sd/-  
(VIJAY PAL RAO)  
Judicial Member

Bangalore,  
Dated, the 07<sup>th</sup> June, 2017.  
/MS/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,  
ITAT, Bangalore.