

**IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH, AHMEDABAD**

[Before Pramod Kumar, Accountant Member]

ITA No. 2758/Ahd/2015 & CO No.200/Ahd/2015
Assessment Year: 2011-12

Income-tax Officer
Ward 3(1)(5)
Vadodara

.....**Appellant**

Vs.

M/s. Spandan Pharmacy
1-2, Nandigram Society-2,
Shindhav Mata Road,
Manjalpur, Vadodara-390011
[PAN : ABTFS 4385 C]

.....**Respondent &
Cross-Objector**

Appearances by:

Keyur Patel for the appellant
Parin Shah for the respondent

Date of concluding the hearing : 17.08.2017
Date of pronouncing the order : 29.08.2017

O R D E R

The Revenue is in appeal before the Tribunal against the order of Id. CIT(A)-3, Vadodara dated 20.07.2015. On receipt of notice in the Revenue's appeal, the assessee has filed Cross-Objection bearing No. 200/Ahd/2015, whereby it has supported the order of the Id. CIT(A).

2. Before carving out the specific grievance of the Revenue, I deem it appropriate to make reference to the brief facts. It emerges out from the record that the assessee has incurred expenditure towards interest, freight charges and royalty amounting to Rs.42,47,087/-. The Assessing Officer observed that the assessee failed to deduct the TDS on these payments which were made to M/s. Vraj Healthcare P. Ltd. Therefore, he disallowed the claim of the assessee with the aid of Section 40(a)(ia) of the Income-tax Act.

3. On appeal, Id. CIT(A) has observed that, by Finance Act, 2012, second proviso was inserted in sub-clause (ia) of clause (a) of Section 40 of the Act, which contemplates that if the recipient has included the receipts paid by an assessee on which TDS was not deducted in its income, then no disallowance would be made. This proviso has been construed as applicable with retrospective effect. Ld. CIT(A) made reference to the order of ITAT, Agra Bench in the case of Rajeev Kumar Agarwal Vs. ACIT, reported in [2014] 34 ITR (Trib) 479 (Agra). Ld. CIT(A) has relegated the issue to the file of Assessing Officer for verification of this fact, i.e. whether the recipient-company has accounted these payments while computing the taxable income.

4. The Revenue is aggrieved with this direction of the CIT(A).

5. The learned Departmental Representative contended that the CIT(A) has no power to set aside any issue to the file of the Assessing Officer. On the other hand, learned Counsel for the assessee contended that the issue in dispute is squarely covered by the decision of Hon ϕ le Delhi High Court in the case of CIT vs. Ansal Land Mark Township (P) Ltd, reported in [2015] 377 ITR 635 (Delhi). He further contended that even if it is construed that the CIT(A) has set aside the issue to the file of the Assessing Officer and learned First Appellate Authority has no power to set aside an issue, then same directions can be given by the Tribunal on the cross-objection filed by the assessee.

6. I have duly considered the rival contentions and gone through the record carefully. I find that the Hon ϕ le Delhi High Court has taken into consideration the second proviso inserted by the Finance Act, 2012 and held this proviso is applicable with retrospective effect. Hon ϕ le Delhi High Court has made reference to the decision of the ITAT in the case of Rajeev Kumar Agarwal Vs. ACIT, reported in [2014] 34 ITR (Trib) 479 (Agra). Hon ϕ le Delhi High Court has observed that the reasoning given by the Agra Bench of the Tribunal as regards the rationale behind the insertion of the second proviso to Section 40(a)(ia) of the Act and its conclusion that the said proviso is declaratory and curative and has retrospective effect from 1st April 2005, merits acceptance. I deem it appropriate to take note of the observations made by the Hon ϕ le Delhi High Court in the case of Ansal Land Mark Township (P) Ltd (supra) which has

reproduced a discussion made by the ITAT, Agra Bench in paragraph No.9 of its order. The observations made by the Hon'ble Delhi High Court read as under:-

“12. Relevant to the case in hand, what is common to both the provisos to Section 40 (a) (ia) and Section 210 (1) of the Act is that the as long as the payee/resident (which in this case is ALIP) has filed its return of income disclosing the payment received by and in which the income earned by it is embedded and has also paid tax on such income, the Assessee would not be treated as a person in default. As far as the present case is concerned, it is not disputed by the Revenue that the payee has filed returns and offered the sum received to tax.

13. Turning to the decision of the Agra Bench of ITAT in Rajiv Kumar Agarwal v. ACIT (supra) , the Court finds that it has undertaken a thorough analysis of the second proviso to Section 40 (a)(ia) of the Act and also sought to explain the rationale behind its insertion. In particular, the Court would like to refer to para 9 of the said order which reads as under:

“On a conceptual note, primary justification for such a disallowance is that such a denial of deduction is to compensate for the loss of revenue by corresponding income not being taken into account in computation of taxable income in the hands of the recipients of the payments. Such a policy motivated deduction restrictions should, therefore, not come into play when an assessee is able to establish that there is no actual loss of revenue. This disallowance does deincevize not deducting tax at source, when such tax deductions are due, but, so far as the legal framework is concerned, this provision is not for the purpose of penalizing for the tax deduction at source lapses. There are separate penal provisions to that effect. Deincevizing a lapse and punishing a lapse are two different things and have distinctly different, and sometimes mutually exclusive, connotations. When we appreciate the object of scheme of section 40(a)(ia), as on the statute, and to examine whether or not, on a "fair, just and equitable" interpretation of law- as is the guidance from Hon'ble Delhi High Court on interpretation of this legal provision, in our humble understanding, it could not be an "intended consequence" to disallow the expenditure, due to non deduction of tax at source, even in a situation in which corresponding income is brought to tax in the hands of the recipient. The scheme of Section 40(a)(ia), as we see it, is aimed at ensuring that an expenditure should not be allowed as deduction in the hands of an assessee in a situation in which income embedded in such expenditure has remained untaxed due to tax withholding lapses by the

assessee. It is not, in our considered view, a penalty for tax withholding lapse but it is a sort of compensatory deduction restriction for an income going untaxed due to tax withholding lapse. The penalty for tax withholding lapse per se is separately provided for in Section 271 C, and, section 40(a)(ia) does not add to the same. The provisions of Section 40(a)(ia), as they existed prior to insertion of second proviso thereto, went much beyond the obvious intentions of the lawmakers and created undue hardships even in cases in which the assessee's tax withholding lapses did not result in any loss to the exchequer. Now that the legislature has been compassionate enough to cure these shortcomings of provision, and thus obviate the unintended hardships, such an amendment in law, in view of the well settled legal position to the effect that a curative amendment to avoid unintended consequences is to be treated as retrospective in nature even though it may not state so specifically, the insertion of second proviso must be given retrospective effect from the point of time when the related legal provision was introduced. In view of these discussions, as also for the detailed reasons set out earlier, we cannot subscribe to the view that it could have been an "intended consequence" to punish the assesseees for non deduction of tax at source by declining the deduction in respect of related payments, even when the corresponding income is duly brought to tax. That will be going much beyond the obvious intention of the section. Accordingly, we hold that the insertion of second proviso to Section 40(a)(ia) is declaratory and curative in nature and it has retrospective effect from 1st April, 2005, being the date from which sub clause (ia) of section 40(a) was inserted by the Finance (No. 2) Act, 2004."

14. The Court is of the view that the above reasoning of the Agra Bench of ITAT as regards the rationale behind the insertion of the second proviso to Section 40(a) (ia) of the Act and its conclusion that the said proviso is declaratory and curative and has retrospective effect from 1st April 2005, merits acceptance.

15. In that view of the matter, the Court is unable to find any legal infirmity in the impugned order of the ITAT in adopting the ratio of the decision of the Agra Bench, ITAT in (Rajiv Kumar Agarwal v. ACIT)."

7. In the light of above, if order of Id. CIT(A) is being examined, then it would reveal that learned First Appellate Authority has relegated the issue to the Assessing Officer for a very limited purpose, i.e. to verify the facts whether the recipient-company has accounted these receipts while computing its taxable income or not. If the recipient-company has accounted these receipts in its books of accounts and considered them

for working out its taxable income, then no disallowance be made in the case of the assessee in this assessment year. After going through this finding of the Id. CIT(A), I do not find any error in it and more so, if some procedural irregularities, if any crept in, then on the Cross-objection filed by the assessee, the same directions can be given by the Tribunal. Considering this aspect, I do not find any force in the appeal of the Revenue and therefore, the same is dismissed; whereas, the Cross-objection filed by the assessee is allowed for statistical purposes. Pronounced in the open court today on the 29th day of August, 2017.

Sd/-
Pramod Kumar
(Accountant Member)

Ahmedabad, the 29th day of August, 2017

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Copies to: (1) The appellant
(2) The respondent
(3) Commissioner
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad