

आय अधकरण, श्रीायपीठ, चेनई

PELLATE TRIBUNAL BENCH, CHENNAI

ी ए. मोहन अलंकामणी, लेखा सदय एवं ी धुवु आर.एल रेडी, यायक सदय के सम

Before Shri A. Mohan Alankamony, Accountant Member &
Shri Duvvuru RL Reddy, Judicial Member

आयकर अपील सं./I T.A. No. 2164/Mds/2014

नधारण वष/Assessment Year:2010-11

The Assistant Commissioner of
Income Tax, Company Circle,
121, 60 Feet Road, Tirupur-2.

M/s. Quantum Knits P. Ltd.,
Vs. 181, Kollupalayam Village, Arasur Post,
Coimbatore 641 407.
[PAN:AAACQ1959K]

(अपीलाथ /Appellant)

(यथ/Respondent)

अपीलाथ क ओर से / Appellant by : Shri A.V. Sreekanth, JCIT

यथ क ओर से/Respondent by : Shri A.S. Sriraman, Advocate

सुनवाई क तारख/ Date of hearing : 04.04.2017

घोषणा क तारख /Date of Pronouncement : 21.06.2017

आदेश /O R D E R

PER DUVVURU RL REDDY, JUDICIAL MEMBER:

This appeal filed by the Revenue is directed against the order of the Commissioner of Income Tax (Appeals) II, Coimbatore dated 29.05.2014 relevant to the assessment year 2010-11. The Revenue has raised the following grounds:

- “1. The order of the learned CIT(Appeals)-II, Coimbatore is against facts, law and circumstances of the case.
2. The CIT(A)-II, Coimbatore has erred in holding that since the recipient has admitted the sum received as income and paid taxes there on then the

assessee) is absolved from deducting tax at source of law and against the legislative intent.

3. *The CIT(A)-II, Coimbatore ought to have appreciated that the second proviso to Sec. 40(a)(ia) takes effect from 01.04.2013 only and it is not applicable for A.Y. 2010-11.*
4. *The CIT(A)-II, Coimbatore should have taken note of the fact that the assessee was liable to deduct tax at source in respect of the payments made as business promotion expenses and having failed to do so, the expenditure was liable to be disallowed u/s. 40(a)(ia). The decision in the case of M/s. Hindustan Coco Cola Beverages does not squarely apply to the facts and law of the case and can be distinguished on facts and law.*
5. *The CIT(A)-II, Coimbatore should have taken note of the fact that if the contention of the assessee that the taxes has already been paid by M/s. KPR Mills Ltd on the sum paid by the assessee is accepted, the provisions of TDS will be redundant which is not the intention of the legislature and law. The Board circular No. 275/201/95-IT dated 29.01.1997 quoted specifically pertains to the provisions of sec 201(1A) and has no bearing on the larger question whether tax is liable to be deducted or not.*
6. *For these and other grounds that may be adduced at the time of hearing, the order of the learned CIT(A)-II, Coimbatore may be cancelled and that of Assessing Officer restored.”*

2. Brief facts of the case are that the assessee is engaged in the business of manufacturing and export of garments and filed its return of income on 30.09.2010 returning an income of ₹.38,74,760/-. The case of the assessee was selected for scrutiny and notice under section 143(2) of the Income Tax Act, 1961 [Act+ in short] was issued to the assessee on 08.09.2011. The assessee has paid ₹.7,13,98,602/- as business promotional expenses to M/s. KPR Mill Ltd. which is the holding company of the assessee without deduction of tax at source. Before the Assessing Officer,

that as per the agreement dated 24.06.2009 between the assessee and M/s. PRK Mills Ltd., the business promotion expenses is not liable for TDS under section 194C, 194H, 194I or 194J or under any of the section under Chapter VII governing deduction of tax at source. It was further submitted that the amount received as business promotion expenses by M/s. KPR Mill Ltd. was reflected in their account and in the computation of income statement and there is no revenue loss to the department. Primarily, it was also argued that the business promotion expense does not come under the ambit of TDS. After considering the submissions of the assessee and analyzing the facts of the assessee, the Assessing Officer has observed that though the agreement filed by the assessee detailing the bundle of services like rent, royalty, commission has been complied with by M/s. KPR Mills Ltd., for which they have received payments in the name and style of business promotion expenses and held that non-deduction of TDS on this payment is hit directly by the provisions of section 40(a)(ia) of the Act and hence, he disallowed the same and brought to tax.

3. The assessee carried the matter in appeal before the Id. CIT(A) and the the assessee has submitted that the purpose of Memorandum of Agreement dated 24.06.2009 between the Holding company and the 100% subsidiary company is to share the revenue at the end of the financial year

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and predetermined portion i.e. percentage of revenue earned from garment exported to the customers list supplied by KPR Mill Limited (KPRML), goes to them and a percentage on turnover was retained by Quantum Knits (P) Ltd. (QKPL) for their work. In this case the two contracting parties act on Principal to Principal basis and one did not provide service to another and there was no sharing of losses as per MOA. And the transactions cannot be inferred beyond the specific terms of the agreement between the parties by the Assessing Officer. It was further submitted before the Id. CIT(A) that such type of payment was neither fee for professional service as prescribed under section 194J or payment to contractor under section 194C, or payment towards rent/lease under section 194I or technical fee/ royalty under section 194J nor it was covered as brokerage or commission under section 194H of the Act and therefore, no tax was required to be deducted from such payment. It was further submitted before the Id. CIT(A) that even if the provisions of section 40(a) (ia) of the Act are found applicable, the Assessing Officer ought to have appreciated that the Business promotion expenses paid of . 7,13,98,602/- by the assessee have been duly subjected to tax in the hands of payee and there is no loss of tax to revenue. The payee to whom the payment is made i.e., KPR Mill Limited has accounted this amount in his profit and loss account and assessed to tax. KPR Mill Limited has already accounted the amount of .7,13,98,602/- in its profit and loss account and paid the tax before due

ment of tax by KPR Mill Limited (the payee), had to be considered as deemed deduction and payment of tax on the day of furnishing of return of income by the payee.

4. After considering the submissions of the assessee, the Id. CIT(A) has observed as under:

“6.0 I have carefully considered the submissions of the appellant and the materials available on record. A perusal of the assessment order would indicate that the Assessing Officer has treated the amount paid by M/s. Quantum Knits P. Ltd. towards parent company M/s. K P R Mills as "bundle of services" such as rent, commission, royalty, contract etc. are all embedded in the agreement between the assessee and the K P R Mills and therefore liable for deduction of TDS. To this question the view of the Assessing Officer is correct as the assessee should have deducted TDS on the business promotion expenses paid to M/s. K P R Mills.

6.1 Further, during the course of assessment the assessee made an alternative plea that M/s. K P R Mill has accounted the entire payment of ₹.7,13,98,602/- in their books of account under the head miscellaneous receipts and they have paid the tax on the same. Therefore, the assessee requested that they may be given the benefit under the Supreme Court decision in the case of M/s. Hindustan Coco Cola Beverages as well as the subsequent amendment in the Finance Act 2012. It is being noted that these issues were raised before the Assessing Officer during the course of assessment.

6.2 On a perusal of the return of income filed by KPR Mills it is noticed that they have accounted this amount under miscellaneous receipts totaling ₹.7,20,24,324/- of which Rs. 7,13,98,602/- are the amount received from M/s. Quantum Knits. Therefore relying on the decision of Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverages (P) Ltd. Vs. CIT and subsequent decision of the ITAT Chennai in the case of M/s. Foxconn India Developers (P) Ltd. Vs. ITO TDS the assessee is entitled to relief. It is also to be noted that Finance Act 2012 has made an amendment to section 201 (1) to the effect that the deductee has discharged the tax liability attributable to such receipts and has filed the return of income the deductor need not be held to be an assessee in default despite failure to deduct tax at source

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present case it is observed that deductee has total income and has also filed the return of income. In effect the Department has not suffered any revenue loss and in the circumstances the amendment though procedural in nature, made effective from a subsequent date should also be taken to be applicable to the year under consideration. Therefore the appeal of the assessee is allowed.”

5. On being aggrieved, the Revenue is in appeal before the Tribunal and the Id. DR has mainly argued that the second proviso to section 40(a)(ia) of the Act takes effect from 01.04.2013 only and it is not applicable for the assessment year 2010-11 and therefore, the said proviso shall not come to the rescue of the assessee and pleaded that the order of the Id. CIT(A) should be reversed and that of the Assessing Officer is restored.

6. On the other hand, by relying on the decision of the Chennai Benches of the Tribunal in the case of Star Investments Pt. Ltd. v. ACIT in ITA Nos. 20 & 231/Mds/2015 dated 21.06.2016 and Ansal Landmark Township Pvt. Ltd. 279 CTR 384 (Del) the Id. Counsel for the assessee has strongly supported the orders of the Id. CIT(A) and prayed for confirming the order passed by the Id. CIT(A).

7. We have heard both sides, perused the materials available on record and gone through the orders of authorities below. In this case, we find that the assessee has paid .7,13,98,602/- as business promotional expenses to M/s. KPR Mill Ltd., which is the holding company of the assessee. Further, deductee M/s. KPR Mill Ltd. has included the payment in its total income and

come and they have paid the tax on the same, which is not in dispute. The only dispute before us is whether the second proviso to section 40(a)(ia) of the Act takes effect from 01.04.2013 is applicable to the assessee or not for that the Id. Counsel for the assessee has placed reliance and submitted that the issue is squarely covered in favour of the assessee by the decision in the case of Star Investments Pt. Ltd. v. ACIT (supra), wherein, the Coordinate Benches of the Tribunal has observed and held as under:

“6.2 We have heard both sides, perused the materials on record and gone through the orders of authorities below. In this case, the assessee has not deducted TDS on the interest of ₹.31.00 crores paid to M/s, United Breweries Ltd. However, since by virtue of the second proviso to section 40(a)(ia) of the Act, the related TDS is deemed to have been deducted and paid on 30.09.2010 being the date of filing of return of income by M/s. United Breweries Ltd. (the deductee), the assessee has claimed deduction by virtue of section 40(a)(ia) of the Act, since 30.09.2010 was also the due date for the assessee for filing the return of income under section 139(1) of the Act. It is an admitted fact that both the assessee and the deductee have filed their returns of income on the due date of filing of return in terms of section 139(1) of the Act. The only dispute raised by the Department is that the second proviso to section 40(a)(ia) of the Act is not applicable for the assessment year 2010-11 since the said second proviso is only operative from 01.04.2013 as per the amendment made by the Finance Act, 2012. The above ground has raised by the assessee before the Id. CIT(A) as an additional ground. Accordingly, the Id. CIT(A) asked comments of the Assessing Officer on the allowability of sum of ₹.31.00 crores as deduction under the first proviso to section 40(a)(ia) of the Act read with second proviso thereto. In the remand report, the Assessing Officer has objected that the second proviso is only operative from 01.04.2013 and would not cover for the assessment year 2010-11.

6.3 It is an admitted fact that the assessee has failed to deduct and remit TDS towards interest paid to M/s. United Breweries Ltd., a resident, for the assessment year 2010-11. In the next step, it has to be

is not deemed to be an assessee in default on 201(1) of the Act. During the course of appellate proceedings, the assessee has furnished all the evidence to the effect that it has complied with all the conditions as laid down in the first proviso to section 201(1) of the Act and after verification of the particulars, the ld. CIT(A) has observed that the assessee has satisfied all the conditions laid down in the first proviso to section 201(1) of the Act and there is no dispute on this account and the assessee has to be treated as assessee not deemed to be in default. The deductee i.e., M/s. United Breweries Ltd. have filed their return of income on 30.09.2010, it has to be deemed that the assessee remitted the TDS as on 30.09.2010.

6.4 With regard to retrospective applicability of second proviso to section 40(a)(ia) of the Act, though amended by Finance Act, 2012 with effect from 01.04.2013, the Agra Bench of the Tribunal in the case of *Rajeev Kumar Agarwal v. Addl. CIT 45 Taxmann.com 555 (Agra – Trib)* has held as under:

“9. 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 de-incentivize 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. De-incentivizing 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

ed as deduction in the hands of an assessee 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 assessees 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."

6.5 In view of legislative amendments made from time to time, which throw light on what was actually sought to be achieved by this legal provision, we are of the considered view that section 40(a)(ia) of the Act cannot be seen as intended to be a penal provision to punish the lapses of non deduction of tax at source from payments for expenditure-particularly when the recipients have taken into account income embedded in these payments, paid due taxes thereon and filed income tax returns in accordance with the law. As a corollary to this proposition, in our considered view, declining deduction in respect of expenditure relating to the payments of this nature cannot be treated as

” of section 40(a)(ia) of the Act. Moreover, Tribunal has not been reversed by any High Court, it can be safely interpret that the second proviso to section 40(a)(ia) of the Act shall effect retrospectively since the above ratio laid down by the Agra Bench of the Tribunal has been affirmed by the Delhi Benches of the Tribunal in the case of *Ansal Landmark Township Pvt. Ltd. v. Addl.CIT* in I.T.A. No. 2972/Del/2012 for the assessment year 2008-09 and in I.T.A. No. 877/Del/2013 for the assessment year 2009-10. Against the decision of the Delhi Benches of the Tribunal in the case of *Ansal Landmark Township Pvt. Ltd. v. Addl.CIT* (supra), the Department went in appeal before the Hon’ble Delhi High Court and vide its order dated 26.08.2015 by confirming the order of the Delhi Benches of the Tribunal, the Hon’ble Delhi High Court has held that the second proviso to section 40(a)(ia) is declaratory and curative in nature and has retrospective effect from 1st April, 2005. During the course of hearing, the ld. DR has relied on the decision in the case of *Prudential Logistics and Transports v. ITO* [2014] 364 ITR 689 (Ker.), wherein the Hon’ble Kerala High Court has taken a view that the application of second proviso to section 40(a)(ia) of the Act is only prospective. Since there exists two contradictory decisions, we are of the considered opinion that the Hon’ble Supreme Court in the case of *CIT v. Vegetable Products Ltd.* 88 ITR 192 has held that the decision favourable to the assessee have to be acted upon.

6.6 Thus, respectfully following the decision of the Agra Benches of the Tribunal in the case of *Rajeev Kumar Agarwal v. Addl. CIT* (supra), which was duly affirmed by the Delhi Benches of the Tribunal in the case of *Ansal Landmark Township Pvt. Ltd. v. Addl.CIT*(supra) and subsequently confirmed by the Hon’ble Delhi High Court, we find no infirmity in the order passed by the ld. CIT(A) on this issue and the ground raised by the Revenue is dismissed.”

8. The ld. DR could not controvert the above findings of the Coordinate Benches of the Tribunal in the case of *Star Investments Pvt. Ltd.*, wherein the decision of Agra Benches of the Tribunal in the case of *Rajeev Kumar Agarwal v. Addl. CIT* (supra) has been followed, which was affirmed by the Delhi Benches of the Tribunal in the case of *Ansal Landmark Township Pvt. Ltd. v. Addl. CIT* (supra), which was subsequently confirmed by the Hon’ble

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of CIT v. Ansal Landmark Township Pvt. Ltd.

377 ITR 635 (Del) and the same was not reverted by the High Court. Thus, respectfully following the decision of the Coordinate Benches of the Tribunal in the case of Star Investments Pvt. Ltd. (supra) and Ansal Landmark Township Pvt. Ltd. 377 ITR 635 (Del), the ground raised by the Revenue is dismissed.

9. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced on the 21st June, 2017 at Chennai.

Sd/-
(A. MOHAN ALANKAMONY)
ACCOUNTANT MEMBER

Sd/-
(DUVVURU RL REDDY)
JUDICIAL MEMBER

Chennai, Dated, the 21.06.2017

Vm/-

आदेश का प्रतिलिपि अर्पण/Copy to: 1. अपीलार्थी/Appellant, 2. प्रत्यर्थी/Respondent, 3. आयकर आयुक्त (अपील)/CIT(A), 4. आयकर आयुक्त/CIT, 5. वित्तीय प्रशासक/DR & 6. गार्डफाइल/GF.