आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री भागचन्द, लेखा सदस्य एवं श्री कुल भारत, न्यायिक सदस्य के समक्ष
BEFORE: SHRI BHAGCHAND, AM AND SHRI KUL BHARAT, JM

आयकर अपील सं./ITA No. 698/JP/2016
निर्धारण वर्ष/Assessment Year : 2009-10.

Smt. Sneh Gupta, E-46, Road No. 1B, VKI Area, Jaipur.	बनाम Vs.	The Income Tax Officer, Ward 4(2), Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN No. ACIPG 4373 J		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri P.C. Parwal (C.A)
राजस्व की ओर से/ Revenue by: Shri P.P. Meena (JCIT)

सुनवाई की तारीख/ Date of Hearing : 23.10.2017.
घोषणा की तारीख/ Date of Pronouncement : 25/10/2017.

आदेश/ ORDER

PER SHRI KUL BHARAT, JM.

This appeal by the assessee is directed against the order of ld. CIT (A)-2, Jaipur dated 25.04.2016 pertaining to assessment year 2009-10. The assessee has raised the following grounds of appeal :

1. The ld. Commissioner of Income Tax (appeals) has erred on facts and in law in confirming the addition of Rs. 2,06,319/- by applying g.p. rate of 7.25% on the alleged short stock of Rs. 25,43,815/-.

2. The ld. Commissioner of Income Tax (appeals) has erred on facts and in law in confirming the trading addition of Rs. 11,74,743/- by applying g.p. rate of 7.25% on the declared turnover as against g.p. rate of 3.63% declared by the assessee.

3. The ld. Commissioner of Income Tax (appeals) has erred on facts and in law in confirming the disallowance of Rs. 3,48,609/- out of interest expenses u/s 40(a)(ia).

3.1. The ld. Commissioner of Income Tax (appeals) has erred on facts and in law in confirming the above disallowance even when the assessee has paid the entire amount and no amount remains payable at the end of the year.

3.2. The ld. Commissioner of Income Tax (appeals) has erred on facts and in law in confirming the above disallowance even when the recipient has included the income in its return and has paid the tax thereon.

3.3. The ld. Commissioner of Income Tax (appeals) has erred on facts and in law in confirming the entire disallowance of interest u/s 40(a)(ia) ignoring that in view of amendment made in this section w.e.f. 01.04.2015 which is to remove unintended hardship, only 30% of such amount can be disallowed by giving the effect of this amendment retrospectively.

4. The assessee craves to amend, alter and modify any of the grounds of appeal.

5. The appropriate cost be awarded to the assessee.

2. Briefly stated the facts of the case are that the assessee carries on the business in the name of M/s. Carpenter Crafts and M/s. Continental Interiors. A survey under section 133A of the Income Tax Act, 1961 (hereinafter referred to as the Act) was conducted on 12.09.2008 on the assessee. During the course of survey, stock difference has been found of Rs. 28,45,786/- in respect of M/s. Continental Interiors. The AO found that the g.p rate of both these concerns have fallen, therefore, the AO asked the assessee to explain the reason for lower g.p. rate. The assessee explained that the stock taken by the survey party was on tag price and the assessee sold the goods after giving discount on tag price therefore the stock was valued on higher prices. Moreover, the GP in this year is 3.63% but the GP taken by the survey party is at 7.25%. The explanation of the assessee was not

found acceptable by the AO, thus he made the addition of Rs. 2,06,319/- on account of shortage of stock. The AO also made addition of Rs. 11,74,319/- on account of low gross profit, addition of Rs. 3,27,831/- on account of interest expenses without deducting TDS and Rs. 13,073/- as income from other sources. Aggrieved, the assessee preferred an appeal before ld. CIT (A), who after considering the submissions of the assessee, dismissed the appeal of the assessee. Now the assessee is further in appeal before this Tribunal.

3. Ground No. 1 relates to confirming the addition of Rs. 2,06,319/-. The ld. Counsel for the assessee reiterated the submissions as made in the written brief. He submitted that value of stock of M/s. Continental Interiors was valued at Rs. 92,68,600/- by taking the tag price. The cost of such stock at the time of survey was determined as under :-

Stock at Tag Price	Rs. 92,68,600/-
Less: Discount @ 10%	Rs. 9,26,860/-
	Rs. 83,41,740/-
Less: G.P.@ 7.25%	Rs. 6,04,776/-
Stock at Cost Price	Rs. 77,36,964/-

Against the above, the book stock was arrived at Rs. 1,05,82,750/- and accordingly the short stock was determined at Rs. 28,45,786/-. The ld. Counsel for the submitted that in the assessment proceedings, the assessee explained that the GP rate for the year is 3.63% but in calculation of the short stock, GP rate considering that of A.Y. 07-08 is applied whereas in A.Y. 08-09 it is 6.63% and the same is 3.63% for the year under consideration. Accordingly, it was requested that the short stock should be worked out by applying GP rate of 3.63% and profit on such short stock be worked out by applying this rate only. However, this was not accepted and

addition of Rs. 2,06,319/- was made. The ld. Counsel submitted that for working out the short stock, the GP rate of current year should be considered. The GP rate for the current year is 3.63%. On this basis, the working of short stock and profit thereon would work out as under :-

Stock at Tag Price	Rs. 92,68,600/-
Less: Discount @ 10%	Rs. 9,26,860/-
	Rs. 83,41,740/-
Less: G.P.@ 3.63%	Rs. 3,02,805/-
Stock at Cost Price	**Rs. 80,38,935/-**
Less: Book Stock	Rs.105,74,686/-
Short stock	**Rs. 25,35,751/-**
Profit on short stock @ 3.63%	**Rs. 92,048/-**

The ld. Counsel for the assessee, therefore, submitted that the addition on account of profit on sale of short stock be restricted to Rs. 92,048/-.

3.1. On the contrary, the ld. D/R supported the orders of the authorities below.

3.2. We have heard rival contentions, perused the material on record and gone through the orders of the authorities below. We find that the ld. CIT (A) confirmed the action of the AO by observing as under :-

> *" 2.3. I have perused the facts of the case, the assessment order and the submissions of the appellant. The assessee is engaged in manufacturing and trading of furniture in the name and style of M/s. Carpenter Crafts and M/s. Continental Interiors. During the survey proceedings under section 133A of the I.T. Act, 1961 at the premises of the assessee, stock of Rs. 92,68,600/- had been found which was inventorised at the tag price. In the assessment order, to arrive at the*

stock at cost price, first a discount of 10% was taken and then gross profit of 7.25% had been applied by the assessing Officer. The issue in this ground relates to this application of gross profit rate of 7.25%. as per the assessment order, the assessee's husband Shri Sudhir Gupta had during the course of proceedings under section 133A of the I.T. Act, 1961, in reply to Q. No. 39 & 40, offered a profit of Rs. 2,06,319/- by applying a gross profit rate of 7.25% on Rs. 28,45,786/-, treating the same as sales outside the books of accounts. The submission of the Authorized Representative in the present proceedings are, that since during the year, the gross profit rate is 3.63%, as per the return filed, the same should be applied. The Assessing Officer's reasoning for applying the gross profit rate of 7.25% was that it was offered by the assessee itself during the proceedings under section 133A of the I.T. Act, 1961, after going through the stock and other details. Further, it is seen that the gross profit % in the two preceding years are 6.63% & 7.14% respectively. Thus, the gross profit % returned in the current year is 3.63%, which is much less than returned in the previous year. No reason has been forwarded for the same. In view of the above discussion, the gross profit % applied by the Assessing Officer to arrive at the stock at cost price, is upheld. The ground of appeal is dismissed."

After going through the findings of the ld. CIT (A), we do not find any reason to interfere in the order of the ld. CIT (A), the same is hereby affirmed. The ground of the assessee is rejected.

4. Ground No. 2 relates to confirming the trading addition of Rs. 11,74,743/-. The ld. Counsel for the submitted that the assessee is maintaining day to day books of accounts which are subject to audit. These books are duly supported by bills and vouchers wherein the lower authorities have not found any discrepancies. The only

discrepancy noted is the decline in GP rate as compared to the last year and non maintenance of stock register. It is to be noted that the decline in GP rate is due to the increase in p urchase cost without corresponding increase in the selling price. This is also evident from the fact that till the date of survey i.e. upto 13.09.2008, the sales of the assessee was Rs. 2,29,111/- whereas the opening stock as on 01.04.2008 was Rs. 91,92,380/-. It is for this reason that assessee has to reduce the profit margin to boost sale. Thereafter, the sales for the period 14.09.2008 to 31.03.2009 could be achieved at Rs. 3,22,62,390/-. This would not have been possible without reducing the profit margin. Hence, the GP rate declared should be accepted and the addition made by the AO be deleted particularly considering the fact that on the short stock already an addition has been made by the AO. Otherwise also, only because there is a decline in the GP rate or stock register is not maintained, the same should not necessarily lead to the trading addition. The ld. Counsel placed reliance on the following decisions :-

Pr. CIT vs. Hues India Ltd., 2015 TIOL 2275 (Raj.)
Malani Rajjivan Jagannath vs. ACIT, 316 ITR 120 (Raj.)
Ashoke Refractgories P. Ltd. vs. CIT 279 ITR 457 (Cal.)
CIT vs. Smt. Poonam Rani, 41 DTR 194 (Del.)
CIT vs. Om Overseas 315 ITR 185 (P&H)
CIT vs. Gotan Lisme Khaniz Udyog, 256 ITR 243 (Raj.)

4.1. On the contrary, the ld. D/R supported the orders of the authorities below.

4.2. We have heard rival contentions, perused the material on record and gone through the orders of the authorities below. While confirming the trading addition, the ld. CIT (A) in para 3.3 of his order observed as under :-

" 3.3. I have perused the facts of the case, the assessment order and the submissions of the appellant. The Assessing Officer during the assessment proceedings, found that, the assessee does not maintain stock register or other quantitative details of goods and in the absence of same the books of accounts were rejected under section 145(3) of the I.T. Act, 1961 and an addition of Rs. 11,74,743/- was made by applying a gross profit rate of 7.25%. In the present proceedings the appellant submitted that proper books of accounts have been maintained and no discrepancies were found in these. However, it was admitted that there is decline in gross profit rate and there is non maintenance of stock register. The only reason given for the decline in gross profit is increase in purchase cost without corresponding increase in selling price. This plea of the appellant cannot be accepted. The disallowance made by the Assessing Officer is upheld. The ground of appeal is dismissed."

In view of the above finding of ld. CIT (A), we find no infirmity in the order of ld. CIT (A). Moreover, the ld. Counsel for the assessee has not brought any contrary material in supports of his case. The ground of the assessee is rejected.

5. Ground No. 3 to 3.3 relates to confirming the addition on account of disallowance out of interest expenses u/s 40(a)(ia) of the Act.

5.1. The ld. Counsel for the assessee reiterated the submissions as made in the written brief. The written submissions of the assessee are as under :-

" 1. It may be pointed out that second proviso to section 40(a)(ia) inserted by FA, 2012 w.e.f. 01.04.2013 has provided that where an assessee fails to deduct tax on the sum paid to the resident but such resident payee has furnished the return, taken into account such sum for computing income and

has paid the tax due on the income declared by him then it will be deemed that assessee has deducted and paid the tax on such sum on the date of furnishing of return by the resident payee. All the finance companies to which assessee have paid interests are assessed to tax. Therefore, the presumption is that these companies have included the interest paid by the assessee to them in their income and paid tax thereon. The **Delhi High Court in case of CIT Vs. Trans Bharat Aviation Pvt. Ltd. 320 ITR 671** has held that since deductee is a Government undertaking, the taxes may be presumed to have been paid lastly by the due date of filing of the return of income and, therefore, the liability of the assessee to pay interest on the amount which was to be deducted as TDS ends with the due date of filing of the return by the deductee. Further, **Hon'ble ITAT, Jaipur Bench in case of ACIT Vs. Girdhari Lal Bargoti in ITA No. 757/JP/12 order dt. 10.04.2015** has held that the recipients are NBFC, therefore, not possible to not be assessed to tax. These payments were related for AY 2009-10 and return for AY 2009-10 already might have been filed by these NBFC by including these interest receipts as their income. Therefore, considering the above amendment which is introduced to remove unintended hardship, the department may be directed to verify this fact and where finance companies has paid tax on such interest, no disallowance u/s 40(a)(ia) be made in the hands of the assessee. Reliance in this connection is placed in case of **Sanjay Kumar Agarwal Vs. ITO 48CCH 0034 (Kol.) (Trib.) decision dated 02.09.2016 (PB 41-42)** wherein it was held that once it was held that assessee was entitled to benefit of 2nd proviso to sec. 40(a)(ia), CIT(A) ought to have directed AO to verify whether recipients included receipts paid by assessee in their respective returns of income and also paid taxes on same. To extent recipients from assessee had so included sum in their returns of income and filed same, no disallowance u/s 40(a)(ia) ought to have been sustained by CIT(A). CIT(A) ought to have also directed AO that in case recipient parties were not cooperating in providing details, AO should call for information u/s 133(6) or 131, for verification of same. In this regard assessee furnished all details of assessment particulars of recipients of payment from assessee. AO therefore should not have any difficulty in making required verification. To extent recipients from assessee

had so included sum in their returns of income and filed same, no disallowance u/s 40(a)(ia) should be made by AO. In case recipient parties were not cooperating in providing details, AO should be directed to call for information u/s 133(6) or 131, for verification of same. Further, M/s Tambi Motors has included the interest paid by the assessee in its income and paid tax thereon **(PB 54-56)**. It is a settled law that second proviso to section 40(a)(ia) inserted w.e.f. 01.04.2013 has retrospective effect as held by the **Hon'ble Delhi High Court in case of CIT vs. Ansal Land Mark Township Pvt. Ltd. (2015) 377 ITR 635** as the amendment was made to remove the undue hardship. The Ld. CIT(A) has relied on the Hon'ble Kerela High Court decision in case of Thomas George Muthoot Vs. CIT 63 taxman.com 99 in holding that the second proviso to section 40(a)(ia) of the IT Act, 1961 introduced w.e.f. 01.04.2013 is prospective. In this connection, it is to be noted that recently the **Bombay Tribunal in case of R.K.P. Company Vs. ITO 180 TTJ 0237 decision dt. 24.06.2016 (PB 38-40)** after considering the above decision of Kerela High Court vide Para 7 of its order held as under:-

As for Hon'ble Kerala High Court's decision in the case of Thomas George Muthoot (supra), undoubtedly, outside the jurisdiction of Hon'ble Kerala High Court and outside the jurisdiction of Hon'ble Delhi High Court- which has decided the issue in favour of the assessee, there are conflicting decisions on the issue of restrospectivity of second proviso to Section 40(a)(ia). It is thus evident that views of these two High Courts are in direct conflict with each other. Clearly, therefore, there is no meeting ground between these two judgments. The difficulty arises as to which of the Hon'ble non jurisdictional High Court is to be followed by us in the present situation. It will be wholly inappropriate for us to choose views of one of the High Courts based on our perceptions about reasonableness of the respective viewpoints, as such an exercise will de facto amount to sitting in judgment over the views of the High Courts something diametrically opposed to the very basic principles of hierarchical judicial system. We have to, with our highest respect of both the Hon'ble High Courts, adopt an objective criterion for deciding as to which of the Hon'ble High Court should be followed by us. We find guidance from the judgment of Hon'ble Supreme Court in the matter of CIT vs. Vegetable Products Ltd. [(1972) 88 ITR 192 (SC)]. Hon'ble Supreme Court has laid down a principle that "if two reasonable constructions of a taxing provisions are possible, that construction which favours the assessee must be adopted". This principle has been consistently followed by the various authorities as also by the Hon'ble Supreme Court itself. In another Supreme Court judgment, Petron Engg. Construction (P) Ltd. & Anr. vs. CBDT & Ors. (1988) 75 CTR (SC) 20 : (1989) 175 ITR 523 (SC), it has been reiterated that

the above principle of law is well established and there is no doubt about that. Hon'ble Supreme Court had, however, some occasions to deviate from this general principle of interpretation of taxing statute which can be construed as exceptions to this general rule. It has been held that the rule of resolving ambiguities in favour of taxpayer does not apply to deductions, exemptions and exceptions which are allowable only when plainly authorised. This exception, laid down in Littman vs. Barron 1952(2) AIR 393 and followed by apex Court in Mangalore Chemicals & Fertilizers Ltd. vs. Dy. Commr. of CT (1992) Suppl. (1) SCC 21 and Novopan India Ltd. vs. CCE & C 1994 (73) ELT 769 (SC), has been summed up in the words of Lord Lohen, "in case of ambiguity, a taxing statute should be construed in favour of a tax-payer does not apply to a provision giving tax-payer relief in certain cases from a section clearly imposing liability". This exception, in the present case, has no application. The rule of resolving ambiguity in favour of the assessee does not also apply where the interpretation in favour of assessee will have to treat the provisions unconstitutional, as held in the matter of State of M.P. vs. Dadabhoy's New Chirmiry Ponri Hill Colliery Co. Ltd. AIR 1972 (SC) 614. Therefore, what follows is that in the peculiar circumstances of the case and looking to the nature of the provisions with which we are presently concerned, the view expressed by the Hon'ble Delhi High Court in the case of Ansal Landmark (supra),which is in favour of assessee, is required to be followed by us. Revenue does not, therefore, derive any advantage from Hon'ble Kerala High Court's decision in the case of Thomas George Muthoot (supra)".

2. It is further pointed out that an amendment has been made by FA, 2014 w.e.f. 01.04.2015 in section 40(a)(ia) whereby it is provided that 30% of any sum payable to a resident shall be disallowed if tax is not deducted at source under Ch. XVIIB as against the 100% presently made. The purpose of this amendment was explained in the memorandum as under:-

"the disallowance of whole of the amount of expenditure results into undue hardship and therefore In order to reduce the hardship, it is proposed that in case of non-deduction or non-payment of TDS on payments made to residents as specified in section 40(a)(ia) of the Act, the disallowance shall be restricted to 30% of the amount of expenditure claimed."

The Finance Minister while introducing the amendment in para 207 of the Budget Speech has stated as under:-

***"207.** Currently, where an assessee fails to deduct and pay tax on specified payments to residents, 100 percent of such payments are not allowed as deduction while computing his income. This has caused undue hardship to taxpayers, particularly where the rate of tax is only 1 to 10%. Hence, I propose to provide that instead of 100 percent, only 30% of such payments will be disallowed."*

From the above, it can be noted that the amendment made by FA (No.2) Act, 2014 w.e.f. 01.04.2015 is to remove unintended and undue hardship and therefore this amendment should be give retrospective effect as per the various decisions stated above. It is also submitted that the **Supreme Court in case of CIT Vs. Vatika Township Pvt. Ltd. 109 DTR 33** has held that legislations which modify accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect. However, if legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally and where to confer such benefit appears to have been the legislators object, then the presumption would be that such legislation, giving it a purposive construction, wouldS warrant it to be given a retrospective effect. Therefore even in a case it is held that the disallowance u/s 40(a)(ia) is warranted, same should be restricted to only 30% of the amount of interest paid."

5.2. On the contrary, the ld. D/R relied on the order of the Assessing Officer.

5.3. We have heard rival contentions, perused the material on record and gone through the orders of the authorities below. After considering the totality of facts and the decision of Hon'ble Delhi High Court rendered in the case of CIT vs. Ansal Landmark Township (P) Ltd. 377 ITR 635 (Delhi), we restore the issue to the file of the Assessing Officer for verification with regard to the Certificate as furnished by the assessee. The AO after verifying the same from the respective parties i.e. NBFCs would delete the disallowance in case the Certificate is found in order. The appeal of the assessee is allowed for statistical purposes.

6. Ground No. 4 is general in nature, needs no adjudication.

7. In respect of Ground No. 5, the assessee has not advanced any argument, therefore, the same is dismissed.

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

Order is pronounced in the open court on 25.10.2017.

Sd/-	Sd/-
(भागचन्द)	(कुल भारत)
(BHAGCHAND)	(KUL BHARAT)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

Jaipur

Dated:- 25/10/2017.

Das/

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

1. The Appellant- Smt. Sneh Gupta, Jaipur.
2. The Respondent – The ITO Ward 4(2), Jaipur.
3. The CIT(A).
4. The CIT,
5. The DR, ITAT, Jaipur
6. Guard File (ITA No. 698/JP/2016)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar