IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH 'B', CHANDIGARH

BEFORE MS.DIVA SINGH, JUDICIAL MEMBER
AND MS.ANNAPURNA GUPTA, ACCOUNTANT MEMBER

ITA No.28/Chd/2017
(Assessment Year : 2012-13)

Sh.Shiv Pal Chaudhary, H.No.3121, Sector 28D, Chandigarh. PAN: AAKPC6883B (Appellant)	Vs.	The D.C.I.T., Circle Chandigarh. (Respondent)

Appellant by : Shri Vineet Krishan, Adv.
Respondent by : Shri Manjit Singh, Sr.DR

Date of hearing : 24.01.2018
Date of Pronouncement : 20.04.2018

ORDER

PER ANNAPURNA GUPTA, A.M.:

This appeal has been preferred by the assessee against the order of Ld. Commissioner of Income Tax(Appeals)-2, Chandigarh (hereinafter referred to as ('Ld.CIT(Appeals)' dated 10.11.2016 relating to assessment year 2012-13.

2. Ground Nos.1 and 6 raised by the assessee are general in nature and needs no adjudication.

3. Ground No.2 raised by the assessee reads as under:

> *"2. That in the facts and circumstances of the case, the Ld. Commissioner of Income Tax (Appeals), Chandigarh gravelly erred in upholding the addition of Rs. 1,90,626/- made by-the Id. Assessing Officer by invoking the provisions of Section 43B of the Income Tax Act, regarding TDS payable."*

4. The issue in the present ground pertains to addition made of Rs.1,90,626/- on account of TDS payable disallowed u/s 43B of the Income Tax Act, 1961 (in short 'the Act'). The assessee had shown the impugned sum as

TDS payable in the Balance Sheet as on 31.3.2012 and the same was not deposited till the date of filing of return. The disallowance of the same was, therefore, made by the Assessing Officer u/s 43B of the Act, which was upheld by the Ld.CIT(Appeals).

5. Before us, the Ld. counsel for assessee contended that the TDS was not an expense and hence not covered u/s 43B of the Act.

6. The Ld. DR, on the other hand, relied upon the order of the Ld.CIT(Appeals).

7. We have heard the contentions of both the parties and find merit in the contention of the Ld. counsel for assessee. The disallowance made u/s 43B of the Act in the present case pertains to income tax deducted at source (hereinafter referred to as TDS) on account of failure to deposit the same with the statutory authorities by the stipulated date. TDS is not an expense debited to the profit and loss account. It is merely a deduction made from specified payments made by the assessee, which payments may be debited to the profit and loss account, but the tax deducted therefrom is not separately claimed as such as a deduction from the income. No question therefore arises of making any disallowance of the same u/s 43B of the Act which deals with the disallowance of expenses, primarily statutory dues, claimed by the assessee on account of non payment of the same to the authorities concerned by the prescribed dates. In view of the above, the disallowance made on account of

TDS paid amounting to Rs.1,90,626/- is deleted. The ground of appeal No.2 raised by the assessee is, therefore, deleted.

8. Grounds of appeal Nos.3 and 4 relate to the same issue of disallowance made of expenses on account of non deduction of tax at source on the same as per the provision of section 40(a)(ia) of the Act. The said grounds read as under:

> *"3. That in the facts and circumstances of the case, the Id. Commissioner of Income Tax (Appeals) gravelly erred in upholding the addition of Rs.54045/- made by the Ld. Assessing Officer in respect of payment made to Sh.Manit Goyal, CA by invoking the provisions of section 40(a)(ia) of the I.T. Act, 1961.*
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> *4. That in the facts and circumstances of the case, the Id. Commissioner of Income Tax (Appeals) gravelly erred in sustaining the addition of Rs.347743/- made by the Ld. Assessing Officer by invoking the provisions of section 40(a)(ia) of the I.T. Act, 1961 on the ground that interest was paid to NBFC viz M/s L&T Finance Limited & M/s Tata Finance Ltd. without deduction of tax."*

9. Briefly stated, the assessee had failed to deduct tax at source on the following payments:

1)	Fee for professional services paid to Shri Manit Goyal	= Rs.54,045/-
2)	Interest paid to M/s L & T Finance Ltd.	= Rs.3,47,743/-
3)	Interest paid to M/s Tata Finance	= Rs. 21,313/-

10. The Assessing Officer found that the TDS was deductible on all the above payments and the assessee having failed to do so, disallowance of the said expenses was made under the provisions of section 40(a)(ia) of the Act. The Ld.CIT(Appeals) upheld the same.

11. Before us the Ld. counsel for assessee contended that the payees of the aforesaid expenses had included the said amounts in their returns of income and had paid taxes thereon and, therefore, the assessee could not be held to be an assessee in default as per the amended provisions of section 201 of the Act and no disallowance of the said expenses, therefore, could be made as per the amended provisions of section 40(a)(ia) of the Act which though brought on the Statute vide Finance Act 2012 w.e.f. 01.04.2013, have been held to be retrospective in nature. The Ld. counsel for assessee pointed out that the proviso to section 40(a)(ia) of the Act making no disallowance of expenses on account of non deduction of taxes at source in case payees had paid taxes on the same, had been held to be retrospective in nature by the Chandigarh Bench of the I.T.A.T. in the case of the assessee itself in ITA No.224/Chd/2017 dated 26.5.2017. Copy of the order was placed before us The Ld. counsel for assessee contended that the evidences in this regard could be produced by the assessee and since the same needed to be verified also it was pleaded that the matter be restored back to the Assessing Officer where necessary evidences would be produced by the assessee which could thereafter be examined and verified by the Assessing Officer.

12. The Ld. DR, on the other hand, relied upon the order of the Ld.CIT(Appeals).

13. We have heard the rival contentions. We find merit in the contention of the Ld. counsel for assessee. We have gone through the order of the ITAT Chandigarh Bench in the case of the assessee itself pertaining to assessment year 2012-13 in ITA No.224/Chd/2017 dated 26.5.2017 wherein it was held that proviso to section 40(a)(ia) of the Act which stated that where taxes have been paid by the payees and the assessee is thus deemed not to be an assessee in default as per 1st proviso to section 201 of the Act, the assessee in such circumstances shall be deemed to have deducted taxes at sources and no disallowance u/s 40(a)(ia) of the Act is to be made, inserted w.e.f.1.4.2013, to be retrospective in nature. In view of the same, in the interest of justice we consider it fit to restore the issue back to the Assessing Officer so as to afford an opportunity to the assessee to file necessary evidences to substantiate its claim that due taxes on the impugned payments made by the assessee have been paid by the recipient and that the assessee is no longer to be deemed to be an assessee in default as per 1st proviso to section 201 of the Act. The Assessing Officer after affording the assessee due opportunity of hearing and after duly verifying the evidences placed before it may thereafter adjudicate the issue in accordance with law. Ground of appeal Nos.3 and 4 raised by the assessee are allowed for statistical purposes.

14. Ground of appeal No.5 raised by the assessee reads as under:

> *"5. That in the facts and circumstances of the case, the Id. Commissioner of Income Tax (Appeals) gravelly erred in sustaining the disallowance made by the Id. Assessing Officer of Rs.17,98,420/- out of total claim of assessee of bank interest of Rs.23,70,440/- and ignoring the fact that appellant had his own capital and interest free funds/loans."*

15. Briefly stated, the facts on the issue are that the assessee obtained loan of Rs.2,71,72,761/- and the same included bank overdraft, secured and unsecured loans on which interest of Rs.23,70,440/- was found to have been paid during the relevant year. The Assessing Officer also noted that the assessee had given loans and advances of Rs.1,69,32,044/-, interest free, and some of the loans and advances were to family members. The Assessing Officer disallowed proportionate interest on the loans and advances so made, calculated at Rs. 17,98,420/-, holding that interest bearing funds had been advanced for non business purpose, and made addition of the same to the income of the assessee.

16. The Ld.CIT(Appeals) upheld the disallowance, following the ratio laid down by the Hon'ble Jurisdictional High Court in the case of CIT Vs. Abhishek Industries Ltd., 286 ITR 1 that where mixed funds are available with the assessee and interest free advances have been made out of said funds, disallowance of interest relatable to such interest free advances is warranted.

17. Before us, the Ld. counsel for assessee contended that the aforesaid ratio laid by the Hon'ble Jurisdictional High Court has since then been reversed by the Hon'ble Jurisdictional High Court in the case of Shri Gurudas Garg

Vs. CIT Bhatinda in ITA No.413 of 2014 dated 16.7.2015. The Ld. counsel for assessee contended that the Hon'ble High Court in the said case has laid down the proposition that where sufficient interest free funds are available for making interest free advances the presumption is that the said advances had been made out of the interest free funds and, therefore, no disallowance u/s 36(1)(iii) of the Act is warranted. Our attention was drawn to the relevant findings of the Hon'ble High Court in this regard at para 11 & 12 of the order, on the Question of law framed before it that "*Whether the Tribunal rightly upheld the addition of an amount of Rs.7,76,043/- made on account of the appellant not charging interest from his debtors*" as under:

> *"11. The appellant had admittedly advanced an aggregate amount of Rs.97,79,200/- between the period 01.04.2008 and 04.12.2008. The amounts were repaid in the year 2009. The appellant contended that He that at his disposal substantial amounts of interest free funds. This fact has been accepted by the Assessing Officer. The Tribunal has not found otherwise. The assessment order sets out the details of the amounts advanced by the appellant as well as the interest free funds received by the appellant. The Tribunal however, upheld the addition made by the Assessing Officer observing that "nothing has been brought on record how the interest free funds which have been claimed to have been available for advancing these loans to various persons were actually available for advancing to these persons". The Tribunal further observed that it had not been pointed out as to how interest free funds available were advanced to the said persons.*
>
> *12. It is a little difficult to understand these observations. It has not been denied that interest free funds were available. Nor has it been denied that interest free advances were made by the appellant. In fact, the latter has been accepted by the Assessing Officer. The contention that the appellant has not established that it was the interest free funds that were actually advanced as interest free advances is without substance. Money has no identity. So long it is established that the interest free advances are made by an assessee who has adequate free reserves, it is sufficient to establish that the amounts advanced interest free cannot be added to the assessee's income. It was not contended that the interest free*

advances exceeded the interest free funds available with the appellant. Nor was it established that a particular advance received was in turn advanced by the assessee interest free."

18. Our attention was also drawn to the decision of the ITAT Chandigarh Bench wherein the aforesaid proposition of the Hon'ble Jurisdictional High Court was followed:

1) Kisan Fats Ltd. Vs. DCIT, 162 ITD 404 (Chd)

2) M/s Stylam Industries Ltd. Vs. DCIT in ITA No.922/Chd/2017 dated 28.11.2017

19. The Ld. counsel for assessee thereafter pointed out that the assessee had submitted before the Ld.CIT(Appeals) that it had enough interest free funds in the form of interest free unsecured loans amounting to Rs.70,50,092/- taken from family members and capital with the assessee firm on which no interest was being paid amounting to Rs.7,73,22,270/- for making the interest free advances of Rs.1,69,32,044/-. The Ld. counsel for assessee contended that in view of the aforesaid ratio laid down by the Hon'ble Jurisdictional High Court and followed by the ITAT Chandigarh Bench, no disallowance u/s 36(1)(iii) of the Act was warranted.

20. The Ld. DR, on the other hand relied upon the order of the CIT(Appeals).

21. We have heard the contentions of both the parties. We are in agreement with the contention of the Ld. counsel for assessee that vis-à-vis disallowance made u/s 36(1)(iii) of the Act,the proposition of law as laid down by the Hon'ble Jurisdictional High Court is that where sufficient interest free funds are available for making interest fee advances,

no disallowance u/s 36(1)(iii) of the Act is warranted. The Hon'ble Jurisdictional High Court has laid down the said proposition in the case of Shri Gurudas Garg (supra) as pointed out by the Ld. counsel for assessee and also in a number of other decisions as under:

1) CIT Vs. Kapsons Associates, 381 ITR 204
2) Bright Enterprises Pvt. Ltd. vs CIT, Jalandhar (2016) 381 ITR 107

22. In the present case the assessee having duly demonstrated the facts of availability of the sufficient funds in the form of interest free capital and unsecured loans taken amounting to approx.Rs.8 crores as against the interest free advance made of Rs. 1.69 crores, which facts have not been disputed by the Revenue, no disallowance u/s 36(1)(iii) of the Act is warranted. The disallowance made, therefore, is directed to be deleted. The ground of appeal No.5 raised by the assessee is allowed.

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

Order pronounced in the Open Court.

Sd/-	Sd/-
(DIVA SINGH)	**(ANNAPURNA GUPTA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated : 20th April, 2018

Rati

Copy to:

1. The Appellant
2. The Respondent
3. The CIT(A)
4. The CIT
5. The DR

Assistant Registrar,
ITAT, Chandigarh