

**IN THE INCOME TAX APPELLATE TRIBUNAL  
RAIPUR BENCH, RAIPUR**

**BEFORE SHRI N.K. BILLAIYA (AM) AND SHRI RAM LAL NEGI (JM)**

**ITA No. 136/RPR/2015  
Assessment Year: 2011-12**

M/s Agrawal Infrabuild Pvt. Ltd., V.R. Plaza, Link Road, Bilaspur (C.G.)  PAN: AAFCS6636C	<b>Vs.</b>	The Dy. Commissioner of Income Tax-Circle 1(1), Mahima Complex, Vyapar Vihar, Bilaspur (C.G.)
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by : Shri G.S. Agrawal (CA)  
Revenue by : Shri Sanjay Kumar (DR)

Date of Hearing: 09/03/2018  
Date of Pronouncement: 04/06/2018

**ORDER**

**PER RAM LAL NEGI, JM**

This appeal has been filed by the assessee against the order dated 09.09.2015 passed by the Commissioner of Income Tax (Appeals), Bilaspur, for the assessment year 2011-12, whereby the Ld. CIT (A) has partly allowed the appeal filed by the assessee against assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short 'the Act').

2. Brief facts of the case are that the assessee a civil contractor filed its return of income for the assessment year under consideration declaring the total income of Rs. 3,21,10,960/-. Since, the case was selected for scrutiny notice u/s 143 (2) and 142 (1) were issued along with the questionnaire. In response to the said notices, the authorized representative of the assessee appeared and filed written submissions

and other details. It was noticed that the assessee had claimed Rs. 10,32,909/- under the head finance charges. It was further noticed that the assessee had paid the said amount to non-banking finance companies. The AO holding that the assessee has not deducted the tax under the provisions of section 194A of the Act at source while making such payments, made disallowance of the said amount u/s 40(a)(ia) of the Act and added the same to the income of the assessee. The assessee challenged the assessment order before the Ld. CIT (A). The Ld. CIT (A) after hearing the assessee rejected the contention of the assessee and confirmed the addition made by the AO.

3. Aggrieved by the impugned order passed by the Ld. CIT (A), the assessee has preferred this appeal before the Tribunal on the following grounds:-

1. *“That under the facts and the law, the learned Commissioner of Income Tax (Appeals) erred in confirming the disallowance of Rs. 10,32,910/- made by the learned Assessing Officer u/s 40(a)(ia) for non-deduction of tax at source on financial charges paid to NBFCs, viz. Tata Capital Limited, Tata Motors Finance Limited and magma Leasing Limited, rejecting all the explanations made and evidences filed. The same be deleted.*
- 1.1 *That the Ld. CIT (Appeals) further erred in rejecting the additional evidences filed under Rule 46A being Certificate from two Chartered Accountants in case of M/s Tata Capital Limited similar to Certificate referred to in second proviso to Sec. 40(a)(ia) and first proviso to Sec. 201(1).*

*Prayed the same be admitted and be considered and the disallowance be deleted.*

- 1.2 *That the Ld. CIT (Appeals) further erred in rejecting various orders of the Hon'ble Tribunal and judgments of High court supporting that, as the amount was not outstanding as payable at the year end, no disallowance was called-for.*

*Prayed that no amount of finance charges is outstanding and therefore, disallowance is uncalled-for and be deleted.*

- 1.3 *That the Ld. CIT (Appeals) further erred in rejecting the explanation and the case laws that second proviso to Sec. 40(a)(ia) and first proviso to Sec. 201 (1) be considered as having retrospective effect.*

*Prayed that disallowance of Rs. 10,32,910/- is unjustified as falls under the above proviso, and be deleted.*

2. *That the Ld. CIT (A) further erred in confirming the disallowance of Rs. 3,00,000/- out of Rs. 3,50,000/- made by the Ld. AO on estimate basis under the head "Purchase of Metal Boulder". Prayed to delete the balance disallowance of Rs. 3,00,000/-."*

4. At the outset, the Ld. counsel for the assessee submitted that the Ld. CIT (A) has erred in confirming the disallowance made by the AO u/s 40(a)(ia) of the Act for non deduction of tax at source on financial charges paid to the non banking finance companies, rejecting the additional evidence filed under rule 46 being certificates from two Chartered Accountants, Audited Balance Sheets, P & L Account etc. as required under the second proviso to section 40(a) (ia) and first proviso to section 201 of the Act. The Ld. counsel for the assessee relying on the decision of the Hon'ble Delhi High Court in the case of *Commissioner of Income Tax-1 vs. Ansel Landmark Township (P) Ltd. 377 ITR 635 (Del)* submitted that second proviso to section 40(a)(ia) is declaratory and curative and it

has retrospective effect from 01.04.2005. Since the payees have furnished their return of income and has taken into account the sum for computing income in the return of income and has paid the tax due to the income declared by them in such return of income, the disallowances is liable to be deleted.

5. On the other hand, the Ld. Departmental Representative (DR) relied on the findings of the Ld. CIT (A).

6. We have heard the rival submissions and also perused the material on record in the light of the contentions of the parties. The first ground of the appeal pertains to confirmation of disallowance made u/s 40(a)(ia) of the Act. The Hon'ble Delhi High Court in *Commissioner of Income Tax Vs. Ansel Landmark Township* (supra) has decided the identical issue involved in this case in favour of the assessee holding as under:-

*"11. The first proviso to section 201(1) of the Act has been inserted to benefit the Assessee. It also states that where a person fails to deduct tax at source on the sum paid to a resident or on this credited to the account of a resident such person shall not be deemed to be an assessee in default in respect of such tax if such a resident has furnished his return of income under section 139 of the Act. No doubt, there is a mandatory requirement under section 201 to deduct tax at source under certain contingencies, but the intention of legislature is not to trade the Assessee as a person in default subject to the fulfilment of the conditions as stipulated in the first proviso to section 201(1). The insertion of the second proviso to section 40(a)(ia) also requires to be viewed in the same manner. This again is a proviso intended to benefit the*

*Assessee. The fact of the legal fiction created thereby is to treat the Assessee as a person not in default of deducting tax at source under certain contingencies.*

*12. Relevant to the case in hand, what is common to both the proviso to section 40(a)(ia) and section 201(1) of the Act is that 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 return and offered the sum received to tax.”*

7. In the light of the aforesaid judgment, the additional evidence filed by the assessee is relevant to adjudicate the issue involved in this case. Hence, the Ld. CIT (A) has wrongly rejected the application filed by the assessee under rule 46A of the Income Tax Rules, 1962.

8. Under Rule 46A the additional evidence can be produced during the course of appellate proceedings, under the following circumstances:-

- (a) Where the [Assessing Officer] has refused to admit evidence which ought to have been admitting, or*
- (b) Where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the [Assessing Officer] or*
- (c) Where the appellant was prevented by sufficient cause from producing before the [Assessing Officer] any evidence which is relevant to any ground of appeal or*
- (d) Where the [Assessing Officer] has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.*

9. As contended by the Ld. counsel for the assessee, the assessee could not collect the documents in question during the course of assessment proceedings the same could not be produced before the AO. In our considered view, these documents are essential for deciding the only issue involved in this case. Hence, we admit the same as additional evidence. Since, the issue is required to be decided afresh in the light of the judgment of the Hon'ble Delhi High Court aforesaid, we set aside the findings of the Ld. CIT (A) and send the appeal back to the AO to decide the issue afresh in the light of the judgment of the Hon'ble Delhi High Court after examining/verifying the additional documents produced by the assessee and giving opportunity of being heard to the assessee.

10. The Ld. counsel for the assessee submitted that the assessee does not want to press ground No 2 of the appeal. In view of the submission made by the Ld. counsel, we dismiss ground No 2 of the appeal as not pressed.

In the result, appeal filed by the assessee for assessment year 2011-2012 is partly allowed for statistical purposes.

Order pronounced in the open court on 4<sup>th</sup> June, 2018.

*Sd/-*

(N.K. BILLAIYA)

ACCOUNTANT MEMBER

Raipur, दिनांक Dated: 04/06/2018

*Sd/-*

(RAM LAL NEGI)

JUDICIAL MEMBER

Alindra, PS

**आदेश प्रतिलिपि अग्रेषित/ Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय  
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**आदेशानुसार/ BY ORDER,**

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