IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F", MUMBAI

BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND SHRI N.K. PRADHAN, HON'BLE ACCOUNTANT MEMBER

ITA NO.4160/MUM/2016 (A.Y: 2012-13)

Asst. CIT – 9(2)(2) R.No. 665A, 6th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400 020	*v.*	M/s. City Gold Investments P. Ltd., Akruti Trade Centre, Road No. 7, Marol, MIDC, Andheri (E), Mumbai – 400 093 **PAN NO: AACCC 7365 H**
(Appellant)		**(Respondent)**

Assessee by	**:**	**Shri Vijay Mehta**
Department by	**:**	**Ms S. Padmaja**
Date of Hearing	**:**	**17.04.2018**
Date of Pronouncement	**:**	**27.06.2018**

O R D E R

PER C.N. PRASAD (JM)

1. This appeal is filed by the Revenue against the order of the Learned Commissioner of Income Tax (Appeals)–16 Mumbai dated 31.03.2016 for the Assessment Year 2012-13.

2. The Revenue has raised the following grounds in its appeal: -

i) *"Whether on the facts and in the circumstances of the case the learned CIT(A) was justified in deleting the addition of ₹.37,00,00,006/- made u/s 40(a)(ia) of the ignoring the facts that the assessee had not deposited the TDS within the due date."*

ii) "Whether on the facts and in the circumstances of the case the learned CIT(A) was justified in holding that the second proviso to section 40(a)(ia) was retrospective and hence applicable for the current year i.e. A.Y. 2012-13."

iii) "Whether on the facts and in the circumstances of the case the learned CIT(A) was justified in deleting the addition made by the AO by relying on the decision of the Apex Court in the case of Hindustan Coca Cola Beverages Pvt. Ltd. [(2007) 293 ITR 226], ignoring the fact that the case is factually distinct from the current case."

iv) "Whether on the facts and in the circumstances of the case the learned CIT(A) was justified in ignoring the decision of Jurisdictional ITAT in the case of Assistant/Deputy Commissioner of Income-tax v. DICGC Ltd wherein the Hon'ble ITAT has held that once tax has not been deducted, disallowance under section 40(a)(ia) can be made even if such tax has been paid by deductee and the ITAT had further clearly distinguished the decision in the case of Hindustan Coca Cola Beverages Ltd."

3. Briefly stated the facts are that, the Assessing Officer while completing the assessment disallowed expenditure of ₹.37,00,00,006/- u/s. 40(a)(ia) of the Act for non-deduction/non remittance of TDS into Government account within due date for filing of return. Before the Ld.CIT(A) the assessee contended that out of expenses of ₹.37,00,00,006/- assessee had already disallowed ₹.9,21,85,291/- in the return of income filed u/s. 139 of the Act and therefore to this extant it is a double disallowance. It is also submitted that TDS of ₹.24,58,430/- corresponding to interest payment of ₹.2,45,84,297/- was remitted into Government account before due date for filing of return u/s. 139 of the Act. It was also contended that the other entities have also revised their returns and not claimed credit for TDS that was receivable but not received from the assessee company. It was also contended that second proviso was inserted by Finance Act, w.e.f 01.04.2013 amending section

40(a)(ia) is retrospective and since the payee has paid the taxes on the amount paid by the assessee before due date for filing of return by them there shall not be any disallowance u/s. 40(a)(ia) of the Act in the hands of the assessee. The detailed written submissions filed by the assessee before the Ld.CIT(A) were forwarded to Assessing Officer for comments and for verification. After independent verification made by the inspector with reference to the returns filed by the payees before the Assessing Officer, the Ld.CIT(A) noticed that interest income received by the payees had been incorporated in their return of income on which taxes due had been already paid by all the payees except M/s. ABP Realty Advisors P. Ltd. In the circumstances Ld.CIT(A) following the decision of the Hon'ble Bombay High Court in the case of CIT *v.* Ansal Landmark Township P. Ltd., [377 ITR 635] and various other decisions of the Tribunals and also the decision of the Apex Court in the case of Hindustan Coca Cola Beverages P. Ltd. *v.* CIT [293 ITR 226] deleted the disallowance of expenditure except the payment made/credited to the account of M/s. ABP Realty Advisors P. Ltd for the reason that payees have already considered the amount paid by the assessee in their return of income filed before due date for filing return u/s. 139 of the Act and paid the taxes.

4. Before us, the Ld. DR strongly supported the orders of the Assessing Officer. Ld. DR also placed reliance on the decision of the

Mumbai Bench of the Tribunal in the case of ACIT *v.* DICGC Ltd., [14 ITR(T) 194] and submitted that the Coordinate Bench considered the decision of the Apex Court in the case of Hindustan Coca Cola Beverages P. Ltd. *v.* CIT (supra) and held that the decision has no application even if the payee accounted for the income in its hands and paid the taxes before due date for filing of return of income and disallowance needs to be made u/s. 40(a)(ia) of the Act.

5. On the other hand, Ld. Counsel for the assessee submitted that the Hon'ble Delhi High Court and various Tribunals have held that the second proviso to section 40(a)(ia) of the Act is retrospective in nature and since the payee's have accounted for the income and paid taxes before due date for filing of return of income no disallowance is required to be made in the hands of the assessee u/s. 40(a)(ia) of the Act. He placed reliance on the decision of the Hon'ble Delhi High Court in the case of CIT *v.* Ansal Landmark Township P. Ltd (supra).

6. Ld. Counsel for the assessee further referring to the decision of the Pr.CIT *v.* Yamazaki Mazak India P. Ltd., in ITA.No.1535/PN/2016 dated 28.10.2016 submitted that the Hon'ble Tribunal considered various decisions applying the ratio laid down by the Supreme Court in the case of CIT *v.* Vegetable Products Ltd., [88 ITR 192] it has taken the view in

favour of the assessee in view of conflicting decisions. Ld. Counsel for the assessee also placed reliance on the on the following decisions of the Mumbai Bench in support of his contentions:

a. *ITO v. D.J. Enterprises in ITA.No. 973/Mum/2015 dated 19.04.2017.*
b. *DCIT v. Vardhavinayak Township Development P. Ltd., in ITA.No.7011/Mum/2016 dated 01.09.2017.*
c. *E-Commerce Magnum Solution Ltd., v. DCIT in ITA.No. 3179/Mum/2016 dated 07.07.2016.*

7. We have heard the rival submissions, perused the orders of the authorities below and the case laws relied on. The Assessing Officer disallowed interest expenditure for want of deduction of TDS. The Ld.CIT(A) referring to various decisions deleted the disallowance for the reason that the payees have accounted for the interest income and filed the returns and paid the taxes as per the second proviso to section 40(a)(ia) of the Act. Second Proviso of section 40(a) was inserted in Finance (No.2) Act w.e.f. 01.04.2013, so the question arises as to whether the said amendment is prospective or retrospective and this aspect of the matter had already been considered by us while passing the order in the case of E-Commerce Magnum Solution Ltd., v. DCIT (supra) to which one of us is a party. By following the decision of the Hon'ble Delhi High Court in the case of CIT *v.* Ansal Landmark Township P. Ltd, (supra) we have held that second proviso to section 40(a)(ia) of the Act is applicable retrospectively from 01.04.2005 being the date from which second clause

(ia) of section 40(a) was inserted by Finance (No.2) Act, 2004. The relevant portion of the decision is as under: -

> *"5. We have heard the rival submissions and perused the material before us. We find that the assessee had, while finding its original return of income, had made a disallowance of Rs. 1.03 Crores, that it had not deducted tax at source as per the provisions of chapter XVII of the Act, that later on it withdrew the disallowance made under section 40(a)(ia) in the revised return, that it relied upon the case of Hindustan Coca-Cola Beverages Private Ltd.(293 ITR 226), that the AO and the FAA held that facts of Hindustan Coca-Cola Beverages Private Ltd. were distinguishable, that the provisions of section 40(a)(ia) were amended by the Finance act, 2012, that second proviso had been brought in statute book with effect from 01/04/2013, that the act of the assessee of deleting the addition under section 40(a)(ia) in the revised return for the assessment year 2012-13 was not in consonance with the judgment of the Hon'ble of Apex Court or the Act, that the assessee had claimed the reversal of TDS amount of Rs. 10,39,94,746/- in the balance sheet under the head inventories, that the assessee claimed that proviso to the section was applicable retrospectively. In our opinion, the core issue to be decided is as to whether the proviso is applicable from 1.4.2005 or from 01/04/2013. We find that the Hon'ble Delhi High Court has, in the case of Ansal Landmark Township Private Ltd. (377 ITR 635) dealt the issue at length and has held as under:*
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> > *"Section 40(a)(ia) of the Income-tax Act, 1961, 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 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 insertion of the second proviso to section 40(a)(ia) is declaratory and curative in nature and it has retrospective effect from April 1, 2005, being the date from which sub-clause (ia) of section 40(a) was inserted by the Finance (No. 2) Act, 2004. 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 the sum 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 resident has furnished his return of income under section 139. What is common to both provisos to sections 40(a)(ia) and 201(1) of the Act is that as long as the payee or resident 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."*
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> *Considering the facts of the case and the above judgment, we hold that the proviso to the section is applicable from 01.04.2005, that the deductee had paid the taxes on the income that was subject of TDS provisions, that no action could be taken*

against the assessee making the payment to HL. The basic aim of chapter XVII is to ensure that no portion of income remains untaxed. To ensure it, TDS provisions were introduced-the person making payment was made responsible to deduct tax and pay it with the government account. But, the proviso to section 40(a)(ia)made it clear that if the deductee pays the taxes on the entire income liable for taxation then no action would be taken against the deductor. The proviso is quite logical. It ensures that whole of the taxable income is taxed. Once the specific purpose is served there is no justification to indulge in unnecessary litigation. It is not the case of the AO or the FAA that the deductee had not paid the taxes on the taxable income or that it was not paid within the prescribed time limit. Therefore, reversing the order of the FAA we decide the effective ground of appeal in favour of the assessee."

8. The Raipur Bench of the Tribunal in the case of R.K.P Company *v.* ITO in ITA.No. 106/RPR/20016 dated 24.06.2016 also considered conflicting views of High Courts on the issue and following the decision of the Hon'ble Supreme Court in the case of CIT *v.* Vegetable Products Ltd., (supra) took a decision which is in favour of the assessee observing as under:

"6. When, however, we asked the learned Departmental Representative as to why we should also not remit the matter to the file of the Assessing Officer, with the same directions, he, alongwith his senior colleague Shri Darhan Singh, who happens to be the CIT(A) authoring the impugned order and who was on duty as CIT(DR) before us, had three points to make- first, that there are decisions in support of the stand of the Assessing Officer's stand, by way of Hon'ble Kerala High Court's decision in the case of Thomas George Muthoot Vs CIT [(2015) 63 taxmann.com 99 (Kerala)]; second, that even if insertion of second proviso to Section 40(a)(ia) can be construed as retrospective in effect, the corresponding rule in the Income Tax Rules 1962 is not, and has not been held to be, retrospective, and the second proviso to Section 40(a)(ia) cannot, therefore, be give retrospective effect; and, third, that there is no decision on this issue by Hon'ble jurisdictional High Court and, as such, the stand of the Assessing Officer cannot be faulted.

7. 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 retrospectivity 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).

8. The second issue is with respect to the second proviso to Section 40(a)(ia) being held to be retrospective, without corresponding enabling provision in the rules being held to be retrospective. That is a hyper technical argument and too pedantic an approach. The second proviso to Section 40(a)(ia) was held to be retrospective in in the context of finding solution to the problem to the taxpayer, and the matter was set aside to the file of the Assessing Officer with certain directions about factual verifications on the recipient having included the same in the receipts based on which taxable income is computed, and the income having been offered to tax. It is this action of the coordinate bench that was upheld by the Tribunal and the course of action so adopted by the coordinate bench approved by Their Lordships. It is impermissible to pick up one of the aspects of the decision of the judicial authority and read the same in isolation with other aspects. The decision is not on the retrospectivity of the proviso alone, its also on deletion of disallowance in the event of the recipient having taken into account these receipts

in the computation of income. The judge made law is as binding on the authorities below as is the legislated statue. The hyper technical stand of the Departmental Representatives, therefore, does not merit our approval.

9. As regards lack of guidance from Hon'ble jurisdictional High Court, that cannot be reason enough to disregard the decisions from non-jurisdictional High Courts. Hon'ble Courts above, being a higher tier of the judicial hierarchy, bind the lower forums not only in the jurisdiction of respective High Courts, but unless, there is anything contrary thereto by the jurisdictional High Courts, other jurisdictions as well. There cannot be any dispute on the fundamental proposition that in the hierarchical judicial system that we have, better wisdom of the Court below has to yield to higher wisdom of the Court above, and therefore we have to humbly bow before the views expressed by Hon'ble Courts above. Such a High Court being a non-jurisdictional High Court does not alter the position as laid down by Hon'ble Bombay High Court in the matter of CIT vs. Godavari Devi Saraf ([1978) 113 ITR 589 (Bom)] and as analysed by a coordinate bench of this Tribunal in the case of ACIT Vs Aurangabad Holiday Resorts Pvt Ltd [(2009) 118 ITD 1 (Pune)]."

9. Therefore, respectfully following the said decision of the Hon'ble Delhi High Court and the Coordinate Bench in the case of E-Commerce Magnum Solution Ltd., v. DCIT. (supra), we hold that the second proviso to section 40(a)(ia) is retrospective and applicable from 01.04.2005.

10. The decision relied by the Ld. DR in the case of ACIT *v.* DICGC Ltd., (supra) was passed on 03.02.2012 which is prior to insertion of second proviso to section 40(a)(ia) of the Act, hence it has no relevance to the facts of the case.

11. In the case on hand as we have already observed above, the payees have considered the amounts as part of their income and filed returns u/s. 139(1) of the Act and paid taxes except M/s. ABP Realty Advisors P. Ltd and therefore the second proviso squarely applies to the

facts of the case and hence there is no infirmity in the order passed by the Ld.CIT(A) in deleting the disallowance to that extant.

12. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on the 27th June, 2018.

Sd/-	Sd/-
(N.K. PRADHAN)	**(C.N. PRASAD)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai / Dated 27/06/2018
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file. //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mum