

**IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH , CHANDIGARH**

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

ITA No.208/Chd/2018
(Assessment Year : 2011-12)

M/s Prestige International,
267, Industrial Area,
Phase-1, Panchkula.

Vs.

The Addl.CIT,
Panchkula Range,
Panchkula.

PAN: AAIFP3677L
(Appellant)

(Respondent)

Appellant by : Shri Parikshit Aggarwal, CA
Respondent by : Smt.Sukhwinder Sharma,
Addl.CIT

Date of hearing : 08.05.2018
Date of Pronouncement : 11.07.2018

ORDER

PER ANNAPURNA GUPTA, A.M. :

This appeal has been preferred by the assessee against the order of learned Commissioner of Income Tax (Appeals), Panchkula (hereinafter referred to as CIT(Appeals)) dated 4.12.2017 relating to assessment year 2011-12.

2. At the outset it was pointed out that this was the second round before the ITAT and the sole issue related to disallowance made u/s 40(a)(ia) of the Income Tax Act, 1961 (in short 'the Act') of Rs.4,50,000/-, being professional fees paid to one Shri K.R Bajpai on account of tax deducted at source on it not being deposited before the due date prescribed for filing return of income. It was pointed out that in the first round of appeal before the CIT(Appeals), the assessee's appeal had been allowed accepting the alternate contention of the assessee that since TDS had

been deposited late in the succeeding year, the same is allowable in the succeeding year i.e. assessment year 2012-13. The CIT(Appeals) at the same time did not adjudicate the contention of the assessee that the recipient had disclosed the professional charges payment in his income for the year under consideration and paid taxes on the same and therefore in the light of the decision of the Hon'ble Delhi High Court in the case of Ansal Land Mark Township (P) Ltd., 377 ITR 635, the proviso to section 40(a)(ia) would be applicable with retrospective effect, calling for no disallowance u/s 40(a)(ia) of the Act. The assessee therefore carried the matter in appeal before the I.T.A.T., who set aside the order of the CIT(Appeals) with the direction to decide the issue in the light of the aforestated contention of the assessee, in accordance with law after giving reasonable opportunity of hearing to the assessee.

3. During second round of appellate proceedings, the assessee filed written submissions, after considering which the Ld.CIT(Appeals) held that the assessee was not entitled to the benefit of the second proviso to section 40(a)(ia), since it had failed to fulfill the basic conditions required under it. Relevant findings of the Ld.CIT(Appeals) at paras 6 and 6.2 of her order are as under:

“6. I have gone through the facts of the case documentary evidences filed and written submission filed by the appellant. It is noted that second proviso to Section 40(a)(ia) was inserted by Finance Act, 2012 with effect from 15th April, 2013. The effect of the said proviso is to introduce a legal fiction **where an assessee fails to deduct tax** in accordance with provisions of

Chapter- XVII -B. Accordingly, when such assessee is deemed not to be an assessee in default in terms of the first proviso to Sub Section (1) to Section 201 of the Act, then, "it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso." The first proviso to Section 201 was also introduced with effect from 15th July, 2012. Even if the appellant's plea of retrospective effect to the amendment and insertion of second proviso to Section 40(a)(ia) to be of declaratory and curative nature is accepted in view of the decision in CIT Vs. Ansal Land Mark Township (P) Ltd. 377 ITR 635 (supra), the benefit of second proviso to Section 40(a)(ia) can be granted only when the appellant can be treated as a person-not-in-default subject to fulfillment of conditions stipulated in the first proviso to Section 201(1) based on the facts of its case.

6.1 From a perusal of the assessment order, copy of return of the resident payee, Form 26AS of resident payee & Form 16 and certificate of Accountant filed by the appellant the following facts emerge:

(a) The appellant has deducted tax on the professional charges of Rs.4, 50,000/- credited/paid to resident payee, Sh.K.R. Bajpai, but did not deposit the tax deducted by it before the due date. The appellant has deposited the TDS on 27.03.2012 and filed the return for the relevant year on the same date i.e. 27.03.2012, which was filed late, beyond the due date cified in Section 139(1) which was 31.07.2011 in its case. Thus the appellant's case is not of non-deduction or even short deduction of TDS which is a primary condition as per provisions of first proviso to Section 201(1) and of second proviso to Section 40(a)(ia).

Further regarding the claim that resident payee Sh.K.R.Bajpai has disclosed these professional charges as his income for the year in question and paid the due taxes within time allowed u/s 139, it is noted that Sh.K.R. Bajpai has also filed his return of income beyond the due date specified u/ sl39(l) of the Act. The return has been filed on 27.03.2012 while the due date was 31.07.2011. Form 26AS in respect of Sh.K.R. Bajpai shows 31.03.2011 as transaction date and 29.03.2013 as the date of booking of amount of Rs.45,000/- as TDS by appellant M/s Prestige International. The enclosed certificate from the accountant certifying that resident payee has fulfilled conditions mentioned in first proviso to subsection (1) of Section 201 as Annexure 'A' to Form 26 AS is reproduced as under:

"(i) M/s Prestige International has paid to or credited following sum to the account of Krishan Ram Bajpai without deduction of whole or any part of the tax in accordance with the provisions of Chapter-XVII-B

Nature of payment	Date of credit	Section under which tax has deductible	Amount credited	Amount of tax deductible	Details of amount deducted, if any

					Amount deducted	Date of deduction
Professional	31.03.11	194J	450000	45000	45000	31.03.11

(ii) The payee, who is a resident, has furnished his return of income for the assessment year 2011-12 relevant to the payment referred to in (i) above. The details of return of income filed by the payee are as under:

Date of filing return	Mode of filing i.e. whether e-filed or paper return	Acknowledgement number of return filed	If paper return- designation and address of the Assessing officer	Amount of total taxable income as per return filed	Tax due on the income declared in the return	Details of tax paid
27.03.12	E-filed	36477382027031 ?	-	6,08,860	57,445	TDS Rs. 68681

(iii) The payee has taken into account the sum referred to in (i) for computing his taxable income in return of income filed by him the details of which are as under:

Receipt on which tax has not been deducted	Head of income under which the receipt is accounted for	Gross receipt under the head of income under which the receipt is accounted for	Amount of taxable income under the head of income under which the receipt is accounted for
4,50,000	Income from Business & Profession	6,50,000	6,50,000

- (iv) It has been ensured that the information furnished is true and correct in all respect and no relevant information has been concealed or withheld
- (v) Neither, I, nor any of my partners, is a director, partner or an employee of the above mentioned entities or its associated concerns."

As can be seen from the above reproduced certificate and from the return income of Sh.K.R. Bajpai, the tax due on income declared in the return has not been paid by the resident payee (in the form of advance tax or self assessment tax) but the payee has claimed adjustment of total TDS of Rs.68.681 - which includes TDS of Rs.45,000/- which was not

deposited by the deductor by the due date but deposited only on 27.03.2012 and on the same date the resident payee as well as the deductor appellant have both filed their return of income for the relevant year i.e. returns were filed beyond the due date specified u/s 139(1).

6.2. Therefore, in the facts of the instant case the proviso to Section 201(1) is not applicable since the appellant deductor does not meet the condition of 'having failed to deduct the whole or any part of tax' failed to deduct the whole or any part of tax' since it has deducted the required tax, although deposited it in the subsequent financial year on 27.3.2012. Further, the resident payee also does not meet the condition of having paid the tax due' on the income which is computed by taking into account the sum paid since he has only claimed adjustment of tax deducted at source by the appellant which has been deposited late on 27.03.2012 and booked on 29. 03.2013 as per Form 26AS of resident payee. Thus the tax due has not been deposited in the Government treasury within stipulated time either from deductor or the deductee. This is not a case where department has already recovered tax from deductee/payee who has paid tax on the amount received from deductor and the department is separately recovering tax from the deductor on the same income by treating the deductor to be assessee in default for non deduction of tax. Therefore, in view of above discussion as conditions stipulated in the first proviso to Section 201(1) are not fulfilled by Appellant/Principal officer of the appellant as well as by the resident payee consequently the appellant is treated as an assessee in default.

Therefore, the benefit of second proviso to Section 40(a)(ia), cannot be granted to the appellant in the instant case even after allowing the plea of retrospective nature of the amendment to Section 201(1) and Section 40(a)(ia). The action of the AO in making addition of Rs.4,50,000/- by disallowing the professional charges of Rs.4,50,000/- paid to Sh. K.R.Bajpai by invoking the provisions of Section 40(a)(ia) r.w.s. 194J of the Act is, therefore, upheld.”

4. Aggrieved by the same the assessee has come in appeal before us raising the following ground:

- “1. That on the facts, circumstances and legal position of the case, the Worthy CIT(A) in Appeal No. 67/PKL/16-17 dated 04.12.2017 has erred in passing that order in contravention of the provisions of Section 250(6) of the Income Tax Act, 1961.*
- 2. That on the facts, circumstances and legal position of the case, the Worthy CIT(A) has erred in confirming the addition of Rs.4,50,000/-*

originally made u/s 40(a)(ia) by the Ld. AO even when the appellant was entitled to benefit of proviso to said section and the Hon'ble ITAT in the 1st round had sent the matter back to Worthy CIT(A) with specific directions.

3. That the appellant craves leave for any addition, deletion or amendment in the grounds of appeal on or before the disposal of the same.”

5. During the course of hearing before us, the Ld. counsel for assessee relied upon the submissions made before the Ld.CIT(Appeals), while the Ld. DR relied upon the order of the Ld.CIT(Appeals).

6. We have heard the contentions of both the parties. We have also gone through the order of the CIT(Appeals) and we find that the issue in the present case of disallowance made u/s 40(a)(ia) of the Act, was restored by the ITAT for the limited purpose of examining the eligibility of the assessee to claim the benefit of the second proviso to section 40(a)(ia) .

7. On going through the order of the CIT(Appeals), we find no infirmity in the same. The Ld.CIT(Appeals) after taking note of the conditions required to be fulfilled for the purpose of claiming benefit of the second proviso to section 40(a)(ia), being no taxes deducted by the assessee on the payment and taxes on the same being paid by the payee in his return filed u/s 139 of the Act, found from the facts before him that the none of the conditions were fulfilled in the present case. Ld.CIT(Appeals) found that the assessee had deducted tax at source and the payee had not paid taxes on the same but had claimed so, on account of the

TDS deposited by the assessee later on in the succeeding year by filing his return of income late, after TDS was deposited by the assessee. None of the above findings of the CIT(Appeals) have been controverted by the Ld.Counsel for the assessee. We therefore see no reason to interfere in the order of the CIT(Appeals) holding that the assessee is not entitled to benefit of the second proviso to section 40(a)(ia) of the Act and thus upholding the disallowance of professional charges amounting to Rs.4,50,000/-.

8. In the result, the appeal of the assessee is dismissed.

Order pronounced in the Open Court.

Sd/-
(DIVA SINGH)
JUDICIAL MEMBER

Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER

Dated : 11th July, 2018

Rati

Copy to:

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

Assistant Registrar,
ITAT, Chandigarh