IN THE INCOME TAX A PPELLATE TRIBUNAL
HYDERABAD BENCH 'B', HYDERABAD

BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No. 1227/Hyd/2016 and CO No. 74/Hyd/2016
Assessment Year: 2012-13

Income-tax Officer, Ward – 3(2), Hyderabad.	vs.	R.K. Infra & Engg. (India) P. Ltd., Hyderabad. PAN – AADCR 9570Q
Appellant		Respondent/Cross Objector

Assessee by: Shri Nilanjan Dey
Revenue by: Shri Pawan Kumar Chakrapani

Date of hearing: 19/08/2019
Date of pronouncement: 05/09/2019

O R D E R

PER SHRI S. RIFAUR RAHMAN, A.M.

This is an appeal of the assessee for the AY 2012-13 against the order of CIT(A) – 3, Hyderabad, dated, 17/06/2016. The assessee also filed CO against the said order of the CIT(A).

2. Brief facts of the case are, assessee company, in the contracts business of engineering, laying of roads and civil works, filed its return of income for the AY 2012-13 on 28/09/2012 declaring a total loss of Rs. 5,83,710/-. In scrutiny assessment, the AO made various disallowances including the disallowance of hire charges for non deduction of TDS of Rs. 1,67,65,947/-, which is the subject matter in this appeal.

2.1 The AO observed that on verification of ledger extract of finance cost as debited in the profit and loss account and out of the total finance cost of Rs. 1,78,81,236/-, the assessee

company paid Rs. 1,67,65,947/- to M/s Reliance Capital Ltd., M/s Tata Capital Ltd., M/s SREI Infrastructure Finance Ltd., and M/s RK Infra - ALD, as per the following:

a) M/s Reliance Capital Ltd., - Rs. 3,48,590/-
b) M/s Tata Capital Ltd. - Rs. 2,70,868/-
c) M/s RK Infra – ALD - Rs. 3,78,047/-
d) M/s SREI Infrastructure Finance Ltd., - Rs. 1,57,68,442/-

Since the assessee has not deducted the tax on payments of interest to the above concerns and when the AO put the same before the assessee in the show cause notice, in reply, the assessee company relied on Board's Circular and stated that the hire purchase transaction does not attract TDS provisions. The AO observed that as the assessee's transactions are financial transactions and the payment consists of principal and interest and the same were separately furnished by financial companies and Assessee was aware the portion of interest towards hire charges. Hence, according to AO, the above financial charges of Rs. 1,67,65,947/- are nothing but interest and accordingly, the same was disallowed on the ground that the assessee has violated TDS provisions and hence, disallowance u/s 40(a)(ia) is warranted

3. Aggrieved by the order of AO, the assessee preferred an appeal before the CIT(A).

4. After considering the submissions of the assessee, the CIT(A) relying on various decisions including the special bench decision of the ITAT, Vizag, in the case of Merlyn Shipping directed the AO to allow the amounts, if the same were already paid by the assessee before 31/03/2012.

5. Aggrieved by the order of CIT(A), the revenue is in appeal before us raising the following grounds of appeal:

> *"1. The learned CIT(A) erred in law and on facts of the case.*
>
> *2. The Learned CIT(A) ought to have appreciated that the AO has rightly made disallowance of Rs.1,67,65,947/- u/s. 40(a)(ia) for non deduction of TDS on interest payments and ought to have upheld the disallowance.*
>
> *3. The learned CIT(A) ought to have appreciated the fact that the department is in further appeal in the case of Merylin Shipping and Transport, Visakhapatnam(2012) 136 ITD 002 on which the CIT(A) relied while giving relief to the assessee.*
>
> *4. The learned CIT(A) ought to have appreciated the matter has not yet reached finality in the case of My s. Merylin Shipping and Transport, Visakhapatnam.*
>
> *5. Any other grounds(s) that may be urged at the time of hearing."*

6. Before us, ld. DR relied on the decision of the Hon'ble Supreme Court in the case of Palam Gas Service Vs. CIT, [2017] 81 Taxmann.com 43 (SC) and relied on the order of AO.

7. The ld. AR submitted that the assessee paid interest to the financial institutions, who are public limited companies and they must have offered the same to tax. Further, he submitted that assessee was not held to be an assessee in default, hence, the provisions of section 40(a(ia) cannot be invoked. He relied on the following cases:

> 1. Win Information Technology Pvt. Ltd. Vs. DCIT, ITA No. 642/Hyd/2017.
> 2. Country Club Hospitality & Holidays Ltd. Vs. Addl. CIT, ITA No. 1504/Hyd/2012.
> 3. DCIT Vs. Aditya Construction Company India Pvt. Ltd., ITA No. 1701/Hyd/2016

4. Visu International Ltd. Vs. DCIT, ITA No. 488/Hyd/2013.

8. Considered the rival submissions and perused the material on record. It is noticed that assessee incurred the above interest payment towards financial charges which includes payment towards hire purchase. With regard to hire purchase payments, this Bench in the case of Win Information Technology Pvt. Ltd., (supra) has already held that the payments will not come under provisions of section 40(a)(ia). The relevant findings of the Bench are reproduced below:

> *"7. Considered the rival submissions and perused the material on record. In the case of Smt. M. Sailaja Vs. ITO in ITA No. 354 and 428/Hyd/2013, order dated 02/01/2015 the coordinate bench has held as under:*
>
> > *"21. Further liberalization of provisions of Section 40(a)(ia) was made through amendment brought by the Finance Act, 2012. With a view to liberalize provisions of Section 40(a)(ia) of the Act Finance Act, 2012 brought amendment w.e.f 01.04.2013 as under. The following second proviso shall be inserted in sub-clause (ia) of clause (a) of Section 40 by the Finance Act, 2012, w.e.f. 1-4-2013 :*
> >
> > *"Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of Section 201, then, for the purpose of this sub-clause, 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."*
> >
> > *22. Since provisions of Section 40(a)(ia) as amended by Finance Act, 2012 is linked to Section 201 of the Act, in which proviso was inserted, it is necessary to look into those provisions which read thus:*
> >
> > *"Sec.201: (1) Where any person, including the principal officer of a company -*

(a) who is required to deduct any sum in accordance with the provisions of this Act; or

(b) referred to in sub-section (1A) of Section 192, being an employer, does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:

Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident -

(i) has furnished his return of income under Section 139;

(ii) has taken into account such sum for computing income in such return of income; and

(iii) has paid the tax due on the income declared by him in such return of income, and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed."

23. Memorandum explaining the provisions while introducing Finance Bill, 2012 provides the justification of the amendment to section 40(a)(ia) in the following words:--

"In order to rationalise the provisions of disallowance on account of non-deduction of tax from the payments made to a resident payee, it is proposed to amend section 40(a)(ia) to provide that where an assessee makes payment of nature specified in the said section to a resident payee without deduction of tax and is not deemed to be an assessee in default under section 201(1) on account of payment of taxes by the payee, then, for the purpose of allowing deduction of such sum, 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."

24. The provisions of Sec.40(a)(ia) of the Act are meant to ensure that the Assessee's perform their obligation to deduct tax at source in accordance with the provisions of the Act.

Such compliance will ensure revenue collection without much hassle. When the object sought to be achieved by those provisions are found to be achieved, it would be unjust to disallowance legitimate business expenses of an Assessee. Despite due collection of taxes due, if disallowance of genuine business expenses are made than that would be unjust enrichment on the part of the Government as the payee would have also paid the taxes on such income. In order to remove this anomaly, this amendment has been introduced. In case of payment to non resident, the government does not have any other mechanism to recover the due taxes. Hence, no amendment was made in section 40(a)(i). The legislature has not given blanket deduction under section 40(a)(ia). The deduction as per amended section will be allowed only if the --

(i) payee has furnished his return of income under section 139;

(ii) payee has taken into account such sum for computing income in such return of income; and

(iii) payee has paid the tax due on the income declared by him in such return of income, and the payer furnishes a certificate to this effect from an accountant in such form as may be prescribed.

25. The question is as to whether the amendment made as above is prospective or retrospective w.e.f. 1.4.2005 when the provisions of Sec.40(a)(ia) were introduced. Keeping in view the purpose behind the proviso inserted by the Finance Act, 2012 in section 40(a)(ia) of the Act, it can be said to be declaratory and curative in nature and therefore, should be given retrospective effect from 1st April, 2005, being the date from which sub-clause (ia) of section 40(a) was inserted by the Finance (No. 2) Act, 2004. In CIT v. Alom Extrusions Ltd. [2009] 319 ITR 306/185 Taxman 416 (SC), the Hon'ble Supreme Court had to deal with the question, whether omission (deletion) of the second proviso to s. 43B of the IT Act, 1961, by the Finance Act, 2003, operated w.e.f. 1st April, 2004, or whether it operated retrospectively w.e.f. 1st April, 1988? Prior to Finance Act, 2003, the second proviso to s. 43B of the IT Act, 1961 (for short, "the Act") restricted the deduction in respect of any sum payable by an employer by way of contribution to provident fund/superannuation fund or any other fund for the welfare of employees, unless it stood paid within the specified due date. According to the

second proviso, the payment made by the employer towards contribution to provident fund or any other welfare fund was allowable as deduction, if paid before the date for filing the return of income and necessary evidence of such payment was enclosed with the return of income. In other words, if contribution stood paid after the date for filing of the return, it stood disallowed. This resulted in great hardship to the employers. They represented to the Government about their hardship and, consequently, pursuant to the report of the Kelkar Committee, the Government introduced Finance Act, 2003, by which the second proviso stood deleted w.e.f. 1st April, 2004, and certain changes were also made in the first proviso by which uniformity was brought about between payment of fees, taxes, cess, etc., on one hand and contribution made to Employees' Provident Fund, etc., on the other. According to the Department, the omission of the second proviso giving relief to the assessee(s) [employer(s)] operated only w.e.f. 1st April, 2004, whereas, according to the assessee(s)- employer(s), the said Finance Act, 2003, to the extent indicated above, operated w.e.f. 1st April, 1988 (retrospectively). The Hon'ble Supreme Court held that the deletion of the second proviso was retrospective w.e.f. 1.4.2004. The Court considered the scheme of the Act and the historical background and the object of introduction of the provisions of S. 43B. The Court also referred to the earlier amendments made in 1988 with introduction of the first and second provisos. The Court also noted further amendment made in 1989 in the second proviso dealing with the items covered in S. 43B(b) (i.e., contribution to employees welfare funds). After considering the same, the Court was of the view that it was clear that prior to the amendment of 2003, the employer was entitled to deduction only if the contribution stands credited on or before the due date given in the Provident Fund Act on account of second proviso to S. 43B. The situation created further difficulties and as a result of representations made by the industry, the amendment of 2003 was carried out which deleted the second proviso and also made first proviso applicable to contribution to employees welfare funds referred to in S. 43B(b).

'15. We find no merit in these civil appeals filed by the Department for the following reasons : firstly as stated above, s. 43B (main section), which stood inserted by Finance Act, 1983, w.e.f. 1st April, 1984, expressly commences with a non obstante clause, the underlying object being to disallow deductions claimed merely by making a

book entry based on mercantile system of accounting. At the same time, s. 43B (main section) made it mandatory for the Department to grant deduction in computing the income under s. 28 in the year in which tax, duty, cess, etc., is actually paid. However, Parliament took cognizance of the fact that accounting year of a company did not always tally with the due dates under the Provident Fund Act, Municipal Corporation Act (octroi) and other tax laws. Therefore, by way of first proviso, an incentive/relaxation was sought to be given in respect of tax, duty, cess or fee by explicitly stating that if such tax, duty, cess or fee is paid before the date of filing of the return under the IT Act (due date), the assessee(s) then would be entitled to deduction. However, this relaxation/incentive was restricted only to tax, duty, cess and fee. It did not apply to contributions to labour welfare funds. The reason appears to be that the employer(s) should not sit on the collected contributions and deprive the workmen of the rightful benefits under social welfare legislations by delaying payment of contributions to the welfare funds. However, as stated above, the second proviso resulted in implementation problems, which have been mentioned hereinabove, and which resulted in the enactment of Finance Act, 2003, deleting the second proviso and bringing about uniformity in the first proviso by equating tax, duty, cess and fee with contributions to welfare funds. Once this uniformity is brought about in the first proviso, then, in our view, the Finance Act, 2003, which is made applicable by the Parliament only w.e.f. 1st April, 2004, would become curative in nature, hence, it would apply retrospectively w.e.f. 1st April, 1988. Secondly, it may be noted that, in the case of Allied Motors (P) Ltd. etc: v. CIT [1997] 139 CTR (SC) 364 : (1997) 224 ITR 677 (SC), the scheme of s. 43Bof the Act came to be examined. In that case, the question which arose for determination was, whether sales-tax collected by the assessee and paid after the end of the relevant previous year but within the time allowed under the relevant sales- tax law should be disallowed under s. 43B of the Act while computing the business income of the previous year ? That was a case which related to asst. yr. 1984-85. The relevant accounting period ended on 30th June, 1983. The ITO disallowed the deduction claimed by the assessee which was on account of sales-tax collected by the assessee for the last quarter of the relevant accounting year. The deduction was disallowed under s. 43B which, as stated above, was inserted w.e.f. 1st April, 1984. It is also relevant to note that the first proviso which came into force w.e.f. 1st April, 1988 was not on the statute book when the

assessments were made in the case of Allied Motors (P) Ltd. Etc. (supra). However, the assessee contended that even though the first proviso came to be inserted w.e.f. 1st April, 1988, it was entitled to the benefit of that proviso because it operated retrospectively from 1st April, 1984, when s. 43B stood inserted. This is how the question of retrospectivity arose in Allied Motors (P) Ltd. etc. (supra). This Court, in Allied Motors (P) Ltd. etc. (supra) held that when a proviso is inserted to remedy unintended consequences and to make the section workable, a proviso which supplies an obvious omission in the section and which proviso is required to be read into the section to give the section a reasonable interpretation, it could be read retrospective in operation, particularly to give effect to the section as a whole. Accordingly, this Court, in Allied Motors (P.) Ltd. etc. (supra), held that the first proviso was curative in nature, hence, retrospective in operation w.e.f. 1st April, 1988. It is important to note once again that, by Finance Act, 2003, not only the second proviso is deleted but even the first proviso is sought to be amended by bringing about an uniformity in tax, duty, cess and fee on the one hand vis- a-vis contributions to welfare funds of employee(s) on the other. This is one more reason why we hold that the Finance Act, 2003, is retrospective in operation. Moreover, the judgment in Allied Motors (P) Ltd. etc. (supra) is delivered by a Bench of three learned Judges, which is binding on us. Accordingly, we hold that Finance Act, 2003, will operate retrospectively w.e.f. 1st April, 1988 (when the first proviso stood inserted). Lastly, we may point out the hardship and the invidious discrimination which would be caused to the assessee(s) if the contention of the Department is to be accepted that Finance Act, 2003, to the above extent, operated prospectively. Take an example - in the present case, the respondents have deposited the contributions with the R.P.F.C. after 31st March (end of accounting year) but before filing of the Returns under the IT Act and the date of payment falls after the due date under the Employees' Provident Fund Act, they will be denied deduction for all times. In view of the second proviso, which stood on the statute book at the relevant time, each of such assessee(s) would not be entitled to deduction under s. 43B of the Act for all times. They would lose the benefit of deduction even in the year of account in which they pay the contributions to the welfare funds, whereas a defaulter, who fails to pay the contribution to the welfare fund right upto 1st April, 2004, and who pays the contribution after 1st April, 2004, would get the benefit of deduction under s. 43B of the

Act. In our view, therefore, Finance Act, 2003, to the extent indicated above, should be read as retrospective. It would, therefore, operate from 1st April, 1988, when the first proviso was introduced. It is true that the Parliament has explicitly stated that Finance Act, 2003, will operate w.e.f. 1st April, 2004. However, the matter before us involves the principle of construction to be placed on the provisions of Finance Act, 2003.

16. Before concluding, we extract hereinbelow the relevant observations of this Court in the case of CIT v. J.H. Gotla [1985] 48 CTR (SC) 363 : (1985) 156 ITR 323 (SC), which reads as under :

"We should find out the intention from the language used by the legislature and if strict literal construction leads to an absurd result, i.e., a result not intended to be subserved by the object of the legislation found in the manner indicated before, then if another construction is possible apart from strict literal construction, then that construction should be preferred to the strict literal construction. Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction."

17. For the aforestated reasons, we hold that Finance Act, 2003, to the extent indicated above, is curative in nature, hence, it is retrospective and it would operate w.e.f. 1st April, 1988 (when the first proviso came to be inserted). For the above reasons, we find no merit in this batch of civil appeals filed by the Department which are hereby dismissed with no order as to costs.'

26. We are of the view that the reasoning of the Hon'ble Supreme Court in the case of Alom Extrusions Ltd. (supra) will equally to the amendment to Sec.40(a)(ia) of the Act whereby a second proviso was inserted in sub-clause (ia) of clause (a) of Section 40 by the Finance Act, 2012, w.e.f. 1-4-2013. The provisions are intended to remove hardship. It was argued on behalf of the revenue that the existing provisions allow deduction in the year of payment and to that extent there is no hardship. We are of the view that the hardship in such an event would be taxing an Assessee on a higher income in one year and taxing him on lower income in a subsequent year. To the extent the Assessee is made to

pay tax on a higher income in one year, there would still be hardship.

12.1. Respectfully following the same, we hold the issue in favour of assessee. A.O. is directed to delete the addition. Grounds are allowed."

We respectfully follow the above findings of the Co-ordinate bench of this Tribunal. At the same time, we notice that ld. DR relied on Thomas George Muthoot Vs. CIT, 235 Taxman 246 (Kerala), in which, the Hon'ble Court has decided that amendment to section 40(a)(ia) is prospective in nature, while, the assessee has relied on the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Ansal Land Mark Township (P) Ltd., 377 ITR 635 (Delhi), in which, the Hon'ble Court adjudicated that the amendment is a curative in nature and it has effect of retrospective. By relying on the judgment of Hon'ble Supreme Court in the case of CIT Vs. M/s Vegetable Products Ltd., 88 ITR 1992, as per which, the decision which is in favour of the assessee has to be preferred, we hold that where two views are possible on an issue, the view, which is favourable to the assessee has to be preferred. Therefore, we are inclined to follow the judgment of the Hon'ble Delhi High court in the case of Ansal Land Mark Township (P) Ltd. (supra) in line with the earlier decision of this Bench and accordingly, we direct the AO to delete the addition made u/s 40(a)(ia) of Rs. 3,11,519/- on account of interest paid to Tata Capital Ltd. Accordingly, grounds raised by the assessee are allowed. In the ground No. 1, the assessee has wrongly mentioned the disallowance of interest of Rs. 31,15,190 instead of actual disallowance of Rs. 3,11,519/-."

Further, even though, the proviso (ii) in section 40(a)(ia) was introduced in Finance Act, 2012, but, judicial precedents held that it is retrospective. Therefore, in the assessee's case, assessee was not held to be an assessee in default, the AO cannot invoke provisions of section 40(a)(ia). Accordingly, we uphold the order of CIT(A) and dismiss the grounds raised by the revenue in this regard.

10. Since we have dismissed the appeal of the revenue by upholding the order of CIT(A), the CO filed by the assessee becomes infructuous and the same is dismissed as infructuous.

11. In the result, appeal of the revenue and the CO of the assessee are dismissed.

Pronounced in the open court on 5th September, 2019.

Sd/-	Sd/-
(P. MADHAVI DEVI)	(S. RIFAUR RAHMAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Hyderabad, dated 5th September, 2019.

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