IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D': NEW DELHI
BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
AND
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER

I.T.A. No.5859/Del of 2016
Assessment Year: 2012-13

M/s Lal Exports Ltd. **Khasra No.150, Chandan Hulla, Delhi.** **PAN: AAACL9688G**	**vs**	**ACIT, Circle 15(1),** **New Delhi.**
(Appellant)		**(Respondent)**

Assessee by: Shri Shafiq Khan, Advocate
Department by: Smt. Aparna Karan, CITDR

Date of Hearing: 29.08.2019
Date of Pronouncement: 13.11.2019

ORDER

PER NARASIMHA K. CHARY, JM

The present appeal is filed by the assessee against the order dated 2.8.2016 passed by the learned Commissioner of Income-tax (Appeals)-5, New Delhi ("CIT(A)") for the Asstt. Year 2012-13.

2. Brief facts of the case are that the assessee is a company, engaged in the business of manufacturing and export of ready-made garments. For Assessment Year 2012-13, it has filed its return of income on 28/9/2012 declaring an income of Rs.1,42,30,983/-. Assessee paid the taxes on the basis of book profit of Rs.2,61,74,414/-under MAT. Learned Assessing Officer, however, assessee the income of the assessee at Rs.1,69,31,960/- as against the declared income of Rs.1,42,30,983/- by

making certain additions, which includes the addition of Rs.9,84,589/-by making disallowance under section 40(a)(ia) of the Income Tax Act, 1961 (for short "the Act"); Rs.75,809/- by disallowing the interest on late payment of TDS; and a sum of Rs.16,04,568/- by invoking Section 43B of the Act in respect of dues of EPF of and ESI.

3. In the appeal preferred by the assessee, Ld. CIT(A) deleted the addition of Rs.16,04,568/- added under section 43B of the Act, but confirmed the addition of Rs.9,84,598/-disallowed under section 40(a)(i) of the Act and Rs.75,809/- by disallowing interest on late payment of TDS.

4. Aggrieved by the findings of the Ld. CIT(A), assessee preferred this appeal and argued that the recipients of the interest income are well-known companies and paying taxes on their interest income and, therefore, there is no loss of Revenue on this count. It was further submitted that in view of the decision of the Hon'ble jurisdictional High Court in the case of CIT vs. JDS Apparels (P) Ltd (2015) 370 ITR 454 (Delhi) before making disallowance under section 40(a)(ia) of the Act, learned Assessing Officer must verify whether the default is wanton or for genuine causes, but as a matter of fact, in this case the Assessing Officer did not afford any opportunity to the assessee to quantify the interest cost each month, and therefore, the disallowance cannot be sustained.

5. Ld. CIT(A) observed that the entities to whom the interest was paid or not, the entities referred to under section 194A (iii) of the Act and therefore the provisions of section 194A are applicable. He further held that Section 40(a)(ia) of the Act is a deterrent and penal provision, having

effect of penalising the assessee who failed to deduct tax at source and acts to the detriment of economic interests, by inflicting hardship and deprivation by disallowing expenditure actually incurred and treating it as disallowed. He further held that the assessee failed to deduct the TDS on the interest paid as required under section 194A of the Act, and therefore, for violation of the statutory duty, the assessee shall suffer the disallowance under section 40(a)(ia) of the Act. He further observed that the assessee did not indicate as to whether the payee had offered the corresponding interest as income in the manner provided in the statute, namely, section 40(a)(ia) of the Act read with 1st proviso to section 201(1) of the Act.

6. In respect of the disallowance of interest of Rs.75,809/-on late payment of TDS, Ld. CIT(A), while following the decision of the Madras High Court in the case of Chennai Properties and Investments Ltd., 105 taxman 346 and also the decision of a coordinate Bench of this Tribunal in Iyer & sons (P) Ltd., 1 ITD 502, reached the conclusion that the interest on delayed TDS paid by the assessee takes colour from the nature of the principal amount required to be paid but not paid within time and in the circumstances, is in the nature of penalty though not described as such in section 201(1A) of the Act and, therefore, the same cannot be allowed.

7. Felt aggrieved by the above findings of the Ld. CIT(A), assessee preferred this appeal submitting that the Ld. CIT(A) is not correct in his finding that section 40(a)(ia) of the Act is a deterrent and penal provision, having the effect of penalising the assessee who has failed to deduct tax at source and acts to the detriment of economic interests of the state or that it operates and inflicts hardship and deprivation, by disallowing the

expenditure actually incurred and treating it as disallowed. He placed reliance on the decision of the Hon'ble jurisdictional High Court in the case of CIT vs. Ansal Land Mark Township (P) Ltd. (2015) 377 ITR 0635 (Delhi), wherein the Hon'ble Court accepted the reasoning of the Agra Bench of ITAT in Rajiv Kumar Agarwal vs. ACIT ITA No. 337/Agra/2013as regards the rationale behind the insertion of the second proviso to Section 40(a) (ia) of the Act and its conclusion that the said proviso is declaratory and curative and has retrospective effect from 1st April 2005. His further submission is that the recipients of the interest are well-known companies and paying taxes on the interest income and, therefore, the assessee cannot be held as assessee in default under proviso to section 201(1) of the Act.

8. Per contra, it is the submission on behalf of the Revenue that whether or not the recipient of the interests had declared the interest income in the returns of income and the proper compliance with the conditions provided in the proviso to section 201(1) of the Act is a verifiable fact only at the end of the Assessing Officer and is not open for the assessee to seek deletion of the amount without establishing first that the conditions stipulated in the proviso to section 201(1) of the Act were compared with.

9. In Rajiv Kumar Agarwal vs. ACIT ITA No. 337/Agra/2013 the Agra Bench of Tribunal held that, -

> *"On a conceptual note, primary justification for such a disallowance is that such a denial of deduction is to compensate for the loss of revenue by corresponding income not being taken into account in computation of taxable income in the hands of the recipients of the payments. Such a policy motivated deduction restrictions should, therefore, not come into*

play when an assessee is able to establish that there is no actual loss of revenue. This disallowance does deincentivize not deducting tax at source, when such tax deductions are due, but, so far as the legal framework is concerned, this provision is not for the purpose of penalizing for the tax deduction at source lapses. There are separate penal provisions to that effect. Deincentivizing a lapse and punishing a lapse are two different things and have distinctly different, and sometimes mutually exclusive, connotations. When we appreciate the object of scheme of section 40(a)(ia), as on the statute, and to examine whether or not, on a "fair, just and equitable" interpretation of law- as is the guidance from Hon'ble Delhi High Court on interpretation of this legal provision, in our humble understanding, it could not be an "intended consequence" to disallow the expenditure, due to non deduction of tax at source, even in a situation in which corresponding income is brought to tax in the hands of the recipient. The scheme of Section 40(a)(ia), as we see it, 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, in our considered view, 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 penalty for tax withholding lapse per se is separately provided for in Section 271 C, and, section 40(a)(ia) does not add to the same. The provisions of Section 40(a)(ia), as they existed prior to insertion of second proviso thereto, went much beyond the obvious intentions of the lawmakers and created undue hardships even in cases in which the assessee's tax withholding lapses did not result in any loss to the exchequer. Now that the legislature has been compassionate enough to cure these shortcomings of provision, and thus obviate the unintended hardships, such an amendment in law, in view of the well settled legal position to the effect that a curative amendment to avoid unintended consequences is to be treated as retrospective in nature even though it may not state so specifically, the insertion of second proviso must be given retrospective effect from the point of time when the related legal provision was introduced. In view of these discussions, as also for the detailed reasons set out earlier, we cannot subscribe to the view that it could have been an "intended consequence" to punish the assessees for non deduction of tax at source by declining the deduction in respect of related payments, even when the corresponding income is duly brought to tax. That will be going much beyond the obvious intention of the section. Accordingly, we hold that the insertion of second proviso to Section 40(a)(ia) is declaratory and curative in nature and it has 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."

10. In CIT vs. Ansal Land Mark Township (P) Ltd (2015) 377 ITR 0635 (Delhi), the Hon'ble Jurisdictional High Court accepted the above reasoning of the Agra Bench of ITAT as regards the rationale behind the insertion of the second proviso to Section 40(a) (ia) of the Act and its conclusion that the said proviso is declaratory and curative and has retrospective effect from 1st April 2005. In view of this decision of the Hon'ble jurisdictional High Court in the case of Ansal Land Mark (supra), we are not in agreement with the observations of the Ld. CIT(A) that whether or not there is any loss to the Revenue merely on the failure of the assessee to deduct TDS, the interest expenditure is liable to be disallowed.

11. Further according to the assessee, the recipients of the interest have shown their interest income in the returns of income filed by them and, therefore, there is no loss on this count. Further, according to him assessee cannot be held to be an assessee in default in view of the proviso to section 201(1) of the Act. Admittedly, this fact has not been verified at the end of the Assessing Officer. Grievance of the assessee is that no opportunity was given to them even to quantify the interest cost each month, let alone to establish the compliance with the proviso to section 201(1) of the Act. Since the Ld. DR submits that the compliance with the conditions under proviso to section 201(1) of the Act is a verifiable fact, we are of the considered opinion that this is a fit case to remand the matter to the file of the Assessing Officer with a direction to the assessee to file the evidence available with them to establish that

there was compliance with the conditions under proviso to Section 201(1) of the Act. This issue is accordingly remanded to the file of the Assessing Officer for compliance in accordance with our directions.

12. Insofar as the disallowance of interest on late payment of TDS to the tune of Rs.75, 809/- is concerned, ld. CIT(A) followed the decision of the Hon'ble Madras High Court in the case of Chennai Properties and Investments Ltd., 105 Taxman 346 and no material is brought to our notice as to how the finding of the Ld. CIT(A) on this aspect is bad under law. We do not see any reason to interfere with the finding of the Ld. CIT(A) on this aspect and accordingly dismiss ground No. 2 of the appeal of the assessee.

13. In the result, appeal of the assessee is allowed in part for statistical purpose.

Order pronounced in the Open Court on 13th November, 2019.

Sd/-	**Sd/-**
(PRASHANT MAHARISHI)	**(K.NARASIMHA CHARY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 13th **November, 2019.**
VJ
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Draft dictated on	6.11.2019
Draft placed before author	8.11.2019
Draft proposed & placed before the second member	
Draft discussed/approved by Second Member.	
Approved Draft comes to the Sr.PS/PS	
Kept for pronouncement on	
Date of uploading order on the website	
File sent to the Bench Clerk	
Date on which file goes to the AR	
Date on which file goes to the Head Clerk.	
Date of dispatch of Order.	