आयकरअपीलीयअधिकरण, दिल्ली न्यायपीठ 'एफ', नई दिल्ली
IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES `F', NEW DELHI

BEFORE Ms.SUCHITRA KAMBLE, JUDICIAL MEMBER
AND SHRI O.P.MEENA, ACCOUNTANT MEMBER

आ.अ.सं./I.T.A No.206/Del/2019
निर्धारण वर्ष/Assessment Year: 2013-14

Umaxe Projects (P) Ltd., D-332, 3rd Floor, Vivek Vihar, New Delhi – 110095. **[PAN: AAACU 9250 F]**	Vs.	Deputy Commissioner of Income Tax, Circle-27(1), New Delhi.
अपीलार्थी / Appellant		**प्रत्यर्थी/Respondent**

निर्धारितीकीओरसे /Assessee by	Shri R.K.Kapoal – FCA
राजस्वकीओरसे /Revenue by	Shri S.N.Meena – Sr.DR

सुनवाईकीतारीख/ Date of hearing:	20.11.2019
उद्घोषणाकीतारीख/Pronouncement on:	22.11.2019

आदेश /O R D E R

PER O.P.MEENA, AM:

1. This appeal by the Assessee is directed against the order of Ld.Commissioner of Income Tax(Appeals)-9, New Delhi dated 17.10.2018 for the assessment year 2013-14.

Additional Ground:

2. During the course of pendency of appeal, the assessee is taken additional ground regarding chargeable of interest u/s.234B/C of the Income Tax Act.

3. The ld.Counsel submitted that the additional ground of appeal be admitted as it is being purely legal issue, goes to the route of the matter and no further enquiry is required for deciding the same as all facts are already on record and issue arises out of impugned order. The ld.Counsel also placed reliance in the case of National Thermal Power Company Ltd. Vs. CIT [1998] 229 ITR 383 (SC).

4. *Per contra,* the ld.Departmental Representative did not seriously opposed the admission of additional ground.

5. We have considered the facts and material available on record and find that the additional ground is being legal one, hence, same is admitted in the light of decision of Hon'ble Supreme Court in the case of National Thermal Power Company Ltd. Vs. CIT [1998] 229 ITR 383 (SC) wherein it was held that the additional ground of appeal can be admitted where the issue involved is pure question of law, not involving any investigation of facts.

6. Now, we discuss this ground on merit. The ld.Counsel for the assessee submitted that the whole income of the assessee is

subjected to TDS. The various courts have held that when whole income is subjected to TDS, then provisions of payment and advance tax u/s.234B are not applicable. The ld.Counsel further placed reliance on the decision of Hon'ble Delhi High Court in the case of Director of Income Tax, International Taxation Vs. G.E.Packaged Power Ink [2015] 56 taxmann.com 190 (Del) wherein it was held that where the assessee was non-resident companies, entire tax was to be deducted at source of payments made by payer to it and there was no question of payment of advance tax by assessee, therefore, Revenue could not charge any interest u/s.234B from assessee.

7. *Per contra,* the ld.DR relied on the orders of the Lower Authorities.

8. We have heard the rival submissions and perused the material available on record. The assessee has claimed that whole of its income is subjected to TDS, therefore, the payer who was obliged to deduct tax at source and therefore, the assessee was not liable to pay tax and to what extent and require to tax deduct at source as per provisions of the Act, the assessee was

not required to pay advance tax. In such circumstances, the assessee was entitled to claim the credit of TDS deducted by the payer. If the legitimate tax has not been deducted by the payee, then the payee would be treated as the assessee in default according to section 201 and the payee/assessee would not be permitted tax credit under the proviso in section 209(1)(d). The ld.Counsel has placed reliance on the decision in the case of DIT(IT) Vs. G.E.Packaged Power Ink, wherein it was held that where the assessee were non-resident companies, entire tax was to be deducted at source of payments made by payer to it then there was no question of payment of advance tax by the assessee, therefore, Revenue could not charge any interest u/s.234B from the assessee. We are therefore of the opinion that the interest u/s.234B/C is not chargeable, if the entire income of the assessee was subjected to TDS. However, this issue has not been examined by the AO as to whether payer was to deduct TDS or assessee's income was subjected to TDS. Therefore, we deem it fit to remit back this issue to the file of the AO to verify where the entire income of the assessee was liable to TDS on the payments made from the payer, if so then there was no question of payment

of advance tax by the assessee and the Revenue could not charge the interest u/s.234B of the Act. In view of this, additional ground is set-aside for limited purpose to the file of the AO.

9. Ground No.5 is not pressed before us, hence, the same is treated as dismissed as not pressed.

10. Ground No.1 to 4 relates to disallowance of Rs.16,76,232/- being interest debited to the Profit and Loss Account and the balance amount appearing in RA bills as noted by the AO.

11. Briefly stated facts related to ground no.1 to 4 are that the AO observed that the assessee has paid interest of Rs.41,33,062/- which consisted interest paid to Air Force Naval Housing Board at Rs.8,80,844/-, interest paid to BHEL for advance paid for purchase of steel of Rs.11,06,165/-, interest paid to BHEL for supply of steel at Rs.6,12,276/- interest paid to BHEL for supply of steel for Rs.10,63,956/- and late payment charges paid to M/s.Sri Ram Finance of Rs.1,87,176/- and interest on loan paid to M/s.Magma Fin Corp Limited of Rs.2,82,645/-. Since the TDS was not deducted, the interest

expenditure of Rs.41,33,062/- was disallowed u/s.40(a)(ia) of the Act.

12. In appeal, it was contended that the interest expenses of Rs.16,76,232/- were paid to Air Force Naval Housing Board and BHEL which were debited to Profit and Loss Account of the assessee. However, the no disallowance of Rs.36,63,241/- could not have been made by the AO on this account. The assessee has also filed bifurcation of the interest paid by the assessee. Considering these facts, the ld.CIT(A) observed that the assessee has debited interest of Rs.16,76,232/- only in the Profit and Loss Account and the balance accounts appearing in RA Bills which were to be adjusted from the advance received from parties or were yet to be paid. Therefore, no disallowance in interest income of Rs.16,76,232/- can be made. However, the ld.CIT(A) observed that the contention of the assessee that interest paid was not covered by the definition of interest as per section 194A r.w.s. 2(28A) of the Act is not acceptable as the plain reading of the provision of section 2(28A) of the Act clearly brings out the interest payable on any money borrowed or debit incurred, hence,

the disallowance on account of interest was restricted to Rs.16,76,232/-.

13. Being aggrieved, the assessee filed this appeal before this Tribunal. The ld.Counsel reiterated the same submissions as made before the ld.CIT(A) and contended that the amount of Rs.16,76,232/- was not paid by the assessee rather the same was deducted by the payers while making payments to the appellant company, therefore the same are not covered under the definition of interest u/s.194A r.w.s. 2(28A) of the Act. In the alternative, the ld.Counsel submitted that the amendment that disallowance u/s.40(a)(ia) of the Act should be restricted to 30% of total payment as per the amendment made vide Finance Act, 2014 w.e.f 01.04.2005 is curative one and having retrospective effect as held by the ITAT Guwahati Bench in the case of Tripura State Electricity Corporation Ltd., Vs. DCIT, Circle Agartala in ITA No.30, 31 & 32/GAU/2015 dated 18.10.2019 and also in the light of decision of ITAT 'B' Bench, Mumbai in ITA No.1386/Mum/2017 dated 21.05.2019.

14. *Per contra,* the ld.Sr.DR relied on the order of the Lower Authorities.

15. We have heard the rival submissions and perused the material available on record. We find that the assessee has debited interest of Rs.16,76,232/- in the Profit and Loss Account which itself states that the interest was paid by the assessee of which TDS was required to be made as per provisions of section 194A r.w. 2(28A) of the Act. We find that the interest is defined u/s.2(28)(A) which says that interest payable on any-money borrowed or that debt incurred this means that the assessee as borrowed and mobilize as mobilization advance and debt was incurred. Therefore, the transactions are duly covered by the provisions of section 2(28A) of the Act, therefore the ld.CIT(A) has rightly held that the interest payment of Rs.16,76,232/- was subjected to TDS. However, considering the alternative ground of the assessee, we find that the ITAT in the case of Neena Kaul Vs. ACIT 24(3), Mumbai in ITAT No.1386/Mum/2017 dated 21.05.2019 and ITAT Guwahati in the case of Tripura State Electricity Corporation Ltd., Vs. DCIT in ITA No.30, 31 & 32/GAU/2015 held that the amendment made by Finance Act [2014] w.e.f. 01.04.2015 restricting disallowance made

u/s.40(a)(ia) from 100% to 30% is curative in nature and therefore having retrospective effect. We, therefore direct the AO to restrict the impugned disallowance to the extent of 30% only, accordingly the ground no.1 to 4 are partly allowed.

16. Ground No.6 to 8 relates to disallowance u/s.40(a)(ia) in respect of expenses of Rs.6,54,79,350/- on account of non-payment of TDS.

17. Brief facts are that the AO noted that the assessee company has shown TDS payable of Rs.18,81,605/- as on 31.03.2013. It was claimed that the TDS provisions are not applicable to the extent in question as they fall below the taxable limit. Therefore, provision of section 40(a)(ia) of the Act are not applicable. However, the AO observed that the assessee has not filed any invoice or confirmation from the parties to whom such payments were made. It was further submitted that the payments were made for sale, purchase transactions and not to for works contract and in business parlance they could term the supplier as the contractor. However, the AO observed that the audited books of accounts of the assessee shows that the payments are due to the contractors. Therefore, the claim is afterthought, that no TDS

is required for disallowance of these payments. Accordingly, based on the submission of the assessee the AO disallowed expenditure of Rs.6,54,79,350/- on account of non-deduction of TDS as per provision of section 40(a)(ia) of the Act.

18. Being aggrieved, the assessee carried the matter before the ld.CIT(A). However, the ld.CIT(A) made observation that the disallowance of expenses related to payments made to the contractors, hence, the AO has rightly disallowed the same u/s.40(a)(ia). With regard to the contention that as per amended provisions of section 40(a)(ia) the disallowance of 30% total expenditure should be made. However, the Ld. CIT(A) was of the view that this contention of the assessee is not tenable in law as the amendment referred by the assessee was made by Finance Act, 2014 and it was applicable w.e.f. 01.04.2015, hence, same cannot be applied for the A.Y.2013-14, accordingly this contention of the assessee was rejected.

19. Being aggrieved, the assessee filed this appeal before this Tribunal. The ld.Counsel repeated the same submissions has made before the Lower Authorities. Further, the ld.Counsel

further submitted that as alternative ground that the deduction of expenses of Rs.6,54,79,350/- should be restricted to 30% of the total expenditure as per amendment provision of section 40(a)(ia) of the Act which is retrospective in nature and curative as held by the ITAT Guwahati Bench in the case of Tripura State Electricity Corporation Ltd., Vs. DCIT, Circle Agartala in ITA No.30, 31 & 32/Gau/2015 dated 18.10.2019 and also in the light of decision of ITAT 'B' Bench, Mumbai in ITA No.1386/Mum/2017 dated 21.05.2019.

20. We have heard the rival submissions and perused the material on record. We find that the payment of expenditure is in the nature of payment to suppliers which is evident from the audited books of accounts, therefore the Lower Authorities are justified in holding that this expenditure was subjected to TDS as per the provision of the Act, accordingly disallowance of expenditure u/s.40(a)(ia) has been rightly made. However, considering the alternative ground of the assessee, we find that the ITAT in the case of Neena Kaul Vs. ACIT 24(3), Mumbai in ITAT No.1386/Mum/2017 dated 21.05.2019 and ITAT Guwahati in the case of Tripura State Electricity Corporation Ltd., Vs. DCIT

in ITA No.30, 31 & 32/GAU/2015 held that the amendment made by Finance Act [2014] w.e.f. 01.04.2015 restricting disallowance made u/s.40(a)(ia) from 100% to 30% is curative in nature and therefore having retrospective effect. We, therefore direct the AO to restrict the impugned disallowance to the extent of 30% only, accordingly the ground no.6 to 8 are partly allowed.

21. In the result, appeal of the assessee is partly allowed.

22. Order pronounced in the open court on 22-11-2019.

Sd/-	**Sd/-**
(SUCHITRA KAMBLE)	**(O.P.MEENA)**
(न्यायिक सदस्यतथा/JUDICIAL MEMBER)	**(लेखा सदस्यकेसमक्ष /ACCOUNTANT MEMBER)**

नई दिल्ली /New Delhi, दिनांक **Dated:** 22nd November, 2019/*S.Gangadhara Rao, Sr.PS*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

/ / **TRUE COPY** / /

Assistant Registrar, New Delhi