

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B": NEW DELHI**

**BEFORE
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
ITA No. 1297/Del/2017, A.Y. 2012-13**

Sh. Dhan Prakash Gupta C-3, Wazirpur Industrial Area New Delhi PAN : AEJPG1212R	Vs.	ACIT Circle-36(1) New Delhi
(Appellant)		(Respondent)

Department by:	Ms. Ashima Neb, Sr. DR
Assessee by :	Shri R.K.Bhalla, CA
Date of Hearing	30/10/2019
Date of pronouncement	27/01/2020

ORDER

PER SUDHANSHU SRIVASTAVA, JM:

This appeal is preferred by the Assessee against order dated 27.04.2015 passed by the Ld. Commissioner of Income Tax (Appeals)-12, New Delhi {CIT (A)} pertaining to the assessment year 2012-13.

2. The brief facts of the case are that the return of income was filed declaring a gross total income of Rs. 25,79,162/-. The case was selected for scrutiny under CASS for the reason that there was a huge increase in unsecured loans during the year. During the scrutiny proceedings, the Assessing Officer noticed that the assessee had paid huge amount of commission amounting to Rs. 2,29,36,408/- to various parties. The Assessing Officer (AO) noted that there was a difference of Rs. 22,96,946/- in the commission account. The assessee was asked to explain the reason for the difference. It was submitted by the assessee before the AO that this amount was paid to the sister concern of the assessee M/s. Pinky Air Services Pvt. Ltd over and above Rs. 27,27,883/- which had already been submitted in the particulars of commission paid. It was also submitted that tax was duly deducted at source on Rs. 27,27,883/- and the actual payment was of Rs. 50,24,829/- and mentioning Rs. 27,27,883/- was a typographical error which had been committed both during the original and revised submissions. However, the AO noted that as per Form 26AS of M/s. Pinky Air Services Pvt. Ltd, they had received the

commission of Rs. 27,27,883/- only and not Rs. 50,24,829/-. The AO noted that they were no supporting documents to verify the assessee's claim that the commission paid was Rs. 50,24,829/-. The AO proceeded to add an amount of Rs. 22,96,946/- to the income of the Assessee.

2.1 On appeal, the Ld. CIT (A) dismissed the assessee's appeal by noting that the assessee could not reconcile the difference of Rs. 22,96,946/- before the Assessing Officer.

2.2 Now, the assessee is before this Tribunal and has challenged the action of the Ld. CIT (A) in confirming the addition.

3.0 The Ld. Authorised Representative (AR) submitted that there were some clerical errors committed during the course of assessment proceedings and that the assessee could not explain the difference before the Ld. CIT (A). It was further submitted that, however, the payee i.e. M/s. Pinky Air Services Pvt. Ltd. has duly accounted the commission amounting to Rs. 50,24,829/- in its return of income which

was verifiable from the copy of the ITR and computation of income of the payee along with its audited balance sheet. It was also submitted that a certificate from the Chartered Accountant was also filed but the same was not considered. The Ld. Authorised Representative also submitted that the Finance Act , 2012 has inserted a new second proviso to section 40(a)(ia) effective from assessment year 2013-14 so as to provide that where an assessee makes payment of the nature specified in the section 40(a)(ia) 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 the 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 provided that the resident payee has furnished his return of income under section 139, has taken into account such sum for computing income in such return of income; and has paid the tax due on the income declared by him in such return of income and further the assessee furnishes a certificate to this effect from a Chartered Accountant in

Form 26A, as prescribed in rule 31ACB. It was further submitted that in the present case, the payee has taken the commission received as its income and properly shown in its profit and loss account duly audited and also filed its Income Tax return paying the tax as applicable and a CA Certificate has also been furnished. It was submitted that in the light of the numerous judicial precedents, since the payee has taken into account the entire commission of Rs. 50,24,829/- which was duly verifiable from the Income Tax Return, audited balance sheet and CA Certificate, the addition was liable to be deleted.

4.0 In response the Ld. Sr. Departmental Representative (Sr. DR) placed reliance on the findings recorded by both the lower authorities and reiterated that the assessee had been unable to reconcile the difference before the lower authorities.

5.0 We have heard the rival submissions and have also perused the material on record. We find that although the assessee gave contradictory submissions and explanations before both the lower authorities, the assessee can be given the benefit of the insertion of the new second

Proviso to Section 40(a)(ia) effective from assessment year 2013-14 wherein it has been provided that where the assessee has made a payment of the nature specified in Section 40 (a)(ia) to a resident payee without deduction of tax at source, no disallowance can be made if the resident payee has furnished his return of income u/s 139 after duly taking into account such payment for computing the income while filing the return of income and has also paid the tax due on the income declared by him in such return of income. It is also required that the assessee furnishes a certificate to this effect from the Chartered Accountant in Form 26AS, as prescribed in Rule 31 ACB of the Income Tax Rules. It is provided that if all the above conditions are specified then it has been deemed that the assessee has deducted and paid the tax on such sum so paid on the date of furnishing return of income by the resident payee. In this regard ITAT Hyderabad Bench and Bangalore Bench have held that this proviso is retrospective and is applicable from 01.04.2005. Similarly, Hon'ble Delhi High Court in the case CIT vs. Ansal Landmark Township – reported in 279 CTR 384 (Delhi High Court) has also held that the second proviso

to Section 40(a)(ia) is declaratory and curative and it has retrospective effect from 01.04.2005. In the present case, the assessee has duly filed copy of the return of income of the payee along with the computation of income and certificate from the Chartered Accountant. It only remains for the Assessing officer to verify if the same are in order. Accordingly, the appeal is restored to the file of the Assessing Officer to examine the issue afresh in light of the insertion of second proviso to Section 40 (a)(ia) and the documents which the assessee has submitted before us in this regard. The AO shall provide adequate opportunity to the assessee to present its case before making the adjudication.

6.0 In the final result, appeal of the assessee stand allowed for statistical purposes.

Order pronounced in the Open Court on 27th January, 2020.

sd/-

**(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

sd/-

**(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER**

Dated: 27/01/2020

BR

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

ASSISTANT REGISTRAR
ITAT, New Delhi