IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA No.109/CTK/2020
Assessment Year : 2012-2013

ARSS Infrastructure Project Ltd., Pl.ot No.38, Sector-A, Zone-D, Mancheswar Indl. Estate, Bhubaneswar.	Vs.	DCIT, Circle -1(1), Bhubaneswar.
PAN/GIR No.AADCA 4203 D		
(Appellant)	..	(**Respondent**)

Assessee by : Shri P.S.Panda/Kamal Agarwal, AR
Revenue by : Shri M.K.Gautam, CIT DR

Date of Hearing : 28 /10/ 2020
Date of Pronouncement : 22/1/2021

O R D E R

Per C.M.Garg,JM

This is an appeal filed by the assessee against the order of the CIT(A),1, Bhubaneswar dated 13.12.2019 for the assessment year 2012-2013.

2. The assessee has raised the following grounds:

'1. On the facts and circumstances of the case, the order passed by ld CIT(A) is arbitrary, unjustified and bad in law.

2. On the facts and circumstances of the case, the order passed by ld CIT(A) is not justified in disallowing a sum of Rs.2,02,54,656/- u/s.43B of the Income tax Act, 1961.

3. On the facts and circumstances of the case, the order passed by ld CIT(A) is not justified in disallowing interest paid to NBFC amounting to Rs.5,17,74,383/- u/s.40(a)(ia) of the I.T.Act, 1961 without appreciating the fact that the appellant has filed Form No.26A.

4. On the facts and circumstances of the case, the order passed by ld CIT(A) has erred in disallowing interest on mobilization advance paid amounting to Rs.34,40,315."

3. Ground No.1 of appeal is general in nature and hence, requires no separate adjudication.

4. Apropos Ground No.2 of appeal, facts are that during the course of assessment proceedings, the Assessing Officer noticed that the assessee has claimed payment of Rs.150,68,34,000/- towards interest expenses, out of which, following interest claimed as expenses were not deposited before due date of filing the return of income:

Sl.No.	Name of the bank	Interest (Rs.)
1.	IDBI Bank (OD)	7,29,844
2.	IDBI Bank(Escrow)	1,64,376
3.	SBI, Jajpur	6,46,001
4.	Export Import Bank	103,02,220
5.	PNB (Loan on BG)	64,76,313
6.	PNB (loan for LC)	5,82,026
7.	ICICI Bank Ltd(Loan on BG)	13,53,876
	Total:	202,54,656

5. Before the AO, since the assessee could not explain the reasons for non-deposit before due date of filing the return of income, the Assessing Officer disallowed the same and added to the total income of the assessee.

6. On appeal before the ld CIT(A), the assessee explained that due to economic slowdown of infrastructure industry, the assessee company had suffered huge loss and as a result, all loan account from bank was declared

as non-performing assets (NPA). Therefore, the assessee could not deposit the amount before filing the return of income. The CIT(A) did not find the contention of the assessee as plausible one and, therefore, confirmed the addition made by the AO.

7. Before us, ld A.R. of the assessee reiterated the submissions made before the ld CIT(A) and further submitted that under the direction of the joint lending committee, a separate current account was opened and the amount were deposited in the above account. He also submitted that because of the above fact, the impugned interest could not be paid for which penal interest is being charged by the bank.

8. Replying to above, ld CIT DR supported the orders of lower authorities. Ld CIT DR submitted that since the liabilities under the respective heads have not been paid in the previous year 2011-12 or on or before the due date of furnishing the return of income for the assessment year under consideration, the AO has rightly disallowed the same and ld CIT(A) was also justified in confirming the addition.

9. We have heard the rival submissions and perused the record of the case. In this case, the Assessing Officer disallowed the liabilities claimed by the assessee on the ground that same have not been paid before the due date of filing the return of income for the assessment year 2012-13. The assessee also could not produce any evidence regarding the payment

before the lower authorities or before the Tribunal. Therefore, we do not find any infirmity in the orders of lower authorities in disallowing the liabilities. Hence, we uphold the disallowance and dismiss this ground of appeal of the assessee.

10. The next issue is with regard to disallowance of interest of Rs.5,17,74,383/- u/s.40(a)(ia) of the Act.

11. During the course of assessment proceedings, the Assessing Officer, on perusal of ledger of interest expenses for the assessment year 2012-13, noticed that the assessee has paid interest on the following mobilization advance, NBFC's and others from whom loan and advance taken:

Sl.No.	Particulars of int. paid	Amount of int.(Rs.)
1.	L&T finance	13,910
2.	Hindustan Petro Corpn.Ltd	9,39,847
3.	Indian Oil Corpn. Ltd.	17,179
4.	Vishnu Enterprises	22,894
5.	ODC on NBFC	19,892
6.	ARSS Atlanta JV	188,79,299
7.	ARSS HCIL Consortium JV	19,95,961
8.	ARSS ANPR JV	4,84,262
9.	Atlanta ARSS JV	245,94,111
10.	Patel ARSS JV	48,07,028
	Total:	5,17,74,383

12. The Assessing Officer found that the assessee has not deducted tax at source from the above interest payments as per the provisions of section 194A of the I.T.Act, 1961. Therefore, the AO required the assessee to explain as to why total interest payment should not be disallowed

u/s.40(a)(ia) of the Act. In reply thereto, the assessee furnished certificate from Chartered Accountant in Annexure-A to Form 26A in respect of interest on mobilization advance paid during the F.Y. 2011-12. The AO discussed the provisions of section 40(a)(ia) of the Act inserted by the Finance Act, 2012 which came into force w.e.f. 1.4.2013 and disallowed Rs.5,17,74,383/- u/s.40(a)(ia) r.w section 201(1) of the Act for non-deduction of TDS as per the provisions of section 194A of the Act.

13. On appeal, the ld CIT(A) confirmed the action of the Assessing Officer. Hence, the assessee is in appeal before us.

14. Before us, ld A.R. submitted that the assessee had already filed Form No.26A duly signed by the C.A. before the Assessing Officer. He submitted that all the recipient of interest are JVs where in the assessee is one of the constituents. All the JVs are assessed under the Income tax Act, 1961 in Bhubaneswar only and the accounts are subject to tax audit as per the provisions of section 44AB of the Income tax Act, 1961. He submitted that the JVs have filed their income tax returns and the impugned interest payment has been shown as income and necessary taxes had been paid. He submitted that the impugned disallowance of interest u/s.40(a)(ia) of the Act will tantamount to double taxation. Ld A.R. referred to the decision of Hon'ble Supreme Court in the case of CIT vs. ELI Lilly and Co. (I) Pvt Ltd., 312 ITR 225 (SC) and also the decision in the case of Hindustan Coca

Cola Beverage Pvt ltd vs CIT (2007) 293 ITR 226 (SC). Ld A.R. in his written submissions submitted as under:

> "a) The second proviso to section 40(a)(ia), which was inserted by the Finance Act, 2012 effective from 1.4.2013, which reads as under:
>
> > "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."
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> b) From the above reading of the proviso it has been conditionally allowed the deduction subject to fulfillment of the condition as specified in first proviso to sub section (1) of section 201 of the Income Tax Act, 1961.
>
> c) The proviso states that:
> "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
> (Hi) as 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 on accountant in such form as may be prescribed."
> This proviso was introduced by Finance Act, 2012 to be operative from 01/07/2012.
>
> d) Accordingly both the proviso to section 201(1) and section 40(a)(ia) of the Income Tax Act, 1961 were to be operative from 01.07.2012 and 01.04.2013 respectively.
>
> e) From the insertion of the second proviso, the unambiguous underlying principle seems to be that in situations in which the assessee's tax withholding lapse have not resulted in any loss to the revenue and this fact is reasonably demonstrated by filing Form No. 26A, the appellant can not be treated as assessee in default.
>
> f) The ultimate aim of the insertion of the second proviso is that the disallowance U/s. 40(a)(ia) shall not made in the situation where in even if the assessee has not deducted tax at source from the related payments for expenditure but the recipient has taken into account these receipts and offered the same for taxation.

g)The intention behind introduction of section 40(a)(ia)is to ensure that TDS provision are scrupulously implemented without default in order to augment recoveries. Failure to deduct TDS or deposit TDS results in loss of revenue and may deprive the revenue from collection of tax.

h) Hence, the section can not be seen as intended to be a penal provision to punish the lapses of non deduction of TDS from payments for expenditure particularly when the recipients have taken into income embedded in these payments, paid tax due on the above income and filed the return in accordance with the law.

i) The 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 recipient.

j) Such restriction should therefore not come into play when an assessee is able to establish that there is no actual loss of revenue.
k)To overcome the above lapses, the insertion of second proviso has been made which is only curative in nature.

l) It is well settled legal position to the effect that a curative amendment in law to avoid unintended consequences is to be treated as retrospective in nature.

15. Ld A.R. submitted that similar view has been taken by various courts as under:

i) M/s. Visu International Ltd vs DCIT (ITA No.488/Hyd/2013)

ii) G.Shankar vs ACIT (ITA No.1832/Bang/2013)

iii) ITO vs Dr Jaideep Sharma (2014) 52 taxmann.com 420 (Delhi)

iv) Santosh Kumar Kedia vs ITO (ITA No.1905/Kol/2014) and Mitra Guha Builders Co vs DCIT (2016) 65 TAXMANN.COM 243.

v) CIT vs Ansal Landmark Township,. 279 CTR 384 (Del)

16. Ld A.R. submitted that where there are divergent views from different Courts, the decision favourable to the assessee shall be adopted as rendered by Hon'ble Supreme Court in the case of CIT vs Vegetable

Products Ltd., (1972) 88 ITR 192(SC). Further, he relied on the decision of this Bench in the case of Om Sri Nilamadhab Builders Pvt Ltd vs ITO in ITA No.296/CTK/2018 order dated 26.11.2019, wherein considering the subsequent amendment in Finance Act, 2014, the Tribunal has restricted the disallowance of expenditure from 100% to 30%.

17. Ld A.R. submitted that the second proviso to section 40(a)(ia) of the Act was inserted by the Finance Act, 2012 w.e.f. 1.4.2013 and the purpose of introduction of said proviso is to introduce a legal fiction where an assessee fails to deduct tax in accordance with the provisions of Chapter XVII B and where such assessee is deemed not to be an assessee in default in terms of the first proviso to sub-section(1) of Section 201 of the Act, then, in such event, 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. Ld A.R. submitted that the second proviso to section 40(a)(ia) of the Act has to be given retrospective effect in view of order of ITAT Agra Bench in the case of Rajeev Kumar Agarwal vs Addl. CIT in ITA No.337/Agra/2013 for A.Y.2006-07 order dated 29.5.2013 and judgment of Hon'ble High Court of Delhi in the case of CIT vs Ansal Land Mark Township (P) Ltd. (supra).

18. Further, drawing our attention towards para 4 of last operative part at page 6 of the assessment order, ld A.R. submitted that the AO dismissed the claim of the assessee for granting benefit of second proviso to section

40(a)(ia) of the Act that the proviso to section 201(1) of the Act by observing that these are to be operative from 1.7.2012 and 1.4.2013, respectively and the case of the assessee pertains to financial year 2011-12 and the dispute is related to the transactions made by the assessee company during the period from 1.4.2011 to 31.3.2012 and, therefore, being prospectively applicable of said statutory provision cannot come to the rescue to the assessee. Ld A.R. submitted that it has to be held that in view of the decision of Hon'ble Delhi High court in the case of Ansal Land Mark Township Pvt Ltd (supra), it may kindly be held that second proviso to section 40(a)(ia) of the Act being curative in nature as retrospective effect and benefit of second proviso to section 40(a)(ia) of the Act.

19. Replying to above, ld CIT DR supported the orders of lower authorities. He submitted that when the proviso to both the sections i.e. 201(1) and 40(a)(ia) of the Act were to be operative from 1.7.2012 and 1.4.2013, respectively, therefore, the transactions undertaken by the assessee during the period 1.4.2011 to 31.3.2012 pertaining to financial year 2011-12 relevant to assessment year 2012-13 cannot be given benefit on second proviso to section 40(a)(ia) of the Act and the AO was right in denying the claim of the assessee and making the addition. Ld CIT DR drawn our attention to para 4.2 of the CIT(A) order and reiterated the arguments and submitted that since the assessee has failed to make TDS

on the interest payment as per the provisions of Section 194A of the Act, the disallowance was rightly made by the lower authorities.

20. We have heard the rival submissions, orders of lower authorities as well as the various decisions relied by ld AR of the assessee. First of all, we may observe that during the course of assessment proceedings, the AO required the assessee to furnish details of the TDS deducted in the interest payment, to which, the assessee furnished certificate from Chartered Accountant in Annexure-A to Form 26A in respect of interest amount during the financial year 2011-12 relevant to assessment year 2012-13, which is not disputed by the lower authorities nor by ld CIT DR. But the short issue which requires our adjudication as to whether, the proviso to section 40(a)(ia) by the Finance Act, 2012 of the Act is prospective or retrospective in nature. The Hon'ble Delhi High Court in the case of Anshal Land Mark Township (P) Ltd., (supra) referring to the order of Agra Bench in the case of Rajeev Kumar Agarwal (supra) in paras 8 to 15 held thus:

> " 8. It is seen that the issue in these AYs arises in the context of the disallowance by the Assessing Officer of the payment made by the Respondent Assessee to Ansal Properties and Infrastructure Ltd. ('APIL') which payment, according to the Revenue, ought to have been made only after deducting tax at source under Section 194J of the Act. Before the ITAT, it was urged by the Assessee that in view of the insertion of the second proviso to Section 40(a) (ia) of the Act, the payment made could not have been disallowed. Reliance was placed on the decision of the Agra Bench of ITAT in ITA No. 337/Agra/2013 (**Rajiv Kumar Agarwal v. ACIT**) in which it was held that the second proviso to Section 40 (a) (ia) of the Act is declaratory and curative in nature and should be given retrospective effect from 1st April 2005.

9. It is seen that the second proviso to Section 40(a) (ia) was inserted by the Finance Act 2012 with effect from 1st April 2013. The effect of the said proviso is to introduce a legal fiction where an Assessee fails to deduct tax in accordance with the provisions of Chapter XVII B. Where such Assessee is deemed not to be an assessee in default in terms of the first proviso to sub-Section (1) of Section 201 of the Act, then, in such event, "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".

10. It is pointed out by learned counsel for the Revenue that the first proviso to Section 201 (1) of the Act was inserted with effect from 1st July 2012. The said proviso reads as under:

"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.

11. The first proviso to Section 210 (1) of the Act has been inserted to benefit the Assessee. It also states that where a person fails to deduct tax at source on the sum paid to a resident or on the sum credited to the account of a resident such person shall not be deemed to be an assessee in default in respect of such tax if such resident has furnished his return of income under Section 139 of the Act. No doubt, there is a mandatory requirement under Section 201 to deduct tax at source under certain contingencies, but the intention of the legislature is not to treat the Assessee as a person in default subject to the fulfilment of the conditions as stipulated in the first proviso to Section 201(1). The insertion of the second proviso to Section 40(a) (ia) also requires to be viewed in the same manner. This again is a proviso intended to benefit the Assessee. The effect of the legal fiction created thereby is to treat the Assessee as a person not in default of deducting tax at source under certain contingencies.

12. Relevant to the case in hand, what is common to both the provisos to Section 40 (a) (ia) and Section 210 (1) of the Act is that the as long as the payee/resident (which in this case is ALIP) has filed its return of income disclosing the payment received by and in which the income earned by it is embedded and has also paid tax on such income, the Assessee would not be treated as a person in default. As far as the present case is concerned, it is not disputed by the Revenue that the payee has filed returns and offered the sum received to tax.

13. Turning to the decision of the Agra Bench of ITAT in **Rajiv Kumar Agarwal v. ACIT** (supra) , the Court finds that it has undertaken a thorough analysis of the second proviso to Section 40 (a)(ia) of the Act and also sought to explain the rationale behind its insertion. In particular, the Court would like to refer to para 9 of the said order which reads as under:

> "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."

14. The Court is of the view that 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, merits acceptance.

15. In that view of the matter, the Court is unable to find any legal infirmity in the impugned order of the ITAT in adopting the ratio of the decision of the Agra Bench, ITAT in (**Rajiv Kumar Agarwal v. ACIT**).

21. Section 201 (1) of the Act was inserted by the Finance Act (No.2) with effect from 1st July 2012, which reads as under:

"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 payee-

(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."

22. In this case, the assessee has furnished Certificates from Chartered Accountant in Annexure -A to Form 26A in respect of interest payment to NBFCs and the AO has not raised any objection or doubt regarding the certificate furnished from the Chartered Accountants regarding interest payment during the financial year 2011-12 but only basis for denying the benefit of second proviso to section 40(a)(ia) of the Act. Hon'ble Delhi High Court in the case of Ansal Land Mark Townships (P) Ltd., (supra) has held that the second proviso to Section 40(a) (ia) of the Act is declaratory and curative and 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. Respectfully following the same, we hold that the benefit of such proviso is available to the assessment for the transactions and payment made by it during financial year 2011-12 i.e. 1.4.2011 to 31.3.2012. Hence, we allow this ground of appeal of the assessee

23. The next issue relates to disallowance of interest on mobilization advance paid amounting to Rs.34,40,315/-.

24. We have heard the rival submissions and perused the record of the case. In this case, the assessee has paid interest of Rs.34,40,315/- to railway department towards mobilization advance, therefore, the AO disallowed the entire amount. However, before the ld CIT(A), the assessee

could furnish a Bill No.Con/SPTR/137 dated 10.5.2011 for Rs.11,44,366/- issued by the Railway Department. Therefore, the ld CIT(A) restricted the disallowance to Rs.34,40,315/- as the assessee could not furnish any documentary evidence. Before us also, the assessee could not furnish any documentary evidence in support of the partly disallowed claim of interest paid on account of mobilization advance from the Railway Department. Hence, we see no reason to interfere with the order of the ld CIT(A), which is hereby confirmed. This ground of appeal is also dismissed.

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

Order pronounced on 22/1/2021.

Sd/-	sd/-
(Laxmi Prasad Sahu)	**(Chandra Mohan Garg)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Cuttack; Dated 22 /1/2021
B.K.Parida, SPS (OS)

Copy of the Order forwarded to :

1. The Appellant : ARSS Infrastructure Project Ltd., Pl.ot No.38, Sector-A, Zone-D, Mancheswar Indl. Estate, Bhubaneswar.
2. The Respondent. DCIT, Circle -1(1), Bhubaneswar.
3. The CIT(A)-1, Bhubaneswar
4. Pr.CIT- 1, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.

//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack