

**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT)
"E" BENCH, MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

ITA NO.385/MUM/2019 (A.Y: 2013-14)

M/s. Essence Retail Ventures Pvt. Ltd., 119, Crystal Paradise Mall 1 st Floor, KFC Lane Off. Linking Road, Bandra (W) Mumbai – 400050 PAN: AABCE5971E	v.	Income Tax Officer – 12(2)(2) Room No. 146A, 1 st Floor Aayakar Bhavan, M.K. Road Mumbai – 400020
(Appellant)		(Respondent)

ITA NO.386/MUM/2019 (A.Y: 2013-14)

M/s. Essence Landmarks Pvt. Ltd., 119, Crystal Paradise Mall 1 st Floor, KFC Lane Off. Linking Road, Bandra (W) Mumbai – 400 050 PAN: AACCK8724A	v.	Income Tax Officer – 12(2)(2) Room No. 146A, 1 st Floor Aayakar Bhavan, M.K. Road Mumbai – 400 020
(Appellant)		(Respondent)

Assessee by	:	Smt Janvi Pamnani
Department by	:	Shri Usha Gaikwad
Date of Hearing	:	05.03.2021
Date of Pronouncement	:	02.06.2021

ORDER

PER C.N. PRASAD (JM)

1. These two appeals are filed by different assessees of same group against different orders of Learned Commissioner of Income Tax (Appeals) – 20 [hereinafter in short “Ld.CIT(A)”] dated 14.11.2018 for the Assessment Year 2013-14.

2. The only issue in both these appeals is that, the Ld.CIT(A) erred in confirming the action of the Assessing Officer in disallowing interest expenses u/s. 40(a)(ia) of the Act on the ground that tax deducted at source was not deposited within due date of filing of return of income.

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3. Briefly stated the facts are that, during the assessment proceedings the Assessing Officer noticed that assessee incurred interest expenses on loans and assessee though deducted TDS and the same was not remitted to the Government account. Assessee was required to explain as to why interest expenses should not be disallowed u/s. 40(a)(ia) of the Act. Even though assessee agreed for disallowance before the Assessing Officer but still he agitated before the Ld.CIT(A). Before the Ld.CIT(A) assessee contended as under: -

"In the matter we submit that the addition made to the income of your Appellant by way of disallowance of interest expenses u/s.40(a)(ia) is incorrect and invalid for the following amongst other reasons: -

a) *We submit that your Appellant and its group was passing through a very bad phase of liquidity crunch and therefore could not make the payment of TDS within the due date of filing of return u/s.139. The scheme of section 40(a)(ia) was aimed at ensuring that expenditure should not be allowed as deduction in the hands of an assessee in a situation in which income embedded in such expenditure had remained untaxed due to tax withholding lapses by the assessee, that section 40(a)(ia) could not be seen as intended to be a penal provision to punish the lapses of non-deduction of tax at source from payments for expenditure, particularly when the recipient has taken into account income embedded in those payments and had paid due taxes thereon. It is submitted that the payer/deductor is not liable to pay the amount of short/non-deduction u/s.201(1) in cases where the payee/deductee has already included the relevant income in his total income and paid tax thereon. In support thereof we rely upon CBDT Instruction No.275/201/95-IT(B) dated 29-1-1997 and decision of the Supreme Court in the case of **Hindustan Coca-Cola Beverages Pvt. Ltd. 293 ITR 226**. The insertion of the second proviso to section 40(a)(ia) is declaratory and curative in nature and it has retrospective effect from April 1, 2005, being the date from which sub-clause (ia) of section 40(a) was inserted by the Finance (No. 2) Act, 2004. The first proviso to section 201(1) 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. What is common to both provisos to sections 40(a)(ia) and 201(1) is that as long as the payee or resident 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. Considering the facts of the case we submit that the proviso to the section is applicable from 1-4-2005, that the deductee had paid the taxes on the income that was subject of TDS provisions. In support we submit relevant*

evidences marked "**Exhibit B**". The proviso to section 40(a)(ia) made it clear that if the deductee pays the taxes on the entire income liable for taxation then no action would be taken against the deductor. The proviso is quite logical. It ensures that whole of the taxable income is taxed. Once the specific purpose is served there is no justification to indulge in unnecessary litigation.

b) We also rely on the following decisions: -

-> CIT vs. Ansal Land Mark Township Pvt. Ltd. 377 ITR 635 (Del.)

-> E Commerce Magnum Solutions Ltd. (ITA/3179/Mum/2016).

Not convinced with the submissions of the assessee the Ld.CIT(A) sustained the disallowance made by the Assessing Officer.

4. Before us, when the matter came up for hearing on 05.03.2021 one of the Directors of the Assessee Company Smt. Janvi Pamnani appeared and filed written submissions.

5. Ld. DR vehemently supported the orders of the authorities below.

6. We have heard the rival submissions, perused the orders of the authorities below and the written submissions filed before us. Before the Ld.CIT(A) as well as before us it was contended by the assessee that provisions of section 40(a)(ia) are not applicable in its case as the interest amount paid by the assessee was already accounted for by the payee in its return filed for the relevant assessment year and also paid the requisite

taxes. It was further contended in the written submissions that the Ld.CIT(A) completely ignored the evidences furnished by the assessee in respect of interest income shown by the payee in its Books of Accounts and payment of taxes thereon. It was further contended that second provision of section 40 is retrospective and applicable from 01.04.2005 and therefore since the payee has considered the amounts paid by the assessee as part of its income and filed return u/s. 139(1) of the Act and paid taxes no disallowance is warranted u/s. 40(a)(ia) of the Act in the case of the assessee. It was also placed reliance on the decision of the Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverages Pvt. Ltd., *v.* CIT [293 ITR 226] and the decision of the Hon'ble Delhi High Court in the case of CIT *v.* Ansal Land Mark Township (P) Ltd [377 ITR 635] and the Coordinate Bench decision of this Tribunal in the case of E-Commerce Magnum Solutions Ltd., *v.* DCIT in ITA.No. 3179/Mum/2016 dated 07.07.2016 in support of the above contentions.

7. Identical issue in these appeals has been decided in favour of the assessee by various Tribunals as well as Hon'ble High Courts. In the case of E-Commerce Magnum Solutions Ltd., *v.* DCIT (supra) the Coordinate Bench of the Tribunal following the decision of the Hon'ble Delhi High

Court in the case of CIT v. Ansal Land Mark Township (P) Ltd (supra) held

as under: -

"5. We have heard the rival submissions and perused the material before us. We find that the assessee had, while finding its original return of income, had made a disallowance of Rs. 1.03 Crores, that it had not deducted tax at source as per the provisions of chapter XVII of the Act, that later on it withdrew the disallowance made under section 40(a)(ia) in the revised return, that it relied upon the case of Hindustan Coca-Cola Beverages Private Ltd.(293 ITR 226), that the AO and the FAA held that facts of Hindustan Coca-Cola Beverages Private Ltd. were distinguishable, that the provisions of section 40(a)(ia) were amended by the Finance act, 2012, that second proviso had been brought in statute book with effect from 01/04/2013, that the act of the assessee of deleting the addition under section 40(a)(ia) in the revised return for the assessment year 2012-13 was not in consonance with the judgment of the Hon'ble of Apex Court or the Act, that the assessee had claimed the reversal of TDS amount of Rs. 10,39,94,746/- in the balance sheet under the head inventories, that the assessee claimed that proviso to the section was applicable retrospectively. In our opinion, the core issue to be decided is as to whether the proviso is applicable from 1.4.2005 or from 01/04/2013. We find that the Hon'ble Delhi High Court has, in the case of Ansal Landmark Township Private Ltd. (377 ITR 635) dealt the issue at length and has held as under:

"Section 40(a)(ia) of the Income-tax Act, 1961, 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 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 insertion of the second proviso to section 40(a)(ia) is declaratory and curative in nature and it has retrospective effect from April 1, 2005, being the date from which sub-clause (ia) of section 40(a) was inserted by the Finance (No. 2) Act, 2004. The first proviso to section 201(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 . What is common to both provisos to sections 40(a)(ia) and 201(1) of the Act is that as long as the payee or resident 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."

Considering the facts of the case and the above judgment, we hold that the proviso to the section is applicable from 01.04.2005, that the deductee had paid the taxes on the income that was subject of TDS provisions, that no action could be taken against the assessee making the payment to HL. The basic aim of chapter XVII is to ensure that no portion of income remains untaxed. To ensure it, TDS provisions were introduced-the person making payment was made responsible to deduct tax and pay it with the government account. But, the proviso to section 40(a)(ia)made it clear that if the deductee pays the taxes on the entire income liable for taxation then no action would be taken against the deductor. The proviso is quite logical. It ensures that whole of the taxable income is taxed. Once the specific purpose is served there is no justification to indulge in unnecessary litigation. It is not the case of the AO or the FAA that the deductee had not paid the taxes on the taxable income or that it was not paid within the prescribed time limit. Therefore, reversing the order of the FAA we decide the effective ground of appeal in favour of the assessee."

8. In the case of Pr.CIT v. Perfect Circle India Pvt. Ltd., in Income Tax Appeal No. 707 of 2016 dated 07.01.2019 before Hon'ble Bombay High Court, the revenue sought admission of the following question of law in its appeal: -

"Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in rejecting the disallowance of Rs. 1,44,78,0007- made by the AO u/S. 40(a)(ia) of the Act by holding that the amendment to the proviso of the said section was retrospective in nature without appreciating that the Act specifically provides that the said proviso comes into operation w.e.f. 1.4.2013 and is prospective in nature and cannot be applied retrospectively?"

The Hon'ble High Court dismissing the appeal of the Revenue held

as under: -

"2. *It is not necessary to record background facts since the question of law raised by the Revenue is whether the second proviso to Section 40(a)(ia) of the Income Tax Act, 1961 ("the Act" for short) would have retrospective effect. We may notice that the said proviso was inserted w.e.f 1.4.2013 and in essence, it provides that where an assessee fails to deduct whole or any part of the tax at source but is not deemed to be an assessee in default under the first proviso to Section 201(1), then for the purpose of clause 40(a)(ia), 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 payee. The Revenue would content that the benefit of this proviso would be available to the assessee only prospectively w.e.f. 1.4.2013. Various Courts, however, have seen this proviso as beneficial to the assessee and curative in nature. The leading judgment on this point was of the Division Bench of Delhi Court in the case of **CIT Vs. Ansal Land Mark Township P Ltd.** The Court held that Section 40(a)(ia) is not a penalty and insertion of second proviso is declaratory and curative in nature and would have retrospective effect from 1.4.2005 i.e the date from the main proviso 40(a)(ia) itself was inserted. Several High Courts have adopted the same lines. We may also note that the Supreme Court in the case of **Hindustan Coca Cola Beverages P Ltd Vs. CIT**² even in absence of second proviso to Section 40(a)(ia) had noticed that the payee had already paid the tax. Under such circumstances, the Court held that the payer / deductor can at best be asked to pay the interest on delay in depositing tax.*

3. *Under such circumstances, no question of law arises. Tax appeal is dismissed."*

9. In the case of CIT v. Ansal Land Mark Township (P) Ltd (supra) the

Hon'ble Delhi High Court held as under: -

"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."

10. The ratio of the above decisions is squarely applicable to the facts of the assessee's case. We find that the assessee before the Ld.CIT(A) filed evidences to show that the payee has included the interest income in its return of income and paid taxes. However, the Ld.CIT(A) did not admit the evidences. Before us, assessee filed petition under Rule 29 of ITAT Rules for admission of additional evidences which go to the root of the matter. As these evidences are going to the root of the matter the same are admitted. The evidences furnished before us in the form of Profit and Loss Account, Balance Sheet, copy of return filed by the payees and the certificate issued by the Chartered Accountant clearly suggest that the interest paid by the assessee was accounted for by the payees in its Books of Accounts and returns were filed within the due date certified u/s. 139(1) of the Act and taxes were paid on such interest income. Therefore, applying the ratio of the above decisions we hold that no disallowance u/s. 40(a)(ia) is warranted as the payee has accounted for the interest income in its Books of Accounts and filed its return of

income u/s. 139(1) of the Act. However, since the information filed by the assessee showing that the payee had accounted for the interest receipts in its Books of Accounts and paid taxes, were never examined by the lower authorities, subject to verification of these evidences by the Assessing Officer, we direct to delete the disallowance made u/s. 40(a)(ia) of the Act. The assessee shall furnish all these evidences before the Assessing Officer.

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11. Facts being identical the decision taken by us in the appeal in ITA.No. 386/Mum/2016 (A.Y. 2013-14) shall apply mutatis-mutandis for this appeal also. We order accordingly.

12. In the result, both appeals of the assessee allowed as indicated above.

Order pronounced on 02.06.2021 as per Rule 34(4) of ITAT Rules by placing the pronouncement list in the notice board.

Sd/-
(S. RIFAUH RAHMAN)
ACCOUNTANT MEMBER

Mumbai / Dated 02/06/2021
Giridhar, Sr.PS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

ITA NO.385/MUM/2019 (A.Y: 2013-14)
M/s. Essence Retail Ventures Pvt. Ltd.,
ITA NO.386/MUM/2019 (A.Y: 2013-14)
M/s. Essence Landmarks Pvt. Ltd.,

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum