

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
ITA No. 1386/Mum/2017 (A.Y. 2010-11)

Neena Kaul,

Techniplex-2, Unit No.2, 10th Floor,
Opp. Hotel Grand Sarovar Park Premiere,
Goregaon (W), Mumbai.

PAN: ANAPK4255A

..... Appellant

Vs.

ACIT-24(3),
Mumbai.

..... Respondent

Appellant by	:	Sh. Sunil G. Rohra / J.K. Chavan, AR
Respondent by	:	Sh. Chetan M. Kacha, Sr.DR
Date of hearing	:	26/09/2022
Date of pronouncement	:	23/12/2022

ORDER

PER GAGAN GOYAL, A.M:

This appeal by assessee is directed against the order of Commissioner of Income Tax (Appeals)-42, Mumbai [for short 'CIT(A)'] passed under section 143(3) of the Income Tax Act, 1961 [for short 'the Act'] vide order dated 12.08.2016 for Assessment Year (AY) 2013-14. The assessee has raised the following grounds of appeal:

4) On the facts and in the circumstances of the case & in law the learned Assessing Officer has erred in ignoring and the learned CIT(A) has erred in confirming the non consideration of form 26A u/r 31 ACB and the certificate of account in annexure A as provided u/s. 201(1) of the Act filed on record and in not holding that provisions of section 40 (a)(ia) as amended are applicable to the appellant on account of the trade discount and share of commission amounting to Rs 1022888/- allowed/paid to VAV Air conditioning by the appellant "

2. Brief facts of the case are that assessee originally filed the appeal before ITAT vide ITA. No. 1386/M/2017 on 06-09-2019, the same was heard on 14.05.2019.

3. In ground of appeals raised by assessee, total 4 grounds were there out of those initial three grounds were duly adjudicated by the bench in favour of assessee. As the ground no.4 was left without adjudication, assessee filed MA to get decision on ground no.4 also. This MA of assessee allowed vides MA No. 506/Mum/2019 vide order dated 15-07-2022. The present appeal before us is limited to the extent of adjudication of ground no.4.

4. We have gone through the order of AO, order of Ld.CIT (A) and submissions of the assessee. With reference to ground no.4 we observed that there was an amendment by Finance Act 2012 in sec 201(1A) by which first proviso has been inserted under the said section. Sec 40(a) (ia) was also amended and second proviso was inserted in the said section by Finance Act 2012. The cumulative effect of both the amendments is if the assessee had filed necessary declaration in form no. 26A and declaration in annexure. A, the concerned assessee who had not deducted TDS on the related payments will not be considered as assessee in default. In consequence to this the impact of sec 40(a) (ia) r.w. second proviso no

disallowance can be made and expenditure of Rs.10, 22,888/- is to be allowed fully.

5. To strengthen our view we found support from the decision of honourable jurisdictional High court in the case of PCIT Vs Perfect Circle India Pvt. Ltd. relevant extracts of the decisions is reproduced herein below as under:

"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 contend 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, (2015) 377 ITR 635 (Delhi). 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, [2007] 293 ITR 226 (SC), 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."

6. In view of the above decision of honourable jurisdictional High court ground no.4 raised by the assessee is allowed and AO. Is directed to allow the expense claimed by the assessee fully.

7. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 23rd day of December, 2022.

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER
Mumbai, दिनांक / Dated: 23/12/2022
SK, Sr.PS

Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. अपीलार्थी / The Appellant ,
2. प्रतिवादी / The Respondent.
3. आयकर आयुक्त (अ) / The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई / DR, ITAT, Mumbai
6. गार्ड फाइल / Guard file.

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BY ORDER,

(Dy. /Asstt. Registrar)
ITAT, Mumbai