

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, एच, मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL

MUMBAI BENCHES "H", MUMBAI

श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं

श्री अश्वनी तनेजा, लेखा सदस्य, के समक्ष

**Before Shri Joginder Singh, Judicial Member, and
Shri Ashwani Taneja, Accountant Member**

**ITA Nos.4916 to 4918/Mum/2014
Assessment Year: 2008-09 to 2010-11**

NRC Limited, 67, Surajmal Bldg. Gr. Floor, 75, Nakhoda Street, Pydhonie, Mumbai-400003	बनाम/ Vs.	Income Tax Officer(OSD)(TDS) Range-2, K.G. Mittal Bldg. Charni Road, Mumbai
(निर्धारिती / Assessee)		(राजस्व / Revenue)
PAN. No.AAACN1616J		

निर्धारिती की ओर से / Assessee by	Shri Vijay Mehta & Shri Anuj Kisnadwala
राजस्व की ओर से / Revenue by	Shri B.D. Naik-DR

सुनवाई की तारीख / Date of Hearing :	25/08/2016
आदेश की तारीख /Date of Order:	06/09/2016

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

This bunch of three appeals are by the assessee, aggrieved by the by the impugned orders dated 20/05/2014, and 27/05/2014 of the Ld. First Appellate Authority, Mumbai. The common ground raised by the assessee pertains to default u/s 201/201(1A) r.w.s. 40(a)(ia) of the Income Tax Act, 1961 (hereinafter the Act).

2. During hearing, the ld. counsel for the assessee, Shri Vijay Mehta along with Shri Anuj Kisnadwala, contended that the Ld. Commissioner of Income Tax (Appeal) did not consider the submissions of the assessee and no discussion has been made on the plea of financial difficulties faced by the assessee. It was also pleaded that payees has paid the taxes so it may be sent to the file of the Assessing Officer to examine the factual matrix. However, the ld. DR, Shri B.D. Naik, defended the conclusion arrived at in the impugned order but had no objection if the appeals may be remanded back to the file of the Assessing Officer to examine whether the payees has paid the taxes.

2.1. We have considered the rival submissions and perused the material available on record. The facts, in brief, are that the assessee company was incorporated under the Companies Act, engaged in the business of manufacturing of manmade fibres viscose filament yarn, nylon tyre cord,

chemical and generation of power, etc. The assessee made various payments for various expenses from time to time and/or incurred various expenditure. As per the assessee, all such payments and expenditure were duly accounted in the books of accounts and reflected in the annual accounts. The expenditure were claimed to be either incurred at registered office at Mumbai or at factory at Mohane. As per the assessee, tax was deducted at source at the applicable rates at the respective locations. It was explained that the assessee has discontinued manufacturing activities since last several years and facing financial crunch, burdened with heavy accumulated losses/acute liquidity crunch and thus filed reference to BIFT in December, 2008, wherein, the assessee was declared a sick industrial unit. The ld. counsel explained that at the fag and of the time barring, show cause notices were issued to the assessee company and thus the assessee was treated as assessee in default u/s 201/201(1A) of the Act. Considering the facts, so far as, no discussion was made on the financial difficulties, faced by the assessee, as claimed by the assessee, is concerned, we are not convinced with this argument and since the assessee has either did not deduct the tax at source and, if deducted, did not deposit in the state ex-chequer, then the assessee committed the default.

However, so far as, the second claim that the payees have deposited the taxes, is concerned, we are guided by the decision in CIT vs Ansal Land Mark Township (P.) Ltd. 377

ITR 635 (Del.). The relevant portion from the order is reproduced hereunder for ready reference:-

“ (i) 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”*. 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.

(ii) 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.

(iii) 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 de-incentivize 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. De-incentivizing 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 assessee 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. 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).”

Identical ratio was laid down in Commissioner Of Income-Tax vs Hindustan Coca Cola Beverages (P) Ltd. 293 ITR 163 (Del.). In the light of the foregoing discussion and the judicial pronouncement, we direct the Id. Assessing Officer to examine the factual matrix and decide in accordance with law. Needless to mention here that the assessee should be given opportunity of being heard to substantiate its claim, therefore, all these three appeals are allowed for statistical purposes only.

Finally, all these three appeals of the assessee are allowed for statistical purposes

This order was pronounced in the open court in the presence of ld. representatives from both sides at the conclusion of hearing on 25/08/2016.

Sd/-

(Ashwani Taneja)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 06/09/2016

Shekhar, P.S/निजी सचिव

Sd/-

(Joginder Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT (TDS), Mumbai.
4. आयकर आयुक्त / CIT(A)-14, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai