IN THE INCOME TAX APPELLATE TRIBUNAL
"C" Bench, Mumbai

Before Shri Jason P. Boaz, Accountant Member
and Shri Sandeep Gosain, Judicial Member

ITA No. 2726/Mum/2012
(Assessment Year: 2007-08)

Shri Pankaj Parasar 1st Floor, Plot No. 376 Didee House, 14th Road Khar (W), Mumbai 400052	Vs.	ACIT, Circle 11(1) Aayakar Bhavan, M.K. Road Mumbai 400020

PAN – AAAPP9015A

Appellant **Respondent**

Appellant by: Shri Gyaneshwar Kataram
Respondent by: Shri Rajat Mittal

Date of Hearing: 29.03.2017
Date of Pronouncement: 05.04.2017

O R D E R

Per Jason P. Boaz, A.M.

This appeal by the assessee is directed against the order of the CIT(A)-3, Mumbai dated 01.06.2011 for A.Y. 2007-08.

2. **Order on petition for condonation of delay in filing appeal for A.Y. 2007-08**

2.1 There is admittedly a delay of 248 days in filing this appeal before the Tribunal. The impugned order of the CIT(A) dated 01.06.2011 was admittedly received by the assessee on 20.06.2011 and therefore the appeal before the Tribunal was to have been filed on or before 20.08.2011, but however was filed on 23.04.2012, thereby leading to a delay of 248 days in filing the appeal. The assessee has filed a petition seeking condonation of the aforesaid delay of 248 days, accompanied by an affidavit sworn to dated 02.05.2012 in this regard. In the affidavit the assessee has, inter alia, prayed for condonation of the aforesaid delay submitting as under: -

"4. I was given to understand that no relief would be available to me in respect of non deduction of tax at source u/s 40(a)(ai). I am

given to understand now it is likely that relief would be available to me, since the issue under appeal is on a law point and since relief is being allowed in other matters in view of the decisions stated herein below.

a. *Merilyn Shipping and Transport V. ACIT 9ITAT Visakhapatnam Special Bench)*
b. *Hindustan Coca Cola Beverages P. Ltd. CIT 293 ITR 226.*
5. *I therefore pray that the delay be condoned in filing the appeal.*
6. *The delay in filing the appeal is not intentional and no prejudice would be caused to the department but heavy prejudice would be caused to me.*
7. *I shall be grateful to the Hon. ITAT for condoining the delay and admitting the appeal."*

2.2 We have heard both parties and perused and carefully considered the material on record. Admittedly, there was a delay of 248 days in filing the appeal for A.Y. 2007-08 before the Tribunal. The Hon'ble Apex Court in the case of Collector, Land Acquisition vs. MST Katji & Others (167 ITR 471) (SC), while laying down the principle for considering matters of condonation of delay in filing appeals, has stated that substantial justice should prevail over technical considerations. The Hon'ble Court also explained that every day's delay must be explained, does not mean that a pedantic approach should be taken. The doctrine must be applied in a natural, common sense and pragmatic manner. Considering the aforesaid principles laid down by the Hon'ble Apex Court; the reasons cited by the assessee in its petition/ affidavit for condonation of delay in filing this appeal belatedly, and the facts and circumstances of the case on hand, we are of the opinion that if the said delay of 248 days is condoned, there shall be no loss to Revenue as legitimate taxes payable by the assessee to Revenue in accordance with law alone will be collected; whereas rejection of the assessee's petition could cause hardship to the assessee. In this view of the matter, we are of the opinion that this is a fit case for condoning the delay in filing this appeal before the Tribunal and accordingly, in the interest of equity and justice condone the delay of 248 days in filing this appeal. This appeal is accordingly admitted for consideration and adjudication. We hold and direct accordingly.

3. The facts of the case, briefly stated, are as under: -

3.1 The assessee, Prop. M/s. Mazaa Films & M/s. Mazaa Productions, engaged in the production and direction of advertisement films, feature films and TV serials, filed its return of income for A.Y. 2007-08 on 31.10.2007 declaring income of ₹18,54,906/-. The case was taken up for scrutiny and the assessment was completed under section 143(3) of the Income Tax Act, 1961 (in short 'the Act') vide order dated 23.12.2009, wherein the income of the assessee was determined at ₹59,75,560/- in view of the following additions/disallowances: -

(i)	Royalty - under section 40(a)(ia) r.w.s. 194J	₹15,00,000/-
(ii)	Interest - under section 40(a)(ia) r.w.s. 194A	₹10,08,795/-
(iii)	Editing – under section 40(a)(ia) r.w.s. 194J	₹3,58,040/-
(iv)	Under section 40(a)(ia) r.w.s. 194-I	₹12,53,820/-

3.2 Aggrieved by the order of assessment dated 23.12.2009, the assessee preferred an appeal before the CIT(A)-3, Mumbai. The learned CIT(A) disposed off the appeal vide the impugned order dated 01.06.2011, allowing the assessee partial relief. The addition/disallowance listed at (i) in para 3.1 of ₹15 lakhs (supra) was deleted by the learned CIT(A), who however fully upheld the disallowance under section 40(a)9ia) of the Act listed at (ii) and (iii) (supra). In respect of the disallowance under section 40(a)(ia) as listed at (iv) in para 3.1 (supra), the learned CIT(A) upheld the disallowance to the extent of ₹8,42,640/- and allowed the assessee partial relief of ₹4,11,180/-.

4. The assessee, aggrieved by the order of the CIT(A)-3, Mumbai dated 01.06.2011 for A.Y. 2007-08, has preferred the present appeal raising the following grounds: -

"1. In the circumstances and facts of our case, the Ld. Commissioner of Income Tax (Appeals) has erred in: -

a. Upholding the addition of Rs 10,08,745/- u/s 40(a)(ia) on account of interest which is unwarranted and unlawful.

b. Upholding the addition of Rs 3,58,040/- u/s 40(a)(ia) on account of editing charges which his unwarranted and unlawful.

c. Upholding the addition of Rs 8,42,640/- u/s 40(a)(ia) on account of hiring charges which is unwarranted and unlawful;

The Appellant crave leave to add, delete or substantiate any grounds of appeal at the time of hearing."

5. **Ground No. 1(b), 1(c)/Ground No. 2**

5.1 At the outset the learned A.R. of the assessee submitted that the assessee is not pressing grounds 1(b) and 1(c) raised in this appeal. Since these grounds are not pressed, they are rendered infructuous and accordingly dismissed.

5.2 **Ground No. 2** being general in nature, no adjudication is called for thereon.

6. **Ground No. 1(a) – Disallowance of interest expenditure under section 40(a)(ia)**

6.1 In this ground, the assessee assails the impugned order of the learned CIT(A) in upholding the disallowance of interest expenditure claimed under section 40(a)(ia) r.w.s. 194A of the Act in respect of payments to Adlabs Films Ltd. for non-deduction at source thereon.

6.2.1 Before us, the learned A.R. of the assessee submitted that the aforesaid disallowance under section 40(a)(ia) of the Act in respect of payments for M/s. Adlabs Films Ltd. was not warranted, since M/s. Adlabs Films Ltd. has offered the same amount of ₹10,08,795/- as interest income earned by it in its return of income for A.Y. 2007-08 and consequently there being no loss to Revenue, the disallowance thereof under section 40(a)(ia) r.w.s. 194A of the Act is to be deleted. In this regard, the learned A.R. drew the attention of the Bench to the paper book filed by the assessee wherein at pages 2-6 thereof copy of Form 26A (as per Rule 31ACB) of Reliance Media Work Ltd. (earlier known as M/s. Adlabs Films Ltd.) issued by Chartered Accountant has been filed confirming that the interest paid by the assessee to that party has been duly accounted in its books of accounts and offered for tax in its return of income for A.Y. 2007-08. In support of the above proposition put forth by the assessee seeking deletion of the disallowance under section 40(a)(ia) of the Act of

₹10,08,795/- on account of payment of interest to M/s. Adlabs Films Ltd. the assessee has, inter alia, placed strong reliance on the following judicial pronouncements: -

(i) CIT vs. Ansal Land Mark Township (P) Ltd. (2015) 61 taxmann.com 45 (Delhi)

(ii) M/s. Selprint vs. CIT (ITA No. 3688/Mum/2012 dated 21.10.2015)

(iii) G. Shankar vs. ACIT (ITA No. 1832/Bang/2013 dated 10.10.2014)

6.2.2 Per contra, the learned D.R. strongly supported the decisions of the authorities below on this issue.

6.3.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncements cited/relied. On an appreciation of the facts on record it is seen that the authorities below have made and sustained the disallowance under section 40(a)(ia) of the Act for non deduction of tax at source in respect of interest payments by the assessee to M/s. Adlabs Films Ltd. as it was not a financial institution in terms of the provisions of section 194A of the Act. According to the learned A.R. of the assessee there is no dispute that the said interest payment was made to Adlabs Film Ltd. in the period under consideration. It is contended that since the recipient, i.e. Adlabs Films Ltd. has confirmed that it has offered the same income for tax in its return of income for A.Y. 2007-08, i.e. the year under consideration, there is no loss to Revenue and hence the disallowance made by the AO under section 40(a)(ia) of the Act is to be deleted. In this regard, the attention of the Bench was drawn to the paper book filed by the assessee and to pages 2 to 6 thereof which is a copy of Form No. 26A of M/s. Reliance Media Works Ltd. (formerly Adlabs Films Ltd.) issued by Chartered Accountant certifying that the aforesaid interest paid by the assessee has been duly accounted for by the payee, M/s. Adlabs Films Ltd. in its books of account and also offered the same interest income for tax in its return of income for A.Y. 2007-08. Revenue has not been able to controvert this factual position put forth by the assessee before us.

6.3.2 We find that the Coordinate Bench of this Tribunal in its order in the case of M/s. Selprint in ITA No. 3688/Mum/2012 dated 21.10.2015 had considered the similar issue as in the case on hand, where a disallowance was made by the authorities below under section 40(a)(ia) of the Act on account of non-deduction of TDS at source in payments to a party even though the said payee had already accounted for the same in its books of account and discharged the tax liability thereon by declaring the same in its return of income filed. In the cited case, the Coordinate Bench after considering following the decisions of the Hon'ble Delhi High Court in the case of CIT vs. Ansal Land Mark Township Pvt. Ltd. (2015) 61 taxmann. Com 45 (Delhi) dated 26.08.2015 and the decision of the ITAT Bangalore Bench in the case of S.M. Anand vs. ACIT in ITA o. 1831/Bang/2013 dated 21.02.2014 and of the ITAT Agra Bench in the case of Rajeev Kumar Agarwal vs. ACIT (2014) 149 ITD 363 (Agra) held that the disallowance under section 40(a)(ia) of the Act will not be attracted, if the respective payee has paid the required taxes thereon in accordance with law. In its order, the Coordinate Bench considered and decided this issue as under: -

> *"3. The Ld. A.R. of the assessee has invited our attention to ground No.1 vide which the disallowance has been made by the lower authorities under section 40(a)(ia) on account of non deduction of TDS on payments made to M/s. M.R. Enterprises. It is the contention of the Ld. A.R. that M/s. M.R. Enterprises has already discharged the tax liability by duly filing the return of income. He has contended that as per the new proviso inserted in section 40(a)(ia) vide Finance Act, 2012 w.e.f. 01.04.13 wherein it has been provided that if the assessee fails to deduct TDS in respect of any payment to which the TDS provisions apply but he is not deemed to be an assessee in default under section 201 of the Act, which provides that if the payee of the such amount computed the same into his income tax return and has paid the due taxes, then such an assessee will not be deemed to be an assessee in default and then no disallowance is attracted under section 40(a)(ia). He has further submitted that the said newly inserted proviso to section 40(a)(ia) is in fact clarificatory in nature and should be applied/retrospectively for the year under consideration and as such no disallowance is attracted on this issue.*
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> *4. On the other hand, the Ld. D.R. has contended that it has been specifically provided in the Act that the said proviso comes into operation w.e.f. 01.04.13 and that where the language of the section as well as the date of operation of such provisions has been mentioned specifically the courts cannot supply words to the*

provisions or amend the provisions to give it a different meaning and further that the newly inserted proviso under such circumstances is prospective in nature i.e. w.e.f. 01.04.13 and cannot be applied retrospectively.

5. The Ld. A.R. of the assessee has brought to our notice that the issue relating to operation of the newly inserted proviso whether prospective or retrospective in nature has already been considered and decided by the co-ordinate Bangalore bench of the Tribunal in the case of "Shri S.M. Anand Vs. ACIT" in ITA No.183/Bang./13 for A.Y. 2005-06 vide order dated 21.02.14. The relevant part of the findings of the Tribunal given in the said case, are reproduced as under:

> *"3.4.1 We have heard the rival submissions and perused and carefully considered the material on record. Admittedly, the assessee has not deducted tax at source on the payments made to Sri G.Shankar of Rs.2,69,21,500 and to Sri Ramesh Kotian of Rs.1,54,75,000. As pointed out by the learned Authorised Representative as far as the payments made to the aforesaid two persons is concerned the fact that the said payees / recipients have shown the said amounts in their respective books of account and profit and loss accounts and also that the same has been offered to tax in their returns of income is not controverted by the authorities below. In our considered opinion, since the payees / recipients i.e. G. Ramesh and Ramesh Kotian have already shown these amounts in their respective books of account audited under section 44AB of the Act; declared and offered the same to tax in their returns of income for the relevant period, thus by virtue of the amendment to the provisions of section 40(a)(ia) of the Act by insertion of the second proviso to section 40(a)(ia) of the Act w.e.f. ;1.4.2013, the provisions of section 40(a)(ia) of the Act would not be attracted to the payments made by the assessee i.e. Sri G. Shankar of Rs.2,69,21,500 and to Sri Ramesh Kotian of Rs.1,54,75,000. This view of ours, is in accordance with the decision of the co-ordinate bench of this Tribunal in the case of Ananda Markala (supra) wherein it was held that the insertion of the second proviso to section 40(a)(1a) of the Act should be read retrospectively from 1.4.2005 and not prospectively from 1.4.2013. In this view of the matter, the provisions of section 40(a)(ia) of the Act is not attracted to the payments made by the assessee to Sri G.Shankar of Rs.2,69,21,500 and to Sri Ramesh Kotian of Rs.1,54,75,000 since the object of introduction of section 40(a)(ia) of the Act is achieved for the reason that the payees / recipients have declared and offered to tax the payments received from the assessee in their respective hands.*
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> *3.4.2 As regards the issue of non-furnishing of Form No.26A, we are of the view that since the second proviso to section 40(a)(ia) of the Act is held to be retrospective in operation w.e.f. 1.4.2005, similarly, Form 26A was to be filed for an assessee not to be*

held as an assessees in default as per proviso to section 201 of the Act. In all fairness, the assessee in the period under consideration i.e. Assessment Year 205-06 could not have contemplated that such a compliance was to be made and therefore in the interest of equity and justice we set aside the order of the learned CIT (Appeals) and remit the matter to the file of the Assessing Officer directing the Assessing Officer to consider the allowance or otherwise of the expenditure claimed amounting to Rs.4,23,96,500; being the payments made by the assessee to Sri G. Shankar of Rs.2,69,21,500 and to Sri Ramesh Kotiar, of Rs.1,54,75,000 after affording the assessee adequate opportunity to file Form No.26A and only after due verification of whether the aforesaid two payees / recipients have reflected the same receipts in their books of account and have offered the some to tax. In these circumstances, we hereby set aside the order of the learned CIT (Appeals) to the file of the Assessing Officer only for the limited purpose as directed above."

6. Almost identical view has been taken by the Agra Bench of the Tribunal in the case of "Rajeev Kumar Agarwal vs. ACIT" (2014) 149 ITD 363 (Agra). The said view has been further upheld by the Hon'ble Delhi High Court in the case of "CIT vs. Ansal Land Mark Township Pvt. Ltd." in ITA No.160 of 2015 decided on 26.08.2015 (Del.-HC). Respectfully following the above cited decisions, we hold that disallowance under section 40(a)(ia) of the Act will not be attracted, if the respective payee has paid the required taxes in accordance with law. For verification of the actual position, we restore this issue to the file of the AO to verify whether the payee had paid the due taxes after computation of its income including the payments received from the assessee. This issue is accordingly allowed for statistical purposes."

6.3.2 Respectfully following the above cited decisions of the Hon'ble High Court and various ITAT Benches referred to in para 6.3.1 (supra) and of the Coordinate Bench in the case of M/s. Selprint in ITA NO. 3688/Mum/2012 dated 21.10.2015, we hold that the disallowance under section 40(a)(ia) of the Act will not be attracted in the case on hand if the payee M/s. Adlabs Films Ltd. has offered for tax the interest payments received by it from the assessee in its return of income for A.Y. 2007-08 as claimed, subject to restoration of this issue to the file of the AO for verification of the actual position, i.e. as to whether the payee/recipient M/s. Adlabs Films Ltd. has offered the said interest receipts for taxation in its return of income for A.Y. 2007-08. We hold and direct accordingly. Consequently, this ground No. 1(a) is allowed for statistical purposes.

7. In the result, the assessee's appeal for A.Y. 2007-08 is treated as partly allowed for statistical purposes.

Order pronounced in the open court on 5th April, 2017.

Sd/-	Sd/-
(Sandeep Gosain)	**(Jason P. Boaz)**
Judicial Member	**Accountant Member**

Mumbai, Dated: 5th April, 2017

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -3, Mumbai*
4. *The CIT - 11, Mumbai*
5. *The DR, "C" Bench, ITAT, Mumbai*

By Order

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Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.