आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'एस.एम.सी' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL "SMC" BENCH, AHMEDABAD

स्वश्री वसीम अहमद, लेखा सदस्य एवं मधुमिता रॉय, न्यायिक सदस्य के समक्ष।

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER And SMT MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No.984/Ahd/2015

(**निर्धारण वर्ष** / Assessment Year : 2010-11)

Omkara Impex and Merchandise P. Ltd., 323, Platinum Plaza, Judges Bunglow Road, Ahmedabad	**बनाम**/ Vs.	The Income Tax Officer, Ward –5(2), Ahmedabad.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACO 7308 J		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से / **Appellant by** :	Shri T. P. Hemani, A.R.
प्रत्यर्थी की ओर से/**Respondent by** :	Shri Rajesh Meena, Sr. D.R.

सुनवाई की तारीख / **Date of Hearing**	06/06/2018
घोषणा की तारीख /**Date of Pronouncement**	20/06/2018

आदेश / O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the assessee against the appellate order of the Commissioner of Income Tax(Appeals)-9 Ahmedabad [CIT(A) in short] vide appeal no.CIT(A)-XI/412/Wd-5(2)/13-14 dated 02.01.2015 arising in the assessment order passed under s.143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dated 28.02.2013 relevant to Assessment Year (AY) 2010-11.

2. The grounds of appeal raised by the assessee are as under:-

> *"1. The ld.CIT(A) has erred both in law and on the facts of the case in confirming the action of learned AO in disallowing an amount of Rs.21,62,634/- u/s. 40(a)(ia) r.w.s 194A of the Act. The Id. CIT(A) ought to have considered that claim of discounting charges doesn't fall under the purview of the provisions of section 40(a)(ia) r.w.s 194A of the Act.*
>
> *2. Alternatively and without prejudice to the above, the ld. CIT(A) has erred in holding that the inserted proviso to section 40(a)(ia) of the Act by Finance Act 2012 is prospective and not retrospective and thereby erred in not considering that when the recipients of the alleged amount have already paid taxes on the same than as per the proviso to 201(1) of the Act the Appellant cannot be treated as assessee in default for non deduction of TDS u/s. 40(a)(ia) r.w.s 194A of the Act.*
>
> *3. Both the lower authorities have passed the orders without properly appreciating the fact and that they further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order. This action of the lower authorities is in clear breach of law and Principles of Natural Justice and therefore deserves to be quashed.*
>
> *4. The learned CIT(A) has erred both in law and on the facts of the case in confirming action of the Id. AO in levying interest u/s 234A, 234B, 234C and 234D of the Act.*
>
> *The appellate craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal."*

3. The solitary issue raised by the assessee in ground no.1, 2 and 3 is that learned CIT(A) erred in confirming the order of the AO by sustaining the disallowance of Rs. 21,62,634/- on account of non deduction of TDS u/s 194A r.w.s. 40(a)(ia) of the Act.

4. Briefly stated facts are that the assessee is a limited company and engaged in the business of trading of construction materials. The assessee in its profit and loss account has claimed an expense under the head interest on finance for Rs. 21,62,634/- only. The assessee during the assessment proceedings admitted the fact that such expense was incurred without deducting the TDS u/s 194A r.w.s. 40(a)(ia) of the Act. Accordingly, the AO disallowed the same and added to the total income of the assessee.

5. Aggrieved, the assessee preferred an appeal to learned CIT(A). The assessee before the learned CIT(A) submitted that the expenses booked under the head interest on finance were like discounting charges paid to L&T Finance Co. The expenses being like discounting charges are not covered under the provisions of Section 194A of the Act and consequently no disallowance on account of non-deduction of TDS u/s 194A r.w.s. 40(a)(ia) of the Act is warranted.

In fact, the assessee used to supply building materials to Laren & Toubro Ltd. and LAFARGE AGGREGATES & CONCRETE INDIA PVT. LTD. on credit ranging from 45 to 75 days. The assessee used to get the bills raised to the above companies discounted from L&T Finance Ltd. The assessee in support of his claim also supplied the copy of certificate obtained from L&T Finance Ltd.

Assessee alternatively also submitted that the discounting charges paid to L&T Finance Ltd. have suffered the tax in the hands of L&T Finance Ltd. Therefore, no disallowance can be made regarding the proviso attached to section 40(a)(ia) of the Act.

However, learned CIT(A) disregarded the contention of the assessee and confirmed the order of the AO by observing as under:

> *"3.2 I have carefully considered the rival contentions. After giving careful thought to detailed submission given by appellant I am of the opinion that the amendment in sec 40(a)(ia) by Finance Act 2012 does not change basics of provision u/s 40 (a)(ia). the amendment is only prospective and effective w.e.f 01.04.2013 which is discussed as under:*
>
> - *With a view to liberalize provisions of Section 40(a)(ia) of the Act Finance Act 2012 brought amendment w.e.f 01.04.2013 as under:*
>
> • *The following second proviso shall be inserted in sub-clause (ia) of clause (a) of Section 40 by the Finance Act, 2012, w.e.f. 1-4-2013; Provided further that where an assesses 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 assesses 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;* ***Since provisions of Section*** *40(a)(ia)* ***as amended by Finance Act 2012 is linked to Section*** *201 of the* ***Act, so*** *it* ***is*** *essential to know* ***and understand the provisions of Section 201 of the Act. Relevant provisions of Section 201.***
> *(1) Where any person, including the principal officer of a company -*
> *(a) who is required to deduct any sum in accordance with the provisions of this Act; or*

(b) referred to in sub-section (1A) of Section 192, being an employer, does not deduct, or does riot pay, or after so deducting fails to pay, the whole of ***any part of the tax,*** *as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:*

[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*
(M) 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:]*

The amendment, in respect of point of TDS deducted and remittance thereof in Govt. account, brought through Finance Act 2010 has been made applicable prospectively from 01.04.2010. In the case of Bharati Shipyard Ltd. vs. DCIT reported in 13 taxmann.com 101, the Hon'ble Mumbai Special Bench decided the matter in favour of Revenue and held ***that amendment brought out by Finance Act, 2010 to*** *Section 40(a)(ia)* ***with effect from*** *1-4-2010 being not remedial and curative in nature cannot be declared as having retrospective effect from date of insertion of provision, i.e., 1-4-2005. –*

In the case of income Tax Appellate Tribunal - Chandigarh Sh. ***Umesh Trehan,*** *Chandigarh vs Assessee* ***on*** *27* ***June,*** *2013*
IN THE.INCOME TAX APPELLATE TRIBUNAL CHANDIGARH BENCH 'A', CHANDIGARH ITA No.1022/Chd/2012 (Assessment Year:2009-10) the issue has been dealt in detail wherein it HAS BEEN DISCUSSED AS UNDER;-
"That on the facts and circumstances of the case, Ld.CIT (A) has grossly erred in confirming addition of Rs.12,84,325/- u/s 40(a)(ia) of the Income Tax Act,.1961 on account of alleged non.deduction of TDS on

interest paid to NBFC's. Addition confirmed u/s 4o(a)(ia)of the Act is illegal and bad in law.

b) That on the facts & circumstances of the case, Ld. CIT(A) has grossly erred in confirming Ld.A.O's action of invoking provisions of sec. 40(a)(ia) of the Act on interest on loans from NBFC's which stood paid on 31-03-2009 to followings:

i)	*Reliance Capital Ltd.-*	*Rs.4,42,793/-*
ii)	*Religfire Finvest Ltd.*	*Rs. 79,321/-*
iii)	*India Bull Ltd.*	*Rs. 5,50,491/-*
iv)	*G.E. Money*	*Rs. 2,11,720/-*
	Total:	*Rs. 12,84,325/-*

The issue in Ground Nos. 3 & 4 raised by the assessee is against the disallowance of interest by invoking the provisions of section 40(a)(ia) of the Act. Admittedly, the assessee had failed to deduct tax at source and deposit the same within the stipulated period and in view thereof, the interest paid to NBFCs totaling to Rs.12,84,325/- and Rs. 150,671/- on unsecured loans was disallowed by the Assessing Officer, in view of the provisions of section 40(a)(ia) of the Act. The said disallowance was confirmed by the CIT (Appeals).

We have heard the rival contentions and perused the record. The issue raised in the present case is against the disallowance of interest for non deduction of tax at source and consequent application of the provisions of section 4o(a)(ia) of the Act. The Hon'ble Gujarat High Court in CIT Vs. Sikander Khan N. Tunvar & Others, ITA No-905 of 2012 - judgment dated 2.5.2013 and the Hon'ble Calcutta High Court in CIT Vs. Cresent Export Syndicate - ITA No.20 of 2013, G.A.No.190 of 2013 have laid down proposition that where the assessee has failed to deduct the tax at source and deposit the same within the specified period, the expenditure relatable to such deduction of tax at source would not be allowed as deduction, while computing the income of the assessee. Admittedly in the facts of the present case the assessee was liable to deduct tax at source in respect of the interest paid to NBFCs totaling Rs.12,84,325/- and also interest[1] paid on unsecured loans totaling Rs.1,50,671/-. We uphold the orders of the authorities below in this regard disallowance

has been made by invoking the provisions of section 40(a)(ia) of the Act, which was warranted in facts and circumstances of the case."

In view of discussion and relying upon the case laws as relied upon in above judgments it is held that the appellant was liable to deduct TDS on payments of interest to NBFCs. It cannot be allowed to take shelter in amendment made by Finance Act, 2012 as the same is prospective not retrospective. Hence I am in agreement with the view taken by A.O and addition on this issue stands confirmed."

Being aggrieved by order of learned CIT(A) assessee is in the second appeal before us. Assessee before us filed a paper book which is running from pages 1 to 58 and submitted that:

- *Assessee has entered into an arrangement with "L&T" for short) as per which, L&T discounts the invoices and makes payment to the assessee. In lieu of such services, L&T charges certain sum from the assessee and such charges are called "discounting charges".*
- *Thus, assessee basically gets its sale consideration discounted from L&T so as to get the underlying sum early and for that. L&T charges "discounting charges". Thereafter, it is the responsibility of L&T to recover such sum from the concerned customers.*
- *Such discounting charges for the year under consideration aggregate to Rs.21,62,669/- as is evident from certificate issued by L&T (Pg-31 of P/B).*
- *S. 194A provides for deducting lax at source on "Interest" (other than interest on securities".*
- *As per S.2(28A). "interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized.*
- *In the present case, assessee has not paid any "interest" within the meaning defined u/s 2(28A). Instead, assessee has paid "discounting charges" which, by no stretch of imagination, fall within the ambit of "interest". When no'interest" has been paid, question of invoking*

provisions of section 194A do not arise and hence, disallowance u/s.40(a)(ia) is unwarranted, Reliance is placed on followings:

- *CIT vs Cargill Global Trading (P.) Ltd. 335 TTR 94 (Del)*
- *PCIT vs. M Sons Gems N Jewellery P. Ltd. -(2016) 69 taxmann.com 373) (Delhi High Court); (Annexure "A")*
- *CIT vs. MKJ Enterprises Ltd. - (2014) 50 taxmann.com 441 (Calcutta High Court).*

- *On this short count, impugned disallowance deserves to be deleted.*

- *Alternatively, insertion of second proviso lo S.40(a)(ia) is declarative and curative in nature and has retrospective effect from 01.04.05 and hence, if recipients of concerned amounts have already paid tax on such sum. no disallowance u/s 40(a)(ia) is called for in payer's hands. Reliance is placed on "Janak Bhupatrai Parekh HUF vs. ITO - 1TA No.2891/Ahd/2011" (Annexure "B") wherein Hon'ble the ITAT has followed "CIT vs. Ansal Land Mark Township Pvt. Ltd -377 1TR 635 (Del)" wherein Hon'ble the Delhi High Court has affirmed the view taken in "Rajiv Kumar Aganval vs. ACIT - 45 taxinann.com 555 (Agra Trib)".*

On the other hand, learned DR submitted that the discounting charges are nothing but like interest only, therefore, disallowances needs to be made as per the provision of section 194A r.w.s. 40(a)(ia) of the Act. Ld. DR vehemently supported the order of authorities below.

6. We have heard the rival contentions and perused the material available on record. The assessee in the case on hand has claimed an expense of Rs.21,62,634/- under the head interest on finance. The assessee incurred such expense without deducting TDS u/s 194A r.w.s. 40(a)(ia) of the Act. Therefore, the disallowance was made by the AO on account of non-deduction of TDS. However, the assessee before the

learned CIT(A) among other things claimed that L&T Finance Ltd. had included the bill discounting charges in its income tax return. Therefore, no disallowance on account of non-deduction of TDS can be made. However, the learned CIT(A) disregarded the contention of the assessee on the ground that the assessee was liable to deduct the TDS u/s 194A r.w.s. 40(a)(ia) of the Act.

Similarly, the learned CIT(A) also observed that the amendment brought u/s 40(a)(ia) of the Act is prospective and not applicable for the year under consideration. Thus, the view taken by the AO was confirmed by the learned CIT(A).

At this juncture we find important and relevant to reproduce the provision of Section 2(28A) of the Act, which reads as under:

> *(28A)[82] "interest"[83] means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised ;]*

From the above provisions, it is revealed that discounting charges are outside the purview of interest expenses, therefore, in our considered view, the question of making any disallowance on account of non-deduction of TDS on such discounting charges does not arise. In holding so, we find support and guidance from the judgment of Hon'ble Delhi High Court in the case of PCIT vs. M. Sons Gems N. Jewellery Pvt. Ltd.

reported in 69 Taxmann.com 373 (Delhi). The relevant extract of the order is reproduced as under:

> *"**7.** The Court first notes that under Section 194A of the Act, the obligation to deduct tax at source is on the 'payer' of interest. In the instant case, the Assessee has permitted factoring and discounting charges to be deducted upfront by GTFL. In response to a query raised by the AO during assessment proceedings, the Assessee by its letter dated 12th September 2011 clarified as under:*
>
> *"The assessee company had paid discount to M/s. Global Trade Finance Ltd. (GTF) for availment of Factoring facility and not interest. This fact is very clear as per the sanction letter given by the GTF which was filed before your goodself vide our letter dated 02.09.2011. The assessee company had discounted its sales invoices from GTF on a discount and it had not taken any amount in the nature of loan or debt. The factoring facility is known as synonymous for bill discounting facility. As per section 2(28A) of the Income Tax Act, 1961, discounting charges are not covered under the definition of interest."*
>
> ***8.** Further the Court finds that the term sheet issued by the GTFL showed that the interest at 13% pa will be charged in the event of repayment of any borrowings. This is different from the factoring charges @0.10% payable to GTFL. As a matter of fact, the Assessee has debited the above sum to its P&L account towards "factoring/discounting charges". In light of the above factors, there was no factual basis for the AO to have disbelieved the Assessee's explanation and simply treat the entire amount as interest. The question of disallowing the entire amount under Section 40(a)(ia) on the ground that the TDS was not deducted in terms of Section 194A of the Act did not arise."*

From the above, there remains no doubt that the discounting charges paid by the assessee are not akin to interest on finance expenses. Therefore, no disallowance on account of non-deduction of TDS u/s. 194A r.w.s. 40(a)(ia) of the Act can be made.

We also find force in the alternate argument raised by the Learned AR that L&T Finance Ltd. has paid the taxes on the discounting charges received from the assessee. Indeed The said proviso though inserted by the Finance Act 2012 w.e.f. 1-4-2013 has been held to be retrospective in operation by recent decision of the Hon'ble Delhi High Court in the case of *CIT v. Ansal Land Mark Township (P) Ltd.* (2015) 61 taxmann.com 45 (Del) wherein the question raised before the court and the decision rendered thereon is reproduced herein below for the sake of clarity:-

> *"**Question**: Whether the second proviso to Section 40(a)(ia) (inserted by the Finance Act, 2012), which states that TDS shall be deemed to be deducted and paid by a deductor if resident recipient has disclosed the amount in his return of income and paid tax thereon, is retrospective in nature or not?"*
>
> ***Held**: Section 40(a)(ia) was introduced by the Finance (No.2) Act, 2004 to ensure that an expenditure should not be allowed as deduction in the hands of an assessee in a situation where income embedded in such expenditure has remained untaxed due to tax withholding lapses by the assessee.*
>
> ***Hence**, section 40(a)(ia) is not a penalty provision for tax withholding lapse but it is a provision introduced to compensate any loss to the revenue in cases where deductor hasn't deducted TDS an amount paid to deductee and, in turn, deductee also hasn't offered to tax income embedded in such amount*
>
> *The penalty for tax withholding lapse per se is separately provided under section 271C and, therefore, section 40(a)(i) isn't attracted to the same. Hence, an assessee could not be penalized under section 40(a)(ia) when there was no loss to revenue.*

The Agra Tribunal in the case of Rajiv Kumar Agarwal-vs-ACIT *[2014] 45 taxmann.com 555 (Agra – Trib) had held that the second proviso to Section 40(a)(ia) is declaratory and curative in nature and has retrospective effect from 1st April, 2005, being the date from which sub-clause (ia) of section 40(8) was inserted by the Finance No.(2) Act, 2004, even though the Finance Act, 2012 had not specifically stated that proviso is retrospective in nature.*

The High Court affirmed the ratio laid down by the Agra Tribunal and held that said provisos is declaratory and curative in nature and ha retrospective effect from 1st April, 2005."

In view of above, we are inclined to reverse the order of authorities below. Hence, the ground of appeal of the assessee is allowed.

7. Next issue is consequential and does not require any separate adjudication.

8. In the result, assessee's appeal stands allowed.

This Order pronounced in Open Court on	**20/06/2018**

Sd/-
(मधुमिता रॉय)
न्यायिक सदस्य
(MADHUMITA ROY)
JUDICIAL MEMBER

Sd/-
(वसीम अहमद)
लेखा सदस्य
(WASEEM AHMED)
ACCOUNTANT MEMBER

Ahmedabad; Dated 20/06/2018
Priti Yadav, Sr.PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-9, Ahmedabad.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

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सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad