IN THE INCOME TAX APPELLATE TRIBUNAL
RAIPUR BENCH, RAIPUR

[Coram: Pramod Kumar AM and C M Garg JM]

I.T.A. No.: 106/RPR/2016
Assessment year: 2010-11

R K P Company ***.....Appellant***
Main Road, Urga
Korba 495677 [PAN: AALFR4758H]

Vs.

Income Tax Officer
Ward 1, Korba ***…….Respondent***

Appearances by:
None *for the appellant*
S K Meena and Darshan Singh *for the respondent*

Date of concluding the hearing : June 23, 2016
Date of pronouncing the order : June 24, 2016

O R D E R

Per Pramod Kumar, AM:

1. This is an appeal filed by the assessee, challenging learned CIT(A)'s order dated 28th December 2015 for the assessment year 2010-11, on the following ground:

> That learned CIT(A) erred in law as well as on facts while confirming addition of Rs 6,48,456 under section 40(a)(ia) on account of interest paid to NBFCs.

2. To adjudicate on this appeal, only a few material facts need to be taken note of. During the course of the assessment proceedings, the Assessing Officer disallowed a sum of Rs 6,48,456, being payment made to NBFCs on account of interest charges without deduction of tax at source, under section 40(a)(ia). Aggrieved, assessee carried the matter in appal, and relied upon, inter alia, Hon'ble Delhi High Court's judgment in the case of **CIT Vs Ansal Landmark Townships Pvt Ltd [(2015) 377 ITR 635 (Del)]**, but without any success. The assessee is not satisfied and is in further appeal before us.

3. We have heard the learned Departmental Representatives, perused the material on record and duly considered factual matrix of the case in the light of the

applicable legal position. None has appeared for the assessee but as the issue in appeal is a short legal issue, set out in a narrow compass of facts, which can be disposed of even without the benefit of assistance from the assessee, we consider it appropriate to procced with the matter *ex parte qua* the assessee.

4. We find that Hon'ble Delhi High Court has specifically approved the stand taken by a coordinate bench of this Tribunal, in the case of **Rajeev Kumar Agarwal Vs ACIT [(2014) 149 ITD 363 (Agra)]**, and upheld the action of the Tribunal in following the same.

> **9. …… 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 assessees 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.**
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> **10. In view of the above discussions, we deem it fit and proper to remit the matter to the file of the Assessing Officer for fresh adjudication in the light of our above observations and after carrying out necessary verifications regarding related payments having been taken into account by the recipients in computation of their income, regarding payment of taxes in respect of such income and regarding filing of the related income tax returns by the recipients. While giving effect to these directions, the Assessing Officer shall give due and fair opportunity of hearing to the assessee, decide the matter in accordance with the law and by way of a speaking order. We order so**

5. In effect thus, Their Lordships have approved the action of the Tribunal in remitting the matter to the file of the Assessing Officer with a direction to ascertain

whether the recipient has taken into account related payments into computation of his income and offering the same to tax, and, if so, delete the disallowance under section 40(a)(ia) in respect of the same.

6. When, however, we asked the learned Departmental Representative as to why we should also not remit the matter to the file of the Assessing Officer, with the same directions, he, alongwith his senior colleague Shri Darhan Singh, who happens to be the CIT(A) authoring the impugned order and who was on duty as CIT(DR) before us, had three points to make- first, that there are decisions in support of the stand of the Assessing Officer's stand, by way of Hon'ble Kerala High Court's decision in the case of **Thomas George Muthoot Vs CIT [(2015) 63 taxmann.com 99 (Kerala)]**; second, that even if insertion of second proviso to Section 40(a)(ia) can be construed as retrospective in effect, the corresponding rule in the Income Tax Rules 1962 is not, and has not been held to be, retrospective, and the second proviso to Section 40(a)(ia) cannot, therefore, be give retrospective effect; and, third, that there is no decision on this issue by Hon'ble jurisdictional High Court and, as such, the stand of the Assessing Officer cannot be faulted.

7. As for Hon'ble Kerala High Court's decision in the case of Thomas George Muthoot *(supra),* undoubtedly, outside the jurisdiction of Hon'ble Kerala High Court and outside the jurisdiction of Hon'ble Delhi High Court- which has decided the issue in favour of the assessee, there are conflicting decisions on the issue of restrospectivity of second proviso to Section 40(a)(ia). It is thus evident that views of these two High Courts are in direct conflict with each other. Clearly, therefore, there is no meeting ground between these two judgments. The difficulty arises as to which of the Hon'ble non jurisdictional High Court is to be followed by us in the present situation. It will be wholly inappropriate for us to choose views of one of the High Courts based on our perceptions about reasonableness of the respective viewpoints, as such an exercise will de *facto* amount to sitting in judgment over the views of the High Courts something diametrically opposed to the very basic principles of hierarchical judicial system. We have to, with our highest respect of both the Hon'ble High Courts, adopt an objective criterion for deciding as to which of the Hon'ble High Court should be followed by us. We find guidance from the judgment of Hon'ble Supreme Court in the matter of **CIT vs. Vegetable Products Ltd. [(1972) 88 ITR 192 (SC)]**. Hon'ble Supreme Court has laid down a principle that "if two reasonable constructions of a taxing provisions are possible, that construction which favours the assessee must be adopted". This principle has been consistently followed by the various authorities as also by the Hon'ble Supreme Court itself. In another Supreme Court judgment, **Petron Engg. Construction (P) Ltd. & Anr. vs. CBDT & Ors. (1988) 75 CTR (SC) 20 : (1989) 175 ITR 523 (SC),** it has been reiterated that the above principle of law is well established and there is no doubt about that. Hon'ble Supreme Court had, however, some occasions to deviate from this general principle

of interpretation of taxing statute which can be construed as exceptions to this general rule. It has been held that the rule of resolving ambiguities in favour of tax-payer does not apply to deductions, exemptions and exceptions which are allowable only when plainly authorised. This exception, laid down in Littman vs. Barron 1952(2) AIR 393 and followed by apex Court in **Mangalore Chemicals & Fertilizers Ltd. vs. Dy. Commr. of CT (1992) Suppl. (1) SCC 21 and Novopan India Ltd. vs. CCE & C 1994 (73) ELT 769 (SC**), has been summed up in the words of Lord Lohen, "in case of ambiguity, a taxing statute should be construed in favour of a tax-payer does not apply to a provision giving tax-payer relief in certain cases from a section clearly imposing liability". This exception, in the present case, has no application. The rule of resolving ambiguity in favour of the assessee does not also apply where the interpretation in favour of assessee will have to treat the provisions unconstitutional, as held in the matter of State **of M.P. vs. Dadabhoy's New Chirmiry Ponri Hill Colliery Co. Ltd. AIR 1972 (SC) 614**. Therefore, what follows is that in the peculiar circumstances of the case and looking to the nature of the provisions with which we are presently concerned, the view expressed by the Hon'ble Delhi High Court in the case of Ansal Landmark *(supra),* which is in favour of assessee, is required to be followed by us. Revenue does not, therefore, derive any advantage from Hon'ble Kerala High Court's decision in the case of Thomas George Muthoot *(supra).*

8. The second issue is with respect to the second proviso to Section 40(a)(ia) being held to be retrospective, without corresponding enabling provision in the rules being held to be retrospective. That is a hyper technical argument and too pedantic an approach. The second proviso to Section 40(a)(ia) was held to be retrospective in in the context of finding solution to the problem to the taxpayer, and the matter was set aside to the file of the Assessing Officer with certain directions about factual verifications on the recipient having included the same in the receipts based on which taxable income is computed, and the income having been offered to tax. It is this action of the coordinate bench that was upheld by the Tribunal and the course of action so adopted by the coordinate bench approved by Their Lordships. It is impermissible to pick up one of the aspects of the decision of the judicial authority and read the same in isolation with other aspects. The decision is not on the retrospectivity of the proviso alone, its also on deletion of disallowance in the event of the recipient having taken into account these receipts in the computation of income. The judge made law is as binding on the authorities below as is the legislated statue. The hyper technical stand of the Departmental Representatives, therefore, does not merit our approval.

9. As regards lack of guidance from Hon'ble jurisdictional High Court, that can not be reason enough to disregard the decisions from non-jurisdictional High Courts.

Hon'ble Courts above, being a higher tier of the judicial hierarchy, bind the lower forums not only in the jurisdiction of respective High Courts, but unless, there is anything contrary thereto by the jurisdictional High Courts, other jurisdictions as well. There cannot be any dispute on the fundamental proposition that in the hierarchical judicial system that we have, better wisdom of the Court below has to yield to higher wisdom of the Court above, and therefore we have to humbly bow before the views expressed by Hon'ble Courts above. Such a High Court being a non-jurisdictional High Court does not alter the position as laid down by Hon'ble Bombay High Court in the matter of **CIT vs. Godavari Devi Saraf ([1978) 113 ITR 589 (Bom)]** and as analysed by a coordinate bench of this Tribunal in the case of **ACIT Vs Aurangabad Holiday Resorts Pvt Ltd [(2009) 118 ITD 1 (Pune)]**.

10. In view of the above discussions, as also bearing in mind entirety of the case, we deem it fit and proper to remit the matter to the file of the Assessing Officer for limited verification on the aspect as to whether recipient of payment has included the same in his computation of business income offered to tax, and, if found to be so, delete the disallowance in question. With these directions, the matter stands restored to the file of the Assessing Officer.

11. In the result, the appeal is allowed for the statistical purposes in the terms indicated above. Pronounced in the open court today on the 24th day of June, 2016.

Sd/-
C M Garg
(Judicial Member)

Sd/-
Pramod Kumar
(Accountant Member)

Dated: 24th day of June, 2016.

Copies to: *(1)* *The appellant* *(2)* *The respondent*
(3) *Commissioner* *(4)* *CIT(A)*
(5) *Departmental Representative* *(6)* *Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Raipur bench, Raipur