

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **INCOME TAX APPEAL No. 603/2018**

Reserved on : 28th August, 2018
Date of decision: 17th January, 2019

COMMISSIONER OF INCOME TAX Appellant
Through Mr. Ashok K. Manchanda, Sr. Standing
Counsel.

versus

BHANOT CONSTRUCTION & HOUSING LIMITED.. Respondent
Through Nemo.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J.:

Present appeal by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act', for short) assails the order dated 16th November, 2017 passed by the Income Tax Appellate Tribunal ('Tribunal', for short) in the case of Bhanot Construction and Housing Limited ('respondent-assessee', for short).

2. The appeal relates to Assessment Year 2011-12. During the year, respondent-assessee was engaged in business of civil construction, real estate, sale-purchase and infrastructure development. The issue raised pertains to disallowance under Section 40(a)(ia) of the Act for failure to deposit tax deducted at source of Rs. 34,00,400/- on or before due date of

filing of the income tax return. Accordingly expenditure of Rs.17,00,20,000/- paid by the respondent-assessee to M/s Arch Infrastructure Projects Nirman Private Limited was disallowed and declared income was enhanced from Rs.1,35,11,330/- to Rs.18,35,31,330/- vide assessment order dated 7th March, 2014.

3. The addition was deleted by Commissioner of Income Tax (Appeals), which deletion has been affirmed by the Tribunal. The reasoning given by the Tribunal in the impugned order while dismissing the appeal of the Revenue reads as under:-

“We have heard the Ld. DR and perused the relevant records, especially the impugned order. We find that TDS deducted by the assessee for Rs.34,00,400/- on account of payment of Rs.17,00,20,000/- to M/s Arch Infra Projects Nirman Private Ltd. was deposited in the government account on 03.10.2011, which in case of the assessee was beyond the due date of filing of Return of Income for A.Y. 2011-12, but then the rigor of the Act for disallowance of payment in such cases as mandated u/s. 40(a)(ia) have been softened in terms of first proviso to section 201 of the I.T. Act (with effect from 01.07.2012) read with second proviso to section 40(a)(ia) (with effect from 01.04.2013). We further note that these amendments are strictly speaking not relatable to assessment year 2011-12, to which the case of the assessee pertains, but then considering the fact that it is a beneficial legislation, the above provisions should in the interest of justice be considered as being declarative and curative in nature and consequently be treated as having retrospective effect from 01.04.2005 which is the date from which sub clause (ia) of section 40(a) was inserted by Finance act, 2004. In fact by treating the above legislation as declaratory and therefore retrospective, it is the intention of the legislature which is being furthered

and that the same would not run counter to the spirit of the enactment. In this connection, reliance was placed before the Ld. CIT(A) on the decision of Hon'ble ITAT in *Rajeev Kumar Agarwal vs. ACIT ITA No.337/Agra/2013* dated 29.05.2014. Now, as in the facts of this case it has already been confirmed through the A.O. of the recipient of payment i.e. M/s Arch Infra Projects Nirman Private Ltd. that they have accounted for the receipts from the assessee for Rs.17,00,20,000/- in their return of income for A.Y. 2011-12, which have been filed on 30.09.2011 and on which taxes have been paid, as per the copy of acknowledgment. Further, even the assessee has filed the certificate as required under the first proviso to section 201. Considering all the above discussion in totality the addition made for Rs.17,00,20,000/- was rightly deleted by the Ld. CIT(A), which does not need any interference on our part, hence, we uphold the action of the Ld. CIT(A) and reject the ground raised by the Revenue.”

4. We find that the aforesaid reasoning is correct and in accord with the ratio and decision in ***Commissioner of Income Tax-XIII versus Naresh Kumar***, (2014) 362 ITR 256 (Del.) holding that insertion of the words- “has not been paid on or before the due date specified in subsection (1) to Section 139” to Section 40(a)(ia) vide Finance Act, 2010 with effect from 1st April, 2010 should be given retrospective effect for varied reasons, including the grounds mentioned in paragraphs 14, 15, 16 and 17, which read:-

“14. Provisions relating to deduction of tax at source are important as this ensures that tax so deducted gets deposited with the Government and non-taxpayers/filers can be identified. The deductee do not suffer and are not deprived of credit of deduction made from their income. Section 40(a)(ia) is a provision incorporated with the said objective and purpose in mind. It is not basically a penal provision as when the TDS is deposited, the amount on

which deduction was made is allowed as an expenditure incurred in previous year in which the payment of TDS is made. Thus, it results in shifting of the year in which the expenditure can be claimed, even if payment has been made to the recipient and is to be allowed as expenditure in another year. Principle of matching i.e. matching of receipts with expenditure to the extent indicated in Section 40(a)(ia), therefore, gets affected. The provision can work harshly and may be very stringent in some cases as is apparent from these facts stated in the case of *Naresh Kumar*. Strict compliance of Section 40(1)(ia) may be justified keeping in view the legislative object and purpose behind the provision but a provision of such nature should not be allowed to be converted into an iron rod provision which metes out stern punishment and results in malevolent results, disproportionate to the offending act and aim of the legislation. Legislative purpose and the object is to ensure payment and deposit of TDS with the Government. TDS results in collection of tax. Legislature can and do experiment and intervene from time to time when they feel and notice that the existing provision is causing and creating unintended and excessive hardships to citizens and subjects or have resulted in great inconvenience and uncomfortable results. Obedience to law is mandatory and has to be enforced but the magnitude of punishment must not be disproportionate by what is required and necessary. The consequences and the injury caused, if disproportionate do and can result in amendments which have the effect of streamlining and correcting anomalies. The amendments made in 2010 were a step in the said direction and this aspect has to be kept in mind when we examine and consider whether the amendment should be given retrospective effect or not.

15. Question whether the amendment is retrospective or prospective is vexed and rigid rule can be applied universally. Various rules of interpretation have developed in order to determine whether or not, an

amendment is retrospective or prospective. Fiscal statutes imposing liabilities are governed by normal presumption that they are not retrospective. The cardinal rule is that the law to be applied, is that which is in force on the first day of the assessment year, unless otherwise mandated expressly or provided by necessary implication. The aforesaid dictum is based upon the principle that a new provision creating a liability or an obligation, affecting or taking away vested rights or attaching new disability is presumed to be prospective. However, it is accepted that Legislatures have plenary power to make retrospective amendments, subject to Constitutional restrictions.

16. Based upon the aforesaid broad dictum, Judges and jurists have drawn distinction between procedural and substantive provisions. Substantive provisions deal with rights and the same are fundamental, while procedural law is concerned with the legal process involving actions and remedies. Amendments to substantive law are treated as prospective, while amendments to procedural law are treated as retrospective. This distinction itself is not free from difficulties as right to appeal has been held to be a substantive law, but law of limitation is regarded as procedural. There is an interplay and interconnect between what can be regarded as substantive and procedural law [see *Commissioner of Income Tax v. Shrawan Kumar Swarup & Sons*, (1998) 232 ITR 123 (SC)].

17. There are decisions, which hold that process of litigation or enforcement of law is procedural. Similarly, machinery provision for collection of tax, rather than tax itself is procedural. Read in this context, it can be strongly argued that Section 40(a)(ia) at least to the extent of the amendment is procedural as by enacting Section 40(a)(ia) the Legislature did not want to impose a new tax but wanted to ensure collection of TDS and the amendments made streamline and remedy the anomalies noticed in the said procedure by allowing deduction in the year when the expenditure is incurred provided TDS is

paid before the due date for filing of the return. Remedial statutes are normally not retrospective, on the ground that they may affect vested rights. But these statutes are construed liberally when justified and rule against retrospectivity may be applied with less resistance [See *Bharat Singh v. Management of New Delhi Tuberculosis Centre*, (1986) 2 SCC 614 and *Workmen of Messrs Firestone Tyre & Rubber Company of India (P) Ltd. v. Management*, AIR 1973 SC 1227].”

Other paragraphs of the said judgment are equally relevant, but to avoid prolixity are not being reproduced.

5. Ratio expressed by this Court in the case of ***Naresh Kumar*** (supra) has been accepted as correct by the Supreme Court in Civil Appeal Nos. 4339-4340/2018, ***Commissioner of Income Tax Kolkata XII versus M/s Calcutta Export Company*** and other cases decided on 24th April, 2018. This judgment refers to the decision in ***Allied Motors (P) Limited versus Commissioner of Income Tax, Delhi*** (1997) 224 ITR 677 (SC) and other cases. In ***Calcutta Export Company*** (supra), it has been held:-

“25) The controversy surrounding the above amendment was whether the amendment being curative in nature should be applied retrospectively i.e., from the date of insertion of the provisions of Section 40(a)(ia) or to be applicable from the date of enforcement.

26) TDS results in collection of tax and the deductor discharges dual responsibility of collection of tax and its deposition to the government. Strict compliance of Section 40(a)(ia) may be justified keeping in view the legislative object and purpose behind the provision but a provision of such nature, the purpose of which is to ensure tax compliance and not to punish the tax payer, should not be allowed to be converted into an iron rod provision which

metes out stern punishment and results in malevolent results, disproportionate to the offending act and aim of the legislation. Legislature can and do experiment and intervene from time to time when they feel and notice that the existing provision is causing and creating unintended and excessive hardships to citizens and subject or have resulted in great inconvenience and uncomfortable results. Obedience to law is mandatory and has to be enforced but the magnitude of punishment must not be disproportionate by what is required and necessary. The consequences and the injury caused, if disproportionate do and can result in amendments which have the effect of streamlining and correcting anomalies. As discussed above, the amendments made in 2008 and 2010 were steps in the said direction only. Legislative purpose and the object of the said amendments were to ensure payment and deposit of TDS with the Government.

27) A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the Section, is required to be read into the Section to give the Section a reasonable interpretation and requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the Section as a whole.

28) The purpose of the amendment made by the Finance Act, 2010 is to solve the anomalies that the insertion of section 40(a)(ia) was causing to the bona fide tax payer. The amendment, even if not given operation retrospectively, may not materially be of consequence to the Revenue when the tax rates are stable and uniform or in cases of big assessees having substantial turnover and equally huge expenses and necessary cushion to absorb the effect. However, marginal and medium taxpayers, who work at low gross product rate and when expenditure which becomes subject matter of an order under Section 40(a)(ia) is substantial, can suffer severe adverse consequences if the amendment made in 2010 is not given retrospective operation i.e., from the date of substitution of the provision.

Transferring or shifting expenses to a subsequent year, in such cases, will not wipe off the adverse effect and the financial stress. Such could not be the intention of the legislature. Hence, the amendment made by the Finance Act, 2010 being curative in nature required to be given retrospective operation i.e., from the date of insertion of the said provision.”

6. The facts of the present case are undisputed and not challenged by the Revenue. The respondent-assessee had filed documents in evidence on which remand report was obtained to show that M/s Arch Infrastructure Projects Nirman Private Limited in their return of income filed under Section 139 for the Assessment Year 2011-12 had included payment/receipts of Rs.17,00,20,000/- in their total income and had paid taxes thereon. The said position was affirmed and accepted after reluctance by the Assessing Officer before the Commissioner of Income Tax (Appeals).

7. Second proviso to Section 40(a)(ia) of the Act introduced by Finance Act, 2012 reads as under:-

“Provided further that where an assessee 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 assessee 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.”

8. Contention of the Revenue is that the second proviso to Section 40(a)(ia) of the Act has been made applicable with effect from 1st April, 2013 and is not retrospective.

Aforesaid proviso was examined and interpreted by the Delhi High Court in decision dated 26th August, 2015, ITA Nos.160-161/2015, ***Commissioner of Income Tax-1 versus Ansal Land Mark Township (P) Limited*** and it was held as under:-

“11. 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.

12. Relevant to the case in hand, what is common to both the provisos to Section 40 (a) (ia) and Section 210 (1) of the Act is that 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.

13. 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 deinceivize 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. Deinceivizing 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 assesseees 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.”

9. The aforesaid quotation also refers to amendment made by enacting first proviso to Section 201(1) of the Act that was inserted with effect from 1st July, 2012. The judgment in ***Ansal Landmark Township (P) Limited*** (supra) was referred to and noticed by the Supreme Court in their decision in the case of ***M/s Calcutta Export Company***(supra).

10. There is additional factum, which must be noticed and was referred to by the Commissioner of Income Tax(Appeals) in his order. Last date for filing of return for the Assessment Year 2011-12 was 30th September, 2011, which was Friday and a bank holiday. Banks were also closed on 1st and 2nd October being Saturday and Sunday. 2nd October was also a national holiday. On 3rd October, 2010 respondent-assessee had deposited tax at source amounting to Rs.34,00,400/- deductible on Rs.17,00,20,000/-. Respondent-assessee had also paid interest for the delay in deposit of TDS of two days. This is also not denied and disputed. In these circumstances, the Revenue should have exercised its discretion and accepted the order of the Tribunal given the peculiar facts of the present case for every infraction of provision, when there is substantive compliance, need not be made a subject matter of challenge before the High Court. At best the disallowance of expenditure under Section 40(1)(a) in this year would have been allowed in the next assessment year.

11. In view of the aforesaid position, as the issue is already covered against the Revenue by decision of this Court in ***Ansal Landmark Township (P) Limited*** (supra), no substantial question of law arises for consideration. The appeal is dismissed, without any order as to costs.

(SANJIV KHANNA)
JUDGE

(CHANDER SHEKHAR)
JUDGE

JANUARY 17th, 2019
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