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

+ INCOME TAX APPEAL NO. 65/2013

Date of decision: 1st July, 2013

COMMISSIONER OF INCOME TAX -XIII

..... Appellant

Through Mr. N.P. Sahni, Sr. Standing
Counsel.

versus

RAJINDER KUMAR

..... Respondent

Through Mr. M.P. Devanath & Mr. R.
Ramachandran, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J. (ORAL):

Having heard learned counsel for the parties, we frame the following substantial question of law:

“Whether the Income Tax Appellate Tribunal was right in deleting addition of Rs.78,51,800/- under Section 40(a)(ia) of the Income Tax Act, 1961?”

2. With the consent of the counsel for the parties, we have heard arguments and proceed to dictate our decision on the aforesaid question.



3. The respondent-assessee is an individual and an architect in a professional profession. It is an accepted position and it is recorded and noted in the assessment order itself that the assessee is following cash system of accounting.

4. The assessment year involved is 2007-2008.

5. The Assessing Officer referred to the TDS payable account for professional payments as on 31st March, 2007 and noticed that an amount of Rs.8,52,034/- had not been paid by 31st March, 2007. The assessee was asked to explain why disallowance should not be made under Section 40(a)(ia) as amended by Finance Act, 2008 with retrospective effect from 1st April, 2005. The assessee filed written submissions that they had not claimed any expense on accrual basis and were following cash system of accounting. However, for better control and record maintenance, they were maintaining a memorandum in the books. This memorandum was of no consequence as the assessee was claiming expenses on cash system and there were no sundry creditors or liabilities at the end of the year. In the month of February, 2007, Rs.8,33,064/- was shown in the TDS account on account of professional charges amounting to Rs.1,48,49,500/-. Rs.69,92,000/- was paid in the month of February, 2007 and TDS of Rs.3,92,221/- thereon was deposited on 7th March, 2007. The balance amount of Rs.78,51,800/- was paid/released in the month of March,



2007 and TDS was deducted and was paid on the said amount before the due date in the month of April, 2007. Deduction, therefore, was due and made in the month of March, 2007 and the TDS was deposited in the Government account in April, 2007, i.e., within the stipulated time.

6. The Assessing Officer after noticing the submission did not deal with it but observed that there was violation of Section 40(a)(ia) as TDS should have been paid on or before 31st March, 2007 and as expenses of Rs.78,51,800/- had been debited to the professional charges account in February, 2007, i.e., prior to March, 2007.

7. The Commissioner of Income Tax (Appeals) upheld the said addition under Section 40(a)(ia) observing that Section 194J required deduction of tax at source either at the time of payment or at the time of credit of such sum to the account of the payee, whichever is earlier. It did not make any difference whether the assessee was following cash system or mercantile system. Reference was made to Explanation (c) to Section 194J which stipulates that credit to suspense account or account by any other name in the books of accounts required deduction of TDS.

8. On further appeal by the respondent-assessee, ITAT by their order dated 1st August, 2012 has deleted the said addition relying upon decision dated 23rd November, 2011 of the Calcutta High Court in ITA



No. 302/2011 GA No. 3200/2011, **Commissioner of Income Tax versus Virgin Creations**. In the said decision, it has been held that the proviso to Section 40(a)(ia) of the Act amended by Finance Act, 2010 has retrospective effect.

9. Learned counsel for the appellant submits that the decision of the Calcutta High Court in the case of **Virgin Creations** (supra) should not be applied and the ratio laid down in the said decision is debatable. Amendments were made to the proviso to Section 40(a)(ia) of the Act by Finance Act, 2010 and these are not retrospective but applicable to and from assessment year 2010-11 onwards. He has referred to Full Bench decision of the tribunal in **Bharati Shipyard Limited versus Deputy Commissioner of Income Tax**, (2011) 11 ITR Tribunal 599 in support. Reference is also made to the decision of the Bombay High Court in **Commissioner of Income Tax versus Shyam Narayan and Brothers**, (2012) 349 ITR 145.

10. Respondent assessee, on the other hand, relies upon the decision of the Calcutta High Court in **Virgin Creations** (supra) and reference is also made to the decision of the Supreme Court in **Allied Motors (P) Limited versus Commissioner of Income Tax**, (1997) 224 ITR 677 and **Commissioner of Income Tax, Bombay and Others versus Podar Cement Private Limited and Others**, (1997) 5 SCC 482.

11. At the outset, we notice and record that the decision of the



Bombay High Court in ***Shyam Narayan and Brothers*** (supra) does not lay down or propound any ratio applicable to the question of law raised in the present case. The said decision does not examine or affirm the ratio by the Full Bench decision of the tribunal in ***Bharati Shipyard Limited*** (supra). Bombay High Court records that the earlier decision of the tribunal in the case of ***Bansal Parivahan (India) Private Limited versus ITO***, (2011) 9 ITR Tribunal 565 stands overruled by ***Bharati Shipyard Limited*** (supra), which is a factual assertion. It did not examine on merits the ratio and reasoning of the tribunal in ***Bharati Shipyard Limited*** (supra) and/or affirm or disapprove the same. The order of the tribunal in the case of ***Shyam Narayan and Brothers*** (supra) was set aside for re-examination as the tribunal had followed the decision in the case of ***Bansal Parivahan (India) Private Limited*** (supra) which stood overruled by the Full Bench. Thus, the said decision does not deal with the legal question raised before us.

12. The decision of the Calcutta High Court in ***Virgin Creations*** (supra) is a short one and is as under:-

“The Court: We have heard Mr.Nizamuddin and gone through the impugned judgment and order. We have also examined the point formulated for which the present appeal is sought to be admitted. It is argued by Mr.Nizamuddin that this court needs to take decision as to whether section 40A(ia) is having retrospective operation or not.

The learned Tribunal on fact found that the



assessee had deducted tax at source from the paid charges between the period April 1, 2005 and April 28, 2006 and the same were paid by the assessee in July and August 2006, i.e., well before the due date of filing of the return of income for the year under consideration. This factual position was undisputed. Moreover, the Supreme Court, as has been recorded by the learned Tribunal, in the case of Allied Motors Pvt. Ltd. And also in the case of Alom Extrusions Ltd., has already decided that the aforesaid provision has retrospective application. Again, in the case reported in 82 ITR 570, the Supreme Court held that the provision, which has inserted the remedy to make the provision workable, requires to be treated with retrospective operation so that reasonable deduction can be given to the section as well. In view of the authoritative pronouncement of the Supreme Court, this court cannot decide otherwise. Hence we dismiss the appeal without any order as to costs.”

13. Section 40(a)(ia) of the Act was introduced with effect from 1st April, 2005 by Finance (No. 2), 2004 Bill. Explaining the rationale behind insertion of the said Section, the Memorandum elucidated:-

“With a view to augment compliance of TDS provisions, it is proposed to extend the provisions of section 40(a)(i) to payments of interest, commission or brokerage, fees for professional services or fees for technical services to residents, and payments to a resident contractor or sub-contractor for carrying out any work (including supply of labour for carrying out any work), on which tax has not been deducted or after deduction, has not been paid before the expiry of the time prescribed under sub-section (1) of section 200 and in accordance with the other provisions of Chapter XVII-B. It is also proposed to provide that where in respect of payment of any sum, tax has been deducted under Chapter XVII-B



or paid in any subsequent year, the sum of payment shall be allowed in computing the income of the previous year in which such tax has been paid.

The proposed amendment will take effect from the 1st day of April, 2005 and will, accordingly, apply in relation to the assessment year 2005-06 and subsequent years. (clause 11).”
(emphasis supplied)

14. Thereafter, by Finance Act, 2008 an amendment was made to Section 40(a)(ia) with retrospective effect from 1st April, 2005.

Section 40(a)(ia) as amended by Finance Act, 2008 was as under:

“40. Notwithstanding anything to the contrary in Sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head “profit and gains of business or profession”...

(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resi-dent, or amounts payable to a contactor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been paid,-

(A) in a case where the tax was deductible and was so deducted during the last month of the previous year, on or before the due date specified in sub-section (1) of section 139; or

(B) in any other case, on or before the last day of the previous year;

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted-



(A) during the last month of the previous year but paid after the said due date; or

(B) during any other month of the previous year but paid after the end of the said previous year,

such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.”

(emphasis supplied)

15. Section 40(a)(ia) was further amended by Finance Act, 2010 with effect from 1st April, 2010 and the amended provision now reads as under:

“(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resi-dent, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or; after deduction, has not been paid on or before the due date specified in sub-section (1) of Section 139:

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deducted in computing the income of the previous year in which such tax has been paid.”

(emphasis supplied)

16. The note on clauses and the memorandum explaining the amendments to Section 40(a)(ia) reproduced in (2010) 321 ITR Statutes 79 reads:



“Notes on Clauses:

Clause 12 of the Bill seeks to amend section 40 of the Income-tax Act relating to amounts not deductible.

Under the existing provisions contained in sub-clause (ia) of clause (a) of the aforesaid section, non-deduction of tax or non-payment of tax after deduction on payment of any sum by way of interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident or amounts payable to a contractor or sub-contractor, being resident, results in the disallowance of the said sum, in the computation of income of the payer, on which tax is required to be deducted under Chapter XVII-B.

It is proposed to amend sub-clause (ia) of clause (a) of the aforesaid section to provide that disallowance under the said sub-clause will be attracted, if, after deduction of tax during the previous year, the same has not been paid on or before the due date of filing of return of income specified in sub-section (1) of section 139.

The proviso to the said sub-clause provides that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the last month of the previous year but paid after the due date of filing of return or deducted during any other month of the previous year but paid after the end of the said previous year, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

This amendment will take effect retrospectively from 1st April, 2010, and will, accordingly, apply in relation to the assessment year 2010-11 and subsequent years.”

17. We have noticed the facts of the present case. It is an accepted



and admitted position that the assessee was following cash system a not mercantile system of accountancy. Neither the Assessing Officer nor the CIT (Appeals) have disputed the said factual position. The assessment order itself specifically records that the assessee was following cash system. It is not disputed in the assessment order or in the first appellate order that the assessee had paid a sum of Rs.78,51,800/- in the month of March, 2007 and had accordingly deducted TDS of Rs.4,40,843/- and the same was deposited within the due date from the date of said deduction in the month of April, 2007. Prior to that, the assessee had deducted TDS of Rs.3,92,221/- on professional charges of Rs.69,92,700/- in February, 2007. TDS on the said amount which was deducted in the month of February was deposited on 7th March, 2007, within the due date.

18. The aforesaid facts show that the assessee had made payment of Rs.78,51,800/- in the month of March, 2007 only and not in the month of February, 2007. The assessee has throughout stated and it is not disputed either in the assessment order or in the order passed by the first appellate authority that they were for convenience maintaining a Memorandum relating to pending bills but this Memorandum did not get reflected and was not shown in the annual accounts as sundry creditors or liabilities, which were payable. It was not booked as an expense or liability. The assessment order nowhere records or



specifically holds that the account of the payee was credited with Rs.78,51,800/- or with Rs.1,48,49,500/-. The first appellate order again does not specifically state so. In such circumstances, we feel a pragmatic and a practical approach has to be adopted. The respondent assessee had deducted tax at source when the payment was made in the month of March, 2007 and thereafter deposited the payment in the month of April, 2007. It is an accepted position that in case tax was deductible in the month of March, 2007 the due date of payment was in April, 2007 and before due date payment, Rs.4,40,843/- deducted as TDS in the month of March, 2007 was duly paid. It has to be accepted and it is logical that there would be some time gap between date of deduction of tax at source and when payment is deposited. Section 40(a)(ia) and the proviso as amended by Finance Act, 2008 with retrospective effect from 1st April, 2005 notices and acknowledges the said position and, therefore, clause (A) states that where tax “was” deductible and was so deducted during the last month of the previous year but stands paid before the due date specified under sub-section (1) to Section 139, deduction shall be allowed in the said year.

19. Proviso applies when tax was deducted in a subsequent year; when TDS has been deducted during any month of the previous year but paid after the end of the previous year; or TDS was deducted during the last month of the previous year but paid after the said due



date. When proviso applies deduction is to be allowed in the year which the payment is made. Clause A of the proviso has to be read with clause A of the main Section and not in isolation. Clause A of the main Section and clause A of the proviso will apply in different factual matrix or situations. Clause A of the main Section applies when the tax was deductible and was so deducted during the last month of the assessment year and was paid on or before the due date for filing of the return under Section 139(1). The proviso applies when tax has been deducted in any subsequent year or has been deducted as per clause A thereto during last month of the previous year, but has been paid after the said due date. The expression “said due date” cannot mean the date on which TDS as per the Chapter XVIII B should have been paid. It refers to the due date for filing of the return under Section 139(1) of the Act. Any other interpretation would lead to difficulties, incongruities and conflict between clause A of the main Section and clause A of the proviso. Both would be applicable to the same factual matrix/situation with contradictory stipulations or consequences. Under clause A of the main Section, the TDS deductible and so deducted during the last month should be paid on or before the due date for filing of the return under Section 139(1) but as per the Revenue under the proviso clause A, TDS should be deducted during the last month of the previous year but paid before the “said due date”



i.e. the date by which TDS is payable under the Act. The interpretation if accepted means that clause A of the proviso and clause A of the main Section would become irreconcilable and mutually contradictory. Clause A of the proviso does not postulate the obvious but seeks to relax the rigor when tax deducted stands paid. This is the reason why the proviso in clause A does not use the expression “tax was deductible and was so deducted” but uses the expression “tax has been deducted during the last month of the previous year”. The expression “said due date” in the clause A to the proviso does not mean and refer to the date on which tax should have been deposited without interest or penalty under Chapter XVII-B. This is obvious. Clause A to the proviso applies when the deduction is post the period specified by law but in the last month of a previous year. In such cases under the proviso clause A, TDS should be paid before “the said due date” i.e. the date on which return under Section 139(1) of the Act is to be filed.

20. Therefore, when the respondent assessee deducted TDS in March 2007, i.e. last month of the previous year and paid the same before in April 2007 before the said due date i.e. the date on which return of Income U/s 139(1) of the Act is to be filed. Section 40(a)(ia) could not have been invoked.

21. Reference to Explanation clause (c) which states that credit to



suspense account or any other account in book would be deemed to credit in account of the payee is inappropriate. The said clause in the explanation is meant to curtail possibility or chance of non-deduction if an assessee credits a third account/head, instead of crediting the account of the payee to await deduction of TDS. It would not be appropriate to apply clause (c) of Explanation to section 194J to factual matrix of the current case. The amount was credited to the account of the payee, payment was made and TDS was deducted in March, 2007 and paid/deposited in April, 2007.

22. Now, we refer to the amendments which have been made by the Finance Act, 2010 and the effect thereof. We have already quoted the decision of the Calcutta High Court in ***Virgin Creations*** (supra). The said decision refers to the earlier decision of the Supreme Court in the case of ***Allied Motors (P) Limited*** (supra) and ***Commissioner of Income Tax versus Alom Extrusions Limited***, (2009) 319 ITR 306 (SC). In the case of ***Allied Motors (P) Limited*** (supra), the Supreme Court was examining the first proviso to Section 43B and whether it was retrospective. Section 43B was inserted in the Act with effect from 1st April 1984 for curbing claims of taxpayers who did not discharge or pay statutory liabilities but claimed deductions on the ground that the statutory liability had accrued. Section 43B states that the statutory liability would be allowed as a deduction or as an expense



in the year in which the payment was made and would not be allowed, even in cases of mercantile system of accountancy, in the year of accrual. It was noticed that in some cases hardship would be caused to assessees, who paid the statutory dues within the prescribed period though the payments so made would not fall within the relevant previous year. Accordingly, a proviso was added by Finance Act, 1987 applicable with effect from 1st April, 1988. The proviso stipulated that when statutory dues covered by Section 43B were paid on or before the due date for furnishing of the return under Section 139(1), the deduction/expense, equal to the amount paid would be allowed. The Supreme Court noticed the purpose behind the proviso and the remedial nature of the insertion made. Of course, the Supreme Court also referred to Explanation 2 which was inserted by Finance Act, 1989 which was made retrospective and was to take effect from 1st April, 1984. Highlighting the object behind Section 43B, it was observed that the proviso makes the provision workable, gives it a reasonable interpretation. It was elucidated:

“12. In the case of Goodyear India Ltd. V. State of Haryana this Court said that the rule of reasonable construction must be applied while construing a statute. Literal construction should be avoided if it defeats the manifest object and purpose of the Act.

13. Therefore, in the well-known words of Judge Learned Hand, one cannot make a fortress



out of the dictionary; and should remember that statutes have some purpose and object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning. In the case of *R.B. Judha Mal Kuthiala v. CIT*, this Court said that one should apply the rule of reasonable interpretation. 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 and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole.

14. This view has been accepted by a number of High Courts. In the case of *CIT v. Chandulal Venichand*, the Gujarat High Court has held that the first proviso to Section 43-B is retrospective and sales tax for the last quarter paid before the filing of the return for the assessment year is deductible. This decision deals with Assessment Year 1985-85. The Calcutta High Court in the case of *CIT v. Sri Jagannath Steel Corpn.* has taken a similar view holding that the statutory liability for sales tax actually discharged after the expiry of the accounting year in compliance with the relevant statute is entitled to deduction under Section 43-B. The High Court has held the amendment to be clarificatory and, therefore, retrospective. The Gujarat High court in the above case held the amendment to be curative and explanatory and hence retrospective. The Patna High court has also held the amendment inserting the first proviso to be explanatory in the case of *Jamshedpur Motor Accessories Stores v. Union of India*. The special leave petition from this decision of the Patna High Court was dismissed. The view of the Delhi High Court, therefore, that the first proviso to Section 43-B will be available only prospectively does not appear to be correct. As observed by G.P. Singh in his *Principles of*



Statutory Interpretation, 4th Edn. At p. 291: “It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended.” In fact the amendment would not serve its object in such a situation unless it is construed as retrospective. The view, therefore, taken by the Delhi High Court cannot be sustained.”

23. Section 43B deals with statutory dues and stipulates that the year in which the payment is made the same would be allowed as a deduction even if the assessee is following the mercantile system of accountancy. The proviso, however, stipulates that deduction would be allowed where the statutory dues covered by Section 43B stand paid on or before the due date of filing of return of income. Section 40(a)(ia) is applicable to cases where an assessee is required to deduct tax at source and fails to deduct or does not make payment of the TDS before the due date, in such cases, notwithstanding Sections 30 to 38 of the Act, deduction is to be allowed as an expenditure in the year of payment unless a case is covered under the exceptions carved out. The amended proviso as inserted by Finance Act, 2010 states where an assessee has made payment of the TDS on or before the due date of filing of the return under Section 139(1), the sum shall be allowed as an expense in computing the income of the previous year. The two provisions are akin and the provisos to Sections 40(a)(ia) and 43B are to the same effect and for the same purpose.



24. In ***Podar Cement Private Limited*** (supra), the Supreme Court considered whether term ‘owner’ would include unregistered owners who had paid sale consideration and were covered by Section 53A of the Transfer of Property Act. The contention of the assesseees was that the amendments made to the definition of term ‘owner’ by Finance Bill, 1987 should be given retrospective effect. It was held that the amendments were retrospective in nature as they rationalise and clear the existing ambiguities and doubts. Reference was made to Crawford: ‘Statutory Construction’ and ‘the principle of Declaratory Statutes’, Francis Bennion: ‘Statutory Interpretation’, Justice G.P. Singh’s ‘Principles of Statutory Interpretation’, it was observed that sometimes amendments are made to supply an obvious omission or to clear up doubts as to the meaning of the previous provision. The issue was accordingly decided holding that in such cases the amendments were retrospective though it was noticed that as per Transfer of Property Act, Registration Act, etc. a legal owner must have a registered document.

25. In view of the aforesaid discussion in paras 18,19 and 20, it is apparent that the respondent assessee did not violate the unamended section 40(a)(ia) of the act. We have noted the ambiguity and referred their contention of Revenue and rejected the interpretation placed by them. The amended provisions are clear and free from any ambiguity



and doubt. They will help curtail litigation. The amended proviso clearly support view taken in paragraphs 17 – 20 that the expression “said due date” used in clause A of proviso to unamended section refers to time specified in Section 139(1) of the Act. The amended section 40(a)(ia) expands and further liberalises the statute when it stipulates that deductions made in the first eleven months of the previous year but paid before the due date of filing of the return, will constitute sufficient compliance.

26. Before we close, we must deal with another contention raised by the counsel for the Revenue to the effect that Finance Bill, 2010 increases the rate of interest from 12% to 18% for failure to deposit TDS in time. This increase in rate of interest, it is submitted, is directly connected and associated with the concession or benefit which was extended to the assessee by amending the proviso. We do not find any merit in the said contention. Even prior to the amendment made by Finance Bill, 2010, Section 40(a)(ia) had stipulated that in case where the tax was deductible and so deducted during the last month of the previous year but was paid on or before the due date specified in Section 139(1) of the Act, deduction/expenditure will be allowed in the previous year notwithstanding the main Section. The section as well as the proviso before the amendment in 2010 had ambiguities and doubts. The proviso as amended by Finance Act, 2008 with retrospective effect



from 1st April, 2005 was not free from interpretative difficulties a problems. This aspect is highlighted above. The intention behind Section 40(a)(ia) is to ensure that TDS is deducted and paid. The object of introduction of Section 40(a)(ia) is to ensure that TDS provisions are scrupulously implemented without default in order to augment recoveries. It is not to penalise an assessee when payment has been made within the time stated. Failure to deduct TDS or deposit TDS results in loss of revenue and may deprive the Government of the tax due and payable. The provision should be interpreted in a fair, just and equitable manner. It should not be interpreted in a manner which results in injustice and creates tax liabilities when TDS has been deposited/paid and the respondent who is following cash system of accountancy has made actual payment to the third party for services rendered. If the said object and purpose is kept in view, we do not think the Assessing Officer was justified in disallowing and in invoking Section 40(a)(ia) in the present case. The question of law is accordingly answered in negative, i.e., in favour of the respondent-assessee and against the Revenue. The appeal is accordingly disposed of. No costs.

SANJIV KHANNA, J.

SANJEEV SACHDEVA, J.

JULY 01, 2013/VKR