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

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\+ **ITA 160/2015**

COMMISSIONER OF INCOME TAX-1 ..... Appellant

Through: Mr. Kamal Sawhney,Senior Standing counsel with Mr. Raghvendra Singh, Junior Standing counsel and Mr. Shikhar Garg, Advocate

versus

ANSAL LAND MARK TOWNSHIP (P) LTD..... Respondent

Through: Mr. Arta Trana Panda, Advocate.

And

ITA 161/2015

COMMISSIONER OF INCOME TAX-1 ..... Appellant

Through: Mr. Kamal Sawhney, Senior Standing Counsel with Mr. Raghvendra Singh, Junior Standing counsel and Mr. Shikhar Garg, Advocate

versus

ANSAL LAND MARK TOWNSHIP (P) LTD..... Respondent

Through: Mr. Arta Trana Panda, Advocate.

CORAM:
HON'BLE DR. JUSTICE S.MURALIDHAR
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% 26.08.2015

CM APPL No. 3774 of 2015 in ITA No. 160 of 2015
CM APPL No. 3775 of 2015 in ITA No. 161 of 2015

1. Allowed, subject to all just exceptions.

2. The applications are disposed of.

ITA No. 160 of 2015 & ITA No. 161 of 2015

3. These two appeals by the Revenue under Section 260A of the Income Tax Act ('Act') are directed against the common order dated 21st July 2014 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 2972/Del/2012 and ITA No. 877/Del/2013 for the Assessment Years ('AYs') 2008-09 and 2009-10 respectively.

4. At the outset, it is pointed out by learned counsel for the Revenue that the questions (a) to (e) as projected by the Revenue in para 2 of the memorandum of appeal concerning ITAT's order deleting certain additions stand answered in favour of the Assessee by the order dated 2nd March 2015 in ITA No. 162 of 2015 ***(CIT v. Ansal Land Mark Township (P) Ltd.)*** concerning and earlier AY. Consequently, those questions for the present AYs also stand answered in favour of the Assessee and against the Revenue.

5. The other issue urged by the Revenue during the course of arguments pertains to the retrospectivity of the second proviso to Section 40(a) (ia) of Act which 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"

6.When it was pointed out to learned counsel for the Appellant that no question as such has been sought to be urged by the Revenue in the memorandum of appeal, learned counsel stated that an application has been filed to amend the memorandum of appeal to include such a question and that perhaps the said application is lying under objection.

7. Notwithstanding the above, the Court has heard learned counsel for the Revenue on the above issue as well.

8. It is seen that the issue in these AYs arises in the context of the disallowance by the Assessing Officer of the payment made by the Respondent Assessee to Ansal Properties and Infrastructure Ltd. ('APIL') which payment, according to the Revenue, ought to have been made only after deducting tax at source under Section 194J of the Act. Before the ITAT, it was urged by the Assessee that in view of the insertion of the second proviso to Section 40(a) (ia) of the Act, the payment made could not have been disallowed. Reliance was placed on the decision of the Agra Bench of ITAT in ITA No. 337/Agra/2013 (***Rajiv Kumar Agarwal v. ACIT***) in which it was held that the second proviso to Section 40 (a) (ia) of the Act is declaratory and curative in nature and should be given retrospective effect from 1st April 2005.

9. It is seen that the second proviso to Section 40(a) (ia) was inserted by the Finance Act 2012 with effect from 1st April 2013. The effect of the said proviso is to introduce a legal fiction where an Assessee fails to deduct tax in accordance with the provisions of Chapter XVII B. Where such Assessee is deemed not to be an assessee in default in terms of the first proviso to sub-Section (1) of Section 201 of the Act,

then, in such event, "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".

10. It is pointed out by learned counsel for the Revenue that the first proviso to Section 201 (1) of the Act was inserted with effect from 1st July 2012. The said proviso reads as under:

> "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-
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> (i) has furnished his return of income under section 139;
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> (ii) has taken into account such sum for computing income in such return of income; and
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> (iii) has paid the tax due on the income declared by him in such return of income;
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> And the person furnishes a certificate to this effect from an accountant in such form as may be prescribed.

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 the 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 deincentivize 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. Deincentivizing 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 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."

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.

15. In that view of the matter, the Court is unable to find any legal infirmity in the impugned order of the ITAT in adopting the ratio of the decision of the Agra Bench, ITAT in ***(Rajiv Kumar Agarwal v. ACIT)***.

16. No substantial question of law arises in the facts and circumstances of the present case. The appeal is dismissed.

S.MURALIDHAR, J

VIBHU BAKHRU, J

AUGUST 26, 2015
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