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

% *Judgement delivered on:24.01.2017*

\+ ITA 436/2016

PR COMMISSIONER OF INCOME TAX - 11

..... Appellant

Through: Mr. Zoheb Hossain, Advocate.

Versus

SHRI DINESH KUMAR MATHUR

..... Respondent

Through: Mr. Kapil Goel and Mr. Mukul Gupta, Advs.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

S. RAVINDRA BHAT (Oral):-

1. The question of law urged in this appeal is as follows:

> *"Did the Income Tax Tribunal (ITAT) fall into error in holding that it was open to the assessee to claim that payments made to a sister concern were not subject to IDS under Section 194 (C) in the circumstances of the case?"*

2. The assessee had, for the Assessment Year (A.Y.) 2008-09, *inter alia* shown expenditure to the tune of about Rs.3,19,66,460/- which was paid to M/s. Aakriti Creation Pvt. Ltd. In the course of regular assessments, the assessee explained that the expenditure was incurred towards reimbursements of the cost of raw materials

resourced by the payee which was a sister concern. The assessee is engaged in the business of manufacture and export of garments and accessories and M/s Aakriti Creation Pvt. Ltd. does fabric work. The A.O. disallowed the amount and added it back to the assessee's returns, bringing it to tax. The CIT(A) granted the relief to the assessee in view of the decision of the Tribunal in *Grandprix Fab (P) Ltd. v. CIT* (2010) 34 DTR 248**.** The ITAT confirmed that order.

3. Counsel for the Revenue urges that the text of Section 34(i)(ia) of the Act is clear that the payee has no choice but to deduct the amounts towards over payments highlighting that the deductor has the choice under Section 195(2) of the Act. The learned counsel submits that if the individual assessee is examined of any outstanding amount as to which part of any payment is income, the entire meaning of tax collection would be thrown into disarray. It was submitted that the ITAT failed to take note of the fact that the second proviso to Section 40(a)(ia) was introduced only w.e.f. 01.04.2013 by way of an amendment and that the grant of relief in the circumstances of the case virtually made the statute prospective. The learned counsel for the assessee relied upon the previous rulings of this Court particularly upon *Commissioner of Income Tax v. Dr. Jaideep Kumar Sharma,* ITA 95/2015, decided on 19.11.2015; *Commissioner of Income Tax v. Ansal Land Mark Township (P) Ltd.,* ITA 160/2015, decided on 26th August, 2015.

4. In *Ansal Land Mark Township (P) Ltd.* (supra), the Court elaborately considered the impact of Section 194C and its interpretation of Section 201 and 210 of the Act. Like in the *Ansal*

Land Mark Township (P) Ltd. (supra), here too the deductee, i.e., M/s Aakriti Creation Pvt. Ltd. has filed its returns which reflected the amounts claimed to be expenditure which were examined and after which the assessment orders were framed. The *Ansal Land Mark Township (P) Ltd.* (supra) had taken note of the Agra Bench of the ITAT decision in *Rajiv Kumar Agarwal v. ACIT, ITA No. 337/Agra/2013***.** The Agra Bench had stated as follows:

> *"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)(ai), 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 271C, and , section 40(a)(ai) does not add to the same. The provisions of Section 40(a)(ai), 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*

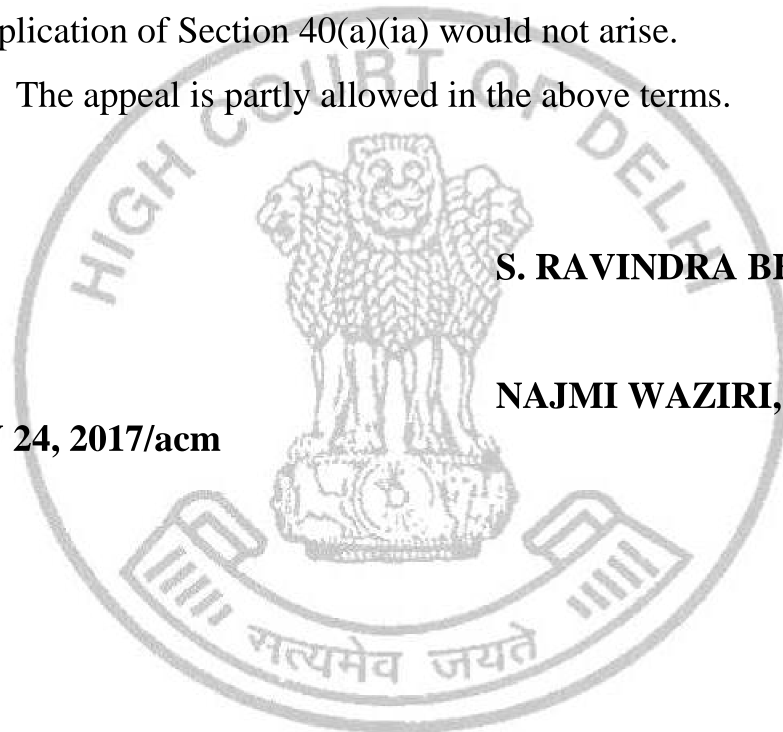
exchequer. Now that the legislature has been compassionate enough to cure these shortcomings of provision, and thus obviate the unintended hardships, such an amendment in law, in view of the well settled legal position to the effect that a curative amendment to avoid unintended consequences is to be 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 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."

5. In the present case too, the Court is of the opinion that since the amounts received by the payee, i.e., M/s Aakriti Creation Pvt. Ltd. were reported by it in the regular course of assessments, the disallowance of the entire amounts, under Section 40(a)(ia) of the Act in effect would render one payment which constitutes a transaction liable to income tax, twice over. Considering that Parliament remedied the law by amendment through insertion of the second proviso, in cases such as the present one, where the AO can have easy access to the returns of the payee, in the larger interest of the assessee and the Revenue, it would be appropriate that the A.O. examines the

figures with relation to the exact claim of payments toward the raw materials. The AO would examine, if necessary, the returns and relative documents pertaining to the payee M/s Aakriti Creation Pvt. Ltd.

6. With these observations, the matter is remanded for reconsideration; in the event the A.O. is satisfied that the claim towards the payment of Rs.3,19,66,460/- does not include any income component but in fact constitutes reimbursement, the question of application of Section 40(a)(ia) would not arise.

7. The appeal is partly allowed in the above terms.



S. RAVINDRA BHAT, J

NAJMI WAZIRI, J

JANUARY 24, 2017/acm