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

\+ ITA 195/2022

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

Through: Mr.Sanjay Kumar, senior standing counsel with Ms.Easha Kadian, Advocate.

versus

FUTURE FIRST INFO. SERVICES PVT. LTD. ..... Respondent

Through: Mr.Sumit Lalchandani, Advocate.

Date of Decision: 14th July, 2022

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMOHAN, J:

C.M.No.30681/2022

Exemption allowed, subject to all just exceptions.

Accordingly, the application stands disposed of.

ITA No.195/2022

1. Present Income Tax Appeal has been filed challenging the order dated 10th May, 2021 passed by the Income Tax Appellate Tribunal ('the ITAT') in ITA No.3838/Del./2017 for the Assessment Year 2009-10.

2. Learned counsel for the Appellant states that the ITAT has erred in deleting disallowance under Section 40a(ia) of the Income Tax Act, 1961 ('the Act') as assessee had done short deduction of tax in violation of

Section 197(1) of the Act.

3. He also states that the ITAT has erred in deleting the addition of Rs.1,03,53,150/- made by the assessing officer under Section 40A(2) of the Act in spite of the fact that assessee, during the course of assessment proceedings, failed to justify the service being rendered by the director Shri Sunil Baijal to the company for which he was earning such a huge amount of remuneration.

4. A perusal of the paper book reveals that the Commissioner of Income Tax (Appeals) while disposing of the appeal filed by the assessee had directed the Assessing Officer to verify whether copies of non-deduction of tax/deduction of tax at lower rate were filed by the assessee before passing the assessment order. The ITAT in the impugned order has recorded that the Assessing Officer after verifying the said tax deduction certificate had deleted the disallowance in order giving effect order.

5. Further, this Court is of the opinion that in cases of short deduction of TDS, disallowance under Section 40a(ia) of the Act cannot be made and the correct course of action would have been to invoke Section 201 of the Act. On similar facts, the Calcutta High Court in ***CIT vs SK Tekriwal [2012 SCC Online CAL 12147]*** dismissed the Revenue's appeal. The relevant para of the said judgement is reproduced herein below:

> *"We are satisfied that the order under challenge is a just order. The reasoning appearing at paragraph 6 of the judgment and/or order under challenge reads as follows:*
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> > *"In the present case before us the assessee has deducted tax u/s. 194C(2) of the Act being payments made to sub-contractors and it is not a case of non-deduction of tax or no deduction of tax as is the import of section 40a(ia) of the Act.*

But the revenue's contention is that the payments are in the nature of machinery hire charges falling under the head 'rent' and the previous provisions of section 194I of the Act are applicable. According to revenue, the assessee has deducted tax @ 1% u/s. 194C(2) of the Act as against the actual deduction to be made at 10% u/s. 194I of the Act, thereby lesser deduction of tax. The revenue has made out a case of lesser deduction of tax and that also under different head and accordingly disallowed the payments proportionately by invoking the provisions of section 40(a)(ia) of the Act. The Ld. CIT, DR also argued that there is no word like failure used in section 40(a)(ia) of the Act and it referred to only non-deduction of tax and disallowance of such payments. According to him, it does not refer to genuineness of the payment or otherwise but addition u/s. 40(a)(ia) can be made even though payments are genuine but tax is not deducted as required u/s.40(a)(ia) of the Act. We are of the view that the conditions laid down u/s.40(a)(ia) of the Act for making addition is that tax is deductible at source and such tax has not been deducted. If both the conditions are satisfied then such payment can be disallowed u/s. 40(a)(ia) of the Act but where tax is deducted by the assessee, even under bonafide wrong impression, under wrong provisions of TDS, the provisions of section 40(a)(ia) of the Act cannot be invoked. Here in the present case before us, the assessee has deducted tax u/s. 194C(2) of the Act and not u/s. 194I of the Act and there is no allegation that this TDS is not deposited with the Government account. We are of the view that the provisions of section 40(a)(ia) of the Act has two limbs one is where, inter alia, assessee has to deduct tax and the second where after deducting tax, inter alia, the assessee has to

> *pay into Government Account. There is nothing in the said section to treat, inter alia, the assessee as defaulter where there is a shortfall in deduction.* ***With regard to the shortfall, it cannot be assumed that there is a default as the deduction is not as required by or under the Act, but the facts is that this expression, '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'. This section 40(a)(ia) of the Act refers only to the duty to deduct tax and pay to government account. If there is any shortfall due to any difference of opinion as to the taxability of any item or the nature of payments falling under various TDS provisions, the assessee can be declared to be an assessee in default u/s. 201 of the Act and no disallowance can be made by invoking the provisions of section 40(a)(ia) of the Act."***
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> (emphasis supplied)

6. Also, both the CIT (A) and ITAT have given concurrent findings on facts in favour of the assessee on the issue of remuneration paid to the director Shri Sunil Baijal by observing that higher salary paid to the said director was accepted as remuneration by the assessing officer during the scrutiny assessment in the subsequent assessment year; and that the assessing officer had not brought any evidence/material for making disallowance under Section 40A(2)(b) of the Act. The ITAT also noted that the Assessing Officer, without any reason or material facts, had arbitrarily disallowed 50% of the remuneration. The ITAT further held that the Assessing Officer had not given cogent reasons to conclude that the

remuneration paid was not commensurate with the market value of the services rendered by the Managing Director.

7. Consequently, no substantial question of law arises in the present proceedings. Accordingly, the present appeal is dismissed.

MANMOHAN, J

MANMEET PRITAM SINGH ARORA, J

JULY 14, 2022
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