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

% *Date of decision: 02.11.2023*

\+ **ITA 599/2023**

PRINCIPAL COMMISIONER OF INCOME TAX -7 ..... Appellant

Through: Mr Aseem Chawla, Sr. Standing Counsel with Ms Pratishtha Chaudhary and Mr Aditya Gupta, Advocates.

versus

M/S SHIVAAI INDUSTRIES PVT. LTD ..... Respondent

Through: None.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MR JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

CM APPL. 56342/2023

1. Allowed, subject to just exceptions.

ITA 599/2023

2. This appeal concerns Assessment Year (AY) 2008-09.

3. *Via* the instant appeal the appellant/revenue seeks to assail the order dated 27.04.2023 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"].

4. The record shows that, insofar as the Tribunal was concerned, the impugned order, which came to be passed in favour of the

respondent/assessee, emanated out of a second round of litigation before it.

4.1 In the first round, the Tribunal had remanded the matter to the Assessing Officer (AO) *via* order dated 16.03.2018. The AO was directed by the Tribunal to verify whether the conditions provided in the proviso appended to Section 201(1) of the Income-tax Act, 1961 [in short, "the Act"] were fulfilled. This direction was issued concerning the fact that in the preceding AY i.e., AY 2007-08, a similar issue had arisen.

4.2 The record shows that no adverse finding was returned by the AO on whether the conditions prescribed in the first proviso to Section 201(1) of the Act stood fulfilled. For convenience, relevant observations made in this behalf by the Commissioner of Income Tax(Appeals) [CIT(A)], in the order dated 18.09.2020, are set forth hereafter:

> "***4.9*** *I have considered the submissions of the appellant and considering the above documents and favorable orders of Hon'ble ITAT, Delhi and High Court of Delhi in appellant's own case (supra),it is being held that the [sic…that the] observations/findings of the Assessing Officer in Para 6 to 8 of the assessment order were beyond the scope of powers of the Assessing Officer in the set aside proceedings, where specific directions were given by the Hon'ble ITAT, Delhi.* ***Further in absence of any adverse findings of the AO on the issue of compliance to the provisions of the section 201(1) by the DTC on the basis of documents submitted by the appellant, the addition made by the AO of Rs. 17,67,16,747/- u/s 40(a)(ia) of the Income Tax Act is [sic.. Act is] deleted and allow the grounds of appeal from 1 to 6.***"
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> [Emphasis is ours]

5. The record reveals that the AO,in the second round, on merits, in the AY in issue i.e., AY 2008-09, had made an addition amounting to Rs.17,67,16,747/- under Section 40(a)(ia) of the Act*via* the assessment order that was framed on 14.12.2018.In an appeal preferred by the respondent/assessee, the Commissioner of Income Tax (Appeals) [in short, "CIT(A)"] deleted the addition made by the AO following the decision of

the court in ***Commissioner of Income Tax v. Ansal Land Mark Township Pvt. Ltd.,***2015:DHC:6976-DB and of its predecessor in AY 2007-08.

6. It may also be relevant to note that the aforementioned amount that was added to the income of the respondent/assessee, i.e., Rs.17,67,16,747/-, were site rent payments made to the Delhi Transport Corporation (DTC) concerning advertisement space made available on bus shelters and times keeper booths.

7. It is not in dispute that, insofar as the earlier AY is concerned i.e., AY 2007-08, the respondent/assessee had succeeded, and the addition, made in a similar circumstance, was deleted by the Tribunal. This order of the Tribunal was, then, confirmed by this court *via* the order dated 21.05.2018 passed in ITA 612/2018, titled ***Pr. Commissioner of Income Tax Delhi - 8 v. M/s. Shivaai Industries Pvt. Ltd.***

7.1 While passing the order, the coordinate bench relied on judgments rendered in ***Commissioner of Income Tax v. Rajinder Kumar,*** (2013) TIOL 547 and ***Commissioner of Income Tax v. Ansal Land Mark Township Pvt. Ltd.***.

8. We are informed by Mr Aseem Chawla, learned senior standing counsel, who appears on behalf of the appellant/revenue, that the appeal preferred by the appellant/revenue with the Supreme Court against the order of the coordinate bench dated 21.05.2018, in ITA 612/2018, was admitted on 18.02.2019.

9. We are also informed that the appeal, preferred in the Supreme Court, against the judgment rendered in ***Commissioner of Income Tax v. Ansal Land Mark Township Pvt. Ltd.***, was dismissed as withdrawn due to low tax effect.

10. At the heart of the instant appeal is whether the second proviso to Section 40(a)(ia) should be given retrospective effect.

11. Although the appeal preferred qua ***Ansal Land Mark Township Pvt. Ltd.*** case was dismissed as withdrawn by the Supreme Court, on the ground of low tax effect, the rationale provided by the coordinate bench of this court finds resonance with us.

12. Before adverting to the ***Ansal Land Mark*** decision, it would be useful to extract the relevant provisions of law, beginning with the second proviso to Section 40(a)(ia):

> "*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 payee referred to in the said proviso***."

[Emphasis is ours]

12.1 It is required to be noted that the second proviso was inserted in the statute *via* the Finance Act, 2012, *albeit* with effect from 01.04.2013.

13. Likewise, it would also be relevant to refer to the first proviso to section 201(1):

> "***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 payee or on the sum credited to the account of a payee shall not be deemed to be an assessee in default in respect of such tax if such payee—***
>
> ***(i) has furnished his return of income under section 139;***
>
> ***(ii) has taken into account such sum for computing income in such***

return of income; and

(iii) has paid the tax due on the income declared by him in such return of income,

and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed."

[Emphasis is ours]

13.1 To be noted, the first proviso appended to Section 201(1) of the Act was inserted in the Act *via* Finance Act, 2012 with effect from 01.07.2012. A further amendment was made to the first proviso *via* Finance Act, 2019, with effect from 01.09.2019, wherein, the term 'resident' was replaced by the word 'payee' in the first proviso.

14. A plain perusal of the first proviso to Section 201 would show that as long as the conditions mandated therein are fulfilled by the payee, i.e., i) that Return of Income [ROI]under Section 139 was furnished; ii) the amount in issue was taken into account in computing income in the ROI; iii) that tax has been paid on the income declared by him in the ROI; and v) that a certificate is furnished to show that the above-mentioned conditions are fulfilled, an assessee shall not be deemed to be an 'assessee in default'.

15. The purpose of Section 40(a)(ia) of the Act is to disincentivize non-deduction of tax at source by disallowing, as deduction, the amount paid to the resident/payee. The second proviso appended to it, however, relaxes the rigour of the said provision by making its application dependent on the assessee being declared as 'assessee in default' under Section 201(1) of the Act.

16. It is not in dispute that, in this case, no adverse findings were returned by the AO concerning fulfilment of conditions stipulated in the first proviso

appended to Section 201(1) of the Act; an aspect which is noted both by the CIT(A) and the Tribunal.

17. As to the retrospective applicability of the second proviso to Section 40(a)(ia) and first proviso to section 201, the court in the ***Ansal Land Mark Township Pvt. Ltd.*** made the following observations:

> "*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.*
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> *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".*
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> *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:*
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> > *"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-*
> >
> > *(i) has furnished his return of income under section 139;*
> >
> > *(ii) has taken into account such sum for computing income in such*

return of income; and

(iii) has paid the tax due on the income declared by him in such return of income;

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) [sic…201(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 fulfillment 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) [sic…201(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."

[Emphasis is ours]

18. We agree with the reasoning given in the judgment delivered in ***Commissioner of Income Tax v. Ansal Land Mark Township Pvt. Ltd.***.Therefore, according to us, this appeal does not bear any substantial question of law. However, the final decision would depend on the decision

that the Supreme Court may take in the respondent's/assessee's case for AY 2007-08.

19. The appeal is, accordingly, closed.

20. The Registry will dispatch a copy of the judgment passed today to the respondent/assessee so that he is made aware of the result concerning the appeal filed by the appellant/revenue.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

NOVEMBER 02, 2023 / tr