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

+ ITA 322/2016

PR. COMMISSIONER OF INCOME TAX-II Appellant
Through : Sh. Rahul Chaudhary, Sr. Standing
Counsel with Ms. Akriti Dawar, Advocate.

versus

UMA SHARAN SHARMA Respondent
Through : Sh. Satyen Sethi and Ms. Gargi Sethi,
Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K. GAUBA

% **ORDER**
24.11.2017

1. Three questions have been urged by the Revenue in its appeal against the orders of the Income Tax Appellate Tribunal (ITAT). The first pertains to the applicability of Section 40(a)(ia) of the *Income Tax Act, 1961* [hereafter “the 1961 Act”]. The ITAT had relied upon its Special Bench ruling in *Marilyn Shipping and Transports v. Addl. CIT* 20 taxmann.com 244 (SB) as well as the decisions of other High Courts. It is common ground that these decisions were disapproved by the Supreme Court in its judgment in *Palam Gas Service v. CIT* 394 ITR 300 (SC). This question is accordingly answered in favour of the Revenue.

2. The second question urged is with respect to the ITAT’s finding

that the assessee-deductee/Delhi Transport Corporation (DTC) was in fact a government agency and, therefore, entitled to be treated as such under Section 196(i) of the 1961 Act. This finding, in the opinion of the Court, is *ex facie* erroneous.

3. The DTC cannot be treated as a government agency even though it might be a local authority or a statutory authority set-up by the erstwhile Municipal Corporation of Delhi under the authority of an Act of Parliament.

4. In these circumstances, the question is answered against the assessee but in favour of the Revenue. The appeal here too has to succeed.

5. The third issue urged is with respect to the deletion of ₹3,34,30,886/- effected by the Assessing Officer (AO) under Section 40(a)(ia) of the 1961 Act. The assessee urges that since the DTC, i.e. the deductee was a Corporation had in fact filed its returns, the question would not arise in view of the judgment in *CIT v. Ansal Land Mark Township (P) Ltd.* 2015 (377) ITR 635 (SB).

6. This Court had in its judgment reported as *Ansal (supra)* noticed the amendment to Section 40(a)(ia) with the insertion of a proviso and the corresponding amendment to Section 201(1) with effect from 01.07.2012 (through the Finance Act). The Court held as follows:

“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.”

7. This Court considered the decision of the Agra Bench of the ITAT and extracted the following reasoning and approved it:

“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 deincestivize 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 assesseees 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). ”

8. For these reasons, the Court is of the opinion that the matter is required to be considered by the authorities; the issue is, therefore, remitted to the AO to consider whether in fact the deductee had filed returns so as to get the benefit of the judgment in *Ansal (supra)*.

9. The appeal is allowed in the above terms.

S. RAVINDRA BHAT, J

R.K. GAUBA, J

NOVEMBER 24, 2017/ajk