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**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**1. ITA No.103 of 2017 (O&M)
Decided on 17.09.2018**

M/s Arihant Foam P. Ltd., Chandigarh
Appellant

Versus

Commissioner of Income Tax, Chandigarh
Respondent

2. ITA No. 155 of 2017

M/s Arihant Foam P. Ltd., Chandigarh
Appellant

Versus

Commissioner of Income Tax, Chandigarh
Respondent

* * *

**CORAM : HON'BLE MR. JUSTICE AJAY KUMAR MITTAL, JUDGE
HON'BLE MR. JUSTICE AVNEESH JHINGAN, JUDGE**

Present : Mr. B.M. Monga, Advocate and
Mr. Rohit Kaura, Advocate
for the appellant.

Ms. Urvashi Dhugga, Sr. Standing Counsel for Revenue.

* * *

AVNEESH JHINGAN, J.

This order shall dispose of ITA Nos.103 and 155 of 2017.
In both the appeals, the facts and the issue raised are similar hence,
are being disposed of by a common order. The assessment years
involved are 2011-12 and 2012-13. For the sake of convenience, the
facts narrated in ITA No.103 of 2017 are being extracted.

2. The appellant has filed appeal under Section 260A of the

Income Tax Act, 1961 (for brevity 'the Act') against the order of Income Tax Appellate Tribunal, Chandigarh (hereinafter referred to as 'the Tribunal') passed in ITA No. 761/CHD/2015, dated 21.06.2016.

3. Appellant claims that following substantial questions of law arise for consideration in the present appeal:-

- “A) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is justified in rejecting the appeal of appellant thereby confirming disallowance/addition of Rs.16,88,163/- without granting sufficient opportunity of hearing to the appellant by grossly violating the principles of natural justice?*
- B) Whether the Income Tax Appellate Tribunal is justified in confirming the order of authorities below thereby confirming disallowance u/s 40(a)(ia) of Income Tax Act, 1961 against the well settled law as laid down in the case of Hindustan Coca-Cola Beverages (P.) Ltd. Vs. CIT [2007] 293 ITR 226(SC)?*
- C) Whether the ITAT was justified in ignoring the principles of consistency by not following their own well settled law that when the payee had paid the due taxes, assessee cannot be treated as assessee in default as decided by Hon'ble Delhi High Court followed time and again by the Hon'ble Chandigarh ITAT Bench in numerous cases?*
- D) Whether the Tribunal is right in law in brushing aside the purposive conscious and intentional usage of the term “PAYABLE” by the legislature in all its wisdom in Section 40(a)(ia) of the 'Act' and substituting the same by the term “PAID” in the name of giving effect to the supposed underlying object behind the said enactment?”*

4. For the assessment year 2011-12, the appellant filed income tax return declaring income of ₹9,30,492/-. The case was taken up in scrutiny. The assessing authority issued a notice to the

appellant to show cause as to why expenses claimed of interest paid to M/s Bajaj Finance Ltd. and M/s Sabsons Agency Pvt. Ltd., without the deduction of tax at source (TDS) be not disallowed.

5. The appellant filed reply to the notice. The Assessing Officer being dissatisfied, vide order dated 16.12.2013, disallowed under 40(a)(ia) of the Act the expenses claimed of interest paid of ₹13,78,291/- to M/s Bajaj Finance Ltd. and ₹3,09,872/- paid to M/s Sabsons Agency Pvt. Ltd.

6. Being aggrieved of the order, an appeal was filed before Commissioner of Income Tax (Appeals) [CIT(A)]. In appeal, the challenge was made against the disallowance of the expenses and also to the action of Assessing Officer making addition of ₹15,000/- holding the portion of expenses as personal expenses. CIT(A) vide order dated 01.06.2015 partly allowed the appeal. Disallowance of expenses was upheld but the addition made of ₹15,000/- was set aside.

7. Further, appeal was filed before the Tribunal. Appeal was fixed for hearing on 17.06.2016. A request was made on behalf of the appellant for adjournment to enable it to produce certificates under Section 201(1) of the Act. Instead of granting adjournment, the Tribunal reserved the order and vide order dated 21.06.2016 dismissed the appeal. Hence, the present appeal.

8. During the pendency of the appeal in this Court, an application was moved for adducing additional evidence. After notice, the application was allowed and additional evidence was taken on record.

9. In the additional evidence, the appellant has produced a certificate under Section 201(1) of the Act. In the said certificate, it has been mentioned that the payments received from the appellant in the three loan accounts have been shown in the Profit & Loss account by M/s Bajaj Finance Ltd. The relevant portion is quoted below :-

“That, the said Company i.e. M/s Arihant Foam (P) Ltd., has paid to Bajaj Finance Ltd. interests on all the above three loans and the income so accrued to us has been properly shown in the profit & loss account of Bajaj Finance Ltd., in every financial year and regarding which necessary certificates under first proviso to sub section (1) of section 201 of the Income Tax Act, 1961 has been issued by our CA M/s B.K. Kothari & Co.”

10. Further, the order of the Tribunal for assessment year 2013-14 has been placed on record to show that on similar issue matter has been remanded back by the Tribunal to the Assessing Officer. The order passed by AO in pursuance to the remand has also been placed on record in which the earlier expenses disallowed under Section 40(a)(ia) of the Act have been allowed.

11. Learned counsel for the appellant argued that the Tribunal erred in dismissing the appeal without affording sufficient opportunity to the appellant to substantiate that the appellant was not an assessee in default and that the case of the appellant would be covered under second proviso to Section 40(a)(ia) of the Act.

12. He further contended that the certificates have already been placed before this Court to establish that the payment of interest made by the appellant on which there was failure to deduct TDS, have been credited by the payee in its Profit & Loss account and has filed his income tax returns accordingly.

13. Learned counsel for the Revenue rebutted the contentions raised by counsel for the appellant. It was argued that the certificates now being relied upon in this Court were never produced before the Assessing Officer and the Revenue was deprived of an opportunity to verify the certificates.

14. Before proceeding further, it would be appropriate to quote second proviso to Section 40(a)(ia) as was inserted by Finance Act, 2012 w.e.f. 01.04.2013 :

“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.”

15. By introduction of second proviso to Section 40(a)(ia) fiction has been created that the assessee who had failed to deduct TDS but is not deemed to be an assessee in default in term of first proviso to Section 201(1), in that case it shall be deemed that assessee had deducted and paid tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso.

16. At this stage, it would be appropriate to quote first proviso to Section 201 as inserted by Finance Act, 2012 w.e.f. 01.07.2012:-

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.

17. First proviso to Section 201 stipulates that a person who has failed to deduct tax in accordance with provisions of Section XVII-B shall not be deemed to be an assessee in default, if a certificate is furnished from an accountant in a prescribed form to the effect that resident has furnished return of Income Tax under Section 139 of the Act; has taken into account the sum received for computing income in the return of income tax and has paid tax due on the income declared by him in such return.

18. There is mandatory requirement under Chapter XVII-B of the Act to deduct TDS under certain eventualities and in case of failure to do so, consequences have also been mentioned under Section 201. With the insertion of second proviso to Section 40(a)(ia) and first proviso to Section 201(1) of the Act, exception has been carved that subject to the fulfilment of condition as stipulated in first proviso to Section 201 of the Act, the assessee shall not be treated as assessee in default and the expenses so claimed will be allowed.

19. This Court in **Pr. Commissioner of Income Tax-2, Chandigarh Vs. Shivpal Singh Chaudhary** (ITA No. 558 of 2017) on 05.07.2018, agreeing with the view of Delhi High Court in **CIT vs. Ansal Land Mark Township Private Limited, (2015) 377 ITR 635 (Delhi)** held that the second proviso to Section 40(a)(ia) and first proviso to Section 201(1) of the Act though inserted by Finance Act,

2012, would be applicable retrospectively w.e.f. 01.04.2005. The relevant portion of the decision is quoted below:-

*“We are in agreement with the view of the Delhi High Court in **Ansal Land Mark Township Pvt. Limited’s** case (supra) approving the reasoning of the Agra Bench of the ITAT whereby holding the rationale behind the insertion of the second Proviso to Section 40(a)(ia) of the Act and that it is merely declaratory and curative and thus, applicable retrospectively with effect from 1st April, 2005.”*

20. In the facts of the present case and in view of the additional evidence adduced in this Court without expressing any opinion on the merits of the case, the matter is remanded back to the Assessing Officer to decide the issue of disallowance of expenses under Section 40(a)(ia) afresh after hearing the appellant and after considering the evidence produced by the appellant.

21. The appeals are, accordingly, disposed of.

(AJAY KUMAR MITTAL)
JUDGE

(AVNEESH JHINGAN)
JUDGE

September 17, 2018

pankaj baweja

Whether speaking/reasoned: Yes / No

Whether reportable : Yes / No