

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

ITA No.495 of 2017 (O&M)
Decided on : 03.10.2018

Pr. Commissioner of Income Tax-2, Chandigarh Appellant

Versus

M/s Mobisoft Telesolutions Private Limited Respondent

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

Present : Ms. Urvashi Dhugga, Senior Standing Counsel
for the appellant.

Ms. Radhika Suri, Sr. Advocate with
Ms. M.S.Kanda, Advocate
for the respondent.

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AVNEESH JHINGAN, J.

The revenue has filed the present appeal under Section 260A of Income Tax Act, 1961 (for brevity, 'the Act') against the order of Income Tax Appellate Tribunal, Chandigarh (hereinafter referred to as 'ITAT') passed in ITA No.1017/Chd/2016 dated 28.02.2017, dismissing the appeal of the revenue.

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

1) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was right in treating the 'copyright expense' as a revenue expense when the Income Tax Act,

1961 alongwith the Income Tax Rules, explicitly mention copyrights as an intangible asset?

2) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was right in treating the 'copyright expense' as a revenue expense relying on the decisions of Hon'ble Supreme Court in the case of CIT vs. IAEC (pumps) Ltd. 232 ITR 316(SC) which was delivered prior to amendments in Section 32(1)(ii) of the Income Tax Act, 1961 and in Rule 5(1) of the Income Tax Rules, 1962, w.e.f. A.Y. 1999-2000, whereby intangible assets, inter-alia, copyrights have been included in the appendix 1 prescribing intangible assets as a separate block of assets on which depreciation is applicable @ 25%.

3) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was right in treating the copyright expense with enduring benefits as revenue expenditure?

4) Whether on the facts and in the circumstances, ITAT was right in allowing the appeal of the assessee by holding that the insertion of second proviso to Section 40(a)(ia) is declaratory and curative in nature and has retrospective effect w.e.f. 01.04.2005 whereas the amendment is prospective in operation w.e.f. 01.04.2013?

3. The facts as transformed from record are that for assessment year 2012-13, the assessee filed the original return declaring the income of ₹ 31,61,130/-. The return was revised declaring the income of ₹ 82,93,240/-.

The assessment was completed under Section 143(3) of the Act vide order

dated 28.11.2014. The income of the assessee was assessed at ₹ 2,35,50,060/-.

4. The Assessing Officer made the following additions :-

- i) Addition of ₹ 1,09,55,426/- on account of treating 'copy right expenses' as capital in nature and allowing 25% depreciation on the same.
- ii) Addition of ₹ 1,38,812/- on account of depreciation allowed on Computer Kiosk @ 10% against 60% as claimed by the assessee.
- iii) Addition of ₹ 41,62,580/- on account of disallowance of interest paid to NBFCs without deduction of TDS u/s 40(a)(ia).

5. Aggrieved of the assessment order, the assessee preferred an appeal. Vide order dated 29.07.2016, Commissioner of Income Tax (Appeals), Chandigarh (for brevity, 'CIT(A)') allowed the appeal of the assessee.

6. Not satisfied with the order passed by CIT(A), revenue preferred an appeal before the ITAT. In appeal, the contention raised was that the "copyright expenses" were wrongly treated as revenue in nature. Further challenge was made to allowing of interest paid to NBFCs (Non Banking Financial Company). The Tribunal vide order dated 28.02.2017 dismissed the appeal of the revenue. It is pertinent to note here that the Tribunal while deciding relied upon its decision in the appeal of the assessee filed for assessment year 2008-09. In the decision of the appeal for assessment year 2008-09, Tribunal further relied upon its decision rendered for assessment year 2009-10. Aggrieved of the dismissal of the appeal by

the Tribunal, the present appeal has been preferred.

7. The questions No.1 to 3 are answered in favour of the assessee. Identical questions arose in the appeal filed by the revenue in the case of the assessee itself for the assessment year 2009-10 i.e. **Principal Commissioner of Income Tax-2, Chandigarh vs. M/s Mobisoft Tele Solutions P. Limited , (2018) 404 ITR 203** where while dismissing the appeal this Court answered the questions against the revenue. It was held that the Tribunal on appreciating the agreement rightly came to the conclusion that only a licence to use the copyright was granted to the assessee company. The assessee company had not acquired the copyright. In such circumstances, licence fee paid was a revenue expenditure.

8. **Re: Question No.4**

This question is also decided in favour of the assessee.

9. Before proceeding further, it would be appropriate to quote second proviso to Section 40(a)(ia) of the Act 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.”

10. By introduction of second proviso to Section 40(a)(ia) of the

Act 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) of the Act, 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.

11. 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.”

12. First proviso to Section 201 stipulates that a person who has failed to deduct tax in accordance with provisions of Chapter XVII-B of the Act 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 paid tax due on the income declared by him in such return.

13. 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, an 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.

14. 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.”*

15. This Court has held that second proviso to Section 40(a)(ia) of the Act is merely declaratory and curative and thus applicable retrospectively w.e.f. 01.04.2005.

16. The Tribunal has dealt with the factual aspect of the matter and it has been specifically recorded that the assessee has been able to prove that the recipients of the interest income have included the income in their return and paid taxes thereon. The said findings have not been shown to be erroneous in any manner. The relevant part of the Tribunal order is extracted below:-

“ We have heard the rival contentions and find no merit in the ground raised by the Revenue. In the present case, it is not disputed that the payees/recipients of the said interest income i.e. M/s Indiabulls Financial Services Ltd. and M/s Bajaj Financial Ltd. have included the said income in their return of income and paid taxes on the same. Evidence in the form No.26A as also report of Chartered Accountant was filed. The Revenue has not challenged this fact before us. Thus the assessee had duly demonstrated compliance with the conditions stated in the second proviso to Section 40(a)(ia), which briefly put, states that no disallowance is to be made in cases where the recipient of the income reflects the same in its return of income and pays taxes on the same.

The Assessing Officer also, we find, has in her Remand Report after examining the evidences produced by the assessee, admitted that the said expenses were allowable in view of the provisions of Section 40(a)(ia) r.w.s. 201(1) of the Act. In such circumstances, since the Assessing Officer has herself admitted that the addition made was unwarranted, the addition no longer survives vis-a-vis assessment order and there is no reason

for the Revenue to have any grievance on the issue.”

17. In view of the above discussion, the substantial questions of law as claimed, are answered against the revenue and in favour of the assessee.
18. Consequently, the appeal is dismissed.

(AJAY KUMAR MITTAL)
JUDGE

(AVNEESH JHINGAN)
JUDGE

October 03, 2018
anju

Whether speaking/reasoned: Yes / No

Whether reportable : Yes / No