IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "B", HYDERABAD

BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No. 1701/Hyd/2016
Assessment Year: 2011-12

Dy. Commissioner of Income-tax, Circle – 1(1), Hyderabad.	Vs. Aditya Construction Company India Pvt. Ltd., Hyderabad. PAN – AAFCA7323J
(Appellant)	(Respondent)

Assessee by : Shri L. Ramji Rao
Revenue by : Shri K.A. Sai Prasad

Date of hearing : 12-10-2017
Date of pronouncement : 27-10-2017

O R D E R

PER S. RIFAUR RAHMAN, A.M.:

This appeal filed by the revenue is directed against the order of the learned Commissioner of Income-tax(A) - 1, Hyderabad, dated 12-09-2016 for AY 2011-12.

2. Briefly the facts of the case are that the Assessee Company is engaged in the business of construction and sale of flats/villas, filed its return of income for the A.Y. 2011-12 on 30.09.2011 declaring total income of Rs.86,61,520/-. Subsequently, the case was selected under CASS and notices u/s 143(2) & 142(1) were issued. The Assessing Officer had completed scrutiny Assessment u/s.143(3) on 25.03.2013 determining the total income Rs.3,93,11,974/-.

2.1 During the course of assessment proceedings, the Assessing Officer noticed that the assessee had borrowed amounts and paid

interest. The interest expenditure debited to P&L a/c was Rs. 4,68,79,147/- which consists of payment to following finance companies:.

M/s. Diwan Housing Finance Ltd (DHFL)	: Rs.2,80,91,495/-
India Bulls Financial Services Ltd	: Rs. 19,05,659/-
HDFC Bank	: Rs.1,64,74,479/-
Corporation Bank CC A/c	: Rs. 20,302/-

The Assessing Officer observed that the interest paid to banks need not be subjected to TDS. However, for payments to private companies, TDS should have deducted by the assessee. AO opined that assessee should have deducted TDS on interest paid to M/s. India Bulls Financial Services Ltd Rs.19,05,659/- and M/s. Diwan Housing Finance Ltd Rs.2,80,91,495/-.

2.2 The Assesse submitted that they paid in cheques, it forming part of “EMI” and relied on special bench case of Merylin Shipping & Transport, the case of CIT Vs Janapriya Engineers Syndicate, ITA No.352/H/2014 order dated 24.06.2014 (A.P.HC) and SPR Publications Pvt Ltd Vs ACIT, ITA No.351/H/15 order dated 24.06.2015. Since these payments have been 'paid', hence need not be brought under section 40(a)(ia).

2.3 Rejecting the submissions of the assessee, the Assessing Officer invoked section 40(a)(ia) on non-deduction of TDS against the said payments, under 194A of the I.T. Act.

3. Aggrieved, the assessee preferred an appeal before the CIT(A).

4. Before the CIT(A), the assessee submitted that the interest was part of the predetermined EMIs paid by way of post dated cheques and that the breakup of interest and principle components was not available with them and hence they were not in a position to deduct

tax at source and that since the working of principal, interest and tax deduction thereon are available with the financial institutions, the person responsible for deducting and paying the tax at source is not the assessee and it is the financial institutions. The assessee had also claimed that since the respective financial institutions have already paid the tax, there is no loss of revenue and no disallowance is warranted.

5. After considering the submissions of the assessee, the CIT(A) observed that there is strength in the submissions of the assessee as the recipients were well known companies and since the amounts were paid, they need not be brought u/s 40(a)(ia) of the Act. He, therefore, deleted the addition made by the AO.

6. Aggrieved by the order of the CIT(A), the revenue is in appeal before us raising the following grounds of appeal:

> *"(i) Ld. CIT(Appeals)erred in accepting the contention of the assessee that the assessee has no control or knowledge of interest element in each EMI and hence the appellant is not the person responsible for deduction and payment of tax at source.*
>
> *(ii) Ld. CIT(Appeals) ought to have appreciated that the details of principal component and interest component in each EMI are always made available either at the time of sanction of the loan or at the request of the borrower later and therefore it is the assessee borrower who is responsible for deduction of TDS from interest payment credit and its remittance to the Government account on or before the due date.*
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> *(iii) Ld. CIT(Appeals) erred in deleting the addition made by the assessing officer on account of disallowance of interest claimed by the assessee by relying on the decision of the Special Bench in the case of Merilyn Shipping and Transporters wherein it was held that if interest amount was already paid during the relevant year provisions of sec. 40(a)(ia) are not applicable.*
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> *(iv) While taking such a view of the matter, Ld. CIT (Appeals) failed to consider circular No. 10/DV/2013 dated 16-12-2013 issued by the CBDT wherein it is clarified in no uncertain terms that provisions of section are applicable not only to the amounts*

payable as on 31st March of the relevant year but also to the amounts payable at any time during the year.

(v) Ld. CIT(Appeals) ought to have appreciated that the clarification issued by the CBDT in the aforesaid circular is in conformity with the ratio of decisions in the case of Crescent Export Ltd., (216 Taxman 258) (Cal) and Sikandar Khan N Tunvar (357 ITR 312) (Guj).

(vi) Ld. CIT(A) erred in law in taking note of the second proviso to section 40 (a)(ia) that where the assessee cannot be found in default u/s 201, no disallowance u/s 40(a)(ia) could be made when the said proviso was inserted w.e.f. 01-04-2013 in the statute and not applicable to the year under consideration.

(vii) The appellant craves leave to add, delete, substitute, amend any grounds of appeal at the time of hearing.

(viii) For these and other grounds that may be canvassed at the time of hearing of the appeal, it is beseeched that disallowance of interest made by the assessing officer be restored."

7. The ld. DR submitted that paid/payable issue is already settled with latest development on account of Hon'ble Supreme Court's decision in the case of Palam Gas Services Vs. CIT, 517 Taxpundit 101 (Civil Appeal No. 5512 of 2017, judgment dated 03/05/2017). He further objected to the fact that the CIT(A) has deleted the addition considering the submission of the assessee that assessee has paid the interest and the introduction of second proviso in section 40(a)(ia) in the Finance Act, 2012, accordingly, where the assessee has not been found in default u/s 201, no disallowance u/s 40(a)(ia) could be made. He submitted that the proviso was introduced in Finance Act, 2012, which cannot be applied retrospectively, for that proposition, he relied on the case of Prudential Logistics and Transports Vs. ITO, [2014] 51 Taxmann.com 426 (Kerala). He further submitted that there is a need to interpret the Act literally when the Act is clear and unambiguous. For this proposition, he relied on the following case laws:

1. CIT Vs. AJAX Products Ltd., [1965] 55 ITR 741 (SC)
2. Keshavji Ravji & Co. Vs. CIT, [10090 49 taxman 87

3. Prudential Logistics and Transports Vs. ITO, [2014] 51 Taxmann.com 426 (Kerala)

8. On the other land, ld. AR submitted that the issues under consideration are similar to the facts of previous AY 2010-11, in which the coordinate bench, has adjudicated in assessee's favour. A copy of the said decision is placed on record and further relied on the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Ansal Land Mark Township (P) Ltd., [2015] 61 Taxmann.com 45 (Delhi), wherein the Hon'ble Court has dealt with the issue of applicability of second proviso retrospectively.

9. Considered the rival submissions and perused the material facts on record as well as the decisions cited. In the case of Ansal Land Mark Township (P) Ltd., (supra), the Hon'ble Delhi High Court has held as under:

> *"It was 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 was to introduce a legal fiction where an assessee failed to deduct tax in accordance with the provisions of Chapter XVII B. Where such assessee was 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".*
>
> *The first proviso to s 210 (1) had been inserted to benefit the Assessee. It also stated 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 had furnished his return of income u/s 139. No doubt, there was a mandatory requirement u/s 201 to deduct tax at source under certain contingencies, but the intention of the legislature was not to treat the assessee as a person in default subject to the fulfilment of the conditions as stipulated in the first proviso to s 201(1). The insertion of the second proviso to s 40(a)(ia) was also required to be viewed in the same manner. This again was a proviso intended to benefit the Assessee. The effect of the legal fiction created thereby was to treat the assessee as a person not in default of deducting tax at source under certain contingencies.*
>
> *What was common to both the provisos to s 40(a)(ia) and s 210(1) was that as long as the payee/resident had filed its return of income disclosing the payment received by and in which the income earned by it was embedded and had also paid tax on such income, the Assessee would not be treated as a person in default. As far as the present case was concerned, it was not*

disputed by the Revenue that the payee had filed returns and offered the sum received to tax.

*Agra Bench of ITAT in **Rajiv Kumar Agarwal v. ACIT** had undertaken a thorough analysis of the second proviso to s 40(a)(ia) and also sought to explain the rationale behind its insertion. The primary justification for such a disallowance was that such a denial of deduction was 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 and restrictions should therefore, not come into play when an assessee was able to establish that there was 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. The scheme of s 40(a)(ia), was 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 had remained untaxed due to tax withholding lapses by the assessee. It was not a penalty for tax withholding lapse but it was a sort of compensatory deduction restriction for an income going untaxed due to tax withholding lapse. The penalty for tax withholding lapse per se was separately provided for in s 271 C, and, s 40(a)(ia) did not add to the same. It could not 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 was duly brought to tax. Accordingly, High Court held that the insertion of second proviso to s 40(a)(ia) was declaratory and curative in nature and it had 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."*

The Court was 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 was declaratory and curative and had retrospective effect from 1st April 2005, merits acceptance.

*In that view of the matter, the Court was 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**. No substantial question of law arises in the facts and circumstances of the present case. The appeal was accordingly dismissed."*

9.1. The coordinate bench has also decided similar issue in assessee's own case for AY 2010-11 in ITA No. 1319/Hyd/2011, order dated 28/11/2014 wherein the Bench has observed as under:

3. We do not find any merit in Revenue appeal as the Ld. CIT(A) directed assessee to furnish necessary certificates as per principles laid down by Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverages P. ltd., (supra) wherein it was held that if the payees have admitted the receipt of income,

there is no need for the payee to deduct the TDS. Since the provisions of section 201(1) allow such assessee to be not an "assessee in default", consequently, the second proviso to section 40(a)(ia) also comes into operation even though the said provision was introduced from 01/04/2013. Since it is for removal of hardship that may also be applied for pending *proceedings. Moreover, the directions of Ld. CIT(A) are also categorical. In case, there is failure on th e part of assessee to furnish such certificates, disallowance stands confirmed. Since, it has to be examined by A.O. we are of the opinion that revenue appeal is not maintainable on the facts of the case and ground raised by the revenue is dismissed."*

9.2 Ld. DR has relied on the decision of Hon'ble Kerala High Court in the case of Thomas George Muthoot Vs. CIT, ITA No. 278 of 2014, in which the benefit of second proviso was denied due to the fact that in that case the intention of the assessee was not to deduct TDS since the assessee has declared the transaction as loan initially and only subsequently during assessment, he has agreed that he had paid the expenses and also claimed the expenses in the P&L A/c. Considering the intention of the assessee, the Hon'ble Court has not granted the benefit. Since the facts of the said case are not similar to the case of the assessee, the same is not applicable to the case of the assessee.

9.3 In view of the above discussion, we are inclined to follow the decision of the coordinate bench in assessee's own case (supra) and the assessee has followed due procedure of submitting the tax compliance before the AO as similar to the findings of previous AY, we dismiss the appeal filed by the revenue.

10. In the result, appeal of the revenue is dismissed.

Pronounced in the open court on 27th October, 2017.

Sd/-	Sd/-
(P. MADHAVI DEVI)	(S. RIFAUR RAHMAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Hyderabad, Dated: 27th October, 2017.

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Copy to:-

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2) M/s Aditya Constructions Company India Pvt. Ltd., 8-2-293/82/F/A/12, Plot No. A/12, Road No. 12, Jubilee Hills, Hyd.
3) CIT(A) – 1, Hyderabad
4 Pr. CIT – 1, Hyderabad
5) The Departmental Representative, I.T.A.T., Hyderabad.
6) Guard File