

आयकर अपीलीय अधिकरण "G" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

BEFORE SHRI JOGINDER SINGH, VICE PRESIDENT
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No.2198/Mum/2017

(निर्धारण वर्ष / Assessment Year : 2012-13)

M/s. Shree Ganeshaya Trading Pvt. Ltd., A-302, Gokul Garden, Thakur Complex, Kandivali East, Mumbai-400101	बनाम/ v.	ITO WD 13(2)(3) Mumbai
स्थायी लेखा सं./ PAN: AAKCS0949M		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:		Shri. Ryan Saldanha
Revenue by :		Shri. Chaudhary Arun Kumar Singh

सुनवाई की तारीख /Date of Hearing : 11.10.2018

घोषणा की तारीख /Date of Pronouncement : 22.10.2018

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member:

This appeal, filed by assessee, being ITA No. 2198/Mum/2017, is directed against appellate order dated 01.02.2017 passed by learned Commissioner of Income Tax (Appeals)-21, Mumbai (hereinafter called "the CIT(A)"), for assessment year 2012-13, the appellate proceedings had arisen before learned CIT(A) from assessment order dated 23.03.2015 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income-tax Act, 1961 (hereinafter called "the Act") for AY 2012-13.

2. The grounds of appeal raised by the Assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

“The following grounds of appeal are without prejudice to each other :-

“1. On the facts and circumstances of the case as well as in law, the Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in disallowing a sum of Rs. 63,750/- by invoking the provision of section 14A r.w.r. 8D of the Income Tax Act, 1961, without considering the facts and circumstances of the case.

2. On the facts and circumstances of the case as well as in law , the Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in disallowing a sum of Rs. 34,82,572/- u/s 40(a)(ia) of the Income Tax Act, 1961 , on the alleged plea that TDS was not deducted , without considering the facts and circumstances of the case .

3. On the facts and circumstances of the case as well as in Law, the Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in treating the share loss of Rs 1,00,08,493/- traded through Vineet Enterprises as alleged bogus loss , without considering the facts and circumstances of the case.

4. On the facts and circumstances of the case as well as in law, the Learned CIT(A) has erred in not adjudicating the ground for making an addition of Rs. 1,10,88,198/- on account of profit from share trading, but gave the direction to the Learned Assessing Officer to re-compute the assessed income of the appellant, without considering the facts and circumstances of the case.

5. The Appellant craves leaves to add, amend, alter or delete the said ground of appeal .”

3. The Ld. Counsel for the assessee at the outset submitted before the Bench that the assessee does not wish to pursue Grounds of appeal no. 1, 3 and 4 raised by the assessee in memo of appeal filed with the tribunal and it was prayed that these three grounds be dismissed as not been pressed. The Ld. DR did not raised any objection to the dismissal of these three grounds of appeals raised by the assessee in memo of appeal filed with the tribunal as not being pressed . We have also observed that Ground of appeal no. 5 raised by the assessee in memo of appeal is general in nature and does not require separate adjudication by the Bench. Thus, keeping in view the submissions of both the rival parties and also that ground no. 5

being general in nature does not require separate adjudication , we dismiss ground of appeal no. 1, 3 and 4 raised in memo of appeal filed by the assessee as not being pressed while ground no. 5 is dismissed as general in nature.

The only effective ground of appeal which requires adjudication by the Bench is Ground no. 2 raised by the assessee in memo of appeal filed with the tribunal and now we proceed to adjudicate this ground of appeal no. 2 raised by the assessee in memo of appeal filed with the tribunal.

4. The Brief facts of the case are that the assessee is engaged in the business of trading in shares and commodities. The ground no. 2 concerns itself with disallowance of interest expenses of Rs. 30,60,799/- paid by assessee to IIFL NBFC and further disallowance of Rs. 4,21,773/- paid to share brokers for delayed pay-in-charges for delay in making payment for purchase of shares. The AO observed that the assessee has not deducted income-tax at source on this delayed pay-in-charges of Rs. 4,21,773/- paid on account of non clearing stock-brokers accounts in time and it was observed that these delayed pay-in-charges are penal in nature, which led to its disallowance of delayed pay-in-charges of Rs. 4,21,773/- made by the AO by adding the same to the income of the assessee keeping in view provisions of Section 40(a)(ia) of the 1961 Act, vide assessment order dated 23.03.2015 passed by the AO u/s 143(3) of the 1961 Act.

The AO also observed from Profit and Loss Account that the assessee has paid interest of Rs. 30,60,799/- to IIFL NBFC . The AO observed that the assessee has taken a loan from the IIFL for its transactions in shares , on which interest is paid without deduction of income-tax at source which as per AO infringed provisions of Section 40(a)(ia) of the 1961 Act. The AO disallowed interest expenses to the tune of Rs. 30,60,799/- which was added back to the income of the assessee keeping in view provisions of Section 40(a)(ia) of the 1961 Act .

Thus, both the disallowances aggregating to Rs. 34,82,572/- were made by adding the same to income of the assessee by the AO on grounds of non deduction of income-tax at source while making these payments ,vide assessment order dated 23.03.2015 passed by the AO u/s 143(3) of the 1961 Act.

5. Aggrieved by the additions as were made by the AO vide assessment order dated 23.03.2015 passed u/s 143(3) of the 1961 Act, the assessee filed first appeal before the Ld. CIT(A). The assessee submitted before learned CIT(A) that payment of Rs. 4,21,773/- were in the nature of delayed payment charges to share brokers. It was submitted that debt incurred was in respect of purchase of goods and not in the nature of debt created between lender and borrower of the money . It was submitted that thus it will take character of original transaction which is purchase of shares being compensatory in nature and hence Section 40(a)(ia) of the 1961 Act has no applicability . The learned CIT(A) rejected the contentions of the assessee by holding that the said payment of Rs. 4,21,773/- is in the nature of interest on outstanding amount and is based on fixed rate of interest on amount outstanding and the period for which it is outstanding. Thus, it was held by learned CIT(A) to be 'interest' and disallowance as was made by the AO by invoking provisions of Section 40(a)(ia) of the 1961 Act on the grounds that no income-tax was deducted at source by the assessee while making interest payment of Rs. 4,21,773/- was upheld by learned CIT(A) vide appellate order dated 01.02.2017.

With respect to interest on loan paid to IIFL NBFC of Rs. 30,60,799/- it was submitted that payments were made without deduction of income-tax at source but the said IIFL NBFC included said interest income of Rs. 30,60,799/- in its return of income filed with Revenue and due income-tax was paid by said IIFL NBFC to Revenue. The assessee filed additional evidences by way of a certificate dated 24.03.2015 issued by Chartered Accountants of IIFL NBFC namely M/s Pritish Mehta & Company (page 24-25/pb) certifying that the

payee M/s. India Infoline Finance Ltd.(PAN AABCI2915C) has included interest of Rs. 30,60,799/- received from the assessee in their return of income filed with Revenue and paid due taxes to Revenue. The said certificate issued by CA of IIFL is placed in paper book at page no. 24 and 25. The assessee relied upon second proviso to Section 40(a)(ia) of the 1961 Act which was introduced by Finance Act, 2012 w.e.f. 01.04.2013 and it was submitted by assessee that it is curative in nature and shall be applicable with retrospective effect from 01.04.2005 as held by several judicial pronouncements. The Ld. CIT(A) did not admit aforesaid additional evidence filed by the assessee on the ground that it was obtained and filed after the return of income was filed by the assessee as well even after the assessment was concluded by the AO. The learned CIT(A) also observed that there was no certificate issued by the AO authorising 'NIL' TDS to the deductee. The learned CIT(A) was also of the view that insertion of second proviso to Section 40(a)(ia) inserted by Finance Act, 2012, w.e.f. 01.04.2013 was prospective in nature. The learned CIT(A) also relied upon certain case laws wherein the amendment introduced by Finance Act 2012, was held to be prospective in nature applicable with effect from 01.04.2013. Thus, both these additions as were made by the AO were sustained/upheld by learned CIT(A) , vide appellate order dated 01.02.2017.

6. Aggrieved by the appellate order passed by learned CIT(A) dated 01.02.2017 against the assessee dismissing assessee's appeal, the assessee has come in an appeal before the tribunal. The learned counsel for the assessee submitted that Chartered Accountant certificate was filed before learned CIT(A) as an additional evidence with respect to payment of interest made to M/s. India Infoline Finance Ltd., to the tune of Rs. 30,60,799/- without deducting income-tax at source. It was submitted that certificate was issued by CA's of IIFL after verification of records wherein they have certified that the income of Rs. 30,60,799/- being interest income received

from the assessee was included in the return of income filed by M/s. India Infoline Finance Ltd. and due taxes were paid by IIFL to Revenue. It was submitted that learned CIT(A) did not admit this additional evidence and the same was rejected on the grounds that the certificate was obtained after filing of return of income as well it was obtained even post assessment. It was submitted that second proviso to Section 40(a)(ia) of the 1961 Act was inserted by Finance Act, 2012 wef 01-04-2013 but the same was held to be retrospective from 01-04-2005 being curative and declaratory in nature by decision of Hon'ble Delhi High Court in the case of CIT v. Ansal Land Mark Township Private Limited reported in (2015) 377 ITR 635(Del) .The learned counsel for the assessee also relied upon decision of Mumbai-tribunal in the case of Perfect Circle India Private Limited v. DCIT in ITA no. 7241/Mum/2012.

With respect to payments of delayed pay-in-charges to the tune of Rs. 4,21,773/- , the learned counsel for the assessee submitted it is not an interest payment but charges paid on delayed payment on purchase of shares to brokers . The learned counsel for the assessee relied upon following case laws:-

CIT v. Vidyut Corporation [2010] 324 ITR 221 (Bombay)

Central Bank of India v JCIT [2006] 99 ITD 34 (MUM.)

ITO v M K J Enterprises Ltd (2014) 42 taxmann.com 460 (Kol)

7.The Ld. DR on the other hand relied upon the appellate order passed by Ld. CIT(A).

8. We have considered rival contentions and perused the material on record including case laws cited before us and orders of the authorities below. We have observed that the assessee is engaged in the business of trading in shares and commodities. We have observed that the assessee has paid interest of Rs. 30,60,799/- to M/s. India Infoline Finance Ltd. on loan availed by the assessee from said IIFL ,

on which income-tax was not deducted at source u/s 194A of the 1961 Act by the assessee, which led to disallowance of interest expenses to the tune of Rs. 30,60,799/- keeping in view provisions of Section 40(a)(ia) of the 1961 Act. It is observed that the assessee has produced additional evidences before Ld. CIT(A) vide certificate issued by Chartered Accountants of IIFL dated 24-03-2015 certifying after verification of records of IIFL that the said interest of Rs. 30,60,799/- paid by the assessee was duly accounted for by recipient company M/s. India Infoline Finance Ltd. and the same was duly included in the income by the said recipient in return of income filed with Revenue and due taxes paid to Revenue. The said certificate is placed in paper book / page 24-25 filed with tribunal. The Ld. CIT(A) before whom the certificate was filed for the first time rejected the same at threshold without admitting the same on the grounds that it was obtained post filing of return of income and also post assessment formed by the AO. The learned CIT(A) was also of the view that second proviso to Section 40(a)(ia) of the 1961 Act as introduced by Finance Act, 2012 wef 01-04-2013 cannot be given retrospective effect. The Hon'ble Delhi High Court in the case of Ansal Land Mark Township Private Limited(supra) had held that insertion of second proviso to Section 40(a)(ia) of the 1961 Act is to be given retrospective effect wef 01-04-2005. We are of the considered view that the CA certificate filed by the assessee is a material evidence for adjudicating this issue and we admit the said additional evidence filed by the assessee in the interest of justice. However, contents of the said CA certificate was not verified by any of the authorities below and hence in the interest of justice and in fairness to both the parties, we are restoring the matter back to the file of the AO for necessary verification of the said CA certificate and thereafter if the contents of the CA certificate are proved to be correct, the AO is directed to grant relief to the assessee keeping in view second proviso to Section 40(a)(ia) in line with judgment of Hon'ble Delhi High Court in the case of CIT v. Ansal Land

Mark Township (P) Ltd., (2015) 61 taxmann.com 45(Del) We order accordingly.

There is another disallowance of Rs. 4,21,733/- with respect to the delayed pay-in-charges to share brokers for making delayed payments against share purchased by the assessee . The assessee has submitted that these payments are not interest and is part of the cost of purchase of shares for making delayed payment for share purchased by the assessee from share brokers beyond the agreed stipulated time for making payments to these share brokers. The assessee relied upon following case laws as under:-

CIT v. Vidyut Corporation [2010] 324 ITR 221 (Bombay)

Central Bank of India v. JCIT [2006] 99 ITD 34 (MUM.)

ITO v. M K J Enterprises Ltd (2014) 42 taxmann.com 460 (Kol)

The assessee has claimed that there was a delay in making payments for buying shares from brokers for which charges for delayed pay-in-charges were paid to share brokers which is part of purchase price of shares and was not having a character of interest . Before proceeding further , it is important to see definition of interest as is contained in Section 2(28A) of the 1961 Act, which is as under:

“Definitions

2. In this Act , unless the context otherwise requires –

28A) interest means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised.”

The Hon'ble Gujarat High Court in the case of *CIT v. Vijay Ship Breaking Corpn.* [\[2003\] 129 Taxman 120 \(Guj.\)](#). has held that the word 'interest' is very wide and would include interest on unpaid

purchase price payable in any manner which would include amount payable by means of irrevocable letter of credit. Usance interest paid by tax-payer apart from purchase price of ship would fall within the definition of term 'interest'.

Thus, as could be seen that the word 'interest' used in Section 2(28A) is of widest amplitude and delayed payment made by the assessee towards delayed pay-in-charges for making delayed payment towards purchase consideration of shares will be covered within definition of 'interest' and income-tax is required to deducted at source u/s 194A of the 1961 Act. The reliance of the assessee on the following judgment will not be of any help to the assessee as these are clearly distinguishable as could be seen below:

- a) In the case of Vidyut Corporation (supra), the issue before the Hon'ble High Court was claim of deduction u/s 80IB of the 1961 and in that context Hon'ble Gujarat High Court held that payment of interest for delayed payment shall form component of sale price as it has same nature and character as a sale consideration and deduction u/s 80IB was found by allowed on the interest income in question, while in the instant case we are seized of the provisions of Section 194A dealing with deduction of income-tax at source on payment of interest and its consequence of non deduction of expenses keeping in view provisions of Section 40(a)(ia) of the 1961 Act.
- b) Similarly, decision in the case of Central Bank of India(supa) has no application as that case firstly concerned itself with interest tax liability and issue was whether the credit card dues falls within meaning of 'loan and advances' within limited mandate of Section 2(7) of Interest Tax Act, 1974 , while Section 2(28A) defines interest in a widest amplitude. The interest payable in the instant case is on the debt owed by the assessee owing to delayed payment of share purchase consideration and interest/charges paid on delayed payments of purchase consideration will fall within wide meaning

of 'Interest' u/s 2(28A) of the 1961 Act. The said debt payable by the assessee owing to purchase of shares is not a 'loan and advance' provided by the sharebroker to the assessee and the said interest may not fall within ambit of Interest Tax Act, 1974, while we are concerned with Section 2(28A) of the 1961 Act read with Section 194A and 40(a)(ia) of the 1961 Act.

- c) The case of M/s M K J Enterprises Limited(supra) is also distinguishable as it concerns itself with discounted sales consideration and it was held that discounting charges of Bill of Exchange or factoring charges of sale shall not fall within meaning of interest within purview of Section 194A.

Thus, in our considered view contention of the assessee cannot be accepted and the delayed pay-in-charges payable by the assessee to sharebroker for making delayed payment of purchase consideration for purchase of shares is infact 'interest' within meaning of Section 2(28A) of the 1961 Act and the assessee was required to deduct income-tax at source on such interest of Rs.4,21,773/- within the provisions of Section 194A of the 1961 Act. Since, the assessee fails to deduct income-tax at source on this payment of Rs.4,21,773/- , the assessee will be hit by provisions of Section 40(a)(ia) of the 1961 Act and the disallowance as was done by the AO and as confirmed by learned CIT(A) is upheld. The assessee fails on this issue. We order accordingly.

9. In the result, the appeal filed by the assessee in ITA No. 2198/Mum/2017 is partly allowed for statistical purposes.

Order pronounced in the open court on 22.10.2018.

आदेश की घोषणा खुले न्यायालय में दिनांक: 22.10.2018 को की गई

Sd/-

(JOGINDER SINGH)
VICE PRESIDENT

Sd/-

(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Mumbai, dated: 22.10.2018

Nishant Verma
Sr. Private Secretary

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

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BY ORDER

DY/ASST. REGISTRAR
ITAT, MUMBAI