

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "SMC" BENCH
(Conducted Through Virtual Court)
Before: Shri Mahavir Prasad, Judicial Member
And Shri Amarjit Singh, Accountant Member

ITA No. 2175/Ahd/2018
Assessment Year 2012-13

Shri Vipin Somabhai Pujara A/11, Amijyot Apartment, Nr. Rajnagar Club, Parimal Society, Ambawadi, Ahemedabd PAN: AFUPP6021P (Appellant)	Vs	The ACIT, Circle-5(2), Narayan Chambers Nehru Bridge Corner Ashram Road, Ahmedabad (Respondent)
---	----	---

Revenue by: Shri S. S. Shukla, Sr. D.R.
Assessee by: Shri S.N. Divatia, A.R.

Date of hearing : 03-08-2021
Date of pronouncement : 23-08-2021

आदेश/ORDER

PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-

This assessee's appeal for A.Y. 2012-13, arises from order of the CIT(A)-5, Ahmedabad dated 17-08-2018, in proceedings under section 143(3) r.w.s. 263 of the Income Tax Act, 1961; in short "the Act".

2. The assessee has raised following grounds of appeal:-

“1.1 The order passed u/s.25 on 17-8-2018 for A.Y.2012-13 by CIT(A)-5. Abad, confirming disallowance u/s 40(a)(ia) to the extent of 30% is wholly illegal, unlawful and against the principles of natural justice.

1.2 The Ld. CIT(A) has grievously erred in law and or on facts in not considering fully and properly the explanations furnished and the evidence produced by the appellant.

2.1 The Ld. CIT(A) has grievously erred in law and/or on facts in upholding that the appellant was required to make TDS u/s 194A from payments aggregating to Rs. 74.54,822/- and there by confirming that the provisions of section 40(a)(ia) were attracted.

2.2 That in the facts and circumstances of the case as well as in law. the Id. CIT(A) erred in upholding that the appellant was required to make TDS u/s 194A from payments aggregating to Rs. 1,63.64,831/- and there by confirming that the provisions of section 40(a)(ia) were attracted.

2.3 Without prejudice to the above and in alternative, the jii. CIT(A) ought to have appreciated that since the recipients were assessed to tax the disallowance u/s 40(a)(ia) was unjustified in law.

”
It is therefore prayed that the disallowance u/s 40(a)(ia) upheld by 30 % by CIT(A) should be deleted”

3. All the grounds of appeal are inter-connected, therefore, for the sake of convenience the same are considered together as follows:-

4. The fact in brief is that assessee has filed return of income showing loss of Rs. 79,96,219/- on 28th Sep, 2012. Assessment order u/s. 143(3) of the Act was passed on 2nd March, 2015 accepting the losses shown in the return of income. Subsequently, the Pr. CIT issued notice u/s. 263 of the act and passed order u/s. 263 of the Act on 28th March, 2017 directing the Assessing Officer to disallow the payment of interest of Rs. 74,54,822/- which included payment of Rs. 25,29,132/- to M/s. India Infoline, Rs. 35,07,114/- to DSP Merrill Lynch and Rs. 14,18,562/- to Morgen Stanely u/s. 40(a)(ia) of the act. In the course of assessment proceedings u/s. 143(3) r.w.s. 263 of the act, the Assessing Officer noticed that assessee has debited aforesaid interest expenses to the Profit and Loss Account and assessee was liable to deduct tax u/s. 194A of the act on interest payment amounting to Rs. 74,54,822/-. On verification of the detail filed, the Assessing Officer observed that assessee has failed to deduct tax on the aforesaid interest

payment. On query, the assessee explained that he was under bonafide impression that interest paid to the aforesaid three parties was not subject to TDS provision and he was under the impression that all these companies have obtained license for operating as banking companies. The assessee further submitted that all the accounts of the aforesaid companies were audited accounts and they have filed the income tax return and paid the tax on the interest income. The Assessing Officer has not accepted the explanation of the assessee. The Assessing Officer has stated that assessee has made request to disallow 30% of interest payment of Rs. 74,54,822/- u/s. 40(a)(ia) of the Act. But the Assessing Officer has not agreed with the assessee stating that amendment for 30% disallowment as per provision of section 40(a)(ia) has been inserted by the Finance Act, 2014 w.e.f. 01-04-2015 applicable to the assessment year 2015-16 and same is not applicable to the year under consideration that is assessment year 2012-13. Consequently, the Assessing Officer has disallowed the whole of interest expenses as mentioned above of Rs. 74,54,822/- u/s. 40(a)(ia) of the act and added to the total income of the assessee.

5. Aggrieved assessee has filed appeal before the Id. CIT(A). The assessee has submitted before the Id. CIT(A) that disallowance at 30% of such sum has to be made in case of non-deduction of TDS as the amendment in the provision u/s. 40(a)(ia) is retrospective and clarificatory in nature and applicable to the year under considerations in view of the various judicial pronouncements holding that the amendment is retrospective and clarificatory. Therefore, the Id. CIT(A) has restricted the disallowance to

30% of the total interest payment. The relevant part of the decision of Id. CIT(A) is as under:-

“4.3. In this case, assessment u/s. 143(3) of the Act was passed on 2.3.2015 determining total loss at Rs.79,96,219/-. Subsequently the Pr.CIT, Ahmedabad-5 passed an order u/s.263 of the Act on 20.3.2017 and directing the AO to disallow the payment of interest of Rs.74,54,822/- which included payment of Rs.25,29,132/- to M/s.India Info Line, Rs.35,07,114/- to DSP Merrill Lynch and Rs.14,18,576/- to Morgan Stanely u/s.40(a)(ia)of the Act as the assessee had failed to comply the TDS provision of the Act. The AO has observed that all these companies are non-banking finance company hence the assessee was liable to deduct tax U/S.194A of the Act on interest payment amounting to rs.74,54,822/-. The assessee has failed to comply the TDS provisions, therefore, the AO has disallowed the interest and made an addition of Rs.74,54,822/-. The AO has also rejected the request of assessee to disallow 30% of total interest payment on the ground that the amended provision is applicable from A.Y. 2015-16.

4.4. During the appellate proceedings the appellant has contended that the AO has failed to appreciate that the impugned payment to NBFCs totaling to Rs.74,54,822/- were not in nature of interest but the same were financial charges so that the provisions of Section 194A were not applicable. Further contended that when the recipients NBFCs were assessed to tax and had included the payments made by the appellant in their accounts, paid taxes thereon, no disallowance is warranted u/s.40(a)(ia) of the Act. It is further contended that the AO has failed to appreciate that the said provisions was amended by Finance Act, 2014 whereby a flat rate of disallowance at 30% of such sum has to be made in case of non-deduction of TDS. It is contended that the said amendment is retrospective and clarificatory in nature in as much as the same was introduced to remove the hardship caused by the disallowance of entire expenses. Though the same may be genuine. It is contended that an identical amendment was made by Finance Act, 2010 in respect of this provision which has held to be retrospective by the Apex Court in the case of CIT Vs. Calcutta Export Co.

4.5. Facts of the case and the submissions are considered. The contention of the appellant that these payments are not in nature of interest but the same were financial charges and the provisions of Section 194A were not applicable is not on sound footing, he appellant has failed to establish that the nature of payment was financial charges. Further the appellant tried to take support of the proviso of the Section and contended that the recipient NBFCs had included the payments made by the appellant in their accounts and paid taxes thereon. However, the appellant has failed in doing so as no required certificate in this regard was furnished by the appellant during the course of assessment proceedings as well as appellate proceedings. The provisions of Section was amended by Finance Act, 2014 whereby a flat rate of disallowance at 30% of such sum has to be made in case of non-deduction of TDS. The AO has rejected the request of the assessee on the ground that this amendment is effective from 1st April, 2014 and not applicable to the year under consideration. The appellant has contended that this amendment is retrospective and clarificatory in nature and applicable in the year under consideration. The argument of the appellant is found to be correct as in various judicial pronouncements it is held that the amendment is retrospective and clariflcatory. Following the judicial pronouncements the AO is directed to restrict the disallowance to 30% of the total interest payment. Thus the ground of appeal is partly allowed.”

6. During the course of appellate proceedings before us, the Id. counsel contended that amount of interest payment has been included in the income of the parities to whom the amount of interest was paid and they have filed their return of income, therefore, no disallowance should be made. In this

regard, the ld. counsel has placed reliance on the decision of Co-ordinate Bench of the ITAT vide ITA No. 309/Alld/2017 in the case of M.K. Agrawal & Co. Vs. ACIT dated 03-12-2020. On the other hand, ld. Departmental Representative has contended that assessee has not produced any evidences of payment of taxes by the other parties, therefore, the contention of the assessee is not correct. The ld. Departmental Representative has also placed reliance on the decision of Supreme Court of India in the case of Shree Chaudhary Transport Company vs. ITO (2020) 118 taxmann.com 47 (SC).

7. Heard both the sides and perused the material on record. The Assessing Officer has disallowed the interest payment of Rs. 74,54,822/- on the ground that assessee has failed to comply with the TDS provision. The Assessing Officer has rejected the request of the assessee to disallow 30% of total interest payment on the ground that the amended provision is applicable from A.Y. 2015-16. The ld. CIT(A) has restricted the disallowance to the extent of 30% of total interest payment after holding that amended provision of section 40(a)(ia) of the Act, the Finance Act, 2014 is retrospective and clarificatory. During the course of appellate proceedings before us, the ld. counsel has referred the decision of ITAT Allahabad as referred above stating that once the recipient of the interest amount has included the same as part of their income and filed the return of income in that case the provision of section 40(a)(ia) is not required to invoked. In this regard, we have perused the material on record and noticed that assessee has not filed any supporting evidences to substantiate that aforesaid payees of interest have included the same in their return of income and paid the taxes there on.

The assessee has not filed such detail at the time of assessment and appellate proceedings. It is further noticed that during the course of appellate proceedings before the Id. CIT(A) in his submission the assessee has categorically pleaded to restrict the disallowance at 30% of such sum of interest payment. In this regard, the relevant part of the submission of the assessee reported at the page no. 4 of Id. CIT(A)'s order is reproduced as under:-

“(c) Lastly, the AO has failed to appreciate that the said provision was amended by Finance Act, 2014 whereby a flat rate of disallowance at 30% of such sum has to be made in case of non-deduction of IDS. The appellant had contended that the said amendment was retrospective and clarificatory in nature in as much as the same was introduced to remove the hardship caused by the disallowance of entire expenses, though the same may be genuine. It is submitted that an identical amendment was made by Finance Act, 2010 in respect of this provision which has held to be retrospective by the Apex Court in case of CIT vs. Kalkatta Export Co. (302 CTR 201) wherein it was held that

“The proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious in the section, is required to be read into the section to give the section a reasonable interpretation and requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole. The amended provision of section 40(a)(ia) should be interpreted liberally and equitably and applies retrospectively from the date of insertion. ”

In view of above, the impugned disallowance of Rs. 74,54,822/- may please be deleted.

On perusal of the aforesaid submission, it is categorically demonstrated that assessee himself has requested the Id. CIT(A) to restrict the disallowance to 30% since the amended provision are applicable retrospectively in view of the decision of Hon'ble Supreme Court as referred in the submission of the assessee. The assessee has failed to file the supporting evidences of including the payment by NBFC in this account and payment of taxes thereon. In the light of the above facts and circumstances, we do not find

any infirmity in the decision of Id. CIT(A), therefore, the grounds of appeal 1.1 to 1.3 are dismissed.

8. In the result, the appeal of the assessee is dismissed.

Order pronounced in the open court on 23-08-2021

Sd/-
(MAHAVIR PRASAD)
JUDICIAL MEMBER

Ahmedabad : Dated 23/08/2021

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद