

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "A", JAIPUR
श्री रमेश सी शर्मा, लेखा सदस्य एवं श्री विजय पाल राव, न्यायिक सदस्य के समक्ष
BEFORE: SHRI RAMESH C SHARMA, AM & SHRI VIJAY PAL RAO, JM

आयकर अपील सं./ITA No. 591/JP/2017
निर्धारण वर्ष / Assessment Year :2012-13

M/s Seatel Electronics India Pvt. Ltd., 13B, Achrol House, Civil Lines, Jaipur.	बनाम Vs.	Income Tax Officer, Ward-2(1), Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAHCS 5191 E		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Siddarth Ranka (Adv.)
राजस्व की ओर से / Revenue by : Shri J.C. Kulhari (JCIT)

सुनवाई की तारीख / Date of Hearing : 24/01/2019
उदघोषणा की तारीख / Date of Pronouncement : 04/02/2019

आदेश / ORDER

PER: R.C. SHARMA, A.M.

This is the appeal filed by assessee against the order of Id.CIT(A)-I, Jaipur dated 03/05/2017 for the A.Y.2012-13 in the matter of order passed U/s 143(3) of the Income Tax Act, 1961 (in short the Act).

2. Solitary grievance of the assessee is relating to disallowance of Rs. 12,47,500/- U/s 40(a)(ia) of the Act on account of non-deduction of TDS towards interest paid by the assessee.

3. Rival contentions have been heard and record perused. The facts in brief are that the assessee is a Private Limited Company carrying on the business of trading in Computer parts and its C&F agent for the past several years. During the course of scrutiny assessment, the Assessing Officer has disallowed a sum of Rs. 12,47,500/- u/s. 40(a)(ia) on account of non-deduction of TDS towards interest paid by the assessee to M/s. Bajaj Auto Finance Ltd., Tata Capital Ltd., Barclays Investments & Loans (India) Ltd., Religare Finvest Ltd. and Reliance Capital Ltd. The Assessing Officer has rejected the submission of the assessee appellant that the recipient Companies have accounted for the interest received from the assessee and have also paid due tax thereon and has held that the 2nd Proviso to Section 40(a)(ia) introduced by Finance Act, 2012 is prospective in nature and shall not be treated as retrospective.

4. By the impugned order, the Id. CIT(A) confirmed the action of the Assessing Officer against which the assessee is further appeal before us.

5. It was argued by the Id AR of the assessee that the issue with regard to applicability of second proviso to Section 40(a)(ia) of the Act introduced by the Finance Act, 2012 is retrospective and in support of the case, the decision of Hon'ble Rajasthan High Court in the case of Pr.CIT Vs Shri Om Prakash Dangayach in D.B. Income Tax Appeal No. 124/2018

decision dated 03/07/2018 and decision of the Coordinate Bench of this Tribunal in the case of M/s Fortune Infonet Vs. ITO in ITA No. 866/JP/2018 order dated 20/11/2018 was placed on record.

6. On the other hand, the Id. DR has relied on the orders of the authorities below.

7. We have considered the rival contentions and carefully gone through the orders of the authorities below and found that the issue with regard to applicability of second proviso to Section 40(a)(ia) of the has been held to be retrospective by the Coordinate Bench in the following judicial pronouncements:

“This Tribunal in the case of ACCME (Urvashi Pumps) Eng. (P.) Ltd. Vs. JCIT (OSD) (2018) 90 taxmann.com 189 (Jp Trib). The Tribunal in the said decision has considered and decided this issue as under:

"7. *We have considered the rival submissions as well as relevant material on record. The assessee contended before the Id. CIT(A) that the interest paid to 3 NBFCs namely Reliance Capital Limited, Barclays Bank and Cholamandalam DBC Finance Limited was included in the return of income filed by these Non Banking Financial Companies therefore, in view of the second proviso to section 40(a)(ia) of the Act no disallowance is called for in respect of this amount on which the recipient have paid the taxes. The assessee urged that the second proviso to section 40(a)(ia) is remedial in nature and therefore, the said amendment will have retrospective effect. We find that Hon'ble Delhi High Court in case of CIT vs. Naresh Kumar (supra) while dealing with an identical issue has held in para 15 to 29 as under:-*

“15. *Question whether the amendment is retrospective or prospective is vexed and rigid rule can be applied universally. Various rules of*

interpretation have developed in order to determine whether or not, an amendment is retrospective or prospective. Fiscal statutes imposing liabilities are governed by normal presumption that they are not retrospective. The cardinal rule is that the law to be applied, is that which is in force on the first day of the assessment year, unless otherwise mandated expressly or provided by necessary implication. The aforesaid dictum is based upon the principle that a new provision creating a liability or an obligation, affecting or taking away vested rights or attaching new disability is presumed to be prospective. However, it is accepted that Legislatures have plenary power to make retrospective amendments, subject to Constitutional restrictions.

- 16.** *Based upon the aforesaid broad dictum, Judges and jurists have drawn distinction between procedural and substantive provisions. Substantive provisions deal with rights and the same are fundamental, while procedural law is concerned with the legal process involving actions and remedies. Amendments to substantive law are treated as prospective, while amendments to procedural law are treated as retrospective. This distinction itself is not free from difficulties as right to appeal has been held to be a substantive law, but law of limitation is regarded as procedural. There is an interplay and interconnect between what can be regarded as substantive and procedural law [see CITv. Shrawan Kumar Swarup & Sons [1998] 232 ITR 123(All.)].*
- 17.** *There are decisions, which hold that process of litigation or enforcement of law is procedural. Similarly, machinery provision for collection of tax, rather than tax itself is procedural. Read in this context, it can be strongly argued that Section 40(a)(ia) at least to the extent of the amendment is procedural as by enacting Section 40(a)(ia) the Legislature did not want to impose a new tax but wanted to ensure collection of TDS and the amendments made streamline and remedy the anomalies noticed in the said procedure by allowing deduction in the year when the expenditure is incurred provided TDS is paid before the due date for filing of the return. Remedial statutes are normally not retrospective, on the ground that they may affect vested rights. But these statutes are construed liberally when justified and rule against retrospectivity may be applied with less resistance [See Bharat Singh v. Management of New Delhi Tuberculosis Centre [1986] 2 SCC 614 and Workmen Firestone Tyre & Rubber Co. of India (P.) Ltd. v. Management AIR 1973 SC 1227.*
- 18.** *It is interesting to note that earlier English decisions have held that an enactment fixing a penalty or maximum penalty for*

offence is merely procedural for the purpose of determining retrospectivity[See DPP v. Lamb [1941]2KB89)and R V. Oliver [1944] 29 Cr. App. 137. This view, however, has been criticized in Reherd Athlumney, In re [1898] 2 QB 547 on the ground that higher or greater punishment impairs existing rights or obligation;—

"No rule of construction is more firmly established than this; that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

19. *The word "fairly" used in the aforesaid quotation is important and relevant, but for application of another rule of interpretation. G.P. Singh in "Principles of Statutory Interpretation", 13th Edition, 2012 at page 538 under the sub-heading "Recent statements of the rule against Retrospectivity" has greatly emphasized the principle of fairness and observed that classification of statute either substantive or procedural does not necessarily determine whether the enactment or amendment has retrospective operation, e.g., law of limitation is procedural but its application to past cause of action may result of reviving or extinguishing a right, and such operation cannot be said to be procedural. Similarly, when requisites of an action under the new statute, draws from a time incident to its passing, rule against retrospectivity may not be applicable.*

20. *In the said text, reference has been made to formulation by Dixon, C.J. in Maxwell v. Murphy [1957] 96 CLR 261 holding:—*

"The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect the rights or liabilities which the law had defined be reference to the past events. But given the rights and liabilities fixed by reference to the past facts, matters or events, the law appointing or regulating the manner in which they are to be enforced or their enjoyment is to be secured by judicial remedy is not within the application of such a presumption".

- 21.** *Identically, in Secretary of State for Social Security v. Tunncliffe [1991] 2 All ER 712 (CA), Staughton, L.J. has expressed the said principle in the following words:—*

"The true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree- the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended".

- 22.** *House of Lords in L' office Cherifien des Phosphates v. Yamashita Shinnihon Steamship Co. Ltd. [1994] 1 All ER 20 has said the question of fairness has to be answered by taking into account various factors, viz., value of the rights which the statute affects; extent to which that value is diminished or extinguished by the suggested retrospective effect of the statute; unfairness of adversely affecting the rights; clarity of the language used by Parliament and the circumstances in which the legislation was created. These factors have to be weighed together to provide an answer whether the consequences of reading the statute with suggested degree of retrospectivity is unfair; that the words used by the Parliament could not have been intended to mean what they might appear to say. This principle was applied while interpreting a new provision in Arbitration Act in this case observing that the delay attributable to the claimant in pursuing a claim before enactment of the new provision, could be taken into consideration for dismissal.*

- 23.** *Principle of "fairness" has not left us untouched and was applied by the Supreme Court in Vijay v. State of Maharashtra [2006] 6 SCC 289 in the following words:—*

"...The negotiation is not a rigid rule and varies with the intention and purport of the legislation, but to apply it in such a case is a doctrine of fairness. When a new law is enacted for the benefit of the community as a whole, even in absence of a provision the statute may be held to be retrospective in nature."

- 24.** *In Allied Motors (P.) Ltd. v. CIT [1997] (224) ITR 677/91 Taxman 205 (SC) it was held that the new proviso to Section 43B should be given retrospective effect from the inception on the ground that the proviso was added to remedy unintended consequences and supply an obvious omission. The proviso ensured reasonable*

interpretation and retrospective effect would serve the object behind the enactment.

- 25.** *In State through C.B.I Delhi v. Gian Singh AIR 1999 SC 3450 extreme penalty of death was diluted to alternative option of imprisonment for life recording that the legislative benevolence could be extended to an accused, who awaits judicial verdicts against his sentence. Earlier in Rattan Lal v. State of Punjab AIR 1965 SC 444 reference was made to Section 6 of the Probation of Offenders Act, 1958 and it was observed that if the Act was not given retrospective operation, it would lead to anomalies and thus could not be the intention of the Legislature.*
- 26.** *Principle of matching which is disturbed by Section 40(a)(ia) of the Act, may not materially be of consequence to the Revenue when the tax rates are stable and uniform or in cases of big assessees having substantial turnover and equally huge expenses as they have necessary cushion to absorb the effect. However, marginal and medium taxpayers, who work at low G.P. rate and when expenditure which becomes subject-matter of an order under Section 40(a)(ia) is substantial, can suffer severe adverse consequences as is apparent from the case of Naresh Kumar. Transferring or shifting expenses to a subsequent year, in such cases, will not wipe off the adverse effect and the financial stress. Nevertheless the Section 40(a)(ia) has to be given full play keeping in mind the object and purpose behind the section. At the same time, the provision can be and should be interpreted liberally and equitable so that an assessee should not suffer unintended and deleterious consequences beyond what the object and purpose of the provision mandates. Case of Naresh Kumar is not one of rare cases, but one of several cases as we find that Section 40(a)(ia) is invoked in large number of cases.*
- 27.** *One important consideration in construing a machinery section is that it must be so construed so as to effectuate the liability imposed by the charging section and to make the machinery workable.*
- However, when the machinery section results in unintended or harsh consequences which were not intended, the remedial or correction action taken is not to be disregarded but given due regard.*
- 28.** *It is, in this context, that we had in Rajinder Kumar's case (supra) observed as under:*

'22. Now, we refer to the amendments which have been made by the Finance Act, 2010 and the effect thereof. We have already quoted the decision of the Calcutta High Court in *Virgin Creations (supra)*. The said decision refers to the earlier decision of the Supreme Court in the case of *Allied Motors (P.) Ltd (supra)* and *Commissioner of Income Tax v. Alom Extrusions Ltd, [2009] 319 ITR 306 (SC)*. In the case of *Allied Motors (P.) Ltd. (supra)*, the Supreme Court was examining the first proviso to Section 43B and whether it was retrospective. Section 43B was inserted in the Act with effect from 1st April 1984 for curbing claims of taxpayers who did not discharge or pay statutory liabilities but claimed deductions on the ground that the statutory liability had accrued. Section 43B states that the statutory liability would be allowed as a deduction or as an expense in the year in which the payment was made and would not be allowed, even in cases of mercantile system of accountancy, in the year of accrual. It was noticed that in some cases hardship would be caused to assessees, who paid the statutory dues within the prescribed period though the payments so made would not fall within the relevant previous year. Accordingly, a proviso was added by Finance Act, 1987 applicable with effect from 1st April, 1988. The proviso stipulated that when statutory dues covered by Section 43B were paid on or before the due date for furnishing of the return under Section 139(1), the deduction/expense, equal to the amount paid would be allowed. The Supreme Court noticed the purpose behind the proviso and the remedial nature of the insertion made. Of course, the Supreme Court also referred to Explanation 2 which was inserted by Finance Act, 1989 which was made retrospective and was to take effect from 1st April, 1984. Highlighting the object behind Section 43B, it was observed that the proviso makes the provision workable, gives it a reasonable interpretation. It was elucidated:

"12. In the case of *Goodyear India Ltd. v. State of Haryana* this Court said that the rule of reasonable construction must be applied while construing a statute. Literal construction should be avoided if it defeats the manifest object and purpose of the Act.

13. Therefore, in the well-known words of Judge Learned Hand, one cannot make a fortress out of the dictionary; and should remember that statutes have some purpose and object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning. In the case of *R.B. Judha Mal Kuthiala v. CIT*, this Court said that one should apply the rule of reasonable interpretation. A proviso which is inserted to remedy unintended consequences and to make the provision workable, a

proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole.

14. This view has been accepted by a number of High Courts. In the case of CIT v. Chandulal Venichand, the Gujarat High Court has held that the first proviso to Section 43-B is retrospective and sales tax for the last quarter paid before the filing of the return for the assessment year is deductible. This decision deals with Assessment Year 1985-85. The Calcutta High Court in the case of CIT v. Sri Jagannath Steel Corpn. has taken a similar view holding that the statutory liability for sales tax actually discharged after the expiry of the accounting year in compliance with the relevant statute is entitled to deduction under Section 43-B. The High Court has held the amendment to be clarificatory and, therefore, retrospective. The Gujarat High court in the above case held the amendment to be curative and explanatory and hence retrospective. The Patna High court has also held the amendment inserting the first proviso to be explanatory in the case of Jamshedpur Motor Accessories Stores v. Union of India. The special leave petition from this decision of the Patna High Court was dismissed. The view of the Delhi High Court, therefore, that the first proviso to Section 43-B will be available only prospectively does not appear to be correct. As observed by G.P. Singh in his Principles of Statutory Interpretation, 4th Edn. At p. 291: "It is well-settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended." In fact the amendment would not serve its object in such a situation unless it is construed as retrospective. The view, therefore, taken by the Delhi High Court cannot be sustained."

23. Section 43B deals with statutory dues and stipulates that the year in which the payment is made the same would be allowed as a deduction even if the assessee is following the mercantile system of accountancy. The proviso, however, stipulates that deduction would be allowed where the statutory dues covered by Section 43B stand paid on or before the due date of filing of return of income. Section 40(a)(ia) is applicable to cases where an assessee is required to deduct tax at source and fails to deduct or does not make payment of the TDS before the due date, in such cases, notwithstanding Sections 30 to 38 of the Act, deduction is to be allowed as an expenditure in the year of payment unless a case is covered under the exceptions carved out. The amended

proviso as inserted by Finance Act, 2010 states where an assessee has made payment of the TDS on or before the due date of filing of the return under Section 139(1), the sum shall be allowed as an expense in computing the income of the previous year. The two provisions are akin and the provisos to Sections 40(a)(ia) and 43B are to the same effect and for the same purpose.

24. In Podar Cement (P.) Ltd. (supra), the Supreme Court considered whether term "owner" would include unregistered owners who had paid sale consideration and were covered by Section 53A of the Transfer of Property Act. The contention of the assessee was that the amendments made to the definition of term "owner" by Finance Bill, 1987 should be given retrospective effect. It was held that the amendments were retrospective in nature as they rationalise and clear the existing ambiguities and doubts. Reference was made to Crawford: "Statutory Construction" and "the principle of Declaratory Statutes", Francis Bennion: "Statutory Interpretation", Justice G.P. Singh's "Principles of Statutory Interpretation", it was observed that sometimes amendments are made to supply an obvious omission or to clear up doubts as to the meaning of the previous provision. The issue was accordingly decided holding that in such cases the amendments were retrospective though it was noticed that as per Transfer of Property Act, Registration Act, etc. a legal owner must have a registered document.

25. In view of the aforesaid discussion in paras 18,19 and 20, it is apparent that the respondent assessee did not violate the unamended section 40(a)(ia) of the act. We have noted the ambiguity and referred their contention of Revenue and rejected the interpretation placed by them. The amended provisions are clear and free from any ambiguity and doubt. They will help curtail litigation. The amended provision clearly support view taken in paragraphs 17 - 20 that the expression "said due date" used in clause A of proviso to unamended section refers to time specified in Section 139(1) of the Act. The amended section 40(a)(ia) expands and further liberalises the statute when it stipulates that deductions made in the first eleven months of the previous year but paid before the due date of filing of the return, will constitute sufficient compliance.'

29. *In view of the aforesaid discussion, we do not find any merit in the present appeals filed by the Revenue and they are dismissed."*

We further note that the Coordinate Bench of this Tribunal in case of Rajesh Yadav in ITA No. 895/JP/2012 vide order dated 29.01.2016 has held as under:-

“6.1. Recently in the matter of P.M.S. Diesels 2015] 59 taxmann.com 100 (Punjab & Haryana), Hon’ble Punjab & Haryana High Court had elaborately discussed the judgment passed by the Hon’ble Calcutta High Court and Hon’ble Gujarat High Court, Hon’ble Allahabad High Court and other judgments as available and thereafter has come to the conclusion that the provisions of section 40(a)(ia) are mandatory in nature and non compliance/non deduction of tax attracts disallowance of the entire amount. Having said so, we will be failing in our duty if we do not discuss the amendment brought in by the Finance (No. 2) Act 2014 with effect from 1.4.2015 by virtue of which proviso to section 40(a)(ia) has been inserted, which provides that if any such sum taxed has been deducted in any subsequent year or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of previous year, and further, section 40(a)(ia) has been substituted wherein the 30% of any sum payable to a resident has been substituted. In the present case, the authorities below has added the entire sum of Rs. 7,51,322/- by disallowing the whole of the amount. Though the substitution in section 40 has been made effective with effective from 1.4.2015, in our view the benefit of the amendment should be given to the assessee either by directing the AO to confirm from the contractors, namely, M/s. Garvit Stonex, M/s. Chanda Marbles and M/s. Nidhi Granites as to whether the said parties have deposited the tax or not and further or restrict the addition to 30% of Rs. 11 ITA No. 895/JP/2012 A.Y 2007-08. Shri Rajendra Yadav vs. ITO Ajmer. 7,51,322/-. In our view, it will be tied of justice if the disallowance is only restricted to 30% of Rs. 7,51,322/-. Accordingly, the appeal of the assessee is partly allowed in the above said manner.”

Further this Tribunal has taken a similar view on this issue by following the above decisions and therefore even if there is divergent view taken by the Hon’ble Kerala High Court the view taken in favour of the assessee by this Tribunal by following the various decisions are to be followed to maintain the rule of

consistency. Accordingly, We are of the view the second proviso to section 40(a)(ia) of the Act would be effective retrospective as it was undisputedly inserted to remove the hardship faced by the assessee. Hence, we set aside this issue to the record of the Assessing Officer for limited purpose to verify the fact that the interest income received by these NBFCs have been included in the return of income and offered to tax and then decide this issue in light of above observation."

Respectfully following the proposition of law laid down in above judicial pronouncements, we hold that second proviso to Section 40(a)(ia) of the Act as introduced by the Finance Act, 2012 is retrospective.

8. However, in the instant case, the assessee had filed application under Rule 29 of the Income Tax Appellate Tribunal Rules, 1963. As per the additional evidence so filed, the assessee has obtained certificate from the following parties to whom interest was paid:

- (a) Bajaj Auto Finance Ltd.
- (b) TATA Capital Ltd.
- (c) Religare Finvest Ltd.
- (d) Barclays Investment & Loans (India) Ltd.
- (e) Reliance Capital Ltd.

9. We also found that the assessee is obtained certificate of Chartered Accountant of the concerned institution to the effect that the interest paid by the assessee to the above parties have already been included in the total income while completing taxable income as per return of income filed with the department, which were not available during the

assessment proceedings and appellate proceedings before the Id. CIT(A) and which is necessary to consider while deciding the aforesaid appeal. Since these certificates goes to the root of the matter and are vital, relevant and important in getting this appeal decided, we direct the Assessing Officer to consider these certificates in deciding the issue in terms of judicial pronouncements referred hereinabove. We direct accordingly.

10. In the result, appeal of the assessee is allowed in terms of the conditions indicated hereinabove.

Order pronounced in the open court on 04th February, 2019.

Sd/-

(विजय पाल राव)
(VIJAY PAL RAO)

न्यायिक सदस्य / Judicial Member
जयपुर / Jaipur

दिनांक / Dated:- 04th February, 2019

*Ranjan

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- M/s Seatel Electronics India Pvt. Ltd., Jaipur.
2. प्रत्यर्थी / The Respondent- The ITO, Ward 2(1), Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 591/JP/2017)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar