IN THE INCOME TAX APPELLATE TRIBUNAL
ELHI BENCH "A", NEW DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

	I.T.A. Nos. 4820/DEL/2014 & ITA NO. 238/DEL/2015		
	A.Yrs. : 2010-11 & 2011-12		
DEPUTY COMMISSIONER OF INCOME TAX, CIRCLE 1(1), ROOM NO. 392, C.R. BUILDING, I.P. ESTATE, NEW DELHI – 110 002	VS.	M/S ANSAL LANDMARK TOWNSHIP LTD., 115, ANSAL BHAWAN, 16, KG MARG, NEW DELHI (PAN: AAECA8892P)	
(APPELLANT)		(RESPONDENT)	

Department by : Smt. Aparna Karan, CIT(DR)
Assessee by : Sh. Satyen Sethi, Adv,

ORDER

PER H.S. SIDHU : JM

These are the Appeals filed by the Revenue against the respective impugned orders of the Ld. CIT(A)-IV, New Delhi pertaining to assessment years 2010-11 & 2011-12. Since the issues involved in these appeals are common and identical, hence, these appeals were heard together and are being disposed by this common order for the sake of convenience.

2. The grounds raised in Revenue's ITA No. 4820/Del/2014 (AY 2010-11) read as under:-

"1. The Ld. CIT(A) has erred on facts and in law in deleting addition of Rs. 19,34,53,000/- on account of Profit reworked for Ghaziabad sub-project plotted.

2. The Ld. CIT(A) has erred on facts and in law in deleting addition of Rs. 4,37,87,000/- on Rs. 16,97,000/- and Rs. 9,65,000/- on account of Profits reworked for Meerut sub project.

3. The Ld. CIT(A) has erred on facts and in law in deleting addition o Rs. 1,26,46,909/- being know how fee surrendered.

4. The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal."

3. The grounds raised in Revenue's ITA No. 238/Del/2015 (AY 2011-12) read as under:-

"1. The Ld. CIT(A) has erred on facts and in law in deleting addition of Rs. 19,66,17,000/- on account of Profit reworked for Ghaziabad sub-project plotted.

2. *The Ld. CIT(A) has erred on facts and in law in deleting addition of Rs. 35,000/- on account of Profits reworked for Meerut sub-project plotted.*

3. *The Ld. CIT(A) has erred on facts and in law in deleting addition of Rs. 35,000/- on account of Profits reworked for Meerut sub-project built-up.*

4. *The Ld. CIT(A) has erred on facts and in law in deleting addition of Rs. 1,09,000/ on account of profits reworked for Karnal sub project plotted.*

5. *The Ld. CIT(A) has erred on facts and in law in deleting addition of Rs. 40,000/- on account of profits reworked for Karnal sub project group housing.*

6 *The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal."*

REVENUE'S APPEAL - ITA NO. 4820/DEL/2014 (AY 2010-11)

4. The brief facts of the case are that the case of the assessee filed the return of income declaring a loss of Rs. 62,72,484/- on 01.10.2010. the revised return of income was filed on 31.3.2012 at an income of Rs. 45,22,872/- and the same was processed u/s. 143(1) of the Income Tax

Act, 1961 (hereinafter referred as the Act). Notice u/s. 143(2) of the Act was issued in this case on 19.9.2011 and duly served on the assesse. In response to the notice u/s. 143(2) of the Act and various other statutory notices, the A.R. of the assessee attended the proceedings from time to time and filed the requisite details called for. Thereafter, the AO completed the assessment at Rs. 24,44,43,910/- and made the various additions vide assessment order dated 26.03.2013 passed u/s. 143(3)(ii) of the Income Tax Act, 1961.

5. Against the aforesaid assessment order dated 26.3.2013, assessee preferred an appeal before the Ld. CIT(A), who vide his impugned Order dated 12.6.2014 has partly allowed the appeal of the asseseee.

6. Aggrieved with the impugned order of the Ld. CIT(A), the Revenue is in appeal before the Tribunal

7. Ld. DR relied upon the order of the AO and reiterated the grounds of appeal raised in the Revenue appeals and requested that appeals of the Revenue may be allowed by cancelling the orders of the Ld. CIT(A).

8. On the other hand Ld. Counsel of the assessee relied upon the order of the Ld. CIT(A) and stated that Ld. CIT(A) has passed a well reasoned order which does not need any interference on our part and requested to dismiss the appeal of the Revenue.

9. We have heard both the parties and perused the records. Apropos ground no. 1 relating to deletion of addition of Rs. 19,34,53,000/- on

account of Profit reworked for Ghaziabad sub-project plotted is concerned, we find that AO has made the addition in dispute on the basis of addition made in AY 2008-09 and Ld. CIT(A) has deleted the addition made during the year 2008-09. However, in the assessment year 2009-10 the AO has accepted the order of the Ld. CIT(A) of AY 2008-09 and hence, no such addition was made in the AY 2009-10 in the order passed u/s. 143(3) of the I.T. Act, 1961. We further note that the Ld. CIT(A) in the present year i.e. AY 2010-11 while passing the impugned order has thus observed that since there is no reason for him to differ from the findings of his Predecessor on this issue. Therefore, in order to maintain the Rule of consistency, respectfully following the decision of the Ld. CIT(A) in the AY 2008-09, the issue in hand was decided in favour of the assessee and AO was rightly directed to delete the addition of Rs. 19,34,53,000/-, which does not need any interference on our part, hence, we uphold the action of the Ld. CIT(A) on the addition in dispute and reject the ground no. 1 raised by the Revenue

10. Apropos ground no. 2 relating to deletion of addition of Rs. 4,37,87,000/- on Rs. 16,97,000/- and Rs. 9,65,000/- on account of Profits reworked for Meerut sub project is concerned, we find that AO has made the addition in dispute on the basis of addition made in AY 2008-09 and Ld. CIT(A) has deleted the addition made during the year 2008-09. However, in the assessment year 2009-10 the AO has accepted the order of the Ld. CIT(A) of AY 2008-09 and hence, no such addition was made in the AY 2009-10 in the order passed u/s. 143(3) of the I.T. Act, 1961. We

further note that the Ld. CIT(A) in the present year i.e. AY 2010-11 while passing the impugned order has thus observed that since there is no reason for him to differ from the findings of his Predecessor on this issue. Therefore, in order to maintain the Rule of consistency, respectfully following the decision of the Ld. CIT(A) in the AY 2008-09, the issue in hand was decided in favour of the assessee and AO was rightly directed to delete the addition of Rs. 4,37,87,000/-, in respect of plots in Meerut project on account of 98.72% of completion as against 96.04% of completion declared by the assessee, Rs. 16,97,000/ in respect of built up area in Meerut project on account of 60.36% of completion as against 60.23% declared by the assessee, Rs. 9,65,000/- in respect of constructions of Mall in Meerut project on account of adoption of 38.41% of completion as against 35.97% declared by the assessee. Therefore, the Ld. CIT(A), also rightly directed to adopt the loss of Rs. 30.7 lacs on account of percentage completion declared by the assesse at 32.09% as against 32.4% adopted by the AO, which does not need any interference on our part, hence, we uphold the action of the Ld. CIT(A) on the addition in dispute and reject the ground no. 2 raised by the Revenue.

11. Apropos ground no. 3 relating to deletion of addition of Rs. 1,26,46,909/- being know how fee surrendered is concerned, we find that ITAT, Agra Bench has considered the similar issue in the case of Rajiv Kumar Agarwal vs. Addl. CIT in ITA No. 337/Agra/2013 in their order dated 29.5.2014 and held that the insertion of second proviso to Section 40(a)(ia) is declaratory and curative in nature and it has

retrospective effect from 1st April, 2005. We also find that ITAT has relied on the decision of the Hon'ble Delhi High Court in the case of CIT vs. Rajinder Kumar 362 ITR 241. However, for the sake of clarity, the relevant observations of the ITAT, Agra Bench as given in para 6 to 9 are reproduced as under:-

> *"6. However, the stand so taken by the special bench was disapproved by Hon'ble Delhi High Court in the case of CIT Vs Rajinder Kumar (362 ITR 241). While doing so Their Lordships observed that, "The object of introduction of Section 40(a)(ia) is to ensure that TDS provisions are scrupulously implemented without default in order to augment recoveries Failure to deduct TDS or deposit TDS results in loss of revenue and may deprive the Government of the tax due and payable " (Emphasis by underlining supplied by us). Having noted the underlying objectives, Their Lordships also put in a word of caution by observing that, " the provision should be interpreted in a fair, just and equitable manner". Their Lordships thus recognized the bigger picture of realization of legitimate tax dues, as object of Section 40(a)(ia), and the need of its fair, just and equitable interpretation. This approach is qualitatively different from perceiving the object of Section 40(a)(ia) as awarding of costs on the. "assessees who fail to comply with the relevant provisions by considering overall objective of boosting TDS compliance". Not only the conclusions arrived at by the special bench were*

disapproved but the very fundamental assumption underlying its approach, i.e. on the issue of the object of Section 40(a)(ia), was rejected too. In any event, even going by Bharti Shipyard decision (supra), what we have to really examine is whether 2012 amendment, inserting second proviso to Section 40(a)(ia), deals with an "intended consequence" or with an "unintended consequence".

7. When we look at the overall scheme of the section as it exists now and the bigger picture as it emerges after insertion of second proviso to section 40(a)(ia), it is beyond doubt that the underlying objective of section 40(a)(ia) was to disallow deduction in respect of expenditure in a situation in which the income embedded in related payments remains untaxed due to non deduction of tax at source by the assessee. In other words, deductibility of expenditure is made contingent up6n the income, if any, embedded in such expenditure being brought to tax, if applicable. In effect, thus, a deduction for expenditure is not allowed to the assessees, in cases where assessees had tax withholding Obligations from the related payments, without corresponding income inclusion by the recipient. That is the

clearly discernable bigger picture, and, unmistakably, a very pragmatic and fair policy approach to the issue - howsoever belated the realization of unintended and undue hardships to the taxpayers may have been. It seems to proceed on the basis, and rightly so, that seeking tax deduction at source compliance is not an end in itself, so far as the scheme of this legal provision is concerned, but s only a mean of recovering due taxes on income embedded in the payments made by the assessee. That's how, as we have seen a short while ago, Hon'ble Delhi High Court has visualized the scheme of things - as evident from Their Lordships' reference to augmentation of recoveries in the context of "loss of revenue" and "depriving the Government of the tax due and payable".

8. With the benefit of this guidance from Hon'ble Delhi High Court, in view of legislative amendments made from time to time, which throw light on what was actually sought to be achieved by this legal provision, and in the light of the above analysis of the scheme of the [aw, we are of the considered view that section 40(a)(ia)

cannot be seen as intended to be a penal provision to punish the lapses of non deduction of tax at source from payments for expenditure - particularly when the recipients have taken into account income embedded in these payments, paid due taxes thereon and filed income tax returns in accordance with the law. As a corollary to this proposition, in our considered view, declining deduction in resp ct of expenditure relating to the payments of this nature cannot be treated as an "intended consequence" of Section 40(a)(ia). If it is not an intended consequence i.e. if it is an unintended consequence, even going by Bharti Shipyard decision (supra), "removing unintended consequences to make the provisions workable has to be treated as retrospective notwithstanding the fact that the amendment has been given effect prospectively". Revenue, thus, does not derive any advantage from Special bench decision in the case Bharti Shipyard (supra).

9. On a conceptual note, primary justification for such a disallowance is that such a denial of deduction is 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 restrictions should, therefore, not come into play when an assessee is able to establish that there is no actual loss of revenue. This disallowance does deincentivize not deducting tax at source, when such tax deductions are due, but, so ar a s the legal framework is concerned, this provision is not for the purpose of penalizing for the tax deduction at source lapses. There are separate penal provisions to that effect. Deincentivizing a lapse and punishing a lapse are two different things and have distinctly different, and sometimes mutually exclusive, connotations. When we appreciate the object of scheme of section 40(a)(ia), as on the statute, and to examine whether or not, on a "fair, just, and equitable" interpretation of law- as is the guidance from Hon'ble Delhi High Court on interpretation of this legal provision, in our humble understanding, it could not be an "intended consequence" to disallow the expenditure, due to non deduction of tax at source, even in a situation in which corresponding

income is brought to tax in the hands of the recipient. The scheme of Section 40(a)(ia), as we see it, is 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 has remained untaxed due to tax withholding lapses by the assessee. It is not, in our considered view, a penalty for tax withholding lapse but it is a sort of compensatory deduction restriction for an income going untaxed due to tax withholding lapse. The penalty for tax withholding lapse per se is separately provided for in Section 271C, and, section 40(a)(ia) does not add to the same. The provisions of Section 40(a)(ia), as they existed prior to insertion of second proviso thereto, went much beyond the obvious intentions of the lawmakers end. created undue hardships even in cases in which the assessee's tax withholding lapses did not result in any loss to the exchequer. Now that the legislature has been compassionate enough to Cure these shortcomings of provision, and thus obviate the unintended hardships, such an amendment in law, in view of the well settled

legal position to the effect that a curative amendment to avoid unintended consequences is to be treated as retrospective in nature even though it may not state so specifically, the insertion of second proviso must be given retrospective effect from the point of time when the related legal provision was introduced. In view of these discussions, as also for the detailed reasons set out earlier, we cannot subscribe to the view that it could 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 is duly brought to tax. That will be going much beyond the obvious intention of the section. Accordingly, we hold that the insertion of second proviso to Section 40(a)(ia) is declaratory and curative in nature and it has retrospective effect from 1 st April, 2005, being the date from which sub clause (ia) of section 40(a) was inserted by the Finance (No.2) Act, 2004."

11.1 We further note that ITAT Hyderabad 'A' Bench in the case of ACIT vs. PLR Projects Pvt. Ltd. in ITA No. 1079/HYD/2013 for A.Y. 2007-08

vide their order dated 12.3.2014 has held that the second proviso to Section 40(a)(ia) of the Act inserted by the Finance Act, 2012 w.e.f. 1.4.2013 is clarificatory in nature and hence the benefit of the same should be applied retrospectively. We further find that the Pune Bench of the ITAT in the case of DCIT, Cir-3, Pune Vs. Bhandari Associates in ITA no. 1129 vide their order dated 19.5.2014 has held that the second proviso to Section 40(a)(ia) was clarificatory in nature. The Bench referred to the decision of ITAT Cochin Bench in the case of Antony D. Mundackal vs. the ACIT vide ITA No. 38/COCH/2013 dated 29.11.2013 for A.Y. 2009-10.

11.2 Therefore, Ld. CIT(A) has observed that AO has not considered the above judicial pronouncement on the issue. In view of the above facts and circumstances of the case and judicial pronouncements on the issue, Ld. CIT(A) has rightly held that the second proviso to Section 40(a)(ia) is clarificatory and curative in nature and therefore, the assessee was entitled for claim of deduction and AO was rightly directed to verify the claim of the assessee that the tax has been paid on the above amount by the payee i.e. Ansal Properties and Infrastructure Ltd. in terms of the aforesaid judgments and allow the aforesaid deduction if the tax has indeed been paid by the payee. Respectfully following the precedents, we do not find any infirmity in the finding of the Ld. CIT(A) on the issue in dispute, hence, we uphold the action of the Ld. CIT(A) on this issue, and reject the ground no. 3 raised by the Revenue.

REVENUE'S APPEAL - ITA NO. 238/DEL/2015 (AY 2011-12)

12. As regards issues raised in this Appeal are concerned, we find that the issues involved in this Appeal are similar and identical to the issues involved in ITA No.4820/Del/2014 (AY 2010-11), as aforesaid, therefore, respectfully following the consistent view, as taken in Revenue's ITA No. 4820/Del/2014 (AY 2010-11), as aforesaid, we do not find any infirmity in the order of the Ld. CIT(A), hence, we uphold the order of the Ld. CIT(A) on the issues in dispute and accordingly reject the grounds raised by the Revenue.

13. In the result, both the Appeals filed by the Revenue stand dismissed.

Order pronounced on 06/12/2017.

SD/-	**SD/-**
[PRASHANT MAHARISHI]	**[H.S. SIDHU]**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Date 06/12/2017

"SRBHATNAGAR"

Copy forwarded to: -

1. Appellant -
2. Respondent -
3. CIT
4. CIT (A)
5. DR, ITAT

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By Order,

Assistant Registrar, ITAT, Delhi Benches