IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH 'A', KOLKATA
(Before Shri Waseem Ahmed, A.M. & Shri S.S.Viswanethra Ravi, J.M.)

ITA No. 205/Kol/2013 : Asstt. Year : 2008-2009

DCIT, Circle-55, Kolkata	Vs	M/s National Homoeo Laboratories PAN: AABFN 9204A
(APPELLANT)		**(RESPONDENT)**

Appellant by : Shri Sallong Yaden, Addl.CIT, Sr.DR
Respondent by : Shri Ravi Tulsiyan, FCA

Date of Hearing : 31.03.2016		**Date of Pronouncement : 22-06-2016**

ORDER

Per Shri S.S.Viswanethra Ravi, J.M.

This appeal by the Revenue is arising out of the order dated 08.11.2012 passed by the CIT(A)-XXXVI, Kolkata for the assessment year 2008-09 order against the order of AO framed under section 143(3) of the Act.

2. The Revenue raised the following grounds:

> "*1. Ld. CIT(A) had erred on facts as well as in law in deleting addition made u/s 40(a)(ia) by disallowing expenditure of Rs.3,52,842/- [Carriage outward], Rs.126000/- [supervision charges], Rs.228,338/- [Commission] and Rs.12,37,460/- [overriding commission], particularly when the Hon'ble Andhra Pradesh High Court has meanwhile been pleased to order interim suspension of the decision of Ld. ITAT, Special bench, Vishakapatnam in ITA No.477(Viz) of 2008.*
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> *2. Ld. CIT(A) has erred on facts as well as in law in deleting addition of Rs.1,23,490/- and Rs.19,56,555/- [difference in sales figure in Sales tax return and that in IT return]*

3. The appellant craves leave to add, delete or modify any ground of appeal."

3. At the time of hearing, it is noted that the appeal has been filed by the Revenue with a delay of 15 days and for condonation of delay, the Revenue has file condonation petition dated 29.01.2013 stating that the delay is occurred due to intervening holidays as well as voluminous nature of the assessments which was duly endorsed by the DCIT, Circle-55, Kolkata. Heard both parties, considering the same, we are of the view that there was a sufficient cause for delay in filing the appeal by the Revenue and accordingly the delay is condoned and appeal is admitted for hearing.

4. Brief facts of the case are that the assessee is a firm engaged in the business of manufacturing and selling Homoeopathic medicines and earns its major income from the said activities. During the year under consideration, the assessee filed its return of income on 10.10.2008 showing therein total income of Rs.51,30,610/-. The assessment was completed u/s.143(3) of the Act vide order dated 28.10.2010 at a total income of Rs. 97,14,080/- making therein various additions and disallowances. As against the disallowance of expenses on account of non-deduction of TDS comprising carriage outward -Rs.3,52,842/-, supervision charges - Rs. 1,26,000/-, commission - Rs. 2,28, 338/- and overriding commission- Rs.12, 37,460/- and addition of Rs.1,28,904/- and Rs.19,56,555/- on account of difference arising between the figure of Sales as per Central Sales Tax Return and Income Tax return and as per West Bengal Sales Tax Return and Income Tax return, the assessee filed appeal before the Ld.CIT(A). Thereafter, the Ld.CIT(A), vide his appellate order dated 08/11/2012, deleted the entire disallowance totaling to

Rs.20,96,537/-, as made by the AO applying the provisions of section 40(a)(ia) of the Act. In addition, relief was also granted in respect of the addition of Rs.19,56,555/- made on account of difference arising between the figure of Sales as per West Bengal Sales Tax Return and Income Tax return.

5. Aggrieved by the order of the Ld. CIT -A, the Revenue has filed this appeal before the Tribunal. The Ld. DR submits that the assessee did not deduct TDS as required under statutory provisions of the Act and relied on the order of AO. The Ld.AR submits that regarding disallowance of carriage outward expenses to the tune of Rs.3,52,842/- and that the assessee being engaged in the business of manufacturing and selling of Homoeopathic medicines had to transport the manufactured medicines from the factory to the godowns and shops of the customers for it availed the services of various transport operators for the purpose of transportation of its manufactured medicines. The said transport agencies used to arrange transportation on behalf of the assessee for carriage of the medicines and in turn received payment from the assessee. No contract, whatsoever was made with any of the transport agents, whenever, the assessee required transport facility it utilized the services of the transport operators only for said purpose. All the payments were mostly made by voucher entries and times running accounts were maintained to which onetime payment was made by the assessee.

6. The Ld.AR submits in respect of disallowance of Rs.1,26,000/- which is towards salary payment to smt. Ruplekha Sinha Roy as supervision charges and she was an employee of the assessee for rendering such service, she used to receive salary payment every month.

7. The Ld.AR submits that regarding disallowance of Rs.l,98,338/- and Rs.30,000/- totaling to Rs.2,28,338/- which represents the fees to visiting doctors and salary payment to sales representative Mr. Sudarshan Banerjee which has been shown by the assessee in the accounts as commission. Further The Ld.AR submits that the assessee provided chambers in its retail premises Homoeopathic doctors and out of composite fees collected the assessee used to distribute a share to the doctors and retains the balance. The details of such distribution of fees with different doctors are as stated to be as under:

Doctors name	**Amount paid**
Dr. S. K. Paul	Rs.1,71,852/-
Dr. Joygopal Chandra	Rs. 25,561/-
Dr. N. R. Pal	Rs. 925/-
Total	**Rs.1,98,338/-**

8. The Ld.AR submits that with regard to disallowance of Rs.12,37,460/- actually represents the discount, the assessee incurred a sum of Rs.12,37,460/- on account of discount. The said discount was allowed to the purchasers annually on total purchase of its discountable products which excluded globules and publications.

9. Heard rival submissions and perused the relevant material on record. As relied by the Ld.AR on the decision in the case of Rajeev Kumar Agarwal of Agra Bench of Tribunal in ITA 337/Agra/2013, wherein the *Hon'ble High Court of Delhi while* dealing with the case on hand, had an occasion to read down the decision of Agra Bench of Tribunal in ITA 337/Agra/2013 as it was relied on, and held and agreed with the reasoning and conclusion given by the Agra Bench to the insertion of second

proviso to section 40(a)(ia) of the Act by the legislature. The relevant portion from paras 11 to 14 are reproduced here in below:

11. The first proviso to Section 210 (1) of the Act has been inserted to benefit the Assessee. It also states 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 has furnished his return of income under Section 139 of the Act. No doubt, there is a mandatory requirement under Section 201 to deduct tax at source under certain contingencies, but the intention of the legislature is not to treat the Assessee as a person in default subject to the fulfillment of the conditions as stipulated in the first proviso to Section 201(1). The insertion of the second proviso to Section 40(a) (ia) also requires to be viewed in the same manner. This again is a proviso intended to benefit the Assessee. The effect of the legal fiction created thereby is to treat the Assessee as a person not in default of deducting tax at source under certain contingencies.

12. Relevant to the case in hand, what is common to both the provisos to Section 40 (a) (ia) and Section 210 (1) of the Act is that the as long as the payee/resident (which in this case is ALIP) has filed its return of income disclosing the payment received by and in which the income earned by it is embedded and has also paid tax on such income, the Assessee would not be treated as a person in default. As far as the present case is concerned, it is not disputed by the Revenue that the payee has filed returns and offered the sum received to tax.

13. Turning to the decision of the Agra Bench of ITA T in Rajiv Kumar Agarwal v. A CIT (supra) , the Court finds that it has undertaken a thorough analysis of the second proviso to Section 40 (a)(ia) of the Act and also sought to explain the rationale behind its insertion. In particular, the Court would like to refer to para 9 of the said order which reads as under:

"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 far as 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 271 C, and, section 40(a)(ia) does not add to the same. The provisions of Section 40 a)(ia1 as they' existed prior to insertion of second proviso thereto, went much beyond the obvious intentions of the lawmakers and 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 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 1st April, 2005, being the date from which sub clause (ia) of section 40(a) was inserted by the Finance (No. 2) Act, 2004."

14. The Court is of the view that the above reasoning of the Agra Bench of IT AT 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 is declaratory and curative and has retrospective effect from 1st April 2005, merits acceptance.

10. The Hon'ble High Court *supra* found that there is a mandatory requirement u/s. 201 to deduct at source, but, however, opined, the assessee cannot be viewed as a person in default in view of the first proviso to section 201(1) of the Act and further that the insertion of second proviso to section 40(a)(ia) of the Act was intended to benefit the assessee and it shall be viewed as in the same manner as that of first proviso to section 201(1) of the Act.

11. In the present case, The case of the assessee was that that the payments made towards carriage outward, supervision charges, commission and overriding commission. The said Rs.3,52,842/- the assessee had to incur transport charges for carriage of manufactured medicines from the factory to the godowns and shops. The payment of Rs.1,26,000/- towards salary payment to smt. Ruplekha Sinha Roy was an employee as supervision charges. The disallowance of Rs.l,98,338/- and Rs.30,000/- totaling to Rs.2,28,338/- paid towards fees to visiting doctors and salary payment to sales representative Mr. Sudarshan Banerjee. An amount of Rs.12,37,460/- for which the assessee incurred on account of discount as per the terms and conditions as per broucher placed at pages 74 and 75 of paper book. These facts are not disputed by the Respondent Revenue as it can be seen from the record. Therefore, the question before us whether the assessee could be treated as defaulter in view of the principle enunciated by the Hon'ble High Court of Delhi *supra*, we hold that the assessee is not a defaulter in view of the first proviso to section 201(1) r/w second proviso to section 40(a)(ia) of the Act. As opined by the Hon'ble High Court of Delhi *supra* that the

second proviso to Section 40(a)(ia) is declaratory and curative in nature having retrospective effect from 01-04-2005 and the case on hand being for A.Y 2008-09, in our view, the matter shall go back to AO. Therefore, we are of the view that the facts therein are similar to the facts of the case on hand. Respectfully following the Judgment of the Hon'ble High Court of Delhi *supra*, we remand the case to AO for examination and for verification of the required details of the payments as indicated and direct the assessee to cooperate in completing the assessment. Ground no-1 raised by the assessee is allowed for statistical purposes.

12. Ground no-2 involves addition of Rs.19,56,555/- on account of difference arising between the sale value in West Bengal Sales as per West Bengal Sales Tax Return and Income Tax return which has resulted in difference of Rs.19,56,555/- in the figures of sales as shown in the West Bengal Sales Tax return and in the Income Tax return. The AO during the course of the assessment, opined and held that there cannot be two different sale values for two concerned Govt. departments and thus completed the assessment u/s.143(3) thereby adding back the said difference to the total income of the assessee. In first appeal, the CIT-A, after considering the remand report of the AO, deleted the entire addition of Rs.19,56,555/- made on account of discrepancy in sales values shown in the said two returns.

13. The appellant Revenue, in the present appeal before us, submits that there cannot be two different disclosures of sales before two different government authorities and relied on the AO's order and prayed to allow the appeal. The Ld.AR submits that the assessee has filed West Bengal Sales Tax return taking the sale value of medicines at MRP and shown actual figure of sales as taken from the audited book of accounts in the Income Tax Return for the relevant assessment

year. The assessee drew our attention to the fact that there is an option to pay tax on maximum retail price which is available to manufacturers and importers of certain goods, to be notified and specified by the respective State Government. The reference of which the notification as issued by the Finance Department of the West Bengal Government, placed at page nos. 114 of the P B.

14. Heard rival submissions and perused the relevant material on record. We find that the discrepancy of Rs.19,56,555/- arose on account of disclosing two sale values in the returns filed in pursuance of two enactments, one belonging to State Act i.e West Bengal Sales Tax and other is Central Act i.e Income Tax which has ultimately resulted in difference of Rs.19,56,555/- and addition thereon. The Ld.AR submitted that an option is available to assessee to pay tax on maximum retail price i.e manufacturers and importers of certain goods i.e drugs and medicine. He also filed a notification which came into force from 01-04-2005 issued by the Government Of West Bengal exercising power Section 16(4) of VAT Act 2003 at page 114 of paper book in support of contention, wherein, it clearly shows that the assessee can pay tax on MRP instead of paying tax on actual sale price of such goods. Relevant portion of the said notification reads as under:

> " ***a registered dealer, may, at his option*** *and subject to the conditions and restrictions as mentioned in sub-section (4) of section 16 of the said Act, pay, in lieu of the tax payable by him on sale price of such goods, tax at full rate as specified under clause (b) of sub-section (2) of section 16 of the said Act,* ***on the maximum retail price of such goods***:"

15. A perusal of the aforementioned notification clearly shows that an option is available for a registered dealer to pay tax at full rate on the MRP of such goods as specified in the notification instead of paying tax on sale price of such goods, as

specified therein. We find that the assessee is accordingly availed this option as the goods sold by the assessee fell within the category specified by the State Government. The CIT-A examined the said details and sought remand report from AO and as it appear from the record, the AO remained silent in his two reports submitted to CIT-A, the relevant portion of finding of the CIT-A is reproduced herein:

So far as the discrepancy of Rs. 1,28,904/- in the Central sales Tax matter is concerned, the assessee explained in its written submission dated 16.05.2011, by pointing out that the difference arose out of rectification made in the books during Audit and that because of time constraint, the assessee usually submitted CST returns by taking the gross value of sales and accordingly paying tax thereon (more than the normal amount) on estimate basis. It was further pointed out that the cancellation of orders from M/s Hanhemann Remedies to the tune of Rs.1,23,490/- was the major cause of the discrepancy under consideration. The copy of the relevant Debit Note was also produced in this connection. Another similar discrepancy of Rs. Rs.5,414/- was also pointed out in this connection. With regard to the discrepancy of Rs.19,56,555/- in the matter of West Bengal Sales Tax, the argument already taken about difference between MRP shown in the Sales Tax Return and the actual sale figure considered in the Income Tax Return was repeated.

In the Remand Report, the A.O. merely relied on the discussions made in the assessment order. No comment was made on behalf of the assessee on these issues in its two Submissions dated 17.02.2012 and 03.05.2012, most probably because of the fact that no particular comment had been made on the issues in the Remand Report.

Hence addition made of Rs. 19,56,555/- on account of sales tax is deleted.

16. In view of the above discussion, we are of the view the AO was not correct in making addition of Rs. 19,56,555/- arising on account of disclosure of sale values shown two different authorities of two respective Governments which was

verified by the CIT-A in detail and also AO failed to give any report as sought under remand by the CIT-A, therefore, ground no-2 fails and it is liable to be dismissed.

17. In the result, the appeal of the Revenue is partly allowed for statistical purposes.

Order Pronounced in the Open Court on 22-06-2016.

Sd/-	Sd/-
(Waseem Ahmed)	**(S.S.Viswanethra Ravi)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 22/06/2016

Talukdar (Sr.PS)

Copy of the order forwarded to:

1. M/s. National Homoeo Laboratories, Flat No.110, A.J.C. Bose Road, Kolkata – 700 014
2. DCIT, Circle-3, Kolkata
3. The CIT-I,
4. The CIT(A)-I,
5. DR, Kolkata Benches, Kolkata

True Copy,

By order,

Asst. Registrar**,** ITAT, Kolkata Benches