IN THE INCOME TAX APPELLATE TRIBUNAL
SMC BENCH, PUNE

श्री आर. के. पांडा, लेखा सदस्य के समक्ष
BEFORE SHRI R.K. PANDA, AM

आयकर अपील सं. / ITA No.2184/PN/2016
निर्धारण वर्ष / Assessment Year : 2009-10

M/s. Shree Sai Traders,
Opp. S.T. Stand,
Parli Vaijnath,
Dist. Beed – 431 515
PAN : AATFS6273L

..... अपीलार्थी / Appellant

बनाम v/s

ITO, Ward-2, Beed

..... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Shri M.K. Kulkarni
प्रत्यर्थी की ओर से / Respondent by : Shri Hitendra Ninawe

सुनवाई की तारीख / Date of Hearing :07.11.2016		घोषणा की तारीख / Date of Pronouncement:11.11.2016

आदेश / ORDER

PER R.K.PANDA, AM :

This appeal filed by the assessee is directed against the order dated 05-07-2016 of the CIT(A)-2, Aurangabad relating to Assessment Year 2009-10.

2. Grounds of appeal No.1 and 2 by the assessee read as under:

> "1. On the facts and circumstances of the case and in law the Ld. CIT(A) was not justified in confirming the addition made by the A.O. of Rs. 6,66,189/- invoking the provisions of S. 40(a)(ia) of the Act and the insertion of 2nd proviso interpreted with retrospective effect from 01-4-2005. Since the deductee has already included this transaction in their return and paid the taxes thereon the disallowance is not called for. The disallowance be deleted.
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> 2. On the facts and circumstances of the case and in law the Ld. CIT(A) also was not justified in confirming the addition of Rs. 6,66,189/- made by the A. O. invoking the provisions of S. 40(a)(ia) of the Act without appreciating the judgment of the Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverages (P) Ltd. v. CIT (2007) 293 ITR 226 (SC) which is deemed to be available to A. O. and the Ld. CIT(A) when the respective order were authored. The addition

made by the A.O. and confirmed by Ld. CIT(A) is without jurisdiction. The addition be deleted.

3. Facts of the case, in brief, are that the assessee is a partnership firm engaged in the business of stockist/distributor of Nirma Products. It filed its return of income on 10-08-2009 declaring total income of Rs.3,85,770/-. The original assessment order was passed u/s.143(3) on 16-08-2011 assessing the total income at Rs.4,25,770/-. Subsequently, the Ld.CIT passed order u/s.263 on 20-03-2014 setting aside the order originally passed u/s.143(3) for the following reasons which has been reproduced by the CIT(A) at Page 2 of his order and which reads as under :

> "1. It was noticed that the assessee had paid/credited interest of Rs.6,66,189/- to Nirma Private Limited, Ahmadabad without deduction of tax at source. Since, in terms of section 194A tax is required to be deducted at source on interest payable at the time of credit of payment whichever is earlier when the aggregate sum is payable during the financial year exceeds Rs.5,000/-, it was apparent that the assessee was required to deduct tax at source on the payments of interest made to the above party. Since the assessee had failed to deduct tax at source on the above payments, the interest paid to this party was required to be disallowed in terms of section 40(a)(ia) of the Act.,
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> 2. During the relevant previous year the opening WDV as on 01/04/2008 was Nil. The assessee had purchased a new vehicle on 23/07/2008. In the depreciation chart the assessee had shown an amount of Rs.1,60,000/- as having been received from the sale of tempo and depreciation @15% of Rs.64,064/- was claimed on the balance amount of Rs.4,27,095/-. The assessee had also claimed expenses in respect of tempo maintenance which was claimed as a revenue expenses. These expenses were in respect of insurance (Rs.19,080/-), new suspension (Rs.16,000/-) and RTO passing expenses (Rs.40,340/-). Apparently these expenses were deserved to be capitalised because there were incurred for deriving benefits of enduring nature.
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> 3. Since the depreciation statement as on 31-03-2008 showed that there was Nil opening WDV, the tempo expenses debited for diesel and oil expenses for the period 01-04-2008 to 23-07-2008 aggregating to Rs.48,052/- deserved to be disallowed."

4. Subsequently, the Assessing Officer issued notice u/s.143(2) r.w.s. 263 to the assessee. During the course of assessment

proceedings, the AO observed that assessee had paid/credited interest of Rs.6,66,189/- Nirma Private Limited which has been debited to the profit and loss account. However, he noted that assessee has not deducted any tax at source from such interest payment. Rejecting the various explanations given by the assessee the Assessing Officer invoking the provisions of section 40(a)(ia) r.w.s.194A disallowed the interest of Rs.6,69,189/- which was debited to the profit and loss account on account of interest.

5. Before CIT(A) it was submitted that the assessee firm has closed its business on 31-03-2011 due to disputes with Nirma Ltd. It was stated that the assessee had not made any interest payment to this entity which attracts the provisions of section 194A of the Act and hence the provisions of section 40(a)(ia) are not applicable to the facts of the case. It was stated that during the year under consideration the said company had given credit notes amounting to Rs.12,27,402/- for different reasons like in 71 schemes, rate difference and different schemes introduced which were duly recorded in the books of accounts by the assessee in Interest account. Similarly, the said company had also issued debit notes amounting to Rs.6,66,190/- for non-fulfillment of their target and for late payment of purchase/sale consideration which has also been recorded in the books of accounts in the Interest account. It was accordingly stated that the impugned payments had a direct link and immediate nexus with the trading liability and hence it does not fall within the category of "Interest" as defined in section 2(28A) of the Act for the purpose of deduction of tax at source as prescribed u/s.194A of the Act. Hence it was stated that the assessee cannot be held to be in default for the non-deduction of tax at source u/s.194A

of the Act. As the provisions of section 40(a)(ia) of the Act is not applicable on the facts of the case. It was accordingly argued that the addition is unjustified since the assessee had not made any payment to the said company and the said debits were made by the company unilaterally which was accounted for by the assessee. The assessee requested that the addition of Rs.6,66,189/- may be deleted. The assessee also submitted the details of incentive deposit account and some credit and debit notes.

6. However, the CIT(A) was not satisfied with the explanation given by the assessee and upheld the action of the Assessing Officer by observing as under :

> "8. I have given a careful consideration to the submissions made by the assessee. From the debit notes issued by Nirma Ltd. presented before me totaling 4 in number, it is observed that they are for an amount of Rs.500/- each, being the inconvenience charges on return of cheque issued by the assessee. One debit notice is for a sum of Rs.l,500/- on account of freight charges. Thus the total debit notes presented before me is for Rs.3,500/- only and they all appear to be on trading account and not on account of interest charged by Nirma Ltd. However the assessee has himself accepted before the assessing officer and before the learned CIT, Aurangabad that the debit notes have been issued by the company for making late payment on account of outstanding dues of the assessee to Nirma Ltd. it is obvious therefore that the said payments which have been debited in the Interest account in the profit and loss account is for an amount due to Nirma Ltd.
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> 9. The expression 'interest' is defined *u/s.2(28A)* of the Act, which "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;"
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> 10. In the circular issued by the Board of Direct Taxes, the concept ... of "interest" defined u/s. *2(28A)* has been explained with the added explanation under:
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> "The term 'interest' has been defined in new clause (28A) inserted in section 2 of the Income-tax Act with a view to removing doubts about the true character of fees or other charges paid in respect of moneys borrowed or in respect of the credit facilities which have not been utilised. The definition is very wide and covers interest payable in any manner in respect of loans, debts, deposits, claims and other similar rights or obligations. It also includes any service fees or other charges in respect of such loans, debts, deposits, etc., as also fees in the nature of

commitment charges on unutilised portion of credit facilities. This definition will be applicable for all purposes of the Income-tax Act."

11. It is clear from the above that before any amount paid is construed as interest, it has to be established that the same is payable in respect of arty money borrowed or debt incurred. The scheme of the Act and the express provisions thereof establish that the interest payable is for the deprivation of the use of the money representing the compensation for the debt owed to a person. Interest constitutes that part of the compensation which is attributable to the fact that the claimant has been kept out of his due for a long period of time. The liability to pay interest arises because the claimant is kept out of his money. A debt is a sum of money which is now payable or will become payable in future by reason of a present obligation. In the expression "debt owed", the verb "owe" means "to be under an obligation to pay". Interest is a payment which becomes due because the creditor has not had his money at the due date. This statutory definition regards amounts which may not otherwise be regarded as interest as interest for the purpose of the statute. Even amounts payable in transactions where money has not been borrowed and debt has not been incurred are brought within the scope of the definition as in the case of a service fee paid in respect of a credit facility which has not been utilised. Even in cases where there is no relationship of debtor and creditor or borrower and lender, if payment is made in any manner in respect of any moneys received as deposits or on money claims or rights or obligations incurred in relation to money, such payment is, by this statutory definition, regarded as interest. It is seen that the word 'interest' for the purpose of the Act is an inclusive definition. A literal construction may lead to the conclusion that the interest received or payable. In any manner in respect of any moneys borrowed or a debt incurred or enumerated analogous transaction would be deemed interest. That was explained by the board in the circular referred to hereinbefore. It is clearly understandable that to call an amount paid as interest, at least one of the conditions should be satisfied, namely, the same should have been paid as a due on account of any money either borrowed or debt incurred. The Hon'ble Supreme Court in *Dr.Shamlal Narula* v. *CIT [1964]* 53 *ITR* 151 *(SC)* observed that interest is a consideration paid either for the use of money or for forbearance from demanding it after it has fallen due. The Court approvingly cited the observations of Lord Wright in *Westminster Bank Ltd.'s* case which indicate that interest, whether it is statutory or contractual, represents the profit the creditor might have made if he had the use of the money or the loss is suffered because he had not used that. The Hon'ble Supreme Court held that it is something in addition to the capital amount, though it arises out of it. In the instant case the amounts were paid, by way of credit in Interest account, in respect of an obligation in respect of monies payable to Nirma Ltd. This is a fact which is not disputed by the assessee. In view of the above discussion, I do not find any merit in the argument of the assessee and hold that the amount credited/payment should be treated as interest u/s.2(28A) of the Act and it is liable for deduction at source u/s.194A of the Act. Hence the disallowance of the impugned amount is sustained. However, the assessing officer is directed to reduce the amount by Rs.3,500/-, which is not in the nature of interest as mentioned supra."

7. Aggrieved with such order of the CIT(A) the assessee is in appeal before the Tribunal.

8. The Ld. Counsel for the assessee submitted that the assessee has not paid any interest and it is on account of certain debit notes issued by Nirma Private Limited. Referring to the decision of the Pune Bench of the Tribunal in the case of Shri Radhesham Bherulal Bhandari Vs. Addl.CIT and vice versa vide ITA No.954/PN/2011 and batch of other appeals order dated 29-02-2016 for A.Yrs. 2007-08 & 2008-09 he submitted that the Tribunal in the said decision has held that as per the amendment made by the Finance Act, 2012 w.e.f. 01-04-2013 the assessee should not be treated as assessee in default when the payee has otherwise discharged its obligation towards tax liability on the corresponding income as per the provision of the Act. Referring to the decision of the Pune SMC Bench of the Tribunal in the case of Phaltan Securities Pvt. Ltd. Vs. ITO vide ITA Nos. 1225 and 1226/PN/2016 for A.Yrs 2006-07 & 2007-08 order dated 29-07-2016 he submitted that the Tribunal in the said decision while holding that the amendment made by the Finance Act, 2012 by way of insertion of second proviso to section 40(a)(ia) of the Act is clarificatory and therefore retrospective in nature. He accordingly submitted that the matter may be restored to the file of the Assessing Officer with a direction to give an opportunity to the assessee to substantiate with evidence that the payee has declared such income in its hands and paid taxes on the same.

9. The Ld. Departmental Representative on the other hand while supporting the order of the CIT(A) submitted that in view of the

decision of the Tribunal he has no objection if the matter is restored to the file of the Assessing Officer.

10. I have considered the rival arguments made by both the sides, perused the orders of the AO and the CIT(A) and the paper book filed on behalf of the assessee. I find the Assessing Officer on the basis of the direction given by the CIT in the order passed u/s.263 called for certain details from the assessee and thereafter made addition of Rs.6,66,189/- u/s.40(a)(ia) of the Act on the ground that the assessee has not deducted any tax from the payment of interest. The Ld.CIT(A) partly upheld the action of the Assessing Officer which has already been reproduced in preceding paragraphs. It is the submission of the Ld. Counsel for the assessee that in view of the insertion of the second proviso to provisions of section 40(a)(ia) of the Act by the Finance Act, 2012 w.e.f. 01-04-2013, disallowance u/s.40(a)(ia) of the Act would not be made if the assessee is not deemed to be an assessee in default under the first proviso to section 201(1) of the I.T. Act. It is also his submission that given an opportunity the assessee is in a position to prove that the payee had already declared such income in its hands and paid taxes thereon and therefore no disallowance u/s.40(a)(ia) can be made in the hands of the assessee. It is also his submitted that such amendment to provisions of section 40(a)(ia) is retrospective in nature.

11. I find merit in the above arguments of the Ld. Counsel for the assessee. I find the Pune Bench of the Tribunal in the case of Radhesham Bherulal Bhandari (Supra) while deciding an identical issue has held that the second proviso to provisions of section 40(a)(ia) is clarificatory and therefore retrospective in operation and

as a consequence once the payee has discharged its tax obligation in accordance with law, operation of section 40(a)(ia) stands dispensed with. The various other decisions relied on by the Ld. Counsel for the assessee also support his case. Under these circumstances, I deem it fit and proper to restore the issue to the file of the Assessing Officer with a direction to give an opportunity to the assessee to substantiate with evidence to his satisfaction that the payee has already included this income in its return and paid the taxes thereon. The grounds raised by the assessee are accordingly allowed for statistical purposes.

12. Ground of appeal No.3 by the assessee reads as under :

> "3. On the facts and circumstances of the case and in law the Ld.CIT(A) Aurangabad was not justified in confirming the addition made by the Assessing Officer of Rs.75,420/- less by depreciation of Rs.11,313/-. The resultant addition be deleted."

13. The Ld. Counsel for the assessee at the time of hearing did not press this ground for which the Ld. Departmental Representative has no objection. Accordingly, this ground by the assessee is dismissed as 'not pressed'.

14. Ground of appeal No.4 being general in nature is dismissed.

15. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 11-11-2016.

Sd/-

(**R.K. PANDA**)
ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 11th November, 2016.
सतीश

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. The CIT(A)-2 Pune
4. The Pr.CIT-2, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "SMC Bench" पुणे / DR, ITAT, "SMC Bench" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune