IN THE INCOME TAX APPELLATE TRIBUNAL
JODHPUR BENCH, JODHPUR

BEFORE: DR. S. SEETHALAKSHMI, JJUDICIAL MEMBER &
SHRI RATHOD KAMLESH JAYANTBHAI, ACCOUNTANT MEMBER

I.T.A. No. 28/Jodh/2023
Assessment Year: 2014-15

Kamal Industries E-16-17, Industrial Area Nohar, Hanumangarh-335523. [PAN: AABFK3320Q] **(Appellant)**	Vs.	ITO, Ward, Nohar. **(Respondent)**

Appellant by	Sh. Jinendra Kochar, C.A
Respondent by	Sh. A.S. Nehra, Sr.-DR

Date of Hearing	19.03.2024
Date of Pronouncement	21.03.2024

ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal filed by assessee is arising out of the order of the Ld CIT(A), National Faceless Appeal Centre, Delhi dated 08.12.2022 [here in after "ld.CIT(E)/NFAC"] for the assessment year 2014-15, which in turn arise from the order dated 04.12.2017 passed under section 143(3) of the Income Tax Act (here in after "Act") by the ITO, Nohar.

2. In this appeal, the assessee has raised following grounds: -

"1) Whether Repayment of loan (principal Rs. 1546076/=) out of total Rs. 1720760/= attracts the provision of section 194A of the Income Tax Act?
2) When the Loan provider company filed its ITR by including interest received from assessee firm Rs. 174684/= in its total income and the required certificate from concerned CA was obtained and duly submitted, whether the assessee firm will be deemed assessee in default in terms of provisio to section 201(1) and second proviso to section 40(a)(ia) of the Income Tax Act?

3) When assessee firm made the payment of freight (Rs. 72450/=) to more than one person (each below Rs. 35000/=), whether provision of section 40A(3) would be applicable?"

3. Brief fact of the case is that the ld. AO noted that the assessee has paid interest of Rs. 17,20,760/- in cash to M/s Magma Fincorp Ltd. during the F.Y. 2013-14 corresponding to the A.Y. 2014-15 and such expenditure has been claimed in the profit and loss account, and on such expenditure no deduction of tax has been made during the year. Further, the assessee could not explain the reason for non deduction of tax on this amount and therefore, an amount of Rs. 17,20,760/- added in the hands of the assessee. The ld. AO also observed that the assessee has paid a sum of Rs. 72,450/- in cash as freight. On confronting the assessee he merely stated that this was in the ordinary course of business. The submission of the assessee was carefully considered but devoid of merit. Therefore, as per provision of section 40A(3) of the Act, sum exceeding Rs. 35,000/- paid to a goods carriage in a day are disallowed.

4. Aggrieved from the above order of the Assessing Officer, the assessee has preferred the present appeal before the ld. CIT(A). Apropos to the grounds so raised by the assessee, the relevant finding of the ld. CIT(A) is reiterated here in below:-

Section 40(a)(ia)

" 5.5 In the case at hand, the appellant did not furnish the requisite certificate in Form 26A and the confirmation from the payee before the AO as required u/s 201(1) of the Act. Such a confirmation from the payee has not even been furnished during the present appellate proceedings. Thus, the statutory requirements (two-fold criteria as set out in para 5.4 above) as to whether the amount of interest in question is accounted as income and taxes due thereon has been paid to the credit of Government Treasury and the furnishing of the Certificate in Form 26A have remained unestablished by the appellant. Therefore, the appellant is disentitled to get any immunity from being deemed to be "an assessee-in-default" within the meaning of section 201(1) of the Act, and resultantly, not entitled to claim any benefit under second proviso to section 40(a)(ia) of the Act. Thus, the action of the AO in invoking section 40(a)(ia) to disallow the sum of Rs. 17,20,760/- cannot be faulted with and is, hence, upheld.

5.6 The alternative contention of the appellant, that the disallowance u/s 40(a)(ia) should be restricted to 30% of the interest expenditure and not 100% thereof, is also not tenable. The window for 30% disallowance is effective from 01.04.2015 (i.e. AY 2015-16) and the appellant's case pertains to AY 2014-15. Undoubtedly, the amendment brought in by the Finance (No.2) Act, 2014 is a substantive amendment and not a procedural one, and hence, it cannot be held to be retrospective in operation automatically. The controversy whether the amendment brought into section 40(a)(ia) for 30% disallowance by the Finance (No.2) Act, 2014 is retrospective or prospective has been set to rest by the judgment of the Hon'ble Supreme Court in the case of Shree Choudhury Transport Company vs. ITO (2020) 118 taxmann.com 47 (SC). The Hon'ble Supreme Court has observed and held as under:

> "19.5 A bare look at the extraction aforesaid makes it clear that what this Court has held as regards "retrospective operation" is that the amendment of the year 2010, being curative in nature, would be applicable from the date of insertion of the provision in question i.e.,

sub-clause (ia) of section 40(a) of the Act. This being the position, it is difficult to find any substance in the argument that the principles adopted by this Court in the case of Calcutta Export Co. (supra) dealing with curative amendment, relating more to the procedural aspects concerning deposit of the deducted TDS, be applied to the amendment of the substantive provision by the Finance (No.2) Act, 2014."

5.7 For what has been outlined above, it is evident that the AO has correctly applied the provisions of section 40(a)(ia) of the Act in respect of interest expenditure of Rs.17,20,760/- on which tax has not been deducted at source u/s 194A by the appellant. The action of the AO is, therefore, upheld. Consequently, the Ground Nos. 1 and 2 as well as the alternative contentions of the appellant are all dismissed."

Section 40A(3)

"6.2 I have perused the submissions of the appellant in this regard. Though the appellant has claimed that the said sum of Rs.72,450/- is the aggregate of payments in cash, each payment less than Rs.35,000/-, paid to more than a single person during the year and hence, the same would not attract the provisions of section 40A(3), yet it is observed that the appellant has not furnished any specific evidence/ instances to prove its claim. In the absence of supporting evidence, the appellant's arguments are mere self-serving statements which cannot be given any credence in view of the strict provisions of section 40A(3)/ 40A(3A) of the Act. The amount of Rs.72,450/- paid in cash, being in excess of the threshold limit of Rs.35,000/- as provided in second proviso to section 40A(3)/ 40A(3A), is liable to be disallowed. Therefore, the action of the AO is upheld. Consequently, the Ground No.3 is dismissed."

5. As the assessee, the ld. CIT(A) has dismissed the appeal of the assessee on both grounds, ground No. 1 is for disallowances of section 40A(3) and then other section 40(a)(ia) of the Act. Apropos the grounds so raised before us, the ld. AR of the assessee has relied upon the following written submission is reiterated as under:-

"May it please your honour,
On behalf of the appellant, i beg to submit the facts of the first ground:-
Audited profit and loss account for the year under consideration shows interest Rs. 6408721.51 as expenditure. Details of interest is as under:-

To HDFC Bank on limit	Rs. 5606228.51	
To HDFC Bank on vehicle loan		Rs. 112736.00
To Arunoday Holding Pvt. Ltd.		Rs. 512877.00
To Magma Fincorp Limited (132895+41789)		Rs. 174684.00
Below Rs. 2500=		Rs. 2196.00
		6408721.51

The copy of account of company Magma Fin Corp Ltd. as appeared in the books of accounts of the assessee firm for the year under consideration was submitted during assessment proceedings. It shows opening balance (Rs. 2336909.41) which means the assessee firm had taken a loan from Magma Fin Corp Ltd. in earlier years. During the year under consideration, it had repaid Rs. 1720760/= (Principal Rs. 1546076/ and Interest Rs. 174684/=). For only Interest portion, the provisions of section 194A was applicable. These provisions were not relevant to Principal repayment. Inspite of that the AO made the disallowance of Whole Repayment (Principal and Interest both).

Our submission in this regard is as under:-

1) Section 194A of the Income Tax Act is being reproduced here under:

(1) Any person, not being an individual or a HUF, who is responsible for paying to a resident any income by way of interest other than income [by way of interest on securities), shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income tax thereon at the rates in force;

It is very clear that for the purposes of section 194A, only Interest is relevant. There is no nexus between repayment of principal and provisions of section 194A of the Income Tax Act. In the instant case since the assessee firm had repaid Rs. 1720760/= out of which there was repayment of Principal of Rs. 1546076/, upon which provisions of section 194A was not applicable. So the addition made by the ITO and confirmed by the CIT (Appeals) NFAC up to that amount (Rs. 1546076/=) was clear cut violation of the Act. Your honor is requested to delete the same.

On behalf of the Appellant, I beg to submit the facts of the Second Ground:-

The assessee firm had repaid loan of Rs. 1720760/= to company Magma Fin Corp Ltd. during the year under consideration. This repayment of Loan consists of Principal Rs. 1546076/ and Interest Rs. 174684/. There was a liability of the assessee firm to deduct the TDS of Rs. 17469/= on payment

of interest, which was not fulfilled by the assessee firm, so in terms of provisions of section 40(a)(ia) of the Income Tax Act, there should be disallowance of Rs. 174684/ while finalizing the assessment order under section 143(3) of the Income Tax Act by the Assessing Officer (Nohar). But the AO had made the addition of Rs. 1720760/= (of amount of principal and interest both), instead of only interest Rs. 174684/=. The rectification application was filed in due time along with copy of certificate from Chartered Accountant of company Magma Fin Corp Ltd. in terms of section 201(1), but the same was not responded till the date.

Copy of the said certificate was also submitted to CIT (Appeals), NFAC vide acknowledgement No. 805877551161122 during the appellate proceedings, but the CIT (Appeals), NFAC, by mentioning in the order that no such certificate was submitted, confirmed the whole disallowance of Rs. 1720760/= (Principal Rs. 1546076/+interest Rs. 174684/=). (Pays no 9 to 11)

Our Submission in this regard:-

1) Section 40(a)(ia) is being re-produce here under:

"Notwithstanding anything to the contrary in section 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession"-

> (a) In the case of any assessee -
>
> (ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work)

Thus, The act clearly mentioned INTEREST ONLY AND NOT WHOLE EMI (PRINCIPAL INTEREST). So on this count the disallowance should be restricted to amount of interest (Rs. 174684/=) only and the addition of EMI (Rs. 1546076/-) should be deleted.

2) Proviso to section 201(1) is being reproduce here under:

PROVIDED that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this chapter on the sum paid to a Payee (resident) or on the sum credited to the account of a Payee (resident) shall not be deemed to be an assessee in default in respect of such tax if such Payee (resident) -

(i) Has furnished his return of income under section 139;

(ii) Has taken into account such sum for computing income in such return of income, and

(iii) Has paid the tax due on the income declared by him in such return of income,

And the person furnishes a certificate to this effect from an accountant in such form as may be prescribed.

Second Proviso to section 40(a)(ia) is also being reproduce here under:

PROVIDED FURTHER that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub- section (1) of section 201, then, for the purposes of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the payee referred to in the said proviso.
In the instant case, The said financer company (Magma Fin Corp Ltd.) had filed its ITR in time as stipulated in section 139 by including the said interest income of Rs. 174684/= in its total income and paid the tax thereon. The certificate in this regard from the accountant of that said financer company was submitted to the ITO and also to the CIT (Appeals) NFAC wide acknowledgement no. 805877551161122. The copy of the said certificate is also being enclosed here with).

So, by virtue of first proviso to section 201(1), the assessee firm will not be termed as assessee in default and by virtue of second proviso to section 40(a)(ia), it shall be deerned that the assessee firm has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee.

On this count also the addition of Principal amount Rs. 1546076/ and addition of interest amount Rs. 1746684/= were unwarranted. Your honor is requested to do the justice by deleting the same.

3) On the issue of disallowance of 100% of Interest Rs. 174684/=, it is being submitted that in following cases, it was held by various ITAT that the amendment made by the Finance (No. 2) Act to be curative in nature and the provisions should be applied retrospectively. Accordingly the disallowance under section 40(a)(ia) on account of non deduction of TDS should be restricted to 30% of the expenses paid as against 100%:

- Muradul Haque v/s ITO (ITA No. 114/Del/2019) by ITAT Delhi.
- M/s R. H. International v/s ITO (ITA No. 6724/Del/2018) by ITAT Delhi
- Rajendra Yadav v/s ITO (ITAT Jaipur)
- Kanta Yadav v/s ITO (ITA No. 6312/ Del/2016) by ITAT Delhi

- Umaxe Projects Pvt. Ltd. v/s DCIT (ITA No. 206/Del/2019) by ITAT Delhi

By applying the same principle, the disallowance of interest should be restricted to 30% (Rs. 52605/=) as against the whole amount of interest Rs. 174684/=.

4) An rectification application under section 154 of the Income Tax Act was also filed by the assessee firm on dated 29.10.2018 mentioning therein the above mistake which was apparent from the records with a request to rectify the order, but till the date no remedial action was taken by the ITO although section 154(8) clearly mentioned the time limit of Six Month from the end of the month in which the application is received by the ITO. And after lapse of that period of six month, the AO can not reject the application.

So on this count also the addition of Rs. 1720760/= (Principal Rs. 1546076/= plus Interest Rs. 174684/=) should be deserves to be deleted by your honor.

On behalf of the Appellant, I beg to submit the facts of the Third Ground:-

During the year under consideration the assessee firm had paid total payment on freight Rs. 1565383/= to various truck owner/ Tractor owner/ Driver etc. The said freight was paid for bringing the goods from Local Mandi to the assessee firm's Factory at Industrial Area or for dispatching the Finished goods to the Buyers. There was no specific contract with any one, so the Provision of section 194C was not applicable. The so called payment of Rs. 72450/= as Freight (for which disallowance was made by the ITO), was made to several persons and not to a single person as mentioned in the order by the ITO. The detailed copy of freight account was submitted during assessment proceedings to prove that the cash payment was made to several persons and not to single person.
Our Submission in this regard:-

1) Section 40A(3) states that where an allowance has been made in the assessment for any year in respect of any liability incurred by the assessee for any expenditure and subsequently during any previous year (hereinafter referred to as subsequent year) the assessee makes payment in respect thereof, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, [or use of electronic clearing system through a bank account [or through such other electronic mode as may be prescribed]], the payment so made shall be deemed to be the profits and gains of business or profession and accordingly chargeable to income tax as income of the subsequent year if the payment or aggregate of payments made to a person in a day, exceeds twenty thousand rupees;
Second Proviso to the section states that in the case of payment made for plying. hiring or leasing goods carriages, the provisions of sub-sections (3)

and (3A) shall have effect as if for the words twenty thousand rupees, the words thirty five thousand rupees had been substituted.

Since in the instant case as above mentioned freight payment to a single person on a single day does not exceed Rs. 35000/=, so the payment of freight may be made in cash. There were no violation of provision of section 40A(3).

Your honor is requested to allowed the appeal and order for deletion of the additions and oblize."

6. Per contra, the ld. DR relied upon the finding of the ld. CIT(A) and that of the ld. AO recorded in the respective orders while making disallowances and the assessee filed to produce necessary evidence before the lower authority.

7. We have heard the rival contentions and perused material available on record. The Bench noted that the assessee has filed before us the audit report wherein the interest is claimed for an amount of Rs. 64,08,721/- out of that amount so debited in the profit and loss account the interest paid and claimed to have been paid to Magma Fincorp Ltd. of Rs. 1,74,684/- as against this claim of interest of Rs. 1,74,684/-. The ld. AO made an addition of Rs. 17,20,760/- which includes the principal amount and therefore, Therefore, the ld. AR of the assessee submitted that the provisions of Section 40(a)(a) of the Act proposes to disallowance only the interest and not the principal amount. This fact has not

been appreciated by the ld. AO as well as ld. CIT(A) before us, the ld. AR of the assessee in addition to the fact that the principal amount has been added in the hands of the assessee. He has submitted that even the interest amount of rs. 1,74,684/- is also not required to be added in the hands of the assessee as he has filed Form no. 26A along with certificate of chartered Accountant as presumption under the rules and therefore, We find force in the arguments raised by the ld. AR of the assessee. Therefore, we direct the ld. AO to delete the principal amount we cannot subjected to disallowance and as the regards balance amount of Rs. 1,74,684/-. We have considered the additional evidences filed by the assessee before us showing that as per provisions of the Act as given in section 201(1), the assessee has in compliance to that provision of the Act has furnished Form No. 26A but had not produced the certificate of Magma Fincorp Ltd. but has filed the copy of Form 26A duly signed by the assessee. The Bench noted the low permit to the assessee to file in form 26A long with Annexur-A2 to that form 26A to be certified giving the details payee and not to the assessee. Therefore, if the assessee would like to defend their case they may be furnished the requisite form before the ld. AO within 60 days from the receipt of the order of

the ld. AO may delete the addition of Rs. 1,74,684/-. Thus, we hold that out of the addition of Rs. 17,20,760/- we direct the ld. AO to delete the addition for a sum of Rs. 15,64,076/- being the principal amount paid by the assessee and not the interest as alleged by the lower authorities and in compliance amount of Rs. 1,74,684/-. We set aside the issue before the ld. AO that if the assessee files correct form 26A within 60 days from the receipt of the order of the assessee. Then the ld. AO may allow the claim of the assessee in accordance with law condoning the delay in filing in form 26A. In terms of these observations ground No. 1 and 2 raised by the assessee are partly allowed.

8. Apropos to ground No. 3 raised by the assessee, the ld. AR of the assessee claimed before us that out of payment of Rs. 72,450/- is paid to various transporters and each payment is less than Rs. 35,000/- paid to more than single person on various dates and therefore, considering that prayer of the assessee and there is no reason, the details filed by the assessee before the lower authorities. Considering that aspect of the matter and in the interest of judicious matter as a single part to the file by the ld. Assessing Officer to determine that whether the assessee has

paid a sum of Rs. 72,450/- which is existing to Rs. 35,000/- to a single party on a single date and after verification of that aspect of the matter, the ld. AO may consider the claim of the assessee. In terms of these observations in ground No. 3 raised by the assessee is allowed for statistical purposes.

In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open Court on 21/03/2024.

Sd/- **Sd/-**

(Dr. S. Seethalakshmi)
Judicial Member

(Rathod Kamlesh Jayantbhai)
Accountant Member

Santosh
(On Tour)
Copy of the order forwarded to:

(1)The Appellant
(2) The Respondent
(3) The CIT
(4) The CIT (Appeals)
(5) The DR, I.T.A.T.

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By order