IT : Second proviso to section 40(a)(ia) has retrospective operation

IT : Where assessee allowed trade discount to its related parties, however, no such discount was offered to other parties, in absence of any prohibitory provisions under section 40A(2)(a) or under section 37, same could not be disallowed

IT : Expenditure incurred by assessee in form of ROC fee at time of increase of authorised share capital being in nature of capital expenditure, same could not be allowed as deduction under section 37(1)

IT : Where assessee was not having any business outside India, expenditure incurred on foreign travel of executive manager of company could not be allowed as deduction

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[2018] 90 taxmann.com 189 (Jaipur - Trib.)

IN THE ITAT JAIPUR BENCH

ACCME (Urvashi Pumps) Eng. (P.) Ltd.

v.

Joint Commissioner of Income-tax.(OSD) Circle-4 Jaipur*

VIJAY PAL RAO, JUDICIAL MEMBER
AND BHAGCHAND, ACCOUNTANT MEMBER
IT APPEAL NOS. 561 (JP) OF 2014 AND 1111 & 1112 (JP) OF 2016
[ASSESSMENT YEARS 2009-10 TO 2011-12]
JANUARY 23, 2018

I. Section 40(a)(ia) of the Income-tax Act, 1961 - Business disallowance - Interest etc., paid to a resident without deduction of tax at source (Applicability of) - Assessment years 2009-10 to 2011-12 - During relevant years assessee made payments of interest to NBFCs without deducting tax at source - Assessing Officer thus disallowed said payments under section 40(a)(ia) - Assessee filed instant appeal contending that in view of insertion of proviso to section 40(a)(ia) by Finance Act, 2012, when recipient of interest had included interest amount in their return of income and offered to tax then no disallowance was called for as per amended provisions of section 40(a)(ia) - Whether second proviso to section 40(a)(ia) would be effective retrospectivly as it was inserted to remove hardship faced by assessee - Held, yes - Whether, therefore, impugned disallowance was to be deleted and matter was to be remanded back to Assessing Officer for limited purpose to verify fact that as to whether interest income received by NBFCs had been included in their return of income and offered to tax and then decide issue in light of aforesaid observation - Held, yes [Para 7] [In favour of assessee/Matter remanded]

II. Section 40A(2) of the Income-tax Act, 1961 - Business disallowance - Excessive or unreasonable payments (Trade discount) - Assessment years 2009-10 to 2011-12 - Whether where assessee allowed trade discount to its related parties, however, no such discount was offered to other parties, in absence of any prohibitory provisions under section 40A(2)(a) or under section 37, same could not be disallowed - Held, yes [Para 11

][In favour of assessee]

Section 37(1) of the Income-tax Act, 1961 - Business expenditure - Allowability of (ROC fee) - Assessment years 2009-10 to 2011-12 - Whether expenditure incurred by assessee in form of ROC fee at time of increase of authorised share capital being in nature of capital expenditure, same could not be allowed as deduction under section 37(1) - Held, yes [Para 16][In favour of revenue]

Section 37(1) of the Income-tax Act, 1961 - Business expenditure - Allowability of (Foreign travel expenditure) - Assessment years 2009-10 to 2011-12 - During relevant year assessee debited certain amount on account of foreign travel expenditure incurred by executive manager of company - Revenue authorities rejected assessee's claim for deduction of said amount - It was noted that assessee was not having any business outside India neither, assessee was exporting any goods or articles nor importing - Whether on facts, in absence of specific purpose of foreign trip of executive manager, expenditure incurred on said trip could not be considered as an expenditure incurred wholly and exclusively for business of assessee - Held, yes - Whether, therefore, impugned disallowance was to be confirmed- Held, yes [Para 15][In favour of revenue]

CASE REVIEW-I

CIT v. *Naresh Kumar*[2014] 221 Taxman 59/[2013] 39 taxmann.com 182 (para 7) *followed.*

CASES REFERRED TO

CIT v. *Vector Shipping Services (P.) Ltd.*[2013] 357 ITR 642/218 Taxman 93/38 taxmann.com 77 (All.) (para 3), *Palam Gas Services* v. *CIT*[2017] 394 ITR 300/247 Taxman 379/81 taxmann.com 43 (SC) (para 4), *CIT* v. *Vatika Township (P.) Ltd.*[2014] 49 taxmann.com 249/227 Taxman 121/367 ITR 466 (SC) (para 5), *CIT* v. *Naresh Kumar*[2014] 362 ITR 256/221 Taxman 59/[2013] 39 taxmann.com 182 (Delhi) (para 5), *United Exports* v. *CIT*[2011] 330 ITR 549/[2009] 185 Taxman 374 (Delhi) (para 9), *Vindhya Teleink Ltd.* v. *Jt. CIT*[2003] 119 TTJ 433 (Jabalpur) (TM) (para 13) and *Glaxo Laboratories (India) Ltd.* v. *ITO*[1986] 18 ITD 226 (Mum.) (SB) (para 13).

Rajeev Sagoni and **Rohan Sagoni**, CA *for the Appellant.* **R.A. Verma**, (Addl. CIT) *for the Respondent.*

ORDER

Vijay Pal Rao, Judicial Member - These three appeals by the assessee are directed against three separate orders of CIT(A) dated 19.06.2014 & 19.09.2016 for the assessment years 2009-10 to 2011-12 respectively.

2. First we take up the appeal for the assessment year 2009-10 wherein the assessee has raised the following grounds:—

"1. In the facts and circumstances of the case and in law the ld. CIT(A) has erred in confirming the action of the ld. AO in disallowing a sum of Rs. 5,15,638/- u/s 40a(ia) of Income Tax Act, 1961 as under:—

Particulars (Interest paid to NBFCs)	
Reliance Capital Limited	67,521/-
Barclays Bank	4,19,169/-
Cholamandalam DBS Finance Limited	28,948/-
Total	5,15,638/-

The Action of the ld. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the said disallowance of Rs. 5,15,638/-.

2. In the facts and circumstances of the case and in law the ld. CIT(A) has erred in confirming the action of the ld. AO in disallowing a sum of Rs. 8,00,969/- u/s 40A(2)(a) of Income Tax Act, 1961. The action of the ld. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the said disallowance of Rs. 8,00,969/-.

3. In the facts and circumstances of the case and in law the ld. CIT(A) has erred in confirming the action of the ld. AO in making following disallowance:—

Particulars	Amount
ROC Fees	33,900/-
Foreign Travelling Expenditure	94,200/-
Total	1,28,100/-

The action of the ld. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the said disallowance of Rs. 1,28,100/-.

4. In the facts and circumstances of the case and in law the ld. CIT(A) has erred in confirming the action of the ld. AO in tqaxing Interest Income on FDR amounting to Rs. 1,13,318/-. The action of the ld. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the said addition of Rs. 1,13,318/—.

5. The assessee company craves its rights to add, amend or alter any of the grounds on or before the hearing."

3. Ground No. 1 is regarding disallowance made by the AO u/s 40(a)(ia) of the Income Tax Act in respect of interest paid to NBFCs and upheld by the ld. CIT(A). The assessee paid interest to three NBFCs namely Reliance Capital Limited, Barclays Bank and Cholamandalam DBC Finance Limited total amounting to Rs. 5,51,638/- without deduction of TDS on these payments. Accordingly, the AO disallowance the above said interest payment u/s 40(a)(ia) of the Act. The assessee challenged the action of the AO before the ld. CIT(A) and raised the contentions on two folds firstly the amount of interest has been paid by the assessee during the year and nothing was payable at the end of the year on 31.03.2009. Therefore, the assessee contended that the provisions of section u/s 40(a)(ia) of the Act are not applicable. In support of his contention, the assessee has relied upon the decision of the Allahabad High Court in case of *CIT* v. *Vector shipping Service (P) Ltd.*[2013] 357 ITR 642/218 Taxman 93/38 taxmann.com 77. The second leg of argument advanced by the assessee before the ld. CIT(A) was that vide Finance Act, 2012 a proviso has been inserted to Section u/s 40(a)(ia) of the Act, therefore, when the recipient of the interest have included this amount in their R.O.C. filed and offer to tax then no disallowance is called for as per amended provisions of section u/s 40(a)(ia) of the Act. The ld. CIT(A) did not accept the contention of the assessee on both aspect and confirmed the disallowance made by the AO.

4. Before us, ld. AR of the assessee has not disputed that the first aspect of the issued regarding paid or payable of the amount as on 31.03.2009 is now covered by the decision of Hon'ble Supreme Court in case of *Palam Gas Service* v. *CIT*[2017] 394 ITR 300/247 Taxman 379/81 taxmann.com 43. The Hon'ble Supreme Court has held in paras 17 and 18 as under:—

"17. Insofar as judgment of the Allahabad High Court is concerned, reading thereof would reflect

that the High Court, after noticing the fact that since the amounts had already been paid, it straightaway concluded, without any discussion, that Section 40(a)(ia) would apply only when the amount is 'payable' and dismissed the appeal of the Department stating that the question of law framed did not arise for consideration. No doubt, the Special Leave Petition thereagainst was dismissed by this Court in limine. However, that would not amount to confirming the view of the Allahabad High Court (See V.M. Salgaocar & Bros. (P.) Ltd. v. CIT [2000] 243 ITR 383/110 Taxman 67 (SC) and Supreme Court Employees Welfare Association v. Union of India [1989] 4 SCC 187.

18. In view of the aforesaid discussion, we hold that the view taken by the High Courts of Punjab & Haryana, Madras and Calcutta is the correct view and the judgment of the Allahabad High Court in Vector Shipping Services (P) Ltd. (supra) did not decide the question of law correctly. Thus, insofar as the judgment of the Allahabad High Court is concerned, we overrule the same. Consequences of the aforesaid discussion will be to answer the question against the appellant/assessee thereby approving the view taken by the High Court."

Accordingly, in view of the above decision of Hon'ble Supreme Court in case of M/s *Palam Gas Service* (supra), we do not find any error or illegality in the impugned orders of the ld CIT(A) to the extent of rejecting the contention of the assessee.

5. As regards the second proviso to section 40(a)(ia) of the Act is respectively applicable the ld. AR of the assessee has relied upon the decision of Hon'ble Supreme Court in case of *CIT* v. *Vatika Township (P.) Ltd.*[2014] 49 taxmann.com 249/227 Taxman 121/367 ITR 466 and submitted that as per the Finance Act, 2014 the proviso has been inserted to remove unintended and undue hardship and therefore, this amendment should be given retrospective effect. The ld. AR has also relied upon the decision of this Tribunal dated 29.01.2016 in case of *Rajendra Yadav* in ITA No. 895/JP/2012 as well as decision of Hon'ble Delhi High Court in case of *CIT* v. *Naresh Kumar*[2014] 362 ITR 256/221 Taxman 59/[2013] 39 taxmann.com 182.

6. On the other hand, ld. DR has submitted that the said proviso to section 40(a)(ia) of the Act was introduced w.e.f. 01.04.2013 and is only prospective. Once the assessee has failed to deduct tax on interest paid by it the provisions of section 40(a)(ia) of the Act are automatically attracted. Even if the recipient has subsequently paid tax the same would not absolve the assessee from consequence of disallowance. He has relied upon the decision of the Hon'ble Kerala High Court in case of *Thomas George Muthoot* v. *CIT*[2015] 235 Taxman 246/63 taxmann.com 99.

7. We have considered the rival submissions as well as relevant material on record. The assessee contended before the ld. 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 *Naresh Kumar* (supra) while dealing with an identical issue has held in paras 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] 2 KB 89) 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. Tunnicliffe [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 assessees 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 removable the hardship faced by the assesses. 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.

8. Ground No. 2 is regarding disallowance made u/s 40A(2)(a) of the Income Tax Act. During the year under consideration, the assessee has allowed discount of Rs. 8,00,969/- to its 100% subsidiary M/s VRC Enterprises Pvt. Ltd. The AO noted that the assessee has not allowed any discount to the other parties and allowed the discount only to the group concern of the assessee and accordingly the AO disallowed the said amount of Rs. 8,00,969/- u/s 40A(2)(a) of the Act. The assessee challenged the action of the AO before the CIT(A) but could not succeed.

9. Before us, the ld. AR of the assessee has submitted that trade discount is not a payment and therefore, does not fall in the ambit of section 40A(2)(a) of the Act. The assessee has granted discount from the sale price and mere fact that it was claim separately rather than the reducing from the sale value will not change its true nature. Thus, the AR has submitted that when the amount in question allowed as discount

is not a payment of expenditure then the same cannot be disallowed u/s 40A(2)(a) of the Act. In support of his contention, he has relied upon the decision of Hon'ble Delhi High Court in case of *United Exports* v. *CIT*[2011] 330 ITR 549/[2009] 185 Taxman 374.

10. On the other hand, ld. DR has relied upon the orders of the authorities below and submitted that the CIT(A) has considered this issue and confirmed the disallowance on the ground that the assessee has failed to establish the commercial expediency for allowing the discount only to the sister concern and not to the other parties whose turnover with the assessee is more than the sister's concern.

11. We have considered the rival submissions as well as relevant material on record. We find that the ld. CIT(A) has accepted this contention of the assessee that discount allowed by the assessee is not an expenditure in respect of which payment is to be made in para 3.3 as under:—

> "3.3 I have examined the facts of the case, the assessment order and the submissions of the appellant. The provisions of section 40A(2)9a) pertains to disallowance of an expenditure in respect of which payment has been made or is to be made. A trade discount is not an expenditure in respect of which payment is to be made. The judgment of the Delhi High Court in the case of United Exports Vs CIT [2009] 185 Taxman 374 (Delhi) is applicable to the facts of this case that a trade discount is not an expenditure and therefore the question of applicability of section 40A(2)(a) does not arise."

However, the ld. CIT(A) has proceeded further and disallowed the claim on the ground of justification and commercial expediency. We find that when there is no actual out go from the assessee to its subsidiary but the assessee has allowed discount to the subsidiary on sale made to the subsidiary. Therefore, even if the said discount was not allowed to the other parties and it is allowed to the related parties, in the absence of any provisions u/s 40A(2)(a) or u/s 37 of the Income Tax Act, the same cannot be disallowed. It is pertinent to note that the transaction may be falling under the category of domestic transfer pricing however, when the said provision is not applicable for the year under consideration and the AO has not applied the same then, it cannot be disallowed. The Hon'ble Delhi High Court in case of *United Exports* (supra) while considering this issue has held in para 11 as under:—

> '11. Lastly, we fail to understand how the provisions of section 40A(2)(b) are, at all, applicable in the facts of the present case.
>
> Section 40A(2)(a) runs as under :—
>
> "(2)(a) Where the assessee incurs any expenditure in respect of which payment has been or is to be made to any person referred to in clause (b) of this sub-section, and the Assessing Officer is of opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him therefrom, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction."

This provision in the Act pertains to disallowance to an expenditure which is made by the assessee i.e., an amount actually spent by the assessee as an expenditure. The expression used in this provision is "incurs any expenditure in respect of which payment has been or is to be made to any person" [Emphasis supplied]. The emphasized words clearly show that actual payment must be made and there has to be an expenditure incurred before the provision can be said to be applicable. A trade discount, and admittedly it is not in dispute that the subject-matter of the claim is a trade discount, and not an expenditure, clearly therefore there does not arise the question of applicability of section 40A(2)(b).'

Hence, in view of the facts and circumstances of the case when the trade disallowance is not an

expenditure paid or payable as per the provisions of section 40A(2)(a) of the Act then the same cannot be disallowed for want of any prohibitory provision in the Income Tax Act.

12. Ground No. 3 is regarding disallowance of registrar of company fees and foreign travelling expenditure. During the course of assessee proceedings the AO noted that the assessee has increased the authorized capital from Rs. 40 lacs to Rs. 60 lacs and incurred ROC fee of Rs. 33,990/- which is debited under the head of registration fee. On enquiry from the AO the assessee stated that the expensive was incurred to increase the authorized capital. The AO disallowed the claim of the assesee on the ground that it is a capital expenditure and not allowable under the provisions of the Act. Similarly the assessee has debited Rs. 1,88,400/- on account of the foreign travel made by Executive Manager of the company along with his wife. The Assessing Officer has disallowed the 50%of the expenses attributable to the foreign travel of the wife of the Executive manager. The assessee challenged the action of the AO before the ld. CIT(A) on both disallowance made in respect of ROC, fees expenses and 50% foreign travel expenses however, the ld. CIT(A) has confirmed the disallowance made by the AO.

13. Before us, the ld. AR of the assessee has submitted that the expenditure incurred for increase of authorized capital is an allowable claim as the amount was to be used for working capital purpose. As regards the foreign travel expenses the ld. AR of the assessee has submitted that the said foreign visit was undertaking by the Executive Manager for the purpose of growth of the business of the assessee by meeting the prospective clients and technological up-gradation. The Assessing Officer has allowed the foreign travel expenses in respect of the Executive Manager and therefore to the extent of the expenditure of Executive Manager the AO accepted the same as business expenditure. However it is customary for the spouse of businessmen to accompany them to formal business gathering. It is necessary to fulfill social obligations in order to form firm business relations. Therefore, the expenditure incurred for foreign travel of wife of the executive manager should be allowed as business expenditure. In support of his contention, he has relied upon the third Member decision (Jabalpur Bench of this Tribunal in this case *Vindhya Telelink Ltd.* v. *Jt. CIT*[2003] 119 TTJ 433 (TM) as well as the decision of the Mumbai Special Bench in case of *Glaxo Laboratories (India) Ltd.* v. ITO [1986] 18 ITD 226.

14. On the other hand, ld. DR has relied upon the orders of the authority below and submitted that when the wife of the executive manager is not an employee of the assessee then, the expenditure incurred on the foreign travel of the wife cannot be allowed as business expenditure.

15. We have considered the rival submissions as well as relevant material on record. The assessee has incurred the expenditure on foreign tour of the Executive Manager along with his wife. It is settled proposition of law that at as per the provisions of section 37 of the IT Act an expenditure laid out wholly and exclusively for the purpose of the business can be allowed. In the case in hand the assessee is not having any business outside India neither, the assessee is exporting any goods or articles nor importing. Therefore, in the absence of the specific purpose of the foreign trip of the Executive Manager, the expenditure incurred on the foreign trip of the Executive Manger cannot be considered as an expenditure incurred wholly and exclusively for the business of the assessee. The decision relied upon the assessee are based on the peculiar facts of those case as the assessee we are having substantial business with the foreign country and therefore the foreign trip in connection with the business of the assessee and particularly in the business of conference, seminar or other business gatherings can be considered as expenditure for the purpose of business of the assessee. Where there is no specific purpose has been explained for the visit of the executive manager then the disallowance made by the AO and upheld by the ld. CIT(A) in respect of the foreign trip expenses of the wife of the executive manager is justified and proper.

16. As regards disallowance of ROC fees we find that the expenditure was incurred by the assesee for increasing the authorized share capital and therefore, the authorities below have rightly considered the

said expenditure as capital in nature. The assessee has failed to show that how the said expenditure is revenue in nature when the same is incurred for increase of authorized capital except the contention that it would be used for working capital. Hence, we do not find any error or illegality in the impugned orders of the authorities below qua this issue. Accordingly this ground of the assessee's appeal is rejected.

17. Ground No. 4 is regarding the addition made by the AO on account of difference in the interest on FDRs as per 26AS and the interest income recognized by the assessee in the books of accounts. The AO noted that during the year under consideration the assessee had account for interest on FDR of Rs. 5,44,352/- however, as per 26AS the said interest was Rs. 6,57,670/-. The AO added the difference of Rs. 1,13,318/- to the income of the assessee. The assessee challenged the action of the AO before the ld. CIT(A) and submitted that the assessee company maintains its account on accrual basis. It requires estimating the accrued income by way of interest on un-matured fixed deposit. This estimation can be variance with the working of the bank however, such variance, over a total period of maturity of fixed deposit will get neutralized. The ld. CIT(A) did not accept these contention of the assessee upheld the addition made by the AO.

18. Before us, ld. AR of the assessee submitted that due to the method of accounting there was difference between the interest accounted by the assessee on FDRs and the interest shown as per 26AS however, the said difference is Revenue neutral when the assessee is reporting the total interest amount over the period of maturity.

19. On the other hand, ld. DR has relied upon the orders of the authorities below and submitted that the bank has correctly given the figure of interest income as available in the form No. 26AS, therefore, when the exact figure provided by the bank cannot be questioned then the estimated figure of the assessee cannot be taken as the income.

20. Having considered the rival submissions as well as relevant material on record, we note that as per form 26AS, the SBI has given the amount of interest accrued on FDRs during the year under consideration at Rs. 6,57,670/- whereas the assessee has accounted the interest income of Rs. 5,44,352/- which is less than the amount reported by the State Bank of India as per form 26AS. The assessee has not disputed the correctness of the income report in 26AS but has contended that the interest income accounted by the assessee is based on estimated accrual interest and the difference in the accounted income is revenue neutral. We do not agree with the contention of the assessee simply on the reason that when the correct amount of income is available as per Form 26AS then, the income of the assessee is required to be assessed on correct figures and facts instead of estimated figures accounted by the assessee. Further, when the corresponding TDS credit is available to the assessee for the year under consideration against the income reported in 26AS then the said credit cannot be allowed against less income declared by the assessee on this account. Accordingly, we do not find any error or illegality in the impugned orders of the authorities below qua this issue.

21. Now we take up two appeal for the assessment year 2010-11 and 2011-12 in which the assessee has raised common grounds. The grounds raised for the assessment year 2010-11 are reproduced as under:—

> "1. In the facts and circumstances of the case and in law the ld. CIT(A) has erred in confirming the action of the ld. AO in disallowing a sum of Rs. 82,618/- out of the total sum of Rs. 1,59,252/- disallowed by ld. AO under section 40(a)(ia) of Income Tax Act, 1961. The action of ld. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the said disallowance of Rs. 82,618/- under section 40(a)(ia) of

Income Tax Act, 1961.

2. The assessee company craves its right to add, amend or alter any of the grounds on or before the hearing."

22. This issue raised by the assessee in respect of disallowance made by the AO under section 40(a)(ia) of Income Tax Act, 1961 is common as raised for the assessment year 2009-10. However, the ld. CIT(A) has allowed the claim of the assessee to the extent of the interest paid to one of the NBFCs which has filed return of income within the due date as provided u/s 139(1) of the Act and disallowed the claim in respect of other NBFCs who have filed their return of income belatedly. The ld. CIT(A) has accepted the contention of the assessee that the second proviso to section 40(a)(ia) is applicable with retrospective effect in paras 2.4 and 2.5 as under:—

> "2.4 In the case of Sh. Girdhari Lai Bargoti (supra) it was further indicated that once the I.T. Returns are filed by the recipient NBFC, including therein the interest receipts from the assessee then the assessee would not be deemed to be in default. It is seen that the corresponding provisions are in 1st proviso to section 201(1) which provides that the assessee shall not be deemed to be in default if the recipient or liable deductee has filed his Return taking into account the amounts on which TDS was not deducted by the assessee and pays due taxes and the assessee furnishes the report of C.A. in the specified format to the above effect. If the assessee furnishes such report of C.A., the assessee shall be deemed to have deducted and paid the tax on the date of furnishing of Return by the abovestated recipient, in terms of 2nd Proviso to sec. 40(a)(ia). The said proviso is inserted by Finance Act,2012 w.e.f. 1.4.2013. However, several courts have held the same to be retrospective in operation. In the case *ClT* V. *Ansal Land Mark Township P. Ltd.*(2015) 377 ITR 635 (Del.), Hon'ble Delhi High Court has held that the insertion of second Proviso to sec. 40(a)(ia) is declaratory and curative in nature and has retrospective affect from 1.4.2005. 2.5 The jurisdictional ITAT, in the case of Shri Rakesh Tak vs. ITO in ITA No. 888/JP/2014, has reiterated the decision of Delhi High Court supra). Be that as it may, the moot point is whether the assessee has furnished the said certificate of C.A. in terms of 1st Proviso to sec. 201(1). The appellant has submitted the said certificates in respect of payment made to various parties as under:-

S.N.	*Name of the parties*	*Disallowance u/s 40(a)(ia)*	*Certificate u/s 201(1) submitted of Rs.*	*Date of filing as against due date*
1.				15/10/2010
2.	Bajaj Auto Finance	39,020/-	39,020	30.03.2012
3.	Cholamandalam DBC	43,598	41,913/-	30.03.2012
	Reliance Capital	76,634/-	77,885/-	12.10.2010

> The due date of filing of Return by the said payees was 15.10.2010 as per s. 139(1). Therefore only one of the above payees i.e. Reliance Capital Ltd. has submitted its return before the said due date. Thus the assessee is deemed to have deducted TDS on the amount of Rs. 76,634/-. Accordingly, the net relief on this ground comes to Rs. 76,634/-. Disallowance in respect of the balance amount of Rs. 82,618/- is upheld."

Thus, it is clear that the return of income filed by Reliance Capital on 12.10.2010 was considered by the ld. CIT(A) as filed within a due date as per section 139(1). Accordingly, disallowance made by the AO in respect of interest payment to Reliance Capital was deleted by the ld. CIT(A) whereas, the disallowance in respect of the interest paid other to NBFCs was sustained on the ground that they have not filed their return of income within due date as per section 139(1) of the Act.

23. The ld. AR of the assessee has contended that the proviso to section 201(1) does not provide due date of return as per section 139(1) but it contemplates that if the recipient has included the amount in the return of income filed u/s 139(1) of the Act then, the assessee cannot be held as assessee in default

and according, in view of second proviso to section 40(a)(ia) no disallowance is called for.

24. On the other hand, ld. DR has relied upon the orders of the authorities below.

25. We have considered the rival submissions and relevant provisions of the Act. If a case is following under the first proviso to section 201(1) then for the purpose of section 40(a)(ia) what is required to be considered is the recipient has included and paid tax on this amount in returned income the same. The requirement of furnishing the return of income by the recipient is referred into first proviso to section 201(1) of the Act. Thus as per the first proviso to section 201(1) if the recipient has furnished his return of income u/s 139 then the assessee though has not deducted tax at source shall not to be deemed to the assessee in default in respect of such tax. For ready reference, we quote the first proviso to section 201(1):—

"201. [48][(1) Where any person, including the principal officer of a company,—

(*a*) who is required to deduct any sum in accordance with the provisions of this Act; or

(*b*) referred to in sub-section (1A) of section 192, being an employer,

does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:

[49][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 resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such 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[50]:]"

The ld. CIT(A) has not disputed the fact that all the three NBFCs has filed their return of income within a time period allowed u/s 139 and particularly u/s 139(4) of the Act. The first proviso to section 201(1) specifically requires the furnishing of return of income u/s 139 without specifying any sub-section, therefore, the time limit provided under any of the sub-section of section 139 will be considered for the purpose of allowing the benefit as per the first proviso. Once, the return of income were filed by the recipient, as per the provisions of section 139 specifically under sub-section (4) then having accepted the applicability of the second proviso to section 40(a)(ia) respective effect no disallowance is called for in respect of the interest paid to the NBFCs. Accordingly, we delete this issue in favour of the assessee and delete the disallowance made by the AO.

In the result, the appeal of the assessee for the assessment year 2009-10 is partly allowed and appeals for the assessment years 2010- 11 & 2011-12 are allowed.

sunil

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*Partly in favour of assessee.