

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "A", JAIPUR
श्री संदीप गोसाईं, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ ITA No. 1259/JP/2019
Assessment Year: 2012-13

M/s Ratan Conductors, H-377(B), Road No. 17, VKI Area, Jaipur.	बनाम Vs.	A.C.I.T., Circle-4, Jaipur.
PAN No.: AABFR 8166 P		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Ashok Kr. Gupta (Adv)
राजस्व की ओर से / Revenue by : Smt. Monisha Choudhary (JCIT)

सुनवाई की तारीख / Date of Hearing : 05/08/2021
उदघोषणा की तारीख / Date of Pronouncement : 02/09/2021

आदेश / ORDER

PER: SANDEEP GOSAIN, J.M.

The present appeal has been filed by the assessee against the order of the Id. CIT(A)-2, Jaipur dated 21/08/2019 for the A.Y. 2012-13 wherein following grounds have been taken by the assessee:

"1. Disallowance of Interest of Rs. 17,73,769/- on account of Non TDS:-

That on the facts and in the circumstances of the case Ld. CIT(A) has grossly erred in law and facts in confirming disallowance of interest of Rs.17,73,769/- paid to M/s Barelays Investment & Loan (india) Ltd. (Rs. 298826/-) and M/s Future Capital (Rs. 1474943/-) on account of non deduction of TDS thereon by invoking provisions of section 40(a)(ia) of the IT Act 1961.

(a) *The assessee firm paid, interest of Rs. 2,98,826/- to NBFC. M/s Barelays Investment & Loan (India) Ltd. and Rs.14,74,943/- to M/s Future Capital another NBFC. The assessee firm raised loan*

from said NBFCs and paid loan with interest monthly. The interest was paid along with EMI which paid in full and therefore no tax was deducted. The Ld. AO on this failure to deduct tax invoked provisions of section 40(a)(ia) and disallowed whole of interest paid to both parties amounting to Rs.17,73,769/-.

2. *Interest paid to NBFC has been computed in there ITR :*
That on the facts and in the circumstances of the case Ld. CIT(A) has grossly erred in law and facts in not considering the plea that the interest paid by the assessee have already been included in the total income while computing taxable income by M/s Barelays Investment & Loan (India) Ltd. and Rs.14,74,943/- to M/s Future Capital another NBFC.
3. *Disallowance is restricted 30% by F.A.2014 -*
That on the facts and in the circumstances of the case Ld. CIT(A) has grossly erred in law and facts in not restricting disallowance of 30% of the total payment on which tax is deductible at source under chapter XVII-B as per amendment made by F.A. 2014 W.e.f. 01/04/2015 in section 40(a)(ai) which is retrospective.
4. *NBFCs ITR is Subject to Verification:-*
That on the facts and in the circumstances of the case Ld. CIT(A) has grossly erred in law and facts in not directing the AO to verify the fact that the interest income received by these NBFCs have been included in the return of income and offered to tax.
5. *That the learned AO has grossly erred both in law and facts in levying interest u/s 234A, 234B, 234C.*
6. *That the appellant reserves his rights to add amend or alter the grounds of appeal on or before date of appeal hearing.”*

2. The hearing of the appeal was concluded through video conference in view of the prevailing situation of Covid-19 Pandemic.

3. Brief facts of the case are that the assessee is a firm and engaged in the business of trading and manufacturing of copper wires. It filed its

return of income on 24/9/2012 declaring total income of Rs. 23,70,240/-. The A.O. completed the assessment U/s 143(3) of the Income tax Act, 1961 (in short, the Act) determining total income of Rs. 41,44,010/- by disallowing Rs. 17,73,769/- U/s 40(a)(ia) of the Act.

4. Being aggrieved by the order of the A.O., the assessee carried the matter before the Id. CIT(A), who after considering the submissions of the parties and material placed on record, dismissed the appeal of the assessee by upholding the action taken by the A.O. Aggrieved by the order of the Id. CIT(A), the assessee has preferred the present appeal before the ITAT on the grounds mentioned above.

5. All the grounds of appeal are interrelated and interconnected and mainly relates to challenging the order of the Id. CIT(A) in confirming the addition of Rs. 17,73,769/-, therefore we thought it fit to dispose off by this consolidated order.

6. The Id. AR appearing on behalf of the assessee has reiterated the same arguments as were raised before the Id. CIT(A) and also relied on the written submissions filed before the Bench and the contents of the same is reproduced as under:

"The assessee firm paid interest of Rs. 2,98,826/- to NBFC M/s. Barclays Investment & Loan (India) Ltd. and Rs. 14,74,943/- to M/s. Future Capital another NBFC. The assessee firm raised loan from

said NBFCs and paid loan with interest monthly. The interest was paid along with EMI which paid in full and therefore no tax was deducted. The Ld. A.O. on this failure to deduct tax invoked provisions of Section 40 (a) (ia) and disallowed whole of interest paid to both parties amounting to Rs. 17,73,769/-.

In this connection the assessee states that interest of Rs. 17,73,769/- stand paid in full by assessee during the financial year. The payee is holding PAN and must have filed its return of income including income from receipts of said interest and paid due tax thereon as it is an NBFC and cannot be expected not to have filed return in time. It is submitted that second proviso to section 40 (a) (ia) inserted by FA, 2012 w.e.f. 01.04.2013 has provided that where an assessee fails to deduct tax on the sum paid to the resident but such resident payee has furnished the return, taken into account such sum for computing income and has paid the tax due on the income declared by him then it will be deemed that assessee has deducted and paid the tax on such sum on the date of furnishing of return by the resident payee and then provisions of Section 40 (a) (ia) becomes inapplicable.

It is now settled law that second proviso to section 40 (a) (ia) inserted w.e.f. 0 has retrospective effect as held by Bangalore Bench in case of Sh. G. Shankar Vs. ACIT in ITA No. 1832/Bang/2013 Dt. 10.10.2014, Agra Bench in case of Rajeew Kumar Agarwal Vs. ACIT (2010) 34 ITR (Trib). 479, Delhi Bench in case of ITO Vs. Dr. Jaideep Kumar Sharma (2014) 34 ITR (Trib.) 565, Bangalore Bench in case of DCIT Vs. Ananda Marakala (2014) 150 ITD 323 as the amendment was made to remove the undue hardship. This in accordance with second provision to Section 40 (a) (ia) no disallowance could be made in the hands of assessee u/s 40 (a) (ia) so the disallowance of Rs. 17,73,769/- made by Ld. A.O. by invoking provisions of Section 40 (a) (ia) deserves to be deleted.

Without prejudice to above the legislative intent for introducing section 40 (a) (ia) is explained in CBDT Circular No. 5/2005 Dt. 15.07.2005 reported at 269 ITR 101 (Statute). In the present case there is no dispute as to the fact that Interest to NBFCs has actually been paid to payees and as on 31.03.2012 no amount of interest was payable.

The Special Bench of IT AT in case of Merilyn Shipping & Transport Vs. ACIT 16 ITR (Trib) 1 (PB 62-63) has held that section 40 (a) (ia) cannot be invoked in respect of amounts actually paid within the previous years without deduction of tax at source.

After tis decision the Gujarat High Court in case of CIT Vs. Sikandar Khan N. Tunvar 357 ITR 312 and Calcutta High Court in case of CIT Vs. Crescent Export Syndicate 94 DTR 81 held that section 40 (a) (ia) would cover not only to the amounts which are payable as on 31st March of the particular year but also which are payable at any time during the year.

However, the Allahabad High Court in case of CIT Vs. Vector Shipping Services (P) Ltd. 94 DTR 101/357 ITR 642 held that it is only the amount which is payable and not that which as been already paid by to end of the year that can be disallowed u/s 40 (a) (ia). Against the said decision of Allahabad High Court, the department filed a Special Leave Petition (SLP) in the Supreme Court which was dismissed by the Supreme Court vide its order Dt. 02.07.2014. Thus there are two views on this issue, one in favour of the assessee and other against the assessee.

Considering these views, the various benches of Hon'ble ITAT, after considering the various amendment made to section 40 (a) (ia) from time to time to remove the undue hardship and considering the decision of Supreme Court in case of CIT Vs. Vegetable Products Ltd. 88 ITR 192 where it is held that when two views are possible on an issue, the view in favour of the assessee has to be preferred. The Jaipur Bench which is binding and, therefore, the addition so made by Ld. A.O. by invoking section 40 (a) (ia) cannot be sustained on this plea also.

The AO could have verified the fact that interest income received by NBFC have been included in their returns

Without prejudice to above it may be stated that the interest paid to 2 NBFC Rs. 2,98,826/- to M/s. Barclays Investment & Loan (India) Ltd. and Rs. 14,74,943/- to M/s. Future Capital another NBFC were included in the return of Income filed by these Non Bank 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 CIT Vs. Naresh Kumar (Supra) while dealing with an identical issued has held in Para 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 principal 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 been 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 for filing of the return. Remedial statues are normally not retrospective, on the ground that they may affect vested rights. But these statues are construed liberally when justified and rule against retrospectively 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 retrospectively [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 impair existing rights or obligation.

"No rule 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 their enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

The word "fairly" used in the aforesaid quotation is important and relevant, but for applicant 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 Retrospectively" 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 in procedural but it application to past cause of action may result or 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 retrospectively 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 by 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. Tunncliffe [1991] 2 All ER 712 (CA), Stoughton, 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*

retrospectively 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 consequence to the Revenue when the tax rates are stable and uniform or in cases of big assesses 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 Rajender Kurnar'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 assesses, 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 / expenses, equal to the amount paid would be allowed. The Supreme Court notices 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. Juddha Mal Kuthiala v. CIT, 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 certificatory 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 43-B 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 as assessee has made payment of the TDS on or before the due date of filling of the return under Section 139 (1), the sum shall be allowed as an expenses 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 assesses 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 rationalize 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 and 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 notices 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 unlamented section 49 (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 provisions 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. corn 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 judgment 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 49 (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 01.04.2015, 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 Granities 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. 1'1'0 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 decision in the matter of M/s ACCME (Urvashi

Pumps Eng. Pvt. Ltd. ITA No. 561/JP/2014 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 remove the hardship faced by the assessee. 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.

Without prejudice to above it may also be pointed out that an amendment has been made by FA, 2014 w.e.f. 01.04.2015 in section 40 (a) (ia) whereby it is provided that 30% of any sum payable to a resident shall be disallowed if tax is not deducted at source under Ch. XVIIIB as against the 100% presently made. The purpose of this amendment was explained in the memorandum as under:-

"The disallowance of whole of the amount of expenditure result into undue hardship and therefore in order to reduce the hardship, it is proposed that in case of non-deduction or non-payment of TDS on payments made to residents as specified in section 40 (a) (ia) of the Act, the disallowance shall be restricted to 30% of the amount of expenditure claimed."

The Finance Minister while introducing the amendment in Para 207 of the Budget Speech has stated as under:-

"207. Currently, where an assessee fails to deduct and pay tax on specified payments to resident, 100 percent of such payments are not allowed as deduction while computing his income. This has caused undue hardship to tax payers, particularly where the rate of tax is only 1 to 10%. Hence, I propose to provide that instead of 100 percent, only 30% of such payments will be disallowed.

From the above it can be noted that amendment made by FA (No. 2) Act, 2014 w.e.f. 01.04.2015 is to remove unintended and undue hardship and therefore this amendment should be give retrospective effect as per the various decisions stated above. It is also submitted

that the Supreme Court in case of CIT Vs. Vatika Township Pvt. Ltd., 109 DTR 33 has held that legislations which modify accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect. However, if legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally and where to confer such benefit appears to have been the legislators object then the presumption would be that such legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. Therefore even in a case it is held that the disallowance u/s 40(a) (ia) is warranted, same should be restricted to only 30% of the amount of interest paid.

In the case of assessee exactly the same facts the disallowance u/s 40 (a) (ia) was made in A.Y. 2011-12 against which assessee filed appeal before CIT(A)- IV, Jaipur and made exactly same submissions and after considering them the Ld. CIT (A) - IV vide appeal order dated 12.07.2016 in appeal No. 43/2014-15 has been deleted. This issue raised in this appeal are covered from said appeal order."

7. On the other hand, the Id DR has vehemently supported the orders of the authorities below.

8. We have considered the rival contentions and carefully perused the material placed on record. As per facts of the present case, the assessment was completed U/s 143(3) of the Act at Rs. 41,44,010/- by making disallowance of Rs. 17,73,769/- U/s 40(a)(ia) of the Act on the ground that the assessee had not deducted TDS on the payment of interest amount of Rs. 17,73,769/- paid to Barclays Investment & Loan (India) Ltd. and Future Capital. The total interest paid by the assessee to the said NBFC is Rs. 2,98,826/- to Barclays Investment & Loan (India)

Ltd. and Rs. 14,74,943/- to Future Capital. As per the assessee, the said interest was paid alongwith EMI which paid in full and no tax was deducted. It was also submitted by the assessee that the payee is holding PAN and must have filed its return of income including income from receipts of said interest and paid due tax thereon as it was an NBFC and cannot be expected not have filed return of income in time. The assessee also submitted that second proviso to Section 40(a)(ia) of the Act inserted by the Finance Act 2012 w.e.f. 01/04/2013 has provided that where an assessee fails to deduct tax on the sum paid to the resident but such resident payee has furnished the return, taken into account such sum for computing income and has paid the tax due on the income declared by him then in that eventuality it will be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return by the resident payee and therefore, provisions of Section 40(a)(ia) of the Act in that case would become inapplicable.

9. We have also gone through the second proviso to Section 40(a)(ia) of the Act which was inserted w.e.f. 01/04/2013, however, the Coordinate Benches of ITAT Bangalore Bench in the case of Shri G. Shankar Vs ACIT in ITA No. 1832/Bang/2013 order dated 10/10/2014, DCIT Vs Ananda Marakala (2014) 150 ITD 323, Agra Bench of the Tribunal in the case of Rajeev Kumar Agarwal Vs ACIT (2010) 34 ITR (Trib) 479 and Delhi

Benches in the case of ITO Vs Dr. Jaideep Kumar Sharma (2014) 34 ITR (Trib) 565 has held that the amendment was made to remove the undue hardship and it was held that the said second proviso to Section 40(a)(ia) of the Act has retrospective effect. Therefore, keeping in view the settled legal proposition, we are also of the view that second proviso to Section 40(a)(ia) of the Act has retrospective effect.

10. In the present case, the disallowance U/s 40(a)(ia) of the Act was made on account of the fact that the assessee could not place on record any documentary evidence in order to demonstrate that the interest paid by the assessee has been shown by the NBFCs as income in the return of income, therefore, the claim was of the assessee was rejected. During the pendency of present appeal, in order to support his contention, the assessee has moved an application under Rule 29 of the ITAT Rules, 1963 for placing on record the documents by way of additional evidences vide application dated 01/4/2021 and the same is reproduced below:

- "1. *That the assessee appellant is a Manufacturer and trader of Copper wires under the Partnership firm named M/s Ratan conductors.*
2. *That with the aggrieved of order of Ld. CIT(A) the assessee appellant approached this honorable bench through aforementioned appeal.*

3. *That one of the partners Shri Mahipal Choudhary borrowed the loans from IV1/s Future Capital (later on converted in Capital First Limited) and from M/s Barclays Investment and Loan (India) Ltd and introduced it into the said Firm M/s Ratan Conductors.*
4. *That during the year under consideration above said firm repaid the same loan to above NBFC's in EMI with Interest without deducting tax as follows;*

(A) Barclays Investment & loan (India) Ltd.	2,98,826.12
(b) Future Capital (later known as Capital First Ltd.	14,74,943.63
5. *The Ld. AO disallowed the aforementioned payment of Interest under section 40(a) (ia) of Income Tax Act, 1961 through their Assessment order dated 27.02.2015 by rejecting the submission of the assessee regarding NBFC must have been declared such interest income in their Income Tax Return along with the deposit of Tax.*
6. *That after the passing of the Assessment order the appellant obtained a Certificate from the Chartered Accountant dated 08/09/2015 in respect of Capital First Limited (one of Payees) to the effect that such interest as paid by the assessee to the above NBFC relating to the AY 2012-13 have already been included as income in his total taxable income followed by the Income tax return as submitted under section 139 after depositing due Income Tax, such Certificate is being enclosed (Page NO. 1-8)."*

11. On the other hand, the Id DR contested the present application on the ground that the said application is not maintainable.

12. Having considered the rival contentions and carefully perused the material available on record. From perusal of record, we observed that Section 254 of the Income Tax Act, 1961 (in short, the Act) read with Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 states about power to admit additional evidences, whether mere fact that evidence sought to be produced is vital and important does not provide a substantial cause to allow its admission at appellate stage, especially when evidence was available to party at initial state and had not been produced at that time. Rule 46A of the Rules speaks about production of additional evidence before the [Deputy Commissioner (Appeals)] [and Commissioner (Appeals)]. The additional evidences submitted by the assessee at this stage are the first time and are necessary for deciding the appeal, therefore, considering the totality of facts and circumstances of the case as well as law prevailing in this regard, we admit the additional evidences filed by the assessee.

13. Since, we have allowed the application of assessee by admitting the documents as additional evidences, therefore, in these circumstances, it has become although necessary to restore the present appeal to the file of the A.O. to verify the certificate placed on record by the assessee of the C.A. dated 08/09/2015 in respect of Capital First Limited (one of payee) to demonstrate that such interest as paid by the assessee to the

above NBFC relating to the year under consideration have already been included as income in his total taxable income followed by the income tax return as submitted U/s 139 of the Act after depositing due income tax. However, the assessee has not placed on record the required certificates of the other payee i.e. Barclays Investment & Loan (India) Ltd.. Considering the totality of the facts and circumstances of the case, though we have restored the matter back to the file of the A.O. for reconsideration. Hence, we further direct the assessee to submit required documents in respect of both the NBFCs i.e. Barclays Investment & Loan (India) Ltd. and Future Capital relating to the year under consideration and further the A.O. is also directed that being the adjudicator as well as investigator, the A.O. should invoke necessary provisions of the Income Tax Act for calling the records from the concerned NBFCs i.e. i.e. Barclays Investment & Loan (India) Ltd. and Future Capital to ascertain that the amount paid by the assessee has been included as income in their total taxable income and if from the documents, the A.O. is satisfied regarding inclusion of the said amount paid by the assessee as income in the records of respected payees i.e. i.e. Barclays Investment & Loan (India) Ltd. and Future Capital then in that eventuality, the A.O. is directed to delete the additions. It is further clarified that since the present assessment year pertains to A.Y. 2012-13 and is quite old, therefore, the A.O. is further

directed to decide this issue within a reasonable time frame by providing appropriate opportunity of hearing to the assessee.

10. In the result, this appeal of the assessee is allowed for statistical purposes only.

Order pronounced in the open court on 02nd September, 2021.

Sd/-
(विक्रम सिंह यादव)
(VIKRAM SINGH YADAV)
लेखा सदस्य / Accountant Member

Sd/-
(संदीप गोसाईं)
(SANDEEP GOSAIN)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 02/09/2021

*Ranjan

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

1. अपीलार्थी / The Appellant- M/s Ratan Conductors, Jaipur.
2. प्रत्यर्थी / The Respondent- The A.C.I.T., Circle-4, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 1259/JP/2019)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar