IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER AND
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER

ITA No. 568/Bang/2014
Assessment year : 2010-11

Shri B V Nagesh, Flat No. 101, 1st Floor, Pristine Boghan Villa, Opp: Katriguppe Water Tank Road, VHBCS Layout, Girinagar 4th Phase, Banashankari 3rd Stage, Bangalore – 560 085. **PAN: ABAPN 9044J**	Vs.	The Income Tax Officer, Ward 10(2), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri V. Srinivasan, Advocate
Respondent by	:	Shri G. Kamaladhar, Standing Counsel

Date of hearing	:	26.04.2017
Date of Pronouncement	:	02.06.2017

O R D E R

Per Vijay Pal Rao, Judicial Member

The appeal of the assessee was earlier adjudicated by this Tribunal vide its order dated 17.07.2015 however subsequently the said order of the Tribunal was recalled in the MP No. 109/Bang/2015 vide order dated 30.06.2016. Hence this appeal of the assessee was again placed before

this Tribunal for adjudication on the issue of disallowance u/s. 40(a)(ia). The assessee is a tour and travel operator and providing vehicles on hire. During the course of assessment proceedings the AO noted that the assessee paid hire charges exceeding Rs. 15,000/- in various cases. Since the assessee has not deducted tax at source from these payments the AO proposes to disallow the hire charges amounting to Rs. 1,03,59,106/- by invoking the provisions of section 40(a)(ia) of the Act. The assessee contented before the AO that these payments to the vehicle owners does not come under the purview of section 194C of the Act as it was not for hiring of the vehicle but it was sharing of revenue with the other owners of the vehicle. The AO did not accept the contention and explanation of the assessee and made disallowance of the said amount as per the provisions of section 40(a)(ia). The assessee challenged the action of the AO before the CIT(A) and contented that the assessee is in cab sharing arrangement with the cab owners and therefore the provisions of section 194C do not apply on the payments in question which is sharing of revenue. The CIT(A) did not accept the contention of the assessee and held that the alleged cab sharing arrangement has not been proved by the assessee by any evidence.

2. Before us the ld. AR of the assessee has submitted that these payments were not in the nature of hire charges but it is a revenue sharing between the assessee and other service providers. He has referred to the para 4 of the CIT(A) and submitted that the assessee has clearly brought out the facts before the CIT(A) that due to his ill health he was not in a position to carry out the business of providing / supplying vehicles to companies for pick up and drop of their employees and had instead, completely transferred his business using such an arrangement of sharing of revenue. He has pointed out that the assessee made cab sharing arrangement with some parties. The ld. AR has pointed out that the assessee filed seven affidavits of the recipients who have confirmed that they received the amount under the cab sharing arrangement whereby specific cab trips were specifically transferred for execution and accordingly they have delivered the services to the respective clients at their own risk and spending their own expenses. In support of his contention he has relied upon the decision of Hon'ble Rajasthan High Court in case of CIT Vs Krishi Upaj Mandi Samiti (390 ITR 59) as well as the decision of coordinate benchs of Tribunal in case of Municipal Corporation Vs ITO [2013] 37 taxmann.com 258. The ld. AR has relied upon the following decision.

1.ITO Vs M/s. KCEL-MEIL(JV) dated 13.01.2014 in ITA Nos. 323 to 336/Hyd/2014

2.DCIT Vs Shri Ananda Marakala dated 13.09.2013 in ITA No. 1584/Bang/2012 and CO No. 58/Bang/2013.

Thus the ld. AR has submitted that it is not an expenditure but sharing of the revenue at source itself and therefore it does not come under the purview of section 194C.

3. The second flag of this argument is that the recipients of this amounts has already taken into account the same for computing income in their return of income and paid tax due on the income declared by them. Therefore as per the second proviso in section 40(a)(ia) no disallowance can be made on this account. In support of his contention he has relied upon the decision of Hon'ble Delhi High Court in case of CIT Vs Naresh Kumar (362 ITR 256) as well as in case of CIT Vs Ansal Land Mark Township (P.) Ltd. (377 ITR 635). The ld. AR has submitted that the Hon'ble High Court has held that the second proviso to section 40(a)(ia) is in the nature of clarity, declaratory and curative and therefore has retrospective effect from 01.04.2005. Hence the ld. AR has submitted that the disallowance made by the AO u/s. 40(a)(ia) is not sustainable and the same may be deleted.

4. On the other hand, the ld. DR has submitted that the second proviso to section 40(a)(ia) has been inserted in the statute vide Finance Act 2012 with effect from 01.04.2013. When the legislature has made it clear that the said proviso is applicable only w.e.f. 01.04.2013 then it cannot be applied retrospectively. The ld. DR has further contented that on merits the payments are clearly in the nature of hire charges as held by the AO as well as CIT(A). Therefore in the absence of any evidence to show otherwise it cannot be treated as sharing of revenue. He has relied upon the orders of the authorities below and submitted it is a direct expenditure and not sharing of revenue.

5. We have considered the rival submissions as well as relevant material on record. We find merits in the contention of the assessee regarding the applicability of second proviso to section 40(a)(ia) of the IT act and in case the recipients have already considered the amounts in question for computation of their income offered for tax in the return of income then no disallowance can be made u/s. 40(a)(ia). The only question arises is whether the second proviso is prospective or retrospective in nature. At the outset we note that the Hon'ble Delhi High Court while dealing with this question in case of CIT Vs Naresh Kumar (supra) held that the said proviso is explanatory and remedial in nature and therefore has to be applied retrospectively. By following the said decision the Hon'ble Delhi

High Court again in case of CIT Vs Ansal Land Mark Township (P.) Ltd. (supra) has held in para 13 and 14 as under.

> "***13.*** *Turning to the decision of the Agra Bench of ITAT in Rajiv Kumar Agarwal's case (supra), the Court finds that it has undertaken a thorough analysis of the second proviso to Section 40(a)(ia) of the Act and also sought to explain the rationale behind its insertion. In particular, the Court would like to refer to para 9 of the said order which reads as under:*
>
> *'On a conceptual note, primary justification for such a disallowance is that such a denial of deduction is to compensate for the loss of revenue by corresponding income not being taken into account in computation of taxable income in the hands of the recipients of the payments. Such a policy motivated deduction restrictions should, therefore, not come into play when an assessee is able to establish that there is no actual loss of revenue. This disallowance does deincentivize not deducting tax at source when such tax deductions are due, but, so far as the legal framework is concerned, this provision is not for the purpose of penalizing for the tax deduction at source lapses. There are separate penal provisions to that effect. Deincentivizing a lapse and punishing a lapse are two different things and have distinctly different, and sometimes mutually exclusive, connotations. When we appreciate the object of scheme of section 40(a)(ia), as on the statute, and to examine whether or not, on a "fair, just and equitable" interpretation of law— as is the guidance from Hon'ble Delhi High Court on interpretation of this legal provision, in our humble understanding, it could not be an "intended consequence" to disallow the expenditure, due to non-deduction of tax at source, even in a situation in which corresponding income is brought to tax in the hands of the recipient. The scheme of Section 40(a)(ia), as we see it, is aimed at ensuring that an expenditure should not be allowed as deduction in the hands of an assessee in a situation in which income embedded in such expenditure has remained untaxed due to tax withholding lapses by the assessee. It is not, in our considered view, a penalty for tax withholding lapse but it is a sort of compensatory deduction restriction for an income going untaxed due to tax withholding lapse. The penalty for tax withholding lapse per se is separately provided for in Section 271C, and, section 40(a)(ia) does not add to the same. The provisions of Section 40(a)(ia), as they existed prior to insertion of second proviso thereto, went much beyond the obvious intentions of the lawmakers and created undue hardships even in cases in which the assessee's tax withholding lapses did not result in any loss to the exchequer. Now that the legislature has been compassionate enough to cure these shortcomings of provision, and thus obviate the unintended*

> *hardships, such an amendment in law, in view of the well settled legal position to the effect that a curative amendment to avoid unintended consequences is to be treated as retrospective in nature even though it may not state so specifically, the insertion of second proviso must be given retrospective effect from the point of time when the related legal provision was introduced. In view of these discussions, as also for the detailed reasons set out earlier, we cannot subscribe to the view that it could have been an "intended consequence" to punish the assessees for non-deduction of tax at source by declining the deduction in respect of related payments, even when the corresponding income is duly brought to tax. That will be going much beyond the obvious intention of the section. Accordingly, we hold that the insertion of second proviso to Section 40(a)(ia) is declaratory and curative in nature and it has retrospective effect from 1st April, 2005, being the date from which sub clause (ia) of section 40(a) was inserted by the Finance (No. 2) Act, 2004.'*
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> ***14.*** *The Court is of the view that the above reasoning of the Agra Bench of ITAT as regards the rationale behind the insertion of the second proviso to Section 40(a)(ia) of the Act and its conclusion that the said proviso is declaratory and curative and has retrospective effect from 1st April 2005, merits acceptance."*

6. Accordingly, in view of the decision of Hon'ble Delhi High Court the second proviso to section 40(a)(ia) has retrospective effect from 01.04.2005 and in case the recipients of the amount have taken into account for computation of their income offered to tax in the return of income then no disallowance can be made u/s. 40(a)(ia). Hence in the facts and circumstances of the case we set aside this issue to the record of the AO for limited purpose of verification of the facts whether the recipients have considered the amount in question for computation of their income offered to tax.

7. As regards the contention of merits regarding nature of the payment the assessee has been contending right from the beginning that this payment is not in the nature of hire charges but it was sharing of revenue under the cab sharing arrangement by the assessee with other cab owners. The main contention of the assessee is that this payment is sharing of the revenue at source and therefore the provisions of section 194C are not applicable. In support of the contention the assessee has relied upon the decision of Hon'ble Rajasthan High Court in case of CIT Vs Krishi Upaj Mandi Samiti (supra) as well as various decisions of this Tribunal as cited in the foregoing paragraphs. It is pertinent to note that this is more of a question of fact than law as to whether the payment in question are sharing of revenue or are in the nature of hire charges. We find that though the assessee filed the affidavits of the recipients in support of the claim however neither the AO nor the CIT(A) have conducted a proper enquiry to verify this fact rather the evidence produced by the assessee was rejected at threshold. Even the decisions relied upon by the assessee before us were also not considered by the authorities below. Therefore in the facts and circumstances of the case and in the interest of justice when we have already set aside the issue of non-applicable of provisions of section 40(a)(ia) by virtue of second proviso to said section we deem fit and proper that this issue of nature of payment also requires a proper verification and examination at the level of the AO. Accordingly, we set

aside this issue to the record of the Assessing Officer for proper examination of the facts by conducting a due enquiry and then deciding the same in the light of various decisions relied upon by the assessee.

8. In the result the appeal of the assessee is allowed for statistical purposes.

Pronounced in the open court on this 02nd day of June, 2017.

Sd/-	Sd/-
(S. JAYARAMAN)	(VIJAY PAL RAO)
Accountant Member	Judicial Member

Bangalore,
Dated, the 02nd June, 2017.
/ MS/
Copy to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.