INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI
BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 4537/Del/2014
(Assessment Year: 2009-10)

SRS Buildcon P. Ltd, RRA Taxindia, D-28, South Extension, Part-I, New Delhi PAN: AAICS9912Q	Vs.	ITO, Ward-II(1), Faridabad
(Appellant)		(Respondent)

Assessee by :	Shri Somil Agarwal, Adv Shri Deepesh Garg, Adv
Revenue by:	Shri V K Jiwani, Sr. DR
Date of Hearing	19/09/2018
Date of pronouncement	06/12/2018

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by the assessee against the order of the ld CIT(A)-II, Faridabad dated 11.07.2014 for Assessment Year 2009-10, raising following grounds of appeal:-

"*1. That having regard to the facts and circumstances of the case, the ld CIT(A) has erred in law and on facts in upholding the action of the ld AO in making an addition of Rs. 200478/- u/s 40a(ia) of the Income Tax Act.*

2. That in any case and in any view of the matter, action of the ld CIT(A) in confirming the addition of Rs. 200478/- in bad in law and against the facts and circumstances of the case.

3. That having regard to the facts and circumstances of the case, the ld CIT(A) has erred in law and on facts in upholding disallowance of Rs. 767938/- out of total disallowance made by ld AO of Rs. 2445799/- u/s 14A of the Income Tax Act, 1961.

4. That having regard to the facts and circumstances of the case, ld CIT(A) has erred in law and on facts in confirming the action of the ld AO in passing the impugned order without giving adequate opportunity of being heard.

5. That in any case and in any view of the matter, action of the ld CIT(A) in confirming the action of the ld AO in making the impugned additions are bad in law and against the facts and circumstances of the case."

2. The brief facts of the case is that the assessee is a company which is subsidiary of a listed entity and mostly the assessee is engaged in the business of real estate, share trading and letting out services to its sister concern. The return of income was filed on 28.08.2009 declaring loss of Rs. 461535/- and assessment u/s 143(3) of the Act was made on 29.12.2011 of Rs. 1984259/-. Addition u/s 14A read with section 40a(ia) of the Act was made which was challenged by the assessee before the ld CIT (A). The disallowance u/s 14A of Rs. 2445799/- was reduced to Rs. 767928/- and disallowance u/s 40a(ia) of Rs. 200478/- was confirmed. Therefore, the assessee is in appeal.

3. Ground No. 1 and 2 is with respect to disallowance u/s 40a(ia) of the Act. The assessee has made a payment, wherein, expenses of Rs. 223500/- were deducting at source but not disputing within the financial year. Therefore, disallowance was confirmed by lower authorities.

4. The ld AR has submitted tax has been deducted correctly undisputed a same was paid not before the ld close of the financial year but was deposited on 26.05.2009 i.e. before the due date of filing of the return of income. He therefore, submitted that in view of decision of the Hon'ble Supreme Court in CIT vs. Kolkata Export Company 404 ITR 654 disallowance now cannot be made.

5. The ld DR relied upon the orders of the lower authorities.

6. We have carefully considered the rival contention and also perused the orders of the lower authorities. It is undisputed fact that the assessee has deducted tax at source, however, such tax could not be deposited before the close of the financial year but was deposited on or before due date of filing of the return of income. Precisely, tax was deposited on 26.05.2009. This is the fact pulled out from tax audit report also. In view of this the only issue remains that whether amendment made by the Financial Act 2010 to provision of section 40a(ia) of Act is retrospective in operation or not. The Hon'ble Supreme Court in case of CIT Vs. Kolkata Export Company ([2018] 93 taxmann.com 51 (SC)/[2018] 255 Taxman 293 (SC)/[2018] 404 ITR 654 (SC)/[2018] 302 CTR 201 (SC)) has held that

Discussion:—

13. The dispute in the present case revolves around the fact that whether the amendment made by the Finance Act, 2010 to the provisions of Section 40 (a) (ia) of the IT Act is retrospective in nature so as to apply to the present case or not. If it is so, then the tax duly paid by the assessee on 01.08.2005 is well in accordance with law and the assessee is allowed to claim deduction for the tax deducted and paid to the government, in the previous year in which the tax was deducted.

14. For deciding as to the retrospective effect of the amendment made by Finance Act, 2010, it is required to see the Section as it stands before and after the amendment made through the Finance Act, 2010 and the purpose of such insertion or amendment to the said provisions. The provisions of Section 40(a)(ia) came into force in the year 2005 which stood as under:—

"*40. Amounts not deductible*- Notwithstanding anything to the contrary in [Sections 30 to 38], the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession,- (a) in the case of any assessee—

(*i*)** ** **

(*ia*) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVIIB and such tax has not been deducted or, after deduction, has not been paid during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section(1) of section 200;

Provided that where in respect of any such sum, tax has been deducted in any subsequent year or, has been deducted during the previous year but paid in any subsequent year after the

expiry of the time prescribed under sub-section (1) of section 200, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid."

15. The purpose of bringing the said amendment to the existing provision of Section has been highlighted in the memorandum explaining the provision which reads as under:—

"With a view to augment compliance of TDS provisions, it is proposed to extend the provisions of the section 40(a)(ia) to payments of interest, commission or brokerage, fee for professional services or fee for technical services to the residents and payments to a residential contractor or sub-contractor for carrying out any work (including supply of labour for carrying out any work), on which tax has not been deducted or after deduction, has not been paid before the expiry of the time prescribed under sub-section(1) of section 200 and in accordance with the provisions of other provisions of Chapter XVII-B."

16. The purpose is very much clear from the above referred explanation by the memorandum that it came with a purpose to ensure tax compliance. The fact that the intention of the legislature was not to punish the assessee is further reflected from a bare reading of the provisions of Section 40(a)(ia) of the IT Act. It only results in shifting of the year in which the expenditure can be claimed as deduction. In a case where the tax deducted at source was duly deposited with the government within the prescribed time, the said amount can be claimed as a deduction from the income in the previous year in which the TDS was deducted. However, when the amount deducted in the form of TDS was deposited with the government after the expiry of period allowed for such deposit then the deductions can be claimed for such deposited TDS amount only in the previous year in which such payment was made to the government.

17. However, it has caused some genuine and apparent hardship to the assesses especially in respect of tax deducted at source in the last month of the previous year, the due date for payment of which as per the time specified in Section 200 (1) of IT Act was only on 7th of April in the next year. The assessee in such case, thus, had a period of only seven days to pay the tax

deducted at source from the expenditure incurred in the month of March so as to avoid disallowance of the said expenditure under Section 40(a)(ia) of IT Act.

18. With a view to mitigate this hardship, Section 40(a)(ia) was amended by the Finance Act, 2008 and the provision so amended read as under:—

"40. Notwithstanding anything to the contrary in Sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "profit and gains of business or profession

(*ia*) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contactor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or after deduction has not been paid—

(A)	in a case where the tax was deductible and was so deducted during the last month of the previous year, on or before the due date specified in sub-section (1) of section 139; or
(B)	in any other case, on or before the last day of the previous year;

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted

(A)	during the last month of the previous year but paid after the said due date; or

(B)	during any other month of the previous year but paid after the end of the said previous year, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid."

19. The above amendments made by the Finance Act, 2008 thus provided that no disallowance under Section 40 (a) (ia) of the IT Act shall be made in respect of the expenditure incurred in the month of March if the tax deducted at source on such expenditure has been paid before the due date of filing of the return. It is important to mention here that the amendment was given retrospective operation from the date of 01.04.2005 i.e., from the very date of substitution of the provision.

20. Therefore, the assesses were, after the said amendment in 2008, classified in two categories namely; one; those who have deducted that tax during the last month of the previous year and two; those who have deducted the tax in the remaining eleven months of the previous year. It was provided that in case of assessees falling under the first category, no disallowance under Section 40(a) (ia) of the IT Act shall be made if the tax deducted by them during the last month of the previous year has been paid on or before the last day of filing of return in accordance with the provisions of Section 139(1) of the IT Act for the said previous year. In case, the assessees are falling under the second category, no disallowance under Section 40(a)(ia) of IT Act where the tax was deducted before the last month of the previous year and the same was credited to the government before the expiry of the previous year. The net effect is that the assessee could not claim deduction for the TDS amount in the previous year in which the tax was deducted and the benefit of such deductions can be claimed in the next year only.

21. The amendment though has addressed the concerns of the assesses falling in the first category but with regard to the case falling in the second category, it was still resulting into unintended consequences and causing grave and genuine hardships to the assesses who had substantially complied with

the relevant TDS provisions by deducting the tax at source and by paying the same to the credit of the Government before the due date of filing of their returns under Section 139(1) of the IT Act. The disability to claim deductions on account of such lately credited sum of TDS in assessment of the previous year in which it was deducted, was detrimental to the small traders who may not be in a position to bear the burden of such disallowance in the present Assessment Year.

22. In order to remedy this position and to remove hardships which were being caused to the assessees belonging to such second category, amendments have been made in the provisions of Section 40(a) (ia) by the Finance Act, 2010.

23. Section 40(a)(ia), as amended by Finance Act, 2010, with effect from 01.04.2010 and now reads as under:

"4(a)(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or; after deduction, has not paid on or before the due date specified in sub-section (1) of Section 139:

Provided that where in respect of any such sum, tax 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 deducted in computing the income of the previous year in which such tax has been paid."

24. Thus, the Finance Act, 2010 further relaxed the rigors of Section 40(a)(ia) of the IT Act to provide that all TDS made during the previous year can be deposited with the Government by the due date of filing the return of income. The idea was to allow additional time to the deductors to deposit the TDS so made. However, the Memorandum explaining the provisions of the Finance Bill, 2010 expressly mentioned as follows: "This

amendment is proposed to take effect retrospectively from 1st April, 2010 and will, accordingly, apply in relation to the Assessment Year 2010-11 and subsequent years."

25. The controversy surrounding the above amendment was whether the amendment being curative in nature should be applied retrospectively i.e., from the date of insertion of the provisions of Section 40(a)(ia) or to be applicable from the date of enforcement.

26. TDS results in collection of tax and the deductor discharges dual responsibility of collection of tax and its deposition to the government. Strict compliance of Section 40(a)(ia) may be justified keeping in view the legislative object and purpose behind the provision but a provision of such nature, the purpose of which is to ensure tax compliance and not to punish the tax payer, should not be allowed to be converted into an iron rod provision which metes out stern punishment and results in malevolent results, disproportionate to the offending act and aim of the legislation. Legislature can and do experiment and intervene from time to time when they feel and notice that the existing provision is causing and creating unintended and excessive hardships to citizens and subject or have resulted in great inconvenience and uncomfortable results. Obedience to law is mandatory and has to be enforced but the magnitude of punishment must not be disproportionate by what is required and necessary. The consequences and the injury caused, if disproportionate do and can result in amendments which have the effect of streamlining and correcting anomalies. As discussed above, the amendments made in 2008 and 2010 were steps in the said direction only. Legislative purpose and the object of the said amendments were to ensure payment and deposit of TDS with the Government.

27. 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, is required to be read into the Section to give the Section a reasonable interpretation and requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the Section as a whole.

28. The purpose of the amendment made by the Finance Act, 2010 is to solve the anomalies that the insertion of section 40(a)(ia) was causing to the *bona fide* tax payer. The amendment, even if not given operation retrospectively, 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 and necessary cushion to absorb the effect. However, marginal and medium taxpayers, who work at low gross product rate and when expenditure which becomes subject matter of an order under Section 40(a)(ia) is substantial, can suffer severe adverse consequences if the amendment made in 2010 is not given retrospective operation i.e., from the date of substitution of the provision. Transferring or shifting expenses to a subsequent year, in such cases, will not wipe off the adverse effect and the financial stress. Such could not be the intention of the legislature. Hence, the amendment made by the Finance Act, 2010 being curative in nature required to be given retrospective operation i.e., from the date of insertion of the said provision.

29. Further, in ***Allied Motors (P) Ltd.* case (*supra*)** , this Court while dealing with a similar question with regard to the retrospective effect of the amendment made in section 43-B of the Income Tax Act,1961 has 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. The aforesaid view has consistently been followed by this Court in the following cases, viz., ***Whirlpool of India Ltd.,*** v. ***CIT*** [2000] 245 ITR 3, ***CIT*** v. ***Amrit Banaspati Co. Ltd.***[2002] 255 ITR 117/[2002] 123 Taxman 74 (SC) and ***CIT*** v. ***Alom Enterprises Ltd.*** [2009] 319 ITR 306/185 Taxman 416 (SC).

30. Hence, in light of the forgoing discussion and the binding effect of the judgment given in ***Allied Moters (P.) Ltd.* case (*supra*)**, we are of the view that the amended provision of Sec 40(a)(ia) of the IT Act should be interpreted liberally and equitable and applies retrospectively from the date when Section 40(a)(ia) was inserted i.e., with effect from the Assessment Year 2005-2006 so that an assessee should not suffer unintended and deleterious consequences beyond what the object and purpose of the provision mandates. As the developments with regard to the Section recorded above shows that the amendment was curative in nature, it should be given retrospective operation as if the amended provision existed even at the time of its

> insertion. Since the assessee has filed its returns on 01.08.2005 i.e., in accordance with the due date under the provisions of Section 139 IT Act, hence, is allowed to claim the benefit of the amendment made by Finance Act, 2010 to the provisions of Section 40(a)(ia) of the IT Act.
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> **31.** In light of the forgoing discussion, we are of the view that judgment of the High Court does not call for any interference and, hence, the appeals are accordingly dismissed. In view of the above, all the connecting appeals, interlocutory applications, if any, transferred cases as well as diary numbers are disposed off accordingly. Parties to bear cost on their own."

Therefore as amendment made is curative in nature and is retrospective in operation from the date of insertion of the above provision. In view of this we are of the view that no disallowance u/s 40a (ia) of the Act is required to be made in this case in the hands of the assessee. Further we also direct the ld AO to verify whether in the subsequent year the assessee has not claimed the deduction of the above expenditure. The ld AO is directed to verify the above and if assessee has not claimed deduction in subsequent year to delete the above disallowance. In the result ground No. 1 and 2 of the appeal is allowed.

7. The 2nd issue involved in the appeal is regarding disallowance under section 14 A of the income tax act, where the learned assessing officer held that interest expenditure incurred by the assessee of INR 2 445799/– was paid in relation to investment in shares, the income from which is exempt as per the provisions of the act. The learned AO noted that during the year assessee has paid interest and engaged in the business of, share trading and also shown the dividend income. The total investment of the assessee is INR 107744905/– as investment in quoted and unquoted equity shares and in immovable property. Therefore, the AO was of the view that assessee has diverted most of the funds towards non-earning assets by taking interest-bearing funds. The AO questioned applicability of the provisions of section 14 A of the income tax act which the assessee submitted that since there are no direct or indirect expenses which have been incurred in earning of the dividend income as all the interest-bearing funds had been used only for direct business purpose and not for the purpose of earning any exempt

income. It was further stated that there are no direct expenses that can be computed under rule 8D. Since the administration expenses are far less than the amount to be computed in rule 8D. The total administrative expenses incurred by the assessee were only INR 69565/–. In view of this, the assessee objected to any disallowance under section 14 A of the act. The learned AO rejected the explanation of the assessee and disallowed the expenditure of INR 2445799/– which also included the disallowance of INR 200478 considered in ground number 1 and 2 of the appeal. The assessee preferred appeal before the learned Commissioner of income tax appeals in submitted that the learned AO has failed to record any satisfaction with respect to the claim of the assessee that no expenditure has been incurred by the assessee and that rule 8D has not been applied by the learned AO, even if it is assumed that satisfaction has been recorded. The learned Commissioner appeals held that out of the total interest expenditure of INR 2445799/–, interest amounting to INR 1 923500/– was in respect of the loans which are utilized by the assessee for the appellant's business and therefore no disallowance from that can be made. He further stated that rule 8D should have been applied by the AO as the appellant could not substantiate the fact that the funds in respect of which said interest was paid were not utilized for earning tax exempt income and therefore he stated that the interest expenditure of INR 522299/– is covered under rule 8D (2) (iii). Further, under the 3rd close he held that half percent of the average value of investment is required to be added which comes to INR 245639/– and therefore he confirmed the total disallowance of INR 767938/–.

8. The learned authorised representative firstly contested that there is no proper satisfaction recorded by the learned assessing officer and then stated that even otherwise, the disallowance of interest made by the learned CIT – A of INR 5 22299/– is also required to be computed with respect to the average investments of the company and therefore the total disallowance cannot be more than Rs. 45772/–. It was further stated that when the assessee has incurred the total administrative expenses only of INR 69585/–, disallowance computed by the learned Commissioner of income tax (A) is of INR 245639, which is far more than the actual expenditure incurred by the assessee in totality, hence, it cannot be sustained.

9. The learned departmental representative gave a detailed written submission stating that all the issues have been covered by the decision of the honourable Supreme Court in case of Maxxopp investment Ltd dated 12/2/2018 (91 taxmann.com 154) and therefore the issue must be set aside to the file of the learned assessing officer for re-computation of the disallowance under section 14 A of the income tax act.

10. We have carefully considered the rival contention and perused the orders of the lower authorities. Admittedly, the learned assessing officer has recorded a proper satisfaction that assessee has claimed deduction of interest expenditure for the purpose of earning of exempt income. The learned AO has analyzed the total interest expenditure and has shown that amount has been utilized for making investment in quoted and unquoted equity shares of the companies. The assessee also could not substantiate before the assessing officer that no expenditure has been incurred with respect to the interest expenditure for earning of the exempt income. The assessee could only substantiate the nexus of the funds with respect to the amount that has been deleted by the learned CIT (A). Therefore, it cannot be said that the assessing officer has not recorded proper satisfaction. This contention of the assessee is rejected. However, the 2nd contention of the assessee with respect to the computation of the disallowance under section 14 A of the income tax act has been verified and found that the indirect interest expenditure of INR 5 22299/– is required to be disallowed in proportion to the total assets with respect to the investments covered under section 14 A of the income tax act. The assessee has computed such disallowance of interest of INR 4 5772/–. The learned Commissioner of income tax has confirmed the disallowance of INR 5 22299/- without applying the proportion of tax free income yielding assets to total assets. Therefore, disallowance of interest is required to be restricted to only INR 4 5772/–. Furthermore with respect to the last limb of the rule 8D (2), the total expenditure incurred by the assessee is only INR 69585/- on account of administrative expenditure whereas the learned Commissioner of income tax (A) has worked out disallowance of INR 245639/–. According to us the total disallowance of expenditure cannot exceed the amount of actual expenditure incurred by the assessee. Therefore, the disallowance as per

rule 8D (2) (iii) is also required to be restricted at INR 69585 only. Accordingly, against the disallowance of the interest of INR 522299/–. We direct the learned assessing officer to restricted to INR 45772/– and with respect to the disallowance of administrative expenses were not by the learned Commissioner of income tax appeals of INR 245639/– We direct the learned assessing officer to restricted to INR 69585/–. Accordingly, ground number 3 – 5 of the appeal is partly allowed.

11. Accordingly, appeal of the assessee is partly allowed.

Order pronounced in the open court on 06/12/2018.

-Sd/-	-Sd/-
(KULDIP SINGH)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 06/12/2018
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi