IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "F" : DELHI

BEFORE SHRI BHAVNESH SAINI, J.M. & SHRI O.P. KANT, A.M.

ITA.No.6724/Del./2018
Assessment Year 2013-2014

M/s. RH International Ltd., 80/80B Ground Floor, Malviya Nagar, New Delhi PIN 110 017. PAN AADCR5273J	vs.	The Income Tax Officer, Ward – 20 (3), C.R. Building, New Delhi.
(Appellant)		(Respondent)

For Assessee :	Shri Ved Jain, Advocate And Shri Himanshu Aggarwal, CA
For Revenue :	Shri Surender Pal, Sr.D.R.

Date of Hearing :	05.03.2019
Date of Pronouncement :	20.03.2019

ORDER

PER BHAVNESH SAINI, J.M.

This appeal by Assessee has been directed against the Order of the Ld. CIT(A)-7, New Delhi, Dated 09th October, 2018, for the A.Y. 2013-2014, on the following grounds :

1. *That under the facts and circumstances of the case and in law Ld. CIT(A) has erred in upholding the disallowance of a sum of Rs. 5,72,34,330/- made*

u/s 40(a)(i)(a) of the Income Tax Act 1961(Act). Ld. CIT(A) has failed to appreciate :

a. *That the appellant was prevented by sufficient cause for non-depositing TDS within the prescribed time. Though the evidence to show the existence of reasonable and sufficient cause was admitted and also confronted to AO but Ld. CIT (A) has failed to take cognizance of the same and without considering the existence of sufficient and reasonable cause Ld. CIT(A) has upheld the disallowance. Therefore, the order passed by Ld. CIT(A) suffers from illegality.*

b. *That even if the relief is allowed to the appellant in accordance with first proviso to section 40(a)(i)(a) then the assessee will not get effective relief as against the tax liability for the present year of a sum of Rs.2.66 crores, the relief which will be allowable to the appellant will be only a meager sum of Rs. 10,17,338/-. Thus, it was demonstrated that the grant of relief under first*

proviso in the year in which TDS was paid will not be an effective remedy to the appellant and, therefore, the disallowance in the year under consideration has brought unintended hardship to the appellant as has been recognized by Hon'ble Jurisdictional High Court in the case of CIT vs Naresh Kumar 362 ITR 256 (Del).

c. *That the disallowance u/s 40(a)(ia), as held by the courts, is not penal in nature and is harsh, therefore, any amendment brought in section 40(a)(ia), which is intended to reduce the harshness of the provision, has to be liberally interpreted in favor of defaulters, more particularly when legislature itself, for the reason to curtail the harshness of the provision, has brought the amendment in this section and that amendment should be interpreted to have retrospective effect.*

d. *That to the extent of Rs.4,92,46,824/-, (for which the appellant has been able to furnish evidence in the shape of copies of acknowledgements of*

income tax returns filed by the seven deductees and which was also confronted to AO), the appellant was eligible for grant of benefit of 100% relief as per second proviso to section 40(a)(ia) which is applicable for the year under consideration.

e. *That for rest of the disallowance of a sum of Rs.54,07,248/- (in respect of remaining seven deductees), the appellant is eligible for relief of 70 % of disallowance in accordance with amendments brought to the statute by the Finance (No 2) Act 2014 w.e.f 01-04-2015 whereby disallowance was reduced to 30% from 100% and such proposition of law is also supported by the decisions of Tribunal which were relied upon before Ld. CIT(A).*

f. *That disallowance to the extent of Rs. 24,00,000/- being remuneration paid to the directors was incorrectly made by the AO as the same was not*

subject to deduction of tax in the year under consideration.

2. *Without prejudice to the above, under the fact and circumstances of the case and in law Ld. CIT(A) has erred in upholding the disallowance to the extent of Rs.4,92,46,824/-(in respect of 7 deductees for whom the evidence was filed with the CIT(A) in the shape of acknowledgement of income tax return filed by these deductees and the same were sent to AO along with written submissions filed by the assessee and in the remand report AO has not adversely commented on the factual aspect of income tax returns having been filed by these deductees and also inclusion of receipts received by these deductees from the assessee). Thus, disallowance to the extent of Rs.4,92,46,824/- was required to be deleted by Ld. CIT(A) in view of legal position and case laws explained in the written submission filed before Ld.CIT(A).*

3. *Without prejudice to above, under the facts and circumstances of the case and in law Ld. CIT(A) has erred in law in upholding the remaining disallowance of Rs.54,07,248/- (total disallowance of Rs.5,72,34,330/- (-) Rs.4,92,46,824/- in respect of 7 deductees for which copy of acknowledgement of income tax return was filed) in its entirety as disallowance only to the extent of 30% of Rs.54,07,248/- was required to be made by granting the benefits of amendments brought in section 40(a)(ia) by Finance (No 2) Act 2014 w.e.f 01.04.2015 as the said amendments has been considered to have retrospective applicability by the several decisions rendered by ITAT which were also relied upon in the written submission filed before Ld.CIT(A).*
4. *Without prejudice to the above, under the facts and circumstance of the case even if it is held that assessee is not entitled to get benefit of second proviso even to the extent of Rs.4,92,46,824/-(in respect of 7 dedcutees for which the evidence was*

filed before CIT(A) and which was also confronted to AO and is also subject to remand report), the Appellant is entitled to get benefit of reduced disallowance of 30% on the entire disallowance of Rs.5,72,34,330/- on ground of retrospective applicability of amendments brought in section 40(a)(ia) by Finance (No 2) Act, w.e.f 01-04-2015 whereby the disallowance is reduced to 30% from 100%. Thus, the appellant is entitled to get relief of 70% of entire disallowance and thus the disallowance is required to be reduced to Rs.1,71,70,299/- from Rs.5,72,34,330/-.

5. *Without prejudice to the above, disallowance to the extent of Rs.24,00,000/- being remuneration paid to the directors which was not subject to deduction of tax, should be deleted on account of non-applicability of section 40(a)(ia) in the year under consideration."*

2. We have heard the Learned Representatives of both the parties and perused the material available on record.

3. The facts of the case are that the assessee company is engaged in the business of providing online services [BPO]. During the year assessee has shown TDS payable to the tune of Rs.1,78,70,190/-. The assessee was asked to furnish details as to why the same should not be disallowed. The tax audit report also reflects that same has not been deposited into the Government Account till the date of the audit. The assessee has submitted that a sum of Rs.3,15,329/- has been deposited on 26th March, 2015, pertaining to Section 192B and 194C of the I.T. Act, 1961. Further, the balance amount has been deposited by assessee on 1st February, 2016. The assessee has filed its return of income on 31.03.2014. As per section 40(a)(ia) of the I.T. Act, if tax has been deducted during the previous year, but, paid after the due date specified under section 139(1), such sum shall be allowed as deduction in computing the income of previous year, in which, said sum has been paid. In view of the above, a sum of Rs.5,72,34,330/- was disallowed by the A.O. and added to

the income of assessee. The details of the same are as under:

Section	TDS amount	Amount on which TDS deducted
192B	290119	2901190
194C	1004081	50204050
194I	378909	3789090
194J	34000	34000

3.1. The assessee challenged the addition before the Ld. CIT(A). The assessee filed written submissions with additional evidences which were forwarded to the A.O. for his comments. The A.O. noted in the remand report that the main contention of the assessee is that Mrs. Jaspal Kaur, one of the Directors of the assessee company was suffering from cancer which was detected in 2011 and was under constant treatment till her death. It was submitted that other two Directors being sons of the deceased Director were busy in getting treatment of their mother in various hospitals and thus, were not able to concentrate upon the business activities. After the death of deceased Director on 13.02.2015, assessee recovered from mental stress and deposited the TDS on 26.03.2015 and 01.02.2016. It was

submitted that TDS payable was of Rs.17,16,461/-, but, the addition is made of Rs.5.72 crores. The assessee relied upon Judgments of Hon'ble Delhi High Court in the case of CIT vs. Naresh Kumar (2014) 362 ITR 256 (Del.) on the proposition that the provisions of Section 40(a)(ia) can be and should be interpreted in a liberal and equitable manner so that the assessee should not suffer any unintended and deleterious consequences beyond what the object and purpose of the provision mandates. The assessee filed certificate of illness of the Director. It was also submitted that since the amount is paid by the deductee, therefore, assessee should not be held to be in default of TDS. The assessee filed copies of the acknowledgment of income tax return filed by the deductees to whom these payments have been paid and they have declared such amount as income in their return and paid the taxes thereon. Several decisions in support of the contention were also relied upon. The Ld. CIT(A) considering the circumstances explained above found that assessee was prevented by sufficient cause from producing the evidences before A.O. Therefore, additional

evidences were admitted. The Ld. CIT(A) reproduced the written submissions of the assessee on merit.

4. The Ld. CIT(A) noted that it is an admitted fact that there was TDS payable of Rs.17,16,461/- and the aggregate amount of expenses, on which, this TDS was deducted amounting to Rs.5.72 crores. It is also admitted fact that assessee made payment of the TDS on 26.03.2015 and 31.03.2016. According to the above provision, the assessee had to deposit the amount of TDS deducted within the period of filing of the return of income. Further, the First proviso clarifies that *"if the amount of expenses shall be deductible in the year the assessee deposits the TDS to the Government Account. Therefore, A.O. was justified in making the disallowance"*. The Ld. CIT(A) also noted that Second proviso is applicable to the assessee who have not deducted the tax or who have short deducted the tax, whereas, in the case, the assessee had correctly deducted the tax, but, had not deposited it before due date of filing of the return of income. Therefore, mere filing of ITR of the deductees [that too only to the extent of Rs.4,92,46,824/- as against

disallowed amount of Rs.5,72,34,330/-], does not discharge the assessee from disallowance under section 40(a)(ia) of the I.T. Act, 1961. The Ld. CIT(A), accordingly, confirmed the addition and dismissed this ground of appeal of assessee.

5. We have heard the Learned Representatives of both the parties. Learned Counsel for the Assessee filed the written submissions on the same which reads as under :

I. *No disallowance under section 40(a)(ia) on payment of salary.*

- *At the outset, it is pertinent to mention here that Rs. 29,01,190/- was paid as salary and TDS was deducted under section 192B and the provisions of section 40(a)(ia) are not applicable on such transactions.*
- *Therefore, AO & CIT(A) both had gone wrong in disallowing the amount of Rs. 29,01,190/-*

II. Disallowance should be restricted to 30% instead of 100% in view of the amendment by Finance (No.2) Act, 2014.

- *Without prejudice to the submissions of the assessee that the entire disallowance is to be deleted. It is respectfully submitted as under.*
- *Section 40(a)(ia) was amended vide Finance Act, 2014 whereby disallowance in respect of default in payment of TDS in case of payments to residents is restricted to 30% instead of 100%, and since the amendment is curative in nature and have been made to remove the undue hardships to the assessee and accordingly should be applied retrospectively.*
- *In the present case, Ld. AO has erred in disallowing that 100% of the expenditure incurred of Rs.5,72,34,330/- u/s 40(a)(ia) of the Act despite the fact that it could be disallowed only @ 30%.*
- *Further, the Ld. CIT(A) has also erred in confirming the disallowance, without appreciating the fact that in view of the amendment and disallowance cannot exceed 30%.*

- *The contention of the assessee gains strength by the judgment of Hon'ble Jaipur ITAT in the case of Shri Rajendra Yadav Vs The Income Tax Officer, Ward 1(3), Ajmer (ITA No.895/JP/2012) wherein, while deciding the issue of AY 2007-08, Hon'ble ITAT has held that the maximum disallowance for default in depositing TDS if any should be restricted to 30%. The relevant extract of the judgment is as below :*

  > *"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.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."

III. *No disallowance should be made when the deductees have offered the income received from the deductor to income tax.*

- *It may please be observed that the deductees have filed their ITR u/s 139(1) and have taken into account income such sums and have duly offered to tax. Total of Rs.4,92,46,824/- were credited to the accounts of various deductees. [PB Pg.172]*
- *The assessee has filed the following documents with Ld. CIT(A) under Rule 46A, substantiating that the deductees have offered the receipt as the income for the said assessment year :*

  a. Copy of certificate by Chartered Accountant u/s 201(1) read with rule 31ACB certifying that the amount of Rs. 3,58,08,411/- was credited to the account of RH BPO Services Private Limited. [PB Pg. 69-72]

b. Copies of ITR acknowledgment of RH BPO Services Private Limited [PB Pg. 46]

c. Copies of ITR acknowledgments of the deductees [PB Pg. 47- 50]

d. Copies of invoices issued by accolade services in the name of the assessee [PB Pg. 51-68]

e. Copy of ITR acknowledgement of Ekta Traders Pvt. Ltd. [PB Pg. 73]

f. Copy of audited balance sheet of Asergis Telecom services Pvt. Ltd. [PB Pg. 74-88]

g. Copy of ITR acknowledgement along with computation of Income of Manmeet Singh [PB Pg. 89-91]

h. Copy of ITR acknowledgement along with computation of Income of Sanmeet Singh [PB Pg. 92-94].

- *Since as evident from the above evidences submitted, that the deductees have paid taxes on the said income and action of Ld. AO in disallowing the expenditure of assessee will*

tantamount to double taxation.

- *In this regard, reliance is placed on the decision of Hon'ble Calcutta High Court in the case of Grindlays Bank vs CIT [1992] 193 ITR 457 wherein their lordships have held that the tax cannot be realized twice on the same income. The relevant extract of the judgment is as below:*

"23. A point has been made by the assessee that as a result of this deduction the department is realizing the tax twice on the same income. It does not appear that this point was agitated before the Tribunal. We, however, make it clear that if the amount of tax has already been realized from the employees concerned directly, there cannot be any question of further realization of tax as the same income cannot be taxed twice. If the tax has been realised once, it cannot be realised once again, but that does not mean that the assessee will not be liable for payment of interest or any other legal consequence for their failure to deduct or to pay tax

in accordance with law to the revenue. "

IV. <u>*On* applicability of second proviso to section 40(a)(ia) :</u>

- *The Ld. AO/CIT(A) has held that the second proviso to section 40(a)(ia) is not applicable to the assessee as in the present case assessee has correctly deducted TDS and the proviso will be applicable in the case of non-deduction of TDS.*
- *In this regard it is respectfully submitted that according to the rules of interpretation entire section has to be read together. Section 40(a)(ia) refers the disallowance to be made in a case where there are following defaults :-*

    a. In a case where tax has not been deducted

    b. After deduction, tax has not been paid on or before the due date specified u/s 139(1)

- *In the light of the above, the case of the assessee is covered under the second proviso of section 40(a)(ia). Having regard to the cardinal rules of interpretation, the second proviso cannot be interpreted in isolation of the main provision and its benefits cannot be*

denied. The Hon'ble Apex Court in the case Ram Narain & Sons Ltd. Vs. ACST AIR 1955 SC 765, held as under :

> *"It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main- provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other"*

- *Thus, in the light of the above law laid down by the Hon'ble Apex court it can be said that the assessee can avail the benefit of second proviso to section 40(a)(ia) of the Act.*
- *It may also be please noted that the second proviso to section is also retrospective in nature. The contention of the assessee finds strength from the decision of Hon'ble Delhi High Court in the case of CIT vs. Ansal Landmark Township- 279 CTR 384 has held that the second proviso to section 40(a)(ia) is declaratory and curative and it*

has retrospective effect from 01.04.2005. The relevant extract of the section is below :

> *"14. The Court is of the view that the above reasoning of the Agra Bench of IT A T 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. "*

- *The above decision has been affirmed by the Apex Court in the case of CIT Kokata X vs. M/s Calcutta Export Company (Civil Appeal Nos. 4339-4340 of 2018).*

V. *<u>No effective relief to the assessee on applicability of first proviso to section 40(a)(ia)</u> :*

- *May it please your honours that if the benefit of first proviso to section 40(a)(ia) is granted to the assessee, which enables him to claim the benefit of disallowance in the year in which TDS is paid,*

the assessee will not be able to get the benefit of the adjustment to the extent the assessee has suffered tax liability due to disallowance made u/s 40(a)(ia).

- *It may be seen from the facts of the case that the total amount of TDS was only of Rs. 17,06,370/- and the amount added to the income of the assessee was Rs. 5,72,34,330/- on which the tax including interest has been raised has been raised at Rs.2.66 crores. The returned income of the assessee has been in the range of Rs.13 lakhs to 32 lakhs (PB pg. 159-160]*
- *Therefore, it can be seen that even if the rebate, as per first proviso is allowed in the year of payment, then, also it would not match with the burden of tax levied upon the assessee in the year under consideration.*
- *Reliance is placed on the jurisprudence laid down by the Hon'ble Delhi High Court in the case of CIT vs Naresh Kumar (2014) 362 ITR 256, their*

Lordships while explaining the principle of matching have recognized the situation which is being faced by marginal and medium tax payers and observed that provisions of section 40(a)(ia) should be interpreted in a liberal and equitable manner so that the assessee should not suffer unintended and deleterious consequences beyond what the object and purpose of the provision mandate.

> *"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".

5.1. Learned Counsel for the Assessee, in view of the above written submissions submitted that reasonable cause explained by assessee may be considered and that addition may be deleted. He has submitted that even if some addition is to be maintained, it must be restricted to 30% as per the amended provisions and A.O. may also be directed to allow the claim of expenses in the year of payment and assessee may be allowed to carry forward the losses arising out of the above claim in subsequent year.

6. On the other hand, Ld. D.R. relied upon the Orders of the authorities below.

7. We have considered the rival submissions. Section 40(a)(ia) of the Income Tax Act, 1961, as is applicable to A.Y. under appeal reads 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 "Profits and gains of business or profession",—*
>
> *(a) in the case of any assessee—*
>
> *(i) any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act, which is payable,—*
>
> *(A) outside India; or*
>
> *(B) in India to a non-resident, not being a company or to a foreign company, on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted 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 in 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.

Explanation.—For the purposes of this sub-clause,—

(A) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;

(B) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;

(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 been 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 deduction in computing the income of the previous year in which such tax has been paid :]

"Provided further that where an assessee fails to deduct the whole or any part of the tax in

accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso."

Explanation.—For the purposes of this sub-clause,—

(i) "Commission or brokerage" shall have the same meaning as in clause (i) of the Explanation to section 194H;

(ii) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;

(iii) "professional services" shall have the same meaning as in clause (a) of the Explanation to section 194J;

(iv) "work" shall have the same meaning as in Explanation III to section 194C;

(v) "rent" shall have the same meaning as in clause (i) to the Explanation to section 194-I;

(vi) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;]"

7.1. The A.O. in the assessment order noted that as regards Section 192B of the I.T. Act, the amount on which TDS is to be deducted comes to Rs.29,01,190/- on which, TDS of Rs.2,90,119/- have been deducted but was not paid by assessee. Learned Counsel for the Assessee rightly contended that the amount in question relates to payment of salary and according to Section 40(a)(ia) of the I.T. Act, the word "Salary" have not been incorporated in the Act. Therefore, assessee would not be in default of TDS under section 40(a)(ia) of the I.T. Act because such provision is not

attracted in this Section. Therefore, Section 40(a)(ia) of the I.T. Act is not application on such transaction. This addition is, therefore, liable to be deleted. We, accordingly, set aside the Orders of the authorities below and delete the addition of Rs.29,01,190/-. This ground of appeal of assessee is allowed.

8. Learned Counsel for the Assessee submitted that assessee is eligible for relief of 70% out of disallowances, in accordance with the Amendments brought to the Statute by the Finance Act, 2014, w.e.f. 01.04.2015, whereby disallowances was restricted to 30% from 100%. The amended provision of Section 40(a)(ia) reads as under :

> *"(ia) [thirty percent of any sum payable to a resident], 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 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, [thirty per cent of] such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid :]

"Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso."]

Explanation.—For the purposes of this sub-clause,—

(i) "Commission or brokerage" shall have the same meaning as in clause (i) of the Explanation to section 194H;

(ii) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;

(iii) "professional services" shall have the same meaning as in clause (a) of the Explanation to section 194J;

(iv) "work" shall have the same meaning as in Explanation III to section 194C;

(v) "rent" shall have the same meaning as in clause (i) to the Explanation to section 194-I;

(vi) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;]"

9. The assessing officer disallowed 100% of the expenditure incurred of Rs.5,72,34,330/-. The amended

provision have been considered by ITAT, Jaipur Bench in the case of Rajendera Yadav vs. ITO for the A.Y. 2007-2008 Order Dated 29.01.2016 in which the Tribunal held as under :

> *"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. 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."

10. Following the above decision, we set aside the orders of the authorities below and direct the assessing officer to follow the order of ITAT, Jaipur Bench in the case of Shri Rajendra Yadav vs., ITO (supra), and in case of disallowance under section 40(a)(ia) of the Income Tax Act, 1961, the same should be restricted to 30% only as against 100% because the amended provision is curative in nature

and have made to remove the undue hardships to assessee and accordingly should be applied retrospectively.

10.1. Learned Counsel for the Assessee further submitted that deductees have filed their ITR under section 139(1) and have shown the same amount as income, which have been offered to tax and have also paid the taxes thereon. All the documentary evidences are available on record. Learned Counsel for the Assessee relied upon Judgment of the Hon'ble Calcutta High Court in the case of Grindlays Bank vs., CIT (supra) and submitted that double tax should not be recovered from the assessee. The Learned CIT(A), however, noted that the provision contained in second proviso to Section 40(a)(ia) is not applicable to the case of the assessee because assessee had fully deducted the TDS, but, did not deposit the same into the Government account. However, assessee explained reasonable cause for failure to comply with such provision, on which, Learned CIT(A) admitted the additional evidences. In case the deductees have also paid the taxes on such receipts and offered the amount for taxation, it would certainly amount

to double taxation in the hands of the assessee as well as the deductee of the same amount. Further, the assessee has raised this issue for the first time, therefore, it requires re-consideration at the level of assessing officer. We, accordingly, set aside the orders of the authorities below and restore this issue to the file of assessing officer with a direction to verify if the deductees have offered the amount of Rs.4.92 crores for taxation and paid the taxes thereon. The assessing officer after verifying the same shall pass a reasoned order, after giving opportunity of being heard to the assessee as per Law. This ground of appeal of assessee is allowed for statistical purposes.

11. Learned Counsel for the Assessee further submitted that ultimately assessee has paid the TDS in subsequent year, but, no relief have been granted to assessee of such deduction in subsequent assessment year. Therefore, direction may be issued to the assessing officer in this regard. In view of the above, it is clear that assessee has ultimately deposited the TDS amount in question to the account of the Government. According to explanation of

assessee, deductees have also paid the taxes on the same income, therefore, as per provisions of Section 40(a)(ia) of the Income Tax Act, 1961, the benefit of same shall have to be granted to assessee by the assessing officer, in the year, in which, such tax have been deposited. We, accordingly, direct the assessing officer to verify the claim of assessee and allow deduction of the TDS amount paid by assessee subsequently in computation of income of the previous year, in which, such tax has been paid. The Assessing officer shall give reasonable sufficient opportunity of being heard to the assessee. This Ground of appeal of assessee is, therefore, allowed for statistical purposes.

12. The Learned Counsel for the Assessee in the written submissions lastly submitted that assessee may be allowed to carry forward losses arising out of the above claim in subsequent assessment year. Assessing officer is, therefore, directed to look into the matter and do the needful as per Law. This Ground of appeal of assessee is, therefore, allowed for statistical purposes.

13. In the result appeal of Assessee is partly allowed.

Order pronounced in the open Court.

Sd/-	Sd/-
(O.P. KANT)	(BHAVNESH SAINI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Delhi, Dated 20th March, 2019

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'F' Bench, Delhi
6.	Guard File.

// BY Order //

Assistant Registrar : ITAT Delhi Benches :
Delhi.