IN THE INCOME TAX APPELLATE TRIBUNAL DELHI
BENCH 'B', NEW DELHI

BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND SH. KULDIP SINGH, JUDICIAL MEMBER

(THROUGH VIDEO CONFERENCING)

ITA No.4157/Del/2013 (for Assessment Year 2007-08)
And
ITA No.4158/Del/2013 (for Assessment Year 2008-09)

Daawat Foods Ltd., Unit No.134, 1st Floor, Rectangle I, Saket District Centre, Saket, New Delhi-110 017 PAN No. AACCD 3698 N	Vs.	ACIT, Central Circle – 19, New Delhi
(APPELLANT)		**(RESPONDENT)**

Assessee by	Shri Ajay Vohra, Sr. Adv. Shri Rohit Jain, Adv. Ms. Deepashree Rao, C.A. Shri Vibhu Gupta, C.A.
Revenue by	Ms. Nidhi Srivastava, CIT-D.R

Date of hearing:	17/12/2020
Date of Pronouncement:	19/01/2021

ORDER

PER ANIL CHATURVEDI, AM:

Both the appeals filed by the assessee are directed against the order dated 28.03.2013 of the Commissioner of Income Tax (A)-XXXIII, New Delhi relating to Assessment Years 2007-08 & 2008-09.

2. The relevant facts as culled from the material on records are as under:

3. Assessee is a company stated to be engaged in the business of manufacturing of rice and sale and purchase thereof. Assessee filed its original return of income for AY 2007-08 on 31.10.2007 declaring loss of Rs.10,86,965/-. The return of income was initially processed u/s 143(1) on 14.02.2009 at Nil income. Thereafter, a search u/s 132 of the Act was carried out in Daawat Group of cases including the assessee on 10.2.2009. Notice u/s 153A dated 07.10.2009 was served on assessee requiring the assessee to file the return of income with 16 days of the service of the aforesaid notice and in response to which assessee filed return of income on 11.12.2009 declaring the loss at Rs.10,86,965/-. The case was taken up for scrutiny and thereafter, vide order dated 19.8.2011 passed u/s 153A the total taxable income was determined at Rs. 58,30,841/-

4. As far as A.Y. 2008-09 is concerned, Assessee had filed the original return of income on 30.09.2008 declaring loss of Rs.2,82,80,689/- which was initially processed u/s 143(1) of the Act. Thereafter in view of the search u/s 132 conducted in the case of assessee, notice u/s 153A dated 07.10.2009 was served on the assessee on 19.10.2009 requiring the assessee to file the return of income within 16 days of the service of the notice. In

response of notice u/s 153A of the Act, assessee filed return of income on 11.12.2009 declaring loss of Rs.2,82,80,689/-. Subsequently, assessment was framed u/s 153A vide order dated 19.08.2011 and the total loss was determined at Rs. 1,87,63,172/-.

5. Aggrieved by the aforesaid orders of AO, assessee carried the matter before CIT(A) who vide order dated 28.03.2013 (Appeal No. 32/11-12/717) for A.Y. 2007-08 and Appeal No. (33/11-12/718) for A.Y. 2008-09 granted partial relief to the assessee. Aggrieved by the orders of CIT(A), assessee is now in appeal before us and has raised the following grounds of appeal in ITA No.4157/Del/2013 For A.Y. 2007-08:

> *"1. That the search conducted under Section 132 is illegal, bad in law and without jurisdiction and the assessment made U/s 153A is also bad in law and without jurisdiction.*
>
> *2. That the notice under section 153A is illegal, bad in law and without jurisdiction and subsequently order passed U/s 153A is also illegal, bad in law and without jurisdiction.*
>
> *3. That reference to special audit under section 142(2A) is illegal and bad in law and the report submitted by the special auditor is illegal, bad in law and without jurisdiction.*
>
> *4. That the special auditor has erred on facts and in law in scrutinizing and auditing those issues which are not part of the terms of reference and has exceeded his jurisdiction in making observations about those issues in th audit report submitted.*
>
> *5. That in the absence of any incriminating material found during search, the additions made by the AO while*

completing assessment U/s 153A rws 143(3) are unjust, arbitrary and bad in law and without jurisdiction.

6. *That the assessment for relevant Assessment Year was not pending at the time of search hence the same was not abated, as such assessment made U/s 153A and addition are illegal, bad in law and without jurisdiction.*

7. *That in view of the facts and circumstances of the case and in law the A.O. has erred in completing the assessment U/s 153A when there is no seized material pertaining to this year. The additions made are unjust, unlawful, bad in law, without jurisdiction and are also highly excessive.*

Addition on account of personal expenses

8. *That in view of the facts and circumstances of the case and in law the A.O. has erred in holding that an amount of Rs. 2,49,650/- is in nature of personal expense and thereby disallowing the same and CIT(A) has also erred in upholding the same.*

Addition of Rs. 9.588/- on account of expenditure on towards printing of MOA being of capital nature

9. *That, in view of the facts and circumstances of the case and in law the A.O. has erred in law and on facts in holding that the amount of Rs. 9,588/- spent towards printing of memorandum of article is capital expenditure in nature and not a revenue expenditure and CIT(A) has erred in law and on facts in upholding the same.*

10. *That the explanations given, evidence produced and material placed and made available on record have not been properly considered and judicially interpreted and the same do not justify the addition made.*

11. *That the addition/disallowance made is based on mere surmises conjunctures and the same cannot be justified by any material on record is highly excessive.*

12. *That the interest u/s 234A, 234B, 234C and 234D has been wrongly and" illegally charged as there is no delay in filling of return and there is no default of payment of Advance tax as the receipt / income is liable to TDS and it could not have*

anticipated such additions. In any case the interest charged has been wrongly worked out and is excessive.

13. That all the above grounds are independent to each other and mutually exclusive.

14. The Appellant craves leave to add, amend, alter and/or delete any of the above grounds of appeal at or before the time of hearing."

6. The grounds raised for AY 2008-09 in ITA No. 4158/Del/2013 reads as under:

"1. That the search conducted under Section 132 is illegal, bad in law and without jurisdiction and the assessment made U/s 153A is also bad in law and without jurisdiction.

2. That the notice under section 153A is illegal, bad in law and without jurisdiction and subsequently order passed U/s 153A is also illegal, bad in law and without jurisdiction.

3. That reference to special audit under section 142(2A) is illegal and bad in law and the report submitted by the special auditor is illegal, bad in law and without jurisdiction.

4. That the special auditor has erred on facts and in law in scrutinizing and auditing those issues which are not part of the terms of reference and has exceeded his jurisdiction in making observations about those issues in the audit report submitted.

5. That in the absence of any incriminating material found during search, the additions made by the AO while completing assessment U/s 153A r.w.s 143(3) are unjust, arbitrary, and bad in law and without jurisdiction.

6. That the assessment for relevant Assessment Year was not pending at the time of search hence the same was not abated, as such assessment made U/s 153 A and addition are illegal, bad in law and without jurisdiction.

7. *That in view of the facts and circumstances of the case and in law the A.O. has erred in completing the assessment U/s 153A at a loss of Rs. 1,87,63,172/- as against returned loss of Rs. 2,82,80,689/- when there is no seized material pertaining to this year. The additions made are unjust, unlawful, bad in law, without jurisdiction and are also highly excessive.*

Disallowance of Payment in Contravention of Section 40A(3)

8. *That, in view of the facts and circumstances of the case and in law, the A.O. and subsequently CIT(A) has erred in law and on facts in holding that the assessee has made cash payments to various concern which are to be disallowed U/s 40A(3) of the Act.*

9. *That, in view of the facts and circumstances of the case, the A.O. and subsequently CIT(A) has failed to appreciate that payment of Rs. 8,64,464/- is made out of commercial expediency and is allowable expenditure.*

10. *That A.O., in view of the facts and circumstances of the case, has erred in law and on facts in disallow sum of Rs. 1,70,501/- U/s 40A(3) paid as freight and CIT(A) has erred in law and on facts in upholding the same. The CIT(A) has failed to appreciate that payment is made out of commercial expediency and is allowable expenditure*

Addition on account of personal expenses

11. *That in view of the facts and circumstances of the case and in law the A.O^ has erred in holding that an amount of Rs. 20,680/- is in nature of personal expense and thereby disallowing the same and CIT(A) has also erred in upholding the same.*

Addition on account of disallowance of additional depreciation

12. *That in view of the facts and circumstances of the case and in law the A.O./CIT(A) has erred in law and on facts in*

confirming an addition on account of disallowance of additional depreciation on plant and machinery.

Disallowance of expenses on account of Non-Deduction and Short-Deduction of TDS

13. *That CIT(A), in view of the facts and circumstances of the case, has erred in law and on facts in only allowing the part relief in respect of disallowance made U/s 40(a)(ia) by the AO. The CIT(A) should have deleted the entire addition/disallowance on this account.*

14. *Without prejudice to the above, the CIT(A), in view of the facts and circumstances of the case, has erred in law and on facts in holding that where TDS has been deducted at lesser rate the disallowance U/s 40(a)(ia) of the Act is required to be made. The CIT(A) has failed to appreciate that no disallowance U/s 40(a)(ia) of the Act is required to be made where TDS has been deducted at lesser rate.*

15. *That CIT(A) in view of the facts and circumstances of the case, has erred in law and on facts in upholding the addition/disallowance U/s 40(a)(ia) on account of freight charges paid to various/ different truck owner. The CIT(A) has also failed to appreciate that provision of Section 194C are not applicable to such payment and no TDS is required to be made payment.*

16. *That CIT(A) has failed to appreciate that the provision of Section 40(a)(ia) are not applicable in respect of disallowances made y disallowance are unjust, unlawful and without any legal basis.*

17. *That the explanations given, evidence produced and material placed and made available on record have not been properly considered and judicially interpreted and the same do not justify the addition made.*

18. *That the addition/disallowance made is based on mere surmises and conjunctures and the same cannot be justified by any material on record and is highly excessive.*

19. That all the above grounds are independent to each other and mutually exclusive.

20. The Appellant craves leave to add, amend, alter and/or delete any of the grounds of appeal at or before the time of hearing."

7. We first proceed to decide the quantum appeal in appeal No 4157/Del/2013 for AY 2007-08.

8. Before us, the Ld. AR at the outset submitted that the assessee does not wish to press Ground Nos. 1 to 4 and 9 to 11. In view of the aforesaid submissions of the Ld. AR, these **grounds are dismissed as not pressed**.

9. In Ground No 5 to 7, assessee is challenging the assessment framed u/s 153A and the additions made therein

10. Before us, Ld. AR submitted that search operation u/s 132 of the Act was undertaken in Daawat Group of cases including the assessee in 10.02.2009. Pursuant to the search conducted in the case of assessee, the AO issued notice u/s 153A on 07.10.2009 asking the assessee to file the return of income and in response to which assessee filed the return of income on 11.12.2009 declaring loss of Rs.10,86,965/-. He submitted that

in pursuance of the notice u/s 153A, the regular assessment proceedings u/s 143(3) stood abated. He submitted that the AO proceeded to make various additions/disallowances in respect of which no incriminating material was found during the course of search by merely relying on the finding of the special auditor. He submitted that assessment u/s 153A of the Act can be made only on the basis of seized material found during the course of search and any addition made de-hors any material/document found during the course of search is clearly outside the scope of proceedings u/s 153A of the Act. He therefore submitted that the action of the AO in passing the impugned order is without jurisdiction, illegal and bad in law. Ld DR on the other hand supported the order of lower authorities.

11. We have heard the rival submissions and perused the material on record. In the present ground, assessee is challenging the assessment proceedings and the additions made thereat.

12. It is an undisputed fact that search u/s 132 of the Act has taken place at the premises of the Assessee on 10.02.2009 and on that date the assessment for A.Y. 2007-08 was pending and therefore as per the provisions of Section 153A, the assessment for A.Y. 2007-08 stood abated and in such a situation the total income of the assessee for that assessment year will have to be computed by the AO as a fresh exercise. We find that Hon'ble

Delhi High Court in the case of Kabul Chawla [2016] 380 ITR 573 (Del) has observed as under:

> *"Summary of the legal position*
>
> *37. On a conspectus of section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under :*
>
> *(i) Once a search takes place under section 132 of the Act, notice under section 153A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six assessment years immediately preceding the previous year relevant to the assessment year in which the search takes place.*
>
> *(ii) Assessments and reassessments pending on the date of the search shall abate. The total income for such assessment years will have to be computed by the Assessing Officers as a fresh exercise.*
>
> *(iii) The Assessing Officer will exercise normal assessment powers in respect of the six years previous to the relevant assessment year in which the search takes place. The Assessing Officer has the power to assess and reassess the "total income" of the aforementioned six years in separate assessment orders for each of the six years. In other words, there will be only one assessment order in respect of each of the six assessment years "in which both the disclosed and the undisclosed income would be brought to tax".*
>
> *(iv) Although section 153A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the Assessing Officer which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously, an assessment has to be made under this section only on the basis of the seized material."*
>
> *(v) In the absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word "assess" in section 153A is*

relatable to abated pro ceedings (i.e., those pending on the date of search) and the word "reassess" to the completed assessment proceedings.

(vi) In so far as the pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under section 153A merges into one. Only one assessment shall be made separately for each assessment year on the basis of the findings of the search and any other material existing or brought on the record of the Assessing Officer.

(vii) Completed assessments can be interfered with by the Assessing Officer while making the assessment under section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."

13. In the light of the aforesaid decision of Hon'ble jurisdictional high Court we find that since it is on undisputed fact that assessment for the year had abated and in such a situation, as per the mandate of the provisions of the Act, the AO is required to compute the total income as a fresh exercise. In such a situation we find no reason to interfere with the order of CIT(A) and **thus the grounds of Assessee are dismissed.**

14. We now proceed with Ground No. 8 which is with respect to disallowance of personal expenses amounting to Rs. 2,49,650/-.

15. AO on examination of the P&L account noted that assessee had debited Rs.2,61,306/- being expenses incurred by Shri Abhinav Arora, one of the director of the company. The assessee was asked to furnish the complete details of the expenses. AO noted that expense vouchers were not filed by the assessee. He was therefore of the view that in the absence of supporting evidence for the incurring of expenses, the same cannot be allowed. He also noted that the Special Auditor in his report has observed that Rs. 11,655/- was incurred on account of foreign travelling of family members of the Directors for which no proper explanation was provided. He therefore, proceeded to disallow the aggregate expense of Rs. 2,49,650/-. When the matter was carried before CIT(A), he confirmed the action of AO. Aggrieved by the order of CIT(A), assessee is now before us.

16. Before us, Ld. AR submitted that the expenses of Rs.2,49,650 was incurred for travel and tour of Shri Abhinav Arora and Vijay Arora who are the Directors of the assessee, the expenses incurred are wholly and exclusively for the purpose of the day to day running of the business. He further submitted that the allegation of the AO that the assessee did not file the requisite documentary evidence is factually incorrect as during the course of assessment proceedings the assessee had filed complete details alongwith supporting evidence and in support of which he pointed to the copy of letter and documents submitted before AO

and the copy of which is placed in page 116 of the paper book. With respect to the expense of Rs. 11,655/-, he submitted that it was incurred towards visa processing fees of Shri Abhinav Arora, the Director of the assessee. He further submitted that assessee being a company, an artificial jurisdictional person and therefore, there cannot be a question of incurring of any personal expenses. He further submitted that identical disallowance was made in the case of L. T. foods Ltd, a group company of the assessee and when the matter travelled before the Co-ordinate Bench of Tribunal, the issue was decided in Assessee's favour (ITA No. 4164/Del/2013 order dated 30.09.2020). He pointed to the relevant findings of the Tribunal. He therefore, submitted that the expenses were allowable u/s 37 of the Act and the disallowance deserves to be deleted. Ld DR on the other hand supported the orders of the lower authorities.

17. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to disallowance of expenses of Rs. 2,49,650/-. These expenses have been disallowed for the reason that the assessee did not substantiate the nature of expenses and did not file the required details. Before us, Ld. AR has pointed to the details that have been filed by the assessee before the AO. The submissions of these details have not been controverted by the Revenue. Further Ld. AR has pointed to the fact that the expenses have been

incurred for the travelling (including related foreign travel) expenses of the Directors and have been incurred for the purpose of the business of the assessee. These submissions have not been controverted by Revenue. Considering the totality of the aforesaid facts and the submissions of Ld. AR, we are of the view that the disallowance of expenses was not called for in the present case. We therefore, direct its disallowance. **Thus this ground of assessee is allowed.**

18. Ground No. 12 is with respect to levy of interest u/s 234A. 234B, 234C and 234D.

19. Before us, Ld AR submitted that the AO issued notice u/s 153A dated 07.10.2009 asking the assessee to file the return of income within 16 days of the service of the aforesaid notice. The notice was received by the assessee on 19.10.2009 and in compliance of which assessee vide letter dated 04.11.2009 (i.e. within the time period allowed) requested the AO to provide additional time for filing the return of income as it was in the process of compilation of necessary information/ details. He submitted that the aforesaid request was not rejected by the AO and thereafter, the assessee filed the return of income on 11.12.2009. He submitted that since assessee has duly complied with the return was filed within the time sought for from AO, no interest u/s 234A was leviable. He therefore, submitted that the

AO erred in computing the interest u/s 234A and in the alternate interest u/s 234A should have been levied only for the period of delay in filing return pursuant to notice u/s 153A of the Act which was for one month of delay in filing the return of income. Ld DR on the other hand supported the order of lower authorities and submitted that the interest being mandatory, it has been rightly levied by the AO.

20. We have heard the rival submissions and perused the material available on record. The issue in the present case is about the levy of interest u/s 234A.

21. A reading of section 234A makes it clear that in the case of an assessee who has filed the return, but filed the return after the 'due date' stipulated in the notice under section 142, the date reckoning for interest to be charged under this section ends on the date of furnishing the return, in case the return is furnished after the due date.

22. In the present case, it is an undisputed fact that notice u/s 153A was issued to the assessee on 07.10.2009 directing the assessee to file the return of income within 16 days of the service of the aforesaid notice. It is the contention of the assessee that the aforesaid notice was served on the assessee on 19.10.2009.

The 16 days period to file the return of income expired on 04.11.2009 but the return of income was filed on 11.12.2009. The contention before us is that the assessee vide letter dated 04.11.2009 requested the AO to provide additional time to file the return and the said application of the assessee has not been rejected by the AO but at the same time it is also a fact that there is nothing on record to demonstrate that the AO, in response to the aforesaid request of the assessee had extended the time for filing the return of income. In such a situation we are of the view that there has been delay on the part of the assessee in filing the return of income and that the assessee was liable for payment of interest u/s 234A from immediately following the due date i.e. 20.10.2009. We finding no infirmity in the order of AO and **thus the ground of appeal of the assessee is dismissed.**

23. **Thus the appeal of the assessee is partly allowed.**

24. Now we take up Appeal in ITA No.4158/Del/2013 for A.Y. 2008-09.

25. Before us, at the outset, the Ld AR submitted that assessee does not wish to press Ground Nos.1 to 4 and 11. In view of the aforesaid submission of Ld AR, those grounds are **dismissed as not pressed.**

26. He further submitted that Grounds Nos.5 to 7 are identical and similar to the Grounds Nos. 5 to 7 raised in A.Y. 2007-08. In view of the aforesaid submission of Ld AR, we for the reasons similar to that given while deciding the appeal of the assessee for A.Y. 2007-08 and for similar reasons **dismiss those grounds**.

27. We now take Ground Nos. 8 to 10 which are with respect to disallowance made u/s 40A(3) of the Act.

28. AO on the basis of the observations of the Special Auditor in the Special Audit report noted that assessee has made payments in excess of Rs. 20,000 in cash thereby contravening the provisions of Section 40A(3) of the Act and the aggregate of such payments was Rs. 12,73,792 (the details of which are as under:)

Sl. No.	**Nature of payment**	**Amount**
1.	Freight charges paid to transporters/ truck operators	Rs.7,46,976/-
2.	Depreciation on capital assets of Rs.5,35,468/- acquired in cash	Rs.93,406/-
3.	Salary to Rakesh Gaur	Rs.28,745/-
4.	Advance to contractor towards labour charges	Rs.97,734/-
5.	Diwali expenses	Rs.43,155/-
6.	Freight charges paid for purchase of paddy	Rs.2,63,776/-
Total		**Rs.12,73,792/-**

29. When the matter was carried by the assessee before CIT(A), he after considering the submissions of the assessee granted partial relief to the assessee and the breakup of the disallowance after confirmation of CIT(A)'s order is as under:

Sl. No.	**Nature of Payment**	**As per AO**	**Exclusion by CIT(A)**	**Disallowance confirmed by CIT(A)**
1.	Freight charges paid to transporters/ truck operators	Rs.7,46,976	Rs.1,19,367	Rs.6,27,609
2.	Depreciation on capital assets of Rs.5,35,468/- acquired in cash	Rs.93,406/-	-	Rs.93,406/-
3.	Salary to Rakesh Gaur	Rs.28,745	-	Rs.28,745
4.	Advance to Contractor towards labour charges	Rs.97,734/-	-	Rs.97,734/-
5.	Diwali expenses	Rs.43,155	-	Rs.43,155
6.	Freight charges paid for purchase of paddy	Rs.2,63,776	Rs.1,19,460	Rs.1,44,316
Total		**Rs.12,73,792**	**Rs.2,38,827**	**Rs.10,34,965**

30. Aggrieved by the order of CIT(A), assessee is now before us.

31. Before us, Ld AR submitted that the intention behind the introduction of the provisions of section 40A(3) requiring the payments of expenditure by crossed cheque or bank draft was to prevent tax evasion and not to disallow deduction of genuine expenditure. In the present case he submitted that the payments which have been disallowed by the AO have been incurred during the course of business and there is no finding of the AO that the expenses are not genuine or are not for the purpose of business. He thereafter, referring to the disallowance of Rs. 7,71,925/- being payment of freight charges to transport/ truck operators (627609 + 144316) he submitted that it is towards the freight charges paid to transporters/truck drivers. He submitted that in a contract of transport of goods there are at least three parties involved namely the transport company, truck owner/ driver and the assessee. In such a transaction normally the arrangement is between the assessee and the transport company and the truck owner/ driver is the intermediary between the two. When the truck owner/ driver carries the goods belonging to the assessee, he acts as an agent of the transport company to deliver the goods and collects the freight from the assessee on behalf of the truck company. In such a situation, the assessee is under obligation to make the payment to the truck driver as payments are made only after the receipt of goods. He therefore, submitted that considering the totality of the transaction, the payment of freight charges are to be considered to be exempt under sub Rule (k) of Rule 6DD of the I. T. Rules. In support of his contention for

deleting the disallowance, he placed reliance on the decision of Pune ITAT in the case of Dhanshree Ispat (ITA No. 794 of 2013). He thereafter, fairly submitted that similar issue has been decided against the assessee in the case of L.T. foods Ltd, a Group Company of the assessee.

32. With respect to disallowance of depreciation (Rs. 93,406/-) on capital assets purchased in cash, he submitted that capital expenditure of Rs. 5,35,468/- was incurred in cash for acquiring various fixed assets and the AO disallowed the depreciation on the same. He submitted that the expenditure towards the acquisition of capital assets has not been debited to the Profit and Loss account and thereby it has not been claimed as an expenditure. He submitted that the provisions of Section 40A(3) can be invoked only in respect of expenditure which are otherwise allowable as deduction u/s 28 to 37 of the Act. In support of his contention, he also placed reliance on the CBDT Circular No. 34 (F. No 13A/92/69-IT(A-II) dated 05.03.1970. He further submitted that depreciation cannot be considered to be an expenditure but it is an allowance. He also placed reliance on the decision of Saral Motors & General Finance Ltd. vs ACIT 121 ITD 50(Del).

33. With respect to the disallowance of other payments aggregating to Rs. 1,69,634/-, he submitted that it includes

payment of Rs. 28,745/- made to Mr. Rakesh Gaur, an employee of the assessee. He submitted that the employee was not having a bank account at that point of time and that in subsequent months the payment of his salary has been made through cheque. He submitted that since the payment is not doubted, the same be allowed.

34. As far as payment of Rs. 43,155/- is concerned, he submitted that the same was incurred for purchase of gifts on the occasion of Diwali and that the payment was made to several parties and no individual payment exceeded Rs. 20,000/-. In support of his aforesaid contention, he pointed to the details at page 140 of the paper book.

35. With respect to payment of Rs. 97,734/-, he submitted that it was an advance payment made to Shri Satoo Kamat for distribution of the daily wages to the labourers. He pointed to the details at page 140 of the paper book. He further submitted that since no payment to an individual was in excess of Rs. 20,000/- the provisions for Section 40A(3) are not applicable and that without prejudice the transactions also falls within the exception provided in Rule 6DD(k). He therefore, submitted that the disallowance upheld by CIT(A) be deleted.

36. Ld DR on the other hand supported the order of lower authorities.

37. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to disallowance u/s 40A(3).

38. As far as the disallowance expenses paid as freight charges to transporters and truck operators is concerned before us, Learned AR has vehemently argued that the payments are covered under sub rule (k) of rule 6DD of I.T. Rules. Therefore, no disallowance u/s 40A(3) is called for and for which assessee has also relied on the decision of Pune Bench of Tribunal and Amritsar Bench of Tribunal. However, it is also a fact that on identical issue in the case of the group company of the assessee namely L. T. Food Ltd., the Co-ordinate Bench of Tribunal while deciding the appeal for A.Y. 2007-08 in ITA No.4164 of 2013 vide order dated 30.03.2020 has held that the payment cannot be covered under sub rule (k) of rule 6DD. The relevant findings of the Co-ordinate Bench of Tribunal reads as under:

> *"80. We have gone through the record in the light of the submissions made on either side. According to the learned Assessing Officer the following cash payments aggregating to Rs.40,00,647/- were made in contravention of provisions of section 40A(3) of the Act and consequently, disallowed expenditure aggregating to Rs.8,00,129 being 20% of Rs.40,00,647/-.*

Sl No.	Nature of payment	Amount
1.	1. Freight charges paid to transporters/ truck operators	Rs.30,47,456
2.	Repair charges	Rs.1,72,940
3.	Clearing & forwarding charges	Rs.4,03,951
4.	Sales and business promotion expenses	Rs.1,31,900
5.	Interest account payments	Rs.2,67,000
6.	Cash deposited in bank account of Daawat Foods Ltd.	Rs.22,000
Total		Rs.40,00,647

81. After considering the contentions of the assessee, the CIT(A), however, deleted disallowance to the extent of Rs.2,15,985/- being 20% of cash payments of Rs.10,79,924/- made on holidays and Sundays, and the CIT(A), however, confirmed disallowance to the extent of Rs.5,84,144 under section 40A(3) of the Act, in the following manner, and no further appeal has been preferred by the department.

Sl. No	Nature of payment	As per AO	Exclusion	Payments considered for disallowance	Disallowance confirmed by CIT(A)
1.	Freight charges paid to transporters/ truck operators	Rs.30,02,856	Rs.6,15,973	Rs.23,86,883	Rs.4,77,376
2.	Repair charges	Rs.1,72,940	Rs.30,000	Rs.1,42,940	Rs.28,588
3.	Clearing & forwarding charges	Rs.4,03,951	Rs.4,03,951	Nil	Nil
4.	Sales and business promotion expenses	Rs.1,31,900 -	-	Rs.1,31,900	Rs.26,380
5.	Imprest account payment	Rs.2,67,000	Rs.30,000	Rs.2,37,000	Rs.47,400
6.	6. Cash deposited in bank account of Dawaat Foods Ltd.	Rs.22,000	Rs.22,000	Rs.4,400	
Total		Rs.40,00,647	Rs.10,79,924	Rs.29,20,723	Rs.5,84,144

82. At the outset, we would like to state that insofar as the disallowance under section 40A(3) of the Act is concerned, identify of the payees or the genuineness of payment are irrelevant considerations, because it is only after crossing the threshold of such genuineness of the expenditure, the question of payment in terms of section 40A(3) of the Act will arise. Assessee is harping on the escape clause under Rule 6DD(k) which says that where a payment or aggregate of payments made by a person to his agent who is required to make payment in cash for goods or services on behalf of such person in a day, otherwise than by an account payee cheque drawn on a bank or account payee bank draft or use of electronic clearing system through a bank account or through such other electronic mode as prescribed under rule 6ABBA, no disallowance under sub-section (3) of section 40A shall be made and no payment shall be deemed to be the profits and gains of business or profession under subsection (3A) of section 40A of the Act.

83. According to the assessee, the truck driver acts as an agent of the assessee. By no stretch of imagination can we say that the truck driver who operates the track pursuant to the agreement between the assessee and the transport contractor would be the agent of the assessee. Even otherwise also, we are not prepared to accept such an argugment because such acceptance would render the provisions under section 40A(3) of the Act nugatory and every payment could be taken out of the purview of section 40A(3) of the Act by delivering the cash to some intermediary calling him as an agent. There is no privity of contract between the person receiving the sums in cash and the assessee and the truck driver. Such payments are not protected under rule 6 DD (k) of the Rules. On this premise, we reject contention of the assessee.

84. An alternative plea is taken on behalf of the assessee to the effect that in certain instances, the assessing officer has proceeded to disallow expenses without first verifying if the aggregate payments were made to a single person on a single day and if the pre-requisites of section 40A(3) of the Act were fulfilled. This plea does not seem to have been taken before the Ld. CIT(A) and at this stage it is difficult to accept the same because 72 61 the assessee does not produce any material to show that any such instances had taken place. In the absence of any such material prima facie to show that, as a matter of fact, the learned

Assessing Officer had proceeded to disallowed expenses without any verification of the aggregate payments to a single person on a single day, we cannot countenance such plea. We, therefore, find ground numbers 10 to 13 is devoid of merits and accordingly dismiss the same."

39. Before us, Learned AR could not point out any distinguishing feature in the facts of the assessee's case and that of L. T. Foods Ltd., Group Company of the assessee. In view of the aforesaid facts, we uphold the action of CIT(A) to that extent.

40. As far as the disallowance of the depreciation of Rs.93,406/- on the capital expenditure is concerned, we find that AO has disallowed the depreciation on the capital expenditure of Rs.5,35,468/- which has been stated to have been incurred by the assessee in cash. We find that the Co-ordinate Bench of Tribunal in the case of Kansi Ram Madan Lal vs. ITO (supra), the Co-ordinate Bench of Tribunal has held that the provision of Section 40A(3) are not attracted in the case of capital expenditure. Before us, Revenue has not pointed any contrary binding decision in his support nor has placed any material on record to demonstrate that the aforesaid decision of Delhi Tribunal has been set aside, stayed or overruled by higher judicial forum. In view of these facts, we hold that AO was not justified in disallowing the depreciation of Rs.93,406/- u/s 40A(3) of the Act.

41. With respect to the payment of Rs.28,745/- made to Rakesh Gaur, it is assessee's contention that the concerned employee was

not having a bank account at that relevant point of time and therefore assessee made the payment in cash. It is also the contention of the Learned AR that salary payment in subsequent months have been made through cheque. The aforesaid contention of the Learned AR has not been controverted by the Revenue. Further no material has been placed by Revenue to demonstrate that the genuineness of the payment and the identity of the payee was in doubt. Considering the totality of the aforesaid facts, we are of the view that the AO was not justified in disallowing the aforesaid expenses.

42. As far as the disallowance of Diwali expenses of Rs.43,155/- is concerned. It is the contention of the assessee that the payments have been made to various parties and no individual payment exceeds Rs.20,000/-. The aforesaid contention of the assessee has not been found to be incorrect nor the genuineness of expenditure has been doubted by Revenue. Considering the aforesaid facts, we are of the view that no disallowance of Diwali expenses is called for.

43. With respect to the advance payment of Rs.97,734/-. It is the assessee's contention that the amount was paid to the contractor which in turn was to be distributed as daily wages to the labourers. It is also the contention that no payment to an individual was in excess of Rs.20,000/-. Considering the aforesaid contention of the assessee it has been found that

genuineness of the expenditure has not been doubted. We are of the view that no disallowance is called for. **Thus the grounds of the assessee are partly allowed.**

44. Ground No.12 is with respect to disallowance of additional depreciation in respect of plant and machinery and pre-operative expenses.

45. The AO has noted that during the year under consideration assessee had purchased old fixed assets (mostly plant and machinery from L. T. Foods Ltd.) and had claimed additional depreciation. The AO also noticed that assessee had also purchased other old machineries and on which also it had claimed additional depreciation. AO also noted that the assessee had capitalized pre-operative expenses in the plant and machinery account to the extent of Rs.2,63,95,173/- which included interest amount of Rs.37,06,470/- and even on those expenditure assessee had claimed additional depreciation. AO was of the view that the additional depreciation was not allowable on the old machineries and pre-operative expenses. He accordingly denied the claim of additional depreciation to the extent of Rs.28,27,393/-. When the matter was carried before the CIT(A), he upheld the order of AO. Aggrieved by the order of CIT(A), assessee is now before us.

46. Before us, at the outset, Learned AR submitted that as far as the additional depreciation claimed on old plant and machinery of Rs.55,85,227/- is concerned, assessee is not pressing for the claim and therefore, the only claim is with respect to additional depreciation claimed on pre-operative expenses except interest of Rs.2,26,88,703/-. Before us, Learned AR submitted that in terms of clause (iia) of sub section (1) to section 32 of the Act, additional depreciation @ 20% is allowable in respect of new machinery on the actual cost acquired and installed by an assessee. He submitted that pre-operative expenses were capitalized as part of the block of plant and machinery and normal depreciation under section 32 of the Act which was claimed by the assessee has been allowed by the AO. He submitted that the 'cost of asset' for the purpose of allowability of normal depreciation has not been disputed but the claim of additional depreciation has been disallowed by the AO as according to him the pre-operative expenses did not found part of actual cost.

47. Before us, Learned AR submitted that Accounting Standard (AS) – 10 issued by the Institute of Chartered Accountants of India (ICAI) specifies the components of cost of a fixed asset and it further states that the administrative and other expenses which are specifically attributable to construction of a project or to acquisition of fixed asset(s) or bringing assets to its working

condition, it may be included as part of cost of the construction project or as part of the cost of the fixed asset. He further submitted that the Guidance Note on 'Treatment of Expenditure during the Construction Period issued by Institute of Chartered Accountants of India' also provides that the expenditure incurred which are not related directly or indirectly to the work of construction cannot be capitalized and cannot be added to the cost of asset. He submitted that following the Guidance Note and pronouncement of Institute of Chartered Accountants of India, the cost which are directly attributable to fixed asset had been capitalized and once the same has been capitalized and has been accepted by the AO along with depreciation and remains no reason to disallow the additional depreciation.

48. Learned DR on the other hand supported the order of lower authorities.

49. We have heard both the parties and perused all the relevant materials available on record. The issue in the present ground is with respect to claim of additional depreciation. As far as the claim of additional depreciation on the old plant and machinery of Rs.55,85,227/- is concerned, before us, Learned AR has not pressed the same and therefore, to that extent the same is not adjudicated. We, therefore, proceed to decide the issue only with respect to the pre-operative expenses capitalized under plant and machinery. It is an undisputed fact that the aforesaid expenses

have been capitalized are pre-operative. Once the pre-operative expense have been capitalized it forms part of block of asset. Before us, no material has been placed by the Revenue to demonstrate that the pre-operative expenses consist of indirect expenses which are not directly attributable for bringing the asset to its working condition. We are of the view that once the AO has accepted the pre-operative expenses to be a part of cost of capital asset and has allowed the depreciation u/s 32 of the Act, there remains no reason for disallowing the claim of additional depreciation. We, therefore, direct the AO to allow the claim of additional depreciation on such pre-operative expenses which are capitalized by the assessee. Since the AR is not claiming the additional depreciation on old plant and machinery, we direct the AO to recompute the additional depreciation by including the pre-operative expenses as part of cost of fixed asset. **Thus the ground of appeal of the assessee is partly allowed.**

50. Ground No.13 to 17 are with respect to disallowance under section 40(a)(ia) of the Act.

51. AO in assessment order has noted that the special auditor in his report has pointed about the instances of the non-deduction of tax at source by the assessee on the payment made on account of freight charges, repairing charges etc. AO asked the assessee to explain about the non-deduction of TDS which have been pointed out by the special auditor. AO after considering the

submissions of the assessee noted that assessee has not deducted TDS on the payment made to Truck owners where aggregate amount exceeded Rs.50,000/-. He accordingly made a disallowance of Rs.29,89,035/-. He also disallowed certain payments made for inland handling charges, taxi charges on account of TDS. When the matter was carried by the assessee before the CIT(A), CIT(A) after considering the submissions of the assessee granted partial relief to the assessee by observing that no disallowance u/s 40(a)(ia) of the Act is to be made where the payment are in the nature of reimbursement of expenses, no disallowance in case of Railway freight, no disallowance to be made in cases where provisions of section 172 of the Act was applicable and in case of short deduction of tax at source, disallowance to be made only in respect of portion of payment on which TDS has not been deducted. With respect to the relief granted by CIT(A),it is the submission of the Learned AR that no appeal have been preferred by the Department and thus the grievance of the assessee is restricted to the disallowance upheld by the CIT(A) on account of non-deduction of TDS and on account of short deduction of TDS. With respect to non-deduction of TDS, the Learned AR submitted that disallowance u/s 40(a)(ia) of the Act if at all is required to be made, the same be restricted to 30% of the expenditure in view of the fact that the amendment of section 40(a)(ia) has been held to be curative in nature and was introduced to reduce the undue hardship caused to assessees on disallowance of entire amount of expenditure. He further

submitted that identical issue arose in the case of L. T. Foods, a group company wherein the Hon'ble Tribunal in ITA No.4164/Del/2013 vide order dated 30.09.2020 in A.Y. 2007-08 held that the amendment made by the Finance Act, 2014 in Section 40(a)(ia) of the Act is retrospective in nature and therefore, held that the disallowance u/s 40(a)(ia) of the Act to be restricted only to 30% of the expenditure. He however admitted that the Hon'ble Apex Court in the case of Shree Choudhary Transport Company vs. ITO 272 Taxman 472 vide order dated 29.07.2020 has held that amendment made to provision of Section 40(a)(ia) of the Act vide Finance Act, 2014 to be substantive and not having retrospective application. With respect to the disallowance sustained by CIT(A) on account of short deduction of tax at source, he submitted that disallowance u/s 40(a)(ia) can be made only if tax is not deducted at source from payment on which the same was deductable under Chapter XVIII-B of the Act and/ or tax deducted at source was not deposited with the Government account within the prescribed time limit. He submitted that even if there is a shortfall in deduction of tax due to difference of opinion as to the taxability of any item or the nature of payments falling under various TDS provisions, no disallowances can be made under section 40(a)(ia) of the Act. He submitted it is not the case of the Revenue that there is a complete non-deduction of tax at source or the tax deducted has not been deposited with the Government within the prescribed time limit. In such a situation, he submitted that no

disallowance cannot be made u/s 40(a)(ia) of the Act and in support of which he placed reliance on the decision in the case of CIT vs. S. K. Tekriwal 361 ITR 432. He further submitted that identical issue also arose in L T Foods, a group company in A.Y. 2007-08 wherein the Co-ordinate Bench of Tribunal by relying on the decision of Hon'ble Calcutta High Court in the case of S.K. Tekriwal (supra) decided the issue in favour of the assessee. He, therefore, submitted that disallowance made by AO u/s 40(a)(ia) of the Act be deleted.

52. The Learned DR on the other hand with respect to the case of non-deduction of TDS supported the order of lower authorities and further submitted that the Hon'ble Apex Court also in the case of Shree Choudhary Transport Company (supra) has held that amendment made to provisions of section 40(a)(ia) of the Act vide Finance Act 2014 was substantive. With respect to disallowance on account of short deduction of TDS, he has supported the order of lower authorities.

53. We have heard both the parties and perused all the materials available on record. The issue in the present ground is with respect to disallowance u/s 40(a)(ia) of the Act. The disallowance u/s 40(a)(ia) can be divided into two parts. One is with respect to non-deduction of TDS and the other is with respect to short deduction of TDS. As far as the issue of non-

deduction of TDS is concerned, it is the contention of the assessee that the Co-ordinate Bench of Tribunal in assessee's own case and the various other benches of the Tribunal have held that the amendment u/s 40(a)(ia) of the Act to be clarificatory and retrospective and the disallowance was restricted to 30% of expenditure. We however, find that the Hon'ble Apex Court in the case of Shree Choudhary Transport Company (supra) noted inter alia that one of the question for determination before it is as under:

> *"As to whether sub-clause (ia) of section 40(a) of the Act, as inserted by the Finance (No. 2) Act, 2004 with effect from 1-4-2005, is applicable only from the financial year 2005-06 and, hence, is not applicable to the present case relating to the financial year 2004-05; and, at any rate, whole of the rigour of this provision cannot be applied to the present case?"*

54. Thereafter it observed as under:

> *"17.6 We need not multiply on the case law on the subject as the principles aforesaid remain settled and unquestionable. Applying these principles to the case at hand, we are clearly of the view that the provision in question, having come into effect from 1-4-2005, would apply from and for the assessment year 2005-06 and would be applicable for the assessment in question. Putting it differently, the legislature consciously made the said sub-clause (ia) of section 40(a) of the Act effective from 1-4-2005, meaning thereby that the same was to be applicable from and for the assessment year 2005-2006; and neither there had been express intendment nor any implication that it would apply only from the financial year 2005-06."*
>
> *"19. In yet another alternative attempt, learned counsel for the appellant has argued that by way of Finance (No.2) Act, 2014, disallowance under section 40(a)(ia) has been Ltd. to 30% of the sum payable and the said amendment deserves to be held*

retrospective in operation. This line of argument has been grafted with reference to the decision in Calcutta Export Co. (supra) wherein, another amendment of section 40(a)(ia) by the Finance Act of 2010 was held by this Court to be retrospective in operation. The submission so made is not only baseless but is bereft of any logic. Neither the amendment made by the Finance (No.2) Act, 2014 could be stretched anterior the date of its substitution so as to reach the assessment year 2005-06 nor the said decision in Calcutta Export Company has any correlation with the case at hand or with the amendment made by the Finance (No.2) Act of 2014.

19.1 By the amendment brought about in the year 2014, the legislature reduced the extent of disallowance under section 40(a)(ia) of the Act and Ltd. it to 30% of the sum payable. On the other hand, by the Finance Act of 2010, which was considered in the case of Calcutta Export Co. (supra), the proviso to section 40(a)(ia) of the Act was amended so as to provide relief to a bona fide assessee who could not make deposit of deducted tax within prescribed time. In fact, even before the year 2010, the said proviso was amended by the Finance Act 2008 and that amendment of the year 2008 was provided retrospective operation by the legislature itself. For ready reference, we may reproduce in juxtaposition the main part of section 40(a) (ia) of the Act as it would read after the amendments of 2008, 2010 and 2014 respectively, as under:

> *(i) 'After the amendment by Finance Act, 2008*
>
> *"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*
>
> ** ** **
>
> *(ia) any interest, commission or brokerage, rent, royalty14, 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,

(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.

** ** **

(ii) After the amendment by Finance Act, 2010

"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

** ** **

(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:

** ** **

(iii) After the amendment by Finance (No.2) Act, 2014 "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

** ** **

(ia) thirty per cent. 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.16

** ** **

19.2 The aforesaid amendment by the Finance (No.2) Act of 2014 was specifically made applicable w.e.f. 14-2015 and clearly represents the will of the legislature as to what is to be deducted or what percentage of deduction is not to be allowed for a particular eventuality, from the assessment year 2015-16.

19.3 On the other hand, in the case of Calcutta Export Co. (supra), this Court noticed the aforesaid two amendments to section 40(a)(ia) of the Act by the Finance Act, 2008 and by the Finance Act, 2010, which were intended to deal with procedural hardship likely to be faced by the bona fide tax payer, who had deducted tax at source but could not make deposit within the prescribed time so as to claim deduction. In paragraph 17 of judgment in Calcutta Export Company, this Court took note of the case of genuine hardship, particularly of the assessees who had deducted tax at source in the last month of previous year; and observed in paragraph 18 that the said amendment of the year 2008 was brought about with a view to mitigate such hardship. After reproducing the said amendment of the year 2008 and after noticing its retrospective operation, this Court delved into the position obtaining after 2008, where still remained one class of assessees who could not claim deduction for the TDS amount in the previous year in which the tax was deducted and who could claim benefit of such deduction in the next year only; and, after finding that the amendment of the year 2010 was intended to remedy this position, held that the said amendment, being curative in nature, is required to be given retrospective operation that is, from the date of insertion of section 40(a)(ia).

19.4 Learned counsel for the appellant has only referred to the concluding part of the decision in Calcutta Export Company but, a look at the entire synthesis by this Court, of the reasons for the amendments of 2008 and 2010, makes it clear as to why this Court held that the amendment of the year 2010 would be retrospective in operation. We may usefully reproduce the relevant

discussion and exposition of this Court in Calcutta Export Company as under:- (at pp. 663-666 of ITR):—

> *"19. The above amendments made by the Finance Act, 2008 thus provided that no disallowance under section 40(a)(ia) of the Income-tax 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 April 1,2005, i.e., from the very date of substitution of the provision.*
>
> *20. Therefore, the assessees 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 the case of assessees falling under the first category, no disallowance under section 40(a)(ia) of the Incometax 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 Income-tax Act for the said previous year. In case, the assessees are falling under the second category, no disallowance under section 40(a)(ia) of Income-tax 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 assessees 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 assessees 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 Income-tax 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.

** ** **

24. Thus, the Finance Act, 2010 further relaxed the rigors of section 40(a)(ia) of the Income-tax 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 April 1, 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.

** ** **

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 the 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 out 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 is required to be given retrospective operation, i.e., from the date of insertion of the said provision."

19.5 A bare look at the extraction aforesaid makes it clear that what this Court has held as regards "retrospective operation" is that the amendment of the year 2010, being curative in nature, would be applicable from the date of insertion of the provision in question i.e., sub-clause (ia) of section 40(a) of the Act. This being the position, it is difficult to find any substance in the argument that the principles adopted by this Court in the case of Calcutta Export Co. (supra) dealing with curative amendment, relating more to the procedural aspects concerning deposit of the deducted TDS, be applied to the amendment of the substantive provision by the Finance (No.2) Act, 2014."

55. We therefore relying on the aforesaid decision rendered by Hon'ble Apex Court in the case of Shree Chowdhary (supra) uphold the disallowance u/s 40(a)(ia) of the Act to the cases of non deduction of TDS is concerned.

56. As far as the issue of short deduction of TDS is concerned, it is not the case of the Revenue that assessee has not deducted tax from the payment on which the same was deductable under Chapter XVIII-B of the Act or it is also not the Revenue's case that tax was deducted at source but was not deposited in the Government account within the prescribed time. It is only the issue that assessee should have deducted TDS at a higher rate than the rate at which it deducted by the assessee. We find Hon'ble Calcutta High Court in the case of S. K. Tekriwal (supra) has held that if there is any shortfall in deduction at source due to difference of opinion as to the taxability of any item or the nature of payments falling under various TDS provisions, no disallowances can be made under section 40(a)(ia) of the Act. We further find that identical issue arose in the case of L T Food, a group company and the Co-ordinate Bench of Tribunal by following the order of Calcutta High Court in the case of S. K. Tekriwal (supra) has decided the issue in favour of the assessee. Before us, Revenue has not pointed to any contrary binding decision in its support. We, therefore, following the aforesaid decision of Calcutta High Court in the case of S.K. Tekriwal (supra) hold that no disallowance has called for in the cases where there is short deduction of TDS. **Thus the grounds of appeal of the assessee are partly allowed.**

57. **In the result, assessee's appeal in ITA No. 4158/Del/2013 is partly allowed.**

58. **In the combined result, both the appeals filed by assessee are partly allowed.**

Order pronounced in the open court on 19.01.2021

Sd/-	**Sd/-**
(KULDIP SINGH)	**(ANIL CHATURVEDI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Date:- 19.01.2021

*PY**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI