IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H" MUMBAI

BEFORE SHRI SHAMIM YAHYA (ACCOUNTANT MEMBER) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)

ITA No. 151/MUM/2020
(Assessment Year: 2014-15)

M/s Kanade Aqua Farms Pvt. Ltd., 3/21, Poddar Building No. 2, Dr. Maisheri Road, Near Sandhurst Road Railway Station, Mumbai– 400009	Vs.	Income Tax Officer-6(3)(3), Room No. 524, 5th Floor, Aaykar Bhavan, M.K. Marg, Mumbai - 400020

PAN No. AAACK0421C

(Assessee) **(Revenue)**

Assessee by : Ms.Vinita Shah, A.R
Revenue by : Shri Neeraj Kumar, D.R

Date of Hearing : 08/09/2021
Date of pronouncement : 20/09/2021

ORDER

PER RAVISH SOOD, J.M:

The present appeal filed by the assessee is directed against the order passed by the Commissioner of Income Tax (Appeals)-12, Mumbai (for short 'CIT(A)'), dated 03.10.2019, which in turn arises from the order passed by the A.O. u/s 143(3) of the Income Tax Act, 1961 (for short 'Act') dated 13.11.2016 .

2. The assessee has assailed the impugned order on the following grounds of appeal before us:

1. "On the facts and circumstances of the case as well as in law, the learned CIT(A) has erred in confirming the action of Learned Assessing Officer in disallowing the clearing expenses of Rs.

1,13,218/- on account of non-deduction of TDS as per sec. 194C, without considering the facts and circumstances of the case.

2. On the facts and circumstances of the case as well as in law, the Learned CIT(A) as well as the Learned Assessing Officer has erred in disallowing the claim of expenses of Rs. 56,68,365/- u/s 14A of the Income Tax Act, 1961 by invoking rule 8D of the Act, without considering the facts and circumstances of the case.

3. The appellant craves leave to add, amend, alter or delete the said ground of appeal."

3. Briefly stated, the assessee company which is engaged in the business of prawn farming had filed its return of income for A.Y 2014-15 on 13.11.2014, declaring a total income of Rs. 1,09,099/-. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act.

4. During the course of assessment proceedings, it was observed by the A.O that though the assessee had made a substantial investment of Rs. 8,52,57,900/- in equity shares of M/s Kanade Anand Udyog Pvt. Ltd., however, it had not offered for disallowance any part of the expenditure incurred for earning of the exempt dividend income u/s 14A of the Act. Backed by his aforesaid observation, the A.O worked out the disallowance u/s 14A as per the methodology provided in Rule 8D at an amount of Rs. 56,68,365/-, as under:-

		(Rs.)	(Rs.)
(i)	Amount of expenditure directly relating to income which does not form part of total income		0
(ii)	Interest expenditure:-		
A	Interest expenses during the year	31940500	
B	Avg. of investment [(85257900+ 15257900)/2]	50257900	
C	Avg. of total assets (292662946 + 300004651)/2	296333799	54,17,075
	A X B / C		
(iii)	0.5% of average value of investment i.e. Rs. 50257900		2,51,290
	Disallowance u/s 14A r.w.r. 8D		**56,68,365**

Also, as the assessee had as per the mandate of Sec. 194C of the Act failed to deduct tax at source on the payments that were made by it towards transportation and agency charges of Rs. 1,13,218/-, therefore, the A.O disallowed the assessee's claim for deduction of the said amount u/s 40(a)(ia) of the Act. Accordingly, the A.O vide his order passed u/s 143(3), dated 13.11.2016 assessed the total income of the assessee company at Rs. 76,44,650/-.

5. Aggrieved, the assessee carried the matter in appeal before the CIT(A). In so far the disallowance u/s 40(a)(ia) of Rs. 1,13,218/- was concerned, the CIT(A) concurred with the view taken by the A.O and upheld the said disallowance. Also, the CIT(A) confirmed the disallowance made by the A.O under Sec. 14A of the Act.

7. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. At the very outset, it was submitted by the Ld. Authorized Representative (for short 'AR') for the assessee that as the assessee had not earned any exempt income during the year under consideration, therefore, no disallowance u/s 14A could have been made in its hands. In so far the disallowance made by the AO u/s 40(a)(ia) of Rs. 1,13,218/- was concerned, it was submitted by the Ld. AR that pursuant to the amendment made available on the statute vide the Finance Act, 2014 w.e.f. 01.04.2015, the disallowance under the aforesaid statutory provision was liable to be restricted only to the extent of 30% of the amount as regards which the assessee had defaulted qua deduction of tax at source under Chapter XVII-B of the Act. It was submitted by the Ld. AR that as the aforesaid amendment was declaratory and curative in nature, therefore, it was applicable to the case of the assessee for the year under consideration i.e. A.Y 2014-15. In support of her aforesaid contention the Ld. A.R had relied on the order of the ITAT, Mumbai in the case of Neena Kaul Vs. ACIT 24(3), Mumbai, ITA No. 1386/Mum/2017, dated 21.05.2019 and that of ITAT, Delhi in the case of Muradul Haque Vs. ITO, ITA No. 114(Delhi) of 2019, dated 18.06.2020.

8. Per contra, the Ld. Departmental Representative (for short 'DR') admitted that the assessee company during the year under consideration had not earned any exempt income. However, the Ld. D.R supported the orders of the lower authorities qua the disallowance that was made/sustained by them u/s 14A r.w Rule 8D. As regards, the disallowance made by the A.O u/s 40(a)(ia) of the Act, it was submitted by the Ld. D.R that as the amendment qua the quantum of disallowance under the said statutory provision was made available on the statute vide Finance (No.2) Act, 2014 w.e.f. 01.04.2015, therefore, the same was applicable only w.e.f. AY 2015-16 and thus would not take within its realm the case of the assessee for the year under consideration i.e A.Y 2014-15.

9. We have heard the Ld. Authorized Representative for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by the Ld. A.R to drive home her aforesaid contentions. In so far, the claim of the Ld. A.R that as the assessee had not earned any exempt income during the year under consideration, therefore, no disallowance could have been made u/s 14A of the Act is concerned, we find substantial force in the same. As stated by the Ld. A.R, and rightly so, in the absence of any exempt income having been earned by the assessee during the year under consideration no disallowance u/s 14A could have been made in its hands. Our aforesaid view that the disallowance u/s 14A cannot exceed the amount of the exempt income received by the assessee during the year is fortified by the following judicial pronouncements:

(i) Joint Investments Vs. ACIT (2015) 372 ITR 694 (Del)

(ii) DCIT Vs. Craft Builders and Constructions (2019) 414 ITR 122 (Del) [SLP filed by the revenue was thereafter dismissed by the Hon'ble Supreme Court in 112 taxman.com 322 (SC)]

(iii) Nirved Traders Pvt. Ltd. Vs. DCIT [ITA 149 of 2017, dated 23.04.2019 (Bom)

(iv) M/s Holcim India Pvt. Ltd. Vs. CIT-IV (2015) 57 taxmann.com 28 (Delhi)

(v) CIT Vs. M/s Lakhani Marketing Inc.(2014) 226 Taxman 45 (P&H)

(vi) CIT Vs.Hero Cycle Ltd. (2010) 323 ITR 518 (P&H)

(vii) CIT Vs. Winsome Textiles Industries Ltd. (2009) 319 ITR 204 (P & H)

(viii) CIT Vs. Corrtech Energy (P) Ltd. (2014) 223 taxman.com 130 (Guj)

(ix) CIT Vs. Shivam Motors (P) Ltd. (2015) 230 Taxman 63 (All)

(x). Pr. Commissioner of Income-tax-10 Vs. HSBC Invest Direct (India) Ltd., ITA No. 1672 of 2016; dated 04.02.2019 (Bom)

As the assessee company during the year under consideration had not earned any exempt income, therefore, we herein vacate the disallowance made by the A.O u/s 14A of the Act. Accordingly, the **Ground of appeal No. 2** is allowed in terms of our aforesaid observations.

10. As regards, the contention of the Ld. A.R that as per the post amended section 40(a)(ia) of the Act the disallowance of only 30% of the amount as regards which the assessee had defaulted to deduct tax at source under Chapter XVII-B could have been made, we are unable to find favor with the same. The Hon'ble Supreme Court in the case of Shree Choudhary Transport Company Vs. ITO (2020) 426 ITR 289 (SC), while rebutting the claim of the assessee before them that the amendment made to Section 40(a)(ia) of the Act by the Finance (No.2) Act, 2014, restricting and limiting the extent of disallowance to 30% of the expenditure, being curative in nature and having been introduced to ameliorate the hardships faced by the assessees, deserves to be applied retrospectively and from the date of introduction of sub-clause (ia) to Section 40(a) of the Act, had observed as under :

> "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 limited 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 Company (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 2005-2006 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 limited 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 Company (supra), the proviso to Section 40(a)(ia) of the Act was amended so as to provide relief to a bonafide 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, The Explanation part of the provision is omitted, for being not relevant for the present purpose.:-

(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-

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(ia) any interest, commission or brokerage, rent, royalty, The expressions "rent, royalty" were inserted in the year 2006., 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, This proviso was substituted in the year 2008 and again in the year 2010; and then, was amended by the Finance (No. 2) Act, 2014.:

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., This proviso was inserted by Act No. 23 of 2012.

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19.2. The aforesaid amendment by the Finance (No.2) Act of 2014 was specifically made applicable w.e.f. 01.04.2015 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 2015-2016.

19.3. On the other hand, in the case of Calcutta Export Company (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 bonafide 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 assesses were, after the said amendment in 2008, classified in two categories namely: one, those who have deducted that tax during the last month of the previous year and two, those who have deducted the tax in the remaining eleven months of the previous year. It was provided that in the case of assessees falling under the first category, no disallowance under section 40(a)(ia) of the Income-tax 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 assesses falling in the first category but with regard to the case falling in the second category, it was still resulting into unintended consequences and causing grave and genuine hardships to the assesses who had substantially complied with the relevant TDS provisions by deducting the tax at source and by paying the same to the credit of the Government before the due date of filing of their returns under section 139(1) of the 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.

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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.

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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 Company (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.

19.6. We may in the passing observe that the assessee-appellant was either labouring under the mistaken impression that he was not required to deduct TDS or under the mistaken belief that the methodology of splitting a single payment into parts below Rs. 20,000/- would provide him escape from the rigour of the provisions of the Act providing for disallowance. In either event, the appellant had not been a bonafide assessee who had made the deduction and deposited it subsequently. Obviously, the appellant could not have derived the benefits that were otherwise available by the curative amendments of 2008 and 2010. Having defaulted at every stage, the attempt on the part of assessee-appellant to seek some succor in the amendment of Section 40(a)(ia) of the Act by the Finance (No.2) Act, 2014 could only be rejected as entirely baseless, rather preposterous.

19.7. Hence, Question No.3 is also answered in the negative, i.e., against the assessee-appellant and in favour of the revenue.

Question No. 4

20. Before finally answering the root question in the matter as to whether the payments in question have rightly been disallowed from deduction, we may usefully summarise the answers to Question Nos. 1 to 3 that the provisions of Section 194C were indeed applicable and the assessee-appellant was under obligation to deduct the tax at source in relation to the payments made by it for hiring the vehicles for the purpose of its business of transportation of goods; that disallowance under Section 40(a)(ia) of the Act is not limited only to the amount outstanding and this provision equally applies in relation to the expenses that had already been incurred

> and paid by the assessee; that disallowance under Section 40(a)(ia) of the Act of 1961 as introduced by the Finance (No.2) Act, 2004 with effect from 01.04.2005 is applicable to the case at hand relating to the assessment year 2005-2006; and that the benefit of amendment made in the year 2014 to the provision in question is not available to the appellant in the present case. These answers practically conclude the matter but we have formulated Question No. 4 essentially to deal with the last limb of submissions regarding the prejudice likely to be suffered by the appellant."

Accordingly, in light of the aforesaid judgment of the Hon'ble Apex Court, we herein reject the claim of the ld. A.R that the amendment to Sec. 40(a)(ia) of the Act that was made available on the statute vide the Finance (No.2) Act, 2014, w.e.f 01.04.2015 being retrospective would thus be applicable to the case of the assessee before us for A.Y 2014-15. In so far the orders of the coordinate benches of the Tribunal that have been relied upon by the ld. A.R are concerned, we find that the same were passed prior to the aforesaid binding judgment of the Hon'ble Apex Court. Be that as it may, in light of the judgment of the Hon'ble Supreme Court in the aforesaid case we herein reject the claim of the ld. A.R that the amendment to Sec. 40(a)(ia) that was made available on the statute vide the Finance (No.2) Act, 2014, w.e.f 01.04.2015 being retrospective would thus be applicable to the case of the present assessee i.e for A.Y 2014-15. Accordingly, the **Ground of appeal No. 1** is dismissed.

11. Resultantly, the appeal filed by the assessee is partly allowed in terms of our aforesaid observations.

Order pronounced in the open court on 20/09/2021.

Sd/-	Sd/-
(Shamim Yahya) ACCOUNTANT MEMBER	(Ravish Sood) JUDICIAL MEMBER

Mumbai;
Dated: 20.09.2021
Alindra, PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,
//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai