

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A" MUMBAI**

**BEFORE SHRI M.BALAGANESH (ACCOUNTANT MEMBER) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)**

**ITA Nos.4713 & 4714/MUM/2019
(Assessment Years: 2012-13 & 2014-15)**

M/s LASA
43, Lydia, Hill Road,
Opp. Elco Market,
Bandra (West),
Mumbai – 400 050

ACIT 23(2)
Vs. Matru Mandir, Grant Road,
Mumbai – 400 007

PAN No. AACFL6401E

(Assessee)

(Revenue)

Assessee by : Shri Ajay Gosalia, A.R
Revenue by : Shri Brajendra Kumar, Sr. D.R

Date of Hearing : 23/08/2021
Date of pronouncement : 29/09/2021

ORDER

PER RAVISH SOOD, J.M:

The present appeals filed by the assessee firm are directed against the respective orders passed by the CIT(A)-48, Mumbai, dated 31.05.2019, which in turn arises from the respective orders passed by the A.O under Sec. 143(3) of the Income Tax Act, 1961 (for short 'Act') for A.Y.2012-13 and A.Y. 2014-15. As common issues are involved in the captioned appeals, therefore, the same are being taken up and disposed off by way of a consolidated order. We shall first take up the appeal of the assessee for A.Y. 2012-13. The assessee has assailed the impugned order on the following grounds (as thereafter amended vide letter dated 05.08.2021) as under :

“1. Disallowance of interest of Rs.6,58,237 u/s 36(1)(iii)

- a) The Id. CIT(A) erred in confirming the disallowance of interest of Rs.6,58,237 of u/s 36(1) (iii) made by the Id. ACIT.
- b) She erred in confirming the disallowance without considering the appellants submissions, much less showing why they were not acceptable.
- c) She failed to appreciate that: -
 - i. the fund flow analysis revealed that the borrowed funds were utilized for business purposes:
 - ii. there was no nexus between borrowing of funds and withdrawals of the partners or their negative capital balances;
 - iii. the capitals introduced/withdrawn by the partners ought to be considered over a larger time frame rather than confining it only to the year under consideration.
- d) She therefore ought to have deleted the disallowance of interest of Rs.6,58,237 made u/s 36(1)(iii) by the Id. ACIT.

2. Disallowance of interest of Rs.62,89,250 u/s 40(a)(ia)

- a) The Id. CIT (A) erred in confirming the disallowance @ 100% of interest of Rs.62,89,250 instead of restricting it to 30% of the said amount as per the amended provisions of S,40(a)(ia) as the amendment was made for removal of undue hardship faced by assessees and is therefore retrospective in nature.
 - b) She further erred in refusing to allow deduction in respect of interest of Rs.56,81,215 (out of the said total amount of Rs.62,89,250/- in the years of filing return of income by 3 parties as reflected in their respective Form 26A without appreciating that the second proviso to S.40(a)(ia) inserted therein was curative in nature and hence also retrospective and also refusing to admit them as additional evidence on technical grounds.
3. Each of the above grounds is without prejudice to one another.
 4. The appellant craves to add to, alter, vary, modify amend the above Grounds of appeal.”

2. Briefly stated, the assessee firm which is engaged in the business of trading in readymade garments, fabrics, imitation jewellery etc. had e-filed its return of income for A.Y. 2012-13 on 11.09.2012 declaring a loss of (-) Rs.1,22,28,811/-. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act.

3. Assessment was thereafter framed by the A.O vide his order passed u/s 143(3) of the Act, dated 16.03.2015, wherein the following additions/disallowances were made by the A.O:

Sr. No.	Particulars	Amount
1.	Disallowance of interest expenditure u/s 36(1)(iii) of the Act.	Rs.6,58,237/-
2.	Disallowance u/s 40(1)(ia) of the Act.	Rs.62,89,250/-

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). However, the CIT(A) not finding favor with the contentions advanced by the assessee qua the aforesaid disallowances that were made by the A.O, dismissed the appeal.

5. The assessee being aggrieved with the order passed by the CIT(A) has carried the matter in appeal before us. Our indulgence in the present appeal has been sought by the assessee for adjudicating two issues, viz. (i) disallowance made by the A.O u/s 40(a)(ia) of the interest loan processing fees and prepayment charges paid by the assessee to NBFC's; and (ii) disallowance of correlating interest on the amounts overdrawn by the partners u/s 36(1)(iii) of the Act.

6. We have heard the Id. Authorized Representatives 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 them to drive home their respective contentions. We shall first deal with the grievance of the assessee that the CIT(A) had erred in law and facts of the case in sustaining the disallowance of the interest expenditure pertaining to the capital that was overdrawn by the partners. As is discernible from the assessment order, it was observed by the A.O that the assessee firm during the year under consideration had claimed deduction of interest expenditure amounting to Rs.82,08,363/- pertaining to the interest bearing funds raised by it. It was observed by the A.O that the partners of the assessee firm had "debit

balances” in their capital accounts at the beginning of the year under consideration. Also, it was noticed by the A.O that as the partners had made further withdrawals from the firm during the year in question, therefore, the capital balances remained to be overdrawn at the end of the year under consideration. On being queried as to why the correlating interest expenditure pertaining to the capital overdrawn by the partners may not be disallowed u/s 36(1)(iii) of the Act, it was the claim of the assessee that as the aggregate of the amounts that were brought in the business by all the partners during the period i.e financial year 2009-10 to 2011-12 were more than the amounts that were withdrawn by them, therefore, no disallowance of interest expenditure was called for in its hands. However, the aforesaid reply of the assessee did not find favor with the A.O. It was observed by the A.O that the withdrawals made by the partners during the year under consideration were in excess of an amount of Rs.68,13,621/- as against what was brought into by them in the firm. Backed by his aforesaid observations, the A.O holding a conviction that the assessee firm had diverted its interest bearing borrowed funds of Rs.68,13,621/- for non business purposes disallowed the correlating interest expenditure of Rs.6,58,237/- u/s 36(1)(iii) of the Act.

7. Before us, it was submitted by the Id. Authorized Representative (for short 'A.R') for the assessee that no disallowance u/s 36(1)(iii) pertaining to the amount overdrawn during the year by the partners was called for in the hands of the assessee firm. Elaborating on his aforesaid contention, it was submitted by the Id. A.R that though the partners during the year under consideration had cumulatively withdrawn an amount of Rs.69,63,621/- in excess of what was introduced by them, however, the said amount of overdrawn capital was sufficiently covered by the net capital of Rs.1,04,78,165/- that was introduced by them in the immediately preceding year. In sum and substance, it was the claim of the Id. A.R that as over a period of two years the partners had introduced a net

capital of Rs.35,14,544/-, therefore, no disallowance u/s 36(1)(iii) was warranted qua the amount that was overdrawn during the year under consideration. Apart from that, it was the claim of the Id. A.R that the major part of the negative opening capital of the partners amounting to (-) Rs.3,70,48,727/- comprised of accumulated losses of (-) Rs.3,56,58,809/- that pertained to the preceding years i.e A.Y. 2006-07 to A.Y 2010-11. Insofar the remaining negative opening capital of (-) Rs.13,89,918/- was concerned, it was submitted by the Id. A.R that the same was also sufficiently covered by the net capital of Rs.1,04,78,165/- that was introduced by the partners in the immediately preceding year i.e A.Y. 2011-12. On the basis of his aforesaid contentions it was submitted by the Id. A.R that as the entire amount of the interest bearing borrowed funds had wholly and exclusively being utilized for the purpose of the assessee's business, therefore, no part of the correlating interest expenditure was liable to be disallowed u/s 36(1)(iii) of the Act.

8. Per contra, the Id. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities.

9. We have given a thoughtful consideration to the aforesaid issue before us and are unable to persuade ourselves to subscribe to the contentions advanced by the Id. A.R. As observed by us hereinabove, the Id. A.R had tried to dissect the negative balances appearing in the partners capital account. Bypassing the accumulated losses, the Id. A.R had tried to impress upon us that a cumulative consideration of the net amount of capital introduced by the partners over the years revealed that there was no overdrawing of the respective capital accounts. In fact, the Id. A.R had tried to project that the partners had brought in more funds than what they have withdrawn in the last three years. In our considered view the aforesaid explanation of the assessee is devoid and bereft of any reasoning. As is discernible from the records, it is a matter of fact that the partners of the assessee firm had debit balances in their capital accounts at the

beginning of the accounting year, which pursuant to the further withdrawals carried out by them during the year had resulted to a 'debit balance' in the capital account at end of the year too. It is also a matter of fact borne from the record, that the assessee did not have any interest free advances. In the backdrop of the aforesaid facts, we are of the considered view that now when the partners of the assessee firm had clearly over withdrawn an amount of Rs.68,13,621/- i.e in excess of what was brought by them in the firm, therefore, the lower authorities had rightly concluded that the correlating interest expenditure pertaining to the amount so overdrawn was liable to be disallowed u/s 36(1)(iii) of the Act. Accordingly, finding no infirmity in the view taken by the lower authorities, we herein uphold the disallowance u/s 36(1)(iii) of Rs.6,58,237/- made by the A.O, which thereafter had rightly been sustained by the CIT(A). The **Ground of appeal No. 1** is dismissed.

10. We shall now take up the grievance of the assessee that the CIT(A) had erred in confirming the disallowance of the entire amount of interest expenditure of Rs.62,89,250/- u/s 40(a)(ia) of the Act. Briefly stated, the assessee firm had during the year under consideration paid certain amounts to NBFC's namely M/s India Bulls, M/s Cholamandalam Finance Ltd, and M/s Future Capital Limited towards, viz. (i) interest: Rs.48,74,330/-; (ii) prepayment charges: Rs.9,60,580/-; and (iii) loan processing fees: Rs.4,54,340/-. As the assessee had failed to deduct tax at source while making the aforesaid payments, therefore, the A.O had disallowed the entire amount of Rs.62,89,250/- u/s 40(a)(ia) of the Act. On appeal, the aforesaid disallowance u/s 40(a)(ia) was upheld by the CIT(A).

11. Before us, the assessee has assailed the disallowance u/s 40(a)(ia) on two grounds, viz. (i) that as the respective payees had taken into consideration the amounts in question while computing the income in their respective returns of income filed u/s 139 of the Act and had paid tax on the same, therefore, as per the '2nd proviso' to Sec.40(a)(ia) of the Act no disallowance of the aforesaid

amounts was liable to be made; and (ii) that even otherwise as per the amended provisions of Sec. 40(a)(ia) disallowance was liable to be restricted to 30% of the amount in question. Apropos the assessee's claim that no disallowance as per '2nd proviso' to Sec. 40(a)(ia) was called for in its hands as the amounts in question had already subjected to tax in the hands of the respective payees, the same was rejected by the lower authorities, for the reason, that as the said '2nd proviso' to Sec. 40(a)(ia) was made available on the statute vide the Finance Act, 2012 w.e.f 01.04.2013, therefore, the same was not applicable to the year under consideration in the case of the present assessee i.e A.Y 2012-13.

12. We have given a thoughtful consideration and find substance in the aforesaid claim of the Id. A.R. Now when the respective payees had taken into account the amounts in question in their respective returns of income filed u/s 139 of the Act and had subjected the same to tax, therefore, as per the '2nd proviso' to Sec. 40(a)(ia) of the Act no disallowance of the said amounts would be warranted in the hands of the assessee. Controversy in respect of the said issue lies in a narrow compass i.e as to whether or not the benefit/concession contemplated in the '2nd proviso' to Sec.40(a)(ia) would be applicable to the year under consideration i.e A.Y. 2012-13. Admittedly, the '2nd proviso' to Sec. 40(a)(ia) had been made available on the statute vide the Finance Act, 2012, w.e.f 01.04.2013. However, as Sec. 40(a)(ia) is not a penal provision, therefore, insertion of the '2nd proviso' being declaratory and curative in nature would have a retrospective effect from 01.04.2005 i.e the date on which the main proviso i.e Sec. 40(a)(ia) in itself was made available on the statute. Our aforesaid view is fortified by the judgment of the Hon'ble High Court of Bombay in the case of Pr.CIT-5, Vs. Perfect Circle India Pvt. Ltd., ITA No.707 of 2016, dated 07.01.2019. Accordingly, in the backdrop of our aforesaid observations, we are of the considered view that the assessee would be eligible for the benefit of the '2nd proviso' to Sec. 40(a)(ia) of the Act, though subject to the satisfaction of the

conditions therein contemplated. We, thus, in terms of our aforesaid deliberations restore the matter to the file of the A.O with a direction to reconsider the disallowance u/s 40(a)(ia) of the aforesaid amounts subject to the satisfaction by the assessee of the requisite conditions contemplated in the '2nd proviso' to Sec. 40(a)(ia) of the Act. At this stage, we may herein observe that the A.O shall in the course of the set-aside proceedings consider the 'Form No.26A' that was filed by the assessee with the ITO (TDS)-1(3)(3), Mumbai on 18.07.2019. Needless to say, the A.O shall in the course of the set-aside proceedings afford a reasonable opportunity of being heard to the assessee.

13. Insofar the claim of the Id. A.R that pursuant to the post-amended Sec. 40(a)(ia) of the Act the disallowance therein contemplated was liable to be restricted to the extent of 30% of the amount in question as regards which the assessee had defaulted the TDS provision under Chapter XVII-B of the Act is concerned, we are unable to persuade ourselves to accept the same. The legislature in all its wisdom had vide the Finance (No.2) Act, 2014, w.e.f 01.04.2015 scaled down the disallowance u/s 40(a)(ia) to 30% of the impugned amount, as against the disallowance of the entire amount that was earlier provided for under the said statutory provision. We find that the Hon'ble Supreme Court in the case of Shree Chaudhary Transport Company Ltd. Vs. ITO (2020) 426 ITR 289 (SC) had, inter alia, held, that the amendment by the Finance (No.2) Act, 2014 limiting the disallowance u/s 40(a)(ia) to 30% of the sum payable cannot be stretched anterior the date of its substitution so as to reach the assessment year 2005-06. It was observed by the Hon'ble Apex Court that the amendment by the Finance (No.2) Act, 2014 was specifically made applicable w.e.f 01.04.2015 and clearly represented 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. For the sake of clarity

the observations of the Hon'ble Apex Court in respect of the aforesaid issue in hand are reproduced 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.

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(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-

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(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:

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(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-

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(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 assesseees 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 assesseees 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 assessee 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 assessee 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 assessee 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 assesseees 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.”

In the backdrop of the aforesaid settled position of law, we are of the considered view that the claim of the Id. A.R that the disallowance, if any, u/s 40(a)(ia) was liable to be restricted to the extent of 30% of the sum payable does not merit acceptance and is accordingly rejected. The **Ground of appeal No. 2** is dismissed.

14. The **Grounds of appeal Nos. 3 & 4** being general are dismissed as not pressed.

15. The appeal of the assessee is partly allowed for statistical purposes in terms of our aforesaid observations.

ITA No. 4714/Mum/2019
A.Y.2014-15

16. We shall now take up the appeal of the assessee for A.Y. 2014-15. The assessee has assailed the impugned order on the following grounds before us:

“1. Disallowance of interest of Rs. 74,28,384 u/s 36(1)(iii)

- a) The Id. CIT(A) erred in confirming the disallowance of interest of Rs.74,28,384 u/s 36(1)(iii) made by the Id. ACIT.
- b) She erred in confirming the disallowance without considering appellant submissions, much less showing why they were not acceptable.
- c) She failed to appreciate that:-
 - i. there was no nexus between borrowing of funds and withdrawals of the partners or their negative capital balances;
 - ii. during the year the partners had introduced net capitals of Rs.1,09,92,157 over and above their withdrawals whereas the borrowings during the year increased by only Rs.21,13,515 from Rs. 6,08,69,738 to Rs.6,29,83,253.

iii. the borrowed funds of Rs.6,08,69,738 at the beginning of the year was utilized in financing losses of Rs.6,02,09,042 and acquiring fixed assets of Rs.28,95,962 aggregating to Rs.6,31,05,004.

d) She therefore ought to have deleted the disallowance of interest of Rs.74,28,384 made u/s 36(1)(iii) by the Id. ACIT.

2. Disallowance of interest of Rs.57,14,354 u/s 40(a)(ia):

a) The Id. CIT(A) erred in confirming the disallowance @ 100% of interest of Rs.57,14,354 instead of restricting it to 30% of the said amount as per the amended provisions of S. 40(a)(ia) as the amendment was made for removal of undue hardship faced by assesseees and is therefore retrospective in nature.

b) She further erred in refusing to allow deduction in respect of interest of Rs.56,95,502.58 (out of the said total amount of Rs.57,14,354) in the year of filing return of income concerned party as reflected in its Form 26A by refusing to admit it as additional evidence on technical grounds.

3. Each of the above Grounds is without prejudice to one another.

4. The appellant craves to add to, alter, vary modify, and amend the above grounds of appeal.”

17. Briefly stated, the assessee firm had e-filed its return of income for A.Y 2014-15 on 26.07.2014, declaring a loss of (-) Rs. 1,32,07,589/-. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act.

18. Assessment was framed by the A.O vide his order u/s 143(3), dated 16.11.2016, wherein the following disallowances were made in the hands of the assessee firm :

Sr. No.	Particulars	Amount
1.	Disallowance u/s 36(1)(iii)	Rs.74,28,384/-
2.	Disallowance u/s 40(a)(ia)	Rs.57,14,354/-

19. Aggrieved, the assessee carried the matter in appeal before the CIT(A). However, the CIT(A) not finding favour with the contentions advanced by the assessee upheld the view taken by the A.O and dismissed the appeal.

20. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. As the facts and the issues involved in the present appeal remains the same as were there before us in the appeal of the assessee for A.Y 2012-13 in ITA No. 4713/Mum/2019, therefore, our order therein passed shall apply mutatis mutandis for the purpose of disposing off the said respective issues. Accordingly, the present appeal for A.Y 2014-15 in ITA No. 4714/Mum/2019 on the same terms is partly allowed for statistical purposes.

21. Resultantly, the appeals filed by the assessee i.e ITA No.4713/Mum/2019 for A.Y. 2012-13 and ITA No. 4714/Mum/2019 for A.Y. 2014-15 are both partly allowed for statistical purposes in terms of our aforesaid observations.

Order pronounced in the open court on 29.09.2021

Sd/-

(M. Balaganesh)
ACCOUNTANT MEMBER

Sd/-

(Ravish Sood)
JUDICIAL MEMBER

Mumbai;

Dated: 29.09.2021

PS: Rohit

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