

**IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : BANGALORE**

**BEFORE SHRI. CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

Appeal No.	Appellant	Respondent	Assessment Year
ITA No. 1151/Bang/ 2015	M/s. Dell International Services India Pvt. Ltd., Divyashree Gardens, No. 12/1, 12/2A & 13/1A, Challghatta Village, Varthur Hobli, Bangalore – 560 071. PAN: AABCD1741M	The Income Tax Officer (TDS), LTU, Bangalore.	2012-13
ITA No. 1644/Bang/ 2014	M/s. Dell International Services India Pvt. Ltd. (for the merged entity Dell India Pvt. Ltd.) Divyashree Gardens, No. 12/1, 12/2A & 13/1A, Challghatta Village, Varthur Hobli, Bangalore – 560 071. PAN: AABCD8893L	The Income Tax Officer (TDS), LTU, Bangalore.	2012-13
ITA No. 2035/Bang/ 2016	The Income Tax Officer, (TDS), LTU, Bangalore.	M/s. Dell International Services India Pvt. Ltd. (for the merged entity Dell India Pvt. Ltd.) Divyashree Gardens, No. 12/1, 12/2A & 13/1A, Challghatta Village, Varthur Hobli, Bangalore – 560 071. PAN: AABCD8893L	2013-14

Assessee by	:	Shri T. Suryanarayana, Advocate
Revenue by	:	Dr. Manjunath Karkihally, CIT- DR

Date of Hearing	:	28-02-2022
Date of Pronouncement	:	25-03-2022

ORDER**PER BEENA PILLAI, JUDICIAL MEMBER**

Present appeals are filed by assessee as well as revenue for assessment years 2012-13 and 2013-14 arising out of following orders passed by the Ld.CIT(A):

Assessment year	Appeal filed by	Date of impugned order
2012-13	Assessee	19/09/2014
2012-13	Assessee	29/05/2015
2013-14	Revenue	22/09/2016

At this juncture we note that there are two appeals filed by the assessee for assessment year 2012-12 arising out of different orders by the Ld.CIT(A). On perusal of the record we note that there was merger of Dell India Pvt.Ltd with Dell International Services India Pvt.Ltd during assessment year 2012-13. It is submitted that the issue raised in all the appeals are common relating to holding the assessee to be 'assessee in default' and levy of interest under section 201(1A).

Accordingly all these appeals are being disposed by way of a common order.

2. Brief facts of the case are as under:

During the assessment year 2012-13, the assessee created aggregate provision of Rs.158,25,21,633/- towards various expenses. While computing the total income assessable for the assessment year 2012-13, the assessee *suo moto* disallowed the entire provision so created under Sections 40(a)(i)/(ia) of the Act.

The Ld.AO initiated proceedings under Section 201 of the Act and passed an order dated 25.03.2014 deeming the assessee to be an assessee-in-default for non deduction of tax at source on which provision created to the extent of Rs. 44,95,92,282/-, on the ground that the same was liable for tax deduction at source. The Officer also levied consequential interest of Rs. 1,07,90,215/- under Section 201(1A) of the Act.

2.1. During the assessment year 2012-13 in ITA no.1151, the assessee created aggregate provision of Rs. 49,16,35,934/- towards various expenses. While computing the total income assessable for the assessment year 2012-13, the assessee *suo moto* disallowed the entire provision so created under Sections 40(a)(i)/(ia) of the Act. The Ld.AO however initiated proceedings under Section 201 of the Act and passed order dated 28.03.2014 deeming the assessee to be an 'assessee-in-default' for non-deduction of tax at source on which provision created to the extent of Rs.11,52,35,903/-. The Ld.AO also levied consequential interest of Rs.1,15,23,590/- under Section 201(1A) of the Act.

2.2. During the assessment year 2013-14, the assessee created aggregate provision of Rs.154,42,29,227/- towards various expenses. While computing the total income assessable for year under consideration, the assessee *suo moto* disallowed the entire provision so created under Sections 40(a)(i)/(ia) of the Act. The Ld.AO initiated proceedings under Section 201 of the Act and passed an order dated 12.03.2015 deeming the assessee to be an 'assessee-in-default' for non deduction of tax at source on which provision created to the extent of Rs.3,33,43,438/-. The Ld.AO also levied consequential interest of Rs.1,62,01,719/- under Section 201(1A) of the Act.

3. Aggrieved by the order of Ld.AO, assessee preferred appeal before Ld.CIT(A).

3.1. The Ld.CIT(A) disposed of the issues raised by assessee in ITA 1644 for assessment year 2012-13, by following its own order for Assessment Year 2009-10 by order dated 30.06.2014 and Assessment Year 2010-11 by order dated 25.03.2004. In ITA No. 1151, the Ld.CIT(A) relied on decision of coordinate bench of this *Tribunal* in case of *IBM India Pvt.Ltd.*, reported in (2015) 59 *taxmann.com* 107. The Ld.CIT(A) gave partial relief in respect of the rates that were to be applied for computing TDS on amount debited as commission and the amount that is characterised as rebate.

3.2. For assessment year 2013-14, the Ld.CIT(A) vide order dated 22.09.2016 set aside the order of the Ld.AO by granting complete relief to the Assessee, by observing as under:

“On the issue of deduction of tax on the provision made, Hon'ble ITAT, Bangalore had passed an order in the case of M/s. IBM India Pvt. Ltd. in ITA nos. 749 to 752/Bang/2012 & Nos. 1588 to 1591/Bang/2012 and also passed an order in the case of M/s. Bosch Ltd. in ITA No. 1583/Bang/2014(ITAT, Bang) .

However ITAT in the the case of TE Connectivity has passed another order in ITA No.3/Bang/2015 Dated:25/05/2016 which is different from the earlier order of the ITAT and is in favour of the assessee.

The Hon'ble ITAT, Bangalore in ITA No.3/Bang/2015 dt. 25.05.2016 in the case of M/s. TE Connectivity India Pvt. Ltd. in Para 6 has stated as under :

"The issue in appeal relates to the liability of the assessee-company to deduct tax at source on provisions made as at the end of the accounting year. The undisputed fact is that the provisions, made at the end of the accounting year are reversed in the beginning of the next year. No payees are identified. The exact amount of liability also cannot be quantified. The provisions are made merely on for

Management Information System. In our considered opinion, liability to deduct tax at source does not arise. In identical circumstances, the Hon'ble Tribunal in the case of M/s. Bosch Ltd. Vs. ITO in ITA No. 1583/Bang/2014 dt. 01.03.2016 to which one of us i.e. the Accountant Member is the author of the order, held as follows.....

“.....Thus, having regard to the ratio laid down by the Hon'ble ex Court, it cannot be said that income had accrued in the hands of the payee. We, therefore, hold that there was no liability in the hands of the assessee company to deduct TDS, merely on the provisions made at the year end. Hence, the assessee company cannot be treated as 'assessee in default' for not deducting tax at source and therefore, we allow the grounds of appeal filed by the assessee company in this regard.

The Hon'ble High Court of Karnataka in the case of Karnataka. Power Transmission Corporation Ltd. vs. DCIT (2016) 383 ITR 59(Karn) held that for the purpose of deducting tax at source, the income which finally partakes character of income alone is allowable for deduction of income-tax. If the amount is not considered to be income in the hands of the deductee, the provisions of tax deduction at source would not be made applicable. The relevant paragraph of the judgment is as under:

We have examined the applicability of section 194A of the Act to the present case. Section 194A of the Act mandates the tax deductor to deduct "income-tax" on "any income by way of interest other than income by way of interest on securities". The phrase "any income" and "income-tax thereon" if read harmoniously, it would indicate that the interest which finally partakes the character of income, alone is liable for deduction of, income tax on that income by way of interest. If the said interest is not finally considered to be an income of the deductee, as per reversal entries of the provision in the present case, Section 194A(1) of the Act would not be made applicable. In other words, if no income is attributable to the payee, there is no income is attributable to the payee, there is no liability to deduct tax at source in the hands of the tax deductor. In view of the admitted fact that interest being not paid to the payees (suppliers) being reversed in the books of account, we are of the considered opinion that there would be no liability to deduct tax as no income accrued to the payees (suppliers). It is true that in the case

of Ericsson Communication Limited (supra), the Delhi High Court was dealing with the case of section 195 of the Act wherein obligation of a person to deduct tax at source would be applicable to the "income chargeable under the Act". Absence of such words "chargeable to tax" under the provisions of section 194A of the Act would not empower the authorities to invoke the provisions of section 201(1) and 201(1A) of the Act ignoring the words 'any income by way of interest.

Respectfully following the above order, we hold that the assessee- company is not liable to deduct tax at source as no income has accrued in. the hands of the payee."

Considering the above order which is later in date and also keeping the decision of Vegetable Products in mind, for judicial prudence, respectfully following the decision of the Hon'ble ITAT, Bangalore in the case of M/s. TE Connectivity India Private Ltd., referred (supra), the appeal is allowed.

Ground no. 2.

Interest levied under Section 201(1A) of the Act - Rs. 1.62 crores

The Learned AO has erred in levying interest under Section 201(1A) amounting to Rs. 16,201,719 on the aforementioned demand which is consequential in nature.

Ground no.3

Interest levied under section 201(1A) of the Act for the intermittent period between the period of accounting and date of actual payment of TDS - Rs. 4,436,352

The learned AO ought to have appreciated that the liability to deduct tax arises only on crystallized expenses and therefore the provisions of Section 201(1A) is not attracted for the intermittent period.

The learned AO ought to have placed reliance on judicial precedents wherein based on the facts of the case, which are similar to the present case, it was held that interest under Section 201(1A) would not be applicable.

Notwithstanding the above, the Learned AO has erred in ignoring the submission of the appellant that interest under Section 201(1A) being compensatory in nature for

loss of revenue, levy of the same where revenue is compensated through Section 40(a)(i)/(ia) disallowance, is not warranted.

Notwithstanding the above, the Learned AO has erred in calculating interest under Section 201(1A) as Rs. 4,436,352 instead of Rs. 4,380,879.

Interest levied under section 201(1A) of the Act for the intermittent period between the period of accounting and date of actual payment of TDS - Rs. 3,268,566

As mentioned earlier, the liability to deduct TDS arises only on receipt of invoices from the vendors in the subsequent period. Thus, we submit that the question of levying interest under Section 201(1A) for the intermittent period between the period of accounting the provision and the actual date of payment of TDS does not arise. Reliance is placed on the Mumbai ITAT decision in the case of Industrial Development Bank of India v ITO and Pfizer Ltd. v. ITO (TDS) (OSD) Range-2 wherein based on the facts of the case, which are similar to the present case, it was held that interest under Section 201(1A) would not be applicable. Further, notwithstanding the above, we submit that even if it is contended that the provisions of TDS are applicable on the provision for expenses, we submit that the provisions of Section 201(1A) would not be applicable to the facts of the present case. We submit that, Section 201(1A) is compensatory in nature and applicable only in case of loss of revenue to the Government. In the present case, as the said provision amount has been disallowed under Section 40(a)(ia) and taxes paid on the same, there is no loss to revenue to the Government as the revenue is more than adequately compensated in the form of higher taxes by the deductor due to disallowance u/s 40(a)(ia). In this regard, the Company had made a detailed submission before the learned AO vide submission dated 5th February 2015, wherein it had demonstrated with illustrations that on account of the disallowance made, there was no loss to revenue.”

4. Aggrieved by the order of Ld.CIT(A), the assessee preferred appeal before this *Tribunal*.

Before us, the Ld.AR submitted that assessee is held to be “assessee in default” for non-deduction of TDS on the provision.

4.1. ITA no. 1644

The details of the Provision of Rs.40,62,42,479/- on which TDS was not effectuated are as under:

Groun d No.	Particulars	Amount disallowed	Details furnished before the Assessing Officer	Additional details furnished before the CIT(A)
1-5	Commissio n:	Rs. 40,62,43,479 /- (break-up as under)		
	Rebate under stock and sell model	Rs. 16,32,79,058/ -	TDS not applicable	TDS not applicable (refer page 16 of the paperbook)
	Sales promotion/d ell reward and recognition expenses	Rs. 12,97,03,478/ -	TDS not applicable	TDS not applicable as it pertains to purchase of materials and supplies (refer page 16 of the paperbook)
	Other expense classified under Commission and Rebate	Rs.1,09,13,89 5/-	-	TDS deducted and deposited (refer annexure 3 to CIT(A) submission s)

	Excess provision for commission and rebate reversed	Rs. 6,15,03,673/-	no TDS liability arises.	no TDS liability arises. (refer page 16 of the paperbook)
6-9	Advertisement	Rs. 16,46,61,955/-	Rs. 33,82,73,745/- (refer submissions dated 18.02.2014)	TDS deducted and deposited of Rs. 3,23,61,831/- (pages 15, 16 26-28 of the paperbook)
	Repairs and maintenance	Rs. 2,32,67,228/-		
	Staff welfare	Rs. 1,17,75,882/-		
	Travelling and conveyance	Rs. 58,30,101/-		
	Legal and professional	Rs. 9,57,01,235/-		
	Warranty	Rs. 10,36,47,579/-		

The Ld.Counsel submitted that the assessee *suo moto* disallowed the total provision created of Rs158,25,21,633/-. The Ld.Counsel relied on the copy of the computation of income filed for the assessment year 2012-13 which is annexed herewith and marked as Annexure-A. It is submitted that the provision of Rs.40,62,42,479/- is subsumed in the disallowance by assessee

4.2. ITA No. 1151

The details of the Provision of Rs.11,52,35,903/- on which TDS was not effectuated are as under:

The Ld.Counsel submitted that the assessee *suo moto* disallowed the total provision created of Rs.49,16,35,934/-. The Ld.Counsel relied on the copy of the computation of income filed for the assessment year 2012-13 which is annexed herewith and marked as Annexure-B. It is submitted that the provision of Rs.11,52,35,903/- is subsumed in the disallowance by assessee

4.3. ITA 2035

This is revenue's appeal and following was the details of provision of Rs.3,33,43,438/-, on which TDS was not effectuated.

The Ld.Counsel submitted that the assessee *suo moto* disallowed the total provision created of Rs.154,42,29,227/-. The Ld.Counsel relied on the copy of the computation of income filed for the assessment year 2013-14 which is annexed herewith and marked as Annexure-C. It is submitted that the provision of Rs.3,33,43,438/-, is subsumed in the disallowance by assessee.

5. The primary argument of the Ld.AR is that no income has accrued to the payee in respect of the entire provision that has been made for the year under consideration. Relying on the following decisions, the Ld.AR proposed that in the absence of income chargeable to tax in the hands of the payee provisions of TDS are not applicable.

- *ACIT v. Motor Industries Co. (reported in [2001] 115 Taxman 222 (Karnataka)*
- *Karnataka Power Transmission Corporation Ltd. reported in [2016] 67 taxmann.com 259 (Karnataka)*
- *PCIT v. Sanghi Infrastructure Ltd. (reported in [2018] 96 taxmann.com 370 (Gujarat)) Toyota Kirloskar Motor (P.) Ltd. (Order dated 24.03.2021 passed by the Hon'ble High Court of Karnataka in ITA No. 245/2018)*

- *Bosch Ltd. v. ITO in ITA No. 1583/Bang/2014 by order dated 01.03.2016*
- *TE Connectivity India Pvt. Ltd. v. ITO in ITA No. 3/Bang/2015 by order dated 25.05.2016*

6. The Ld.AR further submitted that for year under consideration has assessee *suo moto* disallowed the entire provision created during the year under consideration, irrespective of the fact whether the said amount includes income only or partly in the hands of the payee u/s. 40(a)(i)/(ia). It is further submitted that in the subsequent assessment year, on making actual payment by assessee, TDS has been deducted and remitted to the Government account wherever applicable. It is the argument of the Ld.AR that upon doing so, assessee is not liable to be an “assessee in default” u/s. 201 and cannot be levied that levied interest u/s. 201(1A) of the Act. In support of this contention, he placed reliance on the following decisions.

- *Pfizer Ltd. v. ITO reported in [2012] 28 taxmann.com 17 (Mumbai)*
- *Robert Bosch Engineering and Business Solutions Pvt. Ltd. v. ITO in ITA Nos. 1689 & 1690/Bang/2017 by order dated 31.01.2022*

7. It is been submitted by the Ld.Counsel that the rebates are granted to the distributors on principal-to-principal basis on which TDS cannot be effectuated. It was also submitted that a provision has been created towards excess of commission and rebate that was reversed during the year on which no TDS liability arises. He relied on the details of the amount reversed placed at page 148 of the paper book. It is also submitted that an amount of Rs. 3.23 crores have been subjected to tax deducted at source and the details were furnished before authorities below. It is submitted that there is a

difference between the amounts disallowed u/s. 40(a)(i) and the amount which was subjected to tax at source due to the difference in the foreign exchange rate and no default on the part of assessee can be attributed.

8. The Ld.AR relied on distributor agreement placed at page 99a of the paper book submitted that the recitals give an expressed right to the dealer to distribute the products in the territory on its own account. It is a non-exclusive right granted to the dealer on principal-to-principal basis. The Ld.AR submitted that there is no principal agent relationship for which TDS could be applied to the rebates granted to these dealers. He also placed reliance on following decisions in support of his contentions.

- *Decision of Hon'ble Supreme Court in case of CIT v. Ahmedabad Stamp Vendors Association reported in (2012) 25 taxmann.com 201;*
- *Decision of Hon'ble Karnataka High Court in case of Bharti Airtel Ltd. v. DCIT reported in (2014) 52 taxmann.com 31;*
- *Decision of Hon'ble Bombay High Court in case of Harihar Cotton Pressing Factory v. CIT reported in (1960) 39 ITR 594;*
- *Decision of Hon'ble Bombay High Court in case of CIT v. Intervet India (P.) Ltd. reported in (2014) 49 taxmann.com 14 ; and*
- *Decision of Hon'ble Gujrat High Court in case of Ahmedabad Stamp Vendors Association v. UOI reported in (2002) 124 Taxman 628*
- *Decision of Hon'ble Andhra Pradesh and Telangana High Court in case CIT v. United Breweries Ltd. reported in (2017) 80 taxmann.com 123;*
- *Decision of Coordinate Bench of this Tribunal in case of ACIT v. Acer India (P.) Ltd. by Order dated 05.10.2018 passed by this Hon'ble Tribunal in ITA No. 1940/Bang/2018).*

On the contrary, the Ld.DR submitted that even though the amount of expenses have not been crystallised, TDS was liable to be done on the provisioned amount.

We have perused the submissions advanced by both sides in the light of records placed before us.

9. Admittedly, the entire provisioned amount being Rs.158,25,21,633/- has been *suo moto* disallowed by the assessee in the computation income for the year under consideration u/s. 40(a)(ia) of the Act. Under such circumstances, no benefit has accrued to the assessee to that extent which already stands disallowed while computing the taxable income.

10. It is not the case of the revenue that with the help of the provisioned amount assessee has been able to reduce the profits thereby any benefit has been drawn. We place reliance on the decision of *Coordinate Bench* of this *Tribunal* in case of *Robert Bosch Engineering and Business Solutions Pvt. Ltd. v. ITO (supra)* wherein on identical situations this *Tribunal* observed as under:

“**9.** We have perused the submissions advance by both sides in light of records placed before us.

9.1. Before us the assessee concerned is the deductor of TDS.

For AY 2012-13:

Total Provision created : Rs.4,48,04,866/-

TDS deducted on receipt of

Invoice and paid in the FY:2013-14 :Rs.3,25,21,444/-

Balance on which no TDS effectuated :Rs.1,22,83,222/-

For AY:2013-14:

Total Provision :Rs.1,65,77,388/-

TDS deducted and paid in

the same year : Rs.1,01,59,588/-

Balance on which no TDS effectuated :

The amount of Rs.1,01,59,588/-, inadvertently was retained in the provision. However upon noticing the error, it was reversed as on 31/03/2014.

Before we advert to the main issue of levy of interest, under section 201(1)/(1A) of the Act, there is a direction by the Ld.CIT(A) for both the years under consideration to exclude

such payments which has suffered TDS. We also note that for financial year 2011-12, there is payment made by assessee to ESI corporation for which TDS liability does not arise which also needs to be ignored from the alledged quantum.

10. It is the submission of the Ld.Counsel that the entire provision stands disallowed under section 40(a)/(i)/(ia) while filing the return of income and therefore for non deduction of TDS. What needs to be ascertained is, under such circumstances;

whether the assessee(deductor) could be treated to be "assessee in default" under the provisions of Sec.201(1) of the Act ?

Whether interest under section 201(1A) deserves to be levied?

11. The said section reads as under:

Section 201

(1) *Where any person, including the principal officer of a company,—*

(a) *who is required to deduct any sum in accordance with the provisions of this Act; or*

(b) *referred to in sub-section (1A) of section 192, being an employer, does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:*

Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident—

(i) *has furnished his return of income under section 139;*

(ii) *has taken into account such sum for computing income in such return of income; and*

(iii) *The recipient has paid the tax due on the income declared by him in such return of income;*

And the person furnishes a certificate to this effect from an accountant in such form as may be prescribed."

As the section 201(1) is to be read, one must keep in mind that these provisions seeks to make good any loss of revenue, from an assessee who is the payee, on account of any lapse by the recipient of such income. We draw our support from the decision of *Hon'ble Kolkata Tribunal* in case of *Ramkrishna Vedanta Math vs. ITO* reported in (2012) 24 taxmann.com 29. *Hon'ble Kolkata Tribunal* also held as under:

"9. *It is important to bear in mind that the lapse on account of non deduction of tax at source is to be visited with three different consequences - penal provisions, interest provisions and recovery provisions. The penal provisions in respect of such a lapse are set out in Section 271C. So far as penal provisions*

are concerned, the penalty is for lapse on the part of the assessee and it has nothing to do with whether or not the taxes were ultimately recovered through other means. The provisions regarding interest in delay in depositing the taxes are set out in Section 201(1A). These provisions provide that for any delay in recovery of such taxes is to be compensated by the levy of interest. **As far as recovery provisions are concerned, these provisions are set out in Section 201(1) which seeks to make good any loss to revenue on account of lapse by the assessee tax deductor. However, the question of making good the loss of revenue arises only when there is indeed a loss of revenue and the loss of revenue can be there only when recipient of income has not paid tax. Therefore, recovery provisions under section 201(1) can be invoked only when loss to revenue is established, and that can only be established when it is demonstrated that the recipient of income has not paid due taxes thereon.** In the absence of the statutory powers to requisition any information from the recipient of income, the assessee is indeed not always able to obtain the same. The provisions to make good the shortfall in collection of taxes may thus end up being invoked even when there is no shortfall in fact.”

Emphasis supplied

13. In the present facts of the case we note that present assessee filed details of bifurcation of amount estimated in respect of each payee, the month in which the actual invoice was received and the TDS deducted coupled with details of it being deposited with the Government account. The Ld.ITO(TDS) did not consider the same by observing that it is voluminous and impossible to be verified. On verification of the list of payees placed in the paper book at pages 75-80, we note that assessee has deducted TDS between May 2012 to December 2012 (F.Y: 2012-13). Thus it is an admitted fact that TDS has been deducted at the time of making payment in respect of the provision amounting to Rs.3,25,21,444/- made as on 31/03/2012 and the same has been deposited to the Government account. On identical facts and similar circumstances this *Tribunal* in case of *IBM ltd.(supra)*, appreciated the arguments advanced by assessee therein to discharge assessee from the from being called as, ‘assessee in default’, under section 201(1) of the Act to the extent the TDS was effectuated. This *Tribunal* in case of *IBM(supra)* observed and held as under:

“The learned counsel for the Assessee at the outset brought to our notice that pending disposal of the appeals, the Assessee had furnished before the AO, details regarding the actual payment of TDS in subsequent financial year, on the provisions made in the various financial years. These details were verified by the AO. The AO has addressed a letter to the DR in which the AO after verification has found that the Assessee had deducted

tax at source at the time when the provision made in one financial year is subsequently reversed and the expense booked in the subsequent financial year. The following are the contents of the said letter (copy filed by DR in Court) , in so far as it relates to taxes deductible at source.

“3. During the course of appellate proceedings before the Hon’ble ITAT the assessee company took the same plea that it had deducted tax at source in the subsequent year on all the amounts that was disallowed u/s. 40a(i) and 40a(ia) as and when these amounts were paid. The Hon’ble ITAT therefore directed that such details be produced before the Income Tax Officer (TDS) for verification.

4. At the remand stage the assessee company has now submitted year wise details of rental charges paid, professional charges paid, contract amounts paid and details of other payments. The details of year end provisions as per tax audit report (disallowed u/s. 40a(i) and 40a(ia)), payments made in subsequent year in respect of these provisions and details of tax deducted at source on such payments along with proof of deposit of such TDS into Govt. account were called for and systematically verified. Since, the transactions were enormous in respect of these four assessment years, verifications were carried out randomly for different months for these assessment years. **After thorough verification of the transactions in respect of the months selected randomly and after analysis of consolidated annual figures separately for each sections of TDS, it is seen that the amounts which were shown as provisions as on 31 March of a particular year, whether either liquidated by way of payment or was added back to the profit and loss account in subsequent year. Wherever payments were made tax has been deducted at source under the relevant provisions of the IT Act and remitted to the Govt. account.**

5. Though, the tax has been deducted at source at the time of payments in respect of provisions made as on 31 March, it is be stated that it was the assessee company’s responsibility to deduct tax at source and remit it to the Govt. account as soon as item of expenditure is debited by it in the books of accounts. Reference is invited to sub section 2 of section 194C, which mandates that the any amount credited to any account whether called “suspense account” or by any other name, in the books of accounts such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly. Similar provisions / explanation is also to be found in other sections relating to TDS. Thus, it can be seen that the assessee company has failed to deduct tax at source on the provisions made by it as at 31st March within the stipulated time.

The assessee company has deducted tax at source on these amounts in the subsequent year as and when the same were

paid by it. Thus, it is liable for charging of interest u/s. 201(1A) for delayed deduction and remittance of tax to Govt. account.”
(emphasis supplied)

24. In view of the above, the demand on account of tax u/s.201(1) of the Act, in our view, will no longer survive. However the appeals will survive with regard to the liability of the Assessee to interest u/s.201(1A) of the Act.

Therefore the appeals in so far as it relates to challenge to order u/s.201(1) of the Act have to be allowed.”

Respectfully following the same we also hold the present assessee cannot be treated to be an “assessee in default” to the extent TDS has been effectuated though in subsequent financial year.

14. Now the issue that needs to be considered is in a situation where the assessee has not been treated to be an assessee in default, interest under section 201(1A) deserves be levied.

In our humble opinion, the provision of TDS provisions cannot applicable where there is no claim of expenditure made by the assessee. In the present facts assessee made *suo motu* disallowance of the entire provision under Section 40(a)(i)/(ia) of the Act. Once the amount is disallowed u/s. 40(a)(i)/(ia) for non-deduction of tax, it cannot be subject to TDS provisions again so as to make the assessee liable to interest u/s. 201(1A). In our considerate view, the assessee(deductor) gets exonerated from the applicability of TDS provisions on disallowance of the expenditure in question under section 40(a)(i)/(ia) of the Act. This rational is based on the scheme of Section 40(a)(i)/(ia), which is aimed at ensuring that an expenditure should not be allowed as deduction in the hands of an assessee(deductor) in a situation in which income embedded in such expenditure remained untaxed due to tax withholding lapses by such assessee(deductor).

A legal fiction has been appreciated by *Hon’ble Delhi High Court* in case of *CIT vs. Ansal Landmark Township Pvt.Ltd* reported in (2013) 61 *Taxmann.com* 45. *Hon’ble Court* referred to a decision of *Hon’ble Agra bench of this Tribunal* in case of *Rajiv Kumar Agarwal vs.ACIT in ITA No.337/Agra/2013*. The issue for consideration before the *Tribunal* was in respect of retrospective application of second proviso to section 40(a)(ia) of the Act. *Hon’ble Delhi High Court* while deciding the case of *CIT vs. Ansal Landmark Township Pvt. Ltd(supra)*, observed as under:

“9. It is seen that the second proviso to Section 40(a) (ia) was inserted by the Finance Act 2012 with effect from 1st April 2013. The effect of the said proviso is to introduce a legal fiction where an Assessee fails to deduct tax in accordance with the provisions of Chapter XVII B. Where such Assessee is deemed not to be an assessee in default in terms of the first proviso to sub-Section (1) of Section 201 of the Act, then, in such event, “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”

15. *Hon’ble Delhi High Court after referring to section 201(1) of the Act, held as under:*

“11. The first proviso to Section 210 (1) of the Act has been inserted to benefit the Assessee. It also states that where a person fails to deduct tax at source on the sum paid to a resident or on the sum credited to the account of a resident such person shall not be deemed to be an assessee in default in respect of such tax if such resident has furnished his return of income under Section 139 of the Act. No doubt, there is a mandatory requirement under Section 201 to deduct tax at source under certain contingencies, but the intention of the legislature is not to treat the Assessee as a person in default subject to the fulfilment of the conditions as stipulated in the first proviso to Section 201(1). The insertion of the second proviso to Section 40(a) (ia) also requires to be viewed in the same manner. This again is a proviso intended to benefit the Assessee. The effect of the legal fiction created thereby is to treat the Assessee as a person not in default of deducting tax at source under certain contingencies.

12. Relevant to the case in hand, what is common to both the provisos to Section 40 (a) (ia) and Section 210 (1) of the Act is that the as long as the payee/resident (which in this case is ALIP) has filed its return of income disclosing the payment received by and in which the income earned by it is embedded and has also paid tax on such income, the Assessee would not be treated as a person in default. As far as the present case is concerned, it is not disputed by the Revenue that the payee has filed returns and offered the sum received to tax.

13. Turning to the decision of the Agra Bench of ITAT in Rajiv Kumar Agarwal v. ACIT (supra), the Court finds that it has undertaken a thorough analysis of the second proviso to Section 40 (a)(ia) of the Act and also sought to explain the rationale behind its insertion. In particular, the Court would like to refer to para 9 of the said order which reads as under:

“On a conceptual note, primary justification for such a disallowance is that such a denial of deduction is to compensate for the loss of revenue by corresponding income not being taken into account in computation of taxable income in the hands of the recipients of the payments. Such a policy motivated deduction restrictions should, therefore, not come into play when an assessee is able to establish that there is no actual loss of revenue. This disallowance does deinceivize not deducting tax at source, when such tax deductions are due, but, so far as the legal framework is concerned, this provision is not for the purpose of penalizing for the tax deduction at source lapses. There are separate penal provisions to that effect. Deinceivizing a lapse and punishing a lapse are two different

things and have distinctly different, and sometimes mutually exclusive, connotations. **When we appreciate the object of scheme of section 40(a)(ia), as on the statute, and to examine whether or not, on a "fair, just and equitable" interpretation of law- as is the guidance from Hon'ble Delhi High Court on interpretation of this legal provision, in our humble understanding, it could not be an "intended consequence" to disallow the expenditure, due to non deduction of tax at source, even in a situation in which corresponding income is brought to tax in the hands of the recipient. The scheme of Section 40(a)(ia), as we see it, is aimed at ensuring that an expenditure should not be allowed as deduction in the hands of an assessee in a situation in which income embedded in such expenditure has remained untaxed due to tax withholding lapses by the assessee. It is not, in our considered view, a penalty for tax withholding lapse but it is a sort of compensatory deduction restriction for an income going untaxed due to tax withholding lapse.** The penalty for tax withholding lapse per se is separately provided for in Section 271 C, and, section 40(a)(ia) does not add to the same. **The provisions of Section 40(a)(ia), as they existed prior to insertion of second proviso thereto, went much beyond the obvious intentions of the lawmakers and created undue hardships even in cases in which the assessee's tax withholding lapses did not result in any loss to the exchequer.** Now that the legislature has been compassionate enough to cure these shortcomings of provision, and thus obviate the unintended hardships, such an amendment in law, in view of the well settled legal position to the effect that a curative amendment to avoid unintended consequences is to be treated as retrospective in nature even though it may not state so specifically, the insertion of second proviso must be given retrospective effect from the point of time when the related legal provision was introduced. In view of these discussions, as also for the detailed reasons set out earlier, we cannot subscribe to the view that it could have been an "intended consequence" to punish the assesseees for non deduction of tax at source by declining the deduction in respect of related payments, even when the corresponding income is duly brought to tax. That will be going much beyond the obvious intention of the section. Accordingly, we hold that the insertion of second proviso to Section 40(a)(ia) is declaratory and curative in nature and it has retrospective effect from 1st April, 2005, being the date from which sub clause (ia) of section 40(a) was inserted by the Finance (No. 2) Act, 2004."

Emphasis supplied

16. We place reliance on the above decision to emphasize on the interpretation of the scheme under section 40(a)(i)/(ia) of the Act. Hon'ble Delhi High Court also explains that the

intention of the legislature is not to obviate unintended hardship. It also appreciated the object of scheme under section 40(a)(ia), as on the statute, to examine the provisions on a "fair, just and equitable" interpretation of law.

The *Hon'ble Karnataka High Court* in some of its decisions opined regarding on year end provisions that were reversed in the next accounting year.

16.1. In case of *Karnataka Power transmission corporation Ltd., vs. DCIT(TDS)* reported in (2016) 383 ITR 59

In this case *Hon'ble Court* observed that the assessee was the deductor and in their profit and loss account treated the amount of provision as expenditure to arrive at profit. However, in the returns of income filed for the said assessment years, no expenditure was claimed, corresponding reversal entries were made in the books of accounts during the financial year 2007 for the assessment years 2005-06 and 2006-07 indicating that the subject amounts of provision towards contingent interest would never be paid. Similarly for the financial year ending on 31.03.2007, a similar provision towards contingent interest payable on belated payments were created but at the end of the year, the said amount treated as expenditure in the profit and loss account was not excluded to arrive at the taxable income in the return of income filed for the assessment year 2007-08. Further, the said entry was reversed. In that context, this Court has held that the existence or absence of entries in the books of accounts is not decisive or conclusive factor in deciding the right of the assessee claiming deduction. The reasoning of the *Tribunal* that the deductor nor the deductee had paid the tax on the provision amount and the provisions of Sections 201 and 201(1) of the Act are attracted is held to be not acceptable. Thus, it has been held that if no income is attributable to the payee, there is no liability to deduct tax at source in the hands of the tax deductor. The interest being not paid to the payees/suppliers and the same having been reversed in the books of accounts, it was categorically observed that there would be no liability to deduct tax as no income accrued to the payees.

16.2. In a recent decision on similar facts before *Hon'ble Karnataka High Court* in case of *Volvo India Pvt.Ltd vs. ITO(TDS)*, in *ITA no. 369/2018 by order dated 15/11/2021*, the Revenue argued regarding interplay of Section 40(a)(ia) and 194C would make it clear that the default by a person in compliance of the requirements of the provisions contained in Part B of Chapter-XVII of the Act leads, that when the obligation of Section 194C of the Act is not complied with, the consequences under Section 40[a][ia] will operate. The Revenue sought to rely on the decision of *Hon'ble Supreme Court* in case of *Shree Choudhary Transport Company vs.ITO* reported in (2021) 118 taxmann.com 47.

Hon'ble Karnataka High Court considered the decision of Hon'ble Supreme Court in favour of assessee by observing as under:

"10. It is ex-facie apparent that the contention of the assessee inasmuch as non-identification of the payees in the provisions and the disallowance of deduction expenditure under Section 40(a)(ia) of the Act has not been rightly appreciated by the Tribunal. In this scenario, the judgment of the Hon'ble Apex Court in the case of Shree Choudhary Transport Company' would not be of any assistance to the Revenue unless the material aspects are considered with respect to Section 40(a)(ia) of the Act read with Sections 194C, 194H, 194I, 194J — relevant Sections under which TDS was required to be deducted by the assessee. These factors necessarily requires to be addressed by the Tribunal keeping in mind the provisions of the Act as well as the legal principles enunciated by the Hon'ble Courts. If the deduction is not claimed for the expenditures made in the provision even in the return submitted and the same is offered to tax in the subsequent year after reversing the entries pursuant to the receipt of the bills/invoices by the payees, the matter has to be analysed having regard to, whether income has accrued to the payees to deduct tax at source. In the given circumstances, we deem it appropriate to set aside the impugned order and remand the matter for fresh consideration by the Tribunal."

17. At this juncture it is relevant to note the analysys of provisions of section 40(a)(i)/(ia) by Hon'ble Supreme Court in case of Shree Choudhary Transport Company(supra) observed as under:

*"16. While taking up the question of interpretation of section 40(a)(ia), it may be usefully noticed that section 194C is placed in Chapter XVII of the Act on the subject "Collection and Recovery of Tax"; and specific provisions are made in the Act to ensure that the requirements of section 194C are met and complied with, while also providing for the consequences of default. As noticed, section 200 specifically provides for the duties of the person deducting tax to deposit and submit the statement to that effect. The consequences of failure to deduct or pay the tax are then provided in section 201 of the Act which, as noticed, puts such defaulting person in the category of "the assessee in default in respect of the tax" apart from other consequences which he or it may incur. **The aspect relevant for the present purpose is that section 40 of the Act, and particularly the provision contained in sub-clause (ia) of clause (a) thereof, indeed provides for one of such consequences.***

16.1 section 40(a)(ia) provides for the consequences of default in the case where tax is deductible at source on any interest, commission, brokerage or fees but had not been so deducted, or had not been paid after deduction (during the previous year or

in the subsequent year before expiry of the prescribed time) in the manner that the amount of such interest, commission, brokerage or fees shall not be deducted in computing the income chargeable under "profits and gains of business or profession". In other words, it shall be computed as income of the assessee because of his default in not deducting the tax at source.

16.2 *In the overall scheme of the provisions relating to collection and recovery of tax, it is evident that the object of legislature in introduction of the provisions like sub-clause (ia) of clause (a) of section 40 had been to ensure strict and punctual compliance of the requirement of deducting tax at source. In other words, the consequences, as provided therein, had the underlying objective of ensuring compliance of the requirements of TDS. It is also noteworthy that in the proviso added to clause (ia) of section 40(a) of the Act, it was provided that where in respect of the sum referable to TDS requirement, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid in any subsequent year after the expiry of the time prescribed in section 200(1), such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.*

16.3 *The purpose and coverage of this provision as also protection therein have been tersely explained by this Court in the case of Calcutta Export Co. (supra), which has been cited by learned counsel for the appellant in support of another limb of submissions which we shall be dealing with in the next question. For the present purpose, we may notice the relevant observations of this Court in Calcutta Export Company as regards section 40(a)(ia) of the Act as follows (at p. 662 of ITR):-*

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

We note that the above decisions by *Hon'ble Supreme Court* and *Hon'ble Karnataka High Court* were not available before this *Tribunal* while considering similar issue on identical facts in case of *IBM India Pvt.Ltd vs. ITO (TDS)(LTU) (supra)* and *Agreenco Fiber Foam (p.) Ltd vs. ITO(TDS) (supra)* relied by the Ld.Sr.DR.

18. Further *Hon'ble Kolkata Tribunal* in case of *Ramkrishna Vedanta Math vs. ITO* reported in (2013) 55 SOT 417 decided an issue whether, a demand under section 201(1A) r.w.s. 194 C can be enforced even in a situation in which the recipient of income embedded in the payments has paid due taxes thereon, and, if not, who has the onus to demonstrate that status about payment of such taxes.

Relying on decision of *Hon'ble Allahabad High Court's* judgment in the case of *Jagran Prakashan Ltd Vs DCIT* reported in (2012) 21 taxmann.com 489, the Counsel for the assessee argued that the onus is on the revenue to demonstrate that the taxes have not been recovered from the person who had the primary liability to pay tax, and it is only when the primary liability is not discharged that vicarious recovery liability can be invoked. Ld.Counsel therein contended that once all the details of the persons to whom payments have been made, it is for the Assessing Officer, who has all the powers to requisition the information from such payers and from the income tax authorities, to ascertain whether or not taxes have been paid by the persons in receipt of the amounts from which taxes have not been withheld. It was the submission of the Ld.Counsel therein that, as a result of decision of *Hon'ble Allahabad High Court's* judgment in the case of *Jagran Prakashan (supra)*, there is a paradigm shift in the interpretation of Section 201(1).

Hon'ble Kolkata Tribunal observed as under:

*"8. The plea is indeed well taken. Learned counsel is quite right in his submission that, as a result of the judgment of Hon'ble Allahabad High Court in Jagran Prakashan's case (supra) and in the absence of anything contrary thereto from Hon'ble jurisdictional High Court, there is a paradigm shift in the manner in which recovery provisions under section 201(1) can be invoked. As observed by Their Lordships, the provisions of Section 201(1) cannot be invoked and the "tax deductor cannot be treated an assessee in default till it is found that assessee has also failed to pay such tax directly". **Once this finding about the non payment of taxes by the recipient is held to a condition precedent to invoking Section 201(1), the onus is on the Assessing Officer to demonstrate that the condition is satisfied. No doubt the assessee has to submit all such information about the recipient as he is obliged to maintain under the law, once this information is submitted, it is for the Assessing Officer to ascertain whether or not the taxes have been paid by the recipient***

of income. This approach, in our humble understanding, is in consonance with the law laid down by Hon'ble Allahabad High Court.

9. It is important to bear in mind that the lapse on account of non deduction of tax at source is to be visited with three different consequences—penal provisions, interest provisions and recovery provisions. The penal provisions in respect of such a lapse are set out in Section 271 C. So far as penal provisions are concerned, the penalty is for lapse on the part of the assessee and it has nothing to do with whether or not the taxes were ultimately recovered through other means. **The provisions regarding interest in delay in depositing the taxes are set out in Section 201(1A). These provisions provide that for any delay in recovery of such taxes is to be compensated by the levy of interest. As far as recovery provisions are concerned, these provisions are set out in Section 201(1) which seeks to make good any loss to revenue on account of lapse by the assessee tax deductor. However, the question of making good the loss of revenue arises only when there is indeed a loss of revenue and the loss of revenue can be there only when recipient of income has not paid tax. Therefore, recovery provisions under section 201(1) can be invoked only when loss to revenue is established, and that can only be established when it is demonstrated that the recipient of income has not paid due taxes thereon. In the absence of the statutory powers to requisition any information from the recipient of income, the assessee is indeed not always able to obtain the same. The provisions to make good the shortfall in collection of taxes may thus end up being invoked even when there is no shortfall in fact. On the other hand, once assessee furnishes the requisite basic information, the Assessing Officer can very well ascertain the related facts about payment of taxes on income of the recipient directly from the recipients of income. It is not the revenue's case before us that, on the facts of this case, such an exercise by the Assessing Officer is not possible. It does put an additional burden on the Assessing Officer before he can invoke Section 201(1) but that's how Hon'ble High Court has visualized the scheme of Act and that's how, therefore, it meets the end of justice.**

18. Hon'ble Mumbai Tribunal in case of Pfizer Ltd vs. ITO(TDS)(OSD)(supra) on identical issue and similar facts held as under:

“12. As already explained and evidenced from the computation of income as well as the orders of AO in the assessment proceedings, the entire provision has been disallowed under section 40(a)(ia) and section 40(a)(i). Once the amount has been disallowed under the provisions of section 40(a)(i) on the reason that tax has not been deducted, it is

surprising that AO holds that the said amounts are subject to TDS provisions again so as to demand the tax under the provisions of section 201 and also levy interest under section 201(1A). We are unable to understand the logic of AO in considering the same as covered by the provisions of section 194C to 194J. Assessee as stated has already disallowed the entire amount in the computation of income as no TDS has been made. Once an amount was disallowed under section 40(a)(i)/(ia) on the basis of the audit report of the Chartered Accountant, the same amount cannot be subject to the provisions of TDS under section 201(1) on the reason that assessee should have deducted the tax. If the order of AO were to be accepted then disallowance under section 40(a)(i) and 40(a)(ia) cannot be made and provisions to that extent may become otiose. In view of the actual disallowance under section 40(a)(i) by assessee having been accepted by AO, we are of the opinion that the same amount cannot be considered as amount covered by the provisions of section 194C to 194J so as to raise TDS demand again under section 201 and levy of interest under section 201(1A). Therefore, assessee's ground on this issue are to be allowed as the entire amount has been disallowed under the provisions of section 40(a)(i)/(ia) in the computation of income on the reason that TDS was not made. For this reason alone assessee's grounds can to be allowed. Considering the facts and reasons stated above assessee's grounds are allowed.

13. *Assessee has raised one more contention that interest under section 201(1A) should be levied till the date of payment and not till the date of order. Anyhow this issue became academic in nature, as we have already held that demand under section 201 cannot be raised once the entire amount has been disallowed in the computation of income under section 40(a)(i) and 40(a)(ia). In view of this even though the contention is correct being a legal issue, there is no need for adjudicating the matter as the grounds raised have been held in favour of assessee. AO is directed to delete the said demand so raised. Appeal is accordingly allowed."*

In the present facts, there is no loss to the revenue in the year in which provision is created, since the assessee before us is stated to have disallowed the entire provision under section 40(a)(i)/(ia) of the Act on which TDS could not be effectuated. All details of payee and the details regarding when subsequently the actual payments were effectuated on receipt of Invoice/bill, was submitted before the Ld.AO. The Ld.AO without verifying the same levied interest under section 201(1A) of the Act. Then, the question that arises to our minds that, is it logical to put such assessee(deductor) into double jeopardy by casting the liability under chapter XVII-B on an assumption of non payment of taxes on income embedded in

the receipt by an assessee (payee) ? We answer this question in negative.

20. On the amount on which TDS could not be effectuated due to non receipt of invoices, the Ld.AO will first have to ascertain if the payee has paid taxes on the income embedded therein. This is the pre condition for levying interest u/s. 201(1A) of the Act.

21. In our considered opinion applicability of section 201(1A) needs verification of payment of tax by the recipient (payee) at the end of the Ld.AO since the Ld.AO failed to carry out necessary verification in respect of the payees, the details of which were provided by assessee. In the interest of justice, we direct the Ld.AO to verify the details filed by assessee in respect of the payee in accordance with the principles laid down by *Hon'ble Supreme Court* in case of *Hindustan Coco Cola* reported in (2007) 163 *Taxman* 355 and keeping in view the intention of the legislature envisaged under section 40(a)(i)/(ia) of the Act. Assessee is directed to file all the relevant details once again, details of TDS deducted and paid to the Government account on payment being made in the subsequent year on reversal of the provision. At this juncture we caution the Ld.AO provisions of section 201(1) cannot be invoked, in view of the fact that there is no loss to the revenue in the present facts of the case as observed by us in the preceding paras.

22. In case the assessee has not added back the provision created towards the expenditure to the total income in the statement of income and took advantage of provision by reducing the income of assessee then assessee is liable for interest u/s. 201(1)&(1A) of the Act.

Accordingly, the grounds raised by assessee in both the appeals stands allowed for statistical purposes.”

From the above, it is clear that assessee cannot be held liable u/s. 201(1) if no benefit has accrued to assessee.

11. It is pertinent to note that the Ld.CIT(A) for assessment year 2013-14, the Ld.CIT(A) has dealt with in detail the applicability of section 201(1)/(1A) having regards to the scheme of the Act and various decisions by *Hon'ble Karnataka High Court* as well as various decisions of coordinate bench. We have reproduced the findings of the Ld.CIT(A) in the preceding paragraphs. And the same stands upheld based on the discussions herein above.

12. We therefore, are of the view that the entire provision cannot be subjected to the rigours of section 201 for a default that is not been committed by assessee. We confer with the view taken by the Ld.CIT(A) for assessment year 2013-14 to be applied for all the assessment years under consideration.

13. On the issue of applicability of TDS provisions on the commission and Rebate payment by assessee, we note that the relevant observations of the agreement has not been looked into by the Ld.AO. It is the submissions of the Ld.Counsel that it is a non-exclusive right granted to the dealer on principal-to-principal basis and that there is no principal agent relationship, for which provisions of TDS could be applied on such payments. It is also noted that wherever the payment of commission included the element of income in the hands of the recipient, TDS has been effectuated by assessee. *Coordinate Benches of this Tribunal.*

14. However, in respect of the amount shown as rebate and commissioned to the dealers, the agreement has not been looked into by the authorities below.

In the event any amount provisioned as commission / rebate falls under the purview of TDS provisions, the disallowance cannot be simply made for the reason that no TDS has been effectuated as the assessee has *suo moto* disallowed the entire provisioned amount for each year under consideration u/s. 40(a)(ia) of the Act.

15. We also draw our support from the decision of *Hon'ble Supreme Court* in case of *Hindustan Coca Cola Beverage P.Ltd., Vs. Commissioner of Income Tax reported in (2007) 293 ITR 226 (SC)* has held that in the event the payee has paid taxes, the deductor cannot

be held liable for not deducting the TDS. As the Ld.AO has not verified this aspect and considering the fact that assessee has paid taxes by *suo moto* disallowance of the entire provisioned amount, it is difficult to agree with the orders passed by the authorities below.

16. Accordingly, in the interest of justice, we remand the amounts that has been provisioned by assessee pertaining to the commission / rebates extended to the dealers to be verified based on the agreement entered into between the parties in the light of the decisions relied upon by the assessee reproduced hereinabove in para no. 8.

The Ld.AO is also directed to verify the issue in accordance with the principle laid down by *Hon'ble Supreme Court* in case of *Hindustan Coca Cola Beverage P.Ltd., Vs. Commissioner of Income Tax (supra)* in respect of the provisions that has been considered by the Ld.AO for computing interest u/s. 201(1A) of the Act.

In the result the appeals filed by assessee and revenue for A.Ys. 2012-13 and 2013-14 stands allowed for statistical purposes.

Order pronounced in the open court on 25th March, 2022.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 25th March, 2022.
/MS /

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore

Annexure – A

Dell India Private Limited			
Status : Private Limited Company		Assessment Year 2012-13	
		Previous Year : 2011-12	
COMPUTATION OF INCOME TAX			
PARTICULARS	Reference	AMOUNT Rs.	AMOUNT Rs.
COMPUTATION OF INCOME TAX			
18.5% of Book profits - Tax payable as per section 115JB	MAT Comp		338,553,898
Income tax as per the provisions of the Income-tax Act, 1961	Computation		788,005,044
TOTAL INCOME TAX PAYABLE <i>(Higher of the above two is treated as tax payable)</i>			788,005,044
TOTAL TAX PAYABLE			788,005,044
Add: surcharge @ 5%			39,400,252
Tax on Total Income with surcharge			827,405,296
Add: Cess @ 3%			24,822,159
Tax on Total Income with surcharge and Cess			852,227,455
Less Tax Deducted at Source			301,085,831
			551,141,624
Less Advance Tax			920,000,000
Add Interest under section 234B		-	(368,858,376)
Add Interest under section 234C		-	-
			(368,858,376)
Less			
Self assessment tax paid			-
BALANCE TAX PAYABLE / (REFUNDABLE)			(368,858,376)

DELL INDIA PRIVATE LIMITED			
Status: Private Limited Company			
		Assessment Year 2012-13	
		Financial Year 2011-12	
COMPUTATION OF TOTAL INCOME UNDER NORMAL PROVISIONS OF INCOME TAX ACT			
	PARTICULARS	AMOUNT Rs.	AMOUNT Rs.
			TOTAL
A	INCOME FROM BUSINESS		
	Profit / (loss) before tax		(474,330,092)
Add:	Disallowances under the Income-tax Act, 1961 ("the Act")		
	Depreciation as per Books of accounts	261,656,376	
	<u>Expenses disallowed u/s 43B</u>		
	Bonus	20,245,045	
	Leave encashment	52,327,210	
	Gratuity	15,566,234	
	Commission	59,369,568	
	Octroi	-	
	VAT	197,082,355	
	Provision for Doubtful Deposits	-	
	Provision for Doubtful Advances	2,701,262,657	
	Provision for Doubtful Debts	-	
	Loss on sale/scraping of assets	4,636,458	
	<u>Expenses disallowed u/s 40a</u>		
	<u>Disallowance u/s 40a(i)</u>	1,582,521,633	
	Disallowance u/s 40a(i)	366,559,742	
	Disallowance u/s 40a(ii)	-	
	Disallowance u/s 40a(v)	-	
	Penalty	2,288,427	
	Interest Payable to Micro, Small and Medium enterprises disallowed under section 23 of the Micro, Small and Medium Enterprises Development Act	2,672,284	
	Donation	384,285	5,266,572,274
Add:	Principle amount of Finance Lease rent received during the year	37,161,630	37,161,630
Less:	Allowances under the Income-tax Act, 1961		
	Interest income - (Considered separately)	233,595,508	
	Depreciation under the Act	214,788,949	
	<u>Expenses allowed u/s 40a (disallowed in AY 2011-12 now allowed on payment of TDS or on reversal of entries)</u>		
	Disallowance u/s 40a(i)	157,685,596	
	Disallowance u/s 40a(i)	277,841,260	
	<u>Expenses allowed u/s 43B (disallowed in earlier years and now allowed on payment)</u>		
	Leave encashment	7,224,373	
	Gratuity	36,680,461	
	Octroi	-	
	Bonus	17,535,127	
	Commission	-	
	<u>Expenses allowed u/s 43B - payments made in relation to current year's provision</u>		
	Leave encashment	2,831,540	
	Commission	59,369,568	
	VAT	60,034,290	

	PARTICULARS	AMOUNT Rs.	AMOUNT Rs.
			TOTAL
	Realized Capital Foreign Exchange Gain-capitalized for IT purpose as per Sec. 43A	68,832	
	Finance lease rentals (including future rentals) credited to P&L account	1,697,445	
	Reversal of the provision for doubtful debts	2,062,274	
	Reversal of the provision for doubtful	283,862,989	
	Reversal of the provision for doubtful deposits	111,332,058	
	Provision for warranty	969,705,566	
			2,436,315,835
	Income from business		2,393,087,977
B	INCOME FROM OTHER SOURCES		
	Interest income	233,595,508	
	Income from other sources		233,595,508
	GROSS TOTAL INCOME		2,626,683,485
	Deductions under chapter VIA		-
	TOTAL INCOME		2,626,683,485
	Taxable Income Rounded off		2,626,683,480
	Income tax thereon @ 30%		788,005,044
	Surcharge @ 5%		39,400,252
	Education Cess @ 3%		24,822,159
			852,227,455

Annexure – B

DELL INTERNATIONAL SERVICES INDIA PRIVATE LIMITED (Formerly known as Perot Systems TSI (India) Private Limited)			
STATUS : PRIVATE LIMITED COMPANY		PREVIOUS YEAR ENDED : 31 ST MARCH 2012	
		ASSESSMENT YEAR : 2012-13	
COMPUTATION OF INCOME TAX			
PARTICULARS	Reference	AMOUNT Rs.	AMOUNT Rs.
COMPUTATION OF INCOME TAX			
18.5 % OF BOOK PROFITS TAX PAYABLE AS PER SECTION 115JB	MAT A IV		94,24,90,230
INCOME TAX AS PER OTHER PROVISIONS OF INCOME TAX ACT.	COMPUTATION		1,50,55,88,643
TOTAL INCOME TAX PAYABLE (HIGHER OF THE TWO IS TREATED AS INCOME TAX PAYABLE)			1,50,55,88,643
MAT CREDIT CLAIMED			56,30,98,413
TOTAL TAX PAYABLE AFTER MAT CREDIT			94,24,90,230
LESS TAX DEDUCTED AT SOURCE		14,77,53,993	14,77,53,993
BALANCE TAX PAYABLE			79,47,36,237
LESS ADVANCE TAX PAYMENTS			95,10,00,000
BALANCE TAX PAYABLE/(REFUNDABLE)			(15,62,63,763)
ADD INTEREST			
- U/S 234 A		-	
- U/S 234 B		-	
- U/S 234 C		-	
REFUND DUE			(15,62,63,763)

DELL INTERNATIONAL SERVICES INDIA PRIVATE LIMITED (Formerly known as Perot Systems TSI (India) Private Limited)				
STATUS : PRIVATE LIMITED COMPANY			Previous Year : 2011-12	
			Assessment Year : 2012-13	
COMPUTATION OF TOTAL INCOME UNDER NORMAL PROVISIONS OF INCOME TAX ACT				
	PARTICULARS	Reference	AMOUNT Rs.	
				TOTAL
A	INCOME FROM BUSINESS			
	Income from Chennai SEZ unit		12,83,55,202	
	Less: Deduction under section 10AA		12,83,55,202	-
	Income from other Units			4,32,52,01,553
	Profits and Gains of Business			4,32,52,01,553
B	INCOME FROM OTHER SOURCES			
	Interest Income		34,73,63,343	
	Miscellaneous Income		-	34,73,63,343
	Income from Other Sources			34,73,63,343
	Gross Total Income			4,67,25,64,896
	Less : Deduction under Chapter VIA			
	50% of the donations made	3,21,31,417		
	10% of Gross total income	46,72,56,489.60		
	Least of the above is allowed to be claimed	3,21,31,417		3,21,31,417
	Taxable Income			4,64,04,33,479
	Taxable Income Rounded off			4,64,04,33,480
	Tax Thereon @ 30%			1,39,21,30,044
	Add: Surcharge @ 5%			6,96,06,502
	Tax on Total Income with surcharge			1,46,17,36,546
	Add: Education cess @ 2%			2,92,34,731
	Add: Secondary & higher education cess @ 1%			1,46,17,365
	Tax on Total Income with surcharge			1,50,55,88,643

Dell International Services India Private Limited			
Computation of Income from business			Rs.
Particulars	10AA		
	SEZ Unit Chennai	Non 10A	Grand Total
Net Profit for the year (refer Schedule V)			
Add: Inadmissible expenses:	10,24,02,520	4,43,89,35,405	4,54,13,37,925
Depreciation as per books			
Provision for Doubtful Advances	6,28,68,653	88,43,35,536	94,72,04,189
Provision for doubtful deposits		14,62,32,163	14,62,32,163
Provision for service tax receivable		19,91,920	19,91,920
Provision for penalty on Non Development of Land		3,45,79,305	3,45,79,305
Amounts inadmissible under Section 43B:		1,20,00,000	1,20,00,000
- Leave encashment			
- Bonus	1,47,95,016	14,46,43,832	15,94,38,848
- Commission	3,24,03,456	9,89,60,128	13,13,63,584
Provision for Gratuity disallowed		39,90,962	39,90,962
Disallowance under Section 40(a)(i)	61,68,133	18,50,25,579	19,11,94,712
Disallowance under Section 40(a)(ia)		3,19,350	3,19,350
Donations		49,16,36,134	49,16,36,134
- Foreign exchange loss/ (gain) on capital assets		6,88,55,969	6,88,55,969
- Debonding charges on capital asset		63,01,760	63,01,760
Interest on Income Tax demand		1,07,34,155	1,07,34,155
Fringe Benefit tax paid disallowed		2,75,65,336	2,75,65,336
Amount inadmissible u/s 23 of the Micro, Small and Medium Enterprises Development Act		3,67,831	3,67,831
		1,74,557	1,74,557
Less: Admissible Expenses/ considered separately:	11,62,35,258	2,11,77,15,516	2,23,39,50,774
Depreciation as per Section 32(1) of the Income Tax Act, 1961			
Amortisation of expense u/s 35DD	3,00,97,680	1,04,08,30,727	1,07,09,28,407
Amounts admissible under Section 43B:	4,352	1,88,648	1,93,000
- Leave encashment			
- Bonus	46,44,464	5,82,11,559	6,28,56,023
- Gratuity	3,52,31,568	11,82,53,343	15,34,84,911
Amounts admissible under Section 40(a) [disallowed in the earlier year]:	2,03,04,512	43,71,42,448	45,74,46,960
- Disallowance under Section 40(a)(ia)			
Provision for LTI accrual reversal (provision disallowed in earlier year)		2,54,33,202	2,54,33,202
Provision for Service Tax receivable (provision disallowed in earlier year)		1,60,50,181	1,60,50,181
		7,77,723	7,77,723
Provision for F&F Reserve (provision disallowed in earlier year)			
Provision for Loss on service contract (provision disallowed in earlier year)		2,25,07,082	2,25,07,082
Provision for doubtful deposits (provision disallowed in earlier year)		14,58,05,113	14,58,05,113
Provision for debonding of customs duty disallowed in the earlier years		24,59,710	24,59,710
- Interest Income		1,17,62,367	1,17,62,367
- Profit (Loss) on sale of fixed asset		34,73,63,343	34,73,63,343
	9,02,82,576	2,23,14,49,368	2,32,17,31,944
Total Profits derived by the business	12,83,55,202	4,32,52,01,553	4,45,35,56,756

DELL INTERNATIONAL SERVICES INDIA PRIVATE LIMITED (Formerly known as Perot Systems TSI (India) Private Limited)			
STATUS : PRIVATE LIMITED COMPANY		PREVIOUS YEAR ENDED : 31 ST MARCH 2012	
		ASSESSMENT YEAR : 2012-13	
COMPUTATION OF BOOK PROFITS AS PER SECTION 115 JB			
PARTICULARS		AMOUNT Rs.	AMOUNT Rs.
Profit after tax as per profit & loss account			2,01,70,24,997
Add: Income tax paid or payable or provision made			
Interest on Tax Provision relating to Previous Years	44,38,16,131		
Current Tax	93,00,33,233		
Previous Year (Net of write-back of Rs.538 lacs)	54,61,51,428		
MAT Credit	46,49,84,236		
Interest on Income Tax demand	2,75,65,336		
Interest on delayed payment of TDS	7,13,827	2,41,32,64,192	
Amount carried to any reserve			
Provision for unascertained liabilities		-	
Provision for loss of subsidiary companies		-	
Amount of Depreciation		94,72,04,189	
Dividend proposed or paid (Including distribution Tax)		-	
Expenditure relatable to any income to which section 10 [other than section 10 (38)] or section 11 or section 12 apply			
The amount of deferred tax and provision therefor		13,93,27,899	
Amounts set aside as provisions for diminution in the value of any asset			
- Provision for Doubtful Advances	14,62,32,163		
- Provision for Doubtful Deposits	19,91,920		
- Provision for service tax receivable	3,45,79,305	18,28,03,388	
			3,68,25,99,668
Less: Amount withdrawn from any reserves or provision			
- Provision for doubtful Deposit	24,59,710		
- Provision for LTI accrual reversal	1,60,50,181		
- Provision for Service Tax receivable	7,77,723		
- Provision for F&F Reserve	2,25,07,082	4,17,94,696	
Income to which section 10 [other than section 10 (38)] or section 11 or section 12 apply			
Amount of Depreciation debited to the profit and loss account (excluding the depreciation on account of revaluation of assets)		94,72,04,189	
Deferred Tax adjustment		-	
The amount withdrawn from revaluation reserve and credited to profit & loss account to the extent it does not exceed the amount of depreciation on account of revaluation of assets		-	
Loss brought forward or unabsorbed depreciation, whichever is less as per books of account		-	
Profit of sick industrial company for the assessment year commencing on and from the assessment year relevant to the previous year under in which the said company has become a sick industrial company under sub section (1) of section 17 of the sick industrial Companies (Special Provisions) Act, 1985 and ending with the assessment year during which the entire net worth of such company becomes equal to or exceeds the accumulated losses.		-	
			98,89,98,885
Book profit			4,71,06,25,780
Tax as per MAT			
18.5% of book profits			87,14,65,769
Add: Surcharge @ 5%			4,35,73,288.47
Tax including surcharge			91,50,39,058
Add: Education cess			1,83,00,781.16
Add: Secondary and higher education cess			91,50,390.58
Total tax payable under MAT			94,24,90,230

Annexure – C

Dell India Private Limited			
Status : Private Limited Company		Assessment Year 2013-14	
		Previous Year : 2012-13	
COMPUTATION OF INCOME TAX			
PARTICULARS	Reference	AMOUNT Rs.	AMOUNT Rs.
COMPUTATION OF INCOME TAX			
18.5% of Book profits - Tax payable as per section 115JB	MAT Comp		-
Income tax as per the provisions of the Income-tax Act, 1961	Computation		6,69,37,428
TOTAL INCOME TAX PAYABLE <i>(Higher of the above two is treated as tax payable)</i>			6,69,37,428
TOTAL TAX PAYABLE			6,69,37,428
Add: surcharge @ 5%			33,46,871
Tax on Total Income with surcharge			7,02,84,299
Add: Cess @ 3%			21,08,529
Tax on Total Income with surcharge and Cess			7,23,92,828
Less Tax Deducted at Source			44,01,64,909 (36,77,72,081)
Less Advance Tax			70,00,00,000 (1,06,77,72,081)
Add Interest under section 234B		-	-
Add Interest under section 234C		-	-
			(1,06,77,72,081)
Less Self assessment tax paid			-
BALANCE TAX PAYABLE / (REFUNDABLE)			(1,06,77,72,081)

DELL INDIA PRIVATE LIMITED			
Status: Private Limited Company			
Assessment Year 2013-14			
Financial Year 2012-13			
COMPUTATION OF TOTAL INCOME UNDER NORMAL PROVISIONS OF INCOME TAX ACT			
	PARTICULARS	AMOUNT Rs.	AMOUNT Rs.
A	INCOME FROM BUSINESS		TOTAL
	Profit / (loss) before tax		(2,31,95,79,224)
	Add: Exceptional and prior period items		2,44,20,86,224
	Profit / (loss) before tax and exceptional and prior period items		12,25,07,000
Add:	Disallowances under the Income-tax Act, 1961 ("the Act")		
	Depreciation as per Books of accounts	73,49,32,193	
	Expenses disallowed u/s 43B		
	Bonus	2,04,52,301	
	Leave encashment	2,77,15,453	
	Gratuity	1,79,32,336	
	Commission	4,22,82,605	
	Provision for Doubtful Deposits	1,89,43,382	
	Provision for other receivables	14,18,30,342	
	Provision for Doubtful Debts	27,55,74,926	
	Loss on sale/scrapping of assets	40,71,739	
	Expenses disallowed u/s 40a		
	Disallowance u/s 40a(i)	1,17,94,354	
	Penalty	1,24,71,979	
	Interest Payable to Micro, Small and Medium enterprises disallowed under section 23 of the Micro, Small and Medium Enterprises Development Act	13,42,112	
	Donation	3,91,27,641	
	Principle amount of Finance Lease rent received during the year	3,82,76,758	2,40,71,82,995
Less:	Allowances under the Income-tax Act, 1961		
	Interest income - (Considered separately)	26,23,54,810	
	Depreciation under the Act	17,56,58,441	
	Expenses allowed u/s 40a (disallowed in AY 2012-13 now allowed on payment of TDS or on reversal of entries)		
	Disallowance u/s 40a(i)	1,58,25,21,633	
	Disallowance u/s 40a(i)	36,65,59,742	
	Expenses allowed u/s 43B (disallowed in earlier years and now allowed on payment basis)		
	Leave encashment	1,57,97,703	
	Gratuity (This includes Rs. 15,350,030 pertaining to opening balance and Rs. 17,932,336 provided for during the year)	4,61,02,780	
	Bonus	2,02,45,045	
	VAT	84,41,845	
	Expenses allowed u/s 43B - payments made in relation to current year's provision		
	Commission	4,22,82,605	
	Lease rental expenses towards Vehicles taken lease	4,85,97,994	
	Realized Capital Foreign Exchange Gain - capitalized for IT purpose as per Sec 43A	3,57,444	
			2,56,89,20,042
	Income from business		(3,92,30,047)
B	INCOME FROM OTHER SOURCES		
	Interest income	26,23,54,810	
	Income from other sources		26,23,54,810
	GROSS TOTAL INCOME		22,31,24,763
	Deductions under chapter VIA		
	TOTAL INCOME		22,31,24,763
	Taxable Income Rounded off		22,31,24,760
	Income tax thereon @ 30%		6,69,37,428

Dell India Private Limited		
Status: Private Limited Company	Assessment Year: 2013-14	
	Previous Year: 2012-13	
Statement showing the computation of book profits u/s 1153B		
Particulars		Amount (Rs.)
Profit before tax as per Profit and Loss Account		(2,31,95,79,224)
Add:		
Income tax paid or payable or provision made	-	
Amount carried to any reserve	-	
Provision for unascertained liabilities	-	
Provision for loss of subsidiary companies	-	
Amount of Depreciation	23,49,32,193	
Dividend proposed or paid (Including distribution Tax)	-	
Expenditure relating to any income to which section 10 [other than section 10 (38)] or section 11 or section 12 apply	-	
Amount or amounts set aside as provision for diminution in the value of any asset		
Provision for Doubtful Deposits	1,89,43,382	
Provision for Doubtful Debts	27,55,74,926	
Provision for receivables	14,18,30,342	
Provision towards VAT receivable - Exceptional items	1,47,13,52,177	
The amount of deferred tax and provision therefor	-	2,14,26,33,020
Less:		
Amount withdrawn from any reserves or provision	-	
Provision for doubtful debts reversed	-	
Provision for doubtful advances reversed	-	
Provision for doubtful deposits reversed	-	
Income to which section 10 [other than section 10 (38)] or section 11 or section 12 apply	-	
Amount of Depreciation	23,49,32,193	
The amount withdrawn from revaluation reserve and credited to profit & loss account to the extent it does not exceed the amount of depreciation on account of revaluation of assets	-	
Loss brought forward or unabsorbed depreciation, whichever is less as per books of account	-	
The amount of deferred tax and provision therefor	-	
Profit eligible for deduction under section 80HHC, computed under clause (a) or (b) or (c) of sub section (3) or sub section (3A)	-	
Profit eligible for deduction under section 80HHE, computed under sub section (3) or sub section (3A)	-	
Profit eligible for deduction under section 80HHF, computed under sub section (3)	-	
Profit of sick industrial company for the assessment year commencing on and from the assessment year relevant to the previous year under in which the said company has become a sick industrial company under sub section (1) of section 17 of the Sick Industrial Companies (Special Provisions) Act, 1985 and ending with the assessment year during which the entire net worth of such company becomes equal to or exceeds the accumulated losses.	-	
Book profits under section 1153B		<u>23,49,32,193</u> (41,18,78,397)
MAT payable @ 18.5%		-