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

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
and
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER

ITA No.663/Bang/2013
(Assessment year: 2009-10)

M/s.PRB Marketing Pvt. Ltd.,
#192/12-2, 1st 'C' Cross,
Revenue Layout, 5th Block,
BSK 3rd Stage,
Bangalore-560085. … Appellant
PAN:AAECP 5655 M

Vs.

Income-tax Officer,
Ward 12(1),
Bangalore. … Respondent

Appellant by: Shri S.Venkatesan, CA.
Respondent by: Shri Naresh Saka, Addl.CIT(DR).

Date of hearing : 30/11/2015.
Date of pronouncement: 11/12/2015.

O R D E R

Per VIJAY PAL RAO, JM :

This appeal by the assessee is directed against the order dated 21/3/2013 of the CIT(A) for the assessment year 2009-10.

2. The assessee has raised the following grounds of appeal:

> 1. ñThe orders of the authorities below in so far as they are against the appellant are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.

> 2. The learned CIT[A] is not justified in upholding the disallowance of Rs.1,52,61,295/- u/s.40[a][ia] of the Act, which under the facts and in the circumstances of the appellant's case is not only opposed to law as the same is not payable at the end of the year, but, also, on facts, as the entire payments do not constitute expenditure incurred by the appellant and hence, no disallowance u/s. 40[a][ia] of the Act ought to have been made.
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> 3. Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies itself liable to be charged to interest u/s 234-B and 234-C of the Act, which under the facts and in the circumstances of the appellant's case deserves to be cancelled.
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> 4. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs. ò

3. The assessee is a private limited company and engaged in the business as Channel Development Agency (CDA) for insurance business of M/s.Reliance Life Insurance Co. Ltd.,[RLIC] The assessee filed its return of income on 30/9/2009 returning total income of Rs.21,16,840/-. The Assessing Officer (AO) while passing assessment u/s 143(3) dated 30/12/2011 disallowed a sum of Rs.1,52,61,295/- on account of commission paid by the assessee by invoking the provisions of sec.40(a)(ia) of the IT Act.

4. The assessee challenged the action of the AO before the CIT(A) and submitted that the business of CDA carried on by the

assessee is akin to the business as franchisees. RICL carries on business of providing life insurance by promoting various schemes and engaged the services of CDA for marketing the insurance policies offered by it. CDA, like assessee, recruits and trains various field advisors, who go to the business premises of prospective customers and solicit insurance business for RICL. On successful procurement of insurance policy, the field advisors are entitled to commission from RICL. Since the CDA have recruited and trained the field advisors, RICL pay a overriding commission to CDA which is reckoned at 50% of the commission payable to advisors. Thus, the assessee explains the arrangement and business module of selling insurance wherein role of the CDA was in procurement of the insurance policy and recruitment and training of the field advisors. The assessee contended that the sum of Rs.1,52,61,295/- shown by the assessee as commission is nothing but the amount paid to lead generators and was to be reimbursed to the assessee. Therefore, this was not an expenditure of the assessee though it was shown in the Profit & Loss Account as commission paid. The assessee also contended before the CIT(A) that in fact, the actual commission paid by the assessee is only Rs.50,17,957/- and not Rs.1,52,61,295/-. As the assessee has already received a sum of Rs.1,02,43,338/- from S/Shri Rangaraju and R.Bharath who are the two advisors of the assessee as well as the directors of the

assessee-company. The CIT(A) did not accept the contentions of the assessee and confirmed the disallowance made by the AO.

5. Now before us, learned AR of the assessee has reiterated the contention that this amount of Rs.1,52,61,295/- is not an expenditure of the assessee but it was an amount to be reimbursed to the assessee by these two persons viz. S/Shri Rangaraju and R.Bharath. Therefore, no disallowance is called for u/s 40(a)(ia). Alternatively, learned AR of the assessee has submitted that when the amount was not payable as on 31/3/2009, but was already paid, therefore, the provisions of sec. 40(a)(ia) are not applicable to the expenditure of the amount which is not payable as on 31st March. Learned AR of the assessee has referred to the balance-sheet of the assessee and submitted that the only payable amount shown by the assessee is Rs.12,71,775/- and disallowance, if any, u/s 40(a)(ia) the same should be restricted only to the amount which is payable as on 31/3/2009. In support of his contention, he has relied upon the decision of the Special Bench of the Tribunal in the case of *Merilyn Shipping* (16 ITR(Trib) 1) which has been upheld by the Hon'ble Allahabad High Court. Learned AR of the assessee has submitted that SLP filed by the department against the judgment of the Hon'ble Allahabad High Court has already been dismissed. He has further submitted that the co-ordinate bench of this Tribunal had an occasion to consider an identical issue in the case of *DCIT vs. Anand Marakala* vide order dated 13/09/2013 in ITA

No.1584/Bang/2012. Thus, learned AR of the assessee has relied upon the decision of the co-ordinate bench in the case of *Anand Marakala* (supra).

6. On the other hand, learned Departmental Representative submitted that the assessee has clearly shown this amount in the P&L A/c as commission paid and therefore, the provisions of sec.194H are applicable in the case of the assessee. Even if the assessee has made this payment on behalf of other person, assessee is bound to deduct tax at source as per the provisions of sec.194H. Failure of deducting tax at source on the part of the assessee invited disallowance u/s 40(a)(ia). He has relied upon the orders of the authorities below.

7. We have considered the rival submissions as well as the relevant material on record. Learned AR of the assessee has argued at length on the point that the amount debited to P&L A/c is not actual expenditure of the assessee but was to be reimbursed to the assessee by Shri Rangaraju and R.Bharath. Learned AR of the assessee has also pointed out that the assessee has received total amount of Rs.1,02,43,338/- from these two persons which is part of the assessee's turnover shown in the P&L A/c. Therefore, the amount shown as commission paid in the P&L A/c is not the expenditure of the assessee but it was paid on behalf of other persons. Except the submissions advanced the assessee has not produced any record in support of the claim that this amount is reimbursable to the assessee.

Neither any agreement between the parties nor any other record has been filed to show that the amount in question is paid by the assessee on behalf of the other persons and was in fact received back. Accordingly, we are unable to accept the contention of the assessee on this point.

8. Alternatively, learned AR of the assessee has submitted that disallowance can be restricted only to the amount which is payable on 31/3/2009. We find that on the issue of applicability of sec. 40(a)(ia) on the amount already paid has been considered by the Special bench of the Tribunal in the case of *Merilyn Shipping* (supra). We further note that the co-ordinate bench of this Tribunal in the case of *Anand Marakala* (supra) had the occasion to consider the identical issue. The Tribunal has discussed the issue in detail and after analyzing the provisions as well as various precedents on the issue, has held in paras.13 to 30 as under:

> ñ13. We have considered the rival submissions. As far as the cross objection is concerned, the question for our consideration is as to whether section 40(a)(ia) amended by the Finance Act, 2012 with effect from 01.04.2013 is retrospective from 01.04.2005 or prospective from the date specified.
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> 14. In order to find answer to this question, it would be relevant to note down the legislative history of the provision. Section 40 has certain clauses providing for the amounts which are not deductible. Sub-clause (ia) of clause (a) of section 40 was inserted by the Finance (No.2) Act, 2004 with effect from 1st April, 2005 reading as under:-

ñ40. Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computed the income chargeable under the head `Profits and gains of business or professionõõ .

é ..

(ia) any interest, commission or brokerage, 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 or, after deduction, has not been paid during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200 :

Provided that where in respect of any such sum, tax has been deducted in any subsequent year or, has been deducted in the previous year but paid in any subsequent year after the expiry of the time prescribed under sub-section (1) of section 200, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

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

(i) ñcommission or brokerageò shall have the same meaning as in clause (i) of the Explanation to section 194H;

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

(iii) ñprofessional servicesò shall have the same meaning as in clause (a) of the Explanation to section 194J;

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

The Memorandum explaining the provisions in the Finance Bill explained the rationale of the insertion of the new provision in following words :-

ñWith a view to **augment compliance of TDS provisions,** it is proposed to extend the provisions of section 40(a)(i) to payments of interest, commission or brokerage, fees for professional services or fees for technical services to residents, and payments to a resident contractor or sub-contractor for carrying out any work (including supply of labour for carrying out any work), on which tax has not been deducted or after deduction, has not been paid before the expiry of the time prescribed under sub-section (1) of section 200 and in accordance with the other provisions of Chapter XVII-B. It is also proposed to provide that where in respect of payment of any sum, tax has been deducted under Chapter XVII-B or paid in any subsequent year, the sum of payment shall be allowed in computing the income of the previous year in which such tax has been paid.

*The proposed amendment will take effect from 1st day of April, 2005 and will, accordingly, apply in relation to the assessment year 2005- 2006 and subsequent years. [Clause 11]*ò

Thereafter the Finance Act, 2008 made amendment to clause (a) in sub-clause (ia) in section 40 with retrospective effect from 1st April, 2005. The section as amended by the Finance Act, 2008 read as under:-

ñ(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 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.ò ;

15. The Finance Act, 2008 brought out amendment to section 40(a)(ia) w.r.e.f. 1.4.2005 by relaxing earlier position to some extent. It made two categories of defaults causing disallowance on the basis of the period of the previous year in which tax was deductible. The first category of disallowances included the cases in which tax was deductible and was so deducted during the last month of the previous year but there was failure to pay such tax on or before the due date specified in sub-section (1) of section 139 of the Act. In other words, if any amount on which tax was deductible during last month of the previous year, that is March 2005, but was paid before 31st October, 2005, being the due date u/s 139(1), the deductibility of the amount was kept intact. The second category included cases other than those given in category first. To put it simply, if tax was deductible and was so deducted during the first eleven months of the previous year, that is, up to February, 2005, the disallowance was to be made if the assessee failed to pay it before 31st March, 2005.

16. Then came the amendment to section 40(a)(ia) by the Finance Act, 2010 with retrospective effect from 1st April, 2010. The provision so amended, now reads as under :-

ñ(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.ò

17. From the above provision as amended by the Finance Act, 2010 with retrospective effect from 1st April, 2010 it can be seen that the only difference which this amendment has made is dispensing with the earlier two categories of defaults as per the Finance Act, 2008, as discussed in the earlier para, causing disallowance on the basis of the period of the previous year during which tax was deductible. The first category of disallowances included the cases in which tax was deductible and was so deducted during the last month of the previous year but there was failure to pay such tax on or before the due date specified in sub-section (1) of section 139. The Finance Act, 2010 has not tinkered with this position. The second category of the Finance Act, 2008 which required the deposit of tax before the close of the previous year in case of deduction during the first eleven months, as a pre-condition for the grant of deduction in the year of incurring expenditure, has been altered. The hitherto requirement of the assessee deducting tax at source during the first eleven months of the previous year and paying it before the close of the previous year up to 3 1st March of the previous year as a requirement for grant of deduction in the year of incurring such expenditure, has been eased to extend such time for payment of tax up to due date u/s 139(1) of the Act. As per the new amendment, the disallowance will be made if after deducting tax at source, the assessee fails to pay the amount of tax on or before the due date specified in sub-section (1) of section 139 of the Act. The effect of this amendment is that now the assessee deducting tax either in the last month of the previous year or first eleven months of the previous year shall be entitled to deduction of the expenditure in the year of incurring it, if the tax so deducted at source is paid on or before the due date u/s 139(1). This is the only difference which has been made by the Finance Act, 2010.

18. The question as to whether the Amendment by the Finance Act, 2010 as aforesaid is prospective or retrospective from 1.4.2005 came up for consideration before the Mumbai Special Bench ITAT in the case of *Bharati Shipyard Ltd*. Before the Special Bench, it was argued that the amendment was made with a view to remove the unnecessary hardship caused to the assessee by the earlier provision. The Special Bench by its *order dated 9.9.2011,* however, held that the amendment carried out by the Finance Act, 2010 with retrospective effect from assessment year 2010-2011 cannot be held to be retrospective from assessment year 2005-2006. The Special Bench held that the amendment brought out by the Finance Act, 2010 to section 40(a)(ia) w.e.f. 01.04.2010, is not remedial and curative in nature.

19. Prior to the decision of the Special Bench, identical issue had come up for consideration before the ITAT Kolkata Bench in the case of *Virgin Creations Vs. ITO, Ward 32(4), Kolkata ITA No. 267/Kol/2009 for AY 05-06*. The issue that arose for consideration was disallowance of expenses u/s.40(a)(ia)claimed as deduction while computing income from business being embroidery charges, dyeing charges, interest on loan and freight charges without deducting tax at source. The Embroidery charges were paid between 22nd may, 2004 to 30.11.2004. Tax had been deducted at source but were paid to the Government only on 28.10.2005 and not within the time contemplated by Section 200(1) of the Act. The dyeing charges were paid between 5.4.2004 to 20.8.2004. Tax was deducted at source but was paid to the Government only on 28.10.2005. Frieght outward charges were paid without deduction of tax at source. Interest on loans were credited to the creditors account on 31.3.2005 to the extent they were paid after the due date for filing return of income u/s.139(1) of the Act, the disallowance was made u/s.40(a)(ia) of the Act. Before the Tribunal, the Assessee contented that the amendment by the Finance Act, 2010 with retrospective effect from 1st April, 2010 whereby amount of tax deducted at the time of making payment in respect of expenditure referred to in Sec.40(a)(ia) of the Act, if paid to the Government on or before the due date for filing the return of income due date u/s 139(1) of the Act should be allowed as a deduction. In other words it was argued that the amendment by the Finance Act, 2010 to the

provisions of Sec.40(a)(ia) has to be held to be retrospective w.e.f. 1-4-2005. The ITAT Kolkata Bench *by its order dated 15.12.2010*, held as follows:

ñ8. After hearing the rival submissions and on careful perusal of the materials available on record, keeping in view of the fact that though the Ld.D.R. submitted that the decisions of the Coordinate Benches are not binding and the Kolkata benches may take a different view, since Mumbai Bench after analyzing the provisions of Sec.40(a)9ia) since its inception and various amendments made to the same including the suggestion made by the Industry in the form of representation in their pre-budget memorandum to the Hon'ble Finance Minister and by applying the decision of the Hon'ble Apex Court in the case of Alom Extrusions Ltd., has observed that ñThe provisions of Section 40(a)(ia) as stood prior to the amendments made by the Finance Act 2010 thus were 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 u/s.139(1). In order to remedy this position and to remove the hardships which was being caused to the assessee belonging to such category, amendments have been made in the provisions of Section 40(a)(ia) by the Finance Act, 2010. The said amendments, in our opinion, thus are clearly remedial/curative in nature as held by the Hon'ble Supreme Court in the case of Allied Motors Pvt. Ltd. (supra) and Mom Extrusions Ltd. (supra) and the same therefore would apply retrospectively w.e.f. 1st April, 2005. In the case of R.B.Jodha Mal Kuthiala 82 ITR 570, it was held by the Hon'ble Supreme Court that a proviso which is inserted to remedy unintended consequences and to make the provision workable, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole. In the present case, the amount of tax deducted at source from the freight charges during the period 01/04/2005 to 28/02/2006 was paid by the Assessee in the month of July and August 2006 i.e., well before the due date of filing of its return of income for the year under

consideration. This being the undisputed position, we hold that the disallowance made by the A.O. and confirmed by the learned CIT(A) on account of freight charges by invoking the provisions of Section 40(a)(ia) is not sustainable as per the amendments made in the said provisions by the Finance Act, 2010 which, being remedial/curative in nature, have retrospective applicationò, we find no reason to deviate from the decisions of the ITATôs Mumbai Bench and Ahmedabad Bench, in the absence of a contrary view, except the other benches decisions or any other High Court. Therefore, respectfully following the decision of the Coordinate Benches (supra), we allow the ground nos. I to 3 of the assesseeôs appeal.ò

20. As against the aforesaid decision, the Revenue preferred appeal before the Hon'ble Calcutta High Court. The Hon'ble Calcutta High Court in *ITA No. 302 of 2011, GA 3200/2011 decided on 23.11.2011*, held as follows:

ñWe have heard Mr. Nizamuddin and gone through the impugned judgment and order. We have also examined the point formulated for which the present appeal is sought to be admitted. It is argued by Mr. Nizamuddin that this court needs to take decision as to whether section 40(A)(ia) is having retrospective operation or not.

The learned Tribunal on fact found that the assessee had deducted tax at source from the paid charges between the period April 1, 2005 and April 28, 2006 and the same were paid by the assessee in July and August 2006, i.e. well before the due date of filing of the return of income for the year under consideration. This factual position was undisputed. Moreover, the Supreme Court, as has been recorded by the learned Tribunal, in the case of Allied Motors Pvt. Ltd. and also in the case of Alom Extrusions Ltd., has already decided that the aforesaid provision has retrospective application. Again, in the case reported in 82 ITR 570, the Supreme Court held that the provision, which has inserted the remedy to make the provision workable, requires to be treated with retrospective operation so that reasonable deduction can be given to the section as well. In view of the authoritative

pronouncement of the Supreme Court, this court cannot decide otherwise. Hence we dismiss the appeal without any order as to costs.ò

21. Further liberalization of provisions of Section 40(a)(ia) was made through amendment brought by the Finance Act 2012. With a view to liberalize provisions of Section 40(a)(ia) of the Act Finance Act 2012 brought amendment w.e.f 01.04.2013 as under. The following second proviso shall be inserted in sub-clause (*ia)* of clause (*a*) of Section 40 by the Finance Act, 2012, w.e.f. 1-4-2013 :

ñProvided 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.ò

22. Since provisions of Section 40(a)(ia) as amended by Finance Act, 2012 is linked to Section 201 of the Act, in which a proviso was inserted, it is necessary to look into those provisions which read thus:

ñSec.201: (1) Where any person, including the principal officer of a company ï

(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) *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:*

23. Memorandum explaining the provisions while introducing Finance Bill, 2012 provides the justification of the amendment to section 40(a)(ia) in the following words:-

ñIn order to rationalise the provisions of disallowance on account of non-deduction of tax from the payments made to a resident payee, it is proposed to amend section 40(a)(ia) to provide that where an assessee makes payment of the nature specified in the said section to a resident payee without deduction of tax and is not deemed to be an assessee in default under section 201(1) on account of payment of taxes by the payee, then, for the purpose of allowing deduction of such sum, 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.ò

24. The provisions of Sec.40(a)(ia) of the Act are meant to ensure that the Assesseeôs perform their obligation to deduct tax at source in accordance with the provisions of the Act. Such compliance will ensure revenue collection without much hassle. When the object sought to be achieved by those provisions are found to be achieved, it would be unjust to disallowance

legitimate business expenses of an Assessee. Despite due collection of taxes due, if disallowance of genuine business expenses are made than that would be unjust enrichment on the part of the Government as the payee would have also paid the taxes on such income. In order to remove this anomaly, this amendment has been introduced. In case of payment to non resident, the government does not have any other mechanism to recover the due taxes. Hence, no amendment was made in section 40(a)(i). The legislature has not given blanket deduction under section 40(a)(ia). The deduction as per amended section will be allowed only if the -

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

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

(iii) payee has paid the tax due on the income declared by him in such return of income,

and the payer furnishes a certificate to this effect from an accountant in such form as may be prescribed.

25. The question is as to whether the amendment made as above is prospective or retrospective w.e.f. 1.4.2005 when the provisions of Sec.40(a)(ia) were introduced. Keeping in view the purpose behind the proviso inserted by the Finance Act, 2012 in section 40(a)(ia) of the Act, it can be said to be declaratory and curative in nature and therefore, should be given 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. In *CIT Vs. Alom Extrusions Ltd. 319 ITR 306 (SC)*, the Hon'ble Supreme Court had to deal with the question, whether omission (deletion) of the second proviso to s. 43B of the IT Act, 1961, by the Finance Act, 2003, operated w.e.f. 1st April, 2004, or whether it operated retrospectively w.e.f. 1st April, 1988? Prior to Finance Act, 2003, the second proviso to s. 43B of the IT Act, 1961 (for short, "the Act") restricted the deduction in respect of any sum payable by an employer by way of contribution to provident fund/superannuation fund or any other fund for the welfare of employees, unless it stood paid within the specified due date. According to the second proviso, the payment made by the employer

towards contribution to provident fund or any other welfare fund was allowable as deduction, if paid before the date for filing the return of income and necessary evidence of such payment was enclosed with the return of income. In other words, if contribution stood paid after the date for filing of the return, it stood disallowed. This resulted in great hardship to the employers. They represented to the Government about their hardship and, consequently, pursuant to the report of the Kelkar Committee, the Government introduced Finance Act, 2003, by which the second proviso stood deleted w.e.f. 1st April, 2004, and certain changes were also made in the first proviso by which uniformity was brought about between payment of fees, taxes, cess, etc., on one hand and contribution made to Employees' Provident Fund, etc., on the other. According to the Department, the omission of the second proviso giving relief to the assessee(s) [employer(s)] operated only w.e.f. 1st April, 2004, whereas, according to the assessee(s)-employer(s), the said Finance Act, 2003, to the extent indicated above, operated w.e.f. 1st April, 1988 (retrospectively). The Hon'ble Supreme Court held that the deletion of the second proviso was retrospective w.e.f.1.4.2004. The Court considered the scheme of the Act and the historical background and the object of introduction of the provisions of S. 43B. The Court also referred to the earlier amendments made in 1988 with introduction of the first and second provisos. The Court also noted further amendment made in 1989 in the second proviso dealing with the items covered in S. 43B(b) (*i.e.,* contribution to employees welfare funds). After considering the same, the Court was of the view that it was clear that prior to the amendment of 2003, the employer was entitled to deduction only if the contribution stands credited on or before the due date given in the Provident Fund Act on account of second proviso to S. 43B. The situation created further difficulties and as a result of representations made by the industry, the amendment of 2003 was carried out which deleted the second proviso and also made first proviso applicable to contribution to employees welfare funds referred to in S. 43B(b).

"15. We find no merit in these civil appeals filed by the Department for the following reasons : firstly, as stated above, s. 43B (main section), which stood inserted by Finance Act, 1983, w.e.f. 1st April, 1984, expressly

commences with a non obstante clause, the underlying object being to disallow deductions claimed merely by making a book entry based on mercantile system of accounting. At the same time, s. 43B (main section) made it mandatory for the Department to grant deduction in computing the income under s. 28 in the year in which tax, duty, cess, etc., is actually paid. However, Parliament took cognizance of the fact that accounting year of a company did not always tally with the due dates under the Provident Fund Act, Municipal Corporation Act (octroi) and other tax laws. Therefore, by way of first proviso, an incentive/relaxation was sought to be given in respect of tax, duty, cess or fee by explicitly stating that if such tax, duty, cess or fee is paid before the date of filing of the return under the IT Act (due date), the assessee(s) then would be entitled to deduction. However, this relaxation/incentive was restricted only to tax, duty, cess and fee. It did not apply to contributions to labour welfare funds. The reason appears to be that the employer(s) should not sit on the collected contributions and deprive the workmen of the rightful benefits under social welfare legislations by delaying payment of contributions to the welfare funds. However, as stated above, the second proviso resulted in implementation problems, which have been mentioned hereinabove, and which resulted in the enactment of Finance Act, 2003, deleting the second proviso and bringing about uniformity in the first proviso by equating tax, duty, cess and fee with contributions to welfare funds. Once this uniformity is brought about in the first proviso, then, in our view, the Finance Act, 2003, which is made applicable by the Parliament only w.e.f. 1st April, 2004, would become curative in nature, hence, it would apply retrospectively w.e.f. 1st April, 1988. Secondly, it may be noted that, in the case of Allied Motors (P) Ltd. Etc. vs. CIT (1997) 139 CTR (SC) 364 : (1997) 224 ITR 677 (SC), the scheme of s. 43B of the Act came to be examined. In that case, the question which arose for determination was, whether sales-tax collected by the assessee and paid after the end of the relevant previous year but within the time allowed under the relevant sales-tax law should be disallowed under s. 43B of the Act while computing the business income of the previous year ? That was a case which related to asst. yr. 1984-85. The relevant accounting period ended on 30th June, 1983. The ITO disallowed the deduction claimed by the assessee which was on account of sales-tax collected by the assessee for the last quarter of the relevant accounting year. The deduction was disallowed

under s. 43B which, as stated above, was inserted w.e.f. 1st April, 1984. It is also relevant to note that the first proviso which came into force w.e.f. 1st April, 1988 was not on the statute book when the assessments were made in the case of Allied Motors (P) Ltd. Etc. (supra). However, the assessee contended that even though the first proviso came to be inserted w.e.f. 1st April, 1988, it was entitled to the benefit of that proviso because it operated retrospectively from 1st April, 1984, when s. 43B stood inserted. This is how the question of retrospectivity arose in Allied Motors (P) Ltd. Etc. (supra). This Court, in Allied Motors (P) Ltd. Etc. (supra) held that when a proviso is inserted to remedy unintended consequences and to make the section workable, a proviso which supplies an obvious omission in the section and which proviso is required to be read into the section to give the section a reasonable interpretation, it could be read retrospective in operation, particularly to give effect to the section as a whole. Accordingly, this Court, in Allied Motors (P) Ltd. Etc. (supra), held that the first proviso was curative in nature, hence, retrospective in operation w.e.f. 1st April, 1988. It is important to note once again that, by Finance Act, 2003, not only the second proviso is deleted but even the first proviso is sought to be amended by bringing about an uniformity in tax, duty, cess and fee on the one hand vis-a-vis contributions to welfare funds of employee(s) on the other. This is one more reason why we hold that the Finance Act, 2003, is retrospective in operation. Moreover, the judgment in Allied Motors (P) Ltd. Etc. (supra) is delivered by a Bench of three learned Judges, which is binding on us. Accordingly, we hold that Finance Act, 2003, will operate retrospectively w.e.f. 1st April, 1988 (when the first proviso stood inserted). Lastly, we may point out the hardship and the invidious discrimination which would be caused to the assessee(s) if the contention of the Department is to be accepted that Finance Act, 2003, to the above extent, operated prospectively. Take an exampleð in the present case, the respondents have deposited the contributions with the R.P.F.C. after 31st March (end of accounting year) but before filing of the Returns under the IT Act and the date of payment falls after the due date under the Employees' Provident Fund Act, they will be denied deduction for all times. In view of the second proviso, which stood on the statute book at the relevant time, each of such assessee(s) would not be entitled to deduction under s. 43B of the Act for all times. They

would lose the benefit of deduction even in the year of account in which they pay the contributions to the welfare funds, whereas a defaulter, who fails to pay the contribution to the welfare fund right upto 1st April, 2004, and who pays the contribution after 1st April, 2004, would get the benefit of deduction under s. 43B of the Act. In our view, therefore, Finance Act, 2003, to the extent indicated above, should be read as retrospective. It would, therefore, operate from 1st April, 1988, when the first proviso was introduced. It is true that the Parliament has explicitly stated that Finance Act, 2003, will operate w.e.f. 1st April, 2004. However, the matter before us involves the principle of construction to be placed on the provisions of Finance Act, 2003.

16. Before concluding, we extract hereinbelow the relevant observations of this Court in the case of CIT vs. J.H. Gotla (1985) 48 CTR (SC) 363 : (1985) 156 ITR 323 (SC), which reads as under :

"We should find out the intention from the language used by the legislature and if strict literal construction leads to an absurd result, i.e., a result not intended to be subserved by the object of the legislation found in the manner indicated before, then if another construction is possible apart from strict literal construction, then that construction should be preferred to the strict literal construction. Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction."

17. For the aforestated reasons, we hold that Finance Act, 2003, to the extent indicated above, is curative in nature, hence, it is retrospective and it would operate w.e.f. 1st April, 1988 (when the first proviso came to be inserted). For the above reasons, we find no merit in this batch of civil appeals filed by the Department which are hereby dismissed with no order as to costs.ò

26. We are of the view that the reasoning of the Hon'ble Supreme Court in the case of Alom Extrusions Ltd(supra) will equally to the amendment to Sec.40(a)(ia) of the Act whereby a second proviso was inserted in sub-clause

(ia) of clause (a) of Section 40 by the Finance Act, 2012, w.e.f. 1-4-2013. The provisions are intended to remove hardship. It was argued on behalf of the revenue that the existing provisions allow deduction in the year of payment and to that extent there is no hardship. We are of the view that the hardship in such an event would be taxing an Assessee on a higher income in one year and taxing him on lower income in a subsequent year. To the extent the Assessee is made to pay tax on a higher income in one year, there would still be hardship.

27. As far as the appeal of the revenue is concerned, we find that the use of word **"Payable",** in Section 40(a)(ia) of the Act has created controversy as to whether payable includes amounts paid during the year. There were conflicting decisions rendered by the Tribunal.

- In the case of DCIT vs. Ashika Stock Broking Ltd. reported in 44 SOT 556 the Hon'ble Kolkatta ITAT has decided the matter in favour of revenue and after following its decision dated 15.01.2010 in the case of Poddar Son's EXL. P Ltd vs. ITO in ITA No. 1418(Kol.)/09 has held that provisions of Section 40(a)(ia) of the Act are applicable to even sums paid during the year.

- In the case of Teja Construction vs. ACIT reported in 39 SOT 13 the Hon'ble Hyderabad ITAT has decided the issue against the Revenue and has held that provisions of Section 40(a)(ia) of the Act are not applicable in respect of sums/amount paid during the year and which are not payable at end of the year on date of balance sheet, as it is applicable only in respect of ñPayable amountò shown in balance sheet as outstanding expenses on which TDS has not been made. Similar laws were laid in various other cases.

- To resolve the above issue Special Bench was constituted and the Hon'ble Visakhapatnam Special Bench of ITAT in the case of Merilyn Shipping & Transport vs. Addl CIT reported in 20 taxmann.com 244 has decided the issue against the Revenue and after comparing the proposed and enacted provision which is intended from the replacement of the words in the proposed and enacted provision from the words **'amount credited or paid' to 'payable'** has held that it has to be

concluded that provisions of Section 40(a)(ia) are applicable only to the amounts of expenditure which are payable as on the date 31st March of every year and it cannot be invoked to disallow expenditure which has been actually paid during the previous year, without deduction of TDS.

28. In *CIT Vs. Sikandarkhan N.Tunvar & Others, TAX APPEAL NO. 905 of 2012 & others Dated02/05/2013*, the Hon'ble Gujarat High Court held that in *Merilyn Shipping 146 TTJ 1 (Viz) (SB,)* the majority held that as the Finance Bill proposed the words "amount credited or paid" and as the Finance Act used the words "amounts payable", s. 40(a)(ia) could only apply to amounts that are outstanding as of 31st March and not to amounts already paid during the year. This view is not correct for two reasons. Firstly, a strict reading of s. 40(a)(ia) shows that all that it requires is that there should be an amount payable of the nature described, which is such on which tax is deductible at source but such tax has not been deducted or if deducted not paid before the due date. The provision nowhere requires that the amount which is payable must remain so payable throughout during the year. If the assessee's interpretation is accepted, it would lead to a situation where the assessee who though was required to deduct the tax at source but no such deduction was made or more flagrantly deduction though made is not paid to the Government, would escape the consequence only because the amount was already paid over before the end of the year in contrast to another assessee who would otherwise be in similar situation but in whose case the amount remained payable till the end of the year. There is no logic why the legislature would have desired to bring about such irreconcilable and diverse consequences. Secondly, the principle of deliberate or conscious omission is applied mainly when an existing provision is amended and a change is brought about. The Special Bench was wrong in comparing the language used in the draft bill to that used in the final enactment to assign a particular meaning to s. 40(a)(ia). Accordingly, **Merilyn Shipping** does not lay down correct law. The correct law is that s. 40(a)(ia) covers not only to the amounts which are payable as on 31st March of a particular year but also which are payable at any time during the year. The Hon'ble Kolkatta High Court in

CIT Vs. Md.Jakir Hossai Mondal (supra) did not agree with the view of the Special Bench in the case of *Merilyn Shipping* following its judgment on *3rd April, 2013 in ITAT No. 20 of 2013, G.A. No. 190 of 2013 (CIT, Kolkata-XI Vs. Crescent Export Syndicates)* holding that the views expressed in the case of *Merilyn Shipping & Transports (ITA.477/Viz./2008 dated 20.3.2012)* were not acceptable.

29. However, we find that the Hon'ble Allahabad High Court has however upheld the view taken by the Special Bench ITAT in the case of *Merilyn Shipping* (supra) in the case of *M/s. Vector Shipping Services Pvt. Ltd. (supra).* The relevant observations of the Hon'ble Court were as follows:-

ñWe do not find that the revenue can take any benefit from the observations made by the Special Bench of the Tribunal in the case of Merilyn Shipping and Transport Ltd. (136 lTD 23) (SB) quoted as above to the effect Section 40(a)(ia) was introduced in the Act by the Finance Act, 2004 with effect from 1.4.2005 with a view to augment the revenue through the mechanism of tax deduction at source. This provision was brought on statute to disallow the claim of even genuine and admissible expenses of the assessee under the head 'Income from Business and Profession' in case the assessee does not deduct TDS on such expenses. The default in deduction of TDS would result in disallowance of expenditure on which such TDS was deductible. In the present case tax was deducted as TDS from the salaries of the employees paid by M/s Mercator Lines Ltd., and the circumstances in which such salaries were paid by M/s Mercator Lines Ltd., for M/s Vector Shipping Services, the assessee were sufficiently explained.

It is to be noted that for disallowing expenses from business and profession on the ground that TDS has not been deducted, the amount should be payable and not which has been paid by the end of the year.

We do not find that the Tribunal has committed any error in recording the finding on the facts, which were not controverted by the department and thus the question of

law as framed does not arise for consideration in the appeal.

The income tax appeal is dismissed.ò

30. Thus there are two views on the issue, one in favour of the assessee expressed by the Hon'ble Allahabad High Court and the other against the assessee expressed by the Hon'ble Gujarat & Calcutta High Courts. Admittedly, there is no decision rendered by the jurisdictional High Court on this issue. In the given circumstances, following the decision of the Hon'ble Supreme Court in the case of *Vegetable Products Ltd.* (*supra*), we hold that where two views are possible on an issue, the view in favour of the assessee has to be preferred. Following the decision of the Hon'ble Allahabad High Court, we uphold the order of the CIT(A).ò

Following the decision of the co-ordinate bench of this Tribunal, we decide this issue in favour of the assessee and consequently we restrict the disallowance u/s 40(a)(ia) only to the extent of the amount which is payable as on 31/3/2009.

9. One more ground raised by the assessee is regarding levy of interest u/ss. 234B and 234C which is mandatory and consequential.

10. In the result, appeal of the assessee is partly allowed.

Pronounced in the open court on 11th December, 2015.

sd/-	sd/-
(Inturi Rama Rao)	**(Vijay Pal Rao)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

eksrinivasulu,sps

Copy to:

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

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore